



[No. B271883. Second Dist., Div. Five. Sept. 2, 2016.]

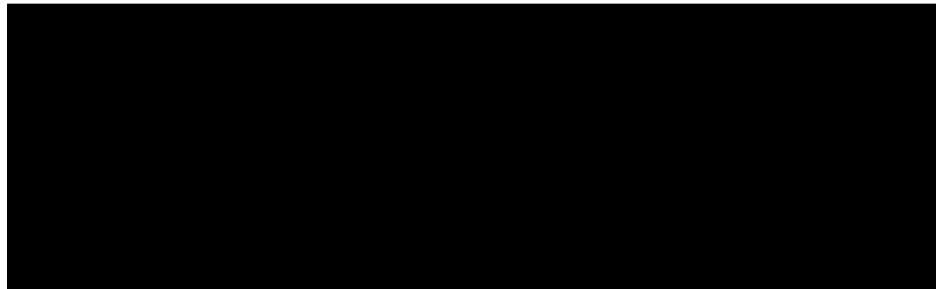
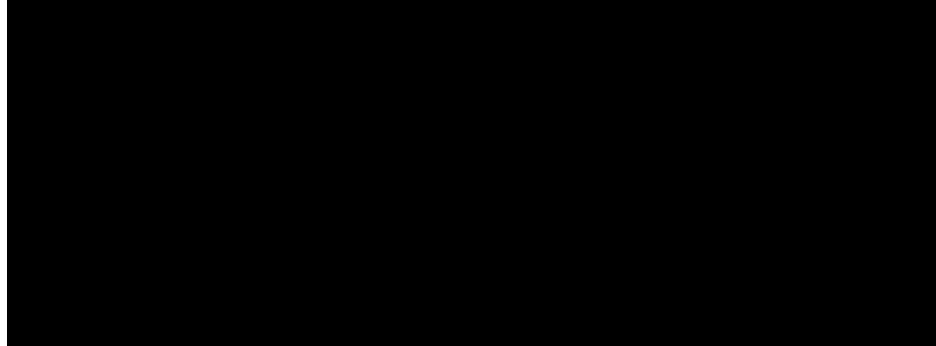
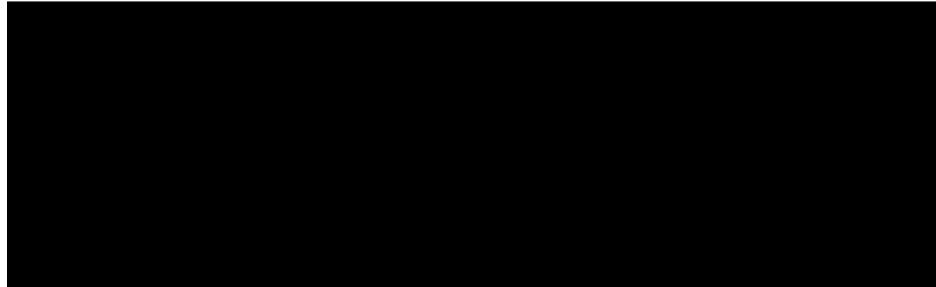
LOCAL TV, LLC, et al., Petitioners, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
KURT KNUTSSON et al., Real Parties in Interest.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Leopold, Petrich & Smith, Vincent Cox and Elizabeth L. Schilken for Petitioners.

No appearance for Respondent.

Judith Salkow Shapiro, Allred Maroko Goldberg, Nathan Goldberg and John Steven West for Real Parties in Interest.

OPINION

RAPHAEL, J.*—

INTRODUCTION

Kurt Knutsson, a technology reporter who created *Kurt the CyberGuy* video segments for use on television news programs and station websites, brought the lawsuit that underlies this petition for writ of mandate (petition). Pursuant to a written agreement that Knutsson and his company, Woojivas, Inc. (plaintiffs), entered into with Los Angeles television station KTLA, Inc. (KTLA), website material Knutsson created was distributed to the websites of certain television stations in other cities, including those of stations owned and operated by Local TV, LLC, and Local TV Finance, LLC (LTV).

We address here the question of whether, for purposes of the common law tort of misappropriation of name and likeness, plaintiffs consented to LTV's use of the CyberGuy material, including placing links to it on web pages along with links to material created by a reporter who was hired following the termination of Knutsson's contract. We hold that based on the broad consent in the agreement, plaintiffs cannot prove lack of consent to the manner in which LTV used the CyberGuy material. This determination requires that plaintiffs also cannot prevail on the two other causes of action at issue. We therefore conclude the trial court's ruling denying summary judgment to LTV was in error and grant the petition.

FACTS AND PROCEDURE**I. *The Agreement Between Plaintiffs and KTLA***

Knutsson was a technology reporter at KTLA for 15 years, between 1996 and 2011. In 2008, he and his company entered into a five-year contract with

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

KTLA (the Agreement) that KTLA could terminate at the end of three years.¹ In the Agreement, Knutsson contracted to work, using his CyberGuy brand, as an on-air reporter on consumer technology and computers, as well as a creator of content on those subjects for KTLA’s website, such as video segments and product reviews.

Under the Agreement, for Knutsson’s work, KTLA was to pay an annual salary that began at \$325,000 and increased by \$25,000 each year, and provide other benefits. In return, the Agreement gave KTLA complete ownership over, and the virtually unfettered right to use, Knutsson’s work. That is, the Agreement made KTLA the “exclusive, perpetual, and unencumbered owner forever” of all the material that Knutsson produced for the station, with “all rights with respect thereto for any and all purposes whatsoever.” It further gave KTLA “the unlimited right . . . perpetually throughout the world in any manner and by any method or means and in any and all media . . . to exploit the programs, recordings, and material or any portions thereof.” The Agreement explained the breadth of KTLA’s ability to use the material: “Exploitation may include unlimited uses in all forms of reproduction, transmission, exhibition, display, and presentation, including television, theaters, rental libraries, devices marketed for the home . . . books, periodicals, wireless, internet uses and all other types of exploitation now existing or hereafter devised.”

The Agreement also allowed KTLA to present Knutsson’s work in virtually any way it wished, including combining it with other material. Specifically, KTLA could “cut, edit, add to, subtract from, arrange, rearrange, or otherwise modify [Knutsson’s work] or take excerpts therefrom or combine all or any portion thereof with the material of others, and [plaintiffs] waive[d] all rights to approve or object thereto.”

The Agreement allowed KTLA to provide CyberGuy material to other television stations. One provision stated that Knutsson would not only provide reports for KTLA newscasts, but also make “live ‘CyberGuy’ segments for other television stations designated by KTLA.” In another provision, KTLA agreed not only to “prominently feature” the material on its website, but also to “distribute the material for website use by other stations owned or managed by KTLA’s corporate parent, Tribune Broadcasting Company [Tribune Broadcasting]. KTLA intend[ed] also to exploit this material through media platforms other than the Tribune Broadcasting stations’ websites.” A provision stated that Knutsson’s website content would “be distributed under [his company’s] ‘CyberGuy’ brand.” KTLA additionally

¹ We treat the Agreement as between KTLA and both plaintiffs. The Agreement itself was between Woojivas, Inc., and KTLA, but Knutsson simultaneously provided a letter approving of the Agreement and agreeing to offer his services under it and to be bound by it.

agreed that Knutsson could create a link on his personal website to both KTLA’s home page and “the home pages of other stations on which [Knutsson’s] materials are distributed under this Agreement.” Finally, KTLA agreed to allow plaintiffs to continue to distribute materials to television stations in two particular cities, with the caveat that if Tribune Broadcasting acquired or managed a television station in either city, “the Tribune station will have the exclusive right thereafter to air the ‘CyberGuy’ material in the affected market.”²

Two provisions of the Agreement placed some restrictions on KTLA’s ownership and use rights. First, a provision authorized KTLA to use Knutsson’s name and likeness in advertising and publicizing KTLA and the CyberGuy material, but not as an “endorsement.” We discuss that provision in greater detail in the Discussion section below. Second, the transfer of ownership to KTLA came with the restriction that “[n]othing in this Agreement gives KTLA ownership rights in the CyberGuy designation used by [Knutsson].” We also discuss that provision below.

II. *LTV’s Agreement with Tribune Company*

LTV, which owned and operated approximately 21 television stations in various cities and their associated websites, entered into a management services agreement (MSA) with Tribune Company, which was the parent of Tribune Broadcasting, KTLA’s corporate parent. The MSA provided that Tribune Company or its subsidiaries would host the LTV stations’ websites on its “Tribune Technology Platform.” In the MSA, Tribune Company represented that it had agreements with third party vendors that allowed LTV to access their products and services, “strictly limited to the rights and obligations contained within such third-party vendor agreements.” These included agreements for, among other content, weather information, news articles from a wire service, photos, sports scores and statistics, and advertising. Tribune Company agreed to indemnify LTV for losses arising out of the breach of the third party vendor agreements by Tribune Company.

Pursuant to the MSA, LTV’s websites began featuring Knutsson’s CyberGuy video segments, product reviews, and photos. This material was “pushed”

² In opposing LTV’s summary judgment motion, Knutsson acknowledged that he consented to KTLA’s distribution of the CyberGuy material to other stations. In a declaration, Knutsson stated that he was “aware while the 2008 Agreement was in place that [his] CyberGuy material was being broadcast on Tribune [Broadcasting] stations and on other stations such as Superstation WGN. Since one of [his] goals was to maximize the reach of [his] CyberGuy broadcasts under the terms of the 2008 Agreement to as many markets as possible, [he] saw distribution of CyberGuy material to other stations during the life of the 2008 Agreement as pursuant to the agreement with KTLA.”

onto the LTV websites by the company that Tribune Company used to operate the Tribune Technology Platform rather than LTV requesting or managing the material.

III. KTLA's Termination of Knutsson and Subsequent Events

KTLA terminated its contract with plaintiffs as of March 31, 2011. Afterward, KTLA employed a new technology reporter, Rich DeMuro, and Tribune Company “pushed” content he created onto the LTV websites. Meanwhile, the CyberGuy material remained on LTV websites for several months, with its format apparently unchanged, except that material from DeMuro also was being pushed by Tribune Company onto web pages with it.³ Between November 2011 and mid-April 2012, LTV began transitioning its 21 station websites off the Tribune Technology Platform to a different host. When a station’s website was transferred, it no longer contained the content that Tribune Company was providing under the MSA, so it no longer had CyberGuy content.

On November 30, 2011, plaintiffs’ counsel wrote KTLA a letter complaining of violations of Knutsson’s rights, including his right to publicity. On January 23, 2012, a Tribune Broadcasting vice-president sent an e-mail to an LTV vice-president stating that he had received a request to “purge any remnants of Kurt the CyberGuy” from LTV sites. He asked if LTV wanted him to remove certain index page and uniform resource locator (URL) material while he was doing that.⁴ The LTV vice-president responded affirmatively.

Some of the CyberGuy content apparently was not removed from the website of one LTV station. On March 31, 2012, LTV received a legal notice from Knutsson that he objected to the presence of his content on their websites. The next day, the LTV vice-president determined that 19 of the 21 LTV stations had moved off of the Tribune Technology Platform, so they did not contain CyberGuy material. One of the two remaining station websites had no CyberGuy material. The final website, KFOR.com, had “no Kurt Knutsson or Cyber[G]uy content on the KFOR.com site that could be reached by links on the main page or any page linked to by the main page.” There

³ With their opposition to LTV’s summary judgment motion, plaintiffs submitted exhibits of web pages from four LTV websites showing his material on them along with DeMuro’s work as of August 2011, and exhibits of web pages from two LTV websites showing his material on them as of early- and mid-January 2012.

⁴ To use the technical terms, the Tribune Broadcasting vice-president asked if he should have the “section fronts and slugs” removed. A “slug” is the headline of an article used in web URL, essentially the address for a web page on the Internet. A “section front” is a web page that contains links to a group of slugs in a list for easy accessibility.

were, however, some “obsolete” pages that were not being promoted or linked to, but which referenced Knutsson or CyberGuy, and the LTV vice-president deleted those.

IV. The Complaint and LTV’s Summary Judgment Motion

Plaintiffs filed their complaint against KTLA, LTV, and several television stations operated by Tribune Broadcasting. Against KTLA, which is not a party to this writ proceeding, plaintiffs alleged age discrimination and breach of contract. Against all defendants, plaintiffs alleged common law misappropriation of name and likeness; violation of Civil Code section 3344, which provides a similar misappropriation cause of action; and unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

The trial court denied LTV’s motion for summary judgment on the claims against it. LTV filed the instant petition seeking a determination that plaintiffs’ claims fail as a matter of law. We issued an alternative writ, following which the trial court did not change its order.

DISCUSSION

I. Propriety of Writ Relief and Standard of Review

We may grant writ relief for the erroneous denial of a motion for summary judgment pursuant to Code of Civil Procedure section 437c, subdivision (m)(1). While writ relief is extraordinary because a party often has an adequate remedy through filing a postjudgment appeal, “[t]he adequacy of an appellate remedy depends on the circumstances of the case, thereby necessarily vesting a large measure of discretion in the appellate court to grant or deny a writ.” (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 323 [187 Cal.Rptr.3d 836].) “Where the trial court’s denial of a motion for summary judgment will result in a trial on nonactionable claims, a writ of mandate will issue.” (*Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 594 [119 Cal.Rptr.2d 823].) We independently review a trial court’s ruling on a summary judgment motion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

II. Common Law Misappropriation of Name and Likeness

■ The tort of misappropriation of name or likeness originated as a branch of the common law right of privacy. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 416 [198 Cal.Rptr. 342] (*Eastwood*).) To prove a misappropriation, a plaintiff must show “(1) the defendant’s use of the

plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." (*Id.* at p. 417.)

In its petition, LTV argues that plaintiffs cannot demonstrate a lack of consent, due to their consent to the use of the CyberGuy material in the Agreement. LTV's knowledge of the consent is immaterial to the common law inquiry. (*Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82, 87 [291 P.2d 194]; see *Eastwood, supra*, 149 Cal.App.3d at p. 417, fn. 6; Rest.3d Unfair Competition, § 46, reporters' note, p. 542 ["a mistake regarding the plaintiff's consent is not a defense"].) Thus, even though LTV, as the licensee of Tribune Company, did not know the terms of the Agreement between plaintiffs and KTLA and relied on Tribune Company to provide authorized material, the consent to LTV's use of the CyberGuy material is determined by the extent of plaintiffs' consent in the Agreement.

Consistent with these principles, in their return to the petition, plaintiffs agree that Tribune Company granted to LTV the rights that Tribune Company's subsidiary, KTLA, obtained in the Agreement. It thus is not in dispute that the language in the Agreement determines whether plaintiffs can show lack of consent. Consent to the use of a name or likeness is determined by traditional principles of contract interpretation. (See *Newton v. Thomason* (9th Cir. 1994) 22 F.3d 1455, 1461 [affirming summary judgment based on consent in letter]; Rest.3d Unfair Competition, § 46, reporters' note, p. 543 ["The scope of consent is determined according to the general principles of contract interpretation"].)

Plaintiffs further acknowledge that they are not challenging "KTLA's ownership of [Knutsson's] works" or "LTV's use thereof." These concessions are warranted because, under the Agreement, KTLA was the "exclusive, perpetual, and unencumbered owner forever" of the work product Knutsson created while working for KTLA, and KTLA had the right to "distribute the material for website use by other [Tribune Broadcasting] stations [and] to exploit this material through media platforms other than the Tribune Broadcasting stations' websites."

Consequently, plaintiffs' argument is limited to claiming that they did not consent to the particular manner in which LTV displayed the material on its stations' websites. Plaintiffs focus on LTV's use of a heading on its web page entitled Kurt the CyberGuy as well as his picture. These items remained on the website after Knutsson's employment was terminated, and links to his CyberGuy material remained on LTV websites, along with links on the same web page to material from DeMuro, the reporter who succeeded him. Plaintiffs' central argument is that, through this use, LTV exceeded plaintiffs'

consent because it violated the provision of the Agreement that allowed KTLA to use his material in “advertising and publicizing KTLA . . . and the [CyberGuy] website material” but not as an “endorsement” (the advertising provision). The advertising provision states: “[Knutsson’s] name, sobriquet (including ‘CyberGuy’), biography, picture, portrait, caricature, voice and likeness may be used in advertising and publicizing KTLA and the program and website material produced under this Agreement, but not as an endorsement or testimonial.”⁵

The advertising provision reflects principles of publicity law that typically arise when a publication is advertising itself. Advertising using a publication’s content does not violate the right to publicity of a person appearing in the advertising, unless the advertisement implies that the person is endorsing the publication. (*E.g., Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634, 639 (*Cher*) [“[a]dvertising to promote a news medium . . . is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium”]; *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 797 [40 Cal.Rptr.2d 639] [newspaper’s posters reproducing its pictures of football quarterback were advertisements that did not misappropriate his image where “they did not state or imply that [the quarterback] endorsed the newspaper”]; Rest.3d Unfair Competition, § 47, reporters’ note, p. 557 [providing general rule that “advertising that is incidental” to news reporting is not actionable, but stating that an “exception is sometimes recognized in connection with otherwise permissible advertising for lawful uses of another’s identity if the advertisement falsely suggests an endorsement or is otherwise deceptive”].)

The advertising provision does not apply to the facts alleged by plaintiffs. Here, the use of Knutsson’s name and picture was not for “advertising and publicizing” the stations or their content, any more than a traditional newspaper headline and photo of a columnist constitutes advertising or publicity for the newspaper. Importantly, LTV’s use of Knutsson’s name and photo occurred only on the LTV sites, not in a communication sent or shown elsewhere. Using Knutsson’s name and picture on the LTV site served the purpose of identifying his material for readers. That use falls under the consent that plaintiffs gave for LTV and its licensee stations to use the CyberGuy material. In fact, separate from the advertising provision, the Agreement states that Knutsson’s material “will be distributed under [his]

⁵ We treat the phrase “endorsement or testimonial” as simply “endorsement” for ease of reference. Generally, an “endorsement” is used when the speaker is a celebrity and “testimonial” is used when the speaker is a consumer. (See, e.g., 16 C.F.R. § 255.0 (2016) [“treat[ing] endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act The term endorsements is therefore generally used hereinafter to cover both terms and situations”].)

‘Cyberguy’ brand” and that KTLA’s website will “prominently feature” his material. These provisions, rather than the advertising provision, authorize the use of Knutsson’s brand name and picture on the LTV websites.

We recognize that LTV’s use of Knutsson’s brand on its Internet pages could serve a secondary purpose of “advertising or publicizing” LTV’s stations by attracting consumers to the sites through their web searches. Even if the advertising provision applied, however, it would demonstrate plaintiffs’ consent to LTV’s use of the identifying heading and picture. Through the advertising provision, plaintiffs agreed that Knutsson’s “name, sobriquet (including ‘CyberGuy’) [and] picture may be used in advertising” The use of a neutral heading and Knutsson’s picture are covered by this language. (See *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 873 [160 Cal.Rptr. 352, 603 P.2d 454] [“Since the use of [a celebrity’s] name and likeness in the film was not an actionable infringement of [the celebrity’s] right of publicity, the use of his identity in advertisements for the film is similarly not actionable”]; *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 325 [79 Cal.Rptr.2d 207] [same]; *Cher, supra*, 692 F.2d at p. 639 [advertisements not actionable where “merely an adjunct of the protected publication and promote[] only the protected publication”].)

Consequently, the material displayed on the LTV’s sites—the CyberGuy material, which KTLA was the owner of “forever,” and the identifying heading and photo—were themselves not a misappropriation of Knutsson’s name or likeness. KTLA owned the CyberGuy material and had the contractual right to display, distribute, and promote it. Although plaintiffs argue that LTV was “using the CyberGuy brand to attract viewers and create positive associations in people[s’] mind[s] between [Knutsson] . . . and the LTV station[s] and website[s],” LTV had the right to use the material in this manner due to the Agreement. Additionally, plaintiffs argue that the material was “posted on LTV’s technology web pages for an extended period after [Knutsson] ceased to broadcast on their stations or provide material for their websites.” This is immaterial, as KTLA’s ownership and distribution rights did not terminate with the end of his employment.

Plaintiffs further claim that the way that Knutsson’s materials were arranged on some LTV web pages indicated that he “was endorsing their new technology reporter, Rich DeMuro.” As the new DeMuro material was “pushed” onto LTV’s websites by Tribune Company, links to that material appeared on the same pages with links to Knutsson’s material. Plaintiffs argue that they did not consent to this use. This argument fails for two reasons.

First, plaintiffs expressly consented to allow KTLA (and therefore LTV) to present the CyberGuy material along with any other content. Under the

Agreement, LTV could “arrange, rearrange, or otherwise modify [Knutsson’s work] or take excerpts therefrom or combine all or any portion thereof with the material of others, and [plaintiffs] waive[d] all rights to approve or object thereto.” This constitutes express consent to arranging materials on the website, the very conduct about which plaintiffs complain here.

Second, even absent the express consent just discussed, plaintiffs have not shown a lack of consent to combining the CyberGuy material, and its neutral heading, with other material on the same web page. As it is common for varied material, including links to unrelated articles and advertising, to appear on the same web page on a news organization’s website, displaying material in this manner is encompassed by plaintiffs’ general consent for stations to use the material on their websites. On this record, it is speculation to suggest that a consumer would be confused by the proximity of the links on the web pages that Knutsson offered, and any such confusion is not an element of the misappropriation tort. (See *Newton v. Thomason*, *supra*, 22 F.3d at pp. 1461–1463 [summary judgment on misappropriation tort upheld under California law where celebrity consented to the use of his name for a character on a television show; consumers’ “likelihood of confusion” between celebrity and television character analyzed separately as element to be proven under federal trademark infringement cause of action].) In this regard, we note that any consumer confusion likely would be limited here because the vast majority of the links to DeMuro material on the LTV websites had DeMuro’s name in the description of the material accompanying the link, so a consumer would see, even before clicking the link, that it was created by DeMuro rather than by Knutsson.

We would agree that LTV *would* act outside the general consent given in the Agreement by using Knutsson’s persona to endorse other material. LTV might do so, for instance, if it falsely stated that Knutsson endorsed a product or DeMuro. The combining of materials here, however, does not involve such deception and thus was not beyond plaintiffs’ consent. (See *Cher*, *supra*, 692 F.2d at p. 638 [no liability against publication where the words it used to publicize a celebrity interview did not constitute a false claim that the celebrity endorsed the publication]; *Page v. Something Weird Video* (C.D.Cal. 1996) 960 F.Supp. 1438, 1445 [company that distributed home videocassettes could use celebrity’s image from two movies “to advertise their entire line of video products so long as they did not falsely claim that [the celebrity] endorsed” the company].)

Finally, plaintiffs argue that LTV violated the contractual provision stating that “[n]othing in this Agreement gives KTLA ownership rights in the ‘CyberGuy’ designation used by [Knutsson].” Knutsson does not state how LTV acted in any way to indicate that it owned that designation. It merely

used headings and banners with the CyberGuy designation in order to identify Knutsson's material, and the Agreement authorized it to distribute the material "under [his] 'Cyberguy' brand." Indeed, plaintiffs appear to have had no issue with LTV's doing this, so long as Knutsson was employed by KTLA. The rights of KTLA and its licensees to use the material under the Agreement, however, did not terminate with Knutsson's employment.

In fact, the few actions that LTV took were consistent with it *not* owning the CyberGuy designation. As LTV moved its websites off of the Tribune Technology Platform between November 2011 and April 2012, it did not keep the CyberGuy material. In January 2012, when a Tribune Broadcasting executive first told LTV he was going to "purge any remnants of Kurt the CyberGuy" from the sites still on the Tribune Technology Platform, an LTV executive confirmed that Tribune Broadcasting should remove the URLs and index pages related to that material as well. (See fn. 4, *ante*.) Finally, when on March 31, 2012, LTV received a legal notice from Knutsson, it immediately investigated and within a day removed the "obsolete" CyberGuy pages from the one station website that still displayed them.

Notably, the evidence demonstrates that LTV did not exercise the utmost rights that it was permitted under the Agreement. Some of Knutsson's complaints about the use of his name and photograph along with other content on the same page arose because LTV was not exploiting his material as much as it could. KTLA and LTV had the contractual right to continue to display the CyberGuy material "forever," so they could have kept all the CyberGuy material posted after Knutsson's termination. Yet Knutsson's works were being phased out as new material was "pushed" onto the LTV websites by Tribune Company, and/or because Knutsson had requested its removal. Further, Knutsson's work also was being completely removed from the LTV websites as LTV moved its stations' web pages off of the Tribune Technology Platform. As plaintiffs consented to LTV's keeping all of Knutsson's material on its website, combined with other material, but as LTV had no obligation to do so, it cannot exceed that consent by phasing out (or actively removing) a portion of the material during a transitional period to the complete elimination of the material.

For these reasons, plaintiffs cannot demonstrate lack of consent to LTV's use of the CyberGuy material, so summary judgment in favor of LTV was warranted on the common law misappropriation of name and likeness cause of action. Because we resolve this and the other causes of actions on this ground, we do not address LTV's arguments that its use of the CyberGuy material was protected by the First Amendment of the United States Constitution.

III. Section 3344

■ Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action. (*Eastwood, supra*, 149 Cal.App.3d at pp. 416–417 & fn. 6.) Under section 3344, a plaintiff must prove all the elements of the common law cause of action. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200] (*Orthopedic Systems*).) The section 3344 cause of action therefore fails for the same reason as the common law cause of action—plaintiffs cannot prove lack of consent.

In addition to the common law elements, Civil Code section 3344 requires “‘a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.’” (*Orthopedic Systems, supra*, 202 Cal.App.4th at p. 544; see *Eastwood, supra*, 149 Cal.App.4th at p. 417, fn. 6.) LTV does not dispute these additional elements, because it knew it was using CyberGuy material pursuant to its contract with Tribune Company, and it used the CyberGuy material for a commercial purpose. Section 3344, subdivision (f), however, contains an additional requirement that the owners or employees of certain mediums used for advertising, including television stations, have “knowledge of the unauthorized use” in order to be liable. As LTV owns television stations, subdivision (f) applies to it. Under the MSA, LTV relied on Tribune Company to provide it with material for LTV’s websites, and Tribune Company agreed that LTV’s access would be “strictly limited to the rights and obligations contained within . . . third-party vendor agreements” such as plaintiffs’ Agreement with KTLA. LTV then passively received Knutsson’s material as the operators of the Tribune Technology Platform pushed the content onto LTV websites. Plaintiffs thus cannot prove LTV’s liability under section 3344 because LTV had no knowledge of the allegedly unauthorized use, even if it were without consent. Summary judgment for LTV was warranted on this cause of action for this reason as well.

IV. Unfair Business Practices

■ Plaintiffs also alleged that LTV violated Business and Professions Code section 17200 et seq., the unfair competition law. Section 17200 provides a private cause of action for any “unlawful, unfair or fraudulent business . . . practice and unfair, deceptive, untrue or misleading advertising.” Section 17200, however, is not a substitute for a tort or contract action, and it generally is limited to providing injunctive relief and restitution to prevent ongoing or threatened acts of unfair competition. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371 [159 Cal.Rptr.3d 672, 304 P.3d 163].) Our

Supreme Court has stated that “‘section 17200 “borrows” violations of other laws and treats them as unlawful practices’ that the unfair competition law makes independently actionable. (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103 [53 Cal.Rptr.2d 229], citing *Farmers Ins. Exchange v. Superior Court* [(1992) 2 Cal.4th 377, 383 [6 Cal.Rptr.2d 487, 826 P.2d 730]]).” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [83 Cal.Rptr.2d 548, 973 P.2d 527].)

Here, as alleged against LTV, the sole factual basis for the section 17200 claim is the same as for the misappropriation tort discussed in part II above. Plaintiffs seek the precise monetary damages that they seek in the misappropriation cause of action. Because summary judgment in favor of LTV was proper on the cause of action that the section 17200 claim “borrows,” summary judgment is likewise warranted on the unfair business practices claim.

DISPOSITION

The alternative writ is discharged and the stay previously imposed is lifted. A peremptory writ shall issue directing respondent court to vacate its April 4, 2016, order denying LTV’s summary judgment motion and enter a new and different order granting that motion. Costs in this original proceeding are awarded to LTV.

Turner, P. J., and Kriegler, J., concurred.

A petition for a rehearing was denied September 20, 2016.

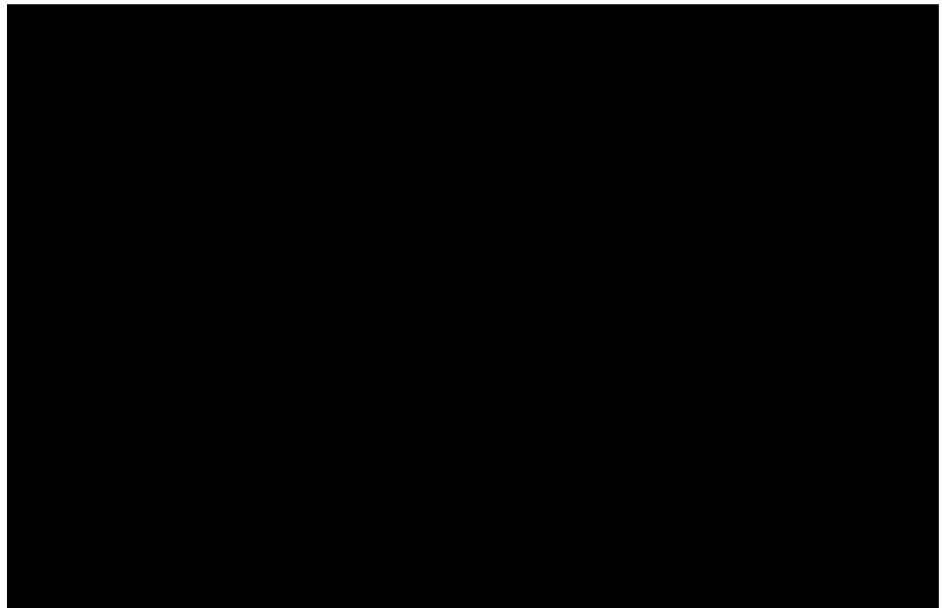
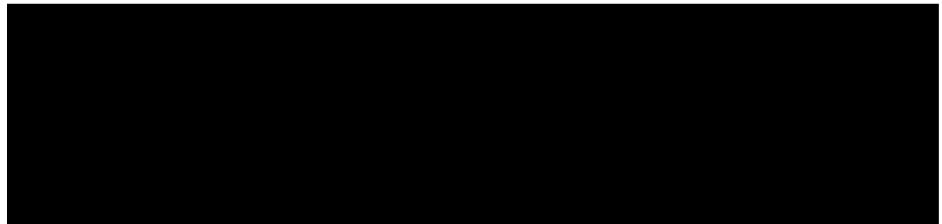
[No. A143187. First Dist., Div. Four. Sept. 2, 2016.]

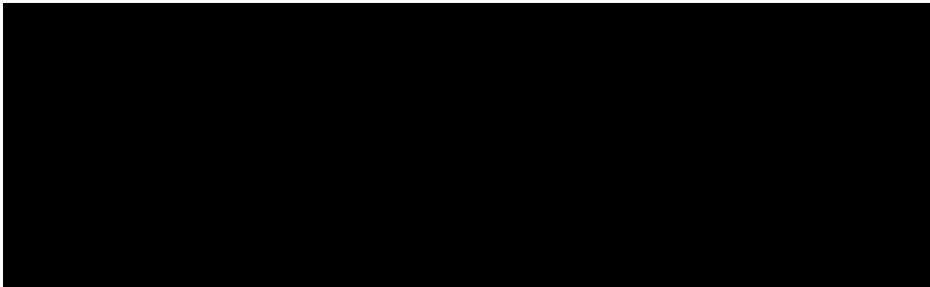
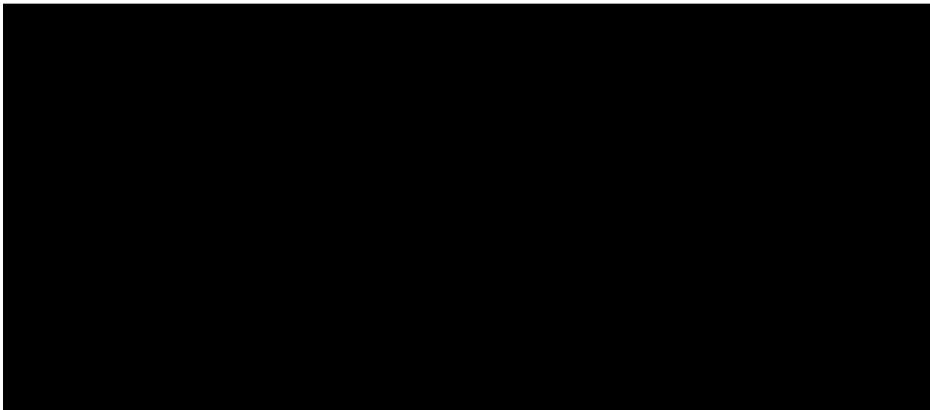
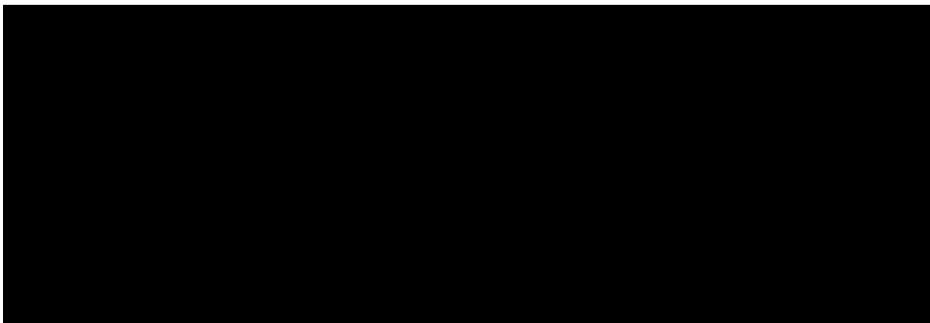
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CITY OF PETALUMA, Defendant and Appellant.

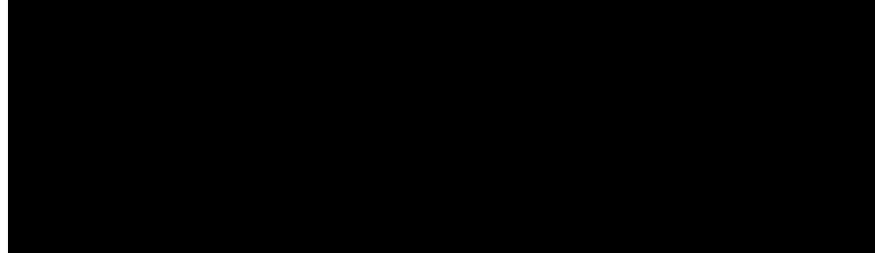
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COUNSEL

Meyers, Nave, Riback, Silver & Wilson, Lozano Smith, Kevin E. Gilbert and Kevin P. McLaughlin for Defendant and Appellant.

The Dolan Law Firm, Christopher B. Dolan; Dwyer + Kim and John P. Dwyer for Plaintiff and Respondent.

OPINION

STREETER, J.—After the trial court granted summary judgment for the City of Petaluma (the City) in this personal injury case, plaintiff Christopher Minick (Minick) moved for discretionary relief from the judgment under Code of Civil Procedure section 473, subdivision (b),¹ on grounds of “mistake, inadvertence, surprise, or excusable neglect.” His attorney, Joshua Watson, submitted a declaration in support of the motion explaining that, at the time he prepared Minick’s summary judgment opposition papers, he was suffering from a serious illness for which he was under heavy medication. Although he was unaware of it at the time, Watson told the court, cognitive impairment caused by a combination of his illness and his medicated state led him to overlook readily available evidence. The court granted the requested relief, finding excusable neglect, and the City now appeals. In deference to the trial court’s broad discretion on this type of motion, we shall affirm.

I. BACKGROUND**A. Minick’s Lawsuit and the Grant of Summary Judgment Against Him**

While riding in the Holstein 100, a noncompetitive charity bicycling event held as a fundraiser for West Marin Senior Services, Minick fell from

¹ All further references to statutory provisions are to the Code of Civil Procedure unless otherwise specifically indicated.

his bicycle while descending a hill on Western Avenue in the City. Christopher Erwin, a friend riding behind Minick, saw him lose control of his bicycle after hitting a large pothole, pitching him headfirst onto the pavement. Following the accident, Minick exhausted his administrative remedies with the City, and then brought suit against it alleging a single cause of action for maintaining a dangerous condition of public property under Government Code section 835. In his lawsuit, Minick was represented by the Dolan Law Firm. Watson was the associate at that firm with sole day-to-day responsibility for the case.

In August of 2013, the City filed a summary judgment motion arguing that Minick—who testified in deposition that he has no recollection of the accident, and only remembers waking up in the hospital afterward—had no proof of any dangerous condition on public property. Watson prepared and filed papers opposing the motion, attaching some grainy, low-resolution black-and-white photographs of the site where the accident was alleged to have taken place, including a photo showing Erwin standing in an unidentified street pointing to somewhere on the pavement; a copy of a police collision report containing a statement from Erwin that he had seen a pothole in the street where Minick fell; and an expert declaration from an engineer, Dale Dunlap, who offered the opinion that a defect in the street at the scene of the crash caused him to fall.

The City’s motion was set for hearing on January 10, 2014. The day before the hearing the court issued a tentative ruling denying the motion. When the parties appeared for argument the next day, Watson appeared, but showed signs of physical distress during argument and was taken to a hospital by ambulance. The court continued the hearing to March 12, 2014. The day before the continued hearing, the court issued another tentative ruling, again denying the City’s summary judgment motion, but after hearing argument and taking the matter under submission for several weeks, eventually reversed its tentative ruling and granted the motion.

Referring at one point to Watson’s arguments as “ludicrous,” the court sustained the City’s hearsay and lack of foundation objections to the accident site photographs; pointed out that because of the poor quality of the images, little could be gleaned from them in any event, other than that there may have been some minor cracking in the street; and went on to sustain lack of foundation and speculation objections to Dunlap’s opinion, since he had no direct knowledge of the site and relied only on the sketchy information Minick presented in the form of the photographs and the police report. Watson seemed to recognize that he failed to provide sufficient foundational evidence for various documents attached as exhibits to his opposition papers, stating in an accompanying declaration that he intended to take the depositions of a custodian of records, but adding—as if an attempt to obtain

evidence could substitute for its absence—that the depositions had been continued at the City’s request, without any explanation of whether he moved to compel, and if not, why not.

In light of the many deficiencies in Minick’s opposition showing, the court agreed with the City that Minick had failed to present admissible evidence of any dangerous condition of public property, and issued an order granting summary judgment on May 13, 2014.

B. *Minick’s Motion for Discretionary Relief Under Section 473, Subdivision (b)*

On June 19, 2014, Minick filed a motion for discretionary relief from the judgment under section 473, subdivision (b), supported by a declaration from Watson. Watson explained that he had been suffering from serious pulmonary and sleep disorders throughout 2013, and that his symptoms gradually worsened as the year progressed. He sought medical treatment and was put on a regimen of 12 different medications. In the course of treatment, he went to the emergency room four times, twice by ambulance; he consulted with five medical specialists in dozens of appointments; and he underwent radiological studies, lab studies, ultrasound studies, and sleep studies. Although Watson’s underlying pulmonary condition gradually improved, he claimed to have suffered side effects from the medications, including painful spasms, episodes of disorientation, and periods of uncharacteristically strong responses to stressors.

From August through December 2013—a time period coinciding with his efforts to prepare summary judgment opposition papers for Minick—Watson reported that the combination of symptoms from illness and the side effects from his medications were at their peak. Although at the time he felt he was adequately “soldiering on” despite the medical crisis he was in, Watson declared that, looking back on that period of time, he could see that his judgment was clouded, his thought processes were not as clear and dispassionately critical as was normal for him, and he suffered from gaps in his memory. Watson explained that he was an experienced trial lawyer, and to that point had a record of considerable success in law practice, but that in 2013, as a result of his medical condition, his ability to perform as a lawyer fell, and he made decisions in this case “that were not in keeping with [his] ordinary practice of law.”

“These shortcomings were not born of any lack of effort, complacency, disregard, or lack of caring about my client or the Court,” Watson declared. Rather, he told the court, they were a result of his “serious illness and the side effects of [the] prescribed medications.” Moreover, because his judgment was

clouded and his thought processes were impaired, and because he had no previous experience with such symptoms, Watson did not realize he was cognitively impaired and thus made no effort to tell colleagues or clients about his condition. Because of his impairment, Watson stated, he did not realize he needed admissible evidence to support the opposition. Instead, he said, he inexplicably thought that, because an expert can rely on hearsay, no foundation was needed for the facts on which the expert's opinion was based.

In further support of Minick's section 473 motion, Watson submitted declarations that provided the necessary foundation for Dunlap's opinion, and, independently of that opinion, enough evidence to show the City maintained a dangerous condition on a public street that caused Minick's accident. A declaration from Erwin established that he had gone with Minick on numerous rides, and that Minick was an experienced and safe rider. Erwin stated that he rode with Minick during the event on August 20, 2011. Toward the end of the ride, he said he was behind Minick. Immediately before and at the moment of the accident, Minick was riding at a safe speed and in a safe manner, Erwin said. According to Erwin, Minick did not suddenly brake or do anything to destabilize the bicycle, but his bicycle suddenly stopped, with the front wheel twisting sideways, catapulting him into the street. It was clear to Erwin that Minick's bicycle encountered something in the street that caused the front wheel to twist and throw him forward. Erwin could see that Minick suffered serious injuries, including to his head and shoulder, and Minick had to be taken to the hospital by ambulance. After Minick was taken to the hospital, Erwin looked at the street where the accident occurred. He saw "many deviations in its surface, including cracks, holes, abrupt vertical rises, and bumps."

Erwin also confirmed that the photographs attached to his declaration accurately depicted the pavement at the accident site on the date of Minick's injury. The deviations in the street surface were not marked and a rider could not see their severity until coming upon them. They were dangerous to a road bicycle, like the one Minick was riding, because they could grab and twist the front wheel, popping the bicycle into the air and causing the rider to lose control. It appeared to Erwin that this uneven pavement was part of a trench that had been dug and patched. When he later returned to the site, as depicted in a photograph with him pointing at the street where Minick fell, the surface had been repaved after the accident. Thus, the photograph, which the court stated showed only a trivial defect, was not designed to show the dangerous condition, but only its location.

In addition to the Erwin declaration, Minick submitted a declaration from Scott Andrews, a resident of the area near Minick's accident. Andrews, misidentified as Scott Takami in the discovery responses Watson submitted in

opposition to the City's summary judgment motion, said he took the photographs that were originally supplied to the court with Minick's summary judgment opposition. He explained the circumstances of his having taken the photographs, identified them as depictions of the location in the street where Minick's accident took place, and confirmed that they "accurately depict the condition of the pavement on Western Avenue, to the west of the Intersection of Hill Street and Western Avenue" in the City "where Mr. Minick was found injured."

Relying on the new foundational information from Erwin and Andrews, a supplemental declaration from Dunlap offered additional support for his expert opinion. Based on a review of the Erwin and Andrews declarations and various additional, better quality photographs authenticated in those declarations, Dunlap identified "a substantial series of defects at the same point identified by Mr. Erwin in his declaration." He concluded that Minick struck a depression in the street where two lines of trenching visible in the photographs intersected. He found the defect identified in the Erwin declaration and photographs consistent with the measurements in the traffic collision report. Further, based on these materials, he opined that the accident site was "in a state of significant disrepair," which posed hazards from "sudden bumps, dips, and ledges," including potholes, that could cause a bicycle rider to lose control.

Dunlap concluded that the condition of the street constituted a dangerous condition. "In my opinion," Dunlap declared, "Mr. Minick's bicycle tire most likely lost friction as it passed over the bumpy road approaching the intersection of the light trenching and main trench line discussed above, then struck the lip of the lighter trench line, such that the bicycle stopped and Mr. Minick flew off his bicycle and was injured. I may defer to an accident reconstructionist on this point, but within the scope of my expertise, this mechanism of the incident is consistent with Mr. Erwin's declaration, and is the type of danger that . . . [applicable road building and maintenance] standards . . . seek to guard against."

The court also thought the opposition was so poorly written that it wondered if something was seriously amiss. The papers were "strikingly not well written and, frankly, left the Court wondering—to be really honest, . . . what was going on, because it didn't seem to me it was of the quality that any firm, whether it be plaintiff or defense, would provide in a—you know, in response to a well written summary judgment motion." "The issue that concerns the Court is this, and I'll be quite frank about it, is that when I sat down and spent the time that I spent to re-review the evidence and re-review the objections and to go through it piece by piece, because it was such a bundle of misstatements and misdirection from the side of the plaintiff in this

case, and I sat down and tried to put it all together and do the best that I could with what I had, and when I made that ruling, I did make that [summary judgment] ruling with some degree of concern about it, because it was astounding to me . . . how it was that it was put together and provided to the Court.” The court also stated that if it had had the evidence that Minick submitted with the motion for relief from judgment—namely, the Erwin, Andrews, and supplemental Dunlap declarations—it would have denied the summary judgment motion.

Responding directly to the City’s contention that Minick still had not submitted evidence of a dangerous condition, the court stated: “If the Court were to consider today the new matter, . . . there would at least be sufficient evidence for purposes of discussion about what the dangerous condition was. [¶] I mean, you do have someone . . . who was riding his bicycle at the same time as plaintiff and who stopped when plaintiff tumbled and was injured and then saw the area where he fell and identified in his new declaration—again, not his original one, but the new declaration—where that occurred. And there are photographs, color photographs of greater clarity showing conditions in the roadway that at least arguably could constitute a dangerous condition of public property under 835 of the Government Code. [¶] I think there’s more for purposes of discussion now than there was, substantially more now for the purposes of discussion than was presented previously to the Court, now, again, even if evidentiary objections had not been sustained at the initial filing [of] the motions.”

At the conclusion of the hearing, the court announced its intention to grant discretionary relief under section 473, subdivision (b), explaining as follows: “The Court finds that Mr. Watson . . . was suffering from a medical state that he was generally unaware of and there was some neglect that was involved in that. To the extent that he may or may not have been able to address his issues during the pendency of this matter is perhaps not expressly determined, but the Court does understand that he had a medical condition, that the medical condition affected his ability to exercise proper judgment, that he provided pleadings, filed pleadings and acted in such a manner that is contrary to his own practice, that the inadvertence and neglect were the result of a medical condition that he later became aware of. So that is the basis for the Court’s ruling” An order granting section 473 relief from judgment issued August 7, 2014, and the City timely sought review of that order.²

² See section 904.1, subdivision (a)(2) (an order following a judgment that is appealable under § 904.1, subd. (a)(1), is itself appealable).

II. DISCUSSION

A. Standard of Review

■ Section 473 is a remedial statute to be “applied liberally” in favor of relief if the opposing party will not suffer prejudice. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 [211 Cal.Rptr. 416, 695 P.2d 713] (*Elston*); see also *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256 [121 Cal.Rptr.2d 187, 47 P.3d 1056] (*Zamora*) [“‘the provisions of section 473 of the Code of Civil Procedure are to be liberally construed’”].) “[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default” (*Elston, supra*, 38 Cal.3d at p. 233; see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980 [35 Cal.Rptr.2d 669, 884 P.2d 126], quoting this language in *Elston* with approval.) “Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails.” (*Elston, supra*, 38 Cal.3d at p. 235.)

A trial court’s ruling granting discretionary relief under section 473, subdivision (b) “shall not be disturbed on appeal absent a clear showing of abuse.” (*Zamora, supra*, 28 Cal.4th at p. 257, quoting *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [109 Cal.Rptr.2d 256] (*State Farm*).) The scope of the trial court’s discretion under section 473 is broad (*Elston, supra*, 38 Cal.3d at p. 233) and its factual findings in the exercise of that discretion are entitled to deference (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368 [118 Cal.Rptr.2d 71]; see also *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598 [153 Cal.Rptr. 423, 591 P.2d 911] [“when two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court”]).

On review, appellate courts have repeatedly noted that an abuse of discretion may be found only if a grant of relief “exceed[s] the bounds of reason.” (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal.Rptr. 902, 749 P.2d 339] (*Shamblin*); accord, *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1271 [135 Cal.Rptr.2d 869].) Given the usual presumption of correctness accorded trial court rulings on appeal, the party attacking a trial court’s grant of relief—here the City—bears the burden of demonstrating error. (*State Farm, supra*, 90 Cal.App.4th at p. 610, citing *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718 [21 Cal.Rptr.2d 200, 854 P.2d 1117].) By the same token, the affidavits presented by the party for whom relief was granted—here Minick—establish “‘not only the facts stated therein but also all facts which reasonably may be inferred therefrom.’” (*Zamora, supra*, 28 Cal.4th at p. 258.) Moreover, the trial court may rely on its own

review of the record in determining the existence of excusable neglect. (*In re Marriage of Kerry* (1984) 158 Cal.App.3d 456, 466 [204 Cal.Rptr. 660].)

Any exercise of discretion must rest on correct legal premises, of course, and in that respect our review is *de novo*. “A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand.” (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85 [87 Cal.Rptr.2d 754].) “‘Discretion is compatible only with decisions “controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice”’” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 [60 Cal.Rptr.2d 93, 928 P.2d 1171].) “[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.’” (*Ibid.*)

B. *Applicable Principles Under the Discretionary Relief Portion of Section 473, Subdivision (b)*

Section 473, subdivision (b), provides, in pertinent part: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . . No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.”

■ The statute includes a discretionary provision, which applies permissively, and a mandatory provision, which applies as of right. Although this bifurcation is not demarcated in any internal subtitling, it is plainly evident in the textual structure of the statute. Section 473, subdivision (b), begins with broad language authorizing relief from a “judgment, dismissal, order, or other proceeding” for “mistake, inadvertence, surprise, or excusable neglect,” and then, in narrower proviso language applicable to a “default,” “default judgment” or “dismissal,” requires relief upon the filing of an “attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect.” The mandatory relief provision fits into the broader language of the statute as a special case tucked within it. “The provision of section 473 which mandates relief from a judgment of dismissal or default when the motion is based on an

attorney's affidavit of fault does not mandate relief from other judgments. In all other cases, relief is discretionary. [Citation.] . . . [¶] Relief can only be granted under the mandatory provision in section 473, subdivision (b), if relief could have been granted under the discretionary provision." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681 [68 Cal.Rptr.2d 228] (*Garcia*).)³

■ This case arises solely under the discretionary relief provision. To obtain discretionary relief for attorney error under section 473, subdivision (b), counsel's neglect must be excusable. (*Zamora, supra*, 28 Cal.4th at p. 258.) Because attorneys as members of a learned profession are held to a standard of conduct befitting those with specialized training and skill, and because as a general matter clients are bound by the judgments and decisions of their chosen counsel, the excusability standard under section 473 is often difficult to meet where a client seeks relief for the errors or omissions of his or her attorney. That is because "[i]n determining whether [an] attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent person under the same or similar circumstances" might have made the same error.' . . . [Citation.] . . . [T]he discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' (*Garcia, supra*, 58 Cal.App.4th at p. 682.) 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. . . . ' (*Ibid.*)" (*Zamora, supra*, 28 Cal.4th at p. 258.)

Numerous cases have applied this principle in the context of failed attempts to defend against summary judgment—a phase of civil litigation that is among the most rigorous and exacting prior to trial—and in none of these cases was attorney error found to be excusable. (See *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 17 [130 Cal.Rptr.2d 263] ["Section 473 cannot be used to remedy attorney mistakes, such as the failure to provide sufficient evidence in opposition to a summary judgment motion. [Citation.] . . . Counsel's failure to understand the type of response required or to anticipate which arguments would be found persuasive does not warrant relief under section 473."]; *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1354–1355 [37 Cal.Rptr.3d 1] [failure to include a request for a continuance pursuant to § 437c, subd. (h) in opposition to summary judgment does not constitute excusable neglect]; *Martin v. Johnson* (1979) 88 Cal.App.3d 595, 606–607 [151 Cal.Rptr. 816] [no abuse of

³ See *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 138–142 [114 Cal.Rptr.2d 93] (*English*) (parsing the statutory history and case law interpretation of the mandatory "attorney fault" provision in § 473, subd. (b), which was added by amendment in 1988 as a narrow exception to the broader discretionary relief provision, which in turn has been part of the statute since its enactment in 1851).

discretion in refusing to vacate summary judgment due to attorney's error in submitting declarations not within the personal knowledge of the declarant]; cf. *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399 [72 Cal.Rptr.2d 188] [failure to lay proper foundation for admission of evidence at prove up hearing on third party claim not excusable neglect warranting mandatory relief from judgment based on attorney's affidavit of fault under § 473].)

Garcia, supra, 58 Cal.App.4th 674, decided by our colleagues in Division Two of this district, is an especially noteworthy summary judgment case where discretionary relief under section 473 for attorney error was denied, since the California Supreme Court relied on it and quoted from it in *Zamora*. (See *Zamora, supra*, 28 Cal.4th at pp. 257–258.) The summary judgment motion in *Garcia* turned on the scope and meaning of a settlement agreement. The trial court initially granted summary judgment for defendant Hejmadi based on the plain language of the agreement, but later granted a motion to vacate under section 473, subdivision (b). (*Garcia, supra*, at pp. 678–680.) In support of the section 473 motion, plaintiff Garcia submitted late supplemental declarations attesting to oral communications that allegedly raised triable issues concerning the parties' mutual intent when the agreement was signed. (*Garcia, supra*, at pp. 678–680.) Garcia's counsel admitted his failure to submit these declarations earlier was a mistake, but explained his tardiness on grounds of "inadvertence and time pressure" in his law practice. (*Id.* at p. 679.) That excuse failed on appeal.

Reversing the trial court's grant of section 473 relief, the panel in *Garcia* explained: "The record describes the tardy presentation of an alternative argument based upon facts and law at all times known to Garcia's counsel The 'inadvertence' asserted by Garcia's counsel is no more than late recognition of inadequate briefing and failure to cite more specifically to a paragraph in a declaration. . . . [¶] Garcia's presumption that consideration of the late-filed papers . . . would have produced a different result begs the question. The issue is not whether the original opposition was insufficient to prevail, but rather whether the reason advanced for its insufficiency was 'excusable' within the meaning of section 473. The 'reasonably prudent person standard' . . . gives an attorney the benefit of such relief only where the mistake is one which might ordinarily be made by a person with no special training or skill." (*Garcia, supra*, 58 Cal.App.4th at pp. 683–684.) Distraction due to the "press of business" was not such a mistake, the court held. "[T]he stress admittedly attending modern legal practice" does not

“afford[] an acceptable excuse for neglect within the meaning of the Code of Civil Procedure.” (*Id.* at p. 684.)⁴

C. *Cognitive Incapacity as a Ground for Relief*

■ Relying heavily on *Garcia*, the City contends Watson was simply trying to secure a “do over” when he realized upon reflection that his summary judgment opposition papers might have been stronger. According to the City, this is a case of simple professional negligence. On one reading of the record, we might agree, but that is not the reading the trial court adopted. While the City frames the court’s ruling as having been based on Watson’s “tactical decisions and conduct as an attorney,” that characterization of the issue here does not comport with the court’s findings. The court specifically found the relevant neglect was Watson’s failure to appreciate his own impairment, which was a mistake anyone could have made, not a failure of legal skill. Watson’s cognitive impairment, to be sure, certainly *caused* his feeble lawyering—there was a specific finding on that point as well—but professional incompetence, *per se*, was not the neglect the court found to be excusable.

In resolving Minick’s motion, the court was faced with two competing versions of the facts. Minick argued, on the one hand, that the best explanation of the situation was cognitive incapacity, not professional dereliction. The City argued, on the other hand, that Watson’s opposition papers, despite their defects, could be considered at least minimally competent. Having seen Watson in physical distress at one point in open court and having reviewed his work product, the court seems to have accepted Minick’s point of view. Because Watson’s opposition papers were such an unintelligible mess, the court explained at the hearing on Minick’s section 473 motion that it had granted summary judgment despite harboring reservations that something was amiss. Watson’s declaration apparently provided a credible explanation, and the court accepted it. Under these circumstances, we cannot say the court’s exercise of discretion under section 473 “exceeded the bounds of reason.” (*Shamblin, supra*, 44 Cal.3d at p. 478.)

⁴ After explaining that ordinary professional neglect cannot be recognized as excusable, the court acknowledged an exception for circumstances “where the attorney’s neglect, although inexcusable, was so extreme as to constitute misconduct effectively ending the attorney-client relationship. ‘Abandonment’ may afford a basis for relief, at least where the client is relatively free of fault, but performance which is merely inadequate will not. . . . For the exception to apply, the attorney’s misconduct must be sufficiently gross to effectively abrogate the attorney-client relationship, thereby leaving the client essentially unrepresented at a critical juncture in the litigation.” (*Garcia, supra*, 58 Cal.App.4th at pp. 682–683; see *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898 [187 Cal.Rptr. 592, 654 P.2d 775]; *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391 [38 Cal.Rptr. 693].) Minick has not argued the client abandonment exception, in the trial court or on appeal.

If Watson's claim of cognitive incapacity is enough to warrant relief under section 473, subdivision (b), the City argues, where is the stopping point? Whenever an attorney omits key authority, overlooks readily available evidence, or fails to object, how are courts to decide whether the error resulted from “[not taking] a particular medication, or . . . a poor night’s sleep the night before, or . . . a [distracting] personal matter . . . ? Which excuse would be sufficient and which would not? There would be no finality to motion practice in California” Summary judgments would not result in judgments but mere suggestions to the losing party of how the evidence could be better presented, with each case to be re-opened upon an attorney’s showing that he could have done better.” We view this set of concerns as overdrawn. Suffice it to say we are confident that trial courts, in their application of section 473, can distinguish between flimsy claims of illness or distraction and genuine medical distress that is so severe it impedes the lawyer’s ability to warn his client or seek assistance from colleagues.

D. *The Argument That Discretionary Relief Under Section 473, Subdivision (b), Is Limited to Defaults or Default-equivalent Conduct*

The City never seriously questions the truth of Watson’s explanation that a combination of serious illness and heavy medication rendered him incapable of carrying out his duties as a lawyer. Instead, it contends Minick’s declaration of his own incapacity is insufficient to warrant relief under section 473 as a matter of law. The main thrust of the City’s argument is that absent an actual default—here, for example, failure to file any summary judgment opposition at all (see, e.g., *Lynch v. Spilman* (1967) 67 Cal.2d 251, 258 [62 Cal.Rptr. 12, 431 P.2d 636] [affirming order vacating summary judgment where attorneys failed to appear at hearing or file opposition papers])—discretionary relief under section 473, subdivision (b), is unavailable. Attempted but ultimately unsuccessful advocacy can never constitute excusable neglect, the City argues, for if the rule were otherwise, requests for discretionary section 473 relief based on attorney error would require courts to undertake open-ended evaluation of deficient lawyering performance, miring them, inevitably, in questions of legal strategy and judgment.

For this argument, the City relies on *Garcia*. Because that case involved not “a default but rather a motion lost, on its merits, after opposition was filed,” the *Garcia* court viewed section 473 as inapplicable. (*Garcia, supra*, 58 Cal.App.4th at p. 683.) The court arrived at this conclusion based on cases limiting the applicability of the mandatory portion of section 473, subdivision (b) to defaults and default-equivalent dismissals. (*Garcia, supra*, at p. 683; accord, *Bernasconi Commercial Real Estate v. St. Joseph’s Regional Healthcare System* (1997) 57 Cal.App.4th 1078, 1082 [67 Cal.Rptr.2d 475]

(*Bernasconi*); see also *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817 [41 Cal.Rptr.2d 182].) Without that limitation, these cases reason, the mandatory dismissal portion of section 473 conflicts with the statutes authorizing discretionary dismissal for dilatory prosecution, since a party who suffers such a default can freely nullify the dismissal—by right—through the simple expedient of filing an attorney affidavit of fault. (*Bernasconi, supra*, 57 Cal.App.4th at p. 1082 [applying the mandatory provision of § 473, subd. (b), literally, to any dismissal, “would effectively abrogate the discretionary dismissal statutes, since few if any dismissals under those statutes would ever be final”].)⁵

■ The *Garcia* court transplanted this rationale to the discretionary portion of section 473, subdivision (b), explaining that “[w]e find this reasoning equally serviceable here, where there was no complete failure to oppose, but rather an opposition which was, though apparently timely and procedurally adequate, inadequate in substance.” (*Garcia, supra*, 58 Cal.App.4th at p. 683.) Citing this language from *Garcia*, the City would have us limit the availability of discretionary relief for attorney error under section 473, subdivision (b), to defaults and default-equivalent conduct. Nothing in *Zamora* or in the text of section 473 compels such a narrow interpretation of the statute. We prefer the plain language reading of section 473, subdivision (b), applied recently by Division Two of the Second District Court of Appeal in *Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432 [197 Cal.Rptr.3d 856] (*Corsair*), which rejected the idea that an identical construction must be placed on the mandatory and discretionary provisions of section 473. In holding that it is unnecessary for an attorney to set forth reasons for his claimed “‘mistake, inadvertence, surprise, or neglect’” in order to qualify for mandatory relief under section 473, the panel in *Corsair* explained that, because “the statutory language creating the mandatory and discretionary relief provisions of section 473, subdivision (b) is significantly different,” these two parts of the statute need not be read in pari materia. (*Corsair, supra*, at p. 440).⁶

⁵ These cases are in line with other appellate opinions adopting narrow constructions of the mandatory attorney fault provision of section 473, subdivision (b), to prevent it “from being used indiscriminately by plaintiffs’ attorneys as a ‘perfect escape hatch’ [citation] to undo dismissals of civil cases.” (*English, supra*, 94 Cal.App.4th at p. 141, quoting *Huens v. Tatum* (1997) 52 Cal.App.4th 259, 263 [60 Cal.Rptr.2d 438].)

⁶ See also *English, supra*, 94 Cal.App.4th at page 137 (“By carefully differentiating between the scope of the discretionary provision of section 473(b) (which applies to ‘a judgment, dismissal, order, or other proceeding’) and the scope of the mandatory provision (which applies to a ‘default’ or a ‘default judgment or dismissal’), the Legislature chose to limit the circumstances in which a court *must* grant relief based on an attorney’s mistake, inadvertence, surprise, or neglect.” (italics added)); *id.* at page 149 (Despite the limited construction placed on the mandatory relief provision of the statute, “[i]n the appropriate circumstances . . . relief from a summary judgment may be available to either a plaintiff or a defendant under the

By its terms, the discretionary relief portion of section 473, subdivision (b) is not limited to defaults and default-equivalent conduct, and we see no reason to require such a limitation by construction. The statute provides, “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” (§ 473, subd. (b).) The only limiting language comes later, in the narrower mandatory relief provision. Although we agree that the discretionary provision of section 473, subdivision (b), should not be applied so expansively that it provides a guaranteed “avenue for attorneys to escape the consequences of their professional shortcomings by the filing of a simple motion” (*Garcia, supra*, 58 Cal.App.4th at p. 685), where, as here, the court finds a wholesale disintegration of the attorney’s professional capacity because of a medical crisis, the availability of relief for excusable neglect is within the court’s sound discretion.

E. *Transit Ads and the Sufficiency of Minick’s Showing of His Own Incapacity*

In addition to *Garcia*, the City cites *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275 [75 Cal.Rptr. 848] (*Transit Ads*), a case in which an attorney’s illness was deemed insufficient to warrant relief under section 473. In *Transit Ads*, the trial court entered a default judgment against the defendant. (*Transit Ads*, at p. 278.) The defendant’s attorney then sought relief on the ground that he had been ill, asserting that medication he took as part of a weight loss program affected his general mental and physical condition such that he was absent from his office for long periods of time and was unable to conduct his law practice properly. Although the attorney engaged a colleague to prepare and file an answer, he did not keep his appointments with the assisting colleague and he did not communicate the urgent need to prepare and file an answer. (*Id.* at p. 286.)

The Court of Appeal agreed that “[i]llness of counsel which actually disables him from timely compliance with the statutory rules of procedure constitutes excusable neglect.” (*Transit Ads, supra*, 270 Cal.App.2d at p. 280.) But the court went on to find the neglect at issue in that case was inexcusable because the attorney was aware of his medical condition yet failed to take the steps a reasonably prudent person would have taken. Despite being aware that his medical difficulties were hindering his practice, counsel made no effort to seek assistance from colleagues or to contact his client about the possibility of retaining someone else. (*Id.* at p. 287.) Thus,

discretionary provision of section 473(b). [Citation.] This is so because discretionary relief under the statute is not limited to defaults, default judgments, and dismissals, but is available from any judgment.”).

the court concluded “[t]here is no showing that disabling illness, and not inexcusable neglect, was the real cause for the default.” (*Id.* at pp. 287–288.) *Transit Ads* is a default case that predates the enactment of the mandatory provision of section 473, subdivision (b) (see fn. 3, *ante*), and thus we suspect it would have been decided differently today, but more importantly, here there was a specific finding that Watson’s impaired condition caused the fatal deficiencies in Minick’s summary judgment opposition. Unlike the dieting attorney in *Transit Ads*, moreover, Watson was found to have been unaware of his own impairment.

■ Even if an attorney’s illness can supply legal grounds for a finding of excusable neglect in some circumstances, the City argues, Watson “cannot attest to whether his medical condition caused him to suffer clouded judgment or other mental deficits” because his claim of cognitive disability constitutes improper lay opinion. (See Evid. Code, § 800, subd. (a) [lay opinion testimony must be rationally based upon the perception of the witness].) With that we disagree. Watson had knowledge of his own physical and mental condition because he personally experienced the symptoms he reported. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 356 [110 Cal.Rptr.2d 272, 28 P.3d 34] [to testify, a lay witness must have personal knowledge, which is “‘a present recollection of an impression derived from the exercise of the witness’ own senses’ ”].) Because that knowledge provided a foundation for his testimony (Evid. Code, §§ 403, subd. (a)(2), 702, subd. (a)), Watson could attest to his own medical condition as a fact known to himself. (See, e.g., *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 528 [123 Cal.Rptr.3d 97] [“lay witnesses are generally competent to testify as to their own knowledge of their diseases, injuries, or physical condition”]; *Frederick v. Federal Life Ins. Co.* (1936) 13 Cal.App.2d 585, 590 [57 P.2d 235] [“‘a witness may testify whether he has had a particular disease as a matter of fact known to himself, and not as a matter of opinion’ ”].)

Cases decided under section 473 are in accord. Without requiring the declaration of a physician, a number of California decisions have upheld orders granting discretionary relief under section 473, subdivision (b), because of counsel’s illness. (See, e.g., *Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 951 [245 Cal.Rptr. 258] [trial court did not abuse its discretion in finding that attorney’s failure to file timely amended complaint was excusable where she had fractured her wrist and elbow]; *Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616 [136 Cal.Rptr. 783] [trial court did not abuse its discretion in finding that attorney’s failure to file a timely answer was excusable in part because attorney was suffering from an unspecified illness]; *Arnke v. Lazzari Fuel Co.* (1962) 202 Cal.App.2d 278, 281–282 [20 Cal.Rptr. 762] [counsel’s declaration that he failed to file a

timely answer because he had an unspecified illness and had been engaged in negotiations to settle the dispute constituted sufficient evidence of excusable neglect].) The City cites no contrary authority under section 473, but instead relies on miscellaneous state and federal decisions taken from other contexts for the general proposition that, in the face of a defense expert's declaration that the plaintiff does not suffer from a particular disease, a plaintiff, to survive a summary judgment, must submit a declaration from his own medical expert. Procedurally, that is not the posture of this case.

F. *Minick's Diligence in Filing for Section 473 Relief and Prejudice to the City*

■ In reply, the City advances two new arguments. It contends, first, that Minick failed to exercise diligence in bringing his section 473 motion "within a reasonable time" (see *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420 [71 Cal.Rptr.3d 65] ["[A] threshold requirement for relief is the moving party's diligence. . . . As the statute itself provides, application for relief 'shall be made *within a reasonable time*, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.'"] (citation omitted)), and second, that the trial court failed to give proper weight to prejudice caused to the City. (See *Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976, 980 [58 Cal.Rptr. 20] ["In weighing a motion for relief under section 473 of the Code of Civil Procedure the trial judge could properly consider as a factor favoring relief the absence of any prejudice to the opposing party as the result of its order."].) Ordinarily, we would deem arguments made for the first time in reply to have been forfeited, but since Minick addresses both issues in his responding brief, unprompted, we briefly address each one.

In granting relief from judgment, the trial court implicitly found that Minick filed his motion "within a reasonable time." We review that implied finding for abuse of discretion. (See *County of Los Angeles v. Sheldon P.* (2002) 102 Cal.App.4th 1337, 1347 [126 Cal.Rptr.2d 350] [trial court's implied finding that the moving party was diligent is reviewed for abuse of discretion].) What constitutes "a reasonable time in any case depends upon the circumstances of that particular case" (*Martin v. Taylor* (1968) 267 Cal.App.2d 112, 114 [72 Cal.Rptr. 847]) and is a question of fact for the trial court (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1145 [198 Cal.Rptr.3d 763]). Here, the court entered judgment on May 13, 2014, and notice of entry of judgment was served by mail on May 15. The date of entry of judgment was the point in time at which a need for section 473 relief arose (see *Huh v. Wang, supra*, 158 Cal.App.4th at p. 1421 [the "critical triggering event for

seeking relief from the judgment was notice of its entry” (italics omitted)], and Minick filed his motion a little over five weeks after that date, on June 19.

Numerous courts have found no abuse of discretion in granting relief where the section 473 motions at issue were filed seven to 10 weeks after entry of judgment. (See, e.g., *Freeman v. Goldberg* (1961) 55 Cal.2d 622, 625 [12 Cal.Rptr. 668, 361 P.2d 244] [10-week delay]; *Hallett v. Slaughter* (1943) 22 Cal.2d 552, 554, 557 [140 P.2d 3] [seven-week delay]; *Outdoor Imports, Inc. v. Stanoff* (1970) 7 Cal.App.3d 518, 523–524 [86 Cal.Rptr. 593] [nine-week delay].) A delay is unreasonable as a matter of law only when it exceeds three months and there is no evidence to explain the delay. (See *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 532 [190 P.2d 593]; see also *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1184 [75 Cal.Rptr.2d 809] [stating that the “three-month unofficial ‘standard’ ” established in *Benjamin* “remains true today”].) By any reckoning, given this precedent, Minick met the standard of acting “within a reasonable time.”

Finally, as to the issue of prejudice, the City claims Minick, having seen how the court analyzed its summary judgment motion, in effect obtained an advisory opinion on the hazardous condition issue under Government Code section 835, giving him an unfair tactical advantage in further litigation with the City on that issue. We have no doubt the grant of relief here improved Minick’s position in his effort to defeat the City’s motion, but that kind of “prejudice” is inherent in any grant of section 473 relief. Coming at the prejudice issue from another angle, the City argues it is bound to incur unfair financial burden due to the need to relitigate issues presented in its summary judgment motion. On this point, the City once again puts greater stock in the finality of an interim order than is warranted. Trial courts always have discretion to revisit interim orders in service of the paramount goal of fair and accurate decisionmaking. (See, e.g., *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107–1109 [29 Cal.Rptr.3d 249, 112 P.3d 636] [after denial of summary judgment motion and filing of second summary judgment motion on the same grounds a year later, trial court may reconsider its original denial sua sponte in the absence of new facts or law]; *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301 [70 Cal.Rptr.3d 691].) The City may well have incurred some additional cost as a result of the court’s decision to revisit its initial summary judgment decision by granting section 473 relief, but that was unavoidable. Where the statute by its terms applies, and a court grants discretionary relief reopening summary judgment proceedings, some replowing of ground will always be necessary. The alternative the City suggests, in any event, would give it undeserved windfall protection from exposure to Minick’s claim.

III. DISPOSITION

The trial court's order of August 7, 2014, granting Minick relief under section 473, subdivision (b), from the grant of summary judgment against him is affirmed.

Ruvolo, P. J., and Reardon, J., concurred.

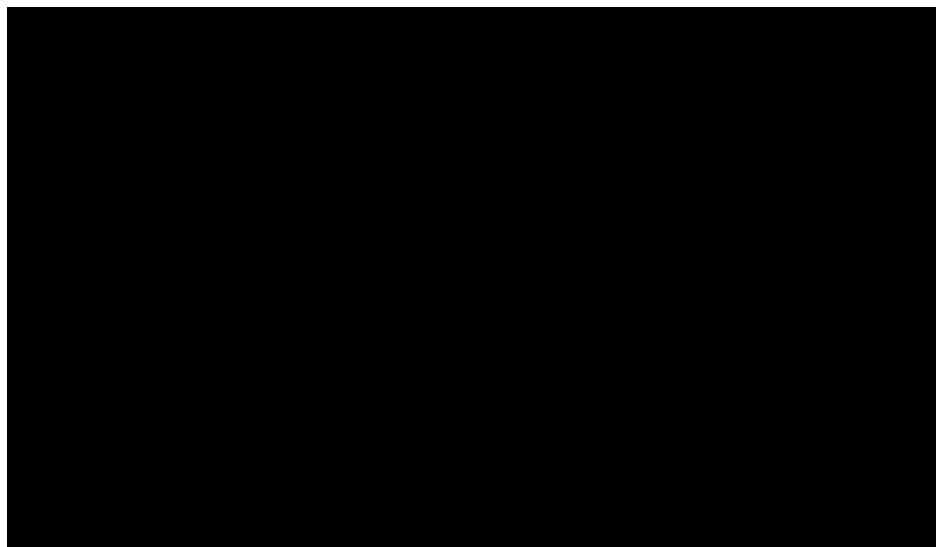
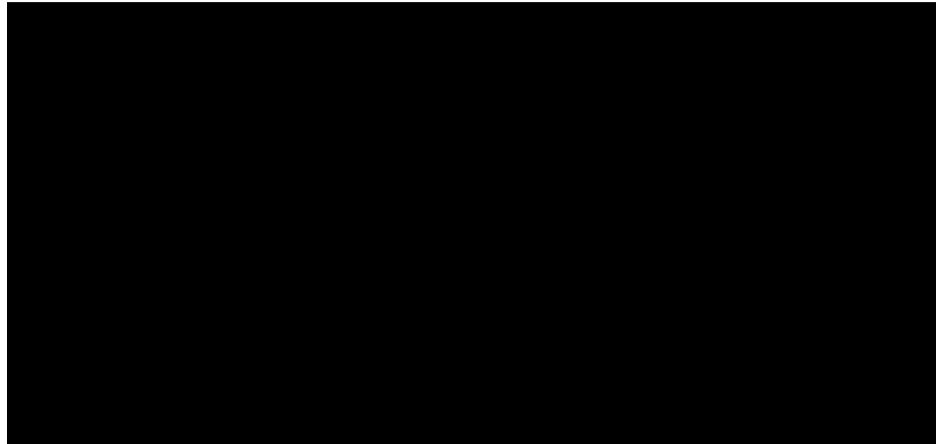
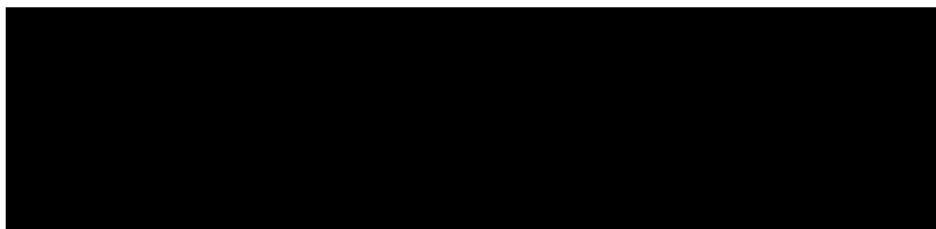
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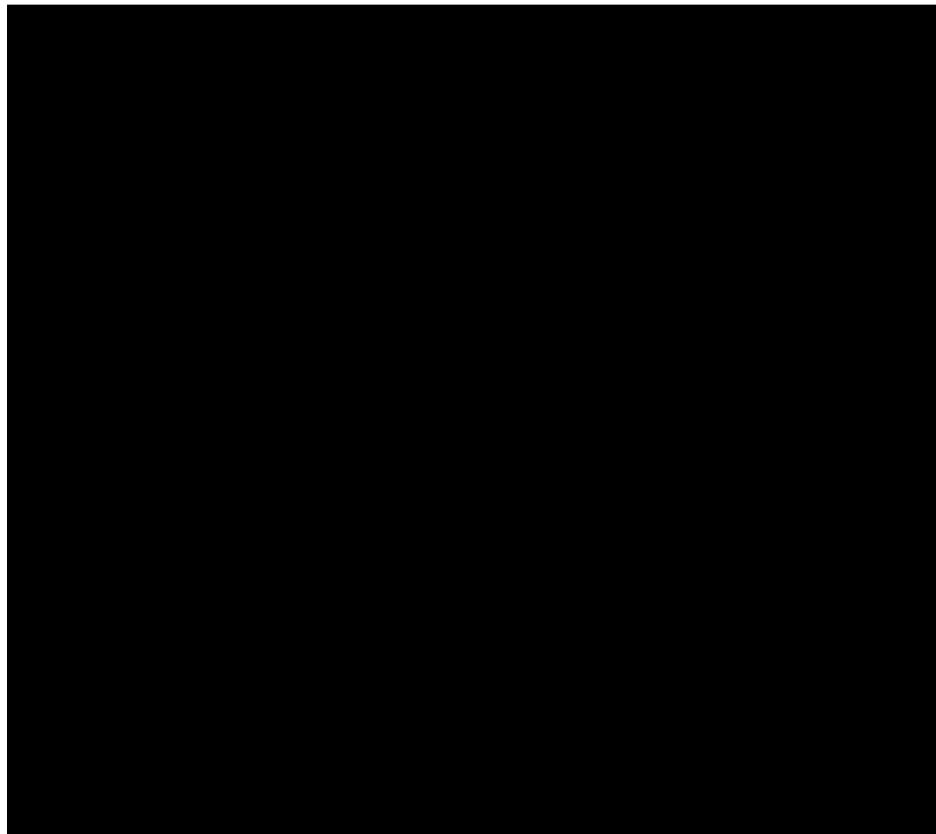
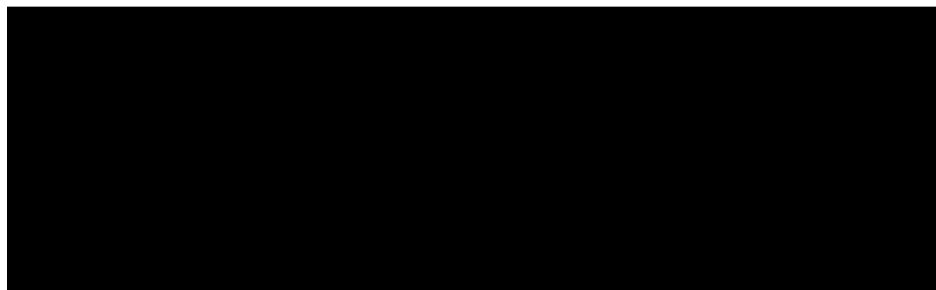
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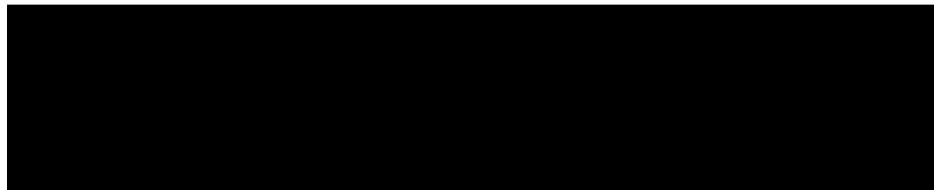
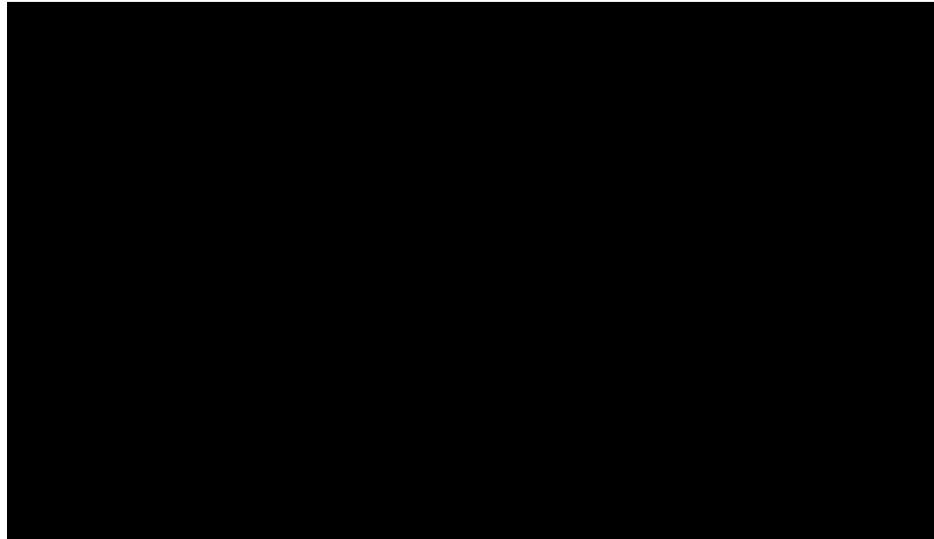
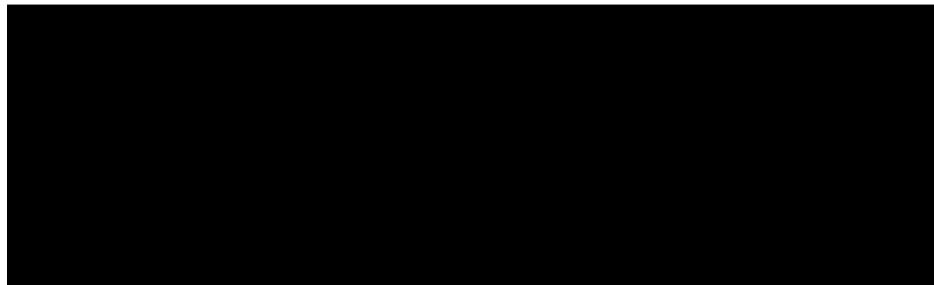
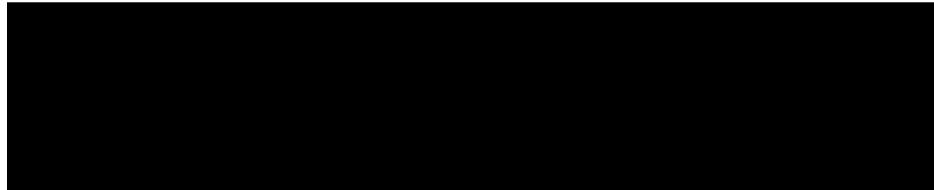
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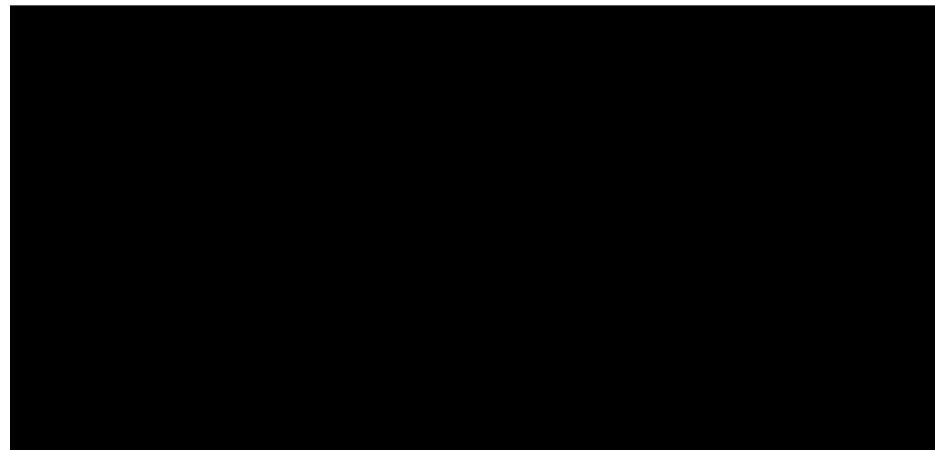
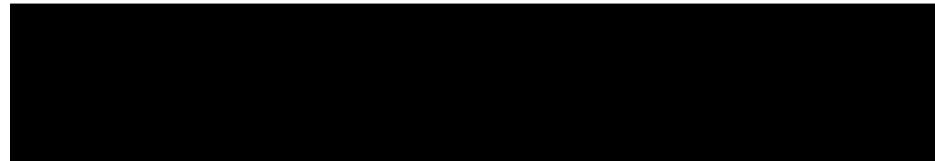
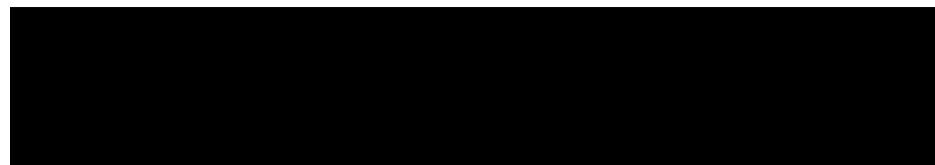
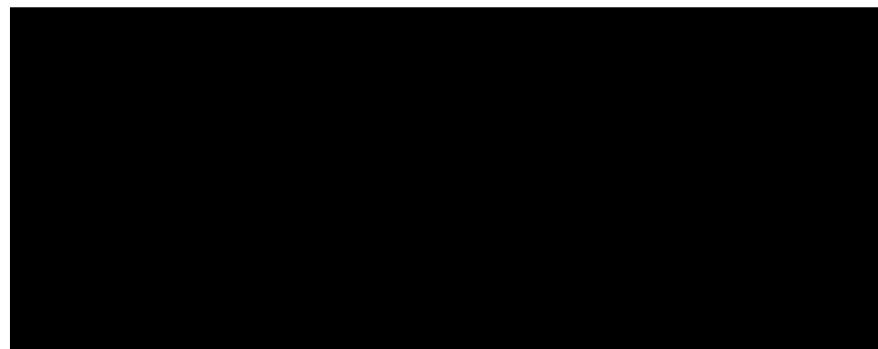
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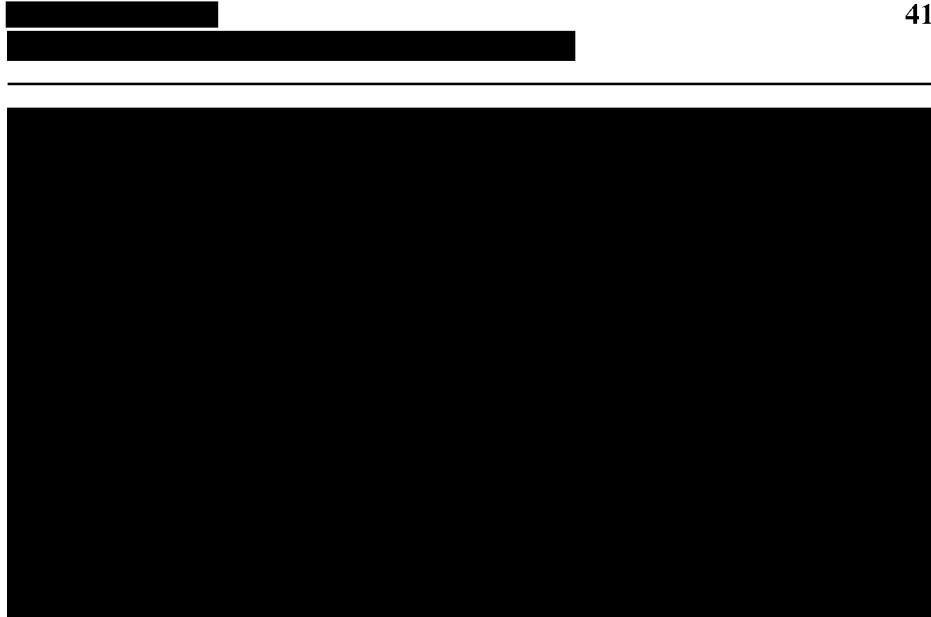
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COUNSEL

Audrey R. Chavez, under appointment by the Court of Appeal, for Defendant and Appellant Adam Cornejo.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant Jesse Cornejo.

Ann Hopkins, under appointment by the Court of Appeal, for Defendant and Appellant Isaac Vasquez.

Kamala D. Harris, Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, Eric L. Christoffersen and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HOCH, J.—Deandre Ellison was shot to death as he drove into his driveway in the Del Paso Heights neighborhood of Sacramento. Four other men, including Latrele Neal, were also in Ellison’s car. Before the car came to a stop in the driveway, an SUV driven by Jesse Cornejo slowly drove past Ellison’s house; the SUV’s front and backseat passengers, Adam Cornejo and

Isaac Vasquez, opened fire on Ellison's car.¹ Neal managed to return fire with Ellison's gun before the SUV drove away. About 20 bullets were exchanged between the vehicles. Bullets also struck Ellison's house. Ellison was the only casualty. After crashing the SUV while being pursued by law enforcement, Adam, Jesse, and Isaac were taken into custody a short time later. Each was a Norteño gang member. Isaac was 16 years old with a developmental disability; Adam and Jesse were 17 and 18 years old, respectively.

Adam, Jesse, and Isaac were tried together and convicted by jury of one count of second degree murder (Pen. Code, § 187;² Count One), four counts of attempted murder (§§ 664, 187; Counts Two, Three, Four, and Five), and one count of shooting at an inhabited dwelling (§ 246; Count Six). Jesse was also convicted of one count of driving in willful or wanton disregard for safety while fleeing from a pursuing peace officer. (Veh. Code, § 2800.2, subd. (a); Count Seven.) With respect to the murder, the jury found the offense was committed by means of shooting a firearm from a motor vehicle at another person outside the vehicle with the intent to inflict great bodily injury. (§ 190, subd. (d).) The jury also found the crimes were committed for the benefit of, at the direction of, or in association with, a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b).) Various firearm enhancement allegations were also found to be true. (Former §§ 12022.53, subds. (c), (d), (e)(1), 12022.5, subd. (a).) The trial court sentenced Adam and Isaac to serve aggregate indeterminate prison terms of 120 years to life plus consecutive determinate terms of nine years four months. Jesse was sentenced to serve the same indeterminate term of 120 years to life plus a consecutive determinate term of 10 years.

Defendants appeal. The following contentions are made by each defendant: (1) the evidence was insufficient to establish the "criminal street gang" requirement of the gang enhancements because there is no evidence Sacramento Norteño subsets are part of the larger Norteño organization; (2) the trial court prejudicially erred by allowing expert testimony that defendants probably fired first because Ellison would not have wanted to attract trouble to his home; (3) the trial court prejudicially erred and violated defendants' constitutional right to due process by excluding evidence they claim indicated Ellison had returned to a gang lifestyle, which they argue was critical to their self-defense claim; (4) the trial court prejudicially erred and further violated defendants' constitutional rights by providing the jury with a different instruction on causation than that contained in bracketed portions of CALCRIM No. 520; and (5) their respective abstracts of judgment must be

¹ Because Adam and Jesse Cornejo have the same last name, we refer to them by their first names; for consistency, we also refer to Isaac Vasquez by his first name.

² Undesignated statutory references are to the Penal Code.

modified to reflect the victim restitution order is a joint and several obligation. Adam and Isaac also assert (6) the trial court's imposition of a sentence that is the functional equivalent of life without parole (LWOP) amounts to cruel and unusual punishment. Finally, Isaac contends (7) the trial court prejudicially erred and violated his constitutional rights by allowing one of the detectives in the case to convey a misleading portion of Isaac's statement to police and (8) the cumulative effect of the foregoing assertions of error requires reversal.

Following oral argument, our Supreme Court decided *People v. Prunty* (2015) 62 Cal.4th 59 [192 Cal.Rptr.3d 309, 355 P.3d 480] (*Prunty*), which squarely addresses the first contention listed above. We requested supplemental briefing on the new case. Having reviewed this briefing, we conclude *Prunty* requires reversal of the gang enhancement findings (§ 186.22, subd. (b)) as to all defendants.³ Also, because each defendant was found to qualify for vicarious firearm enhancements under former section 12022.53, subdivision (e)(1), which requires violation of section 186.22, subdivision (b), as an element of that enhancement, we must reverse these vicarious firearm enhancements as to all defendants as well.

We disagree with the remaining above listed contentions raised by all defendants, except for the conceded point that their respective abstracts of judgment should reflect the victim restitution order is a joint and several obligation. Specifically, the trial court did not err by allowing expert testimony that defendants probably fired first because Ellison would not have wanted to attract trouble to his home. Defendants' contention that the trial court prejudicially erred and violated their constitutional right to due process by excluding evidence of Ellison's return to an active gang lifestyle is forfeited. Nor were their respective counsel ineffective for failing to preserve the issue for review. We also reject defendants' claim the trial court prejudicially erred and violated their constitutional rights by providing the jury with a different instruction on causation than that contained in a bracketed portion of CALCRIM No. 520. While the instruction provided was erroneous in two respects, the error was harmless.

³ This conclusion makes it unnecessary to address defendants' additional, and arguably meritorious, assertion that the trial court prejudicially erred and violated their constitutional right of confrontation by admitting expert gang testimony concerning the basis for the expert's conclusions they were active Norteño gang members. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 670–671 [204 Cal.Rptr.3d 102, 374 P.3d 320] [“case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay” and “[s]ome of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354]”].) And while defendants also assert such a confrontation violation would require reversal of their underlying convictions, as well as the gang enhancements, we disagree. The evidence establishing their guilt of the underlying crimes was very strong, as we explain more fully later in this opinion. Setting aside any testimonial hearsay conveyed to the jury through the gang expert, we would conclude beyond a reasonable doubt the jury would have convicted defendants of the underlying crimes.

Turning to the Eighth Amendment claim raised by Adam and Isaac, we concluded in our original opinion that remand for a new sentencing hearing was required because it was unclear whether the trial court properly considered all mitigating circumstances attendant in each juvenile offender's life, including but not limited to chronological age at the time of the crime and physical and mental development, before sentencing them to serve the functional equivalent of LWOP. In so concluding, we rejected the Attorney General's argument Senate Bill No. 260 (2013–2014 Reg. Sess.) (Senate Bill 260), which became effective January 1, 2014, rendered resentencing unnecessary because, under newly enacted section 3051, Adam and Isaac will be afforded a meaningful opportunity for parole "during [their] 25th year of incarceration" (§ 3051, subd. (b)(3)), i.e., within their natural life expectancies. We granted rehearing on this issue in light of certain language contained in *Montgomery v. Louisiana* (2016) 577 U.S. ____ [193 L.Ed.2d 599, 136 S.Ct. 718] (*Montgomery*), decided after our decision was issued. After receiving supplemental briefing on the import of *Montgomery*, we issued an opinion on rehearing that again concluded there was an Eighth Amendment violation for which remand was required.⁴ The day after we issued the opinion on rehearing, our Supreme Court decided *People v. Franklin* (2016) 63 Cal.4th 261 [202 Cal.Rptr.3d 496, 370 P.3d 1053] (*Franklin*), which prompted us to again grant rehearing and again accept supplemental briefing on the new authority. Based on *Franklin*, we now conclude the Eighth Amendment claim is moot. Moreover, based on the procedural context of this case, we need not order the limited remand that was ordered in *Franklin*.

Finally, the remaining claims brought by Isaac alone also fail. The trial court did not prejudicially err or violate his constitutional rights by allowing one of the detectives to convey a portion of his statement to police. Nor does the cumulative effect of the foregoing assertions of error require reversal.

Accordingly, with respect to each defendant, we shall reverse the gang enhancement and vicarious firearm enhancement findings, modify the judgments to strike these enhancements, and affirm the modified judgments. We shall also direct the trial court to amend the abstracts of judgment to reflect the modifications and to indicate the victim restitution order is a joint and several obligation.

FACTS

On the afternoon of January 19, 2011, Ellison left his home to go to the store. He drove his wife's Ford Taurus and brought along three other men, including Neal, who sat in the back of the car directly behind Ellison. On the

⁴ Justice Murray dissented from both the initial opinion and the opinion on rehearing.

way to the store, Ellison picked up another man, who was walking to Ellison's house, and then continued on to the store. Ellison, a former gang member, had a .40-caliber handgun in the car's center console. According to his wife, he bought the gun for protection. Having recently testified against another gang member in exchange for being released from jail, Ellison had received threats and was concerned about retaliation for being a "snitch." Neal was aware of the threats. He was also aware Ellison had a gun in the center console.

When Ellison and his companions returned from the store, they turned onto Ellison's street and noticed two vehicles approaching from the opposite direction. The first vehicle was a small car. The second vehicle was a Ford Explorer containing the defendants in this case. In order to pull into his driveway, which was on the left side of the street, Ellison turned between the two vehicles. Around this time, Neal noticed the occupants of the Explorer were giving them "hard looks" and said: "[W]ho is them muggin' us?" Before Ellison was able to put the car in park, Neal opened his door and started to step out to "figure out who was in them cars." As he did so, the Explorer stopped in front of Ellison's house and the front and backseat passengers, Adam and Isaac, opened fire with semiautomatic handguns.

Neal managed to "jump back in the car" before the first shots were fired. Multiple bullets struck the Taurus, shattering the rear window. When someone in the car said, "shoot back," Neal grabbed Ellison's handgun from the center console, fired one round through the "busted out" back window, and then got out of the car and continued firing at the Explorer until he "couldn't shoot no more." Neal fired at least six rounds. However, it does not appear any of Neal's shots struck the Explorer. Shots fired by Adam and Isaac were far more accurate. Combined, they fired at least 14 rounds, hitting both the Taurus and Ellison's home multiple times. One bullet struck Ellison in the upper back as he leaned forward in the driver's seat, traveled through his neck and head, and lodged in his brain. Death from this gunshot wound came within a matter of minutes.

After Adam and Isaac finished firing upon Ellison and his companions, the Explorer drove away. The Taurus's remaining passengers got out of the car. Neal "took off running" with Ellison's gun because he was afraid of being arrested for being a felon in possession of a firearm. Ellison's wife, Jettemarie Boyd, who witnessed the shooting from outside her neighbor's home, ran to her husband. During the shooting, the Taurus had continued forward into the garage door. The tires were still spinning when Boyd reached the car. She put the car in park, removed the keys from the ignition, and tended to her husband. Boyd's mother and various neighbors also came out to check on Ellison, who was "slumped over the steering wheel" with "blood . . . coming

out of his neck, running down his chest.” He died before law enforcement and medical personnel arrived on the scene.

A description of the Explorer and the shooters was given to police at the scene and relayed over the radio to nearby patrol cars. The vehicle was located a short time later, not far from the crime scene. When a traffic stop was initiated, Jesse led officers on a high-speed chase, reaching speeds of 85 miles per hour, before crashing the Explorer in an intersection. Defendants then attempted to flee on foot; each was taken into custody. During the chase, two handguns were thrown from the Explorer. Police recovered a 10-millimeter handgun along the chase route. Eight 10-millimeter casings found at the scene appeared to have been fired by this gun. A magazine for a nine-millimeter handgun and several unfired nine-millimeter rounds were also recovered along the chase route. The gun associated with the magazine and bullets was not recovered. However, Isaac admitted to police that a nine-millimeter handgun was also thrown from the vehicle and two nine-millimeter casings found in the Explorer appeared to have been fired by the same gun that fired six such casings found at the scene of the crime. Gunshot residue tests also corroborated the fact that Adam and Isaac were the shooters, while Jesse drove the Explorer.

Finally, the prosecution provided testimony from an expert on criminal street gangs, Detective John Sample, who testified Jesse, Adam, and Isaac were each active members of the Norteño street gang, and a hypothetical shooting based on the facts of this case would have been committed in association with or for the benefit of the gang. We provide a more detailed description of Detective Sample’s testimony in the discussion that follows.

DISCUSSION

We first address those contentions asserted by all three defendants. Then, we address one claim raised by both Adam and Isaac. Finally, we address Isaac’s remaining contentions.

ALL DEFENDANTS

I

Sufficiency of the Gang Evidence

Defendants contend the evidence was insufficient to support the jury’s finding they committed the charged offenses “for the benefit of, at the direction of, or in association with any criminal street gang” (§ 186.22,

subd. (b)(1)) because the required predicate offenses the gang expert testified about were committed by members of Norteño subsets that were different than the subsets to which defendants belonged and there was no substantial evidence linking these subsets to each other or to the greater Norteño gang. We agree.

Section 186.22, subdivision (b)(1), increases punishment for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”

■ “To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group’s members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 [119 Cal.Rptr.2d 272]; see § 186.22, subd. (f) (Section 186.22(f)).) “A ‘pattern of criminal gang activity’ is defined as gang members’ individual or collective ‘commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more’ enumerated ‘predicate offenses’ during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]” (*Duran, supra*, 97 Cal.App.4th at p. 1457; see § 186.22, subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313].)

To satisfy these criminal street gang requirements, Detective Sample testified there were about 1,500 Norteño gang members in the Sacramento area. He had personally contacted about 150 such gang members. The detective testified their commonly used symbols are “the letter N, anything that is representative of the number 14—N is the 14th letter of the alphabet—the Roman numerals XIV, which is the number 14 in Roman numerals, a one dot and a four dot. Typically their primary color is red. They use the Huelga bird as one of their primary symbols, which was taken from the United Farmworkers.” He further testified their primary activities include “[a]ssaults with firearms, stabbings, homicides, narcotics trafficking, burglaries, robberies, stealing cars.” Finally, the detective testified regarding the facts of two predicate offenses committed by gang members belonging to two different Norteño subsets. The first predicate offense involved three Norteño gang members who belonged to the Varrio Centro subset, a “click [*sic*] that’s in downtown Sacramento,” one of whom fired upon a car being driven by a person he “had problems with in the past” while another threw two beer

bottles at the car. The other predicate offense involved four Norteño gang members who belonged to the Varrio Gardenland subset, one of whom pulled out a handgun during a fight with a rival group of Norteños and shot three people, killing one. However, while there is more than sufficient evidence establishing the defendants in this case are Norteño gang members, they did not belong to the specific subsets whose members perpetrated the predicate offenses. Instead, Adam and Jesse belonged to the Oak Park subset, while Isaac belonged to the Varrio Franklin Boulevard subset. Detective Sample testified Norteño subsets adhere to the same structure, have the same beliefs, and claim membership in the overarching Norteño gang.

■ We are compelled by our Supreme Court's recent decision in *Prunty, supra*, 62 Cal.4th 59, to conclude the foregoing evidence was not sufficient to support the gang enhancements. There, as here, the prosecution's gang expert testified to two predicate offenses committed by members of two Norteño subsets, neither of which was the same subset to which the defendant belonged.⁵ The only evidence indicating these subsets "identified with a larger Norteño group" was the expert's testimony that they all "referred to themselves as Norteños." (*Prunty*, at p. 69.) This, the court held, was not enough to show the Norteño gang the defendant sought to benefit by committing his crimes was the same Norteño gang that committed the predicate offenses. (*Id.* at pp. 75–76, 81–82.) Instead, the prosecution was required to prove "some associational or organizational connection uniting those subsets." (*Id.* at p. 71.) The court continued: "That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. [¶] Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22(f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22[, subdivision] (b)." (*Id.* at pp. 71–72, fn. omitted.)

■ Here, as in *Prunty*, the evidence falls short of establishing an associational or organizational connection between the Norteño subsets that committed the predicate offenses, i.e., the Varrio Centro Norteños and the Varrio Gardenland Norteños, and the Norteño subsets to which defendants

⁵ Detective Sample was also the expert in *Prunty*. He testified about the same two predicate offenses there as he did in this case. (*Prunty, supra*, 62 Cal.4th at p. 69.)

belonged, i.e., the Oak Park Norteños and the Varrio Franklin Boulevard Norteños. As in *Prunty*, Detective Sample “did not describe any evidence tending to show collaboration, association, direct contact, or any other sort of relationship among any of the subsets he described. None of his testimony indicated that any of the alleged subsets had shared information, defended the same turf, had members commonly present in the same vicinity, or otherwise behaved in a manner that permitted the inference of an associational or organizational connection among the subsets.” (*Prunty, supra*, 62 Cal.4th at p. 82.)

With respect to showing a connection between the various subsets and the larger Norteño gang, the question becomes closer. As the Attorney General points out, Detective Sample testified Norteño subsets adhere to the same structure, have the same beliefs, and claim membership in the larger Norteño gang. However, the detective did not testify as to what that purported structure was, or that it was somehow imposed upon the subsets by the larger Norteño organization. (See, e.g., *Prunty, supra*, 62 Cal.4th at p. 77 [“straightforward cases might involve subsets connected through formal ways, such as shared bylaws or organizational arrangements”; “proof that different Norteño subsets are governed by the same ‘bylaws’ may suggest that they function—however informally—within a single hierarchical gang”].) Nor is the fact subsets share the same beliefs sufficient to establish the associational connection required by *Prunty*. Instead, as our Supreme Court explained, “subsets of a criminal street gang must be united by their *activities*, not simply by their viewpoints.” (*Id.* at p. 75, italics added.)

Finally, Detective Sample’s testimony that Norteño subsets claim membership in the larger Norteño gang does not suffice to establish the requisite connection. As our Supreme Court explained: “[T]here are some limits on the boundaries of an identity-based theory. The evidence must demonstrate that an organizational or associational connection exists in fact, not merely that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization. [Citation.] Although evidence of self-identification with the larger organization may be relevant, the central question remains whether the groups in fact constitute the same ‘criminal street gang.’ In making the required showing, moreover, the prosecution must do more than simply present evidence that various alleged gang subsets are found within the same broad geographic area. For instance, that the various alleged gang subsets in this case were located ‘all over Sacramento’ does not show that the subsets constituted a single criminal street gang. The prosecution must introduce evidence of the alleged subsets’ *activities*, showing a shared identity that warrants treating them as a single group. Such evidence could come in the form of proof that a certain Norteño subset retaliates against a Sureño gang for affronts that gang has committed against other Norteño subsets. Behavior of this kind could suggest that members of the

Norteño subset consider themselves to be part of a larger association. Or, the prosecution could introduce evidence showing that different subsets require their members to perform the same initiation activities. Evidence of this common behavior may be some evidence that members identify themselves as belonging to the same gang. The key is for the prosecution to present evidence supporting a fact finder's reasonable conclusion that multiple subsets are *acting* as a single 'organization, association, or group.' (§ 186.22(f).) Evidence of self-identification must refer to the particular *activities* of subsets, and must permit the jury to reasonably conclude that the various subsets are associated with each other because of their shared connection with a certain group. And where, as in this case, the alleged perpetrators of the predicate crimes under section 186.22(f) are members of particular subsets, the *behavior* of those subsets' members must connect them to the gang the defendant sought to benefit." (*Prunty, supra*, 62 Cal.4th at pp. 79–80, italics added.) Thus, what is required is proof "various subset members exhibit *behavior* showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Id.* at p. 71, italics added.)

Here, as in *Prunty*, while there was ample evidence defendants self-identified as part of the larger Norteño gang and the Oak Park Norteños (Adam and Jesse's subset) collaborated with the Varrio Franklin Boulevard Norteños (Isaac's subset) to carry out the present offenses, Detective Sample "offered no evidence that . . . members [of the subsets who committed the predicate offenses] behaved in a manner that conveyed their identification with the larger association that [defendants] sought to benefit. Instead, Sample simply described the subsets by name, characterized them as Norteños, and testified as to the alleged predicate offenses. He offered no additional information *about their behavior* or practices that could reasonably lead the jury to conclude they shared an identity with a larger group. The jury was consequently left with no way to connect the subsets that committed the predicate offenses to the larger Norteño group the prosecution claimed [defendants] acted to benefit." (*Prunty, supra*, 62 Cal.4th at pp. 82–83, italics added, fn. omitted.)

We must therefore reverse the gang enhancement findings as to all defendants. Moreover, because each defendant was also found to qualify for vicarious firearm enhancements under former section 12022.53, subdivision (e)(1), which requires violation of section 186.22, subdivision (b), as an element of that enhancement, we must also reverse these vicarious firearm enhancement findings as to all defendants. We note, however, Adam and Isaac were also found to have personally and intentionally discharged a firearm causing great bodily injury or death (former § 12022.53, subd. (d)) during the commission of their crimes, independently qualifying them for the 25-year-to-life enhancement for each crime, which the trial court imposed at sentencing.

II*Admission of Certain Opinion Evidence*

Defendants further assert the trial court prejudicially erred by allowing expert opinion testimony that defendants probably fired first because Ellison would not have wanted to “attract trouble” to his home. Not so.

A.*Additional Background*

Detective Jason Kirtlan interviewed Neal in the presence of Neal’s attorney, who had secured an immunity agreement for Neal prior to the interview. During his cross-examination of Detective Kirtlan, Jesse’s trial counsel asked: “Now, when [Neal] came to talk to you, isn’t it true that the first thing you said to him is, I know you’re the victim?” The detective answered: “Something to that effect, yes.” Counsel then asked: “Wouldn’t it have been better to wait until you had heard what he had to say before you accepted his innocence?” The detective responded: “As I discussed earlier, there was overwhelming evidence in this case, as I’ve outlined, as to why I felt he was the victim and fired back in self-defense, as shared with the D.A.’s office, who agreed, and in this case gave him a letter of immunity.”

During the prosecution’s redirect examination, the prosecutor asked Detective Kirtlan: “Is there anything other than what you’ve already stated, which is the placement of the casings and the evidence around the scene, the statements from [Boyd] and other witnesses and the overall ballistics evidence in the case, including the shot into [a neighboring] house, that causes you to take the position that, in fact, [Neal] was being truth[ful]—that [Neal] did fire back second?” The detective answered: “Yes, there is.” Then, after various objections were overruled, he explained: “[Ellison] was pulling into his driveway. He was in his neighborhood. He is not going to attract, nor would the occupants of his vehicle, in my belief, attract trouble to their home. [¶] The [Explorer] was out of the area. They’re south area occupants up in the north area in a vehicle with weapons. [Ellison] was pulling into his driveway. [¶] If they were—if [Neal] were to have shot, the vehicle gets away, now they know where to come back to retaliate. [¶] It doesn’t make sense to me. And given the totality of the rest of the evidence, that led me to my determination that the Taurus was fired on.” Isaac’s trial counsel then objected that the answer was an “[i]mproper opinion,” which was overruled.

During Detective Sample’s expert testimony, the prosecutor asked: “Assume that you have a gang member with several other people in his car. This

gang member is feeling vulnerable. He has got a gun in his car. He's been threatened, he's been labeled a snitch. And he comes down the street and he sees other people coming towards him who are muggin' him, they don't—he doesn't know them, the people in his car don't know them, but they know that they are giving hard looks to him. [¶] Would it be consistent with your knowledge of gang members for those people feeling vulnerable to turn into a dead end and leave themselves open to attack?" Jesse's trial counsel objected that the answer was "speculative," which was overruled. The detective then answered: "No, it did not—it would not seem a likely response for somebody who's that alert to a possible threat."

B.

Analysis

Defendants argue the testimony of both detectives amounted to improper expert opinion for three reasons: (1) "the subject matter was not beyond the common experience of the average juror"; (2) "the opinion was essentially a question of whether the experts thought that Neal and [Boyd] were telling the truth when they testified that the [defendants] fired first"; and (3) because "the whole case boiled down to whether the jury determined that Neal fired first or they fired first," the testimony amounted to "their view of how the case should be decided." In response, the Attorney General draws a distinction between the two witnesses. With respect to Detective Kirtlan, the Attorney General argues the challenged testimony "was not admitted as his opinion on whether Neal in fact acted in self-defense," but rather "was properly admitted to rebut the implied bias raised by the defense under Evidence Code section 780, subdivision (f)," i.e., the detective concluded Neal fired in self-defense before speaking to him because of a prior working relationship with Ellison and Boyd because Ellison had cooperated in a previous case against a fellow gang member. With respect to Detective Sample, the Attorney General argues the challenged testimony was a proper expert opinion.

1. Detective Kirtlan's Testimony Was Properly Admitted

■ "In determining the credibility of a witness, the jury may consider, among other things, '[t]he existence or nonexistence of a bias, interest, or other motive' for giving the testimony. (Evid. Code, § 780, subd. (f).)" (*People v. Price* (1991) 1 Cal.4th 324, 422 [3 Cal.Rptr.2d 106, 821 P.2d 610].) "Evidence showing a witness's bias or prejudice or which goes to his [or her] credibility, veracity or motive may be elicited during cross-examination." (*People v. Howard* (1988) 44 Cal.3d 375, 428 [243 Cal.Rptr. 842, 749 P.2d 279].) Here, Jesse's trial counsel properly sought to elicit such

evidence during his cross-examination of Detective Kirtlan by asking whether he was “frequently in contact” with Ellison and Boyd during his investigation of the previous case in which Ellison provided testimony against another gang member, which the detective admitted, and whether this working relationship made Detective Kirtlan “a little more emphatic” about “find[ing] the people that [he] believed were responsible,” which the detective denied. Counsel then asked Detective Kirtlan about his interview with Neal, specifically, whether he accepted the fact Neal was an innocent victim before he even “heard what he had to say.” The purpose for these questions, and the order in which they were asked, is unmistakable. Counsel was seeking to establish that the detective did not consider the possibility Neal could have started the gunfight by firing on the Explorer because of his bias in favor of Ellison, one of his “snitches.”

In these circumstances, it was proper for the prosecution to then rehabilitate the detective by eliciting the reason he believed Neal did not fire first before he had spoken to the man. In other words, the challenged testimony was offered to show the detective’s belief Neal fired in self-defense was based on reason, as opposed to mere bias, as the defense questioning suggested. (See, e.g., *People v. Nichols* (1970) 3 Cal.3d 150, 157 [89 Cal.Rptr. 721, 474 P.2d 673] [prosecution properly offered evidence of the reasonable basis for witness’s testimony to rebut inference of bias raised by the defense on cross-examination].)

2. Detective Sample’s Testimony Was Properly Admitted

■ Expert opinion testimony must be “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 [59 Cal.Rptr.2d 356, 927 P.2d 713], disapproved on another point in *People v. Sanchez*, *supra*, 63 Cal.4th 665.) Here, Detective Sample testified, based on his special knowledge, training, education, and experience working as a gang detective, that a gang member who is feeling vulnerable because he has been threatened and labeled a snitch would not be likely to turn into a dead end and leave himself open to attack. Defendants argue this specific opinion was not sufficiently beyond common experience to be helpful to the jury because “[n]o sensible person, regardless of their gang status, would knowingly place themselves in a trap if they thought the[y] were under threat.” We disagree. While no sensible person would pull into his own driveway and start a gunfight with no means of escape, whether a *gang member* would do so is not something the average juror would know. Nor was Detective Sample’s testimony simply an opinion as to whether Neal and Boyd had testified truthfully concerning how the gunfight occurred, or as to how the jury should ultimately decide the case.

The trial court did not abuse its discretion in allowing the challenged testimony of Detectives Kirtlan and Sample.

III

Exclusion of Defense Evidence

Defendants claim the trial court prejudicially erred and violated their constitutional right to due process by excluding evidence of a post made to Ellison's Facebook page on the day of the shooting, which they argue indicated Ellison "had reentered gang life" and "was associating with gang members." According to defendants, this evidence was highly probative of their defense, i.e., Ellison was killed in self-defense after Neal opened fire on them, because "the people in Ellison's car had the same motivations to shoot first as the gang expert attributed to [defendants]." Defendants also claim the excluded evidence "would [have] support[ed] the defense contention that Ellison drove his car in a way to force [defendants] to stop in front of his house" and "would [have] rebut[ted] [Boyd's] testimony that Ellison only purchased the gun because he was afraid of being attacked because he was cooperating with the police."

A.

Additional Background

Jesse moved in limine to introduce a printout from Ellison's Facebook page that included a post made around two hours before the murder. The post stated: "GET MONEY TRUST NOT A SOUL MONEY AND MURDER I SWEAR IM BACK AT IT AGAIN WHO CAN I TRUST IN THIS WORLD????????????????????? GET ACTIVE." The printout also included Ellison's profile picture, in which he was apparently making a gang sign with his hands.

Jesse's trial counsel argued the post was relevant to show Ellison's state of mind at the time of the shooting, i.e., he and the other occupants of the Taurus "were expecting to get hit" and "were expecting trouble," which he argued was "very probative of who fired first." Counsel also argued the post was admissible despite the hearsay rule because it qualified as a statement of Ellison's then-existing state of mind and a statement against penal interest. Counsel further argued Boyd, who also had access to Ellison's Facebook account, could authenticate the post. Isaac's attorney joined in these arguments.

In response, the prosecutor did not object to the profile picture being admitted, but argued defense counsel was attempting to “circumvent the hearsay rules and circumvent the foundational requirements” by seeking to admit the Facebook post. With respect to hearsay, the prosecutor did not actually make an argument. With respect to foundation, the prosecutor questioned whether counsel would be able to establish Ellison “did in fact, make that entry.”

After further argument from defense counsel, the trial court took the matter under submission.

Trial began without a ruling on admissibility of the Facebook post. The following exchange occurred during Jesse’s cross-examination of Neal:

“Q Did you also say that [Ellison] don’t even gang bang no more?

“A Yes, I did say that. He did not gang bang anymore.

“Q You don’t know—you say you know that for a fact?

“A I know that for a fact. [¶] He got married and he was a family—was a family man. He was changing his life. His grandma had just passed away. He had just got saved. [¶] He was—he was a totally different dude that I know from growin’ up with. I know for a fact he did not gang bang anymore.

“Q Did you ever go on his Facebook page?

“A Yes, I did.

“Q When was the last time you went on his Facebook page?

“A Um, I been on there after he was killed. I been on there before he was killed.”

At this point, counsel again sought to admit the Facebook post, arguing the post was admissible under Evidence Code section 780 as evidence tending to disprove the truthfulness of Neal’s testimony that Ellison was no longer “gang banging.” The trial court ruled the post inadmissible under Evidence Code section 352, as requiring the jury to “embark on . . . something that’s a bit of a side show, and that is the question of whether or not [Neal] believes [Ellison] was involved as a gang banger at the time.” The trial court then instructed the jury to disregard Neal’s “opinions as to whether or not [Ellison] was or was not involved actively as a member of a gang.”

B.***Forfeiture***

We first note neither Jesse's trial counsel, nor counsel of either codefendant, pressed for a ruling on the matter of whether or not the Facebook post was admissible as substantive evidence Neal fired first, prompting Adam and Isaac to return fire in self-defense. (See *People v. Braxton* (2004) 34 Cal.4th 798, 813–814 [22 Cal.Rptr.3d 46, 101 P.3d 994] [failure to press for a ruling generally forfeits contention of error].) Indeed, Adam's trial counsel did not join in the argument in the first place. (See *People v. Wilson* (2008) 44 Cal.4th 758, 793 [80 Cal.Rptr.3d 211, 187 P.3d 1041] [failure to join in the objection or motion of a codefendant generally forfeits the issue on appeal].) When the matter of the Facebook post was revisited during Jesse's cross-examination of Neal, counsel sought to admit the evidence *to impeach Neal's testimony that Ellison was no longer a gang member*, but did not indicate to the trial court he was also pressing for a ruling on whether the evidence was admissible to prove self-defense. Thus, the trial court ruled the Facebook post was not admissible *to impeach Neal* under an Evidence Code section 352 analysis. The trial court never ruled on the initial motion to admit this evidence *to prove self-defense*, nor did any of the defendants press the trial court to do so. By failing to press for a ruling—and in Adam's case, by failing to join in the argument altogether—defendants have forfeited their now-joint contention the trial court prejudicially erred and violated their due process rights by excluding the proffered evidence.

C.***Ineffective Assistance of Counsel***

Anticipating forfeiture, Jesse argues his trial counsel rendered constitutionally deficient assistance by failing to “explicitly argue that the fact that Ellison had returned to an active gang life would tend to show that he and his associates . . . were just as likely to fire first as were Jesse and his associates.” Adam and Isaac join in this argument as well, which we interpret as arguing their respective counsel were equally ineffective.

■ A criminal defendant has the right to the assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839].) This right “entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him [or her] to ‘the reasonably competent

assistance of an attorney acting as his [or her] diligent conscientious advocate.’ [Citations.]’ (*Ibid.*, quoting *U.S. v. DeCoster* (D.C. Cir. 1973) [487 F.2d 1197, 1202].) “In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was “deficient” because his [or her] “representation fell below an objective standard of reasonable ness . . . under prevailing professional norms.” [Citations.] Second, he [or she] must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”’” (*In re Harris* (1993) 5 Cal.4th 813, 832–833 [21 Cal.Rptr.2d 373, 855 P.2d 391]; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693, 104 S.Ct. 2052].) The burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816 [129 Cal.Rptr. 438, 548 P.2d 1110].)

Defendants have not carried their burden. Even assuming (1) counsel would have been able to establish Ellison in fact made the post to his Facebook page, (2) the post indeed meant Ellison had decided to return to an active gang lifestyle, (3) defendants are correct that the Facebook post was relevant to establish (a) Neal was just as likely to have fired first as were Adam and Isaac, (b) Ellison likely drove the Taurus in between the first car and the Explorer in order to force defendants to stop in front of his house, and (c) contrary to Boyd’s testimony, Ellison did not purchase the handgun solely because he was afraid of being attacked for having cooperated with the police, and (4) the post was not inadmissible hearsay because it evidenced Ellison’s then-existing state of mind, we cannot conclude exclusion of this evidence would have been an abuse of discretion under Evidence Code section 352 or a violation of their constitutional right to due process.

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Our Supreme Court has explained this section “permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption,” but “requires that the danger of these evils substantially outweigh the probative value of the evidence.” (*People v. Lavergne* (1971) 4 Cal.3d 735, 744 [94 Cal.Rptr. 405, 484 P.2d 77]; see also *People v. Holford* (2012) 203 Cal.App.4th 155, 168 [136 Cal.Rptr.3d 713].) Rulings under this provision “come within the trial court’s discretion and will not be overturned absent an abuse of that discretion.” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070 [56 Cal.Rptr.2d 133, 920 P.2d 1337].)

Here, the Facebook post was minimally probative of defendants' claim of self-defense. Even assuming the post established in the jurors' minds that Ellison possessed the gun, not simply for protection, but also for gang purposes, i.e., confrontation, and Ellison deliberately cut off the Explorer while pulling into his driveway, neither fact would justify defendants' actions of opening fire on Ellison's car. The only purported fact that would justify such an assault is Neal's firing at the Explorer first, or at the very least, pointing Ellison's gun in defendants' direction, and thereby causing a reasonable belief in the need to employ deadly force in self-defense. But the Facebook post was made by *Ellison*, not *Neal*. There is no dispute Neal was the one who fired Ellison's gun. Indeed, Ellison was apparently hit before he could put the car in park. Ellison's post was therefore relevant on the issue of Neal's conduct only if Neal was aware of the post. In other words, Ellison's decision to return to gang life, by itself, does not tend to prove anything about *Neal*. However, Neal's belief Ellison was out of the gang life would tend to make it less likely that he would take it upon himself to use Ellison's gun to fire upon another vehicle in front of Ellison's house had occupants of that vehicle not fired first. Conversely, Neal's belief Ellison had returned to the gang life would tend to make his firing first in these circumstances more likely. But how much more likely? We conclude the answer is, not much. The evidence established Ellison had offered testimony against a rival gang member, had been threatened for having done so, and was pulling into his driveway when the shooting occurred. In these circumstances, regardless of whether Ellison had decided to return to the gang lifestyle, and regardless of whether Neal was aware of this decision, opening fire on an Explorer full of gang members *in front of Ellison's house, and in a driveway with no means of escape* when the occupants of the Explorer predictably returned fire, is so unlikely as to be implausible.

■ Weighing against this low level of probative value is the reality that admission of the evidence would have required a significant consumption of time. The defense would have been required to establish what we have assumed in our analysis thus far, i.e., the post was in fact made by Ellison, the post indeed meant Ellison had returned to an active gang lifestyle, and Neal was aware of his return to this lifestyle. In light of the minimal probative value of the evidence, we cannot conclude the trial court would have abused its discretion by excluding the evidence under an Evidence Code section 352 analysis. Nor are we persuaded such a decision would have amounted to a deprivation of due process. While defendants are correct to point out Evidence Code section 352 "must bow to the due process right of a defendant to a fair trial and his [or her] right to present all relevant evidence of significant probative value to his [or her] defense[,] . . . the proffered evidence must have more than slight relevancy to the issues presented. [Citation.]" (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599 [237

Cal.Rptr. 654], citation omitted; see *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [147 Cal.Rptr. 275].) Here, as we have already explained, the Facebook post did not have significant probative value.

In sum, because admission of the Facebook post would have necessitated an undue consumption of time and the post was not significantly probative of defendants' claim of self-defense, the trial court would not have abused its discretion or violated defendants' due process rights by excluding the evidence under Evidence Code section 352 had defendants' respective counsel pressed for a ruling on the matter. Thus, regardless of whether reasonable counsel would have pressed for such a ruling, our confidence in the outcome is not undermined.

IV

Causation Instruction

Defendants also contend the trial court prejudicially erred and violated their constitutional rights by providing the jury with a different instruction on causation than that contained in bracketed portions of CALCRIM No. 520. We disagree.

CALCRIM No. 520 defines the crime of murder for the jury. The jury was so instructed.⁶ Defendants complain the trial court did not provide the following bracketed portions of the instruction on the issue of causation: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death.

⁶ As given to the jury in this case, CALCRIM No. 520 provides: "The defendants are charged in Count One with murder. To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant committed an act that caused the death of another person. [¶] Two, when the defendant acted, he had a state of mind called malice aforethought. And, three, he killed without lawful justification. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. A defendant acted with implied malice if, one, he intentionally committed an act. [¶] Two, the natural and probable consequences of that act are dangerous to human life. Three, at the time he acted, he knew his act was dangerous to human life, and, four, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill-will toward the victim. It is a mental state that must be formed before the act that causes death is committed. [¶] It does not require deliberation or the passage of any particular period of time."

An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.” (CALCRIM No. 520.)

Instead of the foregoing bracketed portions of CALCRIM No. 520, the trial court instructed the jury, in language virtually identical to CALJIC No. 3.41, as follows: “There may be more than one proximate cause of a homicide, even when there is only one known or actual or direct cause of death. [¶] When the conduct of two or more persons contributes concurrently as a proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also the substantial factor contributing to the result. [¶] A cause is concurrent if it was operative at the time of death and acted with another cause to produce death.”

Both CALCRIM No. 520 and CALJIC No. 3.41 indicate in their respective use notes that a trial court has a *sua sponte* duty to instruct on proximate cause if causation is an issue in the case. (Bench Note to CALCRIM No. 520; Use Note to CALJIC No. 3.41.) CALCRIM No. 520’s bench note continues: “If the evidence indicates that there was only one cause of death, the court should give the ‘direct, natural, and probable’ language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the ‘substantial factor’ instruction and definition in the second bracketed causation paragraph.” (Bench Note to CALCRIM No. 520.)

■ “The California Judicial Council withdrew its endorsement of the long-used CALJIC instructions and adopted the new CALCRIM instructions, effective January 1, 2006.” (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465 [58 Cal.Rptr.3d 581].) California Rules of Court,⁷ rule 2.1050(e) provides: “Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors.” However, as our Supreme Court has explained, “a trial court’s failure to give the *standard . . .* instruction does not necessarily constitute state law error,” and while “use of the standard instruction . . . is preferred, it is not mandatory.” (*People v. Aranda* (2012) 55 Cal.4th 342, 354 [145 Cal.Rptr.3d 855, 283 P.3d 632].) Nor does the trial court’s failure to use the standard instruction “amount to state law error when its substance is covered in other instructions given by the court.” (*Ibid.*)

⁷ Undesignated rule references are to the California Rules of Court.

Here, the substance of the second bracketed causation paragraph of CALCRIM No. 520 was covered by the CALJIC instruction given to the jury. “CALJIC instructions that were legally correct and adequate on December 31, 2005, did not become invalid statements of the law on January 1, 2006. Nor did their wording become inadequate to inform the jury of the relevant legal principles or too confusing to be understood by jurors. The Judicial Council’s adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as superior. No statute, rule of court, or case mandates the use of CALCRIM instructions to the exclusion of other valid instructions.” (*People v. Thomas, supra*, 150 Cal.App.4th at pp. 465–466.)

■ However, we do agree with defendants on two points. First, the instruction given to the jury in this case, CALJIC No. 3.41, omits “the basic legal definition of cause.” This is because that definition was provided in CALJIC No. 3.40, which was not given to the jury.⁸ Second, the instruction given to the jury used the term “proximate cause,” which does not appear in either the current CALCRIM instruction or the post-1992 CALJIC version of the instruction. This is because our Supreme Court has held use of the term “proximate cause” in such an instruction “may mislead jurors, causing them . . . to focus improperly on the cause that is spatially or temporally closest to the harm.” (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see *People v. Roberts* (1992) 2 Cal.4th 271, 313 [6 Cal.Rptr.2d 276, 826 P.2d 274].) However, as we explain immediately below, the error was harmless under any standard.

■ In this case, as in *People v. Sanchez* (2001) 26 Cal.4th 834 [111 Cal.Rptr.2d 129, 29 P.3d 209], “it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines [defendants’] liability for murder.” (*Id.* at p. 845.) Here, there was no dispute Ellison died of a single gunshot wound. This was the direct, but-for cause of death. Overwhelming evidence established both Adam and Isaac fired into Ellison’s car. Who fired the fatal shot is irrelevant. As our Supreme Court explained: “A person can proximately cause a gunshot injury without personally firing the weapon that discharged the harm-inflicting bullet. For example, in *People v. Sanchez, supra*, 26 Cal.4th 834, two persons engaged in a gun battle, killing an innocent bystander. Who fired the fatal bullet, and thus who personally inflicted the harm, was unknown, but we held that the jury could find that *both* gunmen proximately caused the death. (*Id.* at pp. 848–849.)” (*People v. Bland* (2002) 28 Cal.4th 313, 337 [121 Cal.Rptr.2d

⁸ This instruction states in relevant part: “The criminal law has its own particular way of defining cause. A cause of the (result of the crime) is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the (result of the crime) and without which the (result of the crime) would not occur.” (CALJIC No. 3.40.)

546, 48 P.3d 1107].) The same is true here. While the jury should have been instructed with the “direct, natural, and probable consequences” language, we have no doubt the jury reached the same conclusion without it, i.e., the act of firing the fatal shot caused Ellison’s death. Then, under the instruction that was provided, the jury properly concluded both Adam and Isaac proximately caused the death regardless of who fired the fatal shot. Moreover, use of the term “proximate cause” in the instruction, while improper, could only have benefitted defendants by potentially misleading jurors that proximate cause has a “‘physical or temporal nearness’” requirement that does not exist in the law. (*People v. Bland, supra*, 28 Cal.4th at p. 338.) As for Jesse, liability for murder turned on principles of aiding and abetting, on which the jury was appropriately instructed. Thus, any instructional error was manifestly harmless.

Nevertheless, defendants argue there is evidence the occupants of the smaller car in front of the Explorer may have also fired upon Ellison’s car, and one of them might have fired the fatal shot. While there is some evidence shots may have also been fired from the smaller car, this would not undermine our conclusion Adam and Isaac, by firing their own bullets into Ellison’s car, also proximately caused Ellison’s death. Stated simply, assuming there were three gunmen instead of two, who fired the fatal bullet is still unknown, and the jury could find *all three* gunmen proximately caused the death. Nor are we persuaded by the argument, made in Adam’s opening brief, it would be speculative to conclude that “defendants were acting in concert with the occupants of the other vehicle, or that the occupants of the two vehicles even knew each other.” If, as defendants suggest, both the Explorer and the smaller lead car fired upon Ellison’s car as it pulled into the driveway, a reasonable inference is that the two vehicles were acting in concert. Adam’s trial counsel acknowledged as much when he argued in closing that the smaller car was “a companion car” containing “friends of theirs.” Moreover, defendants cite no authority for the proposition that the two cars had to act in concert in order for Adam and Isaac to have proximately caused Ellison’s death by also firing upon his car. Indeed, in *People v. Sanchez, supra*, 26 Cal.4th 834, the two gunmen who were found to have proximately caused the death of the innocent bystander were not acting in concert, but rather in opposition to each other. (*Id.* at pp. 840–841.)

We conclude that while the trial court erred by instructing the jury with an out-of-date version of CALJIC No. 3.41, rather than the preferred bracketed portions of CALCRIM No. 520 on causation, the error was manifestly harmless under any standard of prejudice.

V***Modification of the Abstract of Judgment***

■ The final claim asserted by all defendants is that their respective abstracts of judgment must be modified to reflect the victim restitution order is a joint and several obligation. The Attorney General concedes the point. We accept the concession and order the modification. (See *People v. Leon* (2004) 124 Cal.App.4th 620, 622 [21 Cal.Rptr.3d 394] [trial court may impose liability on each defendant to pay the full amount of the economic loss as long as the victim does not obtain a double recovery]; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535 [86 Cal.Rptr.2d 134] [to avoid double recovery, the court has authority to order victim restitution paid jointly and severally].)

ADAM AND ISAAC**VI*****Cruel and Unusual Punishment***

Adam and Isaac also assert the trial court's imposition of a sentence the functional equivalent of LWOP amounts to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. In light of our Supreme Court's recent decision in *Franklin, supra*, 63 Cal.4th 261, we conclude the claim is moot. Moreover, based on the procedural context of this case, we need not order the limited remand that was ordered in *Franklin*.

A.***Additional Background***

Adam and Isaac were 17 and 16 years old, respectively, when they opened fire on Ellison and his companions, killing Ellison. Isaac was also developmentally disabled. Isaac's sentencing memorandum argued the probation department's recommendation that the trial court impose an indeterminate term of 170 years to life, plus a consecutive determinate term of 37 years four months, "on a mentally impaired minor with a severely disadvantaged upbringing, including a drug-addicted mother, absent father figure, periods of homelessness, and an abusive and chaotic family life" would violate the Eighth Amendment. Adam's sentencing memorandum similarly argued the probation department's recommendation that the trial court impose such a

sentence “on a boy of only 17 years of age at the time of the offense, constitutes cruel and unusual punishment in violation of the Eighth Amendment.”

The trial court sentenced Adam and Isaac to serve an aggregate indeterminate prison term of 120 years to life plus a consecutive determinate term of nine years four months. This sentence was comprised of the following: 20 years to life for second degree murder by means of shooting a firearm from a motor vehicle with intent to inflict great bodily injury (§§ 187, 190, subd. (d)), plus 25 years to life for the greatest firearm enhancement attached to that crime (i.e., personally and intentionally discharging a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), plus a consecutive determinate term of nine years four months (four consecutive terms of two years four months (one-third the middle term of seven years)) for the attempted murders (§§ 187, 664, subd. (a)), plus *three* additional terms of 25 years to life for the same firearm enhancement attached to *three* of the attempted murders. The trial court ran *one* of these 25-year-to-life firearm enhancements concurrently “in light of the constitutional scheme argued by defense.”

B.

Analysis

The Eighth Amendment to the United States Constitution prohibits “cruel and unusual punishments” and “contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’” (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 123 S.Ct. 1179] quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996–997 [115 L.Ed.2d 836, 111 S.Ct. 2680].) This constitutional right “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’” to both the offender and the offense.” (*Miller v. Alabama* (2012) 567 U.S. 460, 461 [183 L.Ed.2d 407, 132 S.Ct. 2455, 2458] (*Miller*), quoting *Roper v. Simmons* (2005) 543 U.S. 551, 560 [161 L.Ed.2d 1, 125 S.Ct. 1183].)

In *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825, 130 S.Ct. 2011] (*Graham*), the United States Supreme Court held the Eighth Amendment “prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender.” (*Graham*, p. 75.) The court explained: “As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’ [Citation.] These salient characteristics mean that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile

offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citation.] Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’ [Citation.] A juvenile is not absolved of responsibility for his [or her] actions, but his [or her] transgression ‘is not as morally reprehensible as that of an adult.’ [Citation.]’ (*Id.*, 560 U.S. at p. 68.) The court also explained that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers,” and therefore, “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.” (*Id.*, 560 U.S. at p. 69.)

Turning to the severity of an LWOP sentence, the court explained such a sentence “deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence,” and noted this is “an especially harsh punishment for a juvenile,” who “will on average serve more years and a greater percentage of his [or her] life in prison than an adult offender.” (*Graham, supra*, 560 U.S. at pp. 69–70.) Finally, the court explored the penological justifications for such a sentence and concluded them to be “not adequate to justify life without parole for juvenile nonhomicide offenders.” (*Id.* at p. 74.) However, the court was also careful to point out the Eighth Amendment “does not require the State to release that offender during his [or her] natural life,” explaining: “Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.” (*Graham*, at p. 75.)

In *Miller, supra*, 567 U.S. 460 [183 L.Ed.2d 407, 132 S.Ct. 2455], the United States Supreme Court held the Eighth Amendment forbids a state from *mandating* the imposition of an LWOP sentence on a juvenile homicide offender. (*Miller*, at p. 479 [132 S.Ct. at p. 2469].) The court explained: “Mandatory life without parole for a juvenile precludes consideration of his [or her] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him [or her]—and from which he [or she] cannot usually extricate himself [or herself]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her]. Indeed, it ignores that he [or she] might have been charged and

convicted of a lesser offense if not for incompetencies associated with youth—for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” (*Id.* at p. 478 [132 S.Ct. at p. 2468].) The court concluded: “Although we do not foreclose a sentencer’s ability to [impose an LWOP sentence on a juvenile] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irreversibly sentencing them to a lifetime in prison.” (*Id.* at p. 480 [132 S.Ct. at p. 2469].)

In *People v. Caballero* (2012) 55 Cal.4th 262 [145 Cal.Rptr.3d 286, 282 P.3d 291] (*Caballero*), our Supreme Court held “sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy,” i.e., the “functional equivalent” of an LWOP sentence, “constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. . . . [T]he sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison ‘based on demonstrated maturity and rehabilitation.’ ” (*Id.* at pp. 268–269, quoting *Graham, supra*, 560 U.S. at p. 75.)

■ In *Franklin, supra*, 63 Cal.4th 261, our Supreme Court held, “just as *Graham* applies to sentences that are the ‘functional equivalent of a life without parole sentence’ [citation], so too does *Miller* apply to such functionally equivalent sentences” (*Franklin*, at p. 276), such that “a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*” (*ibid.*). However, the court also held the Legislature’s passage of Senate Bill 260, which became effective January 1, 2014, and provides juvenile offenders with an opportunity for parole at least by their 25th year of incarceration, renders moot an assertion that “an otherwise lengthy mandatory sentence” was imposed in violation of *Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455], at least where the defendant is not excluded from eligibility for such a parole hearing. (*Franklin*, at pp. 278–282.)

In so holding, the court explained “the Legislature passed [Senate Bill 260] explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*.¹⁰” (*Franklin, supra*, 63 Cal.4th at p. 277.) It did so by adding section 3051 to the Penal Code, “which requires the Board [of Parole Hearings] to conduct a ‘youth offender parole hearing’ during the 15th, 20th, or 25th year of a juvenile offender’s incarceration,” depending on the length of the offender’s “[c]ontrolling offense.” (*Franklin* at p. 277, quoting § 3051, subds. (a)(2)(B), (b).) Thus, section 3051 “provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration,” unless they come within one of the statute’s exclusions, set forth in subdivision (h). (*Franklin*, at p. 278.) While a juvenile offender’s original sentence remains operative, “section 3051 has changed the manner in which [that] sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole,” thereby “superse[ding] the statutorily mandated sentences” of non-excluded juvenile offenders. (*Ibid.*) “The Legislature has effected this change by operation of law, with no additional resentencing procedure required.” (*Id.* at pp. 278, 279.) Because the parole eligibility cap of section 3051 supersedes the mandatory sentence imposed by the trial court, “[s]uch a sentence is neither LWOP nor its functional equivalent,” and therefore, “no *Miller* claim arises.” (*Franklin*, at p. 280.)

Here, as in *Franklin, supra*, 63 Cal.4th 261, Adam and Isaac do not come within any of section 3051’s exclusions and their controlling offenses carried prison terms of 25 years to life, making them eligible for a youth offender parole hearing during their respective 25th years of incarceration. However, unlike *Franklin*, where the trial court imposed a mandatory sentence of 50 years to life, the trial court in this case was not required to impose an aggregate indeterminate prison term of 120 years to life plus a consecutive determinate term of nine years four months. In *Franklin*, our Supreme Court limited its “mootness holding” to circumstances in which “section 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy *mandatory sentence*” and expressed no view “on *Miller* claims by juvenile offenders . . . who are serving lengthy sentences imposed under *discretionary* rather than *mandatory sentencing statutes*.¹¹” (*Franklin*, at p. 280, italics added.) Nevertheless, a sizeable portion of the sentences imposed in this case was mandatory. The trial court had no discretion but to impose a term of 20 years to life for the murder and a consecutive term of 25 years to life for the firearm enhancement attached to that count. (See §§ 190, subd. (d), former 12022.53, subd. (d).) While the trial court did possess discretion to impose concurrent rather than consecutive sentences on the remaining attempted murder counts (see § 669; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458 [18 Cal.Rptr.3d 766] [trial court has “broad discretion to impose consecutive sentences when a person is convicted of two or more crimes”]),

the lowest possible term these juvenile offenders were eligible for was 45 years to life. Moreover, as we have explained, the rationale behind the court's mootness holding in *Franklin* is that section 3051 "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (*Franklin, supra*, 63 Cal.4th at p. 281.) If that fact precludes a lengthy mandatory sentence from being considered the functional equivalent of LWOP, we perceive no reason the same would not be true with respect to the sentences imposed here, a portion of which was mandatory and the remainder discretionary.

Simply put, Senate Bill 260 has rendered moot the *Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455] claim brought by Adam and Isaac by superseding their original sentences, effectively reforming the parole eligibility date so that they will be eligible for parole during their respective 25th years of incarceration.

Ordinarily, the conclusion that a claim is moot ends the inquiry. However, in *Franklin*, the court remanded the matter to the trial court for the limited purpose of determining whether or not the juvenile offender in that case "was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, supra*, 63 Cal.4th at p. 284.) This was done because the youth offender parole hearing established by Senate Bill 260 "shall provide for a meaningful opportunity to obtain release" (§ 3051, subd. (e)), which requires the Board of Parole Hearings to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" (§ 4801, subd. (c)), the statutory scheme also "contemplate[s] that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration" (*Franklin*, at p. 283, citing § 3051, subd. (f)), and it was "not clear" whether the juvenile offender in *Franklin* "had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing" (*Franklin*, at p. 284). Indeed, because the juvenile offender in *Franklin* was sentenced before *Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455] was decided, and because the term imposed was a mandatory sentence, the trial court understandably deemed such mitigating evidence irrelevant. (*Franklin*, at p. 283.)

In contrast, here, Adam and Isaac were sentenced after the *Miller* decision (*Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455]) and the record establishes they were afforded sufficient opportunity to make a record regarding their characteristics and circumstances at the time they opened fire on Ellison's car.

Specifically, in their respective sentencing memoranda, Adam and Isaac each argued the sentence recommended by the probation department violated the Eighth Amendment and urged the trial court to impose a term of 20 years to life based on *Miller, Graham, supra*, 560 U.S. 48, and *Caballero, supra*, 55 Cal.4th 262. Adam's submission included 23 character reference letters attesting to his good character despite his active participation in the murder. The content of these letters relates directly to the question of whether Adam is one of those rare juvenile offenders who may be deemed to be "irreparably corrupt, beyond redemption, and thus unfit ever to reenter society." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [171 Cal.Rptr.3d 421, 324 P.3d 245].)

Isaac's memorandum argued that, in addition to his youth, "severe mental disabilities" mitigated his culpability, explaining: "The neuropsychological evaluation concludes that he has 'cognitive disorder/dementia generalized, severe.' Dr. Wicks testified at trial that [Isaac] was brain damaged. Not only is his IQ very low placing him within the mentally retarded range, he suffers from impairment to his executive functioning, causing him to engage in poor decision making. Also interfering with his ability to make decisions is his tendency to impulsive action, which was testified to by Dr. Wicks. While [Isaac's] chronological age at the time of the offense was 16, *his mental age is 9.*" Aside from his mental impairment, which Isaac argued may have been caused in part by the fact he was "born with methamphetamine in his system" and his mother did not receive adequate prenatal care during her pregnancy, Isaac also argued his mother's drug addiction and father's absence resulted in him "receiv[ing] virtually no support or guidance as a child." Isaac also pointed to evidence he "was sexually abused by his brother," "his father abused other family members," and his "family became homeless when he was 12 or 13 [years old] and he had to rely on his friends for food and shelter." Analogizing Isaac's background to that of the defendant in *Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455], wherein the high court noted, "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here" (*id.* at pp. 478–479 [132 S.Ct. at p. 2469]), the sentencing memorandum concluded: "[Isaac's] background affected his participation in this crime. Given [his] impairments and total lack of support, it is not realistic to think that he could have extricated himself from his family environment. All of the foregoing factors act to reduce [Isaac's] moral culpability." Before the trial court sentenced Adam and Isaac, the court stated it had considered all of the arguments and materials submitted on behalf of defendants.

As contemplated by the statutory scheme enacted by Senate Bill 260, the foregoing information regarding Adam's and Isaac's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board of Parole Hearing's consideration as to whether

or not to grant them release. (*Franklin, supra*, 63 Cal.4th at pp. 283–284; § 3051, subd. (f).) We therefore need not remand the matter to the trial court for a determination as to whether these juvenile offenders had an opportunity to produce such evidence.

ISAAC'S REMAINING CONTENTIONS

VII

Rule of Completeness

Isaac contends the trial court prejudicially erred and violated his constitutional rights by allowing one of the detectives in the case to convey a misleading portion of his police statement rather than require the prosecution to play the entire statement for the jury. We disagree.

A.

Additional Background

Ellison was killed by a nine-millimeter bullet. Police found multiple nine-millimeter and 10-millimeter shell casings in the street in front of Ellison's house. As mentioned, they found the corresponding 10-millimeter handgun along the chase route. However, while police also found a magazine for a nine-millimeter handgun along the chase route, they did not find the gun itself.

Detective Kirtlan interviewed Isaac after the shooting. The detective told Isaac police had found the 10-millimeter handgun and the nine-millimeter magazine, but were still looking for the nine-millimeter handgun. He also explained it was a “public safety issue” to have a gun left out on the street, especially since there would be children walking down that street on their way to school the next morning. Isaac then discussed the matter with his stepmother, who had joined him in the interview room, and ultimately agreed to point out the location of the missing handgun. The detective brought in a map of the area and Isaac pointed out the location he believed “they threw it out.”

The prosecution moved in limine to be allowed to elicit testimony from Detective Kirtlan that Isaac told him the location where he believed police would be able to find the gun, despite the fact Isaac “arguably” invoked his right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602] (*Miranda*) prior to providing the location, under “the ‘public

[REDACTED]

safety' exception to the *Miranda* rule.”⁹ The prosecutor explained: “What I proposed rather than playing the tape was to ask Detective Kirtlan did you receive information from [defendant] Isaac Vasquez as to where you might find the missing nine millimeter gun? Yes. Did you look for it in that location? Yes. Did you find it? No.”

In response, Isaac’s trial counsel argued: “I think that there is . . . [an Evidence Code section] 356 problem. I think that the throwing of the gun is being used to show consciousness of guilt, whereas Isaac’s statement during this long period that he was interrogated and questioned was that this was self-defense. So I think that you need to get in the entire statement so that the jury could, in essence, understand that.” Counsel also expressed concern that limiting the testimony to Isaac providing the location of the gun “gives a false impression that if he’s saying where the gun was thrown, then it gives the impression that he threw the gun, and that’s a significant issue.”

The prosecutor argued in reply: “As far as [Evidence Code section] 356, I don’t know that there is anything in his self-serving statements to [Isaac’s stepmother] or even his inculpatory statements to [his stepmother] that explained the limited part that I’m trying to get out, where could they look for the gun. [¶] One of the things that has already been raised here by [counsel for Jesse] is that the police didn’t do their job, didn’t look for the .40 caliber, didn’t even bother to look for the .40 caliber, didn’t even bother to find it. Now, that’s the one that was used by Latrele Neal. But it should at least be shown that the officers made attempts to find the outstanding nine millimeter. [¶] Because one of the other arguments counsel can make, well, maybe if we had the nine millimeter we could have—if they had done their job and looked for that maybe we could have done some testing on that or figured out which one of them fired it. There’s nothing in any of the witness statements, even the witnesses who saw the ten millimeter being thrown from the car that indicates who in the car threw it. [¶] Now, in his statement, that portion of it I think he indicates or the officer indicates that it was thrown from the driver’s side window. I’m not implying that we know who threw the gun. I’m simply trying to get before the jury that the officers attempted to locate it. They attempted to get information. They got information, and they went to look for it. But there’s nothing in the statements that he makes to [his stepmother] or the lies that he makes to Detective Kirtlan initially that explains that or adds to it or clears anything up.”

The trial court ruled that admitting the fact Isaac provided the location of the gun to police would not violate *Miranda*. The trial court further ruled Evidence Code section 356 did not require “allowing an entire expansive

⁹ Because Isaac’s argument on appeal does not claim a *Miranda* violation occurred, we do not set forth the parties’ arguments regarding this issue.

rambling statement encompassing a number of topics to address a sole and easily isolated question such as we have in this case.” Finally, the court explained the prosecution’s intended use of Isaac’s statement as to the location of the nine-millimeter handgun did not “over-implicate” Isaac or “misrepresent” he was the one who threw the gun out of the Explorer.

In accordance with the trial court’s ruling, during the prosecution’s examination of Detective Kirtlan, the following exchange occurred:

“Q Did you receive information from [defendant] Isaac Vasquez about the location of a missing nine-millimeter semiautomatic handgun?

“A Yes, I did.

“Q Did you go to the area after receiving that information and search the area where it was thought that that gun might be?

“A Yes, ma’am.

“Q And where was that location?

“A Essentially in the area of Northgate and Striker in North Sacramento.

“Q Now, is that an area where other evidence had been located?

“A Yes, ma’am.

“Q What other evidence had been located there?

“A A magazine to a nine-millimeter semiautomatic handgun.

“Q Did you find the nine-millimeter semiautomatic handgun?

“A No, we did not.”

B.

Analysis

Evidence Code section 356 provides: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole *on the same subject* may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation,

or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.” (Italics added.)

■ This provision “is sometimes referred to as the statutory version of the common law rule of completeness. [Citation.] According to the common law rule: ‘ “[T]he opponent, against whom a part of an utterance has been put in, may in his [or her] turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.” [Citation.]’ [Citation.]” (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3 [60 Cal.Rptr.3d 868].) The purpose of the rule “is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party’s oral admissions have been introduced in evidence, he [or she] may show other portions of the same interview or conversation, even if they are self-serving, which ‘have some bearing upon, or connection with, the admission . . . in evidence.’ [Citations.]” (*People v. Arias* (1996) 13 Cal.4th 92, 156 [51 Cal.Rptr.2d 770, 913 P.2d 980].) We review the trial court’s determination of whether or not to admit evidence under this provision for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235 [10 Cal.Rptr.2d 636, 833 P.2d 643].)

Here, Detective Kirtlan testified Isaac told him where the nine-millimeter handgun could be found, and after receiving this information, he went to a certain location where police found a magazine for a nine-millimeter handgun, but not the gun itself. Implicit in this testimony is that Isaac told the detective the gun could be found at that particular location. From this, and the fact the location was along the chase route, the jury could infer *someone* in the Explorer threw the gun out of the vehicle during the chase. The testimony does not reveal who threw the gun. Thus, the concern raised below that the testimony would misleadingly suggest Isaac was the one who threw the nine-millimeter handgun, and therefore likely fired the shot that killed Ellison, was obviated by the actual testimony received into evidence. Indeed, the prosecutor never argued, in either her closing or rebuttal argument, that Isaac fired the fatal shot. Instead, she specifically conceded, “we don’t know who had the nine and who had the ten.”

The other argument for admission of the entire statement, which was raised below, was the jury should hear the entirety of Isaac’s statement, including the portion indicating the shooting was done in self-defense, to balance out the suggestion that throwing the gun out of the Explorer evidenced Isaac’s consciousness of guilt. However, the trial court appeared to credit the prosecutor’s assurance that Isaac’s statement as to where the nine-millimeter handgun could be found was being offered solely on the issue of whether the

police conducted a thorough investigation. (See 4 McKenna & Fishman, Jones on Evidence (7th ed. 2014) § 24:26 [“where the defendant challenges the investigation as unprofessional or sloppy or claims that he [or she] was falsely accused, the prosecutor should be entitled to spell out the investigation in greater detail to rebut this defense”].) The prosecutor lived up to this assurance. At no point in her arguments to the jury did she argue the fact Isaac threw a handgun from the SUV evidenced his consciousness of guilt. Moreover, the rule of completeness prevents “‘the use of selected aspects of a [statement] so as to create a misleading impression *on the subjects addressed*,’” and therefore “hinges on the requirement that the two portions of a statement be ‘*on the same subject*.’” (*People v. Vines* (2011) 51 Cal.4th 830, 861 [124 Cal.Rptr.3d 830, 251 P.3d 943], italics added.) Here, whether Isaac told Detective Kirtlan where to find the nine-millimeter handgun is not a statement on the same subject as whether the shooting itself was done in self-defense. We acknowledge narrow lines should not be drawn around the exact subject of inquiry (*People v. Zapien* (1993) 4 Cal.4th 929, 959 [17 Cal.Rptr.2d 122, 846 P.2d 704]), but the statutory language “on the same subject” cannot be rendered meaningless by an interpretation that draws no lines at all. (Evid. Code, § 356.)

Finally, we note Isaac raises a separate issue for the first time on appeal. He argues his exact statement to Detective Kirtlan, i.e., “they throwed it out” should have been admitted because it “was exculpatory in that it supported an inference that [Isaac] did not shoot the [nine-millimeter] gun that killed Ellison.” Acknowledging admission of Isaac’s statement, “they throwed it out” at the joint trial in this case, where Isaac did not testify, would have potentially violated his codefendants’ confrontation rights under *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal.Rptr. 353, 407 P.2d 265] and *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620], Isaac argues the redaction of this statement to simply indicate he told Detective Kirtlan where the gun could be found prejudiced his defense. This argument is forfeited for failure to raise it in the trial court. (See *People v. Hill* (1992) 3 Cal.4th 959, 994–995 [13 Cal.Rptr.2d 475, 839 P.2d 984], overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1075 [108 Cal.Rptr.2d 409, 25 P.3d 618].)

The trial court did not abuse its discretion in ruling Evidence Code section 356 did not require admission of Isaac’s entire statement to Detective Kirtlan.

VIII***Cumulative Prejudice***

Finally, we reject Isaac's assertion the cumulative effect of the foregoing assertions of error require reversal. We have reversed Isaac's gang enhancement and vicarious firearm enhancement findings. This does not, however, affect Isaac's convictions or remaining enhancement findings. The only other meritorious claim of error, i.e., the instructional error, we concluded was harmless. Accordingly, there is no prejudice to cumulate.

DISPOSITION

The judgments entered against defendants Jesse Cornejo, Adam Cornejo, and Isaac Vasquez are modified to strike the gang enhancement findings under Penal Code section 186.22, subdivision (b), and vicarious firearm enhancement findings under Penal Code former section 12022.53, subdivision (e)(1), as well as the sentences imposed thereon. As modified, the judgments are affirmed. The trial court is directed to amend the respective abstracts of judgment to reflect the modifications and to indicate the victim restitution order imposed as to each defendant is a joint and several obligation and to forward a certified copy of the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

Hull, Acting P. J., and Murray, J., concurred.

A petition for a rehearing was denied October 3, 2016, and the opinion was modified to read as printed above. Appellants' petitions for review by the Supreme Court were denied December 14, 2016, S237640.

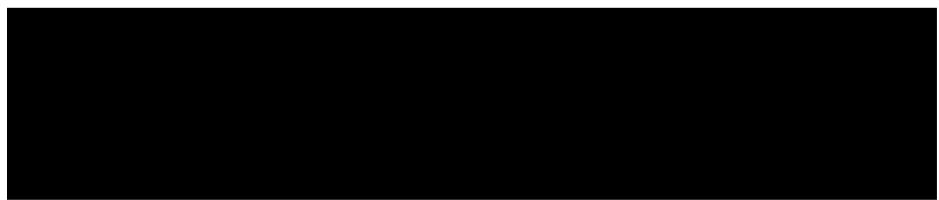
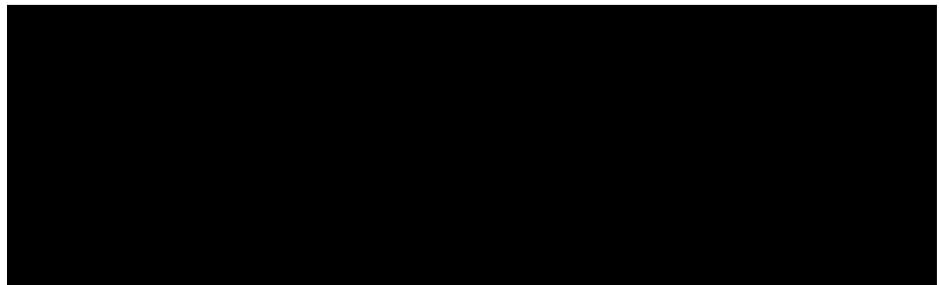
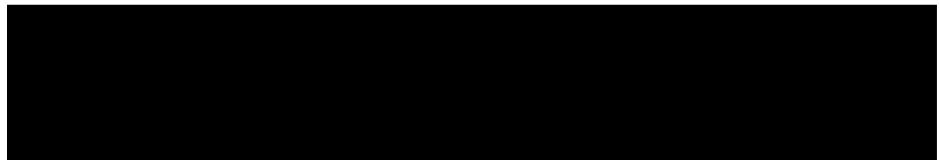
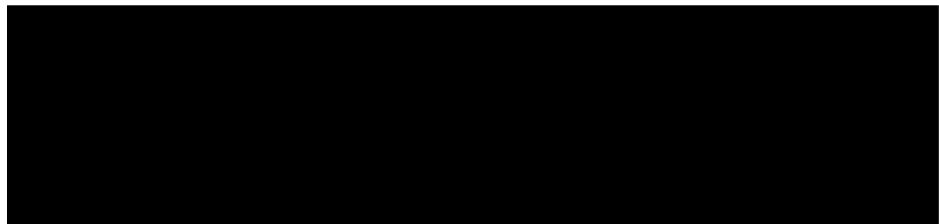
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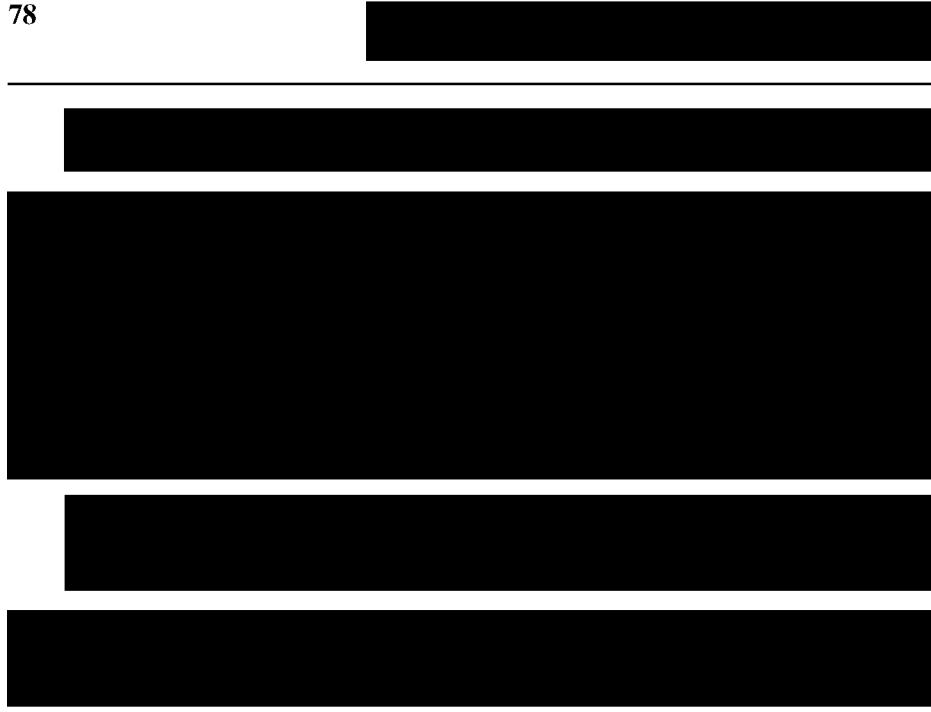
Adoption of REED H., a Minor.
K.M. et al., Plaintiffs and Respondents, v.
MARCOS J., Objector and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Law Office of Gradstein & Gorman, Seth F. Gorman and Marc Gradstein for Plaintiffs and Respondents.

Rajender Law Offices and Shyamala T. Rajender for Objector and Appellant.

OPINION

BUTZ, Acting P. J.—Marcos J., biological father of the two-year-old minor Reed H., filed a notice of appeal from orders dispensing with his consent to adoption and terminating his parental rights. (Fam. Code, § 7662.)¹ Respondents, the adoptive parents K.M. and E.M., filed a motion to dismiss the appeal as untimely. To resolve the issue, we first examine the statutory authorization to appeal the order dispensing with father’s consent, to determine the proper rule to apply in assessing the timeliness of the notice of appeal and then resolve the question of whether the notice of appeal was timely filed.

FACTUAL AND PROCEDURAL BACKGROUND

Reed H. was born in September 2014. Soon thereafter, his mother, D.H., relinquished her parental rights to an adoption agency. (§ 8700.) In October

¹ Undesignated statutory references are to the Family Code.

2014, the agency filed an adoption request seeking termination of father's parental rights and an ex parte petition to dispense with consent in Santa Cruz County. Marcos J. was identified as the father of Reed H. and was notified of the pending actions. He then filed a petition to establish parental relationship in Santa Cruz County. In December 2014, the prospective adoptive parents filed a petition to terminate parental rights, pursuant to section 7662, in Santa Cruz County. Marcos J. dismissed his petition in Santa Cruz County and filed a new petition to establish parental relationship, pursuant to section 7630, in Placer County. In February 2015, the parties stipulated to transferring all the pending proceedings in Santa Cruz County to Placer County and further stipulated that the various cases be consolidated and that the section 7662 petition be set for trial.

Trial commenced in August 2015 with a stipulation that DNA testing established that Marcos J. is the biological father of Reed H., that he was not present at the child's birth and did not sign a voluntary declaration of paternity. The parties further stipulated that the child had been living with the prospective adoptive parents since birth. The court heard testimony relating to the issues of dispensing with consent, termination of Marcos J.'s parental rights and the best interest of the child. In lieu of oral closing arguments, the court took the matter under submission as of October 15, 2015, and set a schedule for the parties to submit written arguments and responses and informed the parties that the court would issue a written ruling thereafter.

The court issued its written ruling December 24, 2015, finding Marcos J. was not a *Kelsey S.* father and it was in the minor's best interest to allow the adoption to proceed.² The court ordered that the consent of Marcos J. was not required and that his parental rights were terminated. The court directed counsel for the prospective adoptive parents to prepare an order and judgment for submission to the court upon review by opposing counsel as to the form of the proposed order and judgment within 30 days. The written ruling was served by mail on each party's counsel on December 24, 2015, the same day the ruling was filed.

Petitioners' counsel prepared the proposed order, but due to uncertainties about whether Marcos J.'s counsel continued to represent him or had been discharged, the order and judgment was not filed until January 28, 2016. Marcos J. filed a formal substitution of attorney the same day.

Marcos J. filed a petition for writ of mandate in this court on February 16, 2016, which was denied because he had an adequate remedy by appeal. He then filed a notice of appeal on February 26, 2016, from the January 28, 2016

² *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 [4 Cal.Rptr.2d 615, 823 P.2d 1216].

judgment and order. On April 18, 2016, respondents filed a motion in this court to dismiss the appeal as untimely. Marcos J. opposed the motion. Shortly thereafter, he filed a petition for writ of habeas corpus in this court on May 4, 2016, which was summarily denied on May 19, 2016.

DISCUSSION

■ Respondents contend the notice of appeal was untimely because the time for filing the notice began to run from the date of filing and service of the court's written ruling as in juvenile appeals and appeals from termination of parental rights pursuant to section 7800 et seq. (Cal. Rules of Court, rules 8.400, 8.406.)³ Marcos J. asserts that the time to appeal ran from the date the written judgment and order was filed as in an unlimited civil case. (Rules 8.100, 8.104; Code Civ. Proc., § 88.) To determine whether the notice of appeal was timely, we must first resolve the question of which appellate process applies to actions to dispense with consent by the biological father resulting in termination of his parental rights so that an adoption may proceed. (§§ 7665, 7669.)

■ Section 7669 states, in pertinent part: “An order requiring or dispensing with an alleged father’s consent for the adoption of a child may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court and is conclusive and binding upon the alleged father.” (§ 7669, subd. (a).) The statutory language itself is generally the most reliable indicator of legislative intent. (*People v. Trevino* (2001) 26 Cal.4th 237, 241 [109 Cal.Rptr.2d 567, 27 P.3d 283].) ■ The language of section 7669 clearly authorizes a right to appeal and provides a separate procedure for appeal from that used in unlimited civil cases by adopting the procedure applicable to juvenile court orders declaring a person to be a ward.

■ “‘When statutory language is thus clear and unambiguous there is no need for construction, and *courts should not indulge in it.*’” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800 [268 Cal.Rptr. 753, 789 P.2d 934].) However here, where Marcos J. argues that section 7669 provides for not merely a right to appeal but a choice of methods of bringing the appeal, a resort to the legislative history of the code section is instructive.

Section 7669 was first adopted in 1992 when portions of various codes, including the Civil Code, were repealed and reenacted to create the Family Code. (Stats. 1992, ch. 162, §§ 1–10, p. 464.) At that time, former section

³ Further rule references are to the California Rules of Court.

7669 was a truncated version of its current form.⁴ Section 7669 continued Civil Code former section 7017, first added in 1975 as a part of the Uniform Parentage Act. (Cal. Law Revision Com. com., 29G pt. 1 West's Ann. Fam. Code (2013 ed.) foll. § 7669, p. 427 [see rev. com. and Historical and Statutory Notes, Derivation].) Civil Code section 7017 did not originally contain a provision to allow a father to appeal an order requiring or dispensing with his consent for adoption. (Civ. Code, former § 7017, subds. (a)–(f), added by Stats. 1975, ch. 1244, § 11, p. 3196.) A 1977 amendment of Civil Code former section 7017 was to allow such an appeal and to specify that the appeal procedures to be used would be the same as those for appeals under Welfare and Institutions Code section 800. (Civ. Code, former § 7017, subd. (g), as amended by Stats. 1977, ch. 207, § 2, p. 729; see Enrolled Bill mem. to Governor, Assem. Bill No. 994 (1977–1978 Reg. Sess.) June 27, 1977; Cal. Health and Welfare Agency, Enrolled Bill Rep. on Assem. Bill No. 994 (1977–1978 Reg. Sess.), prepared for Governor Edmund G. Brown, Jr. (June 23, 1977); Sen. Com. on Judiciary, com. on Assem. Bill No. 994 (1977–1978 Reg. Sess.) com. 3, p. 3; Assem. Com. on Judiciary, analysis of Assem. Bill No. 994 (1977–1978 Reg. Sess.) [hearing of Apr. 28, 1977] par. 2, p. 2.) The language adopted was identical to the 1992 version of section 7669. (See fn. 4, *ante*, p. 81.)

■ The legislative history leaves no doubt that section 7669 establishes a right to appeal from an order requiring or dispensing with an alleged father's consent and specifies the procedure to be used as that set forth in Welfare and Institutions Code section 800, i.e., wardship proceedings pursuant to Welfare and Institutions Code sections 601 and 602. Thus, section 7669 does not give an appellant a choice of procedures to follow in filing a notice of appeal, but instead requires an appellant to follow the provisions of rules 8.400 through 8.416. Having resolved the question of which process to apply, we now address whether the notice of appeal complied with that process.

■ The time to file a notice of appeal of an order under section 7669 is specified in rule 8.406, which provides in pertinent part that "a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed" (rule 8.406(a)(1)). In general, in a juvenile case, an oral pronouncement in open court marks the beginning of the time to file a notice of appeal. (*In re Markaus V.* (1989) 211 Cal.App.3d

⁴ Former section 7669 initially stated: "An order requiring or dispensing with a father's consent for the adoption of a child *may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court.*" (Added by Stats. 1992, ch. 162, § 10, p. 660, italics added.) The italicized language was briefly removed in error in 2002 and reinstated the next year. (Stats. 2002, ch. 260, § 2, p. 1084; Stats. 2003, ch. 251, § 4, p. 2362; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 182 (2003–2004 Reg. Sess.) June 10, 2003, par. 3, p. 2.)

1331, 1335–1337 [260 Cal.Rptr. 126].) However, there are exceptions to this rule. *Markaus V.* recognized that “where a statute requires a certain form of order, the order is effective only when made in the statutory form.” (*Id.* at p. 1337 [statute required that a written order be issued and filed in the family court when the dependency court terminated jurisdiction and entered custody orders].) Thus, time for filing of the notice of appeal did not begin to run until the statutory conditions were satisfied. (*Ibid.*)

Similarly, in *Conservatorship of Ben C.* (2006) 137 Cal.App.4th 689, 695–696 [40 Cal.Rptr.3d 521], where the court took the matter under submission, issued a written order, which was filed in the action but not served on the parties and the parties were not aware of the order until a later hearing, pronouncement of judgment did not occur until a later hearing where the judge mentioned the order had been filed and was in the court file. The pronouncement of judgment and the time for filing notice of appeal was delayed due to lack of notice to the parties.

■ From this we conclude that where the court takes the matter under submission and issues a written order, which is both filed and served on the parties, the time for filing a notice of appeal runs from the date of service of the written order or other notice to the parties of the ruling.

■ Here, the court took the case under submission awaiting written closing arguments. The parties were fully aware that the court would issue a written ruling. The court issued its written ruling, which was filed and served on December 24, 2015. Time for filing a notice of appeal expired on February 22, 2016—60 days after the court’s ruling was filed and served. Marcos J. did not file his notice of appeal until February 26, 2016.

Marcos J. argues the written ruling contemplated a formal judgment and order, which extended the time for filing a notice of appeal. Because the written ruling served on the parties constituted the “rendition of the judgment or the making of the order” (rule 8.406(a)(1)), it is immaterial that the judge’s ruling directed respondents to prepare an order and judgment. No such document was required by rule or by section 7669 for the December 24, 2015 ruling to be effective.

■ The notice of appeal was untimely. Appellate jurisdiction depends upon a timely notice of appeal. (*In re Elizabeth G.* (1988) 205 Cal.App.3d 1327, 1331 [253 Cal.Rptr. 161].) The motion to dismiss is granted. All other pending motions are moot.

DISPOSITION

Marcos J.'s request for judicial notice filed July 5, 2016, is denied. The appeal is dismissed.

Mauro, J., and Murray, J., concurred.

A petition for a rehearing was denied September 29, 2016, and appellant's petition for review by the Supreme Court was denied November 30, 2016, S237759.

[No. F070802. Fifth Dist. Sept. 6, 2016.]

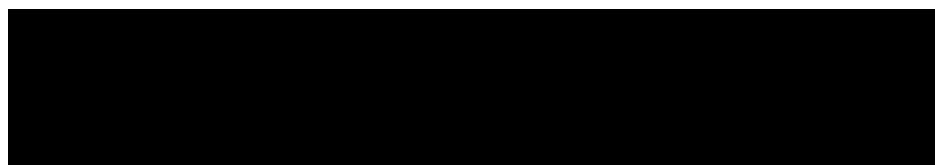
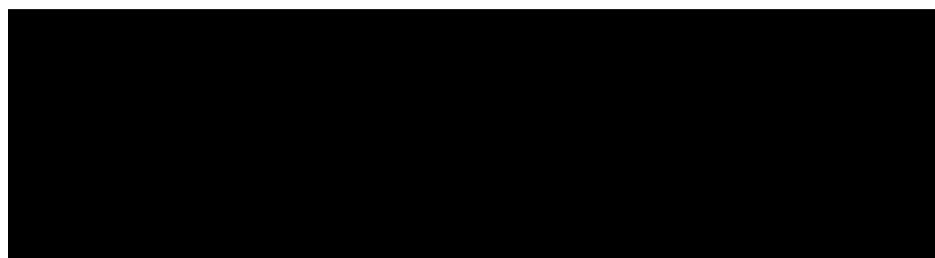
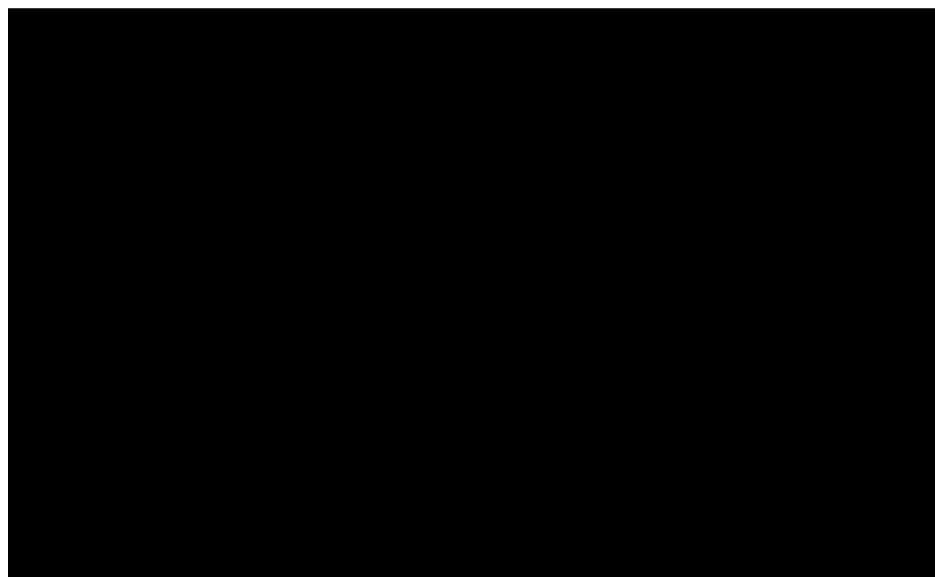
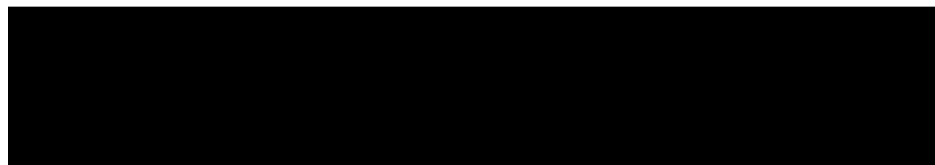
LISA HOTT, Plaintiff and Respondent, v.
COLLEGE OF THE SEQUOIAS COMMUNITY COLLEGE DISTRICT,
Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Stubb & Leone, Louis A. Leone, Claudia Leed and Christopher Vincent for Defendant and Appellant.

Herr Pederson & Berglund, Leonard C. Herr, Kris B. Pedersen and Rhea Ikemiya for Plaintiff and Respondent.

OPINION

GOMES, J.—Plaintiff Lisa Hott (Hott) is a former College of the Sequoias Community College District (COS) administrator whose position was eliminated due to budget cuts. Pursuant to Education Code section 87458,¹ COS offered Hott, who did not have any prior faculty experience, a position as a first-year probationary faculty member, which she accepted. COS determined Hott's faculty salary under the terms of the collective bargaining agreement between COS and its faculty members, and gave her credit for five years' occupational experience, which was the maximum credit she could receive. Hott subsequently filed a complaint for declaratory relief against COS, alleging that COS placed her in the wrong “step” on the faculty academic salary schedule because it should have given her full credit for her 15 years of administrative experience. The trial court agreed with Hott, finding that pursuant to a handbook for administrative employees, she was entitled to year-for-year credit for her total years of employment at COS.

On appeal from the resulting judgment, COS contends the trial court erred (1) in hearing and determining Hott's claim because it falls within the exclusive jurisdiction of the Public Employment Relations Board (PERB) and

¹ Undesignated statutory references are to the Education Code.

(2) the trial court erred in finding that Hott was entitled to a salary greater than that provided for in the collective bargaining agreement. We agree with COS's second contention and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

COS hired Hott in 1996 as a temporary employee; she became a permanent employee in 1997, when she was promoted to the position of Director of Fiscal Services. In August 2006, she became the Director of Admissions and Records, which was a full-time educational administrator position. By the time of trial, Hott had been an employee of COS for over 17 years. Hott has a bachelor's degree in business and a master of business administration, and is a certified public accountant.

In January 2011, the COS Board of Trustees (Board) eliminated Hott's position due to budget cuts. Hott, who did not have any prior faculty experience, was released from her appointment as an educational administrator effective June 30, 2011.

Hott learned of the decision to eliminate her position in December 2010 from John Bratsch, COS's Dean of Human Resources and Legal Affairs, who told Hott she could become an instructor in the business department. Hott asked Bratsch about her salary. At first, Bratsch said he thought her pay would remain the same, but a few days later he told Hott this might not be correct and he would have to check on the matter. Sometime in December 2010, Hott met with COS's payroll coordinator, who led Hott to believe that COS was not going to follow what Hott understood was the "normal practice" of keeping administrators who were classified to a lower level at the same pay until their years of service caught up to the new classification.

When her administrative position was eliminated, Hott did not have an employment contract with COS. Without a contract, Hott understood her employment to be governed by the Education Code, COS Board Policies and Procedures, and COS's Personnel Policies for Management Council (the handbook). Her understanding comported with Bratsch's understanding.

The Board first adopted the handbook in 1991; it adopted a revised handbook in 1999. The Board intended the handbook to provide management council members with "a reference for issues which affect them." The handbook states that the Board recognizes the importance of establishing a management council to fulfill its legal responsibility in the management of COS, and identifies specific objectives of the management council, including providing a "means whereby economic and welfare concerns of the management council members can be addressed, including position descriptions,

classifications, evaluations, fringe benefits, promotion, assignment and transfer.” Hott was a member of the management council while in her administrative position.² According to the handbook, the Board could amend the policies at any time in accordance with the recommendations of the superintendent/president following consultation with the management council.

The handbook addresses issues such as recruitment and selection, compensation, work schedule, and absences. Section VII addresses “Reassignment/Transfer” and contains the following subheadings: “A. Temporary Reassignment”; “B. Permanent Reassignment”; “C. Transfer”; “D. Return Rights”; and “E. Retreat Rights.” Section VII.B on permanent reassignment provides: “When a management employee is reassigned to a lower-level management or non-management position, s/he shall be granted year-for-year credit on the salary schedule for each year of employment with the District. [¶] Seniority and related employment rights will be based on the original date of hire in the District, credentials held, and prior credited services.”³ Section VII.E on retreat rights states: “All pertinent sections of the Education Code and other applicable laws will be adhered to in the determination of retreat rights for administrators employed by [COS]. (See: Education Code § 87458, AB 1725, Appendix M.)”

The Board adopted appendix M to the handbook, entitled “Procedure for Administrator Return Rights,” in 1992. The procedure states that an administrator who is not part of the classified service, was hired after June 30, 1990, and was not previously tenured at COS, has the right to become a first-year probationary faculty member at the conclusion of the administrative assignment if certain conditions apply. It also lists the procedures to be followed when an administrator is assigned to a faculty position. The procedure,

² The management council consisted of personnel that the Board designated as members. Members included the following job groups: superintendent/president, vice-president, provost, dean, executive director, project director, director, public information officer, manager, coordinator, chief accounting officer, district police chief, supervisor, and confidential employees. These job groups were categorized into (1) educational administrators, (2) classified administrators, and (3) confidential employees. Confidential employees included the following job groups: executive assistants to the superintendent/president and vice-president, payroll/accounting coordinator, academic resources coordinator, human resource specialist and assistant, public information assistant and research technician.

³ The handbook does not define the term “non-management position” or state on which salary schedule year-for-year credit will be given. According to section IV.A of the handbook, the superintendent/president, with the Board’s approval, places a new manager/confidential staff member on the salary schedule based on the new member’s background and experience. There are two salary schedules included in the handbook’s appendix—one for management and the other for confidential employees. The salary schedules are arranged in a grid-like format, with vertical columns representing years of work experience and horizontal columns representing the salary range for a particular management or confidential position title.

however, does not address seniority rights or salary placement. The Board followed this procedure with regard to Hott's assignment to faculty.

Because Hott understood the term "non-management position" referenced in section VII.B to include faculty, classified and confidential employees, she believed she would be provided year-for-year service credit for every year she worked at COS, and expected those years to apply to any schedule to which she was transferred. Hott relied on the handbook in continuing her employment with COS for 17 years, and in accepting the assignment to a faculty position.

In contrast to management or confidential employees, faculty members and COS are bound by a collective bargaining agreement, the "Master Agreement between COS and COS Teachers Association" (the CBA), which governs the terms of employment of COS faculty members. The COS Teachers Association (COSTA) is the exclusive bargaining representative of faculty members.

Under the CBA, a faculty member's salary is derived from the "Academic Salary Schedule." The faculty member's placement on the schedule is determined based on education and experience. The schedule is arranged in a grid-like format—the vertical columns, or class, represent the faculty member's educational background (e.g., teaching credentials and degrees earned, with the classes ranging from I to V), while the horizontal columns, or steps, represent the number of years of experience. The CBA requires each faculty member to be placed on the salary schedule at the class and step for which he or she is qualified.

Under the CBA, the step placement for newly hired faculty is determined as follows: "Newly hired faculty will be given full credit for past teaching experience for step placement, not to exceed five (5) years. [¶] Occupational experience for newly hired faculty shall be limited to those teaching in occupational areas and shall follow a general rule of two (2) for one (1), not to exceed five (5) years for initial step placement."

The CBA addresses the "Seniority Rights of Retreating Administrators" in section 25.3. Subsections 25.3.1 and 25.3.2 provide for year-for-year service credit to a retreating administrator only when he or she "was in a regular or contract faculty position with the District prior to service as an administrator," and the administrator had been continuously employed by COS as a faculty member and administrator.⁴ With respect to administrators who were never in a faculty position, subsection 25.3.3 provides: "The retreat rights of

⁴ Section 25.3, entitled Seniority Rights of Retreating Administrators states in its entirety:

"25.3.1 An administrator who retreats to a faculty position shall be given seniority credit in the faculty position for service rendered in his or her administrative position(s), subject to the

an administrator never employed in a regular or contract faculty position at COS shall be determined by law.”

On April 6, 2011, Hott was given formal notice by letter that COS’s superintendent/president, Dr. William T. Scroggins, would be recommending to the Board that she “be appointed as a first year probationary faculty member at the conclusion of your educational administrator assignment,” that this recommendation would be opposed by the chair of the business division and the president of the academic senate, and the Board was scheduled to consider the matter at its next meeting. On April 11, 2011, the Board voted to “reassign[] [Hott] to a first year, probationary faculty member position at the conclusion of her appointment as an educational administrator.” The following day, Hott was presented with a document entitled “Faculty Salary Placement” which stated that Hott’s position would be a probationary tenure track one, and her salary placement would be at class V, step 6, for an annual salary of \$72,069.55. Hott accepted the faculty position; she began work as a faculty member on August 12, 2011, and was still on the faculty at the time of trial. Hott was the first COS administrator without faculty experience to retreat to a faculty position at COS.⁵

COS did not give Hott year-for-year service credit for each year of her employment because it determined that once Hott became a faculty member, she was governed by the CBA, and since she did not have any prior faculty experience, she was not entitled to year-for-year service credit. Instead, COS gave Hott five years’ credit for her occupational experience pursuant to section 9.2.1. The parties stipulated that if Hott were granted year-for-year service credit, her placement on the Academic Salary Schedule would be at class V, step 21, for an annual salary of \$92,669.62.

following qualifications:

“25.3.1.1 The employee was in a regular or contract faculty position with the District prior to service as an administrator.

“25.3.1.2 The employee has been continuously employed by the District as a faculty member an[d] administrator.

“25.3.2 An employee who meets the qualifications set forth immediately above shall be entitled to the following seniority credits:

“25.3.2.1 For placement on the faculty salary schedule, including the longevity steps, the employee shall receive one year of step credit on the faculty salary schedule and all other privileges and entitlements of faculty service relating to seniority for each full year of service as an administrator.

“25.3.3 The retreat rights of an administrator never employed in a regular or contract faculty position at COS shall be determined by law.”

⁵ The only other administrator to have exercised retreat rights at COS in recent years was Chris Knox—a longtime COS faculty member who served in a temporary interim assignment in administration for two years before returning to the classroom as a full-time faculty member. COS gave Knox year-for-year salary credit in her faculty position for the two years she worked as an administrator in accordance with the CBA, as she had prior faculty experience.

The CBA sets forth a grievance process for COS faculty members who claim that “there has been a violation, misapplication, or misinterpretation of any of the provisions of [the] Agreement, or any law, Board policy or regulation.” Hott did not file either a COSTA grievance or a PERB unfair labor practice charge regarding her salary as a COS faculty member.

This Lawsuit

Hott filed a complaint for declaratory relief against COS on November 30, 2012. She sought a judicial determination that the handbook applied to her move from an administrative to a faculty position, and that section VII.B entitled her to receive a faculty salary of \$92,669.62, based on year-for-year service credit and placement at class V, step 21 on the academic salary schedule.

In September 2013, COS filed a motion for judgment on the pleadings in which it argued (1) the trial court did not have jurisdiction because Hott’s complaint was within PERB’s exclusive jurisdiction, and (2) even if the trial court had jurisdiction, COS properly followed the CBA in determining her salary. The trial court denied the motion. COS challenged that denial by a petition for writ of mandate filed in this court in November 2013, which we summarily denied.

The case proceeded to a two-day bench trial, which concluded in March 2014. The parties submitted stipulated facts, and Hott, Bratsch and COS’s president/superintendent, Stan Carrizosa, testified. Following the close of testimony, the parties submitted posttrial briefs.

On May 27, 2014, the trial court issued its statement of decision, in which it ruled that judgment be entered in Hott’s favor. The trial court determined that (1) when Hott’s administrative position was eliminated, the handbook was in effect and “the only writing evidencing her employment rights”; (2) Hott was not subject to the CBA’s salary structure because she was not a member of the bargaining unit that negotiated the CBA’s terms or a faculty member when her administrative position was eliminated; (3) while COS was obligated under section 87458 to offer Hott the option to become a “first-year probationary faculty member,” Hott’s acceptance of this offer did not afford COS discretion to set her salary at anything less than what would be required for an administrator with 17 years of service because section VII.B provided that Hott’s salary level would be based on her years of service with the District, not necessarily faculty or teaching years; (4) while under section 87458 Hott’s status would be that of a “first-year probationary faculty member,” it “would not offend” section 87458 to grant her 17 years of service credit, since there was nothing in either section 87458 or the

handbook to prevent COS from doing so; and (5) the CBA itself defeated COS's efforts to apply the CBA to fix Hott's salary level, as subsection 25.3.3 states that the retreat rights of administrators never employed in a faculty position at COS are to be "determined by law."

The trial court concluded that "the proper interpretation of the language in the [handbook] is to be applied in the precise terms set forth therein and therefore [Hott]'s salary shall be . . . based on year-for-year credit for her total years of employment at COS and not merely limited to her years as a member of the COS faculty." After supplemental briefing from the parties on the issue of damages, the trial court issued a judgment in Hott's favor awarding her \$62,096.66 in damages.

DISCUSSION

Jurisdiction and Exhaustion of Administrative Remedies

As a threshold matter, we address COS's contention that the trial court was without jurisdiction to grant declaratory relief because Hott failed to exhaust her administrative remedies.

■ The Education Employment Relations Act (EERA), Government Code section 3540 et seq., regulates employer-employee relations within California's public school systems.⁶ Government Code section 3543.5 prohibits public school employers, such as COS, from interfering with employees' exercise of rights guaranteed by the EERA, denying employee organizations the rights guaranteed them by the EERA, refusing or failing to negotiate in good faith with an exclusive representative, interfering with the formation or administration of any employee organization, and refusing to participate in good faith in the EERA's impasse procedure. (Gov. Code, § 3543.5.)⁷

⁶ The Legislature enacted EERA "to promote the improvement of personnel management and employer-employee relations . . . by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of education policy." (Gov. Code, § 3540.)

⁷ Government Code section 3543.5 provides:

"It is unlawful for a public school employer to do any of the following:

"(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, 'employee' includes an applicant for employment or reemployment.

"(b) Deny to employee organizations rights guaranteed to them by this chapter.

"(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

■ To ensure the implementation and enforcement of EERA, PERB was established with the enactment of the statute. (Gov. Code, § 3541.) PERB “provides an administrative remedy for unfair practices and violation of Government Code sections 3540–3549.3. (Gov. Code, § 3541.3, subd. (i).)” (*Dixon v. Board of Trustees* (1989) 216 Cal.App.3d 1269, 1277 [265 Cal.Rptr. 511] (*Dixon*)). PERB’s powers and duties are set forth in Government Code section 3541.3, and include, among many other things, the power “[t]o investigate unfair practice charges or alleged violations . . . as the board deems necessary to effectuate the policies of [EERA].” (Gov. Code, § 3541.3, subd. (i).) EERA also provides PERB with “exclusive jurisdiction” to make “[t]he initial determination as to whether . . . charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of [the statute].” (Gov. Code, § 3541.5.) “PERB’s exclusive jurisdiction extends to all alleged violations of the EERA, not just those which constitute unfair practices.” (*Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 885 [50 Cal.Rptr.2d 797] (*Barstow Unified*)).

“This statutory scheme has been consistently interpreted to confer limited jurisdiction to PERB.” (*California Teachers’ Assn. v. Livingston Union School Dist.* (1990) 219 Cal.App.3d 1503, 1510 [269 Cal.Rptr. 160] (*Livingston Union*)). Although “PERB does not have exclusive jurisdiction where a *pure* Education Code violation (*as opposed to an arguably unfair practice*) is alleged” (*Dixon, supra*, 216 Cal.App.3d at p. 1277, italics added), it is well settled that the board retains exclusive jurisdiction over disputes which “*arguably*” constitute an unfair labor practice claim under EERA. (*Barstow Unified, supra*, 43 Cal.App.4th at pp. 885–886; *Livingston Union, supra*, 219 Cal.App.3d at p. 1510.) When determining whether a public school employer’s conduct may give rise to an unfair labor practice claim, a court “must construe the activity broadly.” (*Livingston Union, supra*, 219 Cal.App.3d at p. 1511.)

■ “[A] school district’s improper placement of a teacher on the salary schedule does not constitute an unfair practice as such an act is not of the same character as the unfair practices prohibited by Government Code section 3543.5.” (*Dixon, supra*, 216 Cal.App.3d at pp. 1279–1280, fn. omitted.) Here, Hott’s declaratory relief action is based on her contention that COS improperly placed her at class V, step 6 on the academic salary schedule because her

Knowingly providing an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith.

“(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

“(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).”

placement was governed by the handbook, not the CBA. As the only issue involved here is whether COS improperly placed Hott on the salary schedule, COS's conduct at issue here does not give rise to an unfair labor practice claim.

Moreover, as Hott asserts and we explain further below, COS's placement of Hott on the academic salary schedule stems from its interpretation of section 87458. "We have found no authority for the proposition that an employer's interpretation of a statute, whether correct or incorrect, which adversely affects the rights of its employees to wages constitutes an unfair practice which should be left for the PERB to determine in the first instance. While an interpretation of a statute adverse to the employee by the employer may be unfair in the lay-sense, such a result does not necessitate a conclusion that it is also an 'unfair practice' within the meaning of Government Code section 3543.5." (*California School Employees Assn. v. Azusa Unified School Dist.* (1984) 152 Cal.App.3d 580, 592–593 [199 Cal.Rptr. 635].)

Accordingly, we conclude that Hott's claim of improper placement on the academic salary schedule does not constitute an arguably unfair practice which the PERB should determine in the first instance, and therefore Hott was not required to exhaust her administrative remedies under the EERA.

Declaratory Relief

■ Hott sought and was granted declaratory relief. In a declaratory relief action where, as here, the decisive underlying facts are undisputed, our review of the propriety of the trial court's decision presents a question of law which we review de novo. (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974 [97 Cal.Rptr.2d 280] (*Dolan-King*).)⁸ Moreover, we are not bound by the trial court's determination where the question involves the scope and interpretation of a statute. (*Trustors Security Service v. Title Recon Tracking Service* (1996) 49 Cal.App.4th 592, 599 [56 Cal.Rptr.2d 793], superseded by statute on another point as recognized by *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 524 [48 Cal.Rptr.3d 217].) When the trial court has interpreted a statute and the legal meaning of a written instrument on undisputed facts, we are presented with questions of law subject to de novo review. (*Kelly v. County of Los Angeles* (2006) 141

⁸ Hott asserts there are disputed facts because the "crux of this case comes down to a factual question about timing: When did Hott cease being an administrator, subject to the [handbook], and when did she become a member of faculty, subject to the CBA?" However, as COS points out, there is no factual dispute regarding the timing of the events that occurred in this case, as there is no question when Hott's employment as an administrator ended and when she became a faculty member. Moreover, as we explain further below, the timing issue Hott raises is irrelevant to this action.

Cal.App.4th 910, 919 [46 Cal.Rptr.3d 335]; *Snow v. Woodford* (2005) 128 Cal.App.4th 383, 393–394 [26 Cal.Rptr.3d 862]; *Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153, 1158 [105 Cal.Rptr.2d 208]; *Dolan-King, supra*, 81 Cal.App.4th at p. 974.) “The interpretation of a written instrument . . . [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect.” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839].)

Hott contends the appropriate standard of review is the highly deferential abuse of discretion standard. We do not, however, apply this standard whenever declaratory relief is at issue. Certainly it is true that “[w]hether a determination is proper in an action for declaratory relief is a matter within the trial court’s discretion and the court’s decision to grant or deny relief will not be disturbed on appeal unless it is clearly shown its discretion was abused.” (*Dolan-King, supra*, 81 Cal.App.4th at p. 974; see *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647 [88 Cal.Rptr.3d 859, 200 P.3d 295] [“‘The trial court’s decision to entertain an action for declaratory relief is reviewable for abuse of discretion.’”].) No party, however, challenges this aspect of the trial court proceedings.

COS contends the trial court erred in granting declaratory relief because (1) when COS eliminated Hott’s position as an administrator, it offered her a new position as a faculty member pursuant to section 87458; (2) Hott had no previous faculty experience and was newly hired to the COS faculty when she accepted the faculty position; (3) as a matter of law, the CBA governs the terms and conditions of the employment of COS faculty members; and (4) under the CBA, as a newly hired faculty member with no previous faculty experience, Hott was entitled to a salary that gives some, but not year-for-year, credit for her service as an administrator. We agree.

The undisputed facts show that COS decided to eliminate Hott’s administrative position and reassign her to a faculty position, which was Hott’s right under section 87458. Both the handbook, which applies to administrators, and the CBA, which applies to faculty members, address administrators’ retreat rights. The handbook provides that “[a]ll pertinent sections of the Education Code and other applicable laws will be adhered to in the determination of retreat rights,” and cites to section 87458 and appendix M, which sets forth the substance of section 87458 and the procedure to be followed when an administrator retreats to a faculty position. The handbook, however, is silent regarding seniority rights or salary placement. The CBA addresses the seniority rights of retreating administrators—it provides that a retreating administrator who previously held a regular or contract faculty position with COS will be given year-for-year service credit, while the retreat rights of an

administrator who never held a regular or contract or faculty position at COS “shall be determined by law.” Thus, under both the handbook and the CBA, an administrator’s retreat rights are determined by law.

■ The parties agree that the applicable law is section 87458,⁹ which “sets forth the conditions under which a person previously employed as an administrator shall have the right to become a first-year probationary faculty member at a community college.” (*Wong v. Ohlone College* (2006) 137 Cal.App.4th 1379, 1381 [40 Cal.Rptr.3d 923].)

Under section 87458, “an administrator has the right to reassignment to a first-year probationary faculty member position if the administrator (1) is employed in an administrative position that is not part of the classified service; (2) has not previously acquired tenured status as a faculty member in the same district; (3) is not under contract in a program or project to perform services conducted under contract with public or private agencies, or in other categorically funded projects of indeterminate duration; (4) has completed at least two years of satisfactory service, including any time previously served as a faculty member, in the district, and the termination of his or her administrative assignment was for any reason other than dismissal for cause; and (5) [the] first day of paid service in the district as a faculty member or an

⁹ Section 87458 provides:

“A person employed in an administrative position that is not part of the classified service, who has not previously acquired tenured status as a faculty member in the same district and who is not under contract in a program or project to perform services conducted under contract with public or private agencies, or in other categorically funded projects of indeterminate duration, shall have the right to become a first-year probationary faculty member once his or her administrative assignment expires or is terminated if all of the following apply:

“(a) The process by which the governing board reaches the determination shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that the administrator possesses the minimum qualifications for employment as a faculty member. The process shall further require that the governing board provide the academic senate with an opportunity to present its views to the governing board before the board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Section 87358.

“(b) Until a joint agreement is reached pursuant to subdivision (a), the district process in existence on January 1, 1989, shall remain in effect.

“(c) The administrator has completed at least two years of satisfactory service, including any time previously served as a faculty member, in the district.

“(d) The termination of the administrative assignment is for any reason other than dismissal for cause.

“(e) This section shall apply to every educational administrator whose first day of paid service in the district as a faculty member or an administrator is on or after July 1, 1990.”

administrator [was] on or after July 1, 1990.” (*Entezampour v. North Orange County Community College Dist.* (2010) 190 Cal.App.4th 832, 839 [118 Cal.Rptr.3d 585].)

■ Here, there is no dispute that Hott satisfied these conditions, and therefore had the “right to become a first-year probationary faculty member” at COS when her administrative position was eliminated. (§ 87458.) The issue, then, is what her salary as a first-year probationary faculty member should be. Although section 87458 does not explicitly address seniority rights or salary placement, by giving an administrator whose “assignment expires or is terminated” the “right to become a first-year probationary faculty member,” section 87458 implies that the former administrator will be treated as any other first-year probationary faculty member, including being placed on the salary schedule applicable to such a faculty member.

Under the CBA, a first-year probationary faculty member would be considered newly hired faculty and eligible for a maximum of five years’ credit for past teaching or occupational experience when determining initial step placement. This is because the individual is in his or her first year of employment as a COS faculty member. Applying the CBA to Hott’s situation, Hott, as a first-year probationary faculty member, was entitled to, at most, five years’ credit for her past occupational experience.

The trial court, however, in effect found that the handbook’s provision concerning permanent reassignment of management employees supersedes the CBA’s provision regarding the determination of initial step placement for newly hired faculty when it found that COS did not have discretion to set Hott’s salary at anything less than what would be required for an administrator with 17 years of service. The two provisions, however, conflict, as under the handbook, a management employee reassigned to a nonmanagement position “shall be granted year-for-year credit on the salary schedule for each year of employment with the District,” while under the CBA, a newly hired faculty member is only entitled to a maximum of five years’ credit for past occupational experience.

Since the CBA governs Hott’s situation, the CBA takes precedence and the trial court erred in giving effect to the handbook’s contrary term. (See Gov. Code, § 3540 [chapter governing negotiations in public educational employment “shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements”]; *City of San Diego v. Haas* (2012) 207

Cal.App.4th 472, 488 [143 Cal.Rptr.3d 438] [“ ‘the law does not recognize implied contract terms that are at variance with the terms of the contract as expressly agreed or prescribed by statute.’ ”]; *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1181 [134 Cal.Rptr.3d 779, 266 P.3d 287] [same]; *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 882 [3 Cal.Rptr.2d 614] [“Individual contracts, no matter what the circumstances which justify their execution, may not interfere with the terms of the collective agreement.”].) Thus, COS correctly granted Hott five years’ credit when determining her placement on the academic salary schedule.

Hott contends the handbook and the CBA do not conflict because only the handbook applied to her. She asserts the CBA is inapplicable to her situation by its own terms because subsection 25.3.3 of the CBA states that the rights of a retreating administrator never employed in a regular or contract faculty position are determined by law, not the CBA. But as we have already explained, under the applicable law—section 87458—Hott was to be treated as any first-year probationary faculty member which, according to the CBA, entitled her to a maximum of five years’ credit for her prior occupational experience.¹⁰ Moreover, while Hott argues the CBA did not apply to her situation, she clearly benefitted from its terms when COS used the CBA to determine that she was entitled to be placed in class V (the highest class) on the academic salary schedule based on her education. If only the handbook governed Hott’s placement on the academic salary schedule, Hott would not be entitled to any credit for her education, as section VII.B. of the handbook is silent on this issue.

Hott next argues that the CBA could not apply to her until she actually became a faculty member in August 2011. While she concedes that once she became a faculty member the CBA applied to her, she asserts that because she was still an administrator when COS made its salary placement decision in April 2011, the handbook, not the CBA, applied and should have been followed. She maintains that the question of when she ceased being an administrator and became a faculty member is “crucial,” and that it “defies logic” for COS to argue that the CBA applied to her months before she began work as a faculty member.

The timing issue, however, is a red herring. That Hott was still an administrator when she was offered the faculty position did not make it

¹⁰ Hott asserts that if COS and COSTA had intended to address the retreat rights of administrators never previously employed as faculty in detail, it would have done so by including those details in the CBA. Though that would have made the CBA clearer, it was unnecessary to include more detail since section 87458 provides that such retreating administrators are to be treated as first-year probationary faculty members.

improper for COS to refer to the CBA in deciding where to place Hott on the academic salary schedule, as COS could not ignore the CBA when it offered Hott employment as a first-year probationary faculty member. Without the CBA, it would be impossible to determine where to place Hott on the academic salary schedule, including the appropriate class placement based on Hott's education. For Hott to say that the CBA did not apply merely because she was still working as an administrator when the offer was made defies logic. Instead of an issue of timing, the issue here is whether, based on the language of the CBA and handbook, as well as section 87458, a salary provision from the handbook must be imported into the faculty-employer relationship between Hott and COS that is otherwise governed by the CBA.

After pointing out that section 87458 does not mention salary or salary placement, Hott contends that an analysis of related provisions of the Education Code supports the conclusion that the term "first-year probationary faculty member" is determinative of a retreating administrator's initial status on the tenure track, not salary. After reviewing Education Code sections governing faculty employment and salaries (§§ 87600–87612, 87801–87834.5), Hott asserts that she is a "contract employee, employed for 'the first academic year' of the tenure track."¹¹

But that is precisely the point—by accepting the position as a "first-year probationary faculty member," Hott was placed at the beginning point for faculty members. Under the CBA, the beginning point for a first-year probationary faculty member is that of a newly hired faculty member. And as we have explained, as a newly hired faculty member, Hott was entitled to a maximum five years' credit for her occupational experience. Hott asserts the trial court correctly found that it would not offend section 87458 to determine her salary level based on all her previous years in administration. Even if true, that is not the issue. Instead, the issue is whether she is entitled to credit for those years, which depends on whether the CBA or section VII.B applies.

Finally, Hott contends that she is not newly hired faculty because she did not go through a hiring process to become a faculty member. She points out

¹¹ Section 87602, subdivision (a) states that "[a] contract employee is a probationary employee." Section 87605 provides that a district's governing board "shall employ faculty for the first academic year of his or her employment by contract," and explains that if a person who is neither a tenured employee of the district nor a probationary employee serving under a second or third contract at the time an employment contract is offered to him or her, "shall be deemed to be employed for 'the first academic year of his or her employment.'" The governing board has the discretion to offer contract employees working under first and second year contracts a contract for the following academic year or to employ the contract employee as a regular, or permanent, employee. (§§ 87602, subd. (b), 87608, 87608.5.) Once a contract employee is employed under a third consecutive contract, the governing board must either grant the employee tenure or not employ the person as a tenured employee. (§ 87609.)

that the CBA contains an article entitled “Hiring Procedure,” which states that “[t]he hiring of faculty will follow the Joint Agreement on Hiring Policy between [COS] Faculty Senate, Management and Board of Trustees.” She asserts that instead of being hired, she was “reassigned” to a faculty position following the elimination of her administrative assignment pursuant to section 87458, which was confirmed by COS’s April 2011 minutes that reflected she was “reassigned” and Bratsch’s letter stating that she would be “appointed” to a faculty position.

Regardless of the terminology describing Hott’s move from administration to faculty, the effect of Hott’s reassignment was that she became a newly hired faculty member. Section 87458 obviated the need for a hiring process, since the statute required COS to offer Hott a faculty position, if one were available, upon the elimination of her position as an administrator. Hott cites her 17 years as an administrator for COS to support her position that she was not “newly hired.” That she was not a new employee of COS, however, does not mean that she was not newly hired faculty. COS appropriately treated Hott as newly hired faculty because she was being hired into a faculty position and she had no prior faculty experience.

■ In sum, COS correctly concluded that the CBA applied to Hott and therefore she was entitled to a maximum of five years’ experience in determining her step placement on the academic salary schedule. Accordingly, the trial court erred when it found that the precise terms of the handbook were to be applied and that Hott was entitled to year-for-year credit for her total years of employment at COS.

DISPOSITION

The judgment in favor of Hott is reversed and the matter remanded to the trial court to enter judgment in favor of COS in a manner consistent with this opinion. Costs on appeal are awarded to COS.

Hill, P. J., and Kane, J., concurred.

[No. G052385. Fourth Dist., Div. Three. Sept. 6, 2016.]

DAVID PRATT, Plaintiff and Appellant, v.
ROBERT L. FERGUSON, as Trustee, etc., Defendant and Respondent.

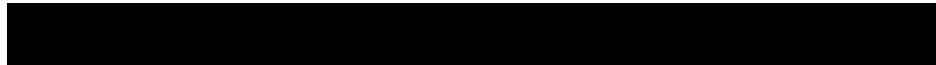
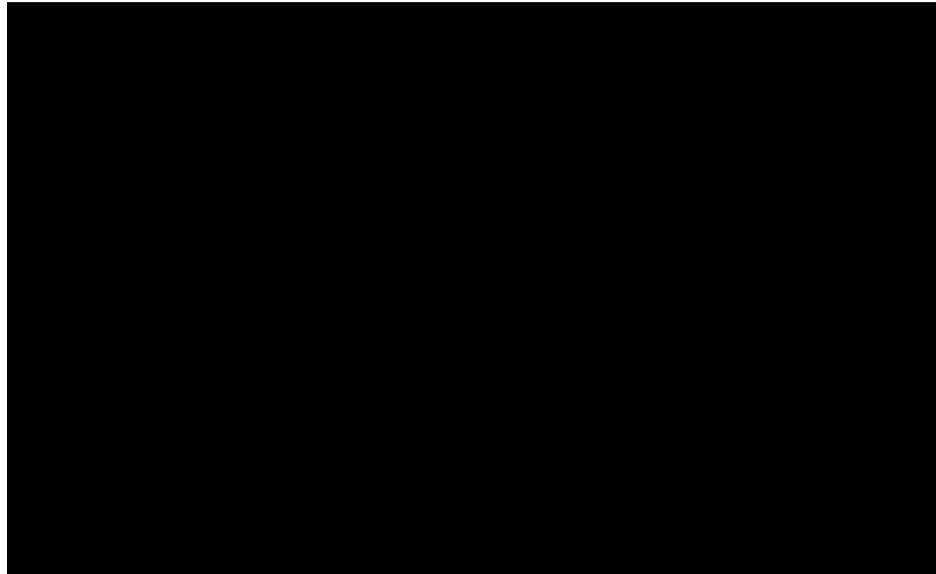
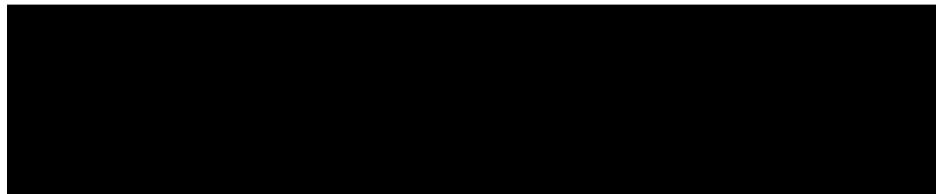
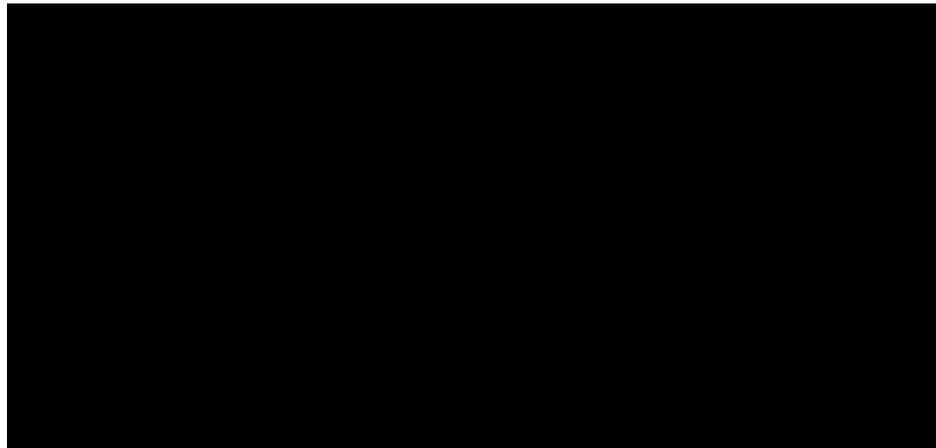
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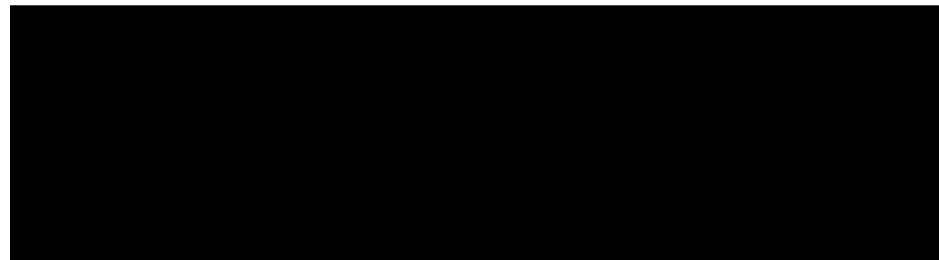
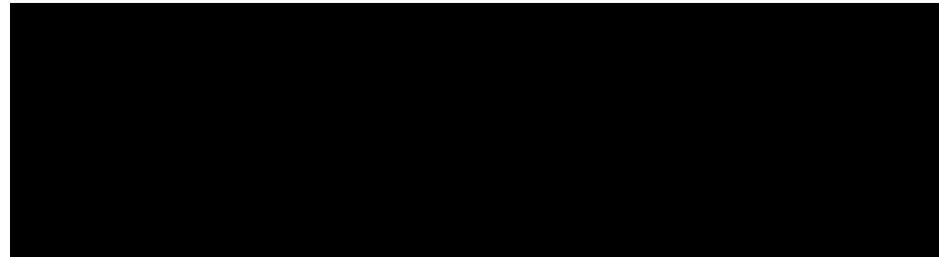
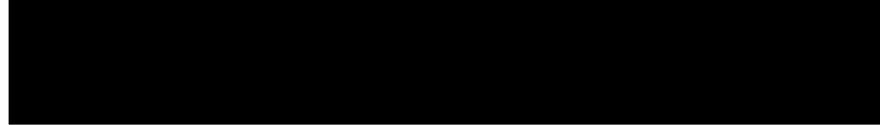
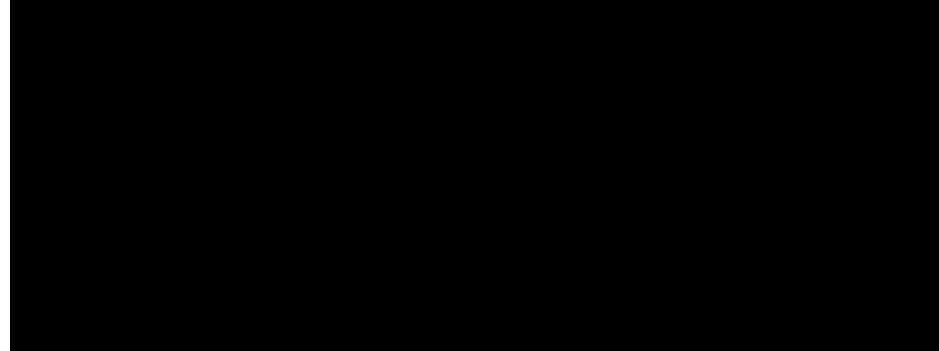
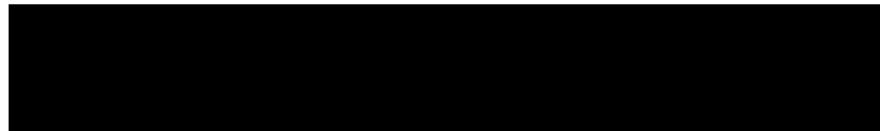
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the first time in the history of the world, the people of the United States have been called upon to determine whether they will submit to the law of force, or the law of the Constitution. We consider the question to be, whether the Southern Slaveholding States have a right to secede from the Federal Union.

For more information about the study, please contact Dr. John D. Cawley at (609) 258-4626 or via email at jdcawley@princeton.edu.

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Terence W. Roberts for Plaintiff and Appellant.

Law Offices of Stephen M. Magro and Stephen M. Magro for Defendant and Respondent.

OPINION**FYBEL, J.—****INTRODUCTION**

David Pratt obtained court orders requiring his ex-wife, Cynthia Vedder, to pay child support and expenses. All those orders are final. Vedder is the beneficiary of a trust established by her grandparents. Pratt filed a petition to compel Robert L. Ferguson, the trustee of the Borger Vedder and Nellie A. Vedder Revocable Trust (the Trustee), to satisfy the orders from Vedder's share of the trust estate. The trial court denied the petition based on a clause in the trust that prohibited the Trustee from making certain distributions if they would become subject to Vedder's creditors' claims (the shutdown clause). We reverse.

We hold that, notwithstanding the shutdown clause, Probate Code section 15305 gives the trial court discretion to order a trustee to make distributions of income and principal to satisfy the final child support orders. Probate Code section 15305, subdivision (d) expressly states that the section "applies to a support judgment *notwithstanding any provision in the trust instrument.*" (Italics added.)

As described more particularly in the disposition, we remand to the trial court to exercise its discretion to order satisfaction of the child support orders with respect to all distributions by the trust of income and principal. We agree with the opinion of *Ventura County Dept. of Child Support Services v. Brown* (2004) 117 Cal.App.4th 144 [11 Cal.Rptr.3d 489] (*Ventura County*), that where a trustee has discretion to make or withhold payment, the trustee may not act with an intent to avoid child support.

Pratt's petition also sought the imposition of a judgment lien on Vedder's interest in the trust estate to satisfy a community property judgment that he held against her. The trial court relied on the shutdown clause to deny the petition for a lien. Because Pratt was entitled to a judgment lien on the trust to satisfy the community property judgment, pursuant to the relevant provisions of the Probate Code and the Code of Civil Procedure, we reverse that portion of the trial court's order as well.

STATEMENT OF FACTS

I.

THE TRUST

The Borgert Vedder and Nellie A. Vedder Revocable Trust was established in 1979. It was amended several times, the last being in 1989. The original trust document and the amendments thereto will be collectively referred to as the Trust. Borgert Vedder and Nellie Vedder were the trustors and the original trustees of the Trust (the Trustors); both are deceased.

The Trustors' children and grandchildren were named as the beneficiaries of the Trust. The Trust provided that upon the death of the surviving Trustor, the Trust's assets would be divided into separate and equal shares for the beneficiaries; those shares would continue to be held in trust. As a grandchild, Vedder was provided with a one-sixth share of the total assets of the Trust. The Trust instructed the trustee to distribute income and/or principal to the beneficiaries as follows:

(1) Until the beneficiary reached age 25, the trustee was to pay to or apply for the benefit of the beneficiary the net income from his or her share of the Trust estate, in the trustee's discretion, up to the total net income.

(2) Between the ages of 25 and 65, the trustee "shall" pay to the beneficiary or apply for the beneficiary's benefit all of the net income of his or her share of the Trust estate.

(3) At any time, the trustee may, in its discretion, pay from the beneficiary's share of the principal for the beneficiary's care, maintenance, support, and education.

(4) Upon the beneficiary reaching the ages of 50, 55, 60, and 65, the trustee "shall" distribute to the beneficiary a specific portion of the principal of his or her share of the Trust estate. At age 65, the remaining balance of the principal will be paid to the beneficiary.

In addition to a standard spendthrift clause,¹ the Trust contained the following language: "All provisions for the payment of periodic installments of principal to any beneficiary shall become inoperative during any period

¹ Section 9.2 of the Trust, entitled "Spendthrift Provisions" (underscoring omitted), terminates the right of a beneficiary to receive income and principal (with limited exceptions) if the beneficiary, among other things, encumbers or assigns such income or principal.

when and to the extent that, if paid, they would become subject to the enforceable claims of creditors of the beneficiary.” The parties refer to this provision as the shutdown clause.

The Trust also provided that if a grandchild-beneficiary dies before age 65, the balance of his or her share of the Trust estate is to be distributed directly to the executor or administrator of his or her probate estate. (None of Vedder and Pratt’s children was born when that provision was added to the Trust.) Vedder is now 48. As of December 31, 2013, the assets of the Trust estate held in trust for Vedder were valued at \$216,008.71.

II.

THE FAMILY COURT’S JUDGMENT AND FINAL ORDERS

Pratt and Vedder were married and had six children before their marriage was dissolved. The oldest child was born in 1990, and the youngest in 2003.

A judgment in the dissolution matter was entered in July 2009 (the community property judgment). Vedder was ordered to pay Pratt \$50,114.85 for Pratt’s community property interest in a bank account. As of September 2014, Vedder owed Pratt \$76,284.23 in principal and interest on the community property judgment.

In May 2012, pursuant to stipulation by the parties, the family court ordered Vedder to pay Pratt \$37,288.18 for past due and unpaid child support incurred during the period from February 2006 through August 2009.² Two years earlier, the court had ordered Vedder to pay Pratt \$9,680.65 to reimburse Pratt for medical and child care expenses. As of April 2014, Vedder owed Pratt a total of \$93,424.14 in unpaid child support and child care expenses, pursuant to the prior court orders, all of which were final. These child support orders are judgments within the meaning of Probate Code section 15305 because they are final, appealable, and enforceable. (*In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637–638 [120 Cal.Rptr.3d 184]; see Fam. Code, § 290; Cal. Rules of Court, rule 8.10(4) [“ ‘Judgment’ includes any judgment or order that may be appealed.”]; *In re Marriage of Lackey* (1983) 143 Cal.App.3d 698, 702 [191 Cal.Rptr. 309].)

PROCEDURAL HISTORY

In January 2015, Pratt filed a petition for an order requiring the Trustee to pay \$93,424.14, plus interest, from the income and/or principal of Vedder’s

² In August 2009, the family court had ordered Vedder to pay child support to Pratt in the amount of \$1,050 per month from September 2009 to June 2011, and \$781 per month from July 2011 to March 2013, at which time the support order would be suspended.

share of the Trust estate for child support and expenses, and to impose a judgment lien on Vedder's share of the Trust estate to satisfy the community property judgment. The Trustee admitted the truth of all allegations in Pratt's petition.

The trial court denied Pratt's petition, based only on the language of the shutdown clause: "The Court finds that the 'shutdown clause' of the subject trust . . . precludes distributions of principal which are due to the beneficiary at the ages of 50, 55, 60 and 65. . . . The trust does not contain specific provision for disposition of trust assets in the event periodic distributions of principal become inoperative due to the shutdown clause and the trustee does not, in his discretion, distribute the entirety of the trust's principal to the beneficiary for her care, maintenance, support or education. The trust does provide that if the beneficiary dies before all such distributions are made that the beneficiary's share shall be distributed to the executor or administrator of the beneficiary's estate to be administered as part of the beneficiary's estate. The facts presented in Ventura County Dept. of Child Support Services v. Brown, [supra,] 117 Cal.App.4th 144 are inapposite here. In that case under the terms of the trust the settlor's intent was if the debtor beneficiary dies the trust was to be administered for the benefit of the children of the beneficiary."

DISCUSSION

I.

STANDARD OF REVIEW

In this case, we are called upon to interpret a statute and the language of a trust instrument. None of the evidence is in conflict. Our review is therefore de novo. (*Ventura County, supra*, 117 Cal.App.4th at pp. 149–150 [statutory interpretation is question of law reviewed de novo]; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439 [100 Cal.Rptr.2d 501] [when there is no conflict in evidence, interpretation of trust instrument is legal question reviewed de novo].)

II.

PROBATE CODE SECTION 15305

The parties agree that this case is governed by application of Probate Code section 15305, which provides, in relevant part: "(b) If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the

particular case, order the trustee to satisfy all or part of the support judgment out of all or part of those payments as they become due and payable, presently or in the future. [¶] (c) Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary. [¶] (d) This section applies to a support judgment notwithstanding any provision in the trust instrument."

■ Probate Code section 15305 was added as one of a series of statutes intended to clarify California law regarding trusts. (*Ventura County, supra*, 117 Cal.App.4th at p. 150.) The legislation adding section 15305 had two objectives: "1) to reduce the ability of a general creditor to reach a beneficiary's interest in a trust; and 2) to give greater rights to support creditors. Child support creditors were elevated to the status of 'preferred creditors' and permitted to reach a beneficiary's interest in the trust, despite the existence of a spendthrift clause. [Citation.]" (*Ventura County, supra*, at p. 151.) Under section 15305, "[a] minor's right to support may not be defeated by a spendthrift provision in a trust instrument. [Citation.]" (*Ventura County, supra*, at p. 152.) Similarly, we hold in this case that a shutdown clause may not defeat a minor's right to support. This conclusion is soundly based in subdivision (d) of section 15305: "This section applies to a support judgment notwithstanding any provision in the trust instrument." An intent of the Legislature in enacting section 15305 was to ensure the payment of child support obligations and to facilitate the collection of child support.

III.

VENTURA COUNTY, SUPRA, 117 CAL.APP.4TH 144

In *Ventura County, supra*, 117 Cal.App.4th at pages 147–148, Helen Marinos (Helen) established an irrevocable life insurance trust, and named her sons, Kenneth Marinos and Daniel Marinos, as beneficiaries. Kenneth Marinos was the subject of child support judgments in favor of Stephanie Solace, the mother of two of his seven children, and in favor of the Ventura County Department of Child Support Services. (*Id.* at pp. 147, 148.) After Helen died, Solace and the Ventura County Department of Child Support Services sought payment from the proceeds of the life insurance trust to pay the child support judgments and to provide for ongoing monthly child support payments. (*Id.* at p. 148.) The trial court ordered the trustee to satisfy the support judgments, and the trustee appealed. (*Id.* at p. 147.)

■ In a case of first impression, the Court of Appeal held a trial court could order a trustee to exercise its discretion to satisfy a support judgment. (*Ventura County, supra*, 117 Cal.App.4th at p. 152.) The court considered the terms of the trust before it, and the extent of discretion given to the trustee by Helen. (*Id.* at p. 150.) The court ultimately concluded it did not need to decide whether the trust was a spendthrift, support, or discretionary trust because the trustee's absolute discretion to make payments from the trust, and the beneficiary's inability to compel any payments, determined whether and how Probate Code section 15305 applied. (*Ventura County, supra*, at p. 150.)

■ The appellate court analyzed an attempt to compel a trustee to make payments toward a child support order: "We next consider California's strong public policy in favor of the payment of support. [Citation.] Under [Probate Code] section 15305, even if the trust instrument contains a spendthrift clause applicable to claims for child support, 'it is against public policy to give effect to the provision.' [Citation.] 'As a general rule, the beneficiary should not be permitted to have the enjoyment of the interest under the trust while neglecting to support his or her dependents.' [Citation.] . . . The policy behind the payment of support 'outweigh[s] the public policy that an owner of property, such as the settlor of a trust, may dispose of it as he pleases and may impose spendthrift restraints on the disposition of income.' [Citation.] [¶] By enacting section 15305, the Legislature intended to allow a support creditor to satisfy court-ordered child support obligations where the parent is a trust beneficiary. The statute was crafted to preclude a beneficiary's efforts to avoid a support obligation. The fact that the statute refers to payments made by the trustee demonstrates legislative intent that the trustee make distributions from the trust. Although a trustee may be given broad discretion, it may not exercise its discretion with an improper motive." (*Ventura County, supra*, 117 Cal.App.4th at pp. 154–155.)

■ The appellate court held that the trial court could compel the trustee in that case to satisfy the child support judgments: "We conclude that, under [Probate Code] section 15305, subdivision (c), a court may overcome the trustee's discretion under the narrow circumstances present here: when there is an enforceable child support judgment that the trustee refuses to satisfy. Under these circumstances, the trial court may order the trustee to satisfy past due and ongoing support obligations directly from the trust." (*Ventura County, supra*, 117 Cal.App.4th at p. 155.)

■ Here, the Trustee attempts to distinguish *Ventura County*. First, the Trustee argues the trust in *Ventura County* did not have a spendthrift clause or shutdown clause, as does the Trust here. The trust in *Ventura County* did have a spendthrift clause, but not a shutdown clause. The spendthrift clause in *Ventura County* appears to be similar to the spendthrift clause in the Trust.

(*Ventura County, supra*, 117 Cal.App.4th at p. 148 & fn. 1.) In *Ventura County*, it was the discretion invested in the trustee, not the type of trust involved, that determined the reach of Probate Code section 15305. In any event, as we explain, under Probate Code section 15305, the shutdown clause in the Trust cannot be enforced to prevent using trust principal to satisfy a final child support order.

Second, the Trustee argues, the trust in *Ventura County* provided that if the beneficiary died, his share was to be administered for the benefit of his children; the court found that provision reflected Helen's "intent to provide support to her grandchildren." (*Ventura County, supra*, 117 Cal.App.4th at p. 154.) Here, the Trust provides that if Vedder dies before reaching age 65, her share is to be distributed through her probate estate. The Trustee contends that this clause shows the Trustors did not intend to benefit Vedder's children. In *Ventura County*, a child support judgment against the beneficiary existed before the irrevocable life insurance trust was established. (Compare *Ventura County, supra*, at p. 147 [child support judgment entered in January 1989] with *id.* at pp. 147–148 [trust established in June 1990].) Here, by contrast, the final amendment to the Trust was executed in April 1989, and the first of Vedder's children was not born until April 1990. The Trust's lack of a reference to children who were not yet born cannot be used to prove an intent not to benefit them.

In any event, as we explain, the language of the Trust actually shows an intent to benefit Vedder's children. As noted *ante*, the Trust provides that if Vedder dies before reaching 65 years of age, the balance of her share of the Trust estate should be delivered to the executor or administrator of her probate estate, to be held or distributed accordingly. The Trustee contends that by using this language, the Trustors did not intend to provide for Vedder's children.

There are three serious problems with the Trustee's argument. First, as noted *ante*, Vedder did not have any children at the time the Trust was executed. Second, when we analyze the language of the Trust, we find a clear intent to benefit any later born grandchildren or great-grandchildren. Section 7.2.1.5 of the Trust provides that if the Trustors' two then-living children, each of whom received a one-third share of the Trust estate, did not reach age 65, that child's share should pass to his or her surviving issue. If the Trustors' children both died without surviving issue, "said share shall be set aside for the benefit of the then surviving issue by right of representation of Trustors, as hereinabove provided, to be held, administered, and distributed as a part of such other shares, respectively, including proportionately the distributed and the undistributed portions of the trust." Thus, the Trust reflects the Trustors' intent to provide support for grandchildren or great-grandchildren who were yet to be born, including Vedder's children.

Third, applying Probate Code section 15305, would the result in this case be different if (as the Trustee argues) the Trustors had not expressed an intent to benefit Vedder's children or even had expressed an intent to not benefit them? No. Probate Code section 15305 expresses this state's policy that child support judgments may be enforced against the distribution of assets from a trust. Indeed, subdivision (d) of section 15305 specifically provides that "[t]his section applies to a support judgment notwithstanding *any* provision in the trust instrument." (Italics added.)

IV.

APPLICATION OF PROBATE CODE SECTION 15305 TO THE TRUST

A.

Which Distributions Does the Shutdown Clause Cover?

The trial court denied Pratt's petition in its entirety, based on the shutdown clause. The shutdown clause does not purport to cover all distributions by the Trust; instead, it applies only to "the payment of periodic installments of principal," meaning the payments of specified amounts of the principal to Vedder upon reaching her 50th, 55th, 60th, and 65th birthdays. Thus, by its own express terms, the shutdown clause does *not* even apply to (1) the Trustee's distributions of *income* to Vedder between the ages of 25 and 65, or to (2) *discretionary* distributions from the principal for Vedder's needs.³ Only the spendthrift clause could possibly apply to those types of income and principal distributions, and *Ventura County* makes clear that the spendthrift clause cannot be employed by the Trustee to avoid a proper child support judgment. "Under [Probate Code] section 15305, even if the trust instrument contains a spendthrift clause applicable to claims for child support, 'it is against public policy to give effect to the provision.' [Citation.]" (*Ventura County, supra*, 117 Cal.App.4th at p. 154.) Accordingly, all distributions of principal and interest from the Trust are covered by Probate Code section 15305.

B.

What Is the Proper Disposition?

We have concluded, for reasons of public policy expressed in the statute, that the shutdown clause cannot prohibit satisfaction of the final child support

³ The shutdown clause also would not have applied to the discretionary payments of income to a beneficiary before he or she reached age 25. That provision is inapplicable in this case, as Vedder is over 25 years old.

orders from periodic payments of principal. The other distributions of principal and interest are all covered by the statute, as we have explained. Thus, with respect to *all* distributions of income and principal of the Trust, the trial court must exercise its discretion under Probate Code section 15305, subdivisions (b) and (c).

The trial court failed to exercise any discretion in declining to order payments from the Trust. The failure to exercise discretion is an abuse of discretion. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1090–1091 [29 Cal.Rptr.3d 499].) In addition, “[a] decision that rests on an error of law constitutes an abuse of discretion.” (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1061 [81 Cal.Rptr.3d 556].)

■ The trial court erred by applying the shutdown clause to preclude the use of any of the Trust’s assets—whether principal or income—to satisfy the child support judgment. The court never reached the question of how to exercise its discretion, much less actually exercise its discretion. We conclude that the trial court, with the analytical framework and guidance in this opinion, should be given the opportunity to exercise its discretion in the first instance.

Therefore, as explained in detail in our disposition, we will remand the matter to the trial court to exercise its discretion to determine how much the Trustee must distribute to pay the child support arrearages and any current support obligations. The trial court must consider the strong public policy in favor of payment of child support obligations contained in Probate Code section 15305.

■ We reject the Trustee’s argument that the trial court has the discretion to order that no portion of the distributions to Vedder from the Trust be used to pay the child support obligations. “It is a matter for the exercise of discretion by the court as to *how much of the amount payable to the beneficiary under the trust should be applied for such support and how much the beneficiary should receive.*” (Cal. Law Revision Com. com., 54 West’s Ann. Prob. Code (1991 ed.) foll. § 15305, p. 556, italics added.) The amount to be applied from trust distributions to the beneficiary’s support obligations is a matter for the trial court’s discretion; the court had no discretion to prevent any distributions to fulfill the support orders.

The record before us does not contain any information beyond the amounts owed and the parties' legal arguments about the Trust. The trial court should be given the opportunity to hear the evidence and make its discretionary calls in the first instance.⁴

These holdings apply only to Pratt's petition for payment from Vedder's share of the Trust estate applicable to the child support *arrearages* and Vedder's ongoing child support obligations. The community property judgment is not subject to the special rules created by Probate Code section 15305. As to the community property judgment, the rules making spendthrift clauses generally applicable would apply. (See Prob. Code, § 15300 et seq.) However, as explained *post*, Pratt was entitled to a judgment lien on Vedder's interest in the Trust to satisfy the community property judgment.

C.

Guidance to the Trial Court and the Trustee on the Trustors' Intent to Benefit a Grandchild's Children

■ The Trustee may *not* exercise his discretion to avoid distributions under the Trust with the improper motive to prevent the Trust estate from being used to satisfy Vedder's child support obligations. As the court explained in *Ventura County, supra*, 117 Cal.App.4th at page 154, "in exercising its discretion to make or withhold payments, a trustee may not act in bad faith or with an improper motive. [¶] 'Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' [Citations.] The court will not interfere with a trustee's exercise of discretion 'unless the trustee, in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of reasonable judgment.' [Citation.] When a trust instrument confers 'absolute,' 'sole' or 'uncontrolled' discretion, 'the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.' [Citation.] To determine the extent of the trustee's discretion, we look to the intention of the trustor, as manifested in the trust instrument. [Citations.]"

⁴ We recognize that *Ventura County* decided this issue as a matter of law based on the record before it. Nevertheless, based on the limited record we have and the statutory framework, in this case we will remand to the trial court with directions.

V.

IMPOSITION OF A LIEN ON THE COMMUNITY PROPERTY JUDGMENT

Pratt also has a judgment against Vedder for the value of a community property bank account improperly taken by Vedder immediately before their separation. In his petition, Pratt sought imposition of a judgment lien on Vedder's share of the Trust estate to satisfy the community property judgment.

■ A lien on a judgment debtor's interest in a trust must be sought by means of a petition filed in the court having jurisdiction over administration of the trust. (Code Civ. Proc., § 709.010, subd. (b).) Probate Code sections 15301, subdivision (b), 15306.5, and 15307 provide exceptions to the statutes making spendthrift clauses generally applicable. Those statutes provide, generally, that when a spendthrift clause applies, the trustee may not be compelled to satisfy a judgment against the beneficiary from the trust principal. (Prob. Code, § 15301, subd. (a).)

However, when the principal is paid from the trust to the beneficiary, it becomes subject to a lien obtained pursuant to Code of Civil Procedure section 709.010. (Prob. Code, § 15301, subd. (b).) If the trustee exercises his or her discretion to make payments to the judgment debtor beneficiary, the trial court, in its discretion, may order that up to 25 percent of the payment to the beneficiary may be used to satisfy the judgment. (Prob. Code, § 15306.5, subds. (a), (b).) Discretionary payments that the trustee makes to the judgment debtor beneficiary in excess of the amount necessary for the beneficiary's education and support are subject to such a judgment lien. (Prob. Code, § 15307.) In short, any amount the Trustee pays to Vedder, whether discretionary or nondiscretionary, above the amount necessary for Vedder's education and support, is subject to a judgment lien and subject to the limitations of the aforementioned statutes.

■ When the trial court's assistance in enforcing a judgment is sought pursuant to Code of Civil Procedure section 709.010, the court has discretion to determine what means of satisfying the judgment is proper. Here, the trial court failed to exercise discretion when it denied the section 709.010 petition for imposition of a judgment lien. Therefore, we reverse the trial court's order.

DISPOSITION

The order is reversed and the matter is remanded for further proceedings consistent with this opinion.

The trial court shall, to the extent the court determines it is equitable and reasonable:

(1) Pursuant to Probate Code section 15305, subdivision (b), if the beneficiary Vedder has the right under the Trust to compel the Trustee to pay income or principal, or both, to or for the benefit of the beneficiary, order the Trustee to satisfy all or part of Vedder's child support and expense obligations, as they become due and payable, presently and in the future, from such principal and income.

(2) Pursuant to Probate Code section 15305, subdivision (c), whether or not the beneficiary Vedder has the right under the Trust to compel the Trustee to pay income or principal, or both, to or for the benefit of the beneficiary, order the Trustee to satisfy all or part of Vedder's child support and expense obligations out of all future payments that the Trustee, pursuant to the exercise of the Trustee's discretion as described in this opinion and the disposition, determines to make to or for the benefit of the beneficiary. With respect to this paragraph, the trial court and the Trustee shall give consideration to the Trustors' intent to provide support for Vedder's children, the strong public policy in favor of payment of child support obligations, and the principle that where a trustee has discretion to make or withhold a payment, the trustee may not act in bad faith or with an improper motive, including an intent to avoid child support obligations.

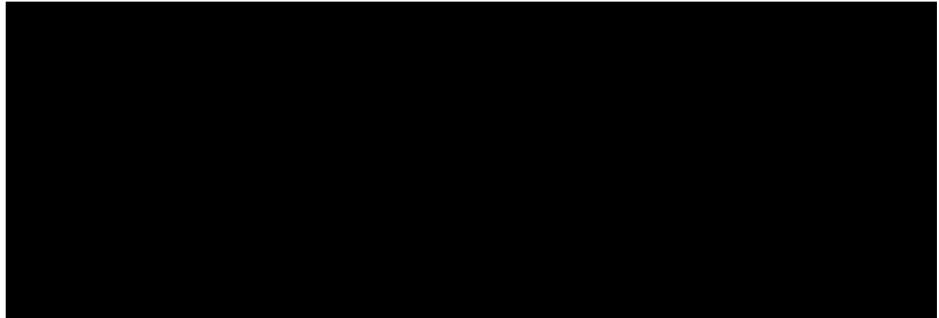
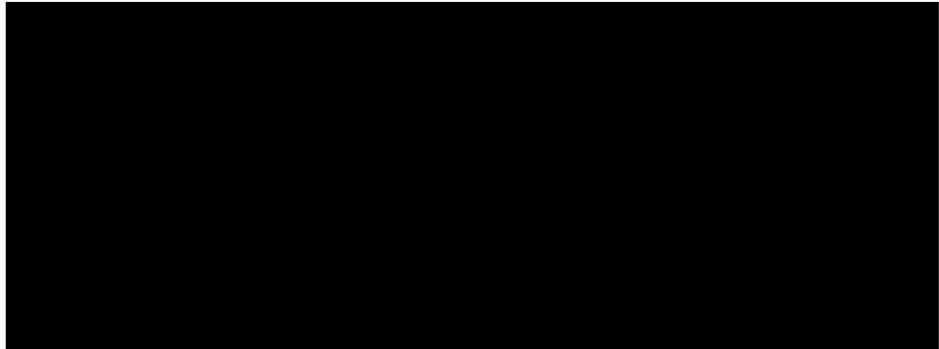
The portion of the trial court's order denying Pratt's petition for imposition of a judgment lien on Vedder's share of the Trust to satisfy the community property judgment is also reversed.

Appellant to recover costs on appeal.

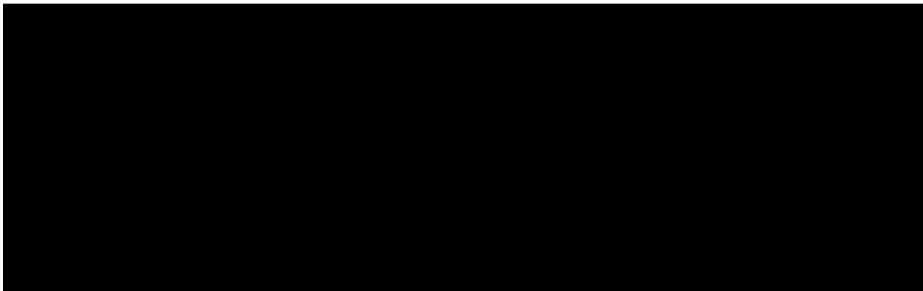
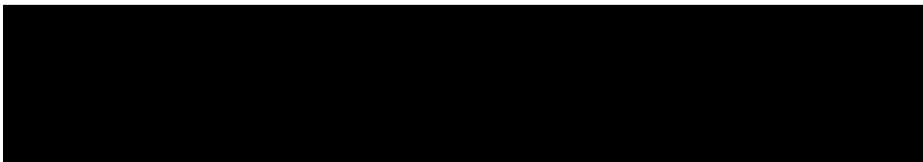
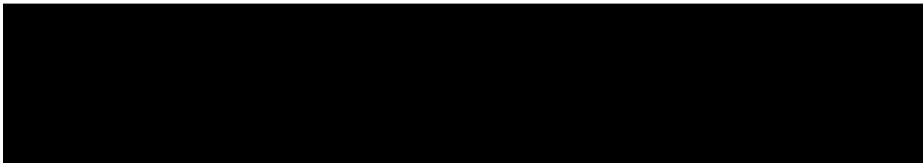
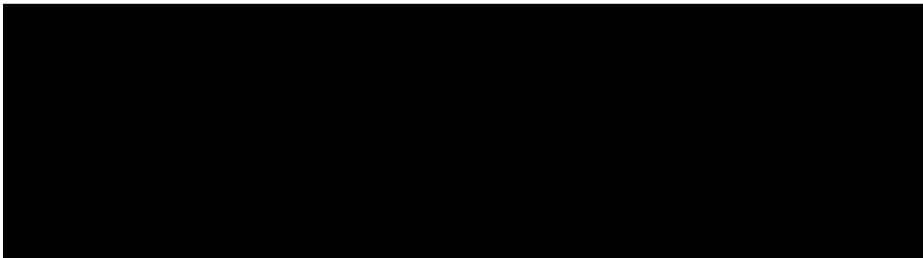
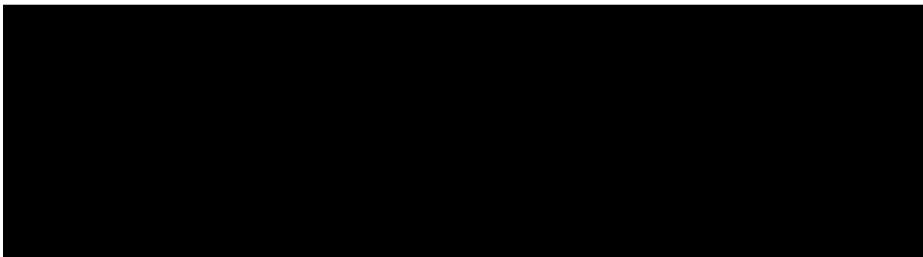
O'Leary, P. J., and Bedsworth, J., concurred.

[No. B264511. Second Dist., Div. Four. Sept. 7, 2016.]

RAFAEL V. SUAREZ, Plaintiff and Appellant, v.
TRIGG LABORATORIES, INC., Defendant and Respondent.









COUNSEL

Law Office of Greg May and Greg May for Plaintiff and Appellant.

Mitchell Silberberg & Knupp and Mark T. Hiraide for Defendant and Respondent.

OPINION

EPSTEIN, P. J.—Rafael V. Suarez challenges the grant of Trigg Laboratories, Inc.’s special motion to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute.¹ We affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

Suarez, a business consultant, entered into an arrangement with Trigg Laboratories (Trigg), and its principal owner Michael Trygstad in April 2005, with the goal of increasing company profit and growth to prepare Trigg for an eventual sale. The parties initially expected the arrangement to be short term, and Suarez was paid \$125 an hour. After several months, the scope of the work expanded to include raising additional capital. The parties agreed Suarez would receive 5 percent of new capital raised and 7 percent of any sale of Trigg, or if neither occurred, he would receive just a monthly retainer. This was not reduced to writing.

Suarez helped Trigg obtain additional capital, which would have entitled him to \$75,000 under their agreement. At Trygstad’s request, he agreed to defer that payment in exchange for an increase of the percentage he would eventually receive for an “end transaction.” That percentage was later increased to 13.5 percent.

¹ SLAPP is an acronym for “strategic lawsuit against public participation.” All statutory references are to the Code of Civil Procedure unless otherwise indicated.

In an April 2007 e-mail to Suarez, Trygstad indicated he did not want to sell the company for less than \$40 million. He also told Suarez his potential compensation upon sale was excessive. Suarez grew increasingly concerned about continuing to work for Trigg with only an oral agreement, and in June 2007, he sought a formal written agreement. Trygstad refused, and one week later terminated Suarez's employment. On September 24, 2007, Suarez filed suit against Trigg for quantum meruit, seeking to recover the fair value of the services he had rendered over the course of the Trigg engagement. (*Suarez v. Trigg Laboratories, Inc.* (Super. Ct. L.A. County, 2007, No. 378025) (*Suarez I*)).

Meanwhile, Trygstad engaged Bell Holdings, Inc., and George Segal Associates (GSA) to assist in selling Trigg. Beginning on June 20, 2008, a series of e-mails was exchanged by Bell, Trygstad, and GSA. The subject was listed as "letter of intent Ansell." Bell informed Trygstad that GSA had reported that a prospective investor, Ansell, was proceeding with a memorandum of intent, which was expected the following week. Ansell had confirmed its interest in Trigg and its desire to "do a deal" as soon as possible. Trygstad responded to Bell: "Just a reminder that the letter of intent cannot come to me directly. Must go to the attorney you referred to keep the contents within attorney client privilege for the Rafael case." On June 22, 2008, Bell e-mailed GSA: "Re: Correspondence/communications regarding Trigg. [¶] NO COMMUNICATIONS OR CORRESPONDENCE FROM GSA DIRECTLY WITH MICHAEL OR TRIGG COMPANY. All communications directly with me or Trigg attorney . . . (do not copy Michael). DO NOT SEN[D] MICHAEL or Trigg company . . . the letter of intent o[r] any other correspondence as per his request." The letter of intent was sent, but Trigg was not sold to Ansell or to any other buyer.

These e-mails, sent between June 20 and 22, 2008, preceded Suarez's July 16, 2008 mediation with Trigg. Suarez was unaware of the potential sale of Trigg when he agreed to settle the case for \$175,000.

Trigg terminated its consulting relationships with Bell and GSA in February and March 2009, respectively. During subsequent litigation between Trigg and Bell, counsel for Bell obtained the e-mails regarding the letter of intent from Ansell and Trygstad's instructions not to send any communications to him. Suarez learned of these e-mails in late 2010. In January 2011, his attorney sent letters to Trigg's counsel, claiming that the law firm and Trigg had wrongfully concealed the Ansell letter of intent from Suarez. Suarez's attorney received no response.

Suarez filed this action against Trigg in May 2014, seeking rescission of the settlement agreement in *Suarez I* based on Trigg's fraudulent concealment

of the prospects for sale of the company, and quantum meruit. Trigg filed a special motion to strike pursuant to the anti-SLAPP statute, asserting Suarez's claims arise out of communications that occurred during the course of *Suarez I*. The trial court found Suarez's causes of action arose from litigation activities protected by the anti-SLAPP statute and that he failed to make a showing of likelihood of success on the merits. The action was dismissed without leave to amend. Suarez appeals.

DISCUSSION

Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

■ As relevant here, an "'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue'" includes "any written or oral statement or writing made in connection with an issue under consideration or review" by a judicial body. (§ 425.16, subd. (e)(2).) "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 [124 Cal.Rptr.2d 530, 52 P.3d 703] (*Navellier*); see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76–78 [124 Cal.Rptr.2d 519, 52 P.3d 695].)

■ Analysis of an anti-SLAPP motion is twofold. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal.Rptr.2d 507, 52 P.3d 685].) In making these determinations, the court considers the pleadings and supporting and opposing affidavits. (*Ibid.*) We review an order granting an anti-SLAPP motion de novo; we engage in the same process as the trial court to determine if the parties have satisfied their respective burdens. (*Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 728 [170 Cal.Rptr.3d 453].)

Appellant alleged in his pleading that while *Suarez I* was pending, respondent was notified that a prospective buyer would be submitting a letter of intent "to purchase Trigg for \$24 million cash, plus a \$16 million earn out.

Such an offer would give Trigg an implied enterprise value of approximately \$40 million. Trygstad knew that disclosure of the [letter of intent] to Plaintiff while the Quantum Meruit Action was pending would be extremely harmful to Trigg's negotiating position in the Quantum Meruit Action. Plaintiff is informed and believes that Trygstad directed that the existence of the [letter of intent] be suppressed and not disclosed to Plaintiff. This was part of a fraudulent strategy by Trigg to protect the [letter of intent] from being disclosed under the guise of the attorney-client privilege and other acts of concealment." As a result of this "evasion," appellant alleged he was deprived of material information that should have been disclosed, and was induced to settle his claims in *Suarez I* for a fraction of their value.

■ Respondent asserts in its anti-SLAPP motion that all of appellant's claims in this action arose out of communications that occurred during the course of the settlement of *Suarez I*, the underlying action for quantum meruit, and thus constitute petitioning activity protected under section 425.16. Communications in the course of settlement negotiations are protected activity within the scope of section 425.16. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963 [106 Cal.Rptr.3d 290]; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907 [90 Cal.Rptr.3d 218].) The protection applies, even against allegations of fraudulent promises made during the settlement process. (*Navellier, supra*, 29 Cal.4th at p. 90; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 842 [36 Cal.Rptr.3d 385].)

Appellant argues this action is not premised on respondent's statements, but its active concealment and nondisclosure of the anticipated letter of intent from Ansell. In opposing the motion, appellant relied on the email from respondent to Bell, directing that all correspondence related to the expected letter of intent from Ansell be sent to his attorney, not to respondent, "to keep the contents within attorney client privilege for the Rafael case." This was litigation-related activity, expressly aimed at appellant Rafael Suarez's case. So was respondent's subsequent silence with respect to the potential sale during settlement discussions with appellant. As appellant made clear in his declaration, the claim for rescission was based on respondent's failure to disclose and his concealment of the existence of the letter of intent from Ansell prior to the time appellant agreed to the settlement in *Suarez I*.

■ In *Navellier, supra*, 29 Cal.4th at page 89, anti-SLAPP protection was applied to an action alleging "misrepresentations and omissions" in connection with the signing of a release in an underlying federal action. Defendant allegedly failed to disclose that he was secretly not in agreement with the terms of the release, which induced plaintiffs to file an amended federal action; defendant then claimed he did not release, and did not intend to

release his claims. The Supreme Court found that each of defendant's "acts or (omissions) . . . falls squarely within the plain language of the anti-SLAPP statute." (*Id.* at p. 90.) Misrepresentation or failure to disclose can be protected petitioning activity for purposes of section 425.16.

■ This is consistent with established free speech jurisprudence. The right to freedom of speech under the First Amendment to the United States Constitution and under article I, section 2 of the California Constitution, encompasses what a speaker chooses to say, and what a speaker chooses not to say; it is a right to speak freely and also a right to refrain from doing so at all. (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 342 [165 Cal.Rptr.3d 800, 315 P.3d 71]; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491 [101 Cal.Rptr.2d 470, 12 P.3d 720].)

The cases relied on by appellant are factually distinct. For example, in *Robles v. Chalilpooyil* (2010) 181 Cal.App.4th 566 [104 Cal.Rptr.3d 628], plaintiffs sued their former expert witness for giving false deposition testimony in the underlying wrongful death action and failing to continue to act as an independent expert in the prosecution of that case by entering into a business relationship with plaintiffs' former lawyer to develop a product based on information obtained while still acting as plaintiffs' expert. (*Id.* at pp. 575–576.) The court found this was not protected activity under the anti-SLAPP statute: "The central subject of the complaint against appellant is not an exercise of free speech or petition but the negligence or fraud inherent in his act of entering into a business relationship to respondents' detriment." (*Id.* at p. 580.) This reasoning has no counterpart in appellant Suarez's action against respondent Trigg. Respondent's alleged wrongdoing was concealing or failing to disclose the existence of a letter of intent to purchase Trigg in order to prevent appellant from obtaining a more favorable settlement in *Suarez I*. The alleged wrongdoing was directed squarely at the underlying litigation.

In *Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384 [159 Cal.Rptr.3d 901], the defendants purchased confidential documents from plaintiff's former fundraiser, then used those documents to prosecute a complaint against plaintiff for alleged election law violations. The court reversed the grant of defendants' special motion to strike: "Rather than focusing on the gravamen of this action, which was that the Pebble defendants allegedly purchased the Coalition's confidential documents, the trial court focused on the injury to the Coalition, which was forced to defend itself in the [Alaska Public Offices Commission] proceeding. However, the gravamen of an action is the *allegedly wrongful and injury-producing conduct*, not the damage which flows from such conduct. Here, the gravamen of the Coalition's action is the allegation that the Pebble defendants wrongfully

purchased its confidential documents. Said purchase was not an act by defendants in furtherance of their right of petition or free speech.” (*Id.* at p. 387.) In our case, the allegedly wrongful conduct—concealing or failing to disclose the potential purchase—occurred as an explicit part of the settlement strategy for *Suarez I*.

In *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617 [90 Cal.Rptr.3d 669], a law firm represented United States Fire in a lawsuit by its insured over the scope of United States Fire’s duty to defend and indemnify the insured against asbestos-related claims. The firm then represented a group of asbestos creditors seeking to maximize insurance benefits from various insurers, including United States Fire. The court held United States Fire’s action to enjoin the firm from the conflicted representation was not protected activity under the anti-SLAPP statute, explaining that the principal thrust of the misconduct alleged was the law firm’s acceptance of representation adverse to the plaintiff, not the actual disclosure of confidential information it had obtained during its representation of United States Fire. Reference to protected activity was “only incidental to the principal thrust of the complaint.” (*Id.* at p. 1628; see also *Coretronic Corp. v. Cozen O’Connor* (2011) 192 Cal.App.4th 1381, 1391 [121 Cal.Rptr.3d 254] [holding that action alleging concealment of dual representation is not protected activity: “That the concealment occurred in the context of litigation does not change this result, as it is clear that any litigation activity is only incidental to plaintiffs’ allegations of wrongdoing.”].) In contrast, respondent’s alleged concealment in our case was undertaken specifically to affect the settlement of the *Suarez I* litigation.

Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624 [7 Cal.Rptr.3d 715] does not aid appellant. In that attorney malpractice action, the conduct from which the action arose was the attorneys’ failure to serve timely discovery responses, and failure to comply with two court orders; “the alleged attorney malpractice did not consist of any act in furtherance of anyone’s right of petition or free speech, but appellants’ negligent *failure* to do so on behalf of their clients.” (*Id.* at p. 631.) This differs from the allegations of respondent’s affirmative nondisclosure and concealment for purposes of affecting settlement in our case.

■ The activity upon which appellant premises this action is respondent’s concealment of and failure to disclose the letter of intent from Ansell prior to the time appellant agreed to settle *Suarez I*. This claim arises from respondent’s litigation activity—to keep this information within the attorney-client privilege for purposes of “the Rafael [Suarez] case.” And it arises from respondent’s protected right of free speech—the right not to speak. The first prong of the anti-SLAPP statute has been satisfied.

Ordinarily we would turn to the second prong of the anti-SLAPP analysis, examining whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. (*Baral v. Schnitt* (2016) 1 Cal.5th 376 [205 Cal.Rptr.3d 475, 376 P.3d 604].) In this case, however, appellant states in his reply brief that respondent's discussion of this prong should be disregarded because "appellant Suarez raised no issue regarding the second prong." For that reason, we do not reach that issue.

DISPOSITION

The order of dismissal is affirmed. Respondent is awarded costs on appeal.

Willhite, J., and Collins, J., concurred.

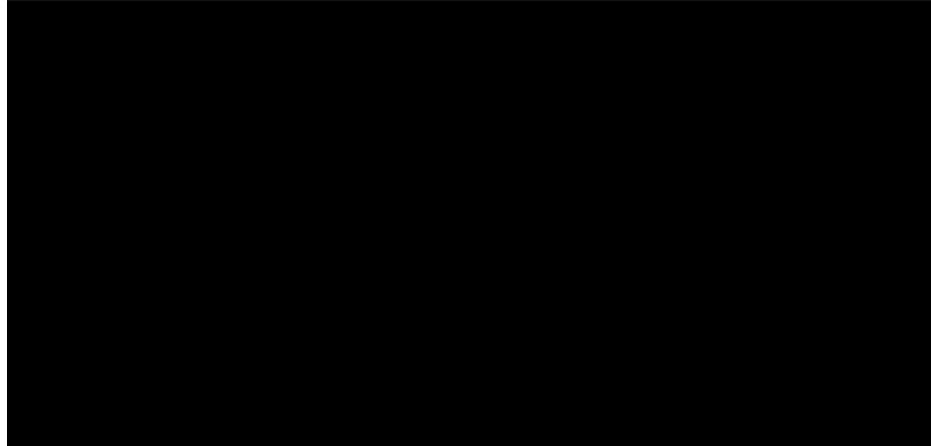
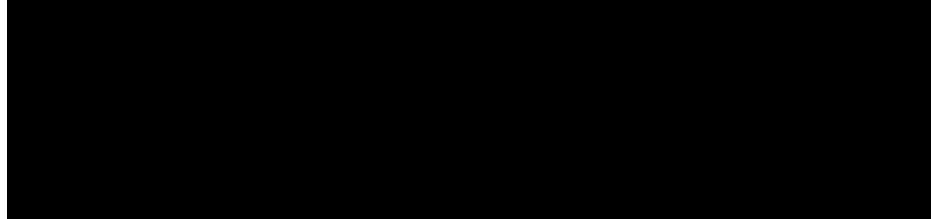
[No. A143369. First Dist., Div. One. Sept. 7, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
HENRY SIBRIAN, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Laurence K. Sullivan and René A. Chacón, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION**BANKE, J.—****INTRODUCTION**

Defendant Henry Sibrian appeals from his conviction of resisting an officer in violation of Penal Code section 69.¹ He contends the trial court erred, first, in allowing expert testimony on excessive force and, second, in precluding defense counsel from questioning one of the officers involved in his arrest about a pending civil lawsuit against the officer. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after 1:00 a.m. on October 21, 2013, Contra Costa County Sheriff Sergeant Joseph Buford observed defendant commit various traffic violations. As Buford turned on the flashing lights of his patrol car to initiate a traffic stop, defendant pulled over on his own because he had arrived at his house. Buford ordered defendant to get out of his car, but he refused. Additional deputies arrived, and defendant was wrestled out of the car and detained. During the struggle, defendant and two deputies were injured. The district attorney charged defendant with a single count of resisting an executive officer by the use of force or violence. (§ 69.)

Sergeant Buford testified at trial that he first noticed defendant's car when he heard squealing tires. He followed the car about a mile as it ran two red lights and a stop sign and then pulled over and came to a stop on Sheryl Drive in San Pablo. Buford knew the neighborhood, as he had responded to "homicides, domestic violence, stolen vehicles, robberies, fights, [and] drunks" in the area. He drew his firearm at low ready² and ordered defendant to show his hands. Defendant stuck both hands out the driver's side window, along with the upper half of his body. Defendant was "slurring and rambling." Buford could not understand him and believed he might be intoxicated.

Buford called for assistance, and Deputy Mitch Moschetti arrived almost immediately. Together, they approached defendant's car, and Buford opened the driver's side door. He ordered defendant "at least five or six times" to get out, but he refused. Defendant smelled of alcohol. He continued to ramble and was "gripping the steering wheel with two hands." Both officers tried to

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Holding a firearm at "low ready" means holding a firearm in both hands "pointed in a downward direction, so it's not pointed at any one person, but it's ready in case you have to deploy it."

pull defendant out of the car, but he “was flailing his body.” Although he suspected defendant was intoxicated, Buford did not conduct a field sobriety test and did not obtain a blood sample.

Deputy Moschetti testified he struggled with defendant for a few seconds, while telling him to stop resisting and get out of the car. Then he “delivered a closed fist strike” to defendant’s right eye. He again tried to move defendant, but defendant grabbed Moschetti’s arm and moved it “very forcefully.” Moschetti punched him in the right eye a second time.

Moschetti retrieved his Taser and told defendant to stop resisting or he would be “Tased.” Defendant grabbed the Taser and tried to pull it from Moschetti’s hand. Moschetti Tased him in the stomach. By this time, another deputy, Michael Santos, had arrived, and he was able to pull defendant out of the car. Defendant’s face and stomach hit the asphalt, and he landed flat on his stomach.

Now on the ground, defendant kept his right arm tucked underneath his stomach and kicked his legs. Moschetti told him to stop resisting and put his hands behind his back. After unsuccessfully trying to pull defendant’s right arm out from under his body, Moschetti “delivered a closed fist strike to his right rib cage.” Defendant released his right arm, and Moschetti placed him in handcuffs. Defendant became “verbally aggressive” and spat blood on Santos.

Moschetti suffered cuts on his hands and bruises on his shins. Defendant also appeared to be injured. There was blood around his right eye and blood from his nose, and he had injuries on the left side of his head and on his right cheek.

Deputy Santos testified that when he arrived at the scene defendant appeared “aggressive” and was “actively resisting.” Defendant scratched Santos with his fingernails, inflicting a four-inch gash on his forearm. After Santos pulled him from the car to the ground, defendant continued to struggle and kick. Another deputy arrived, and Santos, Moschetti, and Trinidad eventually got defendant under control and handcuffed. Defendant continued to be uncooperative—he yelled, failed to follow instructions, and spat a mouthful of blood on Santos’s left arm. Santos suffered an open wound on his left hand and wounds on his right hand and arm.

The prosecution also called George Driscoll, a senior inspector with the district attorney’s office, whom the trial court permitted to testify as an expert “in the area of law enforcement training, law enforcement tactics, and law enforcement procedures regarding the use of force.” Driscoll had 34 years’

experience in law enforcement, and has trained law enforcement officers in Fourth Amendment issues and use of force, including specific defensive tactics and methods to overcome resistance. He testified law enforcement officers have a responsibility to enforce the law, and when “they encounter resistance, they’re not expected to retreat, they’re expected to ensure compliance.”

The prosecutor presented a hypothetical scenario of an officer stopping a car for numerous traffic violations at 1:00 a.m. in a medium- to high-crime area. The prosecutor then questioned Driscoll about hypothetical officer conduct tracking the version of events described by Buford, Moschetti, and Santos. Driscoll opined the officers’ conduct in the hypothetical scenario would not be inconsistent “with the industry standard.” For example, Driscoll testified when a suspect’s unlawful driving threatens the public, an officer is expected to stop that threat by having the suspect stop and step out of the car. If the suspect refuses to leave his car, the officer is at a disadvantage because the suspect has “complete access to everything in the car, and . . . maneuverability inside the car.” There could be a weapon in the car, or the suspect could start the car and flee. Driscoll opined if the suspect grips his steering wheel and refuses to get out, officers should attempt to grab his arm to break his grip and use a distraction strike only if they are unable to break the suspect’s grip on the steering wheel. He explained officers oftentimes have chemical agents and Tasers “as part of their tool system on their belt.” The use of a chemical spray “probably wouldn’t be a good choice for the officers to select” in the circumstances of the hypothetical because dispersal of the spray in the small area of the suspect’s car could impair the officers.³ But if two distraction strikes are ineffective in removing the suspect’s hands from the steering wheel, Driscoll opined use of a Taser would not be inconsistent with industry standard.

On cross-examination, Driscoll stated he had testified 12 times as an expert in the use of force by law enforcement officers. In each case, he concluded the use of force was consistent with industry standards. Revisiting the hypothetical scenario, Driscoll opined that if the first officer were to point his gun at the head of the suspect, that would *not* be consistent with industry standards. He was aware of Contra Costa County’s policy that Tasers should not routinely be used when subjects are demonstrating passive resistance or are unresponsive.

Israel Herrera, defendant’s landlord, testified for the defense. He saw defendant parked outside his house, with police cars behind him. An officer pointed a weapon toward defendant and told Herrera to stay back. Two more

³ Driscoll also noted the chemical agent may have a decreased effect on a person under the influence of alcohol.

officers parked in front of the house. They started to hit defendant inside his car. Herrera never heard the officers telling defendant to get out of the car. “They pulled him out of the car, he was on the floor and then he was handcuffed.”

Defendant also testified. Around 10:30 p.m. the night of his arrest, he left work and went to a friend’s house in Berkeley. He “might have had a couple of drinks.” (Later, he testified he had one 22-ounce beer.) Around 12:30 a.m., he left his friend’s house and drove home. He did not run any red lights or stop signs, and did not notice a police officer following him. As soon as he parked, he saw police lights. An officer approached his window, pointed a gun at his face, and ordered him to put out his hands, which he did. Defendant “thought he was going to shoot.” Another officer arrived, and the two officers forced him out of his car. The officers never ordered him to exit the car. After he was handcuffed, he felt “a whole bunch of punches just coming in different directions, right, left, temple, jaw, the back of [his] head.” He felt a knee hit his eye, and he started yelling “police brutality.” Blood filled his mouth, and he spat it out because he could not breathe. He did not intend to get blood on anyone. Then he felt a burning sensation in his chest from a Taser. He was Tased three times and taken to jail. From there, he was taken to a hospital, where he stayed from 2:00 a.m. to 5:30 p.m. Photographs showed marks from the Taser on defendant’s chest, stomach, and shoulder.

Defendant denied holding on to the steering wheel, denied refusing to exit his car, and denied resisting the officers at any time. “It was like lamb to a slaughter. I gave myself completely to them and—[¶] . . . [¶] I did every order they gave me.” He plans to file a civil lawsuit against Deputy Moschetti.

The jury found defendant guilty as charged. The trial court placed him on formal felony probation for three years, conditioned on serving 180 days in county jail.

DISCUSSION

A. *Allowing Expert Testimony on the Use of Force*

Defendant maintains the issue of whether the officers used excessive force was not a proper subject for expert testimony under Evidence Code section 801. Alternatively, he contends the trial court should have excluded the testimony under Evidence Code section 352 as unduly prejudicial.

■ Evidence Code section 801 allows a qualified expert to testify on matters “[r]elated to a subject that is sufficiently beyond common experience

that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a); see *People v. Brown* (2004) 33 Cal.4th 892, 900 [16 Cal.Rptr.3d 447, 94 P.3d 574].) “Expert opinion is not admissible,” however, “if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.” (*People v. Torres* (1995) 33 Cal.App.4th 37, 45 [39 Cal.Rptr.2d 103].) We review a decision to admit expert opinion testimony for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222 [57 Cal.Rptr.3d 543, 156 P.3d 1015] (*Prince*)).

■ Defendant was charged with “knowingly resist[ing], by the use of force or violence, [an executive] officer, in the performance of his [or her] duty” in violation of section 69. Under this Penal Code provision, an officer must be acting lawfully when the resistance occurs. (*In re Manuel G.* (1997) 16 Cal.4th 805, 814, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].) An officer using excessive force is not acting lawfully. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 45 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167 [161 Cal.Rptr. 541].) Thus, the prosecution was required to prove beyond a reasonable doubt that the officers acted lawfully, and the jury was instructed “[a] peace officer is not lawfully performing his or her duties if he or she is . . . *using unreasonable or excessive force* in his or her duties.” (Italics added.)

In response to defendant’s motion to exclude Driscoll’s testimony, the trial court held an Evidence Code section 402 hearing. Driscoll testified law enforcement officers are required to receive training on the use of force, and the purpose of the training is to enhance the safety of officers, suspects, and the public. An officer’s prior “common life experience regarding combative or forceful situations” is not sufficient because a “law enforcement officer has a significantly greater responsibility, duty, obligation, regarding the enforcement of the laws” than a lay person. Driscoll explained an officer is expected to overcome a person’s noncompliance with lawful commands, and officers receive specialized training to recognize resistance because they “have to try and minimize the escalation of resistance.” “[T]heir training will allow them to recognize this, and then use appropriate means to overcome that resistance.” He stated officers are taught to escalate their level of force if their tactics are not effective in overcoming resistance. Driscoll gave the example of a suspect who is refusing to follow commands and is on the ground with his hands underneath his body. An officer would recognize the inability to see the suspect’s hands is a safety issue, and “would then use greater force to extract the hands.”

At this point in Driscoll’s testimony, the trial court observed it appeared to be helpful and to cover matters beyond the common experience of an ordinary juror. “[W]hat I’ve heard so far, there are many things here that a

normal juror does not understand. The principles for escalation of force, for example. That's nothing that's naturally understood by a juror. [¶] . . . Inspector Driscoll gave the example of the suspect who is forced to the ground and was lying on top of his hands. And so because the officer doesn't know what's in his hands, the officer, according to Inspector Driscoll, has more latitude in what he can do. I'm not sure that's something that is naturally known to a jury. [¶] I think there are many points like that. So I think subject to further testimony in cross-examination, this information . . . is something that would be helpful to a jury."

After further testimony by Driscoll, the court heard argument by the parties. It then ruled Driscoll could testify as an expert "because the issues of incremental use of violence and the kind of force that can be used . . . those are not issues that a jury understands without testimony from an expert." However, Driscoll could not testify that the officers' conduct was either reasonable or constituted excessive force—it would be "up to the jury to decide whether the use of force is reasonable."

Defendant contends Driscoll's testimony "was unnecessary" because "the jury was perfectly capable of evaluating the reasonableness of the force used against [defendant] based on the evidence presented at trial." Necessity, however, is not the measure for the admissibility of expert evidence. "[E]xperts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony. [Citation.] '[I]f that [total ignorance] were the test, little expert opinion testimony would ever be heard.' [Citation.] [¶] Rather, the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." (*Prince, supra*, 40 Cal.4th at p. 1222.)

■ Here, one of the key issues for the jury was whether the officers acted lawfully in the way in which they detained and arrested defendant. Driscoll's testimony could be of some assistance because, as the trial court observed, jurors would not necessarily know about the need for escalating force in response to a noncompliant suspect or the potential continued danger posed by a suspect after he has been wrestled to the ground. Driscoll also explained the risks of allowing a noncompliant suspect to remain in his car and why the officers may have decided not to use a chemical agent.

Expert testimony "will be excluded *only* when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness'" [citation]."
(*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 [283 Cal.Rptr.2d 382, 812 P.2d 563], italics added.) Because we cannot say Driscoll's testimony "would add

nothing at all to the jury's common fund of information,' " we also cannot say the trial court abused its discretion in deeming it admissible. (*Ibid.*; see *People v. Farnam* (2002) 28 Cal.4th 107, 162–163 [121 Cal.Rptr.2d 106, 47 P.3d 988].)

Defendant's reliance on *Allgoewer v. City of Tracy* (2012) 207 Cal.App.4th 755 [143 Cal.Rptr.3d 793] (*Allgoewer*), a civil excessive force case, is misplaced. In *Allgoewer*, the trial court granted the defendants' nonsuit motion because the plaintiff had not presented any expert testimony on "'what force a reasonable law enforcement officer would have used under the same or similar circumstances.' " (*Id.* at p. 757.) The Court of Appeal reversed, concluding, as have other courts, that there is no *per se* requirement that a plaintiff must present expert testimony to prove an excessive force claim. (*Id.* at pp. 763–764.) The appellate court recognized that the "reasonableness" standard applicable to such claims "'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' " (*Id.* at p. 762.) And since "'the standard is not defined by the generic—a reasonable *person*—but rather by the specific—a reasonable *officer*—it is more likely that [the] line between common and specialized knowledge has been crossed.' " (*Id.* at p. 763, quoting *Kopf v. Skymr* (4th Cir. 1993) 993 F.2d 374, 378 (*Kopf*).) However, "'a blanket rule that expert testimony is generally admissible in excess force cases would be just as wrong as a blanket rule that it is not.' " (*Allgoewer*, at p. 763.) "'The facts of every case will determine whether expert testimony would assist the jury.' " (*Ibid.*)

Where the force used consists of only bare hands, the court suggested "'expert testimony might not be helpful.' " (*Allgoewer, supra*, 207 Cal.App.4th at p. 763.) However, "'[a]dd handcuffs, a gun, a slapjack, mace, or some other tool, and the jury may start to ask itself: what is mace? what is an officer's training on using a gun?' " (*Ibid.*) "'Answering these questions may often be assisted by expert testimony.' "⁴ (*Allgoewer*, at p. 763.)

The *Allgoewer* court went on to conclude that, on the record before it, a nonsuit was not warranted. While the defendant officers argued expert testimony was necessary because the case "'involved specialized training and experience regarding police practices and procedures,' " "beyond that vague assertion, defendants offer no explanation of why or how that was so." (*Allgoewer, supra*, 207 Cal.App.4th at p. 765.)

In short, *Allgoewer* holds the admission of expert evidence on police training and practices must be made on a case-by-case basis and, in some

⁴ In *Kopf*, quoted extensively in *Allgoewer*, the circuit court concluded the district court abused its discretion in *excluding* the plaintiff's proffered experts on law enforcement use of dogs and slapjacks. (*Kopf, supra*, 993 F.2d at pp. 378–379.)

civil excessive force cases, as in the case before it, the plaintiff need not present expert testimony to prove his or her case. *Allgoewer* does not hold a plaintiff cannot present such testimony. In fact, it recognizes that, depending on the circumstances, such evidence may be proper. It is, thus, no surprise that expert testimony on the use of force has often been admitted in California excessive force cases without objection. (See, e.g., *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 710 [141 Cal.Rptr.3d 553]; *Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 682–683 [126 Cal.Rptr.3d 706]; *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1090–1093 [16 Cal.Rptr.3d 521], disapproved on other grounds in *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639, fn. 1 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

The instant criminal case presents a different issue than that in *Allgoewer*—did the trial court abuse its discretion in allowing such evidence in this criminal prosecution? Moreover, *Allgoewer* suggests it did not, since more was involved here than force “‘reduced to its most primitive form—bare hands.’” (*Allgoewer, supra*, 207 Cal.App.4th at p. 763, quoting *Kopf, supra*, 993 F.2d at p. 379.) In this case, the officers were dealing with a suspected drunk driver who refused to get out of his car, late at night and in a relatively high-crime area. The officers used not only their hands, but also a Taser and handcuffs, and they chose not to use a chemical agent. Driscoll’s testimony provided relevant context and a basis for evaluating the officers’ handling techniques and choice of assistive tools.

Defendant alternatively maintains that, even if Driscoll’s expert testimony had some relevance and was admissible under Evidence Code section 801, it nevertheless should have been excluded under Evidence Code section 352. He contends the testimony was unduly prejudicial because Driscoll “convey[ed] his belief in the credibility of the officers’ testimony.” This overstates Driscoll’s testimony. When presented with a hypothetical scenario tracking the officers’ testimony, Driscoll gave his opinion on the use of force, but he did not suggest either of the arresting officers’ version of events was correct or that the officers were credible and defendant was not. Nor, contrary to defendant’s claim, did Driscoll refuse “to answer questions based on hypotheticals that contradicted the prosecution’s theory.” On cross-examination, when asked a different hypothetical, Driscoll opined an officer pointing a firearm at a suspect’s head (as defendant testified Sergeant Buford did) would not be consistent with industry standards. Defense counsel then asked if “the officer is able to see the suspect’s hands, and *weapons at that time are not a concern*,” would that change Driscoll’s opinion? (Italics added.) Driscoll responded, “By limiting the factors as you just did, that’s inconsistent with all of the factors that the officer is forced to consider.” This was not a refusal to answer a question based on a hypothetical scenario different from the

prosecution's theory. Rather, Driscoll was pointing out that an officer could not simply put aside concerns about weapons in the hypothetical scenario described.

Defendant also cites to *Thompson v. City of Chicago* (7th Cir. 2006) 472 F.3d 444 (*Thompson*), another civil excessive force case, in which the district court excluded proffered testimony by two officers not on the ground it was inadmissible, but on the ground its prejudicial effect outweighed its probative value. (*Id.* at p. 457.) The circuit court of appeals found no abuse of discretion, observing “[i]ntroducing two experts to testify that [the defendant officer] used excessive force would have induced the jurors to substitute their own independent conclusions for that of the experts.” (*Id.* at p. 458.)

Generally, “[a] finding of no abuse of discretion in one court’s exclusion of evidence has no bearing on whether a different court abused its discretion in admitting evidence in a different trial.” (*People v. Cordova* (2015) 62 Cal.4th 104, 134 [194 Cal.Rptr.3d 40, 358 P.3d 518].) Here, in contrast to *Thompson*, Driscoll was not called to give his opinion on the legal question of whether the officers used excessive force, but to explain law enforcement tactics and training in the use of force. In fact, the trial court expressly barred Driscoll from rendering any opinion on whether the arresting officers’ use of force was reasonable.

After briefing was complete in this appeal, another division of this court issued its opinion in *People v. Brown* (2016) 245 Cal.App.4th 140 [199 Cal.Rptr.3d 303] (*Brown*), holding the trial court abused its discretion in allowing expert testimony on use of force in a section 69 criminal case. We requested, and the parties provided, supplemental briefing on the opinion’s significance to this case.

In *Brown*, the 67-year-old defendant was riding a bicycle on the sidewalk at dusk while wearing headphones and without a light, in violation of municipal code and Vehicle Code provisions. An officer yelled at him to stop, and Brown tried to flee on his bicycle. Two officers pursued, first in patrol cars and then on foot, and arrested him after a brief altercation. (*Brown, supra*, 245 Cal.App.4th at p. 145.) The jury found Brown guilty of resisting an officer in violation of section 69 and two drug offenses. The Court of Appeal conditionally reversed the section 69 conviction because the trial court failed to sua sponte instruct on the lesser included offense of assault. (*Brown*, at p. 155.)

The appellate court went on to address defendant’s claim of evidentiary error, concluding the trial court had also erred in allowing expert testimony on use of force because it had “added nothing to the common fund of

information that any juror would have brought to the jury room and . . . inaccurately addressed the governing law.” (*Brown, supra*, 245 Cal.App.4th at p. 165.) “Because these officers used ‘force . . . reduced to its most primitive form—the bare hands’ (*Kopf, supra*, 993 F.2d at p. 379), this was not a case in which the proper handling of some specialized law enforcement tool (e.g., a gun, a dog, a Taser, Mace, pepper spray) had to be explained.” (*Brown*, at p. 165.) Further, the expert had also been allowed to testify about the meaning and application of section 835⁵ and about United States Supreme Court case law on reasonable force under the Fourth Amendment. Moreover, his testimony was “based on an inaccurate rendition of the law.” (*Brown*, at p. 169.)

The *Brown* court also recognized, however, that “the correct analysis is case by case and very much dependent on the particular facts presented.” (*Brown, supra*, 245 Cal.App.4th at p. 163.) As we have discussed, this case did not involve merely “bare hands,” but a more nuanced set of circumstances. Nor was Driscoll allowed to expound on the law, let alone erroneously, as was the case in *Brown*.

In any event, even if Driscoll’s testimony should have been excluded, there was no prejudicial abuse of discretion. The jury heard the testimony of all those involved in, or who witnessed, the incident. Defendant, himself, testified. The jury was properly instructed that it was tasked with deciding the facts and determining witness credibility, and that the prosecution was required to prove each element of the offense beyond a reasonable doubt. (CALCRIM Nos. 200, 220, 226.) It was further instructed that it was not required to accept an expert’s opinion as true or correct and, with respect to hypothetical questions posed to an expert witness, “[i]t is up to you [the jury] to decide whether an assumed fact has been proved.” (CALCRIM No. 332.) We must presume the jury followed these instructions (see *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326 [63 Cal.Rptr.3d 433, 163 P.3d 118]), and given the credibility determinations the jury plainly made, abundant evidence supports the verdict.

Defendant argues a question the jury asked during deliberations indicates this was a close case, and Driscoll’s testimony may have tipped the balance in favor of conviction. The jury sent a note to the court asking: “Please provide clarification (definition and/or criteria) differentiating between ‘used force . . .’ of [Penal Code section] 69 and ‘willfully resisted of [Penal Code section] 148.’ ”⁶

⁵ Section 835 provides, “An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.”

⁶ The jury was instructed on willfully resisting an officer in violation of section 148 as a lesser included offense of resisting an officer by force or violence in violation of section 69.

This request does not suggest a “close case” as to the issue on which Driscoll’s testimony was relevant—that is, whether the *officers* acted with reasonable force. Rather, the question suggests the jury had determined the officers acted lawfully and were grappling with whether *defendant’s* conduct amounted to use of force.

B. *Precluding Questioning on Pending Lawsuit Against Deputy Moschetti*

During trial, defense counsel notified the court she wanted to impeach Deputy Moschetti with questions about a civil lawsuit against him. Outside the presence of the jury, counsel stated the lawsuit alleged Moschetti deployed his Taser in October 2012 on a 58-year-old man held at the Martinez Detention Facility, and the man later died. Counsel did not know whether any administrative hearing had been conducted on the detainee’s death, but “some internet searching” indicated a coroner’s inquest had determined the death was an accident. Counsel asserted she would not “be able to call a witness to explain what happened because the person was dead.” She therefore asked leave to ask Moschetti during cross-examination: “[D]id you deploy your Taser at the Martinez Detention Facility, in a manner that has been alleged to have been excessive—in a manner of excessive force?”

The trial court responded: “[T]he only basis for saying it’s alleged . . . is a civil lawsuit by—brought [by] John Burris on behalf of surviving family members. And as everybody knows, anybody can sue anybody and say anything. So the fact that there’s a lawsuit pending, I don’t see the relevance here.” Defense counsel posited the existence of the pending lawsuit would show “bias in terms of fear of a subsequent suit” and “prior bad acts or acting in an aggressive manner.” The prosecutor maintained there was no evidence of alleged excessive force committed by Moschetti, and any suggestion of such conduct would be highly inflammatory and improper. Ultimately, the trial court denied defense counsel’s request, observing if there were a witness to the alleged excessive force, that witness could testify, “[j]ust as the person [witness] could in any *Pitchess* case where the evidence is admissible.”⁷ In this case, however, defense counsel was “not able to prove the prior bad act—[¶] . . . [¶]—by the standard necessary, preponderance of the evidence.” The court also rejected the argument the lawsuit was relevant to show bias.

On appeal, defendant contends “[t]he trial court abused its discretion by excluding otherwise admissible evidence that Deputy Moschetti had used

⁷ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537 [113 Cal.Rptr. 897, 522 P.2d 305] (where defendant was charged with battery of four deputies, evidence of “disciplinary records . . . necessary as character evidence of the deputies’ tendency to violence in support of [defendant’s] theory of self-defense” was “unquestionably relevant and admissible under Evidence Code section 1103”).

excessive force against a detainee.” But defendant offered no “admissible evidence” showing Moschetti used excessive force against a detainee. Defense counsel admitted she had no witnesses to establish the facts of the alleged incident. In fact, it does not appear she even offered the civil complaint as evidence of the specific allegations. At one point in the discussion, the trial court said to defense counsel “You just have what some legal assistant from John Burris’[s] office . . . has told you about what he or she understands happened. . . . I wouldn’t permit any questions about that, based on that showing.” Defendant cannot claim he was improperly barred from presenting relevant, admissible evidence, when he has not identified any such proffered evidence in the record.⁸

In any case, even if the trial court abused its discretion in precluding the cross-examination question, there was no prejudice. Had defense counsel been allowed to ask Moschetti whether a civil lawsuit against him *existed*, whatever his response would have had little, to no, probative value regarding either his credibility or whether he had used excessive force on another occasion. And, it would have had no relevance to the credibility of Buford, Santos, Herrera, and defendant. Under these circumstances, it is not reasonably probable defendant would have obtained a better result had defense counsel asked Moschetti about the existence of the lawsuit.⁹

DISPOSITION

The judgment is affirmed.

Humes, P. J., and Dondero, J., concurred.

Appellant’s petition for review by the Supreme Court was denied December 21, 2016, S237847.

⁸ For the same reasons, the trial court’s evidentiary ruling did not violate defendant’s constitutional rights. (See *People v. Boyette* (2002) 29 Cal.4th 381, 427–428 [127 Cal.Rptr.2d 544, 58 P.3d 391] [rejecting “attempt to inflate garden-variety evidentiary questions into constitutional ones”].)

⁹ We therefore need not, and do not, address defendant’s assertion the trial court incorrectly required him to establish admissibility by a “preponderance of the evidence.” As we have explained, defendant made no *evidentiary* showing. And even if he had, any abuse of discretion in excluding the question and hoped for answer was not, on this record, prejudicial.

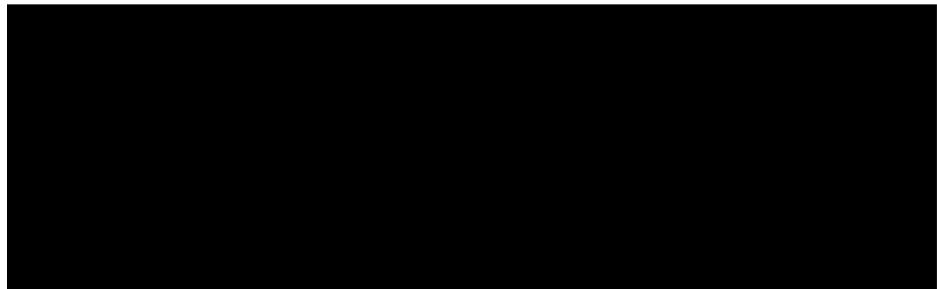
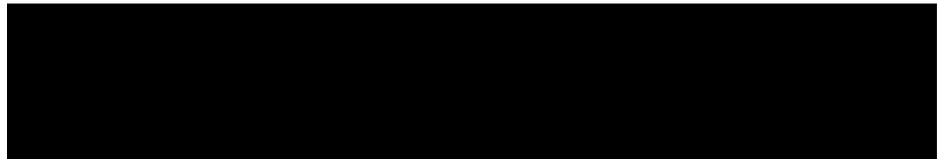
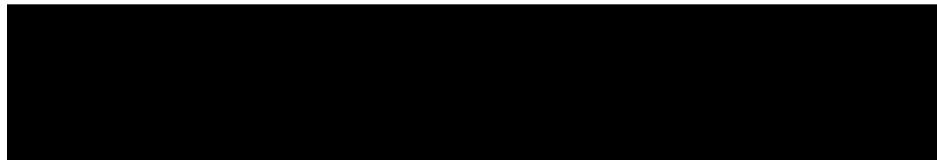
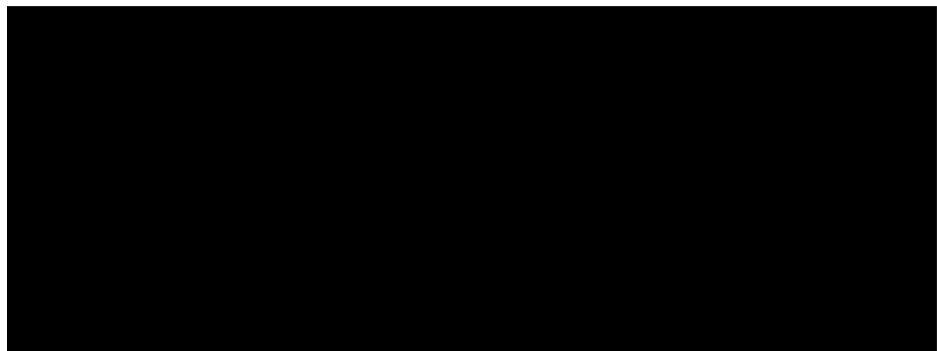
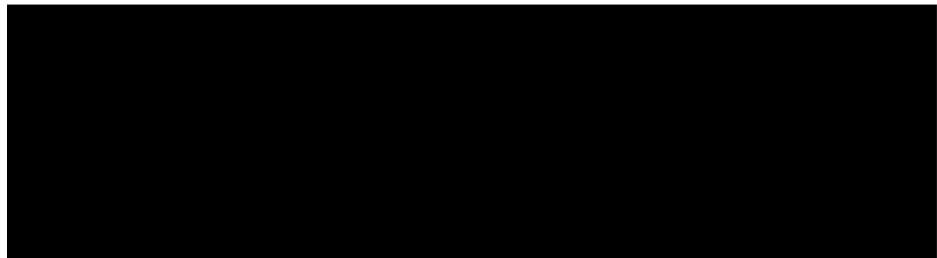
[No. A143873. First Dist., Div. One. Sept. 7, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JON F. HOLM, Defendant and Appellant.

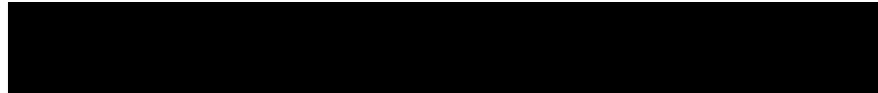
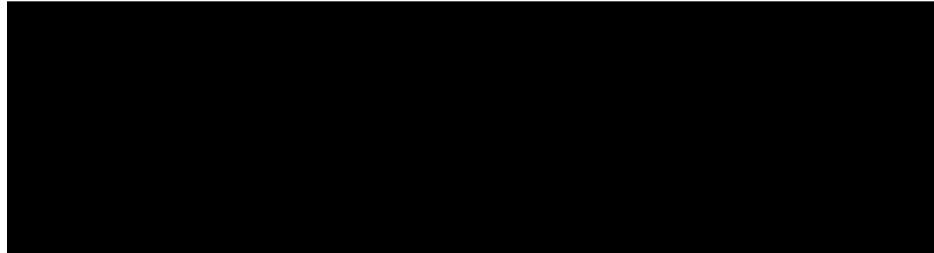
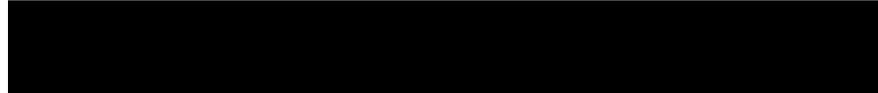
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COUNSEL

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Eric D. Share, and Violet M. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

Banke, J.—

INTRODUCTION

After defendant Jon F. Holm was convicted of second degree burglary, he filed a petition under Proposition 47¹ seeking to reduce his offense to misdemeanor shoplifting under Penal Code section 459.5.² The trial court denied his petition on the ground the private country club from which he stole a flat screen television and golf balls was not a “commercial establishment” within the meaning of that section. We conclude otherwise and reverse and remand.

¹ The voters enacted Proposition 47, the Safe Neighborhood and Schools Act, on November 4, 2014, effective the next day. (Cal. Const., art. II, § 10, subd. (a); *In re J.C.* (2016) 246 Cal.App.4th 1462, 1469 [201 Cal.Rptr.3d 731].)

² All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

In 2013, defendant was charged with burglary, receiving stolen property, and false impersonation.³ (§§ 459, 496, subd. (a), 529.) He pleaded no contest to second degree burglary, a felony, and to impersonation, a misdemeanor. He admitted taking a television, valued at \$662.23, and three boxes of golf balls, valued at \$50 each, from the Santa Rosa Golf and Country Club.

The following year, in November 2014, defendant filed a Proposition 47 petition for resentencing under section 1170.18. At the hearing, Don Florriani, the general manager and CEO of the country club, testified regarding the operations of the club and the items taken. The club is open to members and their guests, but not to the general public. The club's facilities include a pro shop, two restaurants, men's and women's locker rooms, a golf course and banquet facilities. The club also displays art work by local artists, which members and their guests may purchase. Members of the general public, however, can rent the banquet facilities.

Florriani testified the stolen television was worth "\$650, \$670" and at "least three boxes" of personalized golf balls were taken, valued at \$50 each. In addition, a painting was taken, although it was not mentioned in the complaint. The artist testified the painting was worth \$2,000.

In denying defendant's petition, the trial court stated: "The petition is going to be denied not for the amount, though I think the amount is probably over [\$]950; it hasn't been proven. I don't think that the People have carried their burden of showing that this was over [\$]950. But this is not a commercial establishment, in my opinion, within the meaning of Prop 47. This is a private club that you have to be a member. Mr. Holm, according to the presentence report, was not a member of the club at the time that he was actually expelled in 2011, so he's not a member within the meaning of Penal Code section [1170.18], for that reason this is denied."

DISCUSSION

The sole issue on appeal is whether, under the new shoplifting statute established by Proposition 47, a private country club is a "commercial

³ The impersonation offense, unrelated to the burglary, was based on defendant using a friend's driver's license to check into a motel.

establishment,” allowing defendant’s felony conviction of second degree burglary to be reduced to misdemeanor shoplifting.

■ “Proposition 47, which is codified in section 1170.18,^[4] reduced the penalties for a number of offenses. Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor unless the prosecution proves the value of the items stolen exceeds \$950.” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 [191 Cal.Rptr.3d 295].)

Section 459.5 specifies: “Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.” (§ 459.5, subd. (a).)

■ “ ‘In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, ‘we turn first to the language of the statute, giving the words their ordinary meaning.’ [Citation.]’ [Citations.] ‘The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate’s intent]. [Citation.] When the language is ambiguous, ‘we

⁴ Section 1170.18 provides in pertinent part: “Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider all of the following: [¶] (1) The petitioner’s criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner’s disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.”

refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" [Citation.] In other words, "our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure." ' [Citation.] Our review is de novo. [Citation.]" (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1113–1114 [195 Cal.Rptr.3d 482] (*J.L.*)).

Proposition 47 provides: "This act shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 18, p. 74 (2014 Voter Guide).)⁵ The ballot pamphlet, in turn, enumerated the intent and purposes of the proposition as "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes," "[a]uthoriz[ing] consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors," and "savil[ing] significant state corrections dollars on an annual basis." (2014 Voter Guide, *supra*, text of Prop. 47, § 3, p. 70.)

■ While acknowledging the "first step in statutory construction is to focus on the plain meaning of the words used," the Attorney General maintains we should, instead, focus on the "common understanding of 'shoplifting'" and construe "commercial establishment" to mean "a store or shop that is open to the public with regular business hours." We cannot, however, short-circuit the task of statutory construction and must therefore look first at the words of the statute and their plain meaning. (See *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387–388 [97 Cal.Rptr.3d 464, 212 P.3d 736].)

■ Several recent decisions have considered the meaning of "commercial establishment" as used in section 459.5. In *J.L.*, *supra*, 242 Cal.App.4th 1108, for example, the court considered whether a public school was a "commercial establishment" within the meaning of the statute. "Giving the term its commonsense meaning, a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services. That commonsense understanding accords with dictionary definitions and other legal sources. (Webster's 3d New Internat. Dict. (2002) p. 456 ['commercial' means 'occupied with or engaged in commerce' and 'commerce' means 'the exchange or buying and selling of commodities esp. on a large

⁵ We previously granted defendant's request for judicial notice of the legislative history of Proposition 47.

scale’]; The Oxford English Reference Dict. (2d ed. 1996) p. 290 [defining ‘commerce’ as ‘financial transactions, esp. the buying and selling of merchandise, on a large scale’]; Black’s Law Dict. (10th ed. 2014) p. 325 ['commercial' means “[o]f, relating to, or involving the buying and selling of goods; mercantile’]; see also 37 C.F.R. § 258.2 (2015) [copyright regulation defining the term ‘commercial establishment’ as ‘an establishment used for commercial purposes, such as bars, restaurants, private offices, fitness clubs, oil rigs, retail stores, banks and financial institutions, supermarkets, auto and boat dealerships, and other establishments with common business areas’]; Gov. Code, § 65589.5, subd. (h)(2)(B) [defining ‘neighborhood commercial’ land use as ‘small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood’]; *People v. Cochran* (2002) 28 Cal.4th 396, 404–405 [121 Cal.Rptr.2d 595, 48 P.3d 1148] [quoting dictionary definition of commerce, ‘ “[t]he buying and selling of goods, especially on a large scale,” ’ in interpreting statutory phrase ‘commercial purpose’].)’ (*In re J.L.*, *supra*, 242 Cal.App.4th at p. 1114.)

Applying these definitions of “commercial,” the *J.L.* court concluded “[a] public high school is not an establishment primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students.” (*In re J.L.*, *supra*, 242 Cal.App.4th at p. 1114.)

In *People v. Hudson* (2016) 2 Cal.App.5th 575, 579–583 [206 Cal.Rptr.3d 336], the court applied the same definition of “commercial establishment” and held a commercial bank is such an establishment. “Because ‘commercial’ involves being engaged in commerce, including financial transactions, we conclude that the term ‘commercial establishment’ includes a bank.” (*Id.* at p. 582.) While the court acknowledged “a common understanding of the word ‘commercial’ encompasses the buying and selling of merchandise in a retail establishment,” it went on to observe “nothing in the text of the Act supports this narrow interpretation and we reject it.” (*Ibid.*; see also *People v. Abarca* (2016) 2 Cal.App.5th 475, 480–483 [205 Cal.Rptr.3d 888] [bank is “commercial establishment”]; *People v. Smith* (2016) 1 Cal.App.5th 266, 272–273 [204 Cal.Rptr.3d 425] [check-cashing business is “commercial establishment”]; cf. *People v. Stylz* (2016) 2 Cal.App.5th 530, 533 [206 Cal.Rptr.3d 301] [locked storage unit was not “commercial establishment”].)

We also agree with the definition of “commercial establishment” applied in these cases. Applying it here, we conclude the Santa Rosa Golf and Country Club is an establishment “primarily engaged in the sale of goods and services.” The fact most of these are sold to a subset of the general public—namely individual club members and their guests—does not change the commercial nature of the establishment. Furthermore, the club sells some

of its goods and services, namely its banquet space and services, to the general public.

As defendant notes, a similar issue arose under the Unruh Civil Rights Act⁶ which provides, in pertinent part: “All persons . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” In *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594 [42 Cal.Rptr.2d 50, 896 P.2d 776] (*Warfield*), our Supreme Court considered whether the non-profit country club could legally exclude women from proprietary membership. (*Id.* at pp. 598–599.) Although a private club is “not generally thought of as a traditional business establishment,” the court held the country club’s “regular business transactions with nonmembers” rendered it a “business establishment for the purposes of section 51.” (*Id.* at pp. 616, 621, 623.)

The Attorney General maintains *Warfield* is inapposite because the term “business establishment” in the Unruh Civil Rights Act is purportedly broader than “commercial establishment” in the shoplifting statute, and “it stands to reason that the term ‘business establishment’ would be given a broad interpretation in order to prohibit businesses from discriminating against minorities and women.” (See *Warfield, supra*, 10 Cal.4th at p. 611.)

■ However, as we have observed, Proposition 47 specifies “This act shall be liberally construed to effectuate its purposes.” (2014 Voter Guide, *supra*, text of Prop. 47, § 18, p. 74.) Given that these purposes include reducing felonies to misdemeanors for nonserious nonviolent offenses and reducing the costs associated with felony incarcerations, it would be inconsistent with the purposes of this legislation to narrowly construe the pivotal term “commercial establishments.”

We therefore conclude “commercial establishment” within the meaning of section 459.5 means a business that is primarily engaged in the buying and selling of goods or services regardless of whether these goods or services are sold to members or the general public.

■ Thus, under the provisions of Proposition 47, defendant is entitled to have his conviction of second degree felony burglary reduced to misdemeanor shoplifting under section 459.5, unless the trial court determines on remand resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

⁶ Civil Code section 51.

DISPOSITION

The order denying defendant's petition for recall of sentence and request for resentencing is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

Margulies, Acting P. J., and Dondero, J., concurred.

[No. B265722. Second Dist., Div. Five. Sept. 7, 2016.]

RENATO M. LUCIONI, Plaintiff and Appellant, v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.

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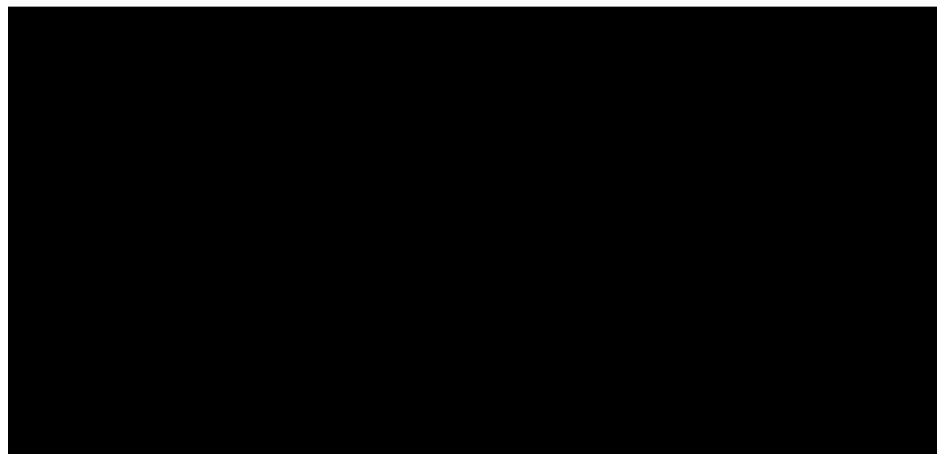
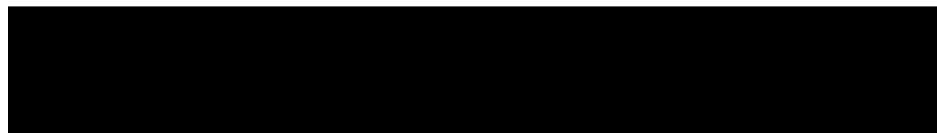
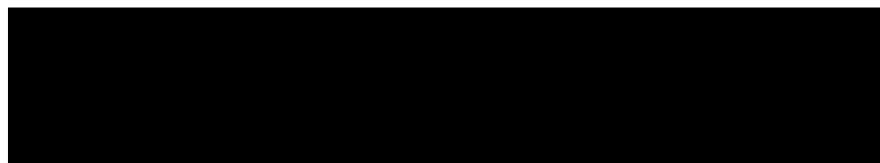
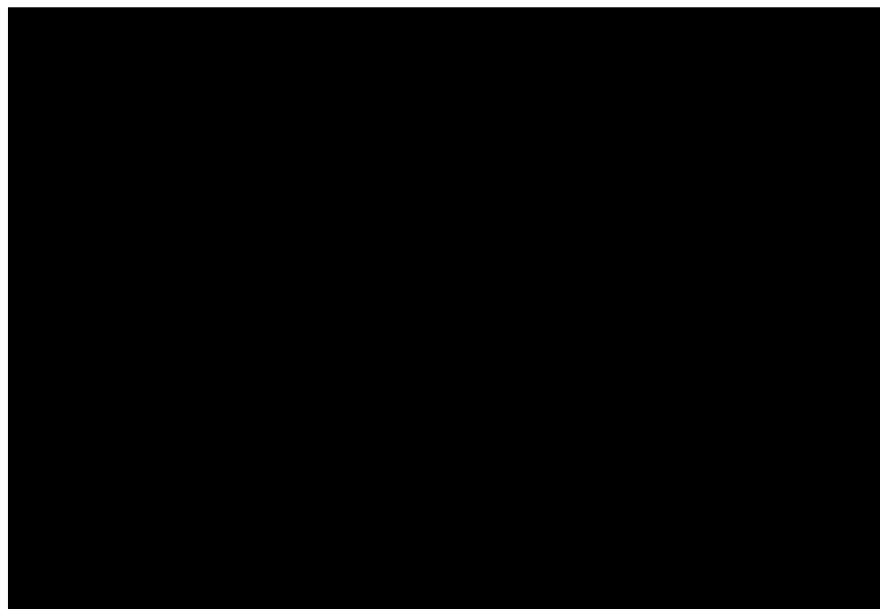
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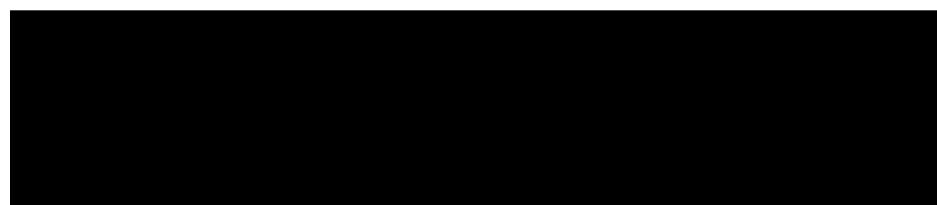
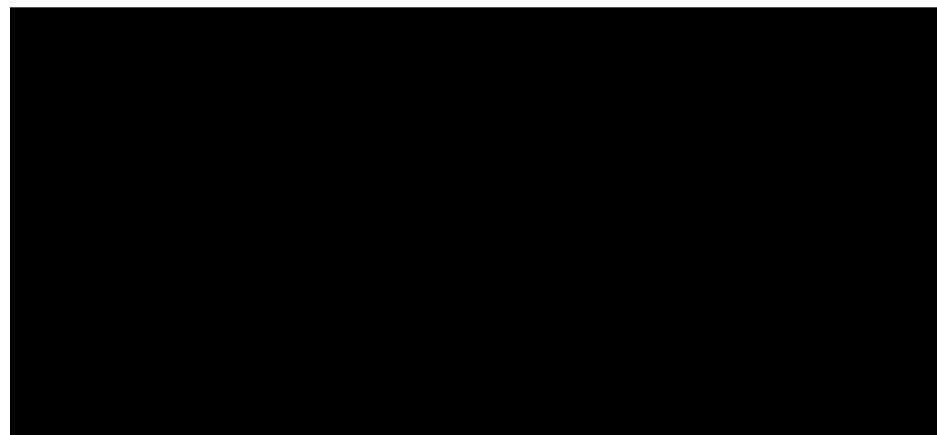
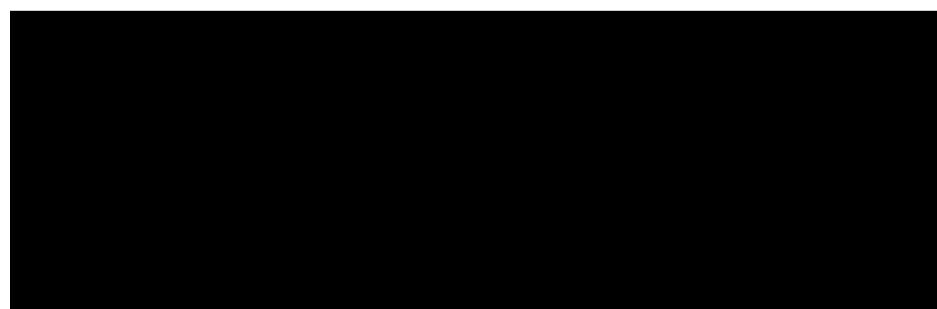
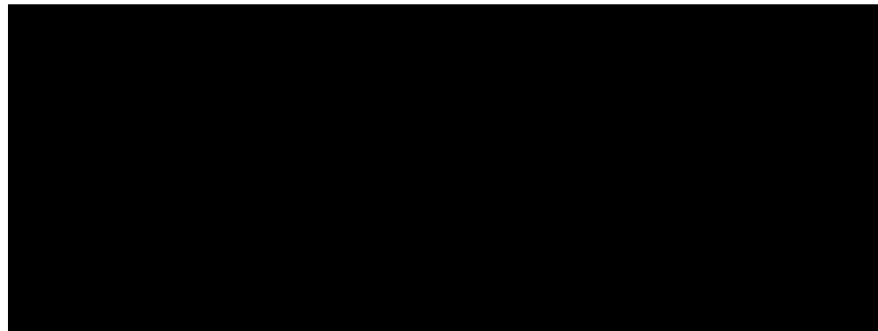
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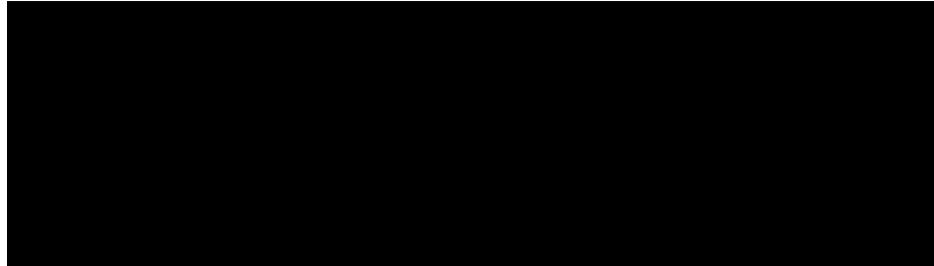
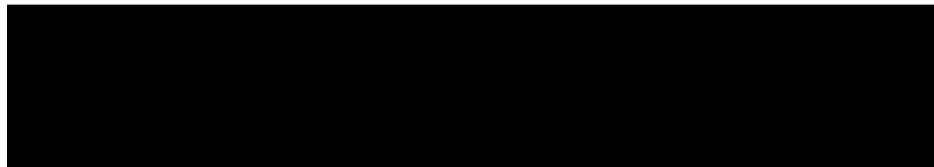
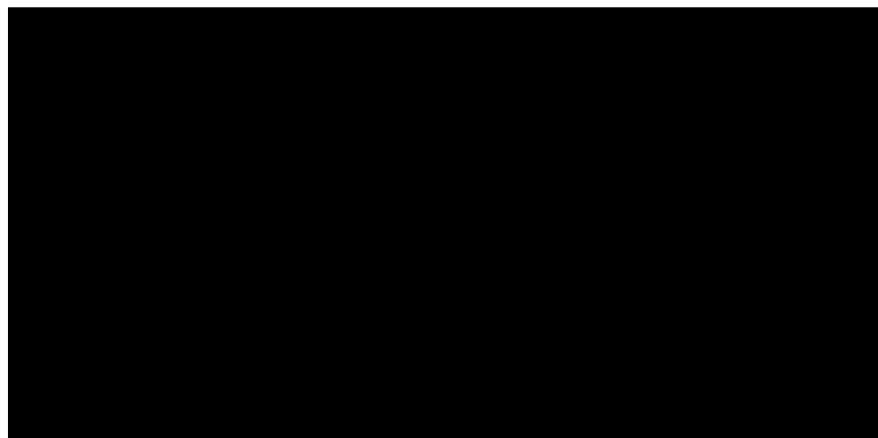
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COUNSEL

Stephen R. Golden & Associates, Stephen R. Golden, Elaine D. Etingoff and Aminah Williams for Plaintiff and Appellant.

Bryan Cave, Andrea Hicks, Monica Kohles and Jennifer Steeve for Defendant and Respondent Bank of America, N.A.

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OPINION**RAPHAEL, J.*—****INTRODUCTION**

A borrower on a home loan sued lending banks, seeking an injunction to prevent a foreclosure. The trial court sustained the lenders' demurrers and entered a judgment of dismissal. The primary question raised in this appeal is whether the 2013 Homeowner's Bill of Rights (HBOR) provides a cause of action for injunctive relief for a violation of its provision—Civil Code, section 2924, subdivision (a)(6) (section 2924(a)(6))¹—that requires an entity initiating a foreclosure be legally entitled to do so.

We hold that the availability of injunctive relief under the HBOR is governed exclusively by its two provisions—sections 2924.12, subdivision (a)(1) and 2924.19, subdivision (a)(1) (sections 2924.12(a)(1) and 2924.19(a)(1))—in which the Legislature authorized the courts to interpose such relief into the nonjudicial foreclosure scheme. Neither provision authorizes a court to enjoin a violation of section 2924(a)(6). Thus, no injunctive relief is available for a violation of that section. We affirm for that reason, and because the borrower has failed to show a reasonable possibility of amending his complaint to plead any of the grounds for injunctive relief that the HBOR authorizes. We also affirm the trial court's order sustaining without leave to amend a demurrer to a separate breach of contract cause of action.

FACTS AND PROCEDURE

In this appeal from a judgment dismissing a complaint after the granting of a demurrer without leave to amend, we “assume the truth of the complaint’s properly pleaded or implied factual allegations.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 79 P.3d 569] (*Schifando*)).

According to the operative second amended complaint (complaint), in 2005 plaintiff and appellant Renato M. Lucioni (Lucioni) obtained a home loan by executing a note and a deed of trust in favor of a lender that is not a party to this litigation. The original lender's interest in the deed of trust was transferred to a securitized trust after the closing date of the trust. Thereafter, the deed of trust was assigned and transferred “throughout the years to numerous

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

¹ All further statutory references are to the Civil Code unless otherwise indicated.

assignees” in a manner that allegedly rendered the assignments “void” because “there are numerous breaks and misrepresentations in the chain of title.” A specific example of a problematic assignment is that on March 23, 2011, defendant and respondent Bank of America, N.A. (Bank of America), purportedly transferred its interest in Lucioni’s loan to defendant and respondent Raymond James Bank, N.A. (RJB), yet the original lender’s beneficiary recorded an assignment of the interest in the loan to Bank of America about four months later, in July 2011. Lucioni alleges that “no documents in the chain of title indicate that [RJB] acquired the beneficial interest or that any assignment or transfer of Plaintiff[’]s loan to [RJB] was made by any person or entity with authority to do so.”

On April 9, 2014, RJB recorded and filed a “Substitution of Trustee” substituting Sage Point Lender Services, LLC (Sage Point), as the trustee under the deed of trust.² Simultaneous with that filing, Sage Point filed a notice of default on the loan.

The complaint alleges two causes of actions at issue in this appeal. In the complaint’s cause of action entitled “Lack of Standing under Civil Code § 2924(a)(6),” Lucioni “alleges that Defendants . . . do not own the beneficial interest under the mortgage or deed of trust.” Lucioni claims “it is impossible to determine who holds the beneficial interest of Plaintiff’s loan. It is unknown whether the note was ever assigned or transferred by any party with authority, and if so, how many times the note was transferred or servicing of the loan was transferred.” Based on the facts alleged in the section 2924(a)(6) cause of action, Lucioni sought to enjoin the nonjudicial foreclosure that, under California law, may follow the April 9, 2014, notice of default.

In a separate cause of action, Lucioni alleges that Bank of America breached a contract with him by failing to grant him a loan modification. In 2009, Bank of America filed a notice of default as to Lucioni’s loan, and after a telephone conversation with Bank of America’s representative, Lucioni entered into a trial payment program, under which Bank of America would offer Lucioni a permanent loan modification if he successfully made three required monthly payments. Lucioni successfully made those payments, causing Bank of America to rescind the default notice. Yet Lucioni never received a loan modification from Bank of America, which, instead, transferred its interest in Lucioni’s loan to RJB.

RJB and Bank of America each demurred separately to the complaint. On May 29, 2015, the trial court sustained both defendants’ demurrs without

² In California’s nonjudicial foreclosure scheme, a foreclosure is initiated by a trustee rather than by the lender. (See § 2924, subd. (a)(1).)

leave to amend. In its ruling, the trial court took judicial notice of a set of documents offered by Bank of America that included Lucioni's deed of trust and the assignments and substitutions of trustees recorded as to it. The trial court entered a judgment dismissing the action.³

DISCUSSION

The HBOR was effective January 1, 2013, and, as enacted, sunsets on January 1, 2018. Passed in 2012, while California was "still reeling from the economic impacts of a wave of residential property foreclosures that began in 2007," the legislation sought to "modify[] the foreclosure process to ensure that borrowers who may qualify for a foreclosure alternative are considered for, and have a meaningful opportunity to obtain, available loss mitigation options." (Stats. 2012, ch. 87, § 1, subds. (a), (b).) Much of the HBOR contains procedures to help borrowers obtain alternatives to foreclosure, which also are designed "to ensure that the current crisis is not worsened by unnecessarily adding foreclosed properties to the market when an alternative to foreclosure may be available." (Stats. 2012, ch. 87, § 1, subd. (b).)

In the HBOR, the Legislature enacted two statutory provisions—sections 2924.12(a)(1) and 2924.19(a)(1)—that allow a borrower to enjoin a foreclosure when a lender violates other specified HBOR sections. As explained below, we hold that those two provisions provide the exclusive means for a borrower to obtain injunctive relief under the HBOR. To enjoin a foreclosure under the HBOR, the borrower must state a cause of action for a material violation of one of the nine statutory sections that are specified in those two provisions. Because Lucioni's complaint alleges a violation of HBOR's section 2924(a)(6), which is not one of those listed sections, the complaint does not state a cause of action for injunctive relief under the HBOR. We further conclude that Lucioni does not show a reasonable possibility that he can successfully amend the complaint to seek injunctive relief, as the sections listed in sections 2924.12(a)(1) and 2924.19(a)(1) do not, as he claims, place the burden on the foreclosing entity to demonstrate in court, prior to foreclosing, that it has a right to foreclose. Finally, we conclude that the trial court correctly entered judgment for Bank of America on the breach of contract cause of action.

The Cause of Action for Injunctive Relief

Lucioni entitled his primary cause of action "Lack of Standing under Civil Code § 2924(a)(6)." The gravamen of the claim is that defendants, as

³ The complaint alleges three causes of action not at issue in this appeal. Those causes of action were for violation of Business and Professions Code section 17200, intentional misrepresentation, and quiet title. The trial court entered judgment for defendants on those causes of action after sustaining demurrers without leave to amend.

the foreclosing lenders, lacked the authority to foreclose on the property because they were not properly assigned an interest in the deed of trust. Section 2924(a)(6), enacted in the HBOR, provides that only the holder of the beneficial interest under a mortgage or deed of trust may foreclose: “No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.”

■ In the HBOR, the Legislature authorized a private right of action to enjoin a nonjudicial trustee’s sale when a lender violates any one of nine statutory provisions. Under section 2924.12(a)(1), a homeowner may bring an action for injunctive relief due to a material violation of section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17. Under section 2924.19(a)(1), a homeowner also may bring an action for injunctive relief for a material violation of section 2923.5 or 2924.18.

Most of these provisions place duties upon a lender before it may record a notice of default.⁴ Based on this legislative focus on establishing requirements for filing a notice of default, we conclude that the provisions of the HBOR that authorize actions to enjoin nonjudicial foreclosures govern where a notice of default was recorded after the HBOR’s effective date. (See *Rockridge Trust v. Wells Fargo, N.A.* (N.D.Cal. 2013) 985 F.Supp.2d 1110, 1153 [dismissing HBOR claims because the statute was not retroactive, where notice of default and notice of trustee’s sale were executed before Jan. 1, 2013].) In this case, the notice of default was recorded on April 9, 2014, after the January 1, 2013, effective date of the HBOR. The HBOR’s injunctive relief provisions therefore govern here.

■ The Legislature, however, did not provide for injunctive relief for a violation of section 2924(a)(6), the provision that the complaint relies upon in seeking injunctive relief. That is, section 2924(a)(6) is not one of the nine sections identified in sections 2924.12(a)(1) and 2924.19(a)(1). In our view,

⁴ See sections 2923.5, subdivision (a)(1), 2923.55, subdivision (a), 2923.6, subdivision (c), 2924.11, subdivision (c), 2924.17, subdivision (b), and section 2924.18, subdivision (a); see also section 2924.9, subdivision (a) (lender must act within five business days after filing a notice of default). Additionally, section 2924.10 imposes requirements on mortgage servicers when a borrower submits a complete application for a first lien loan modification, and section 2924.18, subdivision (a)(1) prohibits the servicer from recording a notice of default while such an application is pending.

under the text of the HBOR, a foreclosure may be enjoined due to a material violation of the statutory provisions that the Legislature has chosen to list, but not due to a violation of unlisted provisions. ■ “Generally, the expression of some things in a statute implies the exclusion of others not expressed.” (*In re Bryce C.* (1995) 12 Cal.4th 226, 231 [48 Cal.Rptr.2d 120, 906 P.2d 1275]; see *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 [25 Cal.Rptr.2d 500, 863 P.2d 745] [same]; see also *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 806 [172 Cal.Rptr.3d 333] [later enacted and more specific injunctive relief provision governs instead of Code Civ. Proc. section generally authorizing injunctive relief].) ■ As the Legislature chose to provide for injunctive relief for some HBOR violations, but not for a violation of section 2924(a)(6), we do not find such relief impliedly available. Under the HBOR, then, a plaintiff may not seek to enjoin a foreclosure based on a claim that the foreclosing party lacked the necessary authority to foreclose.

The HBOR’s legislative history is in accord with our conclusion, indicating that the Legislature deliberately chose to authorize injunctive relief only for particular violations it identified. In conference committee reports adopted by the Assembly and the Senate when they passed the HBOR, a “[s]ummary of [e]nforcement [p]rovisions” stated that the statute contained a “narrow and targeted enforcement mechanism” that was adopted “[i]n response to concerns expressed.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Rep. No. 1 on Assem. Bill No. 278 (2011–2012 Reg. Sess.) as amended June 27, 2012, p. 28; Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Rep. No. 1 on Sen. Bill No. 900 (2011–2012 Reg. Sess.) as amended June 27, 2012, p. 28.)⁵ According to the reports, the HBOR’s enforcement provisions were drafted to avoid “frivolous claims” and “efforts to merely delay legitimate foreclosure proceedings.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Rep. No. 1 on Assem. Bill No. 278, *supra*, as amended June 27, 2012, p. 29; Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Rep. No. 1 on Sen. Bill No. 900, *supra*, as amended June 27, 2012, p. 29.) To this end, the

⁵ The cited portion of both reports stated: “In response to concerns expressed, the Conference Committee amendments would provide for a narrow and targeted enforcement mechanism. Because the amendments provide for individual protections, the bill necessarily allows individual enforcement. However, to protect against any potential frivolous claims or efforts to merely delay legitimate foreclosure proceedings, the amendments would provide for enforceability only for certain key provisions related to the prohibitions against dual tracking, SPOC, and false or incomplete documents. Moreover, no legal action whatsoever could be brought unless the violation is material.

“Importantly, no action for money damages would be allowed until the date the trustee’s deed is recorded after a foreclosure sale. At all times until then, the only legal remedy a homeowner may seek is an action to enjoin a substantial violation of the specified sections, along with any trustee’s sale.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Rep. No. 1 on Assem. Bill No. 278, *supra*, as amended June 27, 2012, pp. 28–29; Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Rep. No. 1 on Sen. Bill No. 900, *supra*, as amended June 27, 2012, pp. 28–29.)

reports stated that while monetary damages are available postforeclosure, prior to a foreclosure the “only” remedy that a borrower may seek is an action to enjoin a violation “of the specified sections, along with any trustee’s sale.” (*Ibid.*) These reports therefore indicate that the Legislature intended to preclude borrowers from seeking to enjoin a foreclosure for reasons other than those expressly authorized.

We note that the recent opinion in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 [199 Cal.Rptr.3d 66, 365 P.3d 845] (*Yvanova*) does not control this case. In *Yvanova*, our Supreme Court recognized a cause of action for wrongful foreclosure based on an allegation that an assignment to the foreclosing bank was void. *Yvanova* held that “a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment.” (*Id.* at p. 924.) The court rejected the argument that a plaintiff must show prejudice to plead wrongful foreclosure because that view would mean that “anyone, even a stranger to the debt, could declare a default and order a trustee’s sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to someone” (*Id.* at p. 938.) Thus, after a foreclosure, a borrower potentially may “base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void.” (*Id.* at p. 923.)

Yvanova, supra, 62 Cal.4th 919, thus is in accord with the policy embodied in section 2924(a)(6) in authorizing an action for damages *after* a foreclosure. Where the foreclosing party had no valid interest in the property, a borrower has postforeclosure recourse even if the borrower is in default to some other party. *Yvanova*, however, does not resolve this case for at least two reasons. First, this is not a wrongful foreclosure case, but rather an action brought preemptively to enjoin a foreclosure. *Yvanova* expressly did not address this situation. (*Yvanova, supra*, 62 Cal.4th at p. 934 [“We do not address the distinct question of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward”].) Second, *Yvanova* considered a foreclosure that occurred before the HBOR became effective and expressly did not address the effect of that legislation. (*Yvanova*, at pp. 941–942.) The Court of Appeal’s post-*Yvanova* opinions have addressed the availability of injunctive relief only prior to the HBOR. (*Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279, fn. 2 [201 Cal.Rptr.3d 892]; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818 [199 Cal.Rptr.3d 790].)

■ In the HBOR, the Legislature addressed when courts may intercede in the nonjudicial foreclosure scheme. The Legislature itself created the nonjudicial foreclosure process, which uses a trustee not beholden to either the lender or borrower “to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property” (*Yanova, supra*, 62 Cal.4th at p. 926.) Where the HBOR applies, actions that disrupt that expeditious process by threatening to enjoin the sale should be limited to the particular violations for which the Legislature has authorized such preforeclosure lawsuits. When a lender without a valid interest in a property initiates a foreclosure, a borrower has a postforeclosure cause of action for damages under *Yanova*, and the decision on whether to allow preforeclosure relief is essentially a policy one, pitting the interest in allowing borrowers injunctive protection against the delays that may occur in nonjudicial foreclosures due to litigation, even where the lenders are ultimately vindicated. By not authorizing injunctive relief for violations of section 2924(a)(6) in the HBOR, as it did for the nine other provisions for which relief is permitted, the Legislature appears to have made that choice. Consequently, the trial court properly sustained the demurrer to Lucioni’s cause of action for a violation of section 2924(a)(6).

■ As to Bank of America only, the demurrer to the section 2924(a)(6) cause of action was properly sustained without leave to amend for a separate reason. Bank of America argues that it cannot have violated section 2924(a)(6) because that provision expressly applies only to entities that “record or cause a notice of default to be recorded or otherwise initiate the foreclosure process.” On the facts alleged in the complaint, this argument has merit, as RJB, not Bank of America, caused the 2014 notice of default to be recorded. For this independent reason, we alternatively affirm the ruling as to Bank of America on the claim for injunctive relief.

Amending the Cause of Action for Injunctive Relief

We must consider whether the trial court properly sustained RJB’s demurrer without leave to amend. To determine whether the trial court should have granted Lucioni leave to amend, “we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint’s legal defect or defects. (*Schifando[, supra,]* 31 Cal.4th [at p.] 1081.)” (*Yanova, supra*, 62 Cal.4th at p. 924.)

■ The specific question here is whether there is a reasonable possibility of amending the complaint to state a cause of action for injunctive relief authorized by the HBOR. In his opening brief on appeal, Lucioni suggests that he can amend his complaint under section 2924.17, which he claims

makes it “the foreclosing entity’s duty to show it has the right to foreclose.” He points out that section 2924.12(a)(1) authorizes injunctive relief for a violation of that section. We conclude that section 2924.17 does not impose a preforeclosure duty on foreclosing entities to demonstrate that they have a right to foreclose.

Section 2924.17 creates a procedural right directed at the requirements for a *declaration* that a different HBOR provision (§ 2923.55) requires a mortgage servicer to file at the time of the notice of default. Subdivision (a) of section 2924.17 states that the declaration must be “accurate and complete and supported by competent and reliable evidence.”⁶ The purpose of the declaration, as explained by section 2923.55, is to ensure that particular information is provided to the borrower before the notice of default is filed. Subdivisions (a) and (b) of section 2923.55 provide that the foreclosing entity may not record a notice of default unless it first sends the borrower specified information, including, among other things, a statement that the borrower may request “[a] copy of any assignment, if applicable, of the borrower’s mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose.”⁷ (§ 2923.55, subd. (b)(1)(B)(iii).) Section 2923.55, subdivision (c) requires that the foreclosing entity file, with the notice of default, a declaration stating that it has contacted the borrower, tried with due diligence to contact the borrower, or that no contact was required because the property owner did not meet the statutory definition of “borrower.” This is the

⁶ Section 2924.17, subdivision (a) states in full: “A declaration recorded pursuant to Section 2923.5 or, until January 1, 2018, pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding shall be accurate and complete and supported by competent and reliable evidence.”

⁷ The portions of section 2923.55 relevant here are as follows:

“(a) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until all of the following:

“(1) The mortgage servicer has satisfied the requirements of paragraph (1) of subdivision (b). [¶] . . . [¶]

“(b) (1) As specified in subdivision (a), a mortgage servicer shall send the following information in writing to the borrower: [¶] . . . [¶]

“(B) A statement that the borrower may request the following:

“(i) A copy of the borrower’s promissory note or other evidence of indebtedness.

“(ii) A copy of the borrower’s deed of trust or mortgage.

“(iii) A copy of any assignment, if applicable, of the borrower’s mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose.

“(iv) A copy of the borrower’s payment history since the borrower was last less than 60 days past due. [¶] . . . [¶]

“(c) A notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of ‘borrower’ pursuant to subdivision (c) of Section 2920.5.”

declaration referenced in section 2924.17. The statute does not require the declaration to contain a statement about the right to foreclose. The declaration concerns only the lender's efforts to contact the borrower to provide the required information.

■ Another subdivision of section 2924.17 contains an important additional requirement for the declarant. Subdivision (b) of section 2924.17 states that before filing the declaration, a mortgage servicer "shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." The statute, however, does not require a statement in the declaration about the default and the right to foreclose. Subdivision (b) of section 2924.17 is directed at ensuring the foreclosing entity's "review[]" of its right to foreclose.

■ Sections 2924.17 and 2923.55, then, place a burden on the foreclosing party to file a declaration with the notice of default, and provide requirements for the lender's diligence prior to filing that declaration. Those provisions do not create a burden on the foreclosing party to prove anything in court, other than that the declaration required by section 2923.55, subdivision (c) was filed, and that necessary steps were taken before filing it. Lucioni does not argue that defendants failed in these duties. Here, in fact, at defendants' request, the trial court took judicial notice of the declaration that section 2923.55, subdivision (c) required to be filed with the April 9, 2014, notice of default, as well as the deed and its assignments that defendants rely upon to substantiate RJB's right to foreclose. The filing of the declaration and review of the assignments do not immunize RJB from a postforeclosure lawsuit, but, under the present statutory scheme, they preclude injunctive relief for a violation of the requirements of sections 2924.17 and 2923.55. Sections 2924.17 and 2923.55 do not create a right to litigate, preforeclosure, whether the foreclosing party's conclusion that it had the right to foreclose was *correct*. If the Legislature wished to authorize as much, it could have authorized injunctive relief for a violation of section 2924(a)(6), but it did not.

■ We note that although we concluded in the prior discussion that the HBOR does not provide for injunctive relief for claimed violations of section 2924(a)(6)—that is, it does not provide for the ability of a borrower to directly litigate preforeclosure a claim that the foreclosing party lacked a beneficial interest in the deed of trust—sections 2924.17 and 2923.55 do serve that provision's purpose in at least two ways. First, the requirement that the foreclosing party must ensure that reliable evidence substantiates its right to foreclose may prompt some lenders to determine in particular cases that they lack the right to foreclose. To this end, a lender faces the possibility that

its intentional failure to comply with its preforeclosure statutory duty to ensure that reliable evidence supports its right to foreclose could subject it later to punitive damages in an appropriate case. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 409 [186 Cal.Rptr.3d 625] [on proper showing, punitive damages available for wrongful foreclosure].) Second, the HBOR provisions provide a borrower with a means of receiving, preforeclosure, all the documents the lender believes are “required to demonstrate the right of the mortgage servicer to foreclose.” (§ 2923.55, subd. (b)(1)(B)(iii).) This disclosure enables a borrower to expeditiously prepare for and litigate a lawsuit for wrongful foreclosure, quiet title, or cancellation of deed. (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561–568 [201 Cal.Rptr.3d 218] [action properly pleaded for these postforeclosure causes of action].) For these reasons, Lucioni has not demonstrated a reasonable possibility that he can successfully amend the complaint to allege injunctive relief on a basis authorized by the HBOR.

The Breach of Contract Cause of Action

Lucioni also alleged a cause of action for breach of contract against Bank of America only. Lucioni claimed that in October 2009 he entered by telephone into an oral contract for a “trial payment program” with Bank of America that would lead to a permanent loan modification if he successfully made three monthly payments, yet, even after he made those payments in October through December 2009, Bank of America failed to provide a loan modification. The cause of action accrued on the date that Bank of America allegedly breached the contract, which, according to the complaint’s allegations, was no later than March 23, 2011, the date on which Bank of America transferred Lucioni’s loan to RJB.⁸ The trial court sustained Bank of America’s demurrer without leave to amend because the cause of action was “barred by the applicable statute of limitations,” where the original complaint was filed on August 13, 2014, over three years after the breach.

■ The statute of limitations on a claim for a breach of an oral contract is two years (Code Civ. Proc., § 339) and Lucioni does not argue that the lawsuit was timely filed under that provision. Instead, Lucioni argues that the four-year statute of limitations for written contracts (Code Civ. Proc., § 337) applies because he has check receipts that demonstrate that he performed on the oral contract. His claim is that the written evidence of performance converts the oral contract into a written one.

⁸ Lucioni argues that the time of the transfer was when he discovered or should have discovered the cause of action. Again, even accepting that argument, according to the complaint’s allegations, March 23, 2011, is the latest date that the cause of action could have accrued.

To support this argument, Lucioni relies on *Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528 [25 Cal.Rptr. 65, 375 P.2d 33] (*Amen*), in which the buyers and sellers of a tavern executed a written sales contract. Our Supreme Court held that the buyers' lawsuit against the defendant escrow company for violating the written escrow instructions was "on a written contract" for purposes of the statute of limitations, even though the company orally agreed to perform the escrow instructions. (*Id.* at p. 533.) Central to the Supreme Court's reasoning was that the longer limitations period for actions on written contracts was warranted where a writing provided "evidence in permanent form of the terms of the agreement." (*Id.* at pp. 532–533.) Here, in contrast, there was never a written agreement providing evidence in permanent form of the contract terms Lucioni alleges, including a promise by Bank of America to offer a permanent loan modification if Lucioni made three monthly trial payments. *Amen* supports the proposition that in some cases a written contract may be accepted orally, but not the proposition that an oral contract is treated as a written contract for statute of limitations purposes simply because a party offers some written evidence of performance. The terms (or even existence) of the contract may be in dispute here, where they could not have been in *Amen*. The cause of action is barred by the two-year statute of limitations applicable to an alleged breach of an oral contract, and such a defect cannot be cured by amendment. The trial court did not err in sustaining without leave to amend the demurrer to the breach of contract cause of action.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

Turner, P. J., and Kriegler, J., concurred.

Appellant's petition for review by the Supreme Court was denied November 30, 2016, S237849.

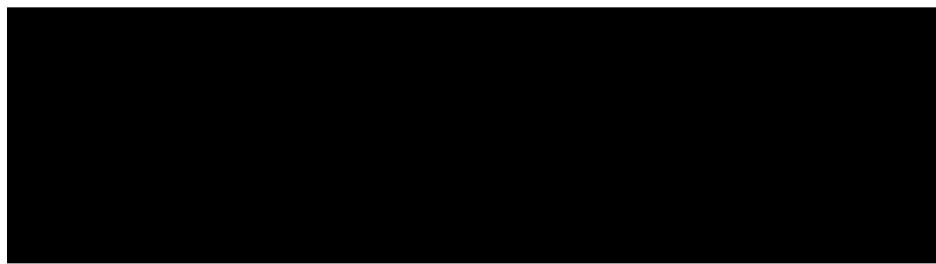
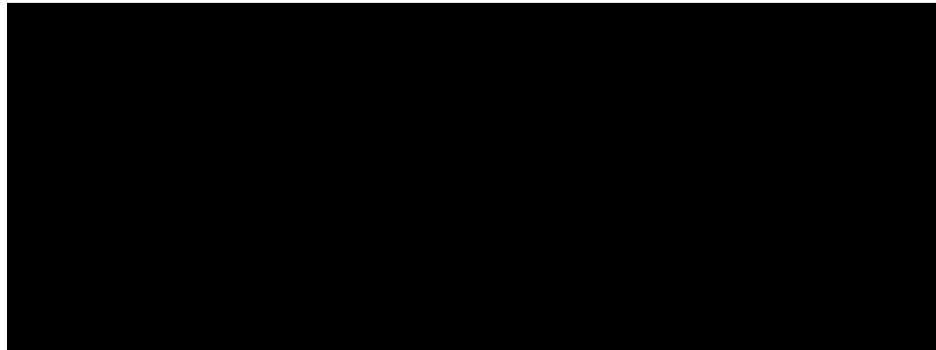
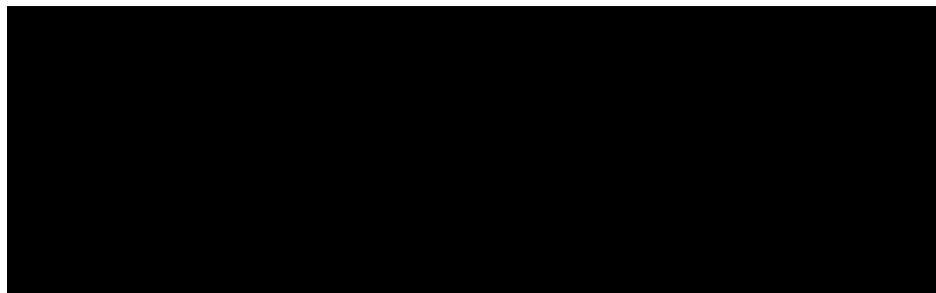
[No. A144424. First Dist., Div. Five. Sept. 7, 2016.]

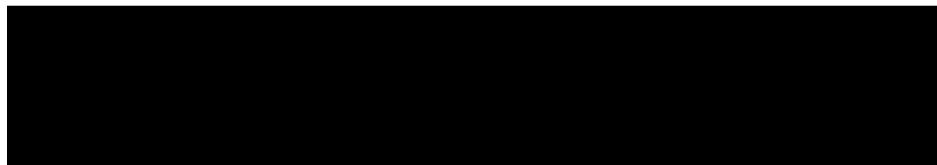
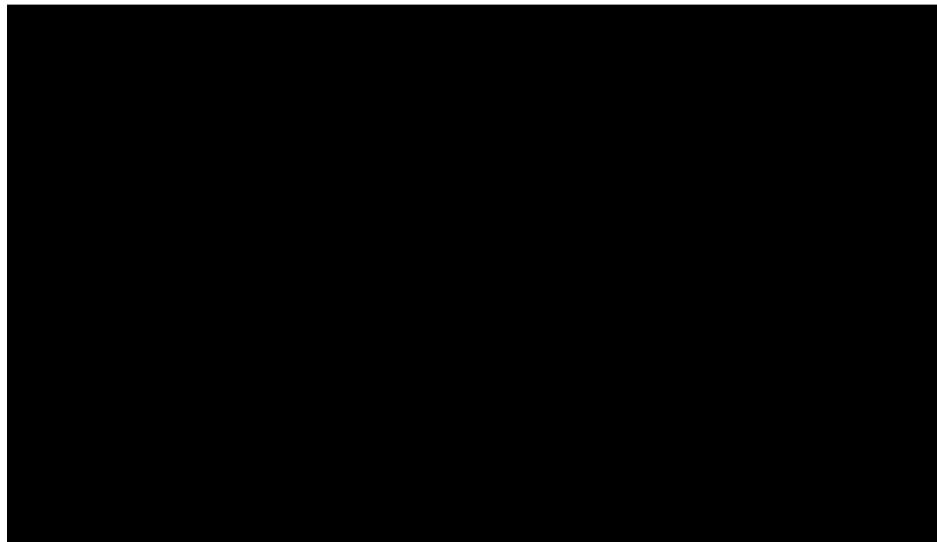
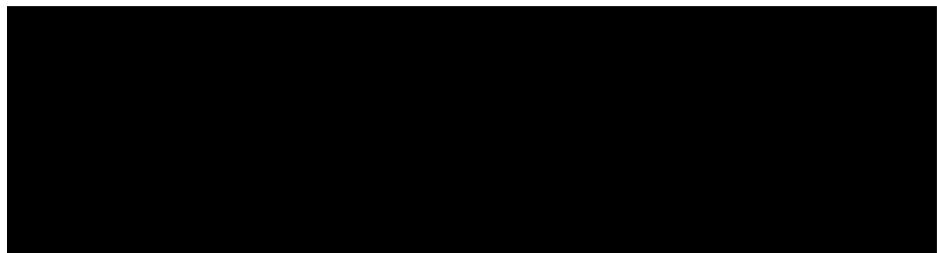
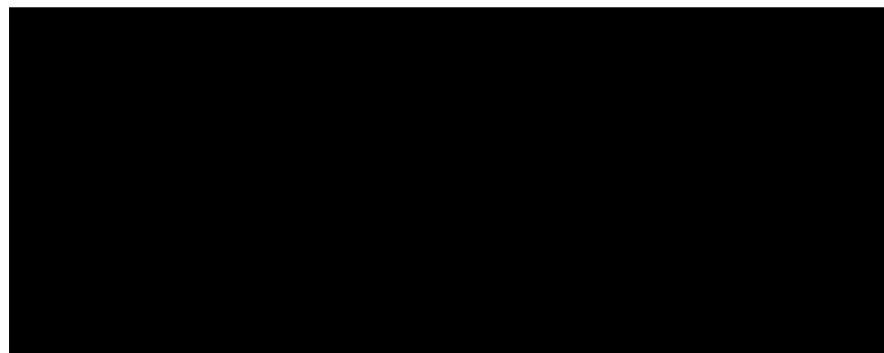
THE PEOPLE, Plaintiff and Respondent, v.
BRADLEY BLACKWELL, Defendant and Appellant.

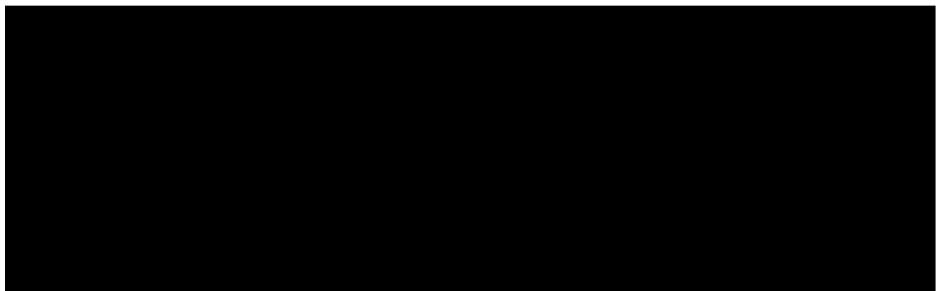
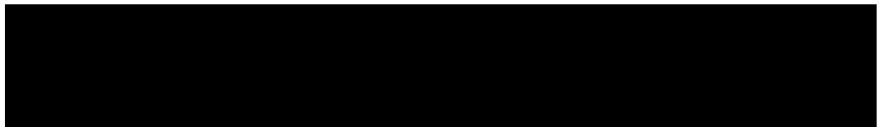
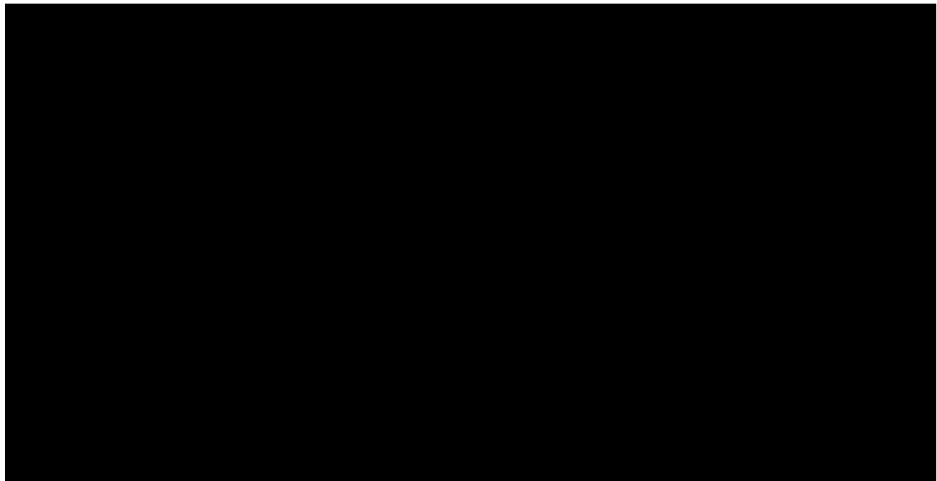
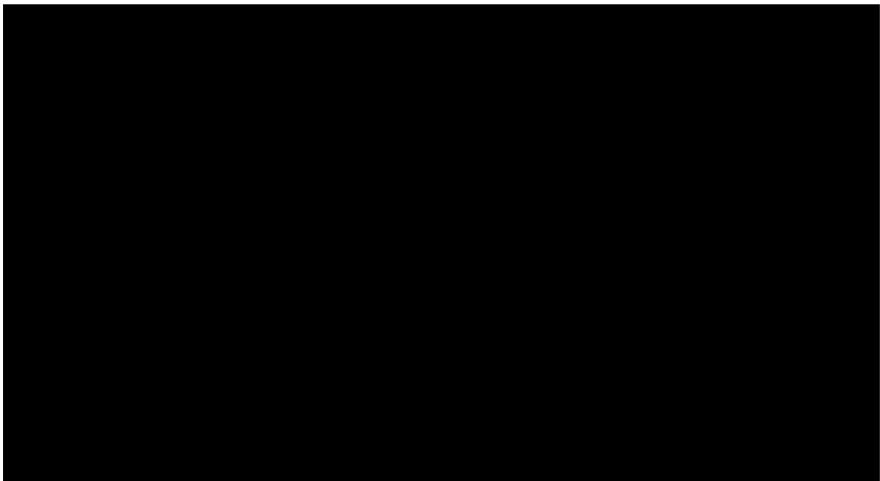
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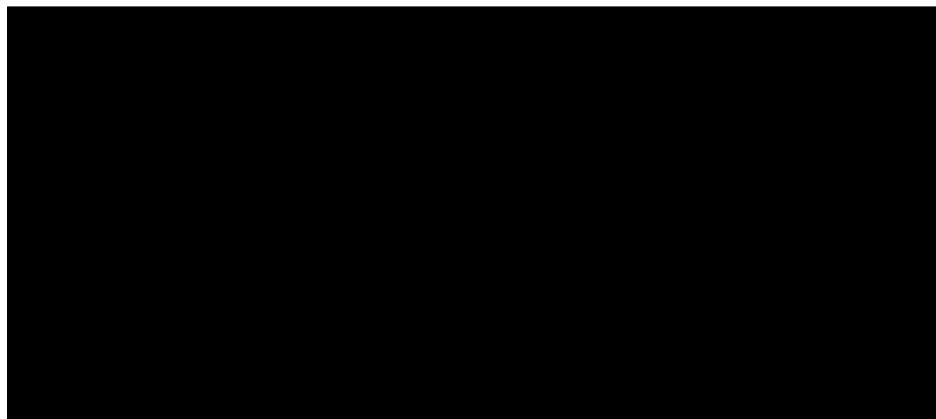
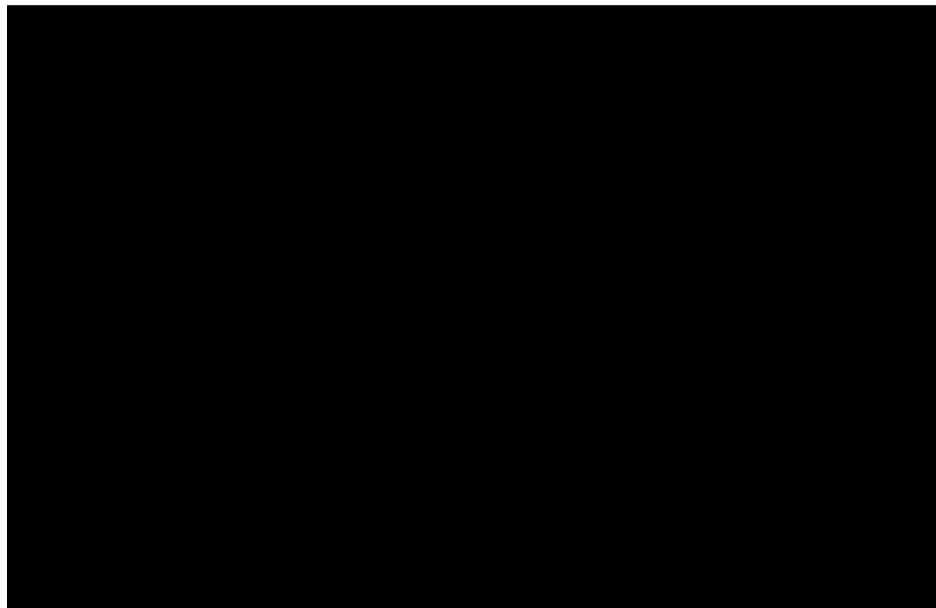
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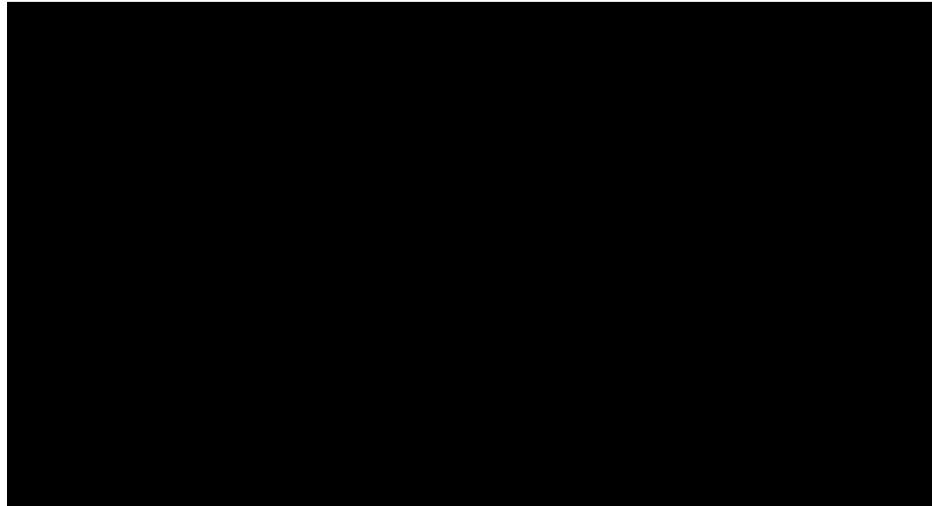
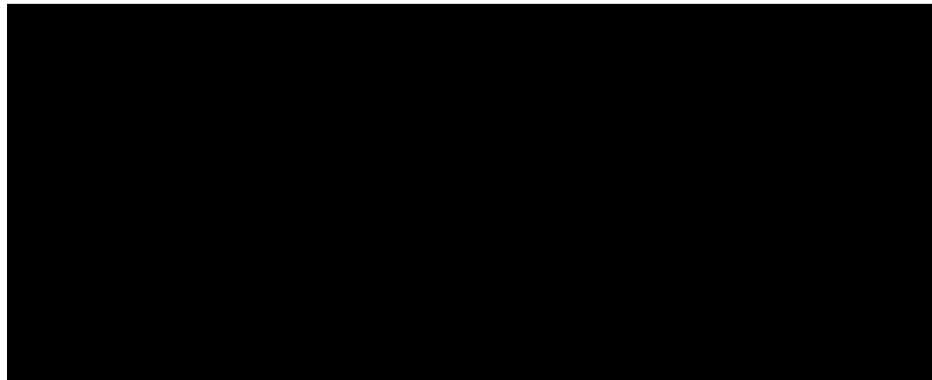
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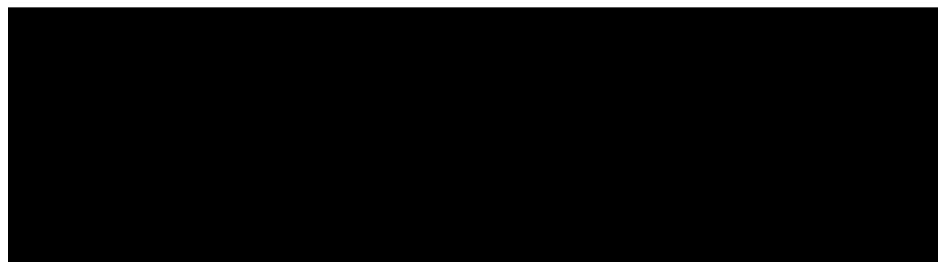
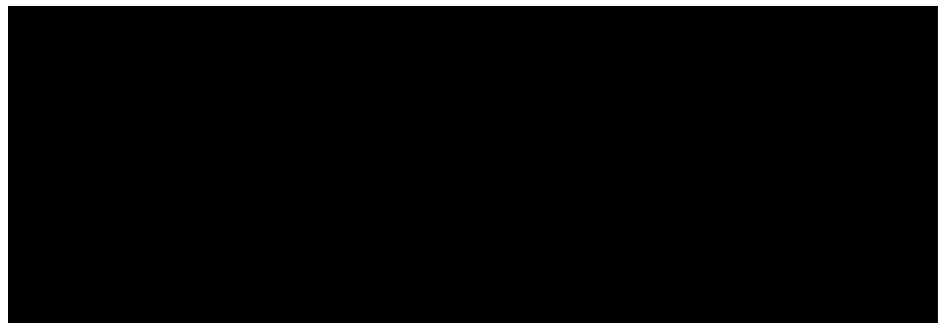
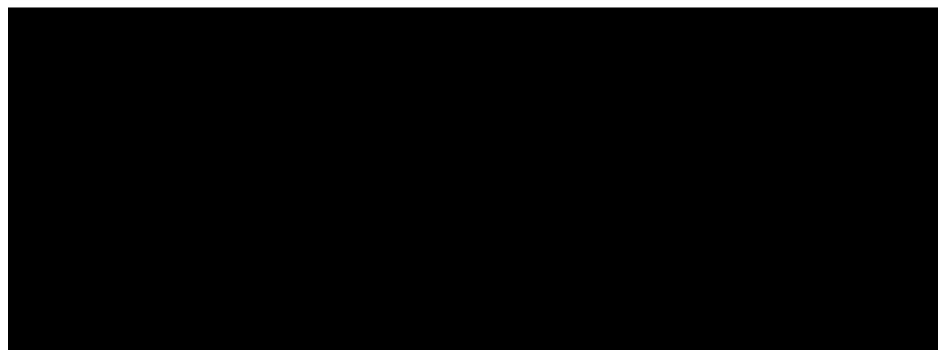
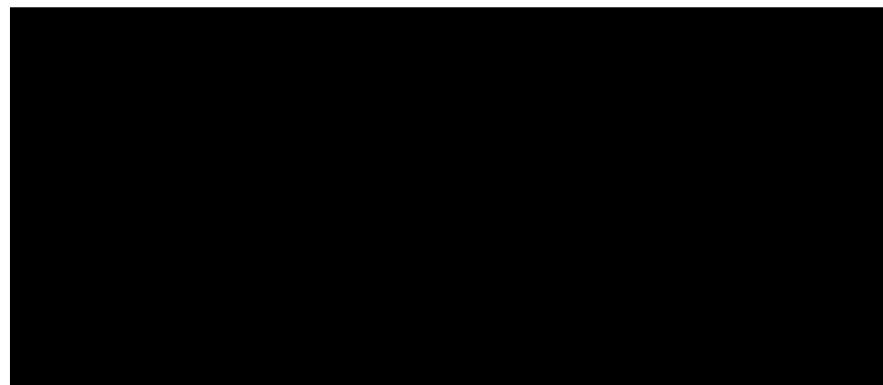




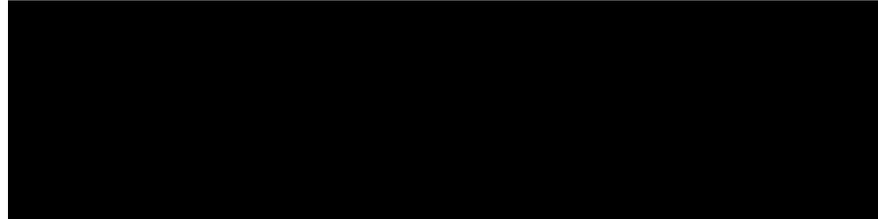












COUNSEL

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OPINION

BRUINIERS, J.—In 2007, Bradley Blackwell, then 17 years old, committed a burglary and attempted robbery with an accomplice. Uriel Carreno was shot and killed in the course of those offenses. Although Blackwell was a minor at the time he committed these offenses, the district attorney elected to directly file the case in adult court under the provisions of Welfare and Institutions Code section 707, subdivision (d). Blackwell was convicted in 2009 of first degree murder with a robbery-murder special circumstance (Pen. Code, §§ 187, subd. (a), 189, 190.2, subd. (a)(17)(A)) and sentenced to life without the possibility of parole (LWOP).¹

In a prior appeal (*People v. Blackwell* (June 20, 2013, A128197) [nonpub. opn.]), we reversed Blackwell’s sentence and remanded for resentencing pursuant to the constitutional standards announced in *Miller v. Alabama* (2012) 567 U.S. 460, 471, 477–480 [183 L.Ed.2d 407, 132 S.Ct. 2455, 2464,

¹ Undesignated statutory references are to the Penal Code.

2468–2469] (*Miller*) [mandatory LWOP sentences for homicide amount to cruel and unusual punishment under the 8th Amend. when imposed on defendant who was a juvenile at time of offense].² On remand, the trial court considered the factors outlined in *Miller*, and again imposed an LWOP sentence. Blackwell again appeals, arguing that the sentence amounts to cruel and unusual punishment, violates the Sixth Amendment, and constitutes an abuse of discretion. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND³

Uriel Carreno was living in the converted garage of his aunt and uncle's home on Joan Drive in Petaluma. On February 7, 2007, he ate lunch with his aunt and returned to his garage apartment. A friend of Carreno's came by later that afternoon and found him lying on the floor, not moving. Carreno had been shot four times in his side and once in his back and had died of his wounds. A piece of the wood doorjamb was found across the room and a muddy shoe print was on the door adjacent to the doorknob.

The police found five 9-millimeter shell casings of two different colors within three to five feet of Carreno's body. Forensic testing and the position of the casings revealed they were all fired from the same weapon while the shooter was inside the room. The coroner recovered five spent bullets from Carreno's body, all of which were fired from the same weapon. Two of the bullets had silver jackets (Silvertips) and the other three were Black Talon brand. There was no evidence that another firearm was discharged inside the room during the incident leading to Carreno's death.

Jeffrey Gray, a convicted felon, saw Blackwell with a nine-millimeter Beretta during early 2007. Gray saw Blackwell load it with different colored bullets, and Blackwell told Gray that some of them were solid points and some were hollow points. Blackwell referred to the hollow-point bullets as Black Talons.

² In the appeal *People v. Blackwell*, *supra*, A128197, Blackwell challenged his sentence and we originally affirmed. His petition for review was denied by the California Supreme Court (*People v. Blackwell* (Mar. 14, 2012, S199767), petn. den.), but the United States Supreme Court granted his petition for writ of certiorari, vacated the judgment, and remanded the case to this court for reconsideration in light of *Miller*, *supra*, 567 U.S. 460 [132 S.Ct. 2455], which was decided after issuance of our original opinion. After reconsideration in light of *Miller*, we remanded the case for resentencing. (*People v. Blackwell*, *supra*, A128197.) Our Supreme Court granted review of *Blackwell*, deferred briefing, and dismissed review (*People v. Blackwell* (July 9, 2014, S212074), review dism.) after it decided *People v. Gutierrez* (2014) 58 Cal.4th 1354 [171 Cal.Rptr.3d 421, 324 P.3d 245] (*Gutierrez*).

³ By separate order, we granted Blackwell's request for judicial notice of the record in his prior appeal. Our statement of facts is taken largely from *People v. Blackwell*, *supra*, A128197.

[REDACTED]

On the afternoon Carreno was shot, Blackwell called Christopher Ortele and asked for a ride to Petaluma near the Kmart so he could pay his cell phone bill. Ortele was in the process of installing a car stereo for his friend Amber Powell, who agreed to drive. Powell and Ortele picked up Blackwell, who was with Keith Kellum, and they all drove from Rohnert Park to the Petaluma Kmart, but when Powell was about to turn into the parking lot, either Blackwell or Kellum told her to go the other way and directed her to a residential neighborhood near the corner of Novak Drive and Joan Drive (the street on which Carreno lived).

After Powell parked the car, Blackwell and Kellum got out and walked in the direction of Joan Drive, telling Powell to wait for them. When they returned five to 15 minutes later, their demeanor had changed. They got into the car and were very quiet during the ride back. It appeared to Powell that Blackwell was "tearing up" and Kellum was consoling him.

Gray received a call from Blackwell that same afternoon and arranged to meet him at a trailer park where Gray was visiting a friend. Blackwell, Kellum, and Blackwell's brother, Colby, arrived in Colby's truck, and Gray got into the truck with them. Blackwell handed Gray some solvent and a rag and told him he wanted him to go inside a house or garage and wipe down any fingerprints that might be on the door. They pulled up to a house on Joan Drive, but saw fire trucks, police cars, and an ambulance outside. Blackwell appeared upset and explained he shot a guy they were trying to rob.

The group drove back to Blackwell's house, where Blackwell told Gray what happened in greater detail. Blackwell said he and Kellum went to Petaluma to "rob a guy" of some money and "dope" (crystal methamphetamine) and Kellum kicked in the door of the garage. Blackwell claimed that when he went into the garage, the guy inside took a shot at him, so he shot back several times.

Also on the day of the shooting, Blackwell called his girlfriend, Jacqueline Pollard, and asked her to come to his house. He sounded very anxious on the phone. When Pollard arrived she found Blackwell and Kellum stripped to their boxer shorts. Blackwell took her into the bathroom and told her in a "frantic" manner he had got a ride to Petaluma with some girl he did not know and had shot someone dead. Blackwell told Pollard he and Kellum had gone to a house, touched a doorknob, and kicked another door down, and he was afraid fingerprints and a footprint would be on two separate doors. He claimed that when they entered the room the person inside had been lying in bed and fired a shot between his head and Kellum's, so Blackwell fired a few shots into his chest. After the victim fell to the ground, Blackwell shot him a few more times. Blackwell admitted to Pollard he used his own gun, a

semiautomatic Pollard had seen before. He told Pollard he and Kellum were going to burn their clothes, and mentioned a pair of shoes and a jacket that would be placed in a backpack along with the gun and some extra bullets. Pollard saw a backpack containing loose bullets and shoes in Blackwell's bedroom. Blackwell wiped off a gun, wrapped it in a T-shirt, and placed it in the backpack, which Blackwell said he was going to bury.

Sometime later, Blackwell told Pollard he was concerned too many people knew the gun was in the bag and where it was buried. He drove her into the Santa Rosa hills and asked her whether he should move it. She told him it might not be a good idea because they had been stopped by the police a number of times in the car they were driving.

On a visit to Bryan Fishtrom's house in March or April 2007, Blackwell was carrying a dirty bandana that contained a rusty semiautomatic handgun, bullets, and a lot of mud. The bullets were different colors and some had hollow tips.

In March 2007, Gray was picked up on a parole violation and told the police what he knew about Blackwell's involvement in Carreno's murder. In April 2007, after he was released, Gray saw Blackwell and another brother, Gary, at Fishtrom's house. Blackwell and his brother asked Gray how he had gotten out of jail, and Blackwell suggested that they go for a ride together. Gray declined.

In May 2007, Blackwell's brother, Colby, directed police officers to a 50-gallon drum in a rural area. Colby moved the drum, revealing a hole in the ground that contained wet clothing, shoes, pieces of a rifle-cleaning kit, five rounds of nine-millimeter ammunition, and rifle grease. A T-shirt had rust stains and bore the imprint of a gun consistent with a Beretta nine-millimeter handgun.

Blackwell was interviewed by the police and initially denied knowing anything about Carreno's murder. Later, he said he and Kellum went to a house to "burn a guy for drugs," and Kellum kicked open the door and shot the person inside several times. Blackwell told officers he knew Kellum had a handgun before they went, his brother Colby buried some of the evidence, and he (Blackwell) sold the gun Kellum used in Santa Rosa.

Blackwell and Kellum were charged with first degree murder with felony-murder special circumstances (murder in the commission of an attempted robbery and a burglary or attempted burglary), burglary of an inhabited

[REDACTED]

[REDACTED]

dwelling house, and attempted robbery in an inhabited dwelling house.⁴ The information further alleged Blackwell personally used and intentionally discharged a firearm. (§§ 187, subd. (a), 190.2, subd. (a)(17)(A) & (G), 211, 459, 664, 1203.06, subd. (a)(1), and former §§ 12022.5, subd. (a), 12022.53, subds. (b)–(d).) Although Blackwell was 17 years old at the time of the killing, the district attorney elected to directly file the case in adult court pursuant to Welfare and Institutions Code section 707, subdivision (d).

Based on the foregoing evidence, a jury convicted Blackwell of first degree murder with felony-murder special circumstances (murder in the commission of an attempted robbery and a burglary or attempted burglary), burglary of an inhabited dwelling house, and attempted robbery of an inhabited dwelling house. The jury rejected allegations Blackwell had personally used or intentionally discharged a firearm in the commission of these offenses, causing death or great bodily injury.

After the jury returned its verdict, Blackwell’s trial counsel filed a sentencing memorandum arguing that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*), the court could not impose an adult sentence without a jury finding regarding Blackwell’s age at the time of the offenses. The court rejected this argument and imposed an LWOP term on the murder count. The trial court acknowledged its discretion to impose a lesser term of 25 years to life because Blackwell was under 18 when he committed the murder (see § 190.5, subd. (b); hereafter section 190.5(b)),⁵ but declined to exercise that discretion in light of Blackwell’s juvenile court history and the heinous nature of the current offenses.

After remand in his prior appeal, Blackwell’s counsel submitted a resentencing brief, arguing for a sentence of 25 years to life based on Blackwell’s drug use, his purported lack of a violent criminal history, and the assertion that Blackwell was “not the shooter.” The trial court also considered a supplemental presentencing report, in which the probation officer wrote: “[Blackwell] was approximately six months from the age of majority when the murder was committed. He was under the auspices of the Juvenile Court for approximately four years prior to the instant offense being committed, during which he spent a considerable amount of time away from his family while in placement and Juvenile Hall. We note his performance while a ward was completely unsatisfactory, and he was released from Juvenile Hall less

⁴ Kellum pleaded guilty to second degree murder before the jury was sworn.

⁵ Section 190.5(b) provides, “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for [LWOP] or, at the discretion of the court, 25 years to life.”

than a month before the commission of the murder. While it is not definitively known who actually shot the victim, by at least one account [Blackwell] reportedly admitted he was the shooter and that Blackwell, [Kellum], and two other individuals attempted to go back to the scene of the murder to clean the area of fingerprints, but were dissuaded by the appearance of police and emergency personnel, who [had] already arrived. At no time during the trial . . . did it appear [Blackwell] was coerced or manipulated by [Kellum] during the commission of the crimes. In fact, it appears it was [Blackwell] who secured the ride over to the victim's residence on the day of the murder. [Blackwell's] juvenile history is replete with offenses, including stealing semi-automatic handguns from his parents, possessing a knife on his person, and attacking another juvenile hall resident. [¶] . . . This officer believes, as the *Miller* Court described, that [Blackwell] is a 'rare juvenile offender whose crime reflects irreparable corruption' and, given the totality of factors present, has rightfully earned a lifetime in custody."

Over defense objection, the trial court also considered Blackwell's records from the Department of Corrections and Rehabilitation (CDCR). The CDCR records were summarized in an additional presentencing report.⁶ "[T]here was little in-depth information regarding overall performance outside the scope of his mental/physical health issues. However, in an evaluation memo dated 02/26/14, records indicate [Blackwell], at the time, was facing a '115 disciplinary process' regarding an incident at Kern Valley State Prison for allegations of 'Conspiracy to Commit Murder.' It is unknown what the outcome of this 115 was. Nevertheless, the same memo outlined the fact [Blackwell] had 'been [previously] found guilty of 4 RVR's [(rules violation reports)] for Fighting, 1 RVR for Battery on an Inmate, and 1 RVR for Participation in a Riot.' It appears that over the years [Blackwell] was sent to the emergency room for treatment on at least two occasions for fighting or being assaulted. The 2014 memo noted his mental health was considered stable for the most part, with 'no indication of severe mental illness, danger to self, or grave disability' at the time of the assessment. . . . Notes further indicate by August 2014 [Blackwell] had distanced himself from the prison gang '2-5ers.' We note that according to current custody information, [Blackwell] has several tattoos, including '187' in fangs on his chest."

On February 24, 2015, at the conclusion of a resentencing hearing, the trial court resentenced Blackwell to an LWOP term on the murder count. The trial court concluded "the sentence initially imposed was appropriate based on the factors existing at the time of the initial sentencing and is still the appropriate

⁶ Although neither Blackwell's CDCR records, nor the probation department's supplemental presentencing reports initially appeared in the record before us, we have augmented the record to include the supplemental probation reports. There appears to be no dispute the probation report accurately summarizes the content of Blackwell's CDCR records.

[REDACTED]
[REDACTED]

sentence after consideration of [Blackwell]’s performance as a prisoner at [CDCR]. The record before the court indicates that [Blackwell] is a ‘rare juvenile offender whose crime reflects irreparable corruption’ *Miller, supra.*’ The court explained:

“a. Age: [Blackwell] was 17 years and six months of age at the time of committing the murder. There is no evidence that [Blackwell] was particularly immature, impetuous, or failed to appreciate the risks and consequences of his act.

“b. Environmental vulnerabilities: There is no evidence of childhood abuse or neglect. Blackwell committed his first felony, theft of firearms, at the age of 13 and spent considerable periods outside the family home, in the custody of the Juvenile Court during the remainder of his childhood. There is no evidence that Blackwell’s educational opportunities were limited, but the [CDCR] records indicate that he did not take full advantage of the opportunities that were offered to him. There is no evidence of susceptibility to psychological damage or emotional disturbance.

“c. Circumstances of the offense: The evidence indicates that Blackwell fully participated in the planning, execution and attempted cover-up of the crime, the brutal execution of the victim, who was lying in his own bed. There is no indication of familial or peer pressure. There is some evidence that Blackwell was using methamphetamine around the time of the crime, but no evidence of intoxication during the commission of the crime. *At trial, the jury verdict found not true the allegation that Blackwell used a gun. However, before trial, Blackwell admitted to his girlfriend . . . that he shot the victim with his 9 mm gun. At trial, Ms. Pollard testified credibly to this fact.*

“d. Possible lesser charges: The record contains no indication that a lesser offense should have been charged.

“e. Possibility of rehabilitation: The court has reviewed Blackwell’s [CDCR] records to determine whether there is an indication of a possibility of rehabilitation. These records do not show any attempts by [Blackwell] to rehabilitate himself. In fact, the records show a history of violent assaults involving [Blackwell], some of which he was not the primary aggressor, and some of which he was found to have initiated, including incidents in April of 2012 and July and December of 2013. In January of 2014, [Blackwell] was found in possession of a razor which had been embedded in a toothbrush and which was possibly involved in a conspiracy to commit murder on another inmate. In addition, the records indicate that at some time during his incarceration he participated in a criminal prison gang, although he later attempted to separate himself from that gang. [Blackwell’s] attorney argues

strenuously that a lack of rehabilitation cannot be inferred from his prison records because as a life prisoner he is not afforded rehabilitative opportunities afforded to other prisoners. While this may be true, the record does not indicate any effort by [Blackwell] to reject a life of violence.” (Italics added.)

The trial court also considered the following section 190.3 factors:⁷

“A. Circumstances of crime: This was a cold-blooded murder committed in the course of a residential burglary. The murderer was planned by [Blackwell] and his accomplice. They also planned and attempted to execute a failed cleanup of the crime scene.

“B. Prior criminal activities, use of force: In 2002 Blackwell stole firearms. In 2004 Blackwell escaped from Hannah Boys Center and was found in possession of knives. In 2005 Blackwell threatened his girlfriend while in possession of a knife and instigated fights at his girlfriend’s school. In 2006 Blackwell attacked a rival gang member in the Juvenile Hall.

“C. Felony convictions: Blackwell suffered juvenile adjudications based on theft of guns and possession of methamphetamine.

⁷ Section 190.3 provides in relevant part: “If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or [LWOP]. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant’s character, background, history, mental condition and physical condition. [¶] . . . [¶] In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1. [¶] (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. [¶] (c) The presence or absence of any prior felony conviction. [¶] (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. [¶] (e) Whether or not the victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act. [¶] (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct. [¶] (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person. [¶] (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication. [¶] (i) The age of the defendant at the time of the crime. [¶] (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. [¶] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”

“D. Offense committed under influence of extreme emotional or mental disturbance: There is no evidence of either extreme emotional or mental disturbance.

“E. The victim participated in the homicide. The victim was in his own home lying on his bed at the time that he was brutally murdered.

“F. Reasonable belief in moral justification: There is no evidence that [Blackwell] believed in a moral justification for his acts.

“G. Extreme duress: [Blackwell] was an active participant in the murder, furnished the murder weapon, and organized the cleanup attempt. He was not under duress.

“H. Mental disease or defect or intoxication impairing capacity to appreciate criminality: There is no evidence that [Blackwell] suffered from a disease or defect. There is evidence that he has achieved only a low level of education. It is possible [Blackwell] was under the influence of methamphetamine but there is no evidence that his ability to appreciate the criminality of what he did was impaired.

“I. Age: [Blackwell] was within six months of becoming an adult.

“J. Accomplice with minor participation: [Blackwell] was an active participant. He organized the murder, arranged for a ride to the crime scene, and broke into the bedroom of the victim.

“K. Circumstances extenuating gravity: There are no such circumstances.”

The trial court also considered the following factors in aggravation:

“A1. Crime of great cruelty viciousness and callousness. [Blackwell] broke into the bedroom of a victim lying on his bed and participated in the execution of the victim;

“A3. Vulnerability of the victim. The victim was at home lying in bed at the time that he was executed.

“A4. Inducement of others to participate. [Blackwell] planned the crime and obtained a ride to the scene both to commit the murder and an aborted attempt to clean up the scene afterward. [Blackwell] also furnished the gun which was the murder weapon.

“A8. Planning and sophistication. This was not a crime of passion, but a well-planned residential burglary. The execution was planned in advance of the entry into the bedroom.

“B1. Violent conduct. [Blackwell] exhibits an escalating level of violence as a juvenile culminating in the execution style murder for which he was convicted.

“B5. Performance on probation. While a ward of the court as a juvenile, [Blackwell] escaped twice, committed new offenses, and was found in possession of weapons.”

The trial court determined, “[t]here are no applicable factors in mitigation.” It explained: “A1. [Blackwell] was an active rather than passive participant in the crime. [¶] A2. The victim did not initiate or willingly participate in the crime. [¶] A3. There were no unusual circumstances such as great provocation to make it unlikely that the crime would occur. [¶] A4. No coercion or duress has been shown. [¶] A5. [Blackwell] was not induced by others and did show a predisposition to commit the offense. [¶] A6. [Blackwell] did not exercise caution to avoid harm. [¶] A7. There is no claim of right shown. [¶] A8. The crime was not committed to provide for the necessities of life. [¶] A9. [Blackwell] was not abused by the victim. [¶] B1. [Blackwell] has a substantial prior record. [¶] B2. [Blackwell] has not demonstrated a mental condition which reduces his culpability. [¶] B3. [Blackwell] did not acknowledge culpability at an early stage. [¶] B4. Probation is precluded in this case. [¶] B5. Restitution is not an issue. [¶] B6. There is no evidence that [Blackwell] could perform satisfactorily when under the jurisdiction of the juvenile court. To the contrary, he escaped a number of times, committed crimes, was found in possession of weapons, and created disruption at the Juvenile Hall by engaging in gang violence and by taunting rival gang members.” Blackwell filed a timely notice of appeal.

II. DISCUSSION

Blackwell argues his LWOP sentence must be reversed for the following reasons: (1) the sentence violates his Sixth Amendment rights under *Apprendi, supra*, 530 U.S. 466 because it exceeds the punishment allowable absent a jury finding of irreparable corruption; (2) his sentence amounts to cruel and unusual punishment under the Eighth Amendment, as construed in *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825, 130 S.Ct. 2011] (*Graham*), because he did not personally kill or intend to kill Carreno; (3) the trial court violated both *Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455] and *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428] (*Ring*) in “elevating” his punishment to LWOP in reliance on a finding in conflict with the jury’s

implicit findings; (4) the trial court abused its discretion; and (5) the trial court violated *Graham* in considering his CDCR records from the time period after his original sentencing. Blackwell's arguments are without merit as they are premised on fundamental misconceptions about the application of *Miller*, *Graham*, section 190.5(b), as well as *Apprendi* and its progeny.

A. Legal Framework

The primary question presented by Blackwell's appeal is one of first impression in California. Who determines the sentence in a case involving the potential for imposition of LWOP against a juvenile offender tried as an adult and convicted of first degree murder with special circumstances—the court or a jury? Blackwell argues that the Eighth Amendment limits on juvenile sentencing established in *Miller* and *Graham* trigger a Sixth Amendment right to jury findings before a juvenile offender convicted of homicide can be sentenced to LWOP. Our review leads us to a different conclusion. As the question involves the intersection of the Sixth and Eighth Amendments to the federal Constitution, we begin by summarizing the relevant precedent from the United States Supreme Court.

■ The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” “The Federal Constitution’s jury-trial guarantee assigns the determination of certain facts to the jury’s exclusive province.” (*Oregon v. Ice* (2009) 555 U.S. 160, 167 [172 L.Ed.2d 517, 129 S.Ct. 711].) “This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.” (*Hurst v. Florida* (2016) 577 U.S. ___, ___ [193 L.Ed.2d 504, 136 S.Ct. 616, 621].) In *Apprendi*, the United States Supreme Court held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490, italics added.) In *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*), the high court further defined “statutory maximum” as the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.” (*Id.* at p. 303.)

The United States Supreme Court has since applied “*Apprendi*’s rule to facts subjecting a defendant to the death penalty, [(*Ring, supra*, 536 U.S. at pp. 602, 609)], facts allowing a sentence exceeding the ‘standard’ range in Washington’s sentencing system, [(*Blakely, supra*, 542 U.S. at pp. 304–305)], and facts prompting an elevated sentence under then-mandatory Federal Sentencing Guidelines, [(*United States v. Booker* (2005) 543 U.S. 220, 244

[160 L.Ed.2d 621, 125 S.Ct. 738]).]” (*Oregon v. Ice, supra*, 555 U.S. at p. 167.) And in *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*), the high court held California’s then operative determinate sentencing law (DSL) violated the Sixth Amendment by “allow[ing] a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Cunningham*, at p. 275.)⁸

■ “The high court’s decision in [*Oregon v. Ice*,] *supra*, 555 U.S. 160, refined and circumscribed the scope of the rule of *Apprendi* and its progeny in significant ways.” (*People v. Mosley* (2015) 60 Cal.4th 1044, 1057 [185 Cal.Rptr.3d 251, 344 P.3d 788].) In concluding that the decision to impose consecutive sentences is not subject to *Apprendi*, the *Oregon v. Ice* court observed: “The [*Apprendi*] rule’s animating principle is the preservation of the jury’s historic role as a bulwark between the State and the accused at the trial for an alleged offense. [Citation.] Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury’s traditional domain.” (*Oregon v. Ice*, at p. 168.) But the Supreme Court also emphasized that *Apprendi* does not extend “beyond the offense-specific context that supplied the historic grounding for the decisions.” (*Oregon v. Ice*, at p. 163.)

■ The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” This provision “guarantees individuals the right not to be subjected to excessive sanctions” and “flows from the basic ‘‘precept of justice that punishment for crime should be graduated and proportioned’’ to both the offense and the offender. (*Roper v. Simmons* (2005) 543 U.S. 551, 560 [161 L.Ed.2d 1, 125 S.Ct. 1183] (*Roper*).) “The concept of proportionality is central to the Eighth Amendment.” (*Graham, supra*, 560 U.S. at p. 59.) Cases addressing the proportionality of sentences have fallen into two general classifications: challenges to the length of a term of years sentence as disproportionate in a particular case, and categorical challenges to the type of sentence imposed in certain types of cases, against a certain type of defendant. (*Ibid.*)

⁸ Following *Cunningham, supra*, 549 U.S. 270, our Legislature reformed the DSL and eliminated its provision that the middle term is the default term in the absence of aggravating or mitigating factors. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850 [62 Cal.Rptr.3d 588, 161 P.3d 1146]; former § 1170, subd. (b), as amended by Stats. 2007, ch. 3, § 2, p. 5 “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court” (italics added).) The DSL was also amended to eliminate the prior requirement that the court state “facts” in support of its decision to impose an upper or lower term. (Compare Stats. 2007, ch. 3, § 2, p. 5 with Stats. 2004, ch. 747, § 1, p. 5807.)

■ Particularly relevant here, the Eighth Amendment prohibition “encompasses the ‘foundational principle’ that the ‘imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.’ (*Miller, supra*, 567 U.S. at p. 474 [132 S.Ct. at p. 2466].) From this principle, the high court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile (*Roper, [supra]*, 543 U.S. at p. 578); (2) no juvenile who commits a nonhomicide offense may be sentenced to LWOP (*Graham, supra*, 560 U.S. at p. 74); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP (*Miller*, at p. 463 [132 S.Ct. at p. 2460]).” (*People v. Franklin* (2016) 63 Cal.4th 261, 273–274 [202 Cal.Rptr.3d 496, 370 P.3d 1053].)

“As to homicide offenses, the United States Supreme Court has held that a state may not impose a *mandatory* LWOP sentence on a juvenile offender, although the sentencing court might impose such a sentence if it has adequately considered the offender’s age and environment and found ‘‘irreparable corruption.’’ (*Miller*, *supra*, 567 U.S. at pp. 479–480 [132 S.Ct. at pp. 2468–2469]) [noting LWOP sentence for a juvenile offender would be ‘uncommon’ and imposed against the ‘‘rare juvenile offender whose crime reflects irreparable corruption’’]”) (*People v. Lewis* (2013) 222 Cal.App.4th 108, 118 [165 Cal.Rptr.3d 624].) Building on its categorical precedents in *Roper, supra*, 543 U.S. 551 and *Graham, supra*, 560 U.S. 48, the *Miller* court explained, “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. [Citation.] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” (*Miller*, at p. 479 [132 S.Ct. at p. 2469].)

■ The *Miller* court discussed the reasons that juveniles are “constitutionally different” from adults for sentencing purposes, including their lack of maturity and underdeveloped sense of responsibility, their vulnerability to outside pressure and negative influences, their limited control over their own environment and their inability to extricate themselves from crime-producing settings, and their greater ability to change due to their possession of a character not as “‘well formed’” as that of an adult. (*Miller, supra*, 567 U.S. at p. 471 [132 S.Ct. at p. 2464].) The court further observed that scientific studies show “‘[o]nly a relatively small proportion of adolescents’” who engage in illegal activity “‘develop entrenched patterns of problem behavior.’’” (*Ibid.*) These characteristics were deemed “at odds” with the defining features of LWOP, which “‘forswears altogether the rehabilitative ideal’” and “reflects ‘an irrevocable judgment about [an offender’s] value and place in society.’” (*Id.* at p. 473 [132 S.Ct. at p. 2465].) Thus, mandatory LWOP for a juvenile “disregards the possibility of rehabilitation even when

the circumstances most suggest it.” (*Id.* at p. 478 [132 S.Ct. at p. 2468].) However, in prohibiting mandatory LWOP sentences, *Miller* made clear that it was not establishing a categorical prohibition on LWOP sentences for juvenile offenders convicted of homicide, but requiring individualized sentencing for such offenses. (*Id.* at pp. 474, fn. 6, 479–480 [132 S.Ct. at pp. 2466, fn. 6, 2469].)

B. *Is a Jury Finding of Irreparable Corruption Required Under Apprendi?*

Blackwell’s primary premise on appeal is that “the categorical Eighth Amendment limits” established in *Miller* and *Graham* trigger a Sixth Amendment right to jury findings before a juvenile offender convicted of homicide can be sentenced to LWOP. According to Blackwell, absent a jury finding of irreparable corruption, a sentence of 25 years to life is the “statutory maximum” a juvenile offender convicted of homicide can receive under section 190.5(b), and *Miller*. Thus, the trial court’s imposition of an LWOP term violated his Sixth Amendment right to a jury trial because a judge, rather than a jury, made a “finding” he was irreparably corrupt. Blackwell’s first premise is flawed.

Miller does not address the issue of who should decide whether a juvenile offender receives an LWOP sentence. The court simply states: “*Graham, Roper*, and our individualized sentencing decisions make clear that *a judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” (*Miller, supra*, 567 U.S. at p. 489 [132 S.Ct. at p. 2475], italics added.) Instead, Blackwell reasons that a jury must determine the sentence because section 190.5(b) and *Miller* create a new “statutory maximum” sentence of 25 years to life for juvenile offenders convicted of special circumstance murder. We first address California’s statutory scheme, an area in which we do not write on a blank slate.

■ *Miller* involved two 14-year-old offenders who were tried as adults, convicted of murder, and sentenced to LWOP terms under state laws that gave the sentencing court no discretion to impose a lesser sentence. (*Miller, supra*, 567 U.S. at pp. 465–469, 477–478 [132 S.Ct. at pp. 2460–2463, 2468].) Section 190.5(b) differs from the mandatory schemes found unconstitutional in *Miller*, because it has long afforded courts discretion to impose a term that affords the possibility of parole. After *Miller*, our Supreme Court has construed this discretion as involving no presumption in favor of LWOP for defendants who were tried as adults but were 16 or 17 when they committed first degree murder with a special circumstance. (*Gutierrez, supra*, 58 Cal.4th at p. 1360; *People v. Palafox* (2014) 231 Cal.App.4th 68, 89 [179 Cal.Rptr.3d 789].)

In *Gutierrez*, our Supreme Court considered LWOP sentences imposed against two 17 year olds who, like Blackwell, had been convicted of first degree murder with special circumstances. (*Gutierrez, supra*, 58 Cal.4th at p. 1360.) The high court first observed that “[f]or two decades, the Courts of Appeal have uniformly interpreted section 190.5(b) as establishing a presumption in favor of [LWOP] for juvenile offenders who were 16 years of age or older when they committed special circumstance murder.” (*Gutierrez*, at p. 1369.) In order to render section 190.5(b) “‘free from doubt as to its constitutionality’” (*Gutierrez*, at p. 1387), the court disapproved that presumption and construed section 190.5(b), as “confer[ring] discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to [LWOP] or to 25 years to life, *with no presumption in favor of [LWOP]*” (*Gutierrez*, at p. 1360, italics added). (See *id.* at pp. 1379–1380.) So construed, section 190.5(b) does not violate the Eighth Amendment “[b]ecause the sentencing regime created by section 190.5(b) authorizes and indeed requires consideration of the distinctive attributes of youth highlighted in *Miller*” (*Gutierrez*, at p. 1361; see *id.* at p. 1387.)

■ The *Gutierrez* court did not address the *Apprendi* issue Blackwell raises. *Gutierrez* merely stated that “a sentencing court” considering LWOP or a 25-year-to-life term for a juvenile offender must consider the aggravating and mitigating factors enumerated in section 190.3 and the California Rules of Court, as well as the offender’s chronological age and its hallmark features, any information regarding the juvenile’s family and home environment, all information available regarding the circumstances of the homicide offense, including the extent of the juvenile’s participation and the existence of any familial or peer pressure, any information as to whether the juvenile might have been charged and convicted of a lesser offense if not for the incompetencies of youth, and any other information bearing on the possibility of rehabilitation. (*Gutierrez, supra*, 58 Cal.4th at pp. 1387–1389.) The court reiterated, “the trial court must consider all relevant evidence bearing on the ‘distinctive attributes of youth’ discussed in *Miller* and how those attributes ‘diminish the penological justifications for imposing the harshest sentences on juvenile offenders.’ [Citation.] To be sure, not every factor will necessarily be relevant in every case. For example, if there is no indication in the presentence report, in the parties’ submissions, or in other court filings that a juvenile offender has had a troubled childhood, then that factor cannot have *mitigating* relevance. But *Miller* ‘require[s] [the sentencer] to take into account how children are different, and *how those differences counsel against* irrevocably sentencing them to a lifetime in prison.’” (*Gutierrez*, at p. 1390, italics added.)

■ Thus, contrary to Blackwell’s assertion, 25 years to life is not the “statutory maximum” under section 190.5(b). (*Gutierrez, supra*, 58 Cal.4th at pp. 1360, 1379–1380, 1387.) Section 190.5(b) and *Gutierrez* make clear that

judges in California have discretion to determine the appropriate sentence for a 16- or 17-year-old offender convicted of first degree murder with special circumstances—LWOP or life with the possibility of parole after 25 years. (*Gutierrez*, at pp. 1360, 1379–1380, 1387.) Nor did the *Gutierrez* court “suggest section [190.5(b)] evinces a preference *for* a sentence of 25 years to life.” (*People v. Palafox, supra*, 231 Cal.App.4th at p. 91; accord, *Gutierrez*, at p. 1379.)

Thus, we agree with the People that after the jury convicted Blackwell of first degree murder with special circumstances, LWOP was the maximum statutory sentence the court could impose. The trial court’s consideration of the *Miller/Gutierrez* factors relating to the offense and offender in exercising its discretion to impose sentence within a prescribed range did not violate *Apprendi*. (See *Alleyne v. United States* (2013) 570 U.S. ___, ___ [186 L.Ed.2d 314, 133 S.Ct. 2151, 2163] [“[w]e have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment”]; *Cunningham, supra*, 549 U.S. at p. 294 [in the wake of *Apprendi* and *Blakely* some states “have chosen to permit judges genuinely ‘to exercise broad discretion . . . within a statutory range,’ which, ‘everyone agrees,’ encounters no Sixth Amendment shoal” (fn. omitted)]; *Apprendi, supra*, 530 U.S. at p. 481 [“nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute”]; *People v. Sandoval, supra*, 41 Cal.4th at pp. 843–844, 852 [reformation of DSL to afford trial court broad discretion to select among three specified terms cures constitutional defect in statute].)

Nor does Blackwell’s reliance on *Ring, supra*, 536 U.S. 584 persuade us to reach a different conclusion. In *Ring*, the United States Supreme Court held the Sixth Amendment requires a jury, not a judge, to make the determination of any aggravating factor that makes a defendant *eligible for imposition* of the death penalty. (*Ring*, at p. 609.) However, *Ring* has had limited impact on California’s death penalty scheme. (*People v. Prieto* (2003) 30 Cal.4th 226, 263 [133 Cal.Rptr.2d 18, 66 P.3d 1123].)

“[A] state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” (*Kansas v. Marsh* (2006) 548 U.S. 163, 173–174 [165 L.Ed.2d 429, 126 S.Ct. 2516].) In holding that a jury must find beyond a reasonable doubt any fact that makes a defendant *eligible* for imposition of the death penalty, *Ring*

involved the first *Kansas v. Marsh* requirement.⁹ (*Ring, supra*, 536 U.S. at p. 609.) Yet, “[t]he federal Constitution does not require the jury to find beyond a reasonable doubt that the prosecution proved each aggravating factor, that the circumstances in aggravation outweigh those in mitigation, or that death is the appropriate penalty.” (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133, 841 P.2d 118].)

“ ‘[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, *death is no more than the prescribed statutory maximum for the offense*; the only alternative is life imprisonment without the possibility of parole.’ [Citation.] Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines ‘whether a defendant eligible for the death penalty should in fact receive that sentence.’ (*Tuilaepa v. California* (1994) 512 U.S. 967, 972 [129 L.Ed.2d 750, 114 S.Ct. 2630].) No single factor therefore determines which penalty—death or [LWOP—is appropriate. [¶] . . . [T]he penalty phase determination ‘is inherently moral and normative, not factual . . .’ [Citation.] Because any finding of aggravating factors during the penalty phase does not ‘increase[] the penalty for a crime beyond the prescribed statutory maximum’ (*Apprendi, supra*, 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California’s penalty phase proceedings.” (*People v. Prieto, supra*, 30 Cal.4th at p. 263, italics added; accord, *People v. Prince* (2007) 40 Cal.4th 1179, 1297–1298 [57 Cal.Rptr.3d 543, 156 P.3d 1015]; *People v. Manriquez* (2005) 37 Cal.4th 547, 589 [36 Cal.Rptr.3d 340, 123 P.3d 614].)

■ Sections 190.2 and 190.5(b), similarly require a special circumstance finding before a 16 or 17 year old convicted of first degree murder is eligible

⁹ *Ring* involved Arizona’s first degree murder statute, which “‘authorizes a maximum penalty of death only in a formal sense,’ [citation], for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.” (*Ring, supra*, 536 U.S. at p. 604; see *id.* at p. 597.) Thus, “‘[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.’” (*Id.* at p. 596.) “Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ ” the court held that “the Sixth Amendment requires that they be found by a jury.” (*Id.* at p. 609.)

The high court has frequently used the terms “‘aggravating circumstance’ ” or “‘aggravating factor’ to refer to those statutory factors which determine death eligibility This terminology becomes confusing when, as in [California], a State employs the term ‘aggravating circumstance’ to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty.” (*Brown v. Sanders* (2006) 546 U.S. 212, 216, fn. 2 [163 L.Ed.2d 723, 126 S.Ct. 884].)

for an LWOP term.¹⁰ Once such a juvenile offender has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, the sentencing court need not find any particular fact before imposing LWOP. The “statutory maximum” for *Apprendi* purposes was determined when the jury returned its guilty verdict on the charge of first degree murder with special circumstances. (§ 190.5(b); *Gutierrez, supra*, 58 Cal.4th at pp. 1360, 1379–1380, 1387.) No additional factfinding by the judge was required to impose an LWOP sentence.

The only cited authority supporting Blackwell’s argument is *People v. Skinner* (2015) 312 Mich.App. 15 [877 N.W.2d 482] (*Skinner*), in which a divided panel of the Michigan Court of Appeals held “the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of [LWOP] have a right to have their sentences determined by a jury.” (*Id.*, 877 N.W.2d at p. 484.)

In *Skinner*, the juvenile defendant was convicted of first degree premeditated murder, attempted murder, and conspiracy to commit murder. In a proceeding under their applicable sentencing statute (Mich. Comp. Laws § 769.25),¹¹ the defendant was sentenced to LWOP for the first degree murder conviction (*Skinner, supra*, 877 N.W.2d at p. 485). The defendant argued on appeal that the facts necessary to impose such a sentence under *Miller* and the Michigan sentencing statute had to be found by a jury because such facts exposed her to a penalty greater than otherwise authorized by the jury’s verdict. (*Skinner*, at pp. 485, 491.) Relying on *Apprendi, supra*, 530 U.S. 466 and its progeny, the *Skinner* court agreed. The court relied on the sentencing statute, which provided that absent a prosecutor’s motion, “‘the court shall sentence the defendant to a term of years.’” (*Skinner*, at p. 497.) Thus, “[i]n order to enhance a juvenile’s default sentence to [LWOP], absent a waiver, a jury must make findings on the *Miller* factors as codified [in the statute] to

¹⁰ By accepting Blackwell’s analogy to the death penalty, we do not mean to suggest that death is not “‘qualitatively different from all other punishments.’” (*People v. Jones* (2012) 54 Cal.4th 1, 81 [140 Cal.Rptr.3d 383, 275 P.3d 496].) We reject Blackwell’s unsupported attempt to import wholesale the high court’s adult death penalty jurisprudence. There is no authority to support Blackwell’s additional assertion that the holding of *Godfrey v. Georgia* (1980) 446 U.S. 420 [64 L.Ed.2d 398, 100 S.Ct. 1759] “must apply in juvenile life without parole cases.” In any event, the California Supreme Court “has consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty.” (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195 [13 Cal.Rptr.3d 34, 89 P.3d 353].)

¹¹ In response to *Miller*, the Michigan Legislature enacted Michigan Compiled Laws section 769.25 to permit the prosecutor to move for imposition of an LWOP sentence after conviction on an eligible offense. On such a motion, the trial court was instructed to conduct a hearing to consider the *Miller* factors, in addition to any other relevant aggravating and mitigating circumstances specified under the statute. (*Skinner, supra*, 877 N.W.2d at pp. 488–490.)

determine beyond a reasonable doubt whether the juvenile's crime reflects irreparable corruption." (*Id.* at p. 504, italics added.)

Skinner is distinguishable because the Michigan statute, unlike our own, established a default term of years sentence and "the *Miller* factors are used to seek enhancement of defendant's punishment." (*Skinner, supra*, 877 N.W.2d at p. 501; see *id.* at p. 496.) Our Supreme Court, on the other hand, has explicitly construed section 190.5(b) to provide discretion to the sentencing court to choose either 25 years to life or LWOP. (*Gutierrez, supra*, 58 Cal.4th at pp. 1360, 1379–1380, 1387.) LWOP is the statutory maximum sentence for a 16 or 17 year old convicted of first degree murder with special circumstances. (*Ibid.*; § 190.5(b).)¹²

Our statutory analysis does not completely resolve Blackwell's argument, however. Blackwell raises an additional argument that, notwithstanding section 190.5(b) and *Gutierrez*, *Miller* alone imposes a categorical Eighth Amendment limit that acts as a ceiling beyond which a juvenile offender convicted of homicide cannot be sentenced, unless a jury finds beyond a reasonable doubt that he is irreparably corrupt. The People disagree, contending that *Miller* is only about the "process for selecting the appropriate penalty, not about . . . determining who is *eligible* for a particular penalty." (Italics added.) Neither position is entirely accurate.

■ The *Miller* opinion "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the high court] did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (*Miller, supra*, 567 U.S. at p. 483 [132 S.Ct. at p. 2471].) But *Miller* also cautioned: "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this *harshest possible penalty* will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at pp. 479–480 [132 S.Ct. at p. 2469], italics added & fn. omitted.)

¹² Subsequent authority suggests *Skinner* is no longer good law in Michigan. (See *People v. Hyatt* (2016) 316 Mich.App. 368, 399 [891 N.W.2d 549, 564] ["[n]either *Miller* nor [the Michigan sentencing statute] implicates the right to a jury trial under *Apprendi* and its progeny"].)

The United States Supreme Court has since concluded that *Miller*'s prohibition on mandatory LWOP for juvenile offenders announced a substantive rule of constitutional law that must be given retroactive effect. (*Montgomery v. Louisiana* (2016) 577 U.S. ___, ___ [193 L.Ed.2d 599, 136 S.Ct. 718, 729, 732] (*Montgomery*).) In reaching that conclusion, the *Montgomery* court said, "Because *Miller* determined that sentencing a child to [LWOP] is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' [citation], it rendered [LWOP] an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [Citation.] . . . ¶ . . . *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to [LWOP]. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that [LWOP] could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." (*Montgomery*, at p. ___ [136 S.Ct. at p. 734].)

■ *Montgomery* is inconsistent with the People's position that *Miller* is entirely procedural, but it is not determinative of Blackwell's Sixth Amendment argument. The *Montgomery* court recognized *Miller* has "a procedural component" and also confirmed *Miller* does *not* require a finding of fact regarding a child's incorrigibility or irrevocable corruption. (*Montgomery, supra*, 577 U.S. at p. ___ [136 S.Ct. at p. 734]; see *id.*, at p. ___ [136 S.Ct. at p. 735] ["*Miller* did not impose a formal factfinding requirement"]; *State v. Fletcher* (La.Ct.App. 2014) 149 So.3d 934, 943.) Rather, to comply with *Miller*'s procedural component, "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to [LWOP] from those who may not. [Citation.] The hearing does not replace but rather gives effect to *Miller*'s substantive holding that [LWOP] is an excessive sentence for children whose crimes reflect transient immaturity." (*Montgomery*, at p. ___ [136 S.Ct. at p. 735].) As the People put it, "irreparable corruption" is not a factual finding, but merely "encapsulates the [absence] of youth-based mitigation."

This brings us to another reason Blackwell's *Apprendi* argument is unpersuasive. Blackwell urges us to apply *Apprendi* beyond situations where the facts authorizing a particular sentence are specified by the Legislature in statutes. (See *Apprendi, supra*, 530 U.S. at p. 490 ["[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed *statutory* maximum must be submitted to a jury, and proved beyond a reasonable doubt” (italics added)]; Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights* (2015) 56 B.C. L.Rev. 553, 577.) In Blackwell’s view, nothing bars the extension of the *Apprendi* principle to not only statutorily prescribed facts, but also to facts with constitutional origins. (See *In re Coley* (2012) 55 Cal.4th 524, 565 [146 Cal.Rptr.3d 382, 283 P.3d 1252] (conc. opn. of Liu, J.) [observing that the aggravating factors in *Ring* were statutorily specified, but only “because the high court’s Eighth Amendment jurisprudence had required legislatures to specify such factors to distinguish death-eligible . . . crimes”]; see also *Ring, supra*, 536 U.S. at p. 606 [“States have constructed elaborate sentencing procedures in death cases . . . because of constraints we have said the Eighth Amendment places on capital sentencing”]; *United States v. Booker, supra*, 543 U.S. at pp. 237, 244 [distinction between maximum sentences set by statute and those set by sentencing guidelines “lacks constitutional significance”].) But we know of no authority directly holding *Apprendi* applicable to such constitutionally prescribed facts.

In fact, there is authority to the contrary. In *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368] (*Enmund*), the United States Supreme Court concluded that the Eighth Amendment forbids the imposition of the death penalty on “one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” (*Enmund*, at p. 797; see *id.* at pp. 788, 801.) In *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127, 107 S.Ct. 1676] (*Tison*), the high court qualified that ruling, holding “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” (*Id.* at p. 158, fn. omitted.)

In a case decided before *Apprendi* or *Ring*, the United States Supreme Court held the Sixth Amendment does not require *Enmund/Tison* findings be made by a jury. (*Cabana v. Bullock* (1986) 474 U.S. 376, 386 [88 L.Ed.2d 704, 106 S.Ct. 689] (*Cabana*), disapproved on other grounds by *Pope v. Illinois* (1987) 481 U.S. 497, 503–504, fn. 7 [95 L.Ed.2d 439, 107 S.Ct. 1918].) The court reasoned: “[O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury. . . . *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill. [¶] The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury.” (*Cabana*, at p. 385, fn. omitted.) Some of the *Cabana*

court's reasoning is reminiscent of *Oregon v. Ice*. (*Cabana*, at p. 386 [“decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant’s constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make”].) Yet other portions of *Cabana*’s reasoning appear irreconcilable with *Apprendi* and *Ring*. (See *Cabana*, at p. 386 [“the rule remains a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury”]; cf. *Ring*, *supra*, 536 U.S. at pp. 589, 598, 609 [disapproving *Walton v. Arizona* (1990) 497 U.S. 639 [111 L.Ed.2d 511, 110 S.Ct. 3047], which “drew support from *Cabana*”].)¹³

The high court has never explicitly overruled *Cabana*’s holding that a judge may make the Eighth Amendment findings mandated by *Enmund* and *Tison*. Because the *Enmund/Tison* findings serve to disqualify otherwise death-eligible defendants, and thus mitigate punishment, we view *Cabana*’s holding as not inconsistent with *Apprendi*. (See *People v. Ring* (2003) 204 Ariz. 534, 564 [65 P.3d 915] [“difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury” (italics added)]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1229–1230 [65 Cal.Rptr.3d 177] [*Apprendi* and its progeny not implicated by consideration of factors that mitigate punishment]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267 [104 Cal.Rptr.2d 641] [same]; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 [7 Cal.Rptr.3d 4] [same].)

■ Similarly, *Miller* does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to aggravate or enhance the sentence for juvenile offender convicted of homicide. *Miller*, like *Enmund/Tison*, avoids disproportionate punishment by mandating consideration of mitigating circumstances specific to youth. This is not the same as increasing the punishment authorized by a jury’s verdict based on a fact not found by the jury. (*State v. Fletcher*, *supra*, 149 So.3d at p. 943.)

Our review of California’s statutory scheme and the relevant Eighth Amendment jurisprudence leads us to conclude that *Miller*, *Gutierrez*, and

¹³ The defendant’s argument in *Ring* was “tightly delineated.” (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) The defendant argued “only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.” (*Ibid.*) The defendant made no Sixth Amendment claim that a jury was required to find mitigating circumstances or make the ultimate determination whether to impose the death penalty. (*Ring*, at p. 597, fn. 4.) Contrary to Blackwell’s repeated suggestion, the *Ring* case also did not involve an *Apprendi* challenge to the trial court’s *Enmund/Tison* finding that the defendant was the actual killer. (*Id.* at pp. 594–595, 597, fn. 4.)

section 190.5(b), require only a discretionary consideration of mitigating circumstances so that a sentencer can reach a moral judgment about an individual juvenile's irreparable corruption—i.e., a determination of what sentence is proportionate to a particular offense and offender. We find no constitutional or statutory requirement that this exercise be accomplished by a jury.

C. *Does the Eighth Amendment Categorically Prohibit LWOP for Juvenile Offenders Who Do Not Kill or Intend to Kill?*

In an attempt to extend *Graham*, Blackwell also claims that an LWOP sentence is categorically prohibited under the Eighth Amendment unless a juvenile offender personally killed or intended to kill. He asserts the jury found he neither killed nor intended to kill, and his sentence consequently constitutes cruel and unusual punishment. “Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment.” (*People v. Palafox, supra*, 231 Cal.App.4th at p. 82.)

■ *Graham* does provide a categorical limit on punishment—the Eighth Amendment prohibits LWOP for juvenile offenders who commit *nonhomicide* offenses. (*Graham, supra*, 560 U.S. at pp. 74–75, 82.) In reaching that conclusion, the court applied a two-step approach appropriate for categorical challenges to punishment as cruel and unusual: “The Court first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue. [Citation.] Next, guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,’ [citation], the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” (*Id.* at p. 61.)

The *Graham* court found that although legislatively prohibited in very few jurisdictions, an examination of actual sentencing practices revealed a consensus against the use of LWOP for juveniles committing nonhomicide offenses. (*Graham, supra*, 560 U.S. at p. 62.) Because “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers” (*id.* at p. 69, italics added), and because of the severity of LWOP sentences applied to juveniles who are, by reason of their immaturity, less culpable when compared to adults (*id.* at pp. 68, 69, 74–75), the practice of sentencing minors to LWOP was deemed unjustifiable under penological theory and unconstitutional in nonhomicide cases (*id.* at p. 74). The court reasoned:

“[W]hen compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.” (*Id.* at p. 69, italics added.)

Recognizing that *Graham*’s categorical prohibition is limited only to *nonhomicide* cases, Blackwell argues that its rationale should also prohibit LWOP for a juvenile offender convicted of homicide who did not personally kill or intend to kill. According to Blackwell, the jury’s rejection of the firearm enhancement allegations demonstrates he was convicted as an aider and abettor on a felony-murder theory and became eligible for LWOP only because someone else fired a fatal shot.

Blackwell both mischaracterizes the implications of the jury’s verdict and reads *Graham* too expansively. The jury’s rejection of the firearm allegations may simply reflect “a reasonable doubt in the minds of the jurors that [Blackwell] specifically used a [gun]. It does not show the reverse, that the jury specifically found [that Blackwell] was an aider and abettor. . . . The jury may merely have believed, and most likely did believe, that [Blackwell] was guilty of murder as either a personal [gun] user or an aider and abettor but it may have been uncertain exactly which role [Blackwell] played.” (*People v. Santamaria* (1994) 8 Cal.4th 903, 919 [35 Cal.Rptr.2d 624, 884 P.2d 81], italics omitted; see *People v. Thompson* (2010) 49 Cal.4th 79, 120 [109 Cal.Rptr.3d 549, 231 P.3d 289].)

In any event, even if we assume Blackwell was convicted as an aider and abettor under a felony-murder theory, it does not follow that his LWOP sentence is categorically barred. The only authority supporting Blackwell’s proposed extension of *Graham* is a concurring opinion in *Miller*, signed only by two justices. (See *Miller*, *supra*, 567 U.S. at pp. 489–493 [132 S.Ct. at pp. 2475–2477] (conc. opn. of Breyer, J.).) Joined by Justice Sotomayor, Justice Breyer wrote: “I join the Court’s opinion in full. I add that, if the State continues to seek a sentence of [LWOP] for Kuntrell Jackson, there will have to be a determination whether Jackson ‘kill[ed] or intend[ed] to kill’ the robbery victim. [(*Graham*, *supra*, 560 U.S. at p. 69.)] In my view, without such a finding, the Eighth Amendment as interpreted in *Graham* forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law. [¶] In *Graham* we said that ‘when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.’ *Ibid.* . . . And we concluded that, because of this ‘twice diminished moral culpability,’ the Eighth Amendment forbids the imposition upon juveniles of a sentence of [LWOP] for nonhomicide cases. [(*Graham*, at pp. 69, 74–75.)]” (*Id.* at pp. 489–490 [132 S.Ct. at p. 2475] (conc. opn. of Breyer, J.), italics omitted.) Justice Breyer

continued: ‘Indeed, even juveniles who meet the *Tison* standard of ‘reckless disregard’ may not be eligible for [LWOP]. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to [LWOP] are those convicted of homicide offenses who ‘kill or intend to kill.’ ” (*Id.* at p. 492 [132 S.Ct. at p. 2476] (conc. opn. of Breyer, J.).)

■ But the *Miller* majority did not adopt Justice Breyer’s suggested categorical rule. Instead, in illustrating the problem of mandatory LWOP sentences for juvenile offenders convicted of homicide, it observed that whether a juvenile actually killed, intended to kill, or acted with reckless indifference to human life were circumstances affecting the juvenile’s culpability for the offense that should be considered in determining punishment. (*Miller, supra*, 567 U.S. at pp. 477–478 [132 S.Ct. at p. 2468], citing *Graham, supra*, 560 U.S. at p. 69.)

In asking us to announce a categorical bar against LWOP for juvenile felony-murder offenders who did not kill or intend to kill, Blackwell seeks a significant extension of the high court’s Eighth Amendment jurisprudence. We decline to read *Graham* for that broader proposition, especially where Blackwell has not even attempted to argue there is a national consensus against imposing an LWOP sentence in a case where a 17-year-old defendant committed a homicide offense that would have rendered him eligible for the death penalty had he been an adult.¹⁴ (§ 190.2.)

D. *Purported Conflict in “Fact Finding”*

In an extension of his initial arguments, Blackwell insists “the jury made a factual finding [he] was not the shooter” and contends the trial court improperly “elevated” his punishment to LWOP based on a finding in conflict with the jury’s. In resentencing Blackwell to LWOP, the trial court made the following observations regarding the circumstances of the offense: “The evidence indicates that Blackwell fully participated in the planning, execution and attempted cover-up of the crime, the brutal execution of the victim, who was lying in his own bed. There is no indication of familial or peer pressure. There is some evidence that Blackwell was using methamphetamine around the time of the crime, but no evidence of intoxication during the commission of the crime. At trial, the jury verdict found not true the allegation that Blackwell used a gun. However, before trial, Blackwell admitted to his girlfriend . . . that he shot the victim with his 9 mm gun. At trial, Ms. Pollard testified credibly to this fact.”

¹⁴ The jury could not have found the robbery-murder special circumstance to be true unless it determined that Blackwell, if not the actual killer, either intended to kill or was a major participant in the underlying felony and acted with reckless indifference to human life. (§ 190.2, subd. (d); *People v. Estrada* (1995) 11 Cal.4th 568, 575 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; see *Tison, supra*, 481 U.S. at p. 158.)

Blackwell insists the trial court violated both the Sixth and Eighth Amendments by “basing [the] choice of LWOP primarily on [the judge’s] own belief that [Blackwell] was the actual killer, despite the jurors’ acquittal on the allegations of personal use and intentional discharge of a firearm.” Blackwell maintains that “[b]ecause 12 jurors found [he] was not the actual killer,” the judge’s finding offended the Sixth Amendment.

■ As we discussed above, we do not agree with Blackwell’s interpretation of the jury’s verdicts. (See *People v. Santamaria, supra*, 8 Cal.4th at p. 919; *People v. Thompson, supra*, 49 Cal.4th at p. 120.) The jury made no affirmative finding that Blackwell was *not* the killer. In imposing a sentence, the trial court is not prohibited from making findings of fact that are inconsistent with a jury’s verdict of *acquittal* on other counts. (*People v. Towne* (2008) 44 Cal.4th 63, 71 [78 Cal.Rptr.3d 530, 186 P.3d 10] (*Towne*).) “[B]ecause facts considered by the court in selecting the appropriate sentence within the available sentencing range need not be proved beyond a reasonable doubt, a trial court, in this setting, is not prohibited from considering evidence underlying charges of which a defendant has been acquitted.” (*Ibid.*) “[T]he *Apprendi* line of decisions does not apply [in such a] context. Both the United States Supreme Court and this court have expressly held that a trial court, in exercising its discretion in sentencing a defendant on an offense of which he or she has been convicted, may take into account the court’s own factual findings with regard to the defendant’s conduct related to an offense of which the defendant has been acquitted, so long as the trial court properly finds that the evidence establishes such conduct by a preponderance of the evidence.” (*In re Coley, supra*, 55 Cal.4th at p. 557 [trial court’s reliance on its own view of facts underlying acquitted charge, in exercising its discretion not to strike any of the defendant’s prior serious or violent felony convictions, did not violate right to jury trial].)

In *Towne*, the defendant was charged with carjacking, kidnapping, robbery, grand theft of an automobile, making criminal threats, kidnapping to commit carjacking, kidnapping to commit robbery, and joyriding. (*Towne, supra*, 44 Cal.4th at p. 72.) However, the jury acquitted the defendant of all counts except for felony joyriding. (*Id.* at p. 73.) Under the unmodified DSL, the trial court selected the upper term for joyriding based upon the defendant’s lengthy criminal history *and* its conclusion the crime was aggravated because the victim was afraid for his life. (*Towne*, at pp. 73–74.) Despite the jury’s acquittal of the defendant on all counts involving force or violence, the trial court noted it was convinced, based on the testimony of the victim and other witnesses, that the victim had been terrified. (*Ibid.*)

■ Our Supreme Court rejected the defendant’s claim that his federal constitutional right to jury trial as established in *Apprendi* and its progeny had

been violated by the trial court's reliance on "facts that the jury implicitly found not to be true." (*Towne, supra*, 44 Cal.4th at p. 83.) The court explained: "California law affords the trial court broad discretion to consider relevant evidence at sentencing. . . . Nothing in the applicable statute or rules suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because that evidence did not convince a jury that the defendant was guilty beyond a reasonable doubt of related offenses. [¶] . . . [¶] Nor did the sentencing judge's consideration of conduct underlying acquitted charges violates defendant's Sixth Amendment right to a jury trial. . . . Because in the present case other aggravating factors rendered defendant eligible for the upper term [under the unmodified DSL], the judge's consideration of evidence of conduct underlying counts of which defendant was acquitted, *in selecting the sentence*, did not implicate defendant's constitutional rights to a jury trial or to proof beyond a reasonable doubt. [¶] . . . [¶] Permitting a judge to consider evidence of conduct underlying counts of which the defendant was acquitted does not in any way undermine the jury's role in establishing, by its verdict, the maximum authorized sentence." (*Towne*, at pp. 85–87, italics added & fns. omitted.)

Blackwell contends *Towne* and *In re Coley* are distinguishable, in that they involve "ordinary discretionary sentencing decisions," whereas "the central teaching of [*Graham*] and [*Miller*] is that imposition of [LWOP] on a juvenile offender is not like other sentence choices." Because of such Eighth Amendment constitutional limitations, Blackwell asks us to analogize to death penalty sentencing. However, it is not at all clear how this analogy advances Blackwell's argument.

We have already concluded that the jury found all facts required to make Blackwell *eligible* for an LWOP sentence and that the trial court's consideration of the circumstances of the offense, and other *Miller/Gutierrez* factors, in selecting the appropriate sentence does not violate *Apprendi*. Thus, we are untroubled by the trial court's recitation of the evidence Blackwell was the shooter. We are bound to follow our Supreme Court's decision in *Towne*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)

E. Abuse of Discretion

Finally, Blackwell argues the trial court abused its discretion when it selected LWOP, rather than the lesser term of 25 years to life. A court's exercise of discretion will not be disturbed on appeal absent a showing that the court acted in an arbitrary, capricious, or patently absurd way, resulting in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316 [228 Cal.Rptr. 197, 721 P.2d 79].) "In reviewing for abuse of discretion, we

are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citation.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377 [14 Cal.Rptr.3d 880, 92 P.3d 369].)

■ Blackwell maintains the trial court abused its discretion by assigning too much weight to the circumstances of the crime, and not enough to the immaturity of the offender. Blackwell urges us to conclude *Miller* established a presumption of immaturity and that 25 years to life is the presumptive sentence. We disagree. *Gutierrez* “[does] not suggest section [190.5(b)] evinces a preference for a sentence of 25 years to life.” (*People v. Palafox, supra*, 231 Cal.App.4th at p. 91; see *Gutierrez, supra*, 58 Cal.4th at p. 1379.) “No particular factor, relevant to the decision whether to impose LWOP on a juvenile who has committed murder, predominates under the law. Hence, as long as a trial court gives due consideration to an offender’s youth and attendant characteristics, as required by *Miller*[, *supra*, 567 U.S. 460 [132 S.Ct. 2455]], it may, in exercising its discretion under . . . section [190.5(b)], give such weight to the relevant factors as it reasonably determines is appropriate under all the circumstances of the case.” (*Palafox*, at p. 73.)

In *People v. Palafox, supra*, 231 Cal.App.4th 68, the defendant and another 16 year old were convicted of two counts of first degree murder with special circumstances after they committed a burglary and murdered the residents of the home in their beds. (*Id.* at pp. 73–74.) After *Miller*, the juvenile defendant, who was originally sentenced to two consecutive LWOP terms, was resentenced. (*Id.* at pp. 74–75.) At resentencing, the trial court considered psychological evidence of the defendant’s immaturity, as well as evidence of a violent and chaotic family background, weighed all the *Miller* factors with no presumption in favor of LWOP, but gave the greatest weight to the circumstances of the offenses. (*Id.* at pp. 75–76, 78–81, 89.)

The reviewing court concluded the trial court had not “exceeded the bounds of reason” in reimposing consecutive LWOP terms. (*People v. Palafox, supra*, 231 Cal.App.4th at p. 91; see *id.* at pp. 90–91.) Rather, “[t]he trial court . . . thoughtfully weighed the applicable factors, particularly defendant’s youth and its attendant circumstances, and implicitly concluded defendant was unfit ever to reenter society.” (*Id.* at p. 91.) The *Palafox* court concluded:

“As required by *Miller*, the trial court here ‘consider[ed] all relevant evidence bearing on the “distinctive attributes of youth” . . . and how those attributes “diminish the penological justifications for imposing the harshest sentences on juvenile offenders.” [Citation.]’ [Citation.] It ‘ “[took] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” [Citation.]’ [Citation.] The sentence it imposed did not violate the federal or state Constitution.” (*Palafox*, at p. 92, quoting *Gutierrez, supra*, 58 Cal.4th at p. 1390.)

Here too, in resentencing Blackwell to LWOP, the trial court explicitly considered all of the relevant *Miller/Gutierrez* factors, with no presumption in favor of LWOP. The trial court was well aware that it had discretion to sentence Blackwell to 25 years to life or LWOP and that the latter sentence should be reserved for the “‘rare juvenile offender whose crime reflects irreparable corruption.’” (*Miller, supra*, 567 U.S. at pp. 479–480 [132 S.Ct. at p. 2469].) In selecting LWOP as the appropriate sentence, based primarily on Blackwell’s circumstances and the heinous nature of the offense, the trial court did not abuse its discretion.

Like the defendant in *People v. Palafox*, Blackwell was significantly chronologically older than the 14-year-old defendants in *Miller*. In fact, Blackwell was six months shy of his 18th birthday when he committed an offense that showed planning, organization, and callous calculation. The trial court recognized Blackwell’s youth, but found “no evidence” he was particularly immature or impetuous. Other than his unsuccessful attempt to shift responsibility to Kellum, Blackwell points to no evidence suggesting the crime was the result of his impulsiveness, a lack of sophistication, peer pressure, or general immaturity. Yet, the evidence is undisputed that Blackwell arranged a ride for himself and Kellum to Carreno’s apartment, that they entered unannounced, apparently intending to rob him of drugs and money, kicked down his door, and that either he or Kellum shot Carreno, who was lying in bed, several times. Blackwell then attempted to destroy or hide any evidence linking him to the crime. Furthermore, Blackwell had an extensive juvenile record involving weapons and violence and had been provided numerous opportunities within the juvenile system to reform, but his criminal behavior has only escalated. In fact, Carreno’s murder was committed less than a month after Blackwell was released from juvenile hall.

We do not foreclose the possibility that in some cases, “the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than [LWOP].” (*Roper, supra*, 543 U.S. at p. 573; see *id.* at pp. 572–573 [discussing the “unacceptable

likelihood” this would occur in death penalty sentencing “despite insufficient culpability”].) This is not such a case. With the exception of evidence of Blackwell’s use of methamphetamines around the time of the offense, there was little to no particularized mitigating evidence before the court. Even if a presumption of immaturity applies, the People rebutted such a presumption in this case.

■ We are similarly unpersuaded that Blackwell’s LWOP sentence is disproportionate to his individual culpability and amounts to cruel and unusual punishment in his particular case.¹⁵ A sentence in an individual case violates the Eighth Amendment proscription against cruel and unusual punishment only if it is grossly disproportionate to the crime. (*Graham, supra*, 560 U.S. at p. 60.) “A court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] ‘[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality’ the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.” (*Ibid.*)

The sentence in this case, though undoubtedly harsh, does not shock the conscience and is not disproportionate. Blackwell was convicted of first degree murder with special circumstances. First degree special-circumstance murder, viewed in the abstract, is perhaps the most serious offense under California law, and the facts of this particular case do not remove it from this category.

LWOP may be “an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth” (*Montgomery, supra*, 577 U.S. at p. ___ [136 S.Ct. at p. 734]), but the record before us does not compel the conclusion Blackwell falls within that class. Although he was six months short of the age of majority when he committed the murder in this case, his criminal history as a juvenile was extensive. In light of his history and the very serious nature of his crime, Blackwell has not demonstrated that his LWOP sentence is disproportionate to his individual culpability. He has not even attempted to argue that it is disproportionate when compared to the sentences of other offenders convicted of the same crime.

¹⁵ Amendments to California’s sentencing law provide Blackwell with the opportunity for parole. Subject to exceptions not relevant here, section 1170, subdivision (d)(2) retroactively permits a defendant who was sentenced to LWOP for a crime committed as a juvenile to petition the court for recall and resentencing after serving at least 15 years of that sentence. The possibility of a sentence recall under this provision does not “enter[] into a determination of constitutionality under *Miller*.” (*People v. Palafox, supra*, 231 Cal.App.4th at p. 82, fn. 13; accord, *Gutierrez, supra*, 58 Cal.4th at p. 1386.) “*Miller* repeatedly made clear that the sentencing authority must . . . consider[] how children are different and how those differences counsel against a sentence of [LWOP] ‘before imposing a particular penalty.’” (*Gutierrez*, at p. 1387.)

Blackwell received a resentencing hearing at which the trial court exercised the individualized sentencing discretion that *Miller* and *Gutierrez* mandate. Imposing LWOP based on the reasons the trial court stated was within its discretion. The trial court did not abuse its discretion or impose cruel and unusual punishment.

F. Consideration of CDCR Records

In his opening brief, Blackwell also argues the sentencing court erred by considering his CDCR records from the time period after his initial sentencing. The argument is unsupported and we reject it.

■ *Gutierrez* emphasized: “The question is whether [a juvenile offender] can be deemed, *at the time of sentencing*, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the ‘diminished culpability and greater prospects for reform’ that ordinarily distinguish juveniles from adults.” (*Gutierrez, supra*, 58 Cal.4th at p. 1391, italics added.) In exercising its discretion under *Miller*, “a sentencing court must consider *any* evidence or other information in the record bearing on ‘the possibility of rehabilitation.’” (*Id.* at p. 1389, italics added.) “[T]here is nothing in *Miller*, *Gutierrez*, or *Montgomery* that suggests, much less states, that a trial court is *precluded* from considering evidence of a defendant’s postconviction conduct in conducting a resentencing as a remedy for *Miller* error. On the contrary, a trial court is *required* to consider such evidence in determining a defendant’s amenability to rehabilitation upon resentencing.” (*In re Berg* (2016) 247 Cal.App.4th 418, 440 [202 Cal.Rptr.3d 786], review granted July 27, 2016, S235277; *People v. Lozano* (2016) 243 Cal.App.4th 1126, 1137–1138 [197 Cal.Rptr.3d 257] [addressing admissibility of positive postconviction behavior].)

■ Blackwell relies on language taken out of context from *Graham*: “Even if the State’s judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made *at the outset*.” (*Graham, supra*, 560 U.S. at p. 73, italics added; see *Gutierrez, supra*, 58 Cal.4th at pp. 1386–1387.) Neither *Graham* nor *Gutierrez* addressed whether custodial records could be considered in a resentencing scenario. “‘It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.’” (*People v. Knoller* (2007) 41 Cal.4th 139, 154–155 [59 Cal.Rptr.3d 157, 158 P.3d 731].)

Here, Blackwell’s postconviction behavior was used “at the outset” to assess his prospects for rehabilitation. In any event, the trial court made clear

[REDACTED]

that it would have reached the same conclusion without consideration of Blackwell's CDCR records.

III. DISPOSITION

The judgment is affirmed.

Jones, P. J., and Simons, J., concurred.

A petition for a rehearing was denied September 29, 2016, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied December 14, 2016, S237862.

[No. B262097. Second Dist., Div. Four. Sept. 9, 2016.]

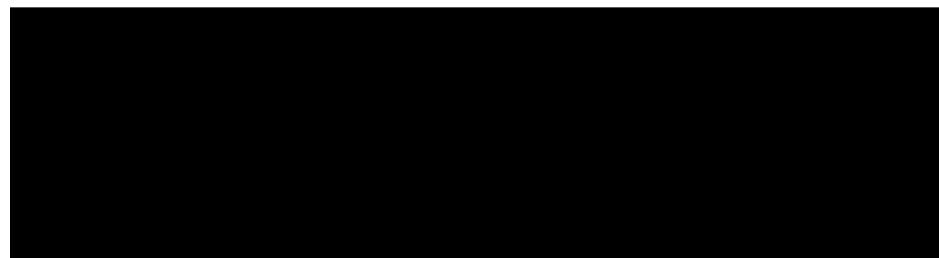
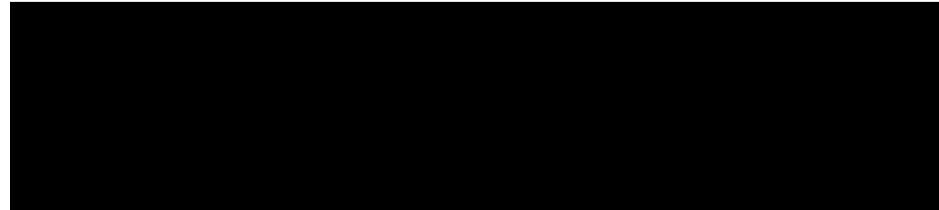
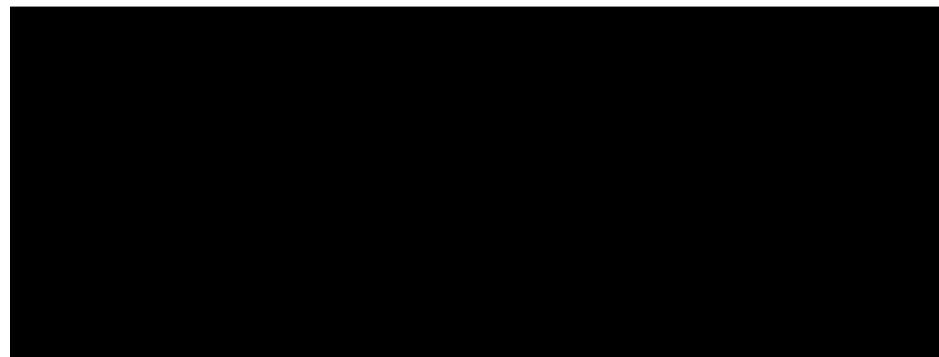
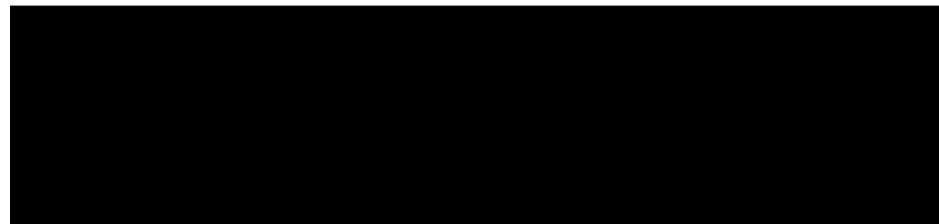
DAVID PENILLA et al., Plaintiffs and Respondents, v.
WESTMONT CORPORATION, et al., Defendants and Appellants.

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[REDACTED]

COUNSEL

Citron & Citron, Thomas H. Citron, Joel F. Citron and Katherine A. Tatikian for Defendants and Appellants.

Dowdall Law Offices for Western Manufactured Housing Communities Association, Inc., as Amicus Curiae on behalf of Defendants and Appellants.

Haney & Young, Steven H. Haney and Gregory L. Young for Plaintiffs and Respondents.

OPINION

MANELLA, J.—

INTRODUCTION

Appellant Westmont Corporation doing business as Wildwood Mobile Home Country Club (Westmont) owns land located in Hacienda Heights, Los

Angeles County. David Penilla and 60 other named plaintiffs are primarily low-income mobilehome owners who rent the land. After plaintiffs filed a first amended complaint (FAC) against Westmont and its employees or agents (collectively appellants) alleging contract, tort and statutory causes of action, appellants filed a motion to compel respondents Penilla and 45 other named plaintiffs to arbitrate those claims. The trial court denied the motion to compel, finding the arbitration provision contained in the rental agreements unconscionable and thus unenforceable. We conclude the arbitration provision was procedurally unconscionable, as it failed to disclose prohibitively expensive arbitration fees and was neither provided in a Spanish-language copy nor explained to respondents who did not understand written English. We further conclude the arbitration provision was substantively unconscionable as it imposed arbitral fees that were unaffordable or would have substantially deterred respondents from asserting their claims. The provision's unreasonably shortened limitations periods for many of the asserted causes of action and its limitation on the remedies available in arbitration for statutory claims further support a finding of substantive unconscionability. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 16, 2014, respondents and 15 other named plaintiffs filed the FAC against appellants Westmont, Mark Rutherford, Jo Davenport, Jose Hernandez, and David Donahue, asserting contract, tort and statutory claims. The FAC alleged 24 causes of action, including two causes of action under the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.¹

¹ All plaintiffs alleged causes of action for breach of contract, public nuisance (Civ. Code, § 798.87), private nuisance, negligence, negligence per se, breach of the implied warranty of habitability, breach of the covenant of quiet enjoyment, improper utility services billings (Civ. Code, § 798.40 et seq.), failure to maintain trees or driveways (Civ. Code, § 798.37.5), illegal towing (Veh. Code, § 22650 et seq.), intentional infliction of emotional distress, intentional interference with property rights, trespass to land, invasion of privacy (Cal. Const., art. I, § 1), retaliation (Civ. Code, § 1942.5), racial discrimination in housing in violation of the FEHA (Gov. Code, § 12955), and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). Respondents David Penilla, Maria Penilla and Roque Ulloa asserted a cause of action for battery. David Penilla separately asserted causes of action for slander and false arrest. Respondents David Davila, Joseph Gonzalez, Carlene Marin, Ronald Millier, Irene Ontiveros and Manuel Salazar alleged causes of action for unfair restraint on alienation (Civ. Code, § 798.74) and breach of the implied covenant of good faith and fair dealing related to appellants' interference with the (attempted) sales of their mobilehomes. Romana Ortiz and respondent Salazar asserted a cause of action for stalking. Finally, Chris and Linda Abeyta, Juana Hernandez, Angelina Rose Ortiz and respondent Maria Penilla asserted a cause of action for sexual harassment in housing (FEHA; Gov. Code, § 12955).

On July 23, 2014, appellants moved, pursuant to Code of Civil Procedure section 1281.2 for an order compelling arbitration of respondents' claims. In the motion, appellants alleged that respondents were signatories to a valid binding arbitration provision contained in rental agreements from 2000 to 2013 that encompassed all the causes of action. Appellants argued the claims in the FAC were covered by the arbitration provision, and that no grounds existed to revoke the provision. They also sought an order staying the proceedings as to the other plaintiffs pending the outcome of the arbitration.

Appellants submitted copies of the written "Mobilehome Rental Agreement" containing the arbitration provision, executed by the parties. The arbitration provision states: "Arbitration of Disputes [¶] Binding arbitration under Code of Civil Procedure §§ 1280, et seq. shall be used to resolve disputes. This term applies to all members of your household, privies and contractors even if not parties to this agreement. The only non-arbitration exceptions are unlawful and forcible detainer; injunctive relief. 'Dispute' includes maintenance, condition, provision of the facilities, improvements, services and utilities, living conditions; injuries or damage, other residents and invitees [*sic*], or to property of any kind, from our operation, maintenance, or the condition of the community or its equipment, facilities, improvements or services, whether resulting in any part from our negligence or intentional misconduct; business administration or practices or operations; punitive damages and class action claims. Also included are disputes with employees, contractors, agents or any other person who you contends [*sic*] has injured you and you also contends [*sic*] that we are responsible for that other person's acts or failure to act. [¶] If you do not give us notice within one (1) year of the date of any occurrence, or disputed condition or act or omission, we will not be liable for any injury or damage to you or others in your household. Damages shall be limited to a 1 year period prior to the date you deliver your written demand or notice of intention to arbitrate. [¶] An arbitrator shall be appointed by the Judicial Arbitration And Mediation Service [*sic*], Inc. ('JAMS'). If the parties cannot agree, JAMS will select 5 neutral arbitrators; the parties shall strike 2. Civil discovery shall be permitted. No dispute shall be consolidated with any other dispute. Each party to advance one be billed [*sic*] for one-half the fees; failure to pay results in default award. A referee shall decide all disputed issues without a jury as provided by Code of Civil Procedure §§ 638, et seq. if arbitration is not applicable or enforceable. The arbiter may impose no remedy except money damages and remedies allowed by the Mobilehome Residency Law. Receivership or punitive damages [if more than two percent of owner equity in the park or if in addition to any statutory penalty in any sum], exceed the arbiter's jurisdiction." None of the submitted documents were in Spanish or translated, wholly or in part, into Spanish.

Respondents opposed the motion, arguing the arbitration provision was unconscionable. They contended the provision was procedurally unconscionable on the following grounds: (1) it was a contract of adhesion; (2) although 15 of the 46 named respondents spoke little or no English, they were never given a Spanish language copy of the arbitration provision, and no one explained it to them in Spanish; (3) it was outside respondents' reasonable expectations that the arbitration provision would include tort claims, yet exclude unlawful detainer actions; (4) the fees unique to arbitration were outside respondents' reasonable expectations; and (5) respondents were under severe economic pressure to agree to the arbitration provision. Respondents contended the arbitration provision was substantively unconscionable on the following grounds: (1) there was a lack of mutuality, given that unlawful detainer actions, which could only be brought by Westmont, were excluded from arbitration, and (2) arbitration would be prohibitively expensive for respondents, as they could not afford to advance the arbitration fees. They further contended the unconscionable terms permeated the arbitration provision and could not be severed.

In supporting declarations, several respondents stated that Spanish was their native language, and that they did not speak English. They asserted they were not provided with a Spanish-language copy of the agreement. Additionally, although Westmont's managers informed respondents in Spanish that they were required to sign the rental agreement, the managers never advised them of the arbitration provision or its terms.

In their reply, appellants argued the arbitration provision was not unconscionable. With respect to procedural unconscionability, appellants contended the rental agreements containing the arbitration provisions were not contracts of adhesion, as respondents had other options for housing. Additionally, they contended there was no surprise, as each plaintiff initialed the arbitration provision. With respect to substantive unconscionability, appellants contended the exclusion for unlawful detainer and eviction actions did not show a lack of mutuality. They argued the instant arbitration provision did not impose prohibitive costs, noting the requirement of a single arbitrator and numerous judicial findings that arbitration is generally less expensive than litigation.

The trial court requested supplemental briefing on plaintiffs' incomes at the time they signed the agreements, and the projected cost estimate for each of the individual claims. Respondents submitted evidence that none of them could afford to pay for arbitration.² They also submitted declarations from two plaintiffs that they were not afforded adequate time to read the rental agreement containing the arbitration provision before being told to sign the

² The declarations show that most respondents earned less than \$3,000 a month. No respondent earned more than \$10,000 a month, and few earned more than \$5,000.

documents. Additionally, they submitted declarations showing they were under economic pressure to sign the agreements, as they already had paid for the mobile home or made a large down payment when presented with the agreements, and failure to sign would have forced them to look for new housing. Many stated that they could not afford other housing.³

The arbitration provision did not detail the amount of arbitration fees. Nor were fee schedules for JAMS arbitrators attached. Respondents' counsel, Steven H. Haney, submitted a declaration stating he had ascertained the amount of arbitration fees by contacting the Los Angeles Office of JAMS and obtaining fee schedules for 10 neutrals. He attached the fee schedules, showing fees for a single arbitrator ranged from \$500 to \$800 per hour, or from \$5,000 to \$10,000 per day, depending on the neutral selected. In addition, JAMS assessed a mandatory \$400 filing fee. Haney also opined that based on his experience, it would take two to three days to arbitrate common claims. For those plaintiffs with additional claims, four to six days would be required.

In response, appellants again disputed that respondents were under economic pressure to sign the rental agreements, arguing that their failure to sign would result in the refund of all monies, except a small escrow fee. Appellants also disputed the length of arbitration, arguing that an individual plaintiff's claims would require no more than two days. They did not challenge the JAMS fee schedules.

On February 5, 2015, the trial court denied appellants' motion for an order compelling arbitration. The court determined that appellants had demonstrated a written arbitration agreement between the parties existed and that all of the causes of action in the FAC were subject to arbitration. However, it concluded that respondents had met their burden to show the arbitration agreement was unconscionable and therefore unenforceable. The court found the arbitration provision in the mobilehome rental agreements was procedurally and substantively unconscionable. It determined there was a considerable degree of procedural unconscionability, as (1) the arbitration provision was contained in a contract of adhesion, and most respondents signed the contract after making a significant financial commitment to purchase their mobile-homes; (2) appellants did not inform respondents that they would have to pay, in advance, half of the \$5,000 to \$10,000 fee for each day of arbitration before a single neutral in order to avoid a default; and (3) appellants failed to attach documentation informing respondents of JAMS's arbitration fees. The court further determined there was substantive unconscionability, as (1) the

³ As the amicus curiae brief filed by Western Manufactured Housing Communities Association, Inc., acknowledges, mobilehomes are more affordable than traditional foundation-constructed housing.

arbitration provision lacked mutuality, given the carve-out for unlawful detainer actions; and (2) the arbitration provision imposed unreasonable and prohibitively expensive arbitration costs on respondents. As to the latter, the court found that respondents' incomes at the time they signed the agreements were at levels rendering the cost of arbitration prohibitively expensive, and that the arbitration costs greatly exceeded the expected recovery on respondents' claims.⁴

On February 19, 2015, appellants filed a timely notice of appeal from the order denying their motion to compel arbitration.

DISCUSSION

Code of Civil Procedure section 1281.2 provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that . . . [¶] . . . [¶] . . . [g]rounds exist for revocation of the agreement."⁵ Similarly, under Civil Code section 1670.5, subdivision (a), "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Here, the trial court denied appellant's motion to compel arbitration, concluding that the arbitration provision was unconscionable and thus unenforceable. To the extent extrinsic evidence was presented to the trial court, "[w]e will uphold the trial court's resolution of disputed facts if supported by substantial evidence. [Citation.]" (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277 [16 Cal.Rptr.3d 296].) "Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation as unconscionable, is a question of law subject to de novo review." (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 702 [155 Cal.Rptr.3d 506].)

■ As our Supreme Court has explained: "The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural

⁴ Appellants argue the trial court was biased against arbitration as a means of dispute resolution. They rely on the court's ultimate determination that arbitration would be an "inferior forum" to resolve the disputes in this case. We find no bias. A forum that would prevent a person of limited means from filing and proceeding with a meritorious claim is inferior to our court system.

⁵ All further statutory citations are to the Code of Civil Procedure, unless otherwise stated.

unconscionability and substantive unconscionability must be shown, but ‘they need not be present in the same degree’ and are evaluated on “‘a sliding scale.’” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 [145 Cal.Rptr.3d 514, 282 P.3d 1217] (*Pinnacle*), quoting *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 [99 Cal.Rptr.2d 745, 6 P.3d 669] (*Armendariz*).) “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” [Citation.]” (*Pinnacle, supra*, 55 Cal.4th at p. 247.)

A. Procedural Unconscionability

■ ‘Procedural unconscionability focuses on oppression or unfair surprise’ (*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 171 [90 Cal.Rptr.3d 818].) ‘Oppression results from unequal bargaining power when a contracting party has no meaningful choice but to accept the contract terms. [Citations.] Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party’s consent was not an informed choice. [Citations.]’ (*Id.* at p. 173, fn. omitted.) “[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.” (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244 [200 Cal.Rptr.3d 7, 367 P.3d 6].)

1. Oppression

■ Initially, we observe that the instant arbitration provision is a contract of adhesion, viz., “‘a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817 [171 Cal.Rptr. 604, 623 P.2d 165], quoting *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694 [10 Cal.Rptr. 781].) Our Supreme Court has noted that “[t]he immobility of the mobilehome, the investment of the mobilehome owner, and restriction on mobilehome spaces, has sometimes led to what has been perceived as an economic imbalance of power in favor of mobilehome park owners” (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1010 [103 Cal.Rptr.2d 711, 16 P.3d 130] [discussing mobilehome rent control ordinances].) Similarly, California courts have noted that landlords have more bargaining power than their tenants. (See, e.g., *Jaramillo v. JH Real Estate Partners, Inc.* (2003) 111 Cal.App.4th 394, 403 [3 Cal.Rptr.3d 525] [discussing Civ. Code, § 1953].)

The arbitration provision was drafted by appellant Westmont or its agents, and no evidence suggests that respondents could either reject or negotiate the terms of the arbitration provision. While relevant to our analysis however, “an adhesion contract remains fully enforceable unless . . . the provision falls outside the reasonable expectations of the weaker party” or it is otherwise unconscionable. (*Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, 722 [129 Cal.Rptr.2d 659].)⁶

The evidence also shows that respondents were under severe pressure to sign the agreements. As set forth in multiple declarations, respondents signed the rental agreements containing the arbitration provision after they had paid for their mobilehomes or deposited a large amount of money toward the purchase of a mobilehome. Respondents are primarily low-income mobile-home owners, most of whom cannot afford other housing options. Although respondents who were in escrow on the purchase of a mobilehome and who refused to sign the rental agreement could have cancelled escrow and received most of their money back, they would have been required to quickly find other affordable housing options. For respondents who had already purchased a mobilehome, no evidence suggests they could readily have relocated their mobilehomes to another mobilehome park. As the Legislature has recognized and amicus curiae acknowledges, there is a “high cost” to moving a mobilehome. (See Health & Saf. Code, § 18250.) Thus, as the trial court correctly found, after respondents had purchased a mobilehome or had made a significant commitment to purchase one, “they were left with no real practical choice other than to give in to the terms which were imposed by the owner of the land on which those mobilehomes were situated.” In short, respondents had no meaningful choice but to sign the rental agreements containing the arbitration provision.

Appellants’ reliance on *Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159 [22 Cal.Rptr.3d 189], is misplaced. There, the plaintiff purchased a used motor home. (*Id.* at p. 1162.) The appellate court found no procedural unconscionability in the contract of sale’s arbitration provision, as the plaintiff presented no evidence of the circumstances surrounding the

⁶ We reject appellants’ contention that there was no contract of adhesion, because the FAC alleged that respondents negotiated the rental agreements. The FAC does not allege that respondents negotiated the arbitration provision. Moreover, nothing suggests that respondents “could have opted out of the arbitration agreement or that [they] could have negotiated a . . . contract without an arbitration agreement.” (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 [190 Cal.Rptr.3d 812, 353 P.3d 741]; *id.* at pp. 914, 910–911 (*Sanchez*) [finding adhesive contract evinces some procedural unconscionability].) No evidence shows that any preprinted contractual term in the rental agreements—including the arbitration provision—was interlined or modified.

execution of the agreement. (*Id.* at p. 1165.) The court noted that generally “nothing prevents purchasers of used vehicles from bargaining with dealers.” (*Id.* at p. 1166.) In contrast, here, respondents presented evidence showing the circumstances surrounding the execution of the rental agreements, specifically, that signing the rental agreements with the arbitration provisions was a requirement to completing the purchase of their primary residences. Moreover, a primary residence is qualitatively different from a recreational vehicle: a recreational vehicle is a luxury item, a primary residence is not.

2. *Surprise*

■ Unfair “‘surprise’” covers a variety of deceptive practices and tactics, including hiding a clause in a mass of fine print or phrasing a clause in language that is incomprehensible to a layperson. (*Sanchez v. Western Pizza Enterprises, Inc.*, *supra*, 172 Cal.App.4th at p. 173, fn. 10; see also *Pinnacle*, *supra*, 55 Cal.4th at p. 247 [“surprise” typically involves hiding unconscionable provision in a prolix printed form].) The evidence below shows that a reasonable person would have been surprised by the arbitration provision. First, although Westmont’s managers knew many respondents were not proficient in English, the managers never explained the arbitration provision in Spanish or provided a Spanish-language copy of it. The evidence indicates that one-third of respondents were not proficient in English, that Westmont’s managers were aware of the language difficulties, and that the managers informed respondents in Spanish that they were required to sign the rental agreement but failed to advise them of the arbitration provision or its terms. Additionally, several respondents stated in sworn declarations that they were not provided sufficient time to review the arbitration provision. These facts support a finding of procedural unconscionability. (See *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85 [171 Cal.Rptr.3d 42] [finding procedural unconscionability where arbitration agreement was not translated into Spanish for employees who could not read English, and one employee had only a few minutes to review and sign the multi-page employment agreement].)

Moreover, even for persons proficient in English, the instant arbitration provision is confusing and sometimes contradictory. For example, one sentence states that “class action claims” are subject to arbitration, but another provides that “[n]o dispute shall be consolidated with any other dispute.” Thus, it is unclear what class action claims, if any, could be brought in arbitration. Similarly, while “injunctive relief” is excluded from arbitration, the provision states that the arbitrator may impose any remedies allowed by

the Mobilehome Residency Law (Civ. Code, § 798 et seq.), which includes injunctive relief. (See, e.g., Civ. Code, § 798.88, subd. (a) [“any person in violation of a reasonable rule or regulation of a mobilehome park may be enjoined from the violation”].) In light of this lack of clarity, a reasonable person would have been at best surprised and at worst confused by the scope of the arbitration provision and the limitations on remedies available in arbitration.⁷

Even were the terms clear, appellants and their representatives failed to draw respondents’ attention to the arbitration provision or explain its import. “Where the contract is one of adhesion, conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness. Where a contractual provision would defeat the ‘strong’ expectation of the weaker party, it may also be necessary to call his attention to the language of the provision.” (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 359–360 [133 Cal.Rptr. 775].) “While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not.” (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 90 [7 Cal.Rptr.3d 267] (*Gutierrez*).) Here, appellants failed to explain that respondents would be required to advance half the costs of arbitration—even for disputes involving small amounts of money—that their share of those costs would be between \$2,500 and \$5,000 per day per arbitrator, and that there would be no arbitral fee waivers. Appellants’ failure to provide information on the arbitration fees is particularly egregious here, as respondents’ failure to advance half the fees would result in the entry of a default judgment on their claims.⁸

As noted, appellants failed to attach any documentation of arbitration fees. Respondents’ attorney was able to obtain information regarding such fees only by contacting the local JAMS office. We take judicial notice that the JAMS Web site does not list the fee schedules for neutrals. (Cf. *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690 [168 Cal.Rptr.3d 800] [failure to attach copy of arbitration rules may support finding of procedural unconscionability where it would lead to surprise; finding no surprise where arbitration rules were easily accessible on Internet].) In sum, there was a significant degree of procedural unconscionability, as the evidence indicates both oppression and surprise.

⁷ While not a basis for invalidating the arbitration provision, we note the drafter’s tenuous grasp of grammar and syntax contributes to the difficulty in parsing its terms.

⁸ Appellants assert that numerous federal and California cases have characterized arbitration as a relatively inexpensive means of dispute resolution. That fact would support a determination that prohibitively expensive arbitration costs are outside the reasonable expectations of a consumer.

B. Substantive Unconscionability

■ “Substantive unconscionability pertains to the fairness of an agreement’s actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be ‘so one-sided as to “shock the conscience.”’” (*Pinnacle, supra*, 55 Cal.4th at p. 246, quoting *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th [1199,] 1213 [78 Cal.Rptr.2d 533].) As our Supreme Court recently explained, the doctrine of unconscionability is concerned with contractual terms that are “‘unreasonably favorable to the more powerful party.’” (*Sanchez, supra*, 61 Cal.4th at p. 911.) We conclude the instant arbitration provision is substantively unconscionable, as it imposes unreasonably high arbitration costs that significantly deter, if not effectively preclude, appellants from asserting their claims. Our finding of substantive unconscionability is further supported by the provision’s restrictions on the time in which respondents may bring their claims and the remedies available in arbitration.

1. Prohibitively High Arbitration Costs

■ “[I]t is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high.” (*Gutierrez, supra*, 114 Cal.App.4th at p. 90.) In *Gutierrez*, the court held that “a mandatory arbitration agreement is substantively unconscionable if it requires the payment of unaffordable fees to initiate the process.” (*Id.* at p. 98.) In determining the affordability of arbitration costs, a court should conduct a case-by-case analysis, with the party resisting arbitration bearing the burden of showing the likelihood of prohibitive costs. (*Id.* at p. 96.) Our Supreme Court recently approved *Gutierrez*’s approach on affordability of arbitration. (*Sanchez, supra*, 61 Cal.4th at p. 919 [“We agree with *Gutierrez*’s approach.”].) It noted that an arbitration cost provision “cannot be held unconscionable absent a showing that [arbitration] fees and costs in fact would be unaffordable or would have a substantial deterrent effect in [a plaintiff’s] case.” (*Id.* at p. 920.)

Here, the arbitration provision requires the parties to advance half the arbitration fees or suffer a default. Respondents presented evidence that a JAMS-conducted arbitration, as called for in the agreement, would require a mandatory \$400 arbitration filing fee, and that fees for a single JAMS arbitrator ranged from \$500 to \$800 per hour, or from \$5,000 to \$10,000 per day.⁹ They also presented evidence that most respondents earned less than

⁹ The arbitration provision provides that when a party brings an arbitral claim, “[a]n arbitrator shall be appointed by the Judicial Arbitration And Mediation Service, Inc. (‘JAMS’). If the parties cannot agree, JAMS will select 5 neutral arbitrators; the parties shall strike 2.” Thus, a single arbitrator would hear the matter unless the parties could not agree on the

\$3,000 a month and could not afford to advance \$2,500 to \$5,000 per day of arbitration. In short, respondents met their burden to show arbitration was unaffordable. (See *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1580–1582 [98 Cal.Rptr.3d 743] (*Parada*) [petitioners demonstrated cost provision substantively unconscionable where they submitted declarations showing their inability to each pay \$20,000 in arbitration costs].)¹⁰

We note that the arbitration provision does not limit the amount of arbitration fees and contains no term that could reduce them. It has no provision for waiver of arbitration fees or for the allocation of such fees at the discretion of the arbitrator. Nor does it allow respondents to bring an otherwise arbitrable claim in small claims court. Additionally, consolidation is prohibited, precluding plaintiffs from splitting costs among themselves. Indeed, rather than alleviating prohibitively expensive arbitration costs, the provision increases the impact of those costs. It provides that a party's failure to advance the anticipated costs of arbitration results in a default. Thus, a plaintiff who belatedly discovers the high cost of arbitration may not dismiss an arbitrable claim, raise funds and refile the claim. (Cf. § 581, subd. (c) [“plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial”].) As a practical matter, respondents unable to advance the arbitration fees will have their claims defaulted. Thus, far from providing an alternative forum in which to resolve their disputes, enforcement of the arbitration provision would effectively deprive them of any venue for adjudicating their claims.¹¹

selection of arbitrator. In that case, JAMS would nominate five arbitrators and the parties would strike two. Although appellants contend that each party would strike two, leaving one arbitrator, the language is sufficiently ambiguous that it could be interpreted to permit the parties to strike a total of two arbitrators, leaving three to adjudicate the dispute. Although the likelihood of prohibitive costs is greater in the case of three arbitrators, we conclude that even a single JAMS arbitrator would be unaffordable for respondents.

¹⁰ Appellants' reliance on *Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 733–734 [132 Cal.Rptr.2d 35] is misplaced. There, the court concluded that plaintiffs had not shown judicial reference—an alternate method of dispute resolution—was unaffordable, because they presented no evidence that “the fees they are likely to pay are in fact greater than those which would accrue in litigation before the court.” (*Id.* at p. 733.) *Woodside Homes* involved ongoing litigation costs, whereas the instant matter involves the cost to initiate arbitration. As noted above, respondents showed they could not afford to advance the fees to access the only forum available under the arbitration provision to resolve their disputes.

¹¹ We do not hold that the prohibition of joinder renders the contract unenforceable. However, the prohibition of joinder and the lack of other cost-allocation terms evidences an intent on the part of appellants to “discourage or prevent . . . [respondents] from vindicating their rights.” (*Parada, supra*, 176 Cal.App.4th at p. 1582.)

■ Appellants contend that the arbitration provision's requirement that each party advance half the arbitration costs is supported by section 1284.2. That statute provides: "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit." By its own terms, section 1284.2 does not approve a requirement that parties *advance* their pro rata share of the expenses and fees or suffer a default. More important, it does not override "California's long-standing public policy of ensuring that all litigants have access to the justice system [or an alternate forum] for resolution of their grievances, without regard to their financial means." (*Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 94 [161 Cal.Rptr.3d 493].) Thus, section 1284.2 cannot be interpreted to support an arbitration provision that would deny persons of limited means a forum in which to vindicate their rights. (*Roldan v. Callahan, supra*, 219 Cal.App.4th at pp. 95–96.)¹²

Appellants further contend that section 1284.3, subdivision (b) would act as a "safety valve" for high arbitration costs. Pursuant to that statutory provision, "[a]ll fees and costs charged to or assessed upon a consumer party by a private arbitration company in a consumer arbitration, *exclusive of arbitrator fees*, shall be waived for an indigent consumer." (*Id.*, subd. (b)(1), italics added.) Thus, while the \$400 JAMS filing fee may be waived for indigent consumers, the statute does not affect the prohibitively high cost of arbitrator fees. In short, section 1284.3 does not render arbitration affordable for respondents.¹³

Appellants dispute respondents' assertion that arbitration is unaffordable, contending that respondents' average gross annual income at the time they signed the rental agreements was approximately \$50,628.84. Appellants'

¹² The arbitration provision provides that it is governed by the California Arbitration Act (CAA), § 1280 et seq., and does not mention the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). Appellants concede the provision is governed by the CAA. Additionally, they have presented no evidence showing the instant matter involves interstate commerce. Thus, appellants' citations to federal case law interpreting arbitration agreements solely under the FAA is inapposite.

¹³ As our Supreme Court has noted, "The legislative history shows that [section 1284.3]'s specific provisions were part of a general concern about the affordability of arbitration: 'One of the primary arguments advanced in support of mandatory consumer arbitration is that it is less costly than civil litigation. However, this argument is cast into significant doubt by the available evidence. In fact, arbitration costs are so high that many people drop their complaints because they can't afford to pursue them, a recent study by Public Citizen found.' " (*Sanchez, supra*, 61 Cal.4th at p. 919.)

figure is not supported by the record. In calculating the average gross annual income, appellants apparently excluded respondents who did not report any income (Monica Bravatti, Christine Davis, Jose Luis Mendoza, and Maria Salazar) and included individuals not subject to arbitration (Chris Abeyta and Linda Abeyta, Hetty Torres and Beatrice Perez). In addition, appellants used the combined income of a household—many of which include two or more respondents—despite the arbitration provision’s prohibition on consolidation of claims. When corrected for these errors, the individual average annual gross income of respondents at the time they signed the agreements was approximately \$35,600, and their median annual income was approximately \$32,600. A respondent earning this amount would likely qualify as an “indigent consumer,” entitled to a fee waiver under section 1284.3, subdivision (b)(1).¹⁴

Moreover, as our Supreme Court has noted, even a nonindigent consumer may be substantially deterred by high arbitration costs. (*Sanchez, supra*, 61 Cal.4th at p. 920 [“[H]igh arbitration fees can be unaffordable for nonindigent as well as indigent consumers, and nothing . . . precludes courts from using unconscionability doctrine on a case-by-case basis to protect nonindigent consumers against fees that unreasonably limit access to arbitration”].) For example, a person who earns \$50,000 annually, supports a family, and has a claim requiring two days of hearings would likely be substantially deterred by having to advance 20 percent of his or her annual salary before arbitrating a claim.

Finally, in the context of mandatory employment arbitration agreements that apply to unwaivable statutory claims—such as FEHA claims—our Supreme Court has held that regardless of an employee’s income, an employer must pay all costs unique to arbitration, including arbitrator fees. (*Armendariz, supra*, 24 Cal.4th at p. 113.) In the FAC, respondents asserted two FEHA claims—racial discrimination and sexual harassment in housing. Nevertheless, the instant arbitration provision does not exempt respondents bringing those claims from the unique costs of arbitration. This fact further supports a finding of substantive unconscionability.

¹⁴ Section 1284.3, subdivision (b) provides that “‘indigent consumer’ means a person having a gross monthly income that is less than 300 percent of the federal poverty guidelines.” Respondents signed the agreements between 2000 to 2013. Over those years, we take judicial notice that the federal poverty guidelines ranged from \$8,350 (in 2000) to \$11,490 (in 2013) annually for a single-member household, and from \$11,250 (in 2000) to \$15,510 (in 2013) for a two-member household. (See U.S. Dept. of Health & Human Services, Poverty Guidelines, online at <<http://aspe.hhs.gov/2000-hhs-poverty-guidelines>> and <<http://aspe.hhs.gov/2013-poverty-guidelines>> [as of Sept. 9, 2016].) Based on their declarations, most respondents were supporting two or more persons on their income, and would have qualified as indigent consumers.

2. Other Terms Contributing to Substantive Unconscionability

On its face, the arbitration provision contains other terms that raise concerns of substantive unconscionability. Although the trial court did not address those contractual terms, the parties provided supplemental briefs at our request.

i. Shortened Arbitral Limitations Period

The arbitration provision states: “If you do not give us notice within one (1) year of the date of any occurrence, or disputed condition or act or omission, we will not be liable for any injury or damage to you or others in your household. Damages shall be limited to a 1 year period prior to the date you deliver your written demand or notice of intention to arbitrate.” In *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107 [12 Cal.Rptr.3d 663], the court found that a vastly shortened limitations period was unreasonable and restricted an employee’s ability to vindicate his civil and statutory rights. There, the arbitral limitations period was six months, whereas FEHA claims have a one-year limitations period from the issuance of a “‘right to sue’” letter and the Labor Code violations have three- or four-year limitations periods. (*Martinez v. Master Protection, supra*, 118 Cal.App.4th at pp. 117–118; see also *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 470–471 [64 Cal.Rptr.3d 773, 165 P.3d 556] (*Gentry*) [characterizing contractual term providing for “a one-year statute of limitations as opposed to the three-year statute for recovering overtime wages provided under Code of Civil Procedure section 338 [citation] and a four-year statute of limitations for the unfair competition claim under Business and Professions Code section 17208” as unfairly one-sided], abrogated on other ground as stated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360 [173 Cal.Rptr.3d 289, 327 P.3d 129]; *Nyulassy v. Lockheed Martin Corp.*, *supra*, 120 Cal.App.4th at p. 1283, fn. 12 [“shortened limitations period . . . is one factor leading us to hold that the contract is substantively unconscionable” (italics omitted)].) Here, the one-year limitations period is significantly shorter than those for most of the claims in the FAC and further supports a finding of substantive unconscionability.¹⁵

ii. Limitations on Arbitral Remedies

■ As detailed above, the arbitration provision limits damages to one year from the demand for arbitration. It also precludes an award of “punitive

¹⁵ For example, the contract claims have a four-year limitations period (see § 337), the unfair business practice claims have a four-year limitations period (see Bus. & Prof. Code, § 17208), the illegal towing claim has a three-year limitations period (see Veh. Code, §§ 22658, 338, subd. (a)), and the negligence claims have a two- or three-year limitations period (see §§ 335.1, 338, subd. (b)).

damages [if more than two percent of owner equity in the park or if in addition to any statutory penalty in any sum].” In *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504 [105 Cal.Rptr.3d 585], the court found that a contractual term limiting an arbitrator’s power to award “consequential, incidental, and punitive” or “special damages” on breach of contract, tort and statutory claims was substantively unconscionable. (*Id.* at p. 1509; see pp. 1510, 1515.) Likewise, in *Armendariz*, the Supreme Court held that an arbitration agreement may not limit punitive damages where authorized by statute, such as FEHA. (*Armendariz, supra*, 24 Cal.4th at pp. 103–104.) As noted, respondents asserted two FEHA claims, but the arbitration provision unlawfully limits punitive damage awards on those claims. The improper limitation on punitive damages further supports a finding of substantive unconscionability. (See *Gentry, supra*, 42 Cal.4th at p. 471 [noting that contractual terms limiting damages to one year from date cause of action accrued and imposing \$5,000 cap on punitive damages were unfairly one sided].)¹⁶

C. Severance

■ An unconscionable contractual term may be severed and the resulting agreement enforced, unless the agreement is permeated by an unlawful purpose, or severance would require a court to augment the agreement with additional terms. (See *Armendariz, supra*, 24 Cal.4th at pp. 124–125.) Here, the arbitration provision has more than one unlawful term: it requires that all parties—even persons of limited means—advance half the costs of arbitration fees or suffer a default, imposes a shortened limitations period on most claims, and improperly limits remedies available in arbitration. Where an “arbitration agreement contains more than one unlawful provision,” that factor weighs against severance. (*Id.* at p. 124.) Moreover, appellants do not argue on appeal that the terms governing the costs of initiating arbitration are severable. As severing the selection of JAMS and the requirement to advance arbitration fees would require reforming the contract with additional terms, we decline to do so.

■ We conclude the arbitration provision is significantly unconscionable, both procedurally and substantively. Accordingly, the trial court properly denied appellants’ motion to compel arbitration.

¹⁶ In their supplemental briefing, appellants contend that *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 [179 L.Ed.2d 742, 131 S.Ct. 1740], abrogated *Armendariz* to the extent it held that limitations of arbitral remedies with respect to statutory claims are substantively unconscionable. *Concepcion* involved class-action waivers; it did not address limitations on arbitral remedies.

DISPOSITION

The order is affirmed. Respondents are entitled to their costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

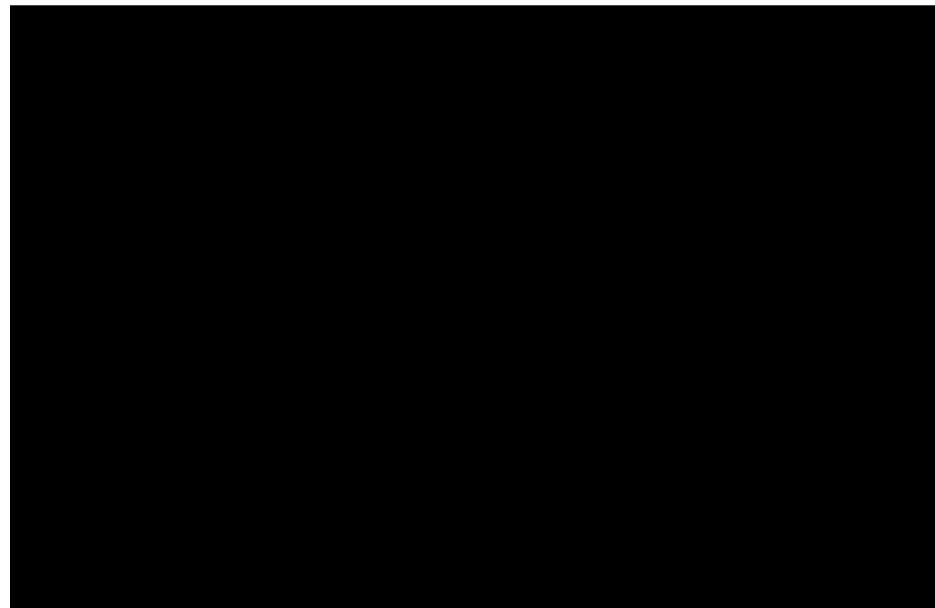
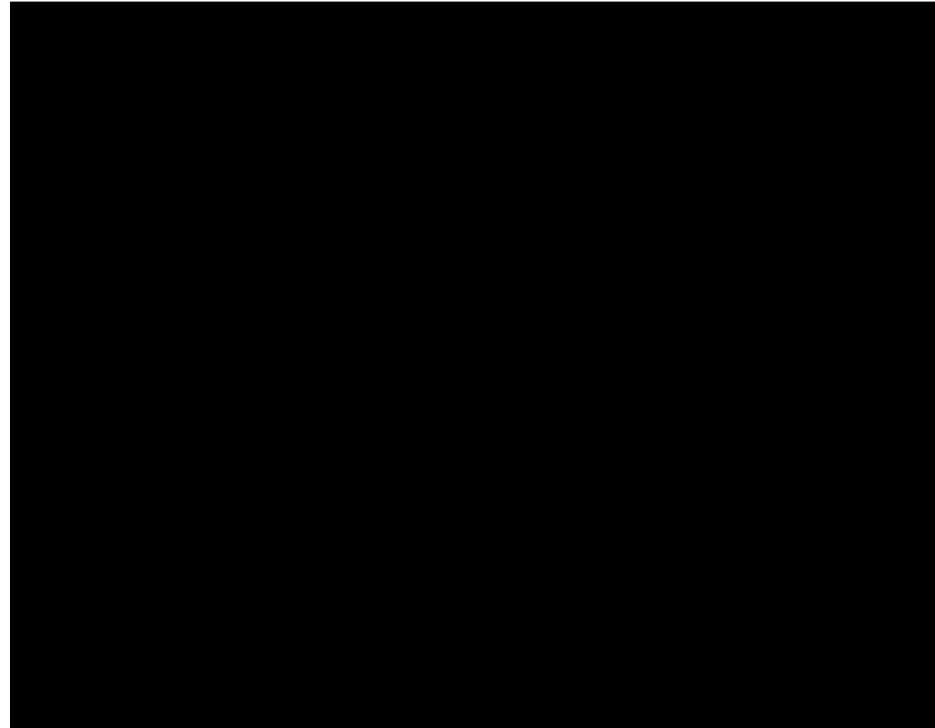
[No. B268149. Second Dist., Div. Seven. Sept. 12, 2016.]

In re MICHAEL V. et al., Persons Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
KRISTINA C., Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

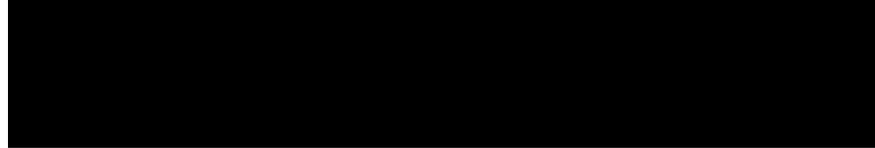
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COUNSEL

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

PERLUSS, P. J.—Kristina C., the mother of five-year-old Alissa M. and two-year-old K.C., appeals the juvenile court’s September 29, 2105 order terminating her parental rights and identifying adoption as the permanent plan for her two daughters. Kristina contends the court and the Los Angeles County Department of Children and Family Services (Department) failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We agree the Department failed to adequately investigate Kristina’s claim of Indian ancestry, remand the matter to allow the Department and the juvenile court to fully comply with ICWA and related California law and otherwise conditionally affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dependency Proceedings Leading to Termination of Kristina’s Parental Rights to Alissa and K.C.*

Both Kristina and K.C. tested positive for methamphetamine immediately after K.C.’s birth in December 2013. On June 2, 2014 the court sustained a petition filed pursuant to Welfare and Institutions Code section 300,

subdivision (b),¹ alleging Kristina had a history of alcohol and illicit drug abuse and was a current user of methamphetamine, which rendered her incapable of providing regular care for her two daughters and their older brother, Michael V., who was then six years old.² The court also sustained the allegation that Kristina had, on prior occasions, been under the influence of methamphetamine while the children were in her care, endangering their physical health and safety. At the disposition hearing on August 4, 2014 the court declared the children dependents of the court, ordered Michael placed with his paternal great-grandmother and the two other children suitably placed and ordered family reunification services for Kristina, including a full drug and alcohol program with testing and aftercare, parenting classes and individual counseling to address case issues. Reunification services were also ordered for Alissa's presumed father, but not for K.C.'s alleged (biological) father.

At the six-month review hearing (§ 366.21, subd. (e)), held on May 18, 2015, the court found that Kristina was only in partial compliance with her case plan and Alissa's father was not in compliance with his case plan. The court ordered family reunification services terminated and set a selection and implementation hearing (§ 366.26) for September 29, 2015.

The court conducted a contested hearing pursuant to section 366.26 on September 29, 2015. Kristina testified, and her counsel argued she had established the parent-child relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). After considering the evidence and argument of counsel, the court found by clear and convincing evidence that the return of Alissa and K.C. to their parents would be detrimental and that the children were adoptable. The court also found, although Kristina had regular, consistent visitation with the children, she had not occupied a parental role in their life and the benefit to the children of permanency through adoption outweighed the benefit of an ongoing relationship with Kristina. Accordingly, the court terminated Kristina's and the two fathers' parental rights and transferred care, custody and control of the children to the Department for adoptive planning and placement.³

¹ Statutory references are to this code unless otherwise stated.

² Michael was subsequently placed in a legal guardianship with his paternal great-grandmother. The September 29, 2015 order terminating parental rights at issue in this appeal does not apply to him.

³ After terminating parental rights and identifying adoption as the children's permanent plan on September 29, 2015, the court denied as moot Kristina's section 388 petition to liberalize visitation, filed on September 16, 2015. Several days earlier the court had denied those portions of the section 388 petition requesting a home-of-parent order or the reinstatement of reunification services because Kristina had not presented any new evidence or change of circumstances and the proposed modifications would not, in any event, be in the best interest of the children. Although Kristina's notice of appeal identifies both the September 29, 2015

2. *Investigation of Kristina's Claim of Indian Ancestry and the Finding ICWA Did Not Apply*

The detention reported filed December 11, 2013 states ICWA does not apply and explains, "On 12/07/13, mother, Kristina C[.], denied any American Indian Ancestry." The section 300 petition, filed the same date, included a Judicial Council form ICWA-010(A), "Indian Child Inquiry Attachment," for each of Kristina's three children, completed by the children's social worker who had prepared the detention report. Each form also states "mother denied any American Indian Ancestry." (The material filed on Dec. 11, 2013 stated Michael's paternal great-grandmother denied any American Indian ancestry, but provided no information concerning possible Indian ancestry of the fathers of the two other children.)

In connection with her appearance at the detention hearing on December 11, 2013, however, Kristina filed a Judicial Council form ICWA-020, "Parental Notification of Indian Status," in which she stated she "may have Indian ancestry through MGM," that is, through her mother, the children's maternal grandmother. At the hearing the court described the statement on the ICWA-020 form, learned that the woman in court with Kristina was a paternal aunt, and then asked, "Who told you you may have Indian ancestry?" Kristina, who was then 22 years old, responded, "When I was, like, going through court for myself, like, my social worker, she was looking up my mom because she's never, like, a part of my life. So they were trying to track her down. And when they did, they told me she was full-blood Indian. And they tried seeing if I could get services for that, but they said something about, like, the number." The court inquired further, "When the social worker started looking into your Indian ancestry, what did the social worker find?" Kristina answered, "That she was from two tribes." The court asked, "And what were the tribes?" Kristina responded, "I don't remember."

The court ordered the Department to investigate Kristina's Indian ancestry, to provide notice to the tribes if ICWA was triggered and to include details regarding its ICWA inquiry in the social study report. The court then ruled, "At this point, the court does not have reason to know or believe that the child is an Indian child as defined by the Indian Child Welfare Act. The Indian Child Welfare Act does not apply."

The jurisdiction/disposition report prepared for the March 18, 2014 jurisdiction hearing was received by the court on February 27, 2014. The report

order terminating parental rights and the order denying her section 388 petition, her appellate brief challenges the ICWA ruling only as it relates to the termination order. (See *Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066 [193 Cal.Rptr.3d 403] ("[o]n appeal we need address only the points adequately raised by plaintiff in his opening brief on appeal").)

stated that Kristina had been interviewed on February 24, 2014 regarding her knowledge of the family's ancestry. The report quoted Kristina's comment, "My social worker from LA told me my mom was full blooded and from 2 tribes, but I don't remember. This was about 7 years ago." Kristina explained she had been placed in foster homes, provided services and eventually emancipated from the system. The report stated the records from Kristina's dependency case were searched, and there was no indication the family had Indian ancestry and no information was found as to the names of possible tribes. Alissa's father was interviewed, and he stated he did not have Indian ancestry. The report reiterated Michael's paternal great-grandmother had previously stated her family had no American Indian ancestry.

In another section of the report, the Department briefly described Kristina's childhood, noting she was raised by her paternal grandparents because both of her parents were methamphetamine users. Kristina stated she had two siblings. Her grandmother died when she was 13 years old, at which point she apparently became a dependent of the court because she kept running away from her father and her aunt. Kristina also said she believed her mother was currently living in San Diego.

At a status hearing on February 28, 2014 the court asked if any party wanted to be heard regarding the ICWA investigation. No one responded. The court found the ICWA investigation had been completed. It again ruled it had no reason to know or believe the children were Indian children as defined by ICWA and concluded ICWA did not apply.

With respect to ICWA the Department's report prepared for the section 366.26 hearing, dated August 27, 2015, stated only, "On 02/28/2014 the court found that ICWA does not apply." There was no mention of ICWA at the September 29, 2015 hearing at which the court terminated Kristina's parental rights as to Alissa and K.C.

DISCUSSION

1. *The ICWA Inquiry and Notice Requirements*

■ ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. (25 U.S.C. § 1902; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7–8 [203 Cal.Rptr.3d 633, 373 P.3d 444]; *In re W.B.* (2012) 55 Cal.4th 30, 47 [144 Cal.Rptr.3d 843, 281 P.3d 906].) For purposes of ICWA, an "Indian child" is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the

biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); see Welf. & Inst. Code, § 224.1, subd. (a) [adopting federal definitions].)⁴

As the Supreme Court recently explained, notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 829.) Notice to the parent or Indian custodian and the Indian child's tribe is required by ICWA in state court proceedings seeking foster care placement or termination of parental rights "where the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) Similarly, California law requires notice to the parent, legal guardian or Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court "knows or has reason to know that an Indian child is involved" in the proceedings. (§ 224.3, subd. (d); see Cal. Rules of Court, rule 5.481(b)(1) [notice is required "[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," which includes all dependency cases filed under § 300].)

■ If the court has reason to know an Indian child may be involved in the pending dependency proceeding but the identity of the child's tribe cannot be determined, ICWA requires notice be given to the federal Bureau of Indian Affairs (BIA) (25 U.S.C. §§ 1903(11), 1912(a); see *In re Isaiah W.*, *supra*, 1 Cal.5th at p. 8). California law reinforces this requirement: Section 224.2, subdivision (a)(4), provides, "Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs." In addition, the California statute requires any notice sent to the child's parents, Indian custodians or tribe to "also be sent directly to the Secretary of the Interior" unless the Secretary of the Interior has waived notice in writing. (§ 224.2, subd. (a)(4); see *In re Isaiah W.*, at p. 9.)

The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a person having an interest in the child, including a member of the child's extended family, "provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1);

⁴ In 2006, to increase compliance with ICWA, the California Legislature passed Senate Bill No. 678 (2005–2006 Reg. Sess.), codifying and elaborating on ICWA's requirements through revisions to several provisions of the Family, Probate and Welfare and Institutions Codes. (See *In re Isaiah W.*, *supra*, 1 Cal.5th at p. 9; *In re W.B.*, *supra*, 55 Cal.4th at p. 52; see also § 224, subd. (a).)

see *In re Isaiah W.*, *supra*, 1 Cal.5th at p. 15 [“section 224.3, subdivision (b) sets forth a nonexhaustive list of ‘circumstances that may provide reason to know the child is an Indian child’ ”]; Cal. Rules of Court, rule 5.481(a)(5)(A) [containing language substantially identical to that in § 224.3, subd. (b)(1)]; see also *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386–1387 & fn. 9 [194 Cal.Rptr.3d 679] [because only the tribe may make the determination whether the child is a member or eligible for membership, there is no general blood quantum requirement or “remoteness” exception to ICWA notice requirements]; *In re B.H.* (2015) 241 Cal.App.4th 603, 606–607 [194 Cal.Rptr.3d 226] [“a person need not be a *registered* member of a tribe to be a member of a tribe—parents may be unsure or unknowledgeable of their own status as a member of a tribe”].)

■ Importantly for our purposes, the burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. Juvenile courts and child protective agencies have “an affirmative and continuing duty to inquire” whether a dependent child is or may be an Indian child. (§ 224.3, subd. (a); see *In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 9, 10–11; see also Cal. Rules of Court, rule 5.481(a); *In re W.B.*, *supra*, 55 Cal.4th at pp. 52–53.) This affirmative duty to inquire is triggered whenever the child protective agency or its social worker “knows or has reason to know that an Indian child is or may be involved.” (Cal. Rules of Court, rule 5.481(a)(4).) At that point, the social worker is required, as soon as practicable, to interview the child’s parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child’s membership status or eligibility. (§ 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4)(A); see *In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1386; *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539 [83 Cal.Rptr.3d 513].)

2. *The Department Did Not Adequately Investigate Kristina’s Claim of Indian Ancestry*

a. *The issue of ICWA compliance is properly before this court*

As discussed, the juvenile court ruled ICWA did not apply to this dependency proceeding on December 11, 2013 and February 28, 2014. Emphasizing that Kristina has appealed only from the juvenile court’s order of September 29, 2015 terminating her parental rights as to Alissa and K.C., not either of those earlier orders, the Department contends we lack jurisdiction to consider the ICWA issue and Kristina’s appeal should be dismissed.

The Department's argument is directly refuted by the Supreme Court's recent decision in *In re Isaiah W.*, *supra*, 1 Cal.5th 1, which held a parent who did not file a timely appeal from a juvenile court order that included a finding of ICWA's inapplicability may nonetheless challenge such a finding by appealing from a subsequent order terminating parental rights. (*In re Isaiah W.*, at p. 6.) The Supreme Court explained the juvenile court has "a *continuing duty*" to inquire whether the child before it is an Indian child "in all dependency proceedings, including a proceeding to terminate parental rights." (*Id.* at p. 10.) In light of that continuing duty, an order terminating the mother's parental rights "was necessarily premised on a *current* finding by the juvenile court that it had no reason to know [the child] was an Indian child and thus ICWA notice was not required." (*Ibid.*) In *In re Isaiah W.* that finding was explicitly made during the section 366.26 hearing. (*In re Isaiah W.*, at p. 10.) Here, that essential finding was implicit in the court's order terminating parental rights, grounded on its earlier ICWA rulings, which were identified in the Department's section 366.26 report. (See *In re Asia L.* (2003) 107 Cal.App.4th 498, 506 [132 Cal.Rptr.2d 733] [juvenile court is not required to make an express finding that ICWA does not apply; "its finding may be either express or implied"]; cf. *In re Zacharia D.* (1993) 6 Cal.4th 435, 456 [24 Cal.Rptr.2d 751, 862 P.2d 751] [recognizing implied findings in dependency proceedings].) As in *In re Isaiah W.*, Kristina's appeal, properly understood, does not challenge the juvenile court's December 11, 2013 and February 28, 2014 findings of ICWA inapplicability, but the implied finding of ICWA inapplicability underlying the September 29, 2015 order terminating her parental rights. (See *In re Isaiah W.*, at p. 15.)

- b. *The Department apparently made no affirmative effort to inquire about the children's possible Indian ancestry by contacting members of Kristina's family*

Kristina's principal argument on appeal is that her social worker's comments when she was a dependent of the court about her mother's Indian ancestry triggered ICWA's notice requirements and it was, therefore, error for the juvenile court not to order the Department to notify the BIA of the dependency proceedings. We agree with the Department that Kristina's recollection of what she had been told seven years earlier, coupled with the absence of any corroborating information in the records from her dependency case, was insufficient without further substantiation to require notice to the BIA. (See, e.g., *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 [135 Cal.Rptr.3d 355] [mother's inability to identify tribe or nation and failure to provide any contact information to substantiate her unsupported belief insufficient to invoke ICWA; family lore alone is insufficient to give court reason to know a child is an Indian child]; *In re O.K.* (2003) 106 Cal.App.4th 152, 157 [130 Cal.Rptr.2d 276] [grandmother's statement that child "may have

Indian in him,’ ” without more, insufficient to invoke ICWA notice requirements]; see also *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 [92 Cal.Rptr.3d 203] [“more than a bare suggestion that a child might be an Indian child” is required to trigger ICWA notice requirements].)⁵

■ But Kristina also contends the investigation of her Indian ancestry conducted by the Department was inadequate. We agree. (See *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200 [74 Cal.Rptr.3d 863] [“the duty to inquire is triggered by a lesser standard of certainty regarding the minor’s Indian child status . . . than is the duty to send formal notice to the Indian tribes”].) The Department, as well as the court, has an affirmative obligation “to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members” (§ 224.3, subd. (c); see Cal. Rules of Court, rule 5.481(a)(4)(A)) if a person having an interest in the child “provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe” (§ 224.3, subd. (b)(1); see Cal. Rules of Court, rule 5.481(a)(5)(A)). (5) Kristina did precisely that, suggesting Alissa and K.C.’s maternal grandmother was a member of two Indian tribes in answer to questions from the court. Although the court then ordered the Department to investigate the children’s possible Indian ancestry, the Department did not take appropriate affirmative steps to do so; and the court failed to ensure that an adequate investigation had been conducted.

To be sure, following Kristina’s statements to the court that she had been told by a social worker that her mother was a full-blooded Indian, the Department reinterviewed Kristina and checked its own records but could not find any information that confirmed Kristina’s recollection. Then, notwithstanding the express requirements of section 224.3 and California Rules of Court, rule 5.481, it did nothing more. The Department made no effort to locate the children’s maternal grandmother to interview her even though it was she who reportedly had the direct link to a tribe. (Kristina had said her mother might be living in San Diego, thus giving the Department at least a starting place for its inquiry.) Moreover, although Kristina said she had two siblings, the Department did not attempt to interview them, nor does it appear a social worker even asked Kristina their names or where they lived. In addition, while the children’s paternal relatives, including Alissa’s father, indicated there was no Indian ancestry on their side of the family, the

⁵ When the facts are undisputed, we review independently whether ICWA requirements have been satisfied. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254 [126 Cal.Rptr.2d 639].)

Department did not inquire whether they might have any information regarding Alissa's and K.C.'s possible Indian ancestry through their mother.

The Department's brief in this court reflects its misunderstanding of its duty to meet ICWA's requirements. The Department attempts to defend its investigation by asserting, "Mother's paternal aunt, who was present at the detention hearing, also never spoke up to indicate mother's paternal family believed mother might have Indian heritage." It was not the paternal great-aunt's obligation to speak up; it was the Department's obligation to inquire, an affirmative and continuing duty imposed by both ICWA and California law. (See *In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 10–11.)

We remand the matter for the juvenile court to direct the Department to conduct a meaningful investigation into Kristina's claim of Indian ancestry, including making genuine efforts to locate other family members who might have information bearing on the children's possible Indian ancestry. If that investigation produces any additional information substantiating Kristina's claim, notice must be provided to any tribe that is identified or, if the tribe cannot be determined, to the BIA. The Department shall thereafter notify the court of its actions and file certified mail return receipts for any ICWA notices that were sent, together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether Alissa and K.C. are Indian children. If the court finds they are Indian children, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect.

DISPOSITION

The section 366.26 order of the juvenile court is conditionally affirmed. The matter is remanded to the juvenile court for compliance with the inquiry and notice provisions of ICWA and related California law as set forth above and for further proceedings not inconsistent with this opinion.

Zelon, J., and Segal, J., concurred.

[No. F070988. Fifth Dist. Sept. 12, 2016.]

CITIZENS FOR CERES, Plaintiff and Appellant, v.
CITY OF CERES, Defendant and Respondent;
WALMART STORES, INC., et al., Real Parties in Interest and Respondents.

[No. F071600. Fifth Dist. Sept. 12, 2016.]

CITIZENS FOR CERES, Plaintiff and Respondent, v.
CITY OF CERES, Defendant and Respondent;
WALMART STORES, INC., et al., Real Parties in Interest and Appellants.

[REDACTED]

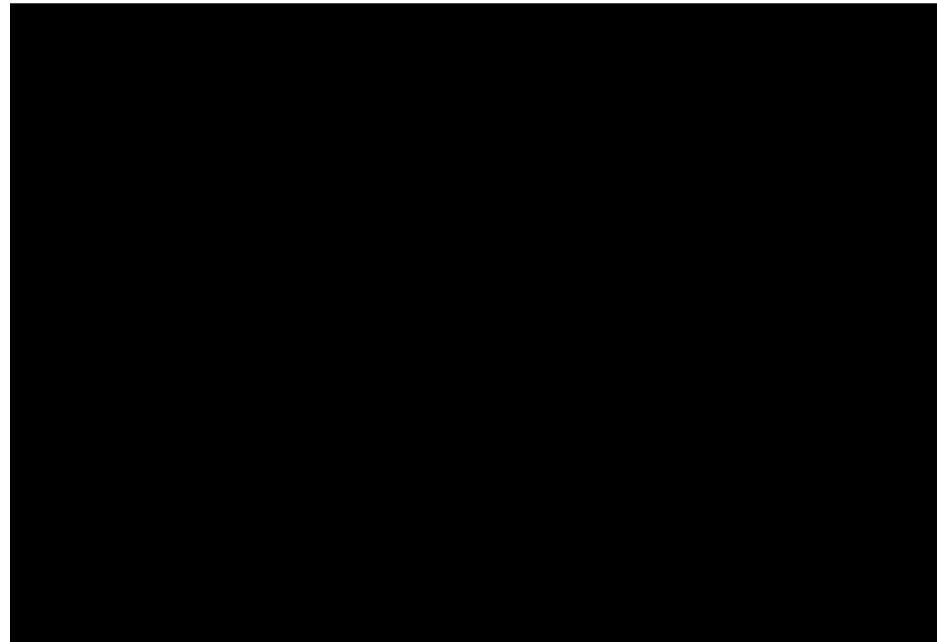
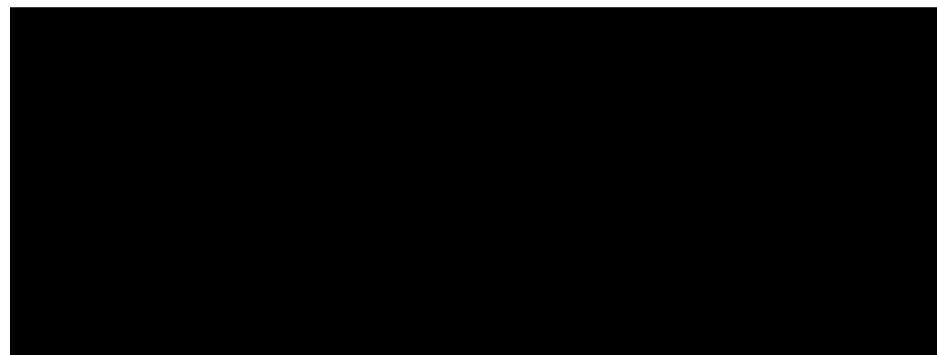
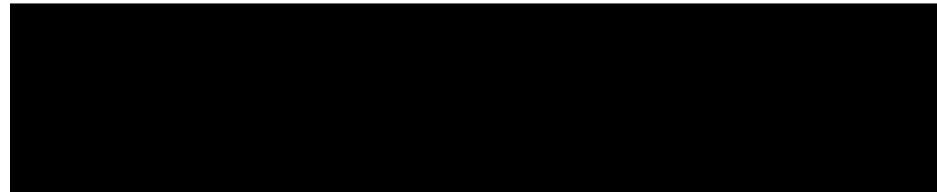
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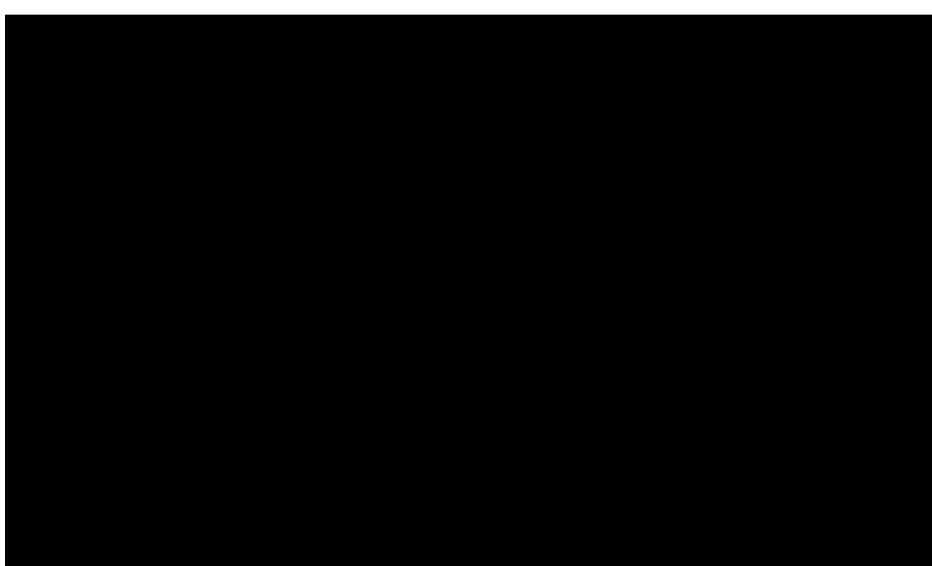
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COUNSEL

Shore, McKinley & Conger, Brett S. Jolley and Aaron S. McKinney for Plaintiff and Appellant and for Plaintiff and Respondent.

Meyers, Nave, Riback, Silver & Wilson and Edward A. Grutzmacher for Defendant and Respondent.

K & L Gates, Edward P. Sangster and Daniel W. Fox for Real Parties in Interest and Respondents and for Real Parties in Interest and Appellants.

OPINION

SMITH, J.—After conducting an environmental review, the City of Ceres (city) approved the development of a shopping center anchored by a Walmart Supercenter to replace an existing Walmart store. Citizens for Ceres (Citizens) filed a petition for a writ of mandate in the trial court pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)¹ (CEQA), alleging several defects in the environmental documents

¹ Subsequent statutory references are to the Public Resources Code unless otherwise noted.

the city certified when it approved the project. The trial court denied the petition and Citizens appeals.

Citizens makes four arguments: (1) The environmental impact report (EIR) certified by the city did not mandate adequate mitigation measures for the urban decay impact of the project; (2) the EIR did not sufficiently analyze the project's impacts on landfill and recycling facilities and did not mandate adequate mitigation measures for those impacts; (3) the EIR failed to contain adequate information correlating the project's air pollution impacts with resulting effects on human health; and (4) the city's statement of overriding considerations, a document that explains how the project's benefits will outweigh its significant and unavoidable environmental impacts, was not supported by substantial evidence. We reject each of these arguments.

After prevailing in the trial court, real parties in interest Walmart Stores, Inc., and Walmart Real Estate Business Trust (collectively Walmart) filed a memorandum of costs in which they requested, among other things, an award against Citizens of \$48,889.71 for the cost of preparing the administrative record. The city had incurred this cost by directing the record's preparation by outside counsel and Walmart had reimbursed the city. Granting Citizens' motion to tax costs, the trial court struck this item from Walmart's memorandum of costs. The court held that *Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176 [26 Cal.Rptr.3d 783] (*Hayward Area Planning*) and section 21167.6, subdivision (b)(1) and (2), bar a real party in interest from recovering the cost of preparing the administrative record when a petitioner had requested a lead agency to prepare the record and had not consented to a real party's involvement in its preparation. In a separate appeal, Walmart argues that this application of *Hayward Area Planning* was erroneous. We agree.

We affirm the trial court on the appeal by Citizens and reverse as to Walmart's appeal on the cost of preparing the administrative record.²

FACTS AND PROCEDURAL HISTORY

The project is a shopping center with about 300,000 square feet of retail space located at Mitchell Road and Service Road in Ceres. A building of about 190,000 square feet constitutes the first phase, to be occupied by a Walmart store. This store will replace an existing Walmart in Ceres. The new store will have nongrocery space comparable to the existing store, to which it

² This is the second opinion we have issued in this case. The first, *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 [159 Cal.Rptr.3d 789] (*Citizens for Ceres I*), granted Citizens' petition for a writ of mandate regarding privilege claims erroneously sustained by the trial court in connection with the preparation of the administrative record.

will add a 56,000-square-foot grocery area. The remainder of the project includes 10 additional buildings intended for smaller stores and restaurants. There is no specific timetable for the construction of any but the Walmart portion of the project.

An application for the necessary land use approvals was submitted to the city on February 16, 2007, by an entity called Regency Centers. Walmart bought the land from Regency Centers in 2009 and became the project applicant.

The city issued a notice of preparation of the EIR on September 5, 2007. It released the draft EIR on May 19, 2010, and announced a 45-day public comment period. The final EIR, including responses to comments, was issued on February 2, 2011. The city's planning commission held public hearings on February 22 and April 4, 2011, and voted to certify the final EIR.

The city's procedures provided for a process referred to as an appeal, in which the city council would review the planning commission's decision. Citizens filed such an appeal, leading to public hearings before the city council on May 23, August 22, and September 12, 2011. The city council upheld the planning commission's decision and again certified the final EIR. The city issued a notice of determination on September 13, 2011, stating that it had certified the EIR. The land use approvals granted included a conditional use permit and a vesting tentative subdivision map.³

Citizens filed its writ petition in the trial court on October 12, 2011. The petition advanced the claims Citizens advances in this appeal, among others.

While the writ petition was pending, a dispute developed between the parties over the city's claim that all communications between the city and Walmart were privileged. The city refused to disclose these communications and did not include them in the administrative record it prepared for purposes of the writ proceedings in the trial court. (*Citizens for Ceres I*, *supra*, 217 Cal.App.4th at pp. 899–900.) The trial court upheld the privilege claims, and Citizens filed a writ petition in this court. (*Id.* at p. 905.) In our opinion filed on July 8, 2013, we held that, for all communications preceding project approval and passing between the city and Walmart, privileges were waived by disclosure and the common interest doctrine did not apply. (*Id.* at pp. 898, 914.)

³ A conditional use permit authorizes a land use that, under a zoning ordinance, is allowed only when certain conditions are met. (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1006 [68 Cal.Rptr.3d 882].) A vesting tentative subdivision map authorizes a developer to proceed with development in accordance with local laws in effect at the time of application for the map, thus avoiding the potential for frustration of the project by later enactments. (*City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1193, fn. 6 [278 Cal.Rptr. 375, 805 P.2d 329].)

The case then proceeded in the trial court, and Citizens' petition on the merits was heard and taken under submission on July 11, 2014. The court rejected all of Citizens' claims and denied relief in a statement of decision filed on November 3, 2014. Judgment was entered on November 25, 2014.

Walmart filed its memorandum of costs in the trial court on December 17, 2014. It requested \$49,284.71 in costs. Of this, \$395 was for filing fees and \$48,889.71 was for “[o]ther.” The “[o]ther” costs, which are at issue in this appeal, were broken down as follows: original administrative record, \$34,981.84; supplemental administrative records, \$12,258.87; and privilege log, \$1,649.

Citizens had requested pursuant to section 21167.6 that the city prepare the administrative record, and the city had directed its outside counsel to carry out the preparation. When Walmart became the project applicant, it became successor to an agreement between the city and the prior applicant; this agreement included the project applicant's promise to reimburse the city for all expenses arising from legal challenges to the project. Walmart paid the city \$48,889.71 for costs of preparing the administrative record.

Citizens responded to Walmart's memorandum of costs by filing a motion to tax costs, in which it challenged the \$48,889.71 claim. Citizens' motion argued that, although the city, as the lead agency, could have recovered the cost of preparing the record under section 21167.6, Walmart could not. The trial court agreed.

DISCUSSION

I.–V.*

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VI. Order taxing costs

Walmart argues that the trial court erred when it applied *Hayward Area Planning* to bar an award of costs to Walmart for preparation of the administrative record. We agree.

Section 21167.6 includes the following provisions regarding preparation of the administrative record for purposes of CEQA actions: “(a) At the time that the action or proceeding is filed, the plaintiff or petitioner shall file a request that the respondent public agency prepare the record of proceedings relating

*See footnote, *ante*, page 237.

to the subject of the action or proceeding . . . [¶] (b)(1) The public agency shall prepare and certify the record of proceedings. . . . The parties shall pay any reasonable costs or fees imposed for the preparation of the record of proceedings in conformance with any law or rule of court. [¶] (2) The plaintiff or petitioner may elect to prepare the record of proceedings or the parties may agree to an alternative method of preparation of the record of proceedings, subject to certification of its accuracy by the public agency. . . . [¶] . . . [¶] (f) In preparing the record of proceedings, the party preparing the record shall strive to do so at reasonable cost in light of the scope of the record.”

In *Hayward Area Planning*, the plaintiffs sued the City of Hayward under CEQA, challenging the city’s approval of a developer’s project. The plaintiffs requested that the city prepare the administrative record. The city asked the law firm representing the developer to prepare the record. The city and the developer prevailed in the trial court and the developer filed a cost bill seeking to recover against the plaintiffs the \$50,193 it paid to its lawyers for preparation of the record, plus \$228 in filing fees. (*Hayward Area Planning, supra*, 128 Cal.App.4th at pp. 179–180.) The plaintiffs filed a motion to tax costs, arguing among other things that the developer was not entitled to recover the cost of preparing the administrative record because that preparation was the responsibility of the public agency, not the project applicant, under section 21167.6. The trial court disagreed but found that the city should have notified the plaintiffs of its intention to delegate record preparation to the developer; also, the amount requested by the developer was unreasonable. The trial court directed the developer to file a revised cost bill. The plaintiffs appealed, contending the developer was not entitled to any recovery for preparing the administrative record. (*Hayward Area Planning, supra*, at pp. 180–181.)

■ The Court of Appeal agreed with the plaintiffs. It first stated that section 21167.6 provided only three alternatives for preparation of the administrative record: the agency could prepare it; the plaintiff could prepare it subject to the agency’s certification; or the agency and the plaintiff could agree on a different procedure. The court pointed out that preparation by a real party in interest (i.e., a project applicant like the developer) was not among the options. (*Hayward Area Planning, supra*, 128 Cal.App.4th at p. 183.)

Next, the Court of Appeal found that section 21167.6 was ambiguous on the question of whether a real party in interest could recover the cost of preparing the administrative record from a defeated plaintiff, if it should end up bearing that cost. On the one hand, the statute allowed recovery “in conformance with any law or rule of court” (§ 21167.6, subd. (b)(1)), a

phrase that did not impose any limit on the parties who could recover. On the other hand, the provision allowing recovery of costs was part of the subdivision that said the public agency can prepare the record, which could be taken to imply that the public agency is also the party that can recover the cost of preparation. (*Hayward Area Planning, supra*, 128 Cal.App.4th at p. 183.)

The court resolved the ambiguity by finding that the policies of CEQA are best served by a rule that “the public agency must itself incur and seek recovery of the costs of record preparation when the record is prepared under subdivision (b)(1).” (*Hayward Area Planning, supra*, 128 Cal.App.4th at p. 185.) The court adduced several considerations in favor of this rule. First, the agency has incentives for minimizing costs that the applicant lacks. A public agency has a duty to act in the public interest and is accountable to its constituents if it fails to conserve public funds. (*Id.* at p. 184.) The applicant, by contrast, is free to act solely for its own private interest. (*Id.* at p. 185.) Further, when the agency prepares the record at its own expense, it knows it will have to justify any recovery in a public forum under the potential scrutiny of its constituents. This could be a motivation to avoid accumulating costs that are “exorbitant,” like those claimed in the case. (*Ibid.*) Finally, allowing the applicant to prepare the record and recover the cost would undermine the statutory purpose of expediting CEQA litigation. (See § 21167.1, subd. (a) [CEQA actions to be given scheduling priority over other civil actions].) Because the applicant was preparing the record, “the mounting costs of record preparation did not come under scrutiny until the end of the trial court proceedings”; whereas the agency or the plaintiffs, had they prepared it, “would have had reason to control those costs as the record was being prepared, promoting efficiency and limiting the need for time consuming litigation and judicial intervention.” (*Hayward Area Planning, supra*, at p. 185.) The court also stated that delegation of the preparation of the record to the applicant undermined the statutory scheme because the plaintiffs were not informed of the delegation in advance and had no opportunity to choose to prepare the record themselves to avoid having the applicants do it. (*Id.* at p. 184.)

■ In its written order granting Citizens’ motion to tax costs, the trial court quoted the *Hayward Area Planning* opinion’s rule that “the public agency must itself incur and seek recovery of the costs of record preparation when the record is prepared under subdivision (b)(1).” (*Hayward Area Planning, supra*, 128 Cal.App.4th at p. 185.) The trial court observed that the city in this case did *incur* the cost of preparing the record when it gave the task to its outside counsel, but it did not *seek recovery* of the cost. Walmart was doing that.

As we will explain, we disagree with the limitation in *Hayward Area Planning* on which prevailing parties are entitled to seek an award of the cost

of preparing the administrative record. *Hayward Area Planning* got it right when limiting awardable administrative record costs to situations in which the record was prepared in a statutorily approved manner, but not when excluding real parties in interest from the set of prevailing parties to which an award can be made.

■ A central premise of *Hayward Area Planning* is that, under section 21167.6, a party can be awarded the cost of preparing the administrative record only if it was prepared in one of the ways described in that section: by the agency, by the plaintiff, or by another method agreed on by the agency and the plaintiff. This premise is not explicitly stated in the opinion, but it is a necessary support for the holding of the case. Here, the record was prepared by one of the statutorily approved methods: The agency prepared it. An award of costs to Walmart thus would be consistent with this central premise.

In addition to stating the proper methods for preparing the administrative record (and thereby limiting the situations in which an award of costs for preparing it can be made), section 21167.6 provides that “[t]he parties shall pay any reasonable costs or fees imposed for the preparation of the record of proceedings in conformance with any law or rule of court.” (§ 21167.6, subd. (b)(1).) Here, the law under which Walmart applied for a costs award was Code of Civil Procedure sections 1032 and 1033.5. Citizens does not argue that a prevailing real party in interest that has reimbursed a coparty for otherwise allowable costs cannot recover those costs from an opposing party under those statutes. We see nothing in section 21167.6 from which we could infer a limitation on the identity of the prevailing parties that can recover administrative record costs under Code of Civil Procedure sections 1032 and 1033.5, so long as the record has been prepared in one of the three specified ways.

Hayward Area Planning holds that one reason a real party in interest should not be allowed, absent an agreement between the agency and the plaintiff, to seek an award of administrative record costs paid to the agency is that the agency should be obliged to appear in a public forum to seek recovery in its own name. This, the court believed, would encourage public agencies to minimize the cost of preparing the record. (*Hayward Area Planning*, *supra*, 128 Cal.App.4th at p. 185.) This rule might or might not be good public policy, but we do not see how section 21167.6 implies it. Even if section 21167.6 reflects a cost-reducing motivation, it would be beyond the usual limits of judicial interpretation to discover in this motivation an unstated prohibition on real parties in interest submitting cost bills after reimbursing public agencies for preparing the administrative record.

Citizens argues that, just as the *Hayward Area Planning* court believed the real party there lacked a public agency’s motivation to minimize costs in

preparing the record, here the city's incentive to reduce costs was weakened because of the reimbursement agreement. The city knew it would be reimbursed in full, win or lose. Citizens says the cost-reducing spirit of section 21167.6 is against allowing recovery under those circumstances. In our view, the trial court's power under Public Resources Code section 21167.6, subdivision (b)(1), and Code of Civil Procedure section 1033.5 to reduce unreasonable costs suffices to mitigate this concern.

■ Citizens says it did not have a chance to agree to the procedure by which the city would prepare the record and Walmart would reimburse it. Citizens relies on the remarks in *Hayward Area Planning* about how the plaintiff in that case was not consulted before the agency entrusted the developer with the task of preparing the record. (*Hayward Area Planning*, *supra*, 128 Cal.App.4th at p. 184.) We do not think this was required in this case. We agree with the *Hayward Area Planning* court's view that section 21167.6 would require the plaintiff's agreement before an agency could delegate record preparation to a real party in interest, but this does not imply anything about a real party in interest covering an agency's costs after the record is prepared by the agency and then applying for a cost award as a prevailing party.

Code of Civil Procedure section 1032 states that a prevailing party is "entitled" to a cost award "as a matter of right" in "any action or proceeding," except "as otherwise expressly provided by statute." (Code Civ. Proc., § 1032, subd. (b).) The key premise of *Hayward Area Planning*—that administrative record costs can be recovered by a prevailing party only if the record was prepared in one of the approved ways—can rightly be seen as a specific limitation on cost awards imposed by section 21167.6; but we do not think a prevailing party's right to recover costs can be squared with an additional rule that a prevailing real party is barred from recovery by section 21167.6 even if the administrative record was prepared in one of the approved ways.

For these reasons, we will reverse the order granting Citizens' motion to tax costs. Because the trial court had no occasion previously to consider whether the claimed administrative record costs were reasonable, we will remand to allow that determination to be made.

DISPOSITION

The judgment in case No. F070988 is affirmed. The order to tax costs in case No. F071600 is reversed and the case is remanded for further proceedings

consistent with this opinion. Respondents are awarded costs in the merits appeal, case No. F070988. Appellants are awarded costs in the costs appeal, case No. F071600.

Poochigian, Acting P. J., concurred.

FRANSON, J., Concurring.—*

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A petition for a rehearing was denied October 4, 2016, and the opinion was modified to read as printed above.

*See footnote, *ante*, page 237.

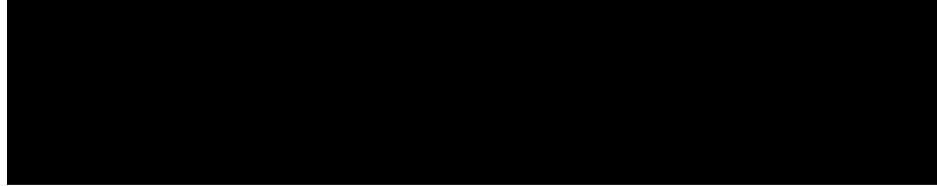
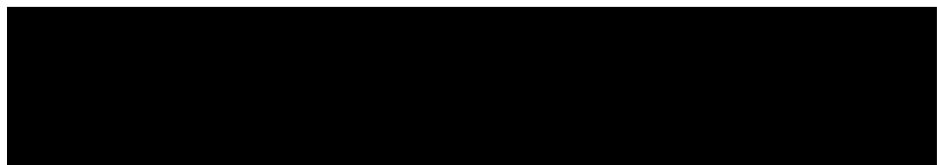
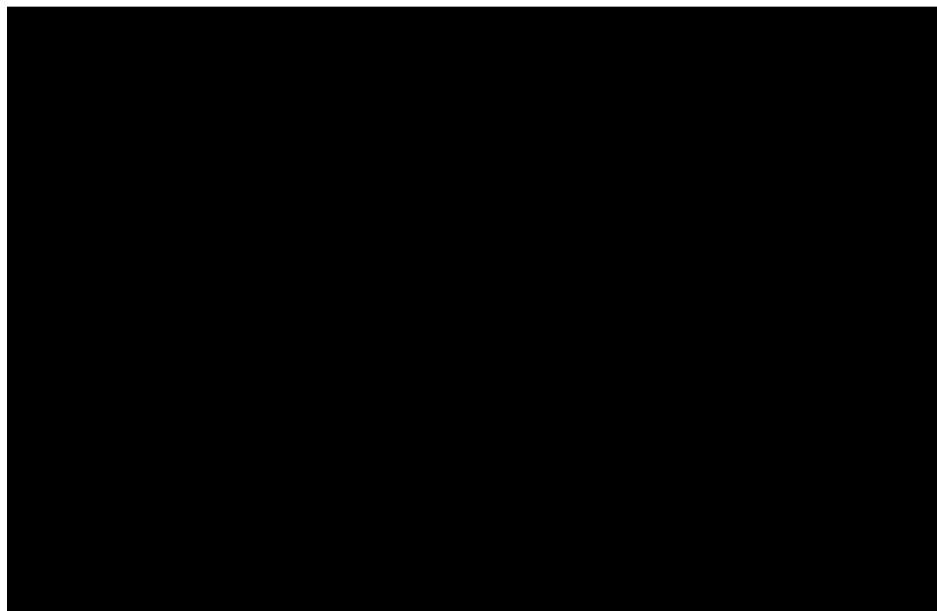
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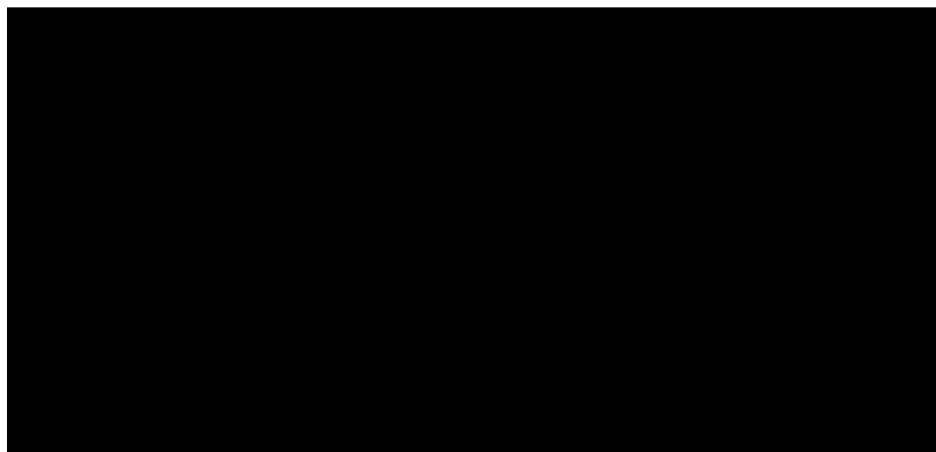
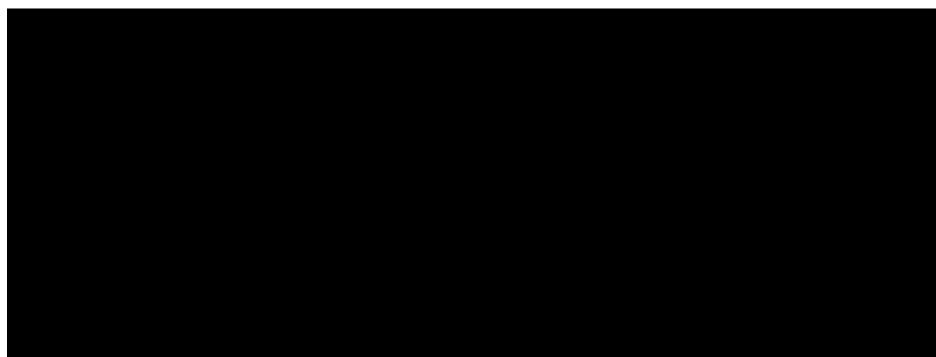
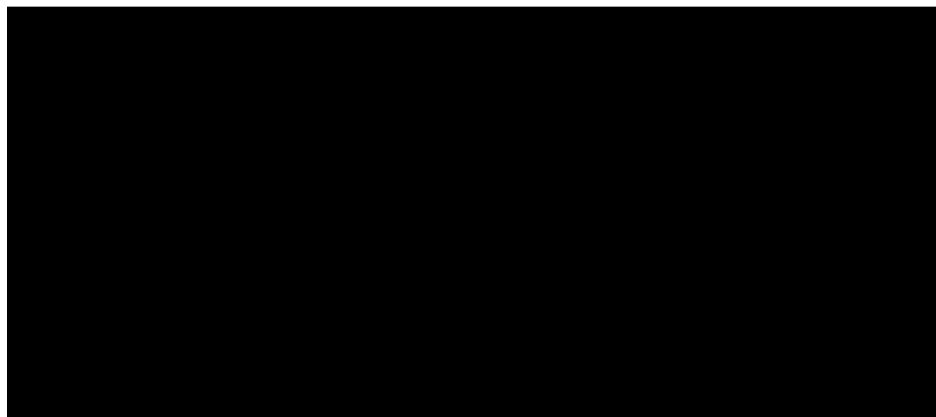
ANGEL L. MENDEZ et al., Individually and as Trustees, etc., Plaintiffs and Appellants, v.
RANCHO VALENCIA RESORT PARTNERS, LLC, Defendant and Respondent.

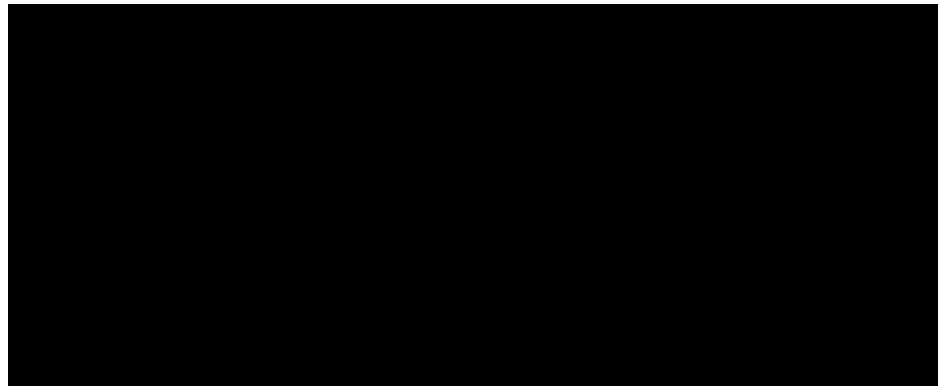
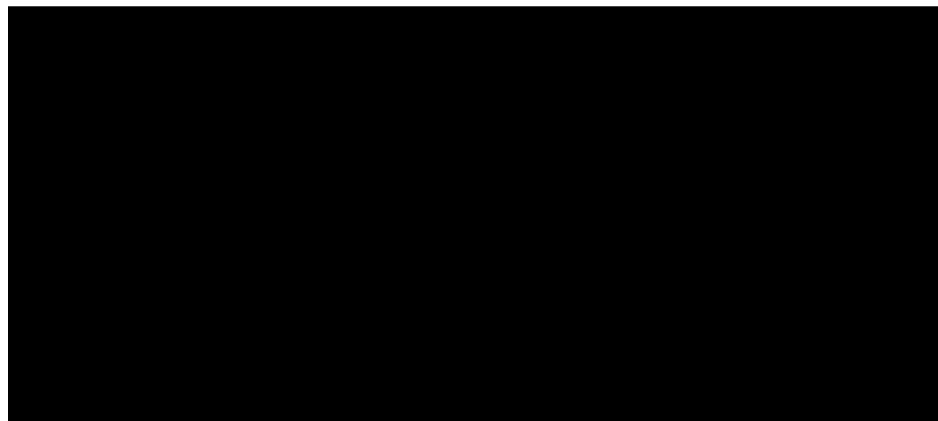
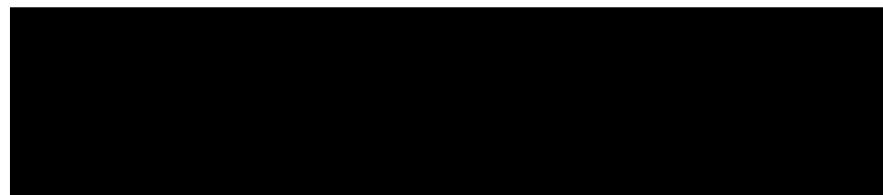
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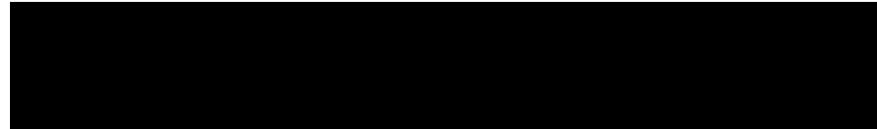
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COUNSEL

Burkhardt & Larson, Philip Burkhardt and Francisco Garcia, Jr., for Plaintiffs and Appellants.

Cooley, Steven M. Strauss and Dennis C. Crovella for Defendant and Respondent.

OPINION**AARON, J.—****I.****INTRODUCTION**

Plaintiffs Angel L. and Linda Mendez¹ appeal a judgment in favor of defendant Rancho Valencia Resort Partners, LLC. At the conclusion of a bench trial, the trial court entered judgment in favor of defendant on plaintiffs' action for private nuisance.

The case arises from a dispute over the reasonableness of the level of noise generated during outdoor festivities held at the Rancho Valencia Resort (the Resort). Plaintiffs, who share a property line with the Resort, became frustrated with the noise emanating from the Resort when it hosted outdoor events on a lawn created for that purpose. Plaintiffs filed suit, alleging that the Resort's outdoor events constituted a private nuisance, and seeking to enjoin the Resort from continuing to create noise that would travel onto plaintiffs' property and disturb them there.

¹ The Mendezes filed this action in their individual capacities, as well as in their capacities as trustees of the Mendez Family Trust dated November 1, 2002. For ease of reference and clarity, we will refer to each plaintiff by his or her first name when referring to them individually.

The trial court appreciated the difficulties inherent in this situation, but after a trial on the merits, concluded that the Resort's outdoor events did not amount to a private nuisance. The trial court explained:

"The history of this case reflects the principle that where neighbor disputes are concerned, a judicial resolution is rarely the preferable solution. This is because a court decision can only articulate a rule that marks a line between what one party is responsible for, and what it is not responsible for. Such a black-and-white approach is ill-suited to the multi-faceted subtleties that attend a neighbor relationship, which often require an ongoing series of give-and-take compromises on a variety of subjects. Once a legal rule is applied to the facts of a particular case, there is often little wiggle room left to smooth the frictions that inevitably arise between parties who continue to share a common property boundary."

"In this case, plaintiffs elected not to pursue other avenues for addressing the dispute. In particular, they abandoned their earlier attempts to obtain relief through available County administrative procedures. They likewise chose not to join other homeowners in the neighborhood, who continued to work informally with the resort owners despite not being completely satisfied with the progress. By filing this lawsuit and taking the matter to trial, plaintiffs effectively drew a line in the sand. But forced to choose, the Court concludes that the noise in this case is not so substantial and unreasonable as to fall on the side of the line that would require issuance of the injunction sought by plaintiffs."

Despite plaintiffs' contentions that the trial court failed to properly address purported violations of various San Diego County ordinances, we conclude that plaintiffs have demonstrated no reversible error in the trial court's decision. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The Resort, a five-star resort property in the Rancho Santa Fe area of San Diego County, first opened in 1989. The property occupies approximately 45 acres in an otherwise residential neighborhood, consisting of large homes on large lots. A central building on the property houses a guest reception area, restaurant, bar, ballroom and terrace balcony. To one side of this building is an area called the "Croquet Lawn," which consists of an expanse of grass. This area can accommodate large outdoor events at the Resort, such as weddings.

Plaintiffs own a 6,800-square-foot residence located on a lot that borders the Resort property. Plaintiffs' home is approximately 600 feet from the Croquet Lawn. Plaintiffs were aware of the Resort and its location in reference to their home at the time they purchased the home in 2000. Within weeks of buying the home, plaintiffs became aware that the Resort held outdoor events on the Croquet Lawn.

Beginning in 2004, Linda began complaining to San Diego County (County) officials regarding noise coming from the Resort property. In a March 2004 e-mail, Linda complained that the Resort was “‘not authorized to have outdoor events with amplified music or voices, which could adversely affect the neighborhood.’” Linda cited Resort Services Regulation section 6403 (Resort Services section 6403), which is contained in the County zoning ordinance (Zoning Ordinance), in complaining that the Resort “‘can not [*sic*] use a “public address system at such a volume as to allow words to be understood outside the boundaries of the lot or parcel on which the activity is located.”’”

The record does not contain information as to precisely how Linda’s 2004 complaint was resolved. Linda testified that she never received a response from the County, but documentary evidence demonstrates that when Linda again complained in 2006, a code enforcement officer responded that Linda’s complaint regarding the “‘same issues’” had been investigated in 2004. When Linda continued to press the issue, the code enforcement officer referred Linda to a 2004 e-mail that had been sent to Linda, which stated that the enforcement department had determined “‘that weddings and other outdoor events are an allowable accessory use to a resort.’”² In 2007, the County issued a formal administrative decision regarding Linda’s complaint that the Resort was in violation of the Zoning Ordinance, concluding that “‘wedding ceremonies are a reasonable and expected accessory use in a resort’” and that the Resort was not in violation of the major use permit issued to it in 1986.

The record indicates that Linda took no further action to appeal the County’s administrative zoning decision. Linda also did not take any action with respect to the County’s noise ordinance, despite her concern that events at the Resort were in violation of noise restrictions. Linda explained that she was not as troubled by the noise from the Resort at that time because the frequency of outdoor events at the Resort had diminished.

In May 2010, defendant purchased the Resort from its previous owners. Upon learning about a proposed renovation of the property, plaintiffs and

² At the time, Linda did not indicate in response to the code enforcement officer that she had not received the previous e-mail referred to by the code enforcement officer.

other neighbors became concerned that there would be more frequent outdoor events at the Resort. In November 2011, there was a meeting attended by four sets of neighbors to the Resort and David Essakow, one of the partners who owned the Resort. Two of the four sets of neighbors were principally concerned with events taking place on the Croquet Lawn. Essakow told the group that he could not make any commitments before speaking with the Resort's lawyers. The group agreed to meet again approximately 30 days later.

In January 2012, the Resort closed for renovations. During the eight-month renovation period, representatives of the Resort met with surrounding neighbors in several follow-up meetings. The Resort's representatives indicated to the neighbors that they intended to include noise mitigation measures as part of the renovations. Plaintiffs did not attend these meetings because they apparently disagreed with the approach that their neighbors were taking in addressing concerns about the Resort. Instead, plaintiffs filed this lawsuit on May 22, 2012, claiming that sound from events at the Resort amounted to a private nuisance.

The Resort reopened in September 2012. The renovations that had taken place at the property included a number of measures designed to mitigate the effect of noise from the Croquet Lawn events on neighboring property owners, including plaintiffs. The Resort hired a consulting company, URS Corporation (URS), to analyze sound at the Resort and come up with methods to attempt to address excess sound. For example, the Resort mandated that all outdoor events end at 10:00 p.m. It was determined that a stage area located on the Croquet Lawn would be positioned so that sounds would be directed away from plaintiffs' property. In addition, the Resort purchased a distributive sound system and a removable sound barrier to be installed behind the stage, which would be used during amplified events. Further, regulations at the Resort required that members of live bands use earpieces rather than utilize speakers directed back toward the band.

The Resort began hosting wedding receptions and other outdoor events on the Croquet Lawn when it reopened in September 2012. The Resort continued to adjust its noise mitigation efforts and add new ones as more events were held. For example, sometime after the renovations were completed, a subwoofer system was added to reduce the level of bass sounds.

In addition to taking these noise mitigation measures, the Resort implemented a sound monitoring system for all Croquet Lawn events. Sound decibel monitors were installed along the property line between the Resort and plaintiffs' property. For events in which amplified sound was being used, the Resort utilized the services of URS to monitor real time sound level

readings. URS would communicate with an employee of a different company, Sound Image, which operated the Resort's sound system for events. Using this system, when URS would detect sound levels that exceeded noise levels permitted by the County's noise ordinance, a URS employee would direct a Sound Image employee to reduce the volume of the sound system.

After the Resort reopened, plaintiffs had sound monitors placed on a second story deck at their residence. Plaintiffs' sound monitors were thus positioned at a higher level than the sound monitors utilized by the Resort at the property line. Plaintiffs sought a preliminary injunction to enjoin the Resort from "generating any noise whatsoever on [the Resort's property] in excess of the statutory limits imposed by San Diego County Code of Regulatory Ordinances Section 36.404." In support of their motion for a preliminary injunction, plaintiffs presented to the trial court evidence that the decibel readings from their sound monitors at times exceeded the noise levels permitted by the County's noise ordinance.³ Based on this evidence, in December 2012, the trial court issued a preliminary injunction prohibiting the Resort "from generating any noise whatsoever on defendants' property located at 5926 Valencia Circle, Rancho Santa Fe, California in excess of the statutory limits imposed by San Diego County Code of Regulatory Ordinances Section 36.404 and 36.414."⁴

In response to the preliminary injunction, the Resort declined to book events on the Croquet Lawn until May 2013. In the meantime, the Resort continued to take measures intended to mitigate the noise effects from events that the Resort planned to hold on the Croquet Lawn. For example, after January 2013, the Resort tested its distributive sound system a number of times prior to holding events. In May 2013, the Resort again began holding events on the Croquet Lawn that involved some form of amplified sound. The majority of outdoor events held at the Resort are weddings, which often occur during the summer months. The total duration of these events averaged approximately eight hours per month.

Despite the hosting of outdoor events at the Resort after the preliminary injunction was in place, plaintiffs never filed a motion claiming that the Resort had violated the preliminary injunction.

³ As we explain further in our discussion, the County's noise ordinance generally makes it unlawful for any person to cause or allow the creation of any noise that exceeds the one-hour average of 50 decibels per hour between the hours of 7:00 a.m. and 10:00 p.m. in the area in which the Resort and the Mendez residence are located.

⁴ In seeking the preliminary injunction, plaintiffs did not rely on Resort Services section 6403. In addition, plaintiffs did not argue that the Resort violated County of San Diego Noise Ordinance section 36.414, subdivision (c)(3) on the ground that the device used for the production or reproduction of sound was located "in" a structure—i.e., that the Croquet Lawn itself or a stage on the Croquet Lawn constituted a "structure" for purposes of the ordinance.

In their complaint against the Resort, plaintiffs asserted four causes of action: (1) private nuisance; (2) negligence; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress. All of plaintiffs' claims arose from their contention that the noise generated from the Resort's outdoor events constituted a private nuisance.

The litigation between the parties progressed to a bench trial. At trial, plaintiffs focused on their nuisance claim. Plaintiffs sought a permanent injunction preventing the Resort from using any outdoor sound amplification system or mechanical music from drums, horns, or other instruments. In seeking an injunction for a private nuisance, plaintiffs relied, in part, on alleged violations of County ordinances, including regulations pertaining to resorts, specifically, those found in the County's Zoning Ordinance, and regulations included in the County's noise ordinance, which is part of the County's regulatory ordinances.

The court heard testimony from 13 witnesses, including plaintiffs, certain of plaintiffs' neighbors, two experts for the plaintiffs, a URS consultant, and representatives of the Resort. The court also listened to clips edited from audio recordings of specific events, selected by plaintiffs' attorney. In addition, the trial judge personally visited both the Resort, as well as plaintiffs' home, during a wedding reception held on the Croquet Lawn, at which the Resort utilized its amplified sound system (the court's site visit). The judge listened to the sounds that could be heard from plaintiffs' balcony.⁵

The evidence demonstrated that in 2014, there was at least one event held every weekend in July and August, and at least 17 events held between January 2014 and September 12, 2014. There were more than 30 outdoor events held on the Croquet Lawn between the beginning of 2013 and fall of 2014, when the trial took place.

At trial, Linda testified that it was her belief that the Resort "is not allowed to host outdoor events" at all. Linda testified that she became upset whenever she could hear sound from an event at the Resort. She acknowledged, however, that outdoor events took place for, at most, approximately eight hours per month, and conceded that she did not always hear noise during the hours in which the events took place.

⁵ Because the court was concerned that the noise generated from this event might have been intentionally dampened if the Resort was made aware of the court's site visit, the court ordered the parties and counsel not to advise anyone about the court's site visit in advance. In addition, the court was able to compare sound measurements from the event on the night of the court's site visit with sound measurements from events on other dates; the sound measurements were comparable.

Linda acknowledged that in 2014, she began taking notes of her perceptions of the noise emanating from the events at the Resort. The trial court had access to Linda's notes. Linda had taken notes about the event that was held on the night of the court's site visit. The trial court found a marked contrast between (a) Linda's subjective expressions of what she experienced, as reflected in her notes, and (b) the objective sound measurements from that night and the court's own observations about the noise emanating from the event.

Linda testified that the event held during the court's site visit was "one of the quietest" that the Resort had hosted. She reflected on her notes from the evening, and testified that although the sound was fairly typical of other events between the 7:00 p.m. and 8:00 p.m. hours, at some point "things were turned down," and then she "could hardly hear the voices." However, the objective sound measurements, which were not in dispute, demonstrated that the event registered between 46 and 48 decibels on average per hour. These sound measurements were "typical of the sound levels for other Croquet Lawn events about which Linda Mendez complained."

Angel testified that he could not identify a single Croquet Lawn event that had caused him to initiate suit against the Resort. He acknowledged that his wife's stress about the noise contributed to his own stress, and conceded that he had testified at his deposition that at least with respect to one particular event, any stress he had suffered had resulted from the fact that Linda "was very upset and distraught and it upsets [the] harmony of the home."⁶ Angel also admitted that he was not claiming to have suffered emotional distress resulting from any specific event at the Resort during 2014. Linda acknowledged that Angel was not as bothered by the noise from the Resort as she was, and conceded that he had testified that only "a handful of events" had ever disturbed him.

After the bench trial, the court issued a 26-page statement of decision in which it concluded that an injunction pertaining to the events on the Resort's Croquet Lawn was not warranted. Specifically, the court found that "the outdoor events in question—typically wedding receptions and similar festivities—have not occasioned any systematic violation of applicable local regulations," and "[t]o the extent there have been any violations, they are not so substantial and unreasonable as to constitute a private nuisance that requires issuance of an injunction." The trial court gave considerable weight to the evidence that demonstrated that "at no time did Croquet Lawn events hosted by [the Resort] generate noise exceeding the statutory limit [in the County's

⁶ Angel also admitted that his ability to sleep was generally impacted by the fact that he and Linda were "up late talking about [the noise] instead of resting comfortably."

noise ordinance].”⁷ The trial court therefore found in favor of the Resort on plaintiffs’ private nuisance cause of action, and further determined that plaintiffs’ “ancillary claims provide no independent basis for relief.”

Plaintiffs filed a timely notice of appeal from the trial court’s judgment.

III.

DISCUSSION

Plaintiffs contend that the trial court erred in two respects in declining to issue an injunction prohibiting the Resort from emitting noise from its property that is audible to plaintiffs on their property. Specifically, plaintiffs contend that the trial court (1) erroneously failed to enjoin the Resort’s purported violations of Resort Services section 6403, which is part of the County’s Zoning Ordinance, and (2) erroneously failed to enjoin the Resort’s purported violations of the County’s noise ordinance. They request that this court order the trial court to issue “a permanent injunction prohibiting the Resort from violating either the Zoning Ordinance or Noise Ordinance.”

We conclude that the trial court did not err in its determination of the issues raised in this action and therefore affirm the judgment entered in favor of the Resort.

A. Legal standards on review

The standards under which we review the trial court’s judgment are well settled. “‘A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action . . . against a defendant and that equitable relief is appropriate.’ [Citation.] The grant or denial of a permanent injunction rests within the trial court’s sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390 [33 Cal.Rptr.3d 644] (*Horsford*); see also *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912 [117 Cal.Rptr.2d 631] (*Shapiro*) [the decision to issue a permanent injunction will not be disturbed on appeal in the absence of a showing of clear abuse of discretion by the trial court].)

“‘[T]o the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts [in

⁷ The court also determined that “if there was a technical violation [of the County’s noise ordinance average sound limits], it would have been slight, infrequent, and would have occurred despite the good faith efforts of the Resort to assure compliance with the Noise Ordinance.”

exercising its discretion with respect to the granting or denying of a permanent injunction], [we] review such factual findings under a substantial evidence standard.’ [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court’s order.” (*Horsford, supra*, 132 Cal.App.4th at p. 390.)

However, we exercise independent judgment when addressing a pure question of law, such as the interpretation and application of a statute where the underlying facts are not in dispute. (*Shapiro, supra*, 96 Cal.App.4th at p. 912.)

Whether the Resort’s activities have resulted in “any systematic violation” of the regulations in question is a mixed question of law and fact. To the extent that the trial court’s determination that there were no such violations relies on factual findings, we review those findings for substantial evidence. To the extent that the court’s determination in this regard is premised on the court’s interpretation of the relevant regulations, we review such an interpretation *de novo*. Finally, with respect to the trial court’s conclusion that no injunction is appropriate, we review that conclusion for an abuse of discretion.

B. *Relevant law regarding private nuisances*

Plaintiffs sought an injunction against the Resort based on their cause of action asserting that the Resort’s outdoor events in which amplified sound is utilized constitute a private nuisance. The legal standards applicable to nuisance claims are therefore relevant to this appeal.

In 1872, the California Legislature codified a number of common law principles regarding the law of nuisance. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1104 [60 Cal.Rptr.2d 277, 929 P.2d 596].) For example, the Legislature defined a “nuisance” in Civil Code section 3479 as anything that is “injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.”

■ A nuisance is considered a “public nuisance” when it “affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” (Civ. Code, § 3480.) A “private nuisance” is defined to include any nuisance not covered by the definition of a public

nuisance (Civ. Code, § 3481), and also includes some public nuisances. (47 Cal.Jur.3d (2010) *Nuisances*, § 27, p. 303 [a nuisance may be both public and private under certain circumstances].) “In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.” (*Adams v. MHC Colony Park L.P.* (2014) 224 Cal.App.4th 601, 610 [169 Cal.Rptr.3d 146] (*Adams*)).

■ “A private nuisance cause of action requires the plaintiff to prove an injury specifically referable to the use and enjoyment of his or her land.” (*Adams, supra*, 224 Cal.App.4th at p. 610.) Pursuant to Civil Code section 3501, a plaintiff seeking to remedy a *private nuisance* is limited to a civil action or abatement.⁸

“ ‘Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. . . . [T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public.’ ” (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302 [84 Cal.Rptr.3d 75] (*Monks*)).

“ ‘Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. “So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.” . . . An interference need not directly damage the land or prevent its use to constitute a nuisance; private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes . . . and against a sewage treatment plant for interference caused by noxious odors.’ ” (*Monks, supra*, 167 Cal.App.4th at p. 302.)

In *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938 [55 Cal.Rptr.2d 724, 920 P.2d 669] (*San Diego Gas & Electric Co.*), the Supreme Court outlined the elements of an action for private nuisance. First, the plaintiff must prove an interference with his use and enjoyment of his property. (*Ibid.*) Second, “the invasion of the plaintiff’s interest in the use and enjoyment of the land [must be] substantial, i.e., that it cause[s] the plaintiff to suffer ‘substantial actual damage.’ ” (*Ibid.*) Third, “[t]he interference with

⁸ “A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.” (Civ. Code, § 3493.) The damage suffered by the private party must be different in kind and not merely in degree from that suffered by other members of the public. (*Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 21 [258 Cal.Rptr. 418].)

the protected interest must not only be substantial, but it must also be unreasonable' [citation], i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' " (*Ibid.*, italics omitted.)

The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: " 'Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability . . . is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.' " (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at pp. 937–938, quoting Rest.2d Torts, § 822, com. g, p. 112, italics added.)

■ Both elements are to be judged by an objective standard. Thus, with respect to the substantial damage element, the degree of harm is to be measured by the "effect . . . the invasion [would] have on persons of normal health and sensibilities living in the same community." (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at p. 938.) " 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' " (*Ibid.*) With respect to the unreasonableness element, "[t]he primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. [Citation.] Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' [Citation.] . . . 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' " (*Id.* at pp. 938–939.)

As is apparent from the above standards, the elements of substantial damage and unreasonableness necessary to making out a claim of private

nuisance are questions of fact that are determined by considering all of the circumstances of the case. (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at pp. 938–939.)

■ It is clear that “[e]xcessive and inappropriate noise may under certain circumstances constitute an interference with the present enjoyment of land amounting to a nuisance.” (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 764 [283 Cal.Rptr. 533], fn. omitted, citing *Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 232 [185 Cal.Rptr. 280, 649 P.2d 922] [permitting plaintiffs to move forward with nuisance action, but not trespass action, in case involving complaint regarding noise from steel fabricating plant]; *Morton v. Superior Court* (1954) 124 Cal.App.2d 577, 586 [269 P.2d 81] [injunction preventing quarry from operating was too broad to address nuisances from traffic, excessive noise and dust; trial court should have enjoined the objectionable practices and imposed conditions to correct them]; *Wilns v. Hand* (1951) 101 Cal.App.2d 811, 812, 815–816 [226 P.2d 728] [trial court did not abuse its discretion in issuing preliminary injunction to prevent dogs in dog hospital from “‘annoying and disturbing the peace and comfort’” of plaintiffs, owners of neighboring motel].) However, it is equally clear that “*not every activity* which is ‘offensive to the senses [and] interferes with the comfortable enjoyment of life’ (Civ. Code, § 3479) is a nuisance.” (*Schild, supra*, at p. 764, italics added.)

C. *Trial court did not err in failing to enjoin the purported “Violation of the Zoning Ordinance”*

Plaintiffs’ first contend that they are entitled to equitable relief because they are “affected by the Resort’s unlawful use of its property.” The purported “unlawful use of [the Resort’s] property” is the violation of Resort Services section 6403. Resort Services section 6403 is part of the County’s Resort Services Regulations, which are found in Part Six, “General Regulations,” of the Zoning Ordinance. Resort Services section 6400 provides the title and purpose of these specific provisions: “The provisions of Section 6400 through 6449, inclusive, shall be known as the Resort Service Regulations. The purpose of these provisions is to ensure that transient habitation uses providing resort services meet minimum standards of habitability and do not adversely impact surrounding property.”

Resort Services section 6403 contains a provision addressing the use of public address systems and lighting at a resort facility, providing in full:

“6403 IMPACT ON SURROUNDING PROPERTY.

“a. Public Address Systems. Public address systems shall not be used by resort services at such a volume as to allow words to be understood outside the boundaries of the lot or parcel on which the activity is located.

“b. Outdoor Lighting. Outdoor lighting used by resort services uses shall be adjusted to reflect light away from roads and driveways and from adjoining property, except that a bona fide system of street lights may be used if it does not cause light to be reflected on adjoining property.”

The trial court made a finding that “the public address system used by the Resort on the Croquet Law operates at a volume that allows words to be understood outside the boundaries of the Rancho Valencia property.”⁹ Plaintiffs seize on this finding to assert that the trial court “improperly overlooked the clear violation of the Zoning Ordinance simply because ‘the evidence demonstrates that the Resort has complied with the County Noise Ordinance.’” Plaintiffs insist that the trial court failed to independently assess whether the violation of the County’s Zoning Ordinance, as opposed to the County’s noise ordinance, constituted a nuisance. In making this argument, plaintiffs suggest that any violation of the Zoning Ordinance constitutes a nuisance per se. Plaintiffs’ analysis is incorrect.

Plaintiffs rely on section 7703, subdivision (e) of the Zoning Ordinance to support their contention that the court’s finding of a violation of Resort Services section 6403 required the court to issue a permanent injunction prohibiting the Resort from using its amplified sound system on its property.¹⁰ Zoning Ordinance section 7703, subdivision (e) provides: “Violation is A Public Nuisance. Any building or structure erected, constructed, altered or maintained and/or any use of property contrary to the provisions of these regulations shall be and the same is hereby declared to be unlawful and a public nuisance, and any failure, refusal or neglect to obtain a permit as required by the terms of this ordinance shall be prima facie evidence of the fact that a nuisance has been committed in connection with the erection, construction, alteration or maintenance of any building or structure erected,

⁹ The trial court noted that during the court’s site visit, the court “could make out words from certain of the speeches at the reception.”

¹⁰ Plaintiffs assert that the trial court “swept away section 7703 in a footnote refusing to recognize the misuse of the public address system on the Resort property as a ‘use of property contrary to the provisions of these regulations’ and rejecting the propriety of a private lawsuit to abate a nuisance.” However, plaintiffs did not raise Zoning Ordinance section 7703 in their complaint, their motion for a preliminary injunction, or in their trial briefing. Rather, plaintiffs apparently raised the question of the effect of Zoning Ordinance section 7703 only in their objections to the court’s proposed statement of decision. As a result, the trial court addressed plaintiffs’ objection to the proposed statement of decision by way of a footnote in the final statement of decision. As we shall discuss, the trial court’s analysis of the effect of Zoning Ordinance section 7703 in the court’s footnote demonstrates no error.

constructed, altered or maintained or used contrary to the provisions of this ordinance. The public nuisance may be abated in accordance with the Uniform Public Nuisance Abatement Procedures contained in Chapter 2, Division 6, Title 1 (commencing with Section 16.201) of the San Diego County Code or County Counsel shall, upon order of the Board of Supervisors immediately commence necessary proceedings for the abatement, removal and/or injunction thereof in the manner provided by law.”

■ As is clear from this provision, Zoning Ordinance section 7703 does not declare any violation of the Zoning Ordinance to be a *private nuisance*, nor does it provide private individuals with a right to enforce provisions of the Zoning Ordinance through private equitable actions. Rather, Zoning Ordinance section 7703, subdivision (e) identifies the method by which a violation of the Zoning Ordinance is to be addressed—i.e., in accordance with the San Diego County Uniform Public Nuisance Abatement Procedure contained in the San Diego County Code or by way of county counsel commencing proceedings to abate or enjoin the nuisance “in the manner provided by law.” (Zoning Ordinance, § 7703, subd. (e).) The provision does not authorize private persons to bring a private civil action to enforce the Zoning Ordinance.

Nevertheless, plaintiffs suggest that because the County has “clearly set the legislative policy here,” it is “the *court’s* responsibility to enforce that policy” (italics added), presumably in plaintiff’s private nuisance action, because, according to plaintiffs, “[t]he County does not have the authority to issue an injunction.” However, the County clearly has a method of abating a public nuisance if it should so desire, pursuant to its authority to engage in abatement procedures specified in the San Diego County Code. For example, Zoning Ordinance section 7703, subdivision (e) refers to the San Diego County Uniform Public Nuisance Abatement Procedure (the UPNAP), found in San Diego County Code of Regulatory Ordinances, title 1, division 6, chapter 2. The UPNAP begins with the following introductory language: “This chapter shall be known and cited as the ‘Public Nuisance Abatement Procedure.’ It is enacted pursuant to Government Code Section 25845 and is intended to establish an administrative procedure for the abatement of a public nuisance resulting from a violation of any statute, regulation or ordinance the County enforces.” (San Diego County Code of Reg. Ord., § 16.201.)

Pursuant to the UPNAP, a “‘County Abatement Officer’ ” is the “County officer responsible for enforcement of the County ordinances being violated and who declares a violation to be a public nuisance.” (San Diego County Code of Reg. Ord., § 16.202(a).) The UPNAP also provides a detailed procedure for instituting and proceeding with an administrative abatement of

a violation that is deemed to be a public nuisance. (See San Diego County Code of Reg. Ord., §§ 16.202.5–16.218.)

■ Further, as Zoning Ordinance section 7703 acknowledges, a county or municipality seeking to enforce the policies set forth in its ordinances clearly also has the authority *to seek an injunction itself* if it believes that the policies it has set are being violated and other methods of remediation have failed. (See, e.g., *County of Tulare v. Nunes* (2013) 215 Cal.App.4th 1188, 1193 [155 Cal.Rptr.3d 781] [county brought action for injunctive relief seeking to require defendants to discontinue nonconforming use of the property]; *County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 854 [218 Cal.Rptr. 613] [county filed action to enjoin defendant from using house in violation of zoning ordinance].)

Thus, even assuming that a violation of Resort Services section 6403 constitutes a public nuisance pursuant to Zoning Ordinance section 7703, plaintiffs' suggestion that the court has a responsibility to enjoin any violation of a zoning ordinance raised in a private nuisance action because there is no other method to "enforce [the County's legislative] policy," is baseless. The relevant ordinances do not leave a vacuum of remedies for the violation of the Zoning Ordinance, such that the only available remedy is for a trial court to enjoin such a violation of the Zoning Ordinance through a private nuisance action filed by private individuals.

■ Further, plaintiffs' contention that they are "*entitled* to . . . equitable relief" as a result of the Resort's violation of Resort Services section 6403 fails to recognize the nature of the claim that plaintiffs brought against the Resort—i.e., a claim for private nuisance. While Zoning Ordinance section 7703 states that unlawful use of property constitutes a *public* nuisance, it does not declare that any violation of the Zoning Ordinance is a *per se private* nuisance entitling a private party to an injunction. Absent any such statement that would make a violation of Resort Services section 6403 a private nuisance, a private party seeking to rely on a violation of the Zoning Ordinance as the basis for a private nuisance cause of action must still establish that the violation in question meets the elements of a private nuisance.

Plaintiffs' reliance on *Sapiro v. Frisbie* (1928) 93 Cal.App. 299 [270 P. 280] (*Sapiro*) for the proposition that they are *entitled* to a private cause of action based on a violation of a zoning ordinance, and are thereby entitled to an injunction to abate the zoning ordinance violation, is misplaced. In *Sapiro*, the court considered whether a private individual could obtain injunctive relief and damages against a funeral home that was operating without a permit in a residentially zoned district. (*Id.* at p. 301.) The *Sapiro* court

concluded that the plaintiffs could state such an action, *apart from* any claim that the funeral home constituted a nuisance: “[W]e emphasize the proposition that the right of the plaintiff herein to claim and recover damages for any damage they may have sustained or may sustain as a result of the acts of the defendants in doing that which the ordinance prohibits, proceeds, *not from or upon the theory that the acts complained of constitute a common-law nuisance, but upon the theory that, the defendants having violated a right specially given to the plaintiffs by the law, and thus have caused damage to their real property, the latter are entitled to have redressed by way of compensatory relief the wrong so committed.*” (*Id.* at p. 311, italics added.)

We are not persuaded that a local ordinance’s regulation of certain uses of property, together with the application of the maxim that all wrongs have a remedy, is a proper basis for a claim of an implied right of action in favor of private individuals in situations in which an ordinance, such as the one at issue here, specifically provides for enforcement by public officials. Indeed, more recent cases that have considered the question have determined that a zoning violation *cannot* be enjoined by a private individual in the absence of proof that the violation also constitutes a private nuisance, has caused the individual special damages of a kind different from the general public, or that the ordinance was enacted to protect the particular welfare of a community of which the private individual is a member. (See, e.g., *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498 [36 Cal.Rptr.3d 875] [“citizens of a municipality ordinarily have limited standing to enjoin violations of a municipal ordinance, absent authorization in the ordinance itself,” and thus individuals must show specialized personal injury in order to enjoin violation of ordinance]; *Pacifica Homeowners’ Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1152–1153 [224 Cal.Rptr. 380] [“The law allows a private individual to enjoin a zoning violation as a nuisance when the individual suffers a ‘special injury to himself in person or property of a character different in kind from that suffered by the general public’ ” or “the individual is a ‘member of the community for whose particular welfare the ordinance was enacted’ ”]; *Taliaferro v. Salyer* (1958) 162 Cal.App.2d 685, 691 [328 P.2d 799] [“[A] violation [of a local building code] would not necessarily give a private individual a cause of action therefor. In order to state a cause of action based upon a violation of the building code, plaintiff must show that he has suffered some exceptional damage other than that suffered by the public generally”]; *Stegner v. Bahr & Ledoyen, Inc.* (1954) 126 Cal.App.2d 220, 231 [272 P.2d 106] [“Failing to prove that the operation of the quarry constitutes a nuisance and failing to prove that the operation of the quarry results in legal injury to them, plaintiffs are in effect seeking, solely and simply, to enforce a penal law. No such remedy is available to them”]; *McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 253 [172 P.2d 758] [“The record discloses evidence that appellants were guilty of willfully

creating and maintaining a dangerous and deleterious condition on their premises, thereby substantially impairing the use and enjoyment of respondents' adjoining premises"]; *Carter v. Chotiner* (1930) 210 Cal. 288, 291–292 [291 P. 577] [in action seeking to enjoin the operation of a cemetery where local ordinance required a permit that defendants did not possess, mere violation of ordinance was not a sufficient basis on which to grant the plaintiffs injunctive relief: "It is elementary that violation of a penal ordinance does not of itself create a private nuisance *per se*, and it is likewise elementary that in the absence of special injury an injunction will not be granted on the application of a private individual merely to prevent violation of a penal statute"].)

After considering the enforcement provisions of the Zoning Ordinance, and considering other cases holding that a zoning violation cannot be enjoined by a private individual through a private nuisance action in the absence of proof that the violation constitutes a private nuisance, we reject the argument that *Sapiro* establishes that plaintiffs are necessarily entitled to an injunction on the basis of any demonstration of a violation of the Zoning Ordinance.¹¹

¹¹ Plaintiffs brought a claim for a private nuisance and sought to rely on a demonstration of a violation of Resort Services section 6403 in order to prove their claim for private nuisance. They did not bring an action seeking to enforce Resort Services section 6403. As a result, in order to prevail, they were required to establish the elements of a private nuisance at trial.

Although it might also be possible for a private individual to bring an action seeking an injunction to enforce a provision of a zoning ordinance if that individual can either demonstrate that he or she has suffered a special injury that is different in kind from that suffered by the general public, or that he or she "is a 'member of the community for whose particular welfare the ordinance was enacted'" (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, *supra*, 178 Cal.App.3d at pp. 1152–1153), plaintiffs did not bring such an action, nor did they attempt to demonstrate in the trial court that they either suffered any injury that is different *in kind*, and not different *in degree*, from that suffered by the general public as a result of the violation of Resort Services section 6403, or that they are members of a community for whom Resort Services section 6403 was enacted.

In their reply briefing and at oral argument, plaintiffs cited Government Code section 25132 in support of their contention that they are entitled to bring a private civil action to enforce a county ordinance, and to suggest that the trial court should have granted them an injunction based on the court's finding of a violation of Resort Services section 6403, even absent any "unique interest in enforcing the law." Government Code section 25132, subdivision (a) provides: "(a) violation of a county ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a county ordinance may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action." However, even assuming that the statute means what plaintiffs contend it means (i.e., that, like a private attorney general statute, it authorizes any private individual to file an action to enforce a county ordinance), the fact remains that plaintiffs did *not* bring an action to privately enforce a county ordinance. Instead, plaintiffs pled and attempted to prove a cause of action for private nuisance, based in part on asserted violations of various county ordinances, including Resort Services section 6403. The existence of a statutory provision that, according to plaintiffs, grants them the right to privately enforce a county ordinance does not eliminate the need for a plaintiff who seeks to privately enforce a county ordinance to plead and prove *that* cause of

Thus, we conclude that even in the face of a finding of the existence of violations of Resort Services section 6403 on the part of the Resort by its use of a public address system that allows words to be understood outside the boundaries of the Resort's property, plaintiffs still must demonstrate that the use of this public address system in this way constitutes an interference with plaintiffs' use and enjoyment of their land that is *substantial and unreasonable*. Again, both the substantiality and unreasonableness of the claimed interference are to be judged by objective standards—i.e., what effect would the invasion have on persons of normal health and sensibilities. (See *Monks, supra*, 167 Cal.App.4th at p. 303.) In this regard, the trial court determined that the use of the public address system in a manner that permitted words to be heard on plaintiffs' property during certain outdoor events held on the Croquet Lawn was not so substantial and unreasonable, to a person of normal sensitivities, to amount to a private nuisance. Plaintiffs do not contend that this portion of the trial court's decision was erroneous; rather, their position on appeal is that the Resort's intermittent violation of Resort Services section 6403, as contained in the Zoning Ordinance, constitutes a per se private nuisance that *entitles* them to an injunction. For the reasons stated, the statutory framework does not support plaintiffs' position. We therefore reject plaintiffs' contention that the court is obligated, in this private nuisance action, to abate the alleged public nuisance stemming from the court's finding that the Resort has technically violated Resort Services section 6403.

D. *The trial court did not err in declining to "Enjoin the Resort's Violation of the Noise Ordinance"*

Plaintiffs also suggest that the trial court erred in declining to issue an injunction based on the court's analysis of the noise ordinance contained in title 3, division 6, chapter 4 of the San Diego County Code of Regulatory Ordinances (Noise Ordinance).

The trial court made a determination that even though the "noise from Croquet Lawn events is clearly audible to the Mendezes and other neighbors in the surrounding area," the noise "*is not unreasonably disturbing* within the meaning of the County Noise Ordinance." (Italics added.) In other words, the court found that the noises emanating from the Resort's property during outdoor events held on the Croquet Lawn do not constitute a violation of the Noise Ordinance. Plaintiffs argue that the trial court was wrong in concluding that the noise from the Resort's outdoor events does not violate the Noise Ordinance and contend that if the trial court had properly interpreted and applied Noise Ordinance section 36.414, it would have issued an injunction in their favor prohibiting the Resort from violating the Noise Ordinance.

action, and thereby give the opposing party the opportunity to defend against that claim and the court the opportunity to address that claim.

Plaintiffs make two arguments with respect to the trial court's application of Noise Ordinance section 36.414 (Section 36.414) to this case. Plaintiffs first assert that the trial court erred in its interpretation of Section 36.414, subdivision (c)(3). Section 36.414, subdivision (c)(3) provides that it is "a *prima facie* violation of section 36.414(c)(2)(A) if a device for the production or reproduction of sound that is being operated, used or played is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located." According to plaintiffs, the Resort's use of an amplification system on the Croquet Lawn necessarily constitutes a violation of the Noise Ordinance because the sound is audible at a distance more than 50 feet from either the stage, or the Croquet Lawn itself. They appear to contend that because the noise from the events on the Croquet Lawn comes from a device used to reproduce sound, and is audible more than 50 feet from where the device is housed, they are necessarily entitled to an injunction to abate this violation of the Noise Ordinance.

Plaintiffs next assert that the trial court "improperly refused to apply [the] general noise prohibition of Section 36.414(a)." According to plaintiffs, the trial court's focus on the Resort's compliance with the sound limits provided for in section 36.404 of the Noise Ordinance (Section 36.404)—i.e., the fact that the noise from the Resort remained under 50 decibels per hour on average—resulted in the court "eviscerat[ing] the General Noise Prohibitions of section 36.414." Plaintiffs argue that the trial court inappropriately focused solely on the level of noise generated by the Resort's outdoor festivities held on the Croquet Lawn, and failed to give adequate consideration to the additional factors on the "list of 10 nonexclusive factors to be considered when determining whether noise from any source, mechanically produced or not, violates section 36.414." According to plaintiffs, the trial court's finding that plaintiffs' neighbors who testified at trial "'were disturbed by the noise from the events on the Croquet Lawn.' . . . mandates a ruling in favor of [plaintiffs]" because it demonstrates that the noise was "'disturbing, excessive, or offensive'" in violation of Section 36.414, subdivision (c)(2)(A).

1. Relevant provisions of the Noise Ordinance

Because plaintiffs' argument is premised on various provisions of the Noise Ordinance, it is useful to set forth some of the relevant provisions of this portion of the County's regulatory ordinances.

Section 36.401 of the Noise Ordinance provides the basic policy behind the Noise Ordinance: "Disturbing, excessive or offensive noise interferes with a person's right to enjoy life and property and is detrimental to the public health and safety. Every person is entitled to an environment free of annoying and harmful noise. The purpose of this chapter is to regulate noise in the

unincorporated area of the County to promote the public health, comfort and convenience of the County's inhabitants and its visitors."

Noise Ordinance section 36.402 provides definitions applicable to the chapter. This provision defines "'[d]isturbing, excessive or offensive noise'" as "any sound or noise that" either "[e]ndangers the health or safety of any person" or "[c]auses discomfort or annoyance to a person of normal sensitivity." (Noise Ord., § 36.402, subd. (g).) It defines "'[p]lainly audible'" to mean "any sound that can be detected by a person using his or her unaided hearing faculties." (*Id.*, subd. (o).)

Section 36.404, titled "General Sound Level Limits" (some capitalization and boldface omitted), contains a table that sets forth objective sound level measurements proscribed for various areas of the County. It provides in relevant part: "Except as provided in section 36.409 of this chapter, it shall be unlawful for any person to cause or allow the creation of any noise, which exceeds the one-hour average sound level limits in Table 36.404, when the one-hour average sound level is measured at the property line of the property on which the noise is produced or at any location on a property that is receiving the noise." The parties agree that, pursuant to Section 36.404, the applicable one-hour average for the property at issue in this case is 50 decibels between the hours of 7:00 a.m. and 10:00 p.m.¹²

Sections 36.405 through 36.413 of the Noise Ordinance provide for noise regulation of specific activities and/or locations.¹³

Noise Ordinance section 36.414 is titled "General Noise Prohibitions" (some capitalization and boldface omitted), and appears to codify general nuisance standards. It provides, in relevant part:

"In addition to the general limitations on sound levels in section 36.404, the following additional prohibitions shall apply:

"(a) It shall be unlawful for a person to make, continue or cause to be made or continued a disturbing, excessive or offensive noise.

¹² Subdivision (d) of Section 36.404 provides for a slight deviation from this 50-decibel requirement in circumstances in which "the measured ambient noise level exceeds the applicable limit in Table 36.404." In such an instance, "the allowable one-hour average sound level shall be the one-hour average ambient noise level, plus three decibels. The ambient noise level shall be measured when the alleged noise violation source is not operating."

¹³ For example, titles of these sections of the Noise Ordinance include "Repairing, Rebuilding or Testing Motor Vehicles" (§ 36.405), "Refuse Vehicles & Parking Lot Sweepers" (§ 36.407), "Sound Level Limitations on Construction Equipment" (§ 36.409), "Signal Device for Food Trucks" (§ 36.412), and "Multiple Family Dwelling Units" (§ 36.413). (Some capitalization and boldface omitted.)

“(b) The characteristics and conditions which should be considered in determining whether a violation of this section has been committed include, but are not limited to, the following:

- “(1) The level of noise.
- “(2) Whether the nature of the noise is usual or unusual.
- “(3) Whether the origin of the noise is natural or unnatural.
- “(4) The ambient noise level.
- “(5) The proximity of the noise to a place where someone sleeps.
- “(6) The nature and zoning of the area within which the noise emanates and where it is received.
- “(7) The time of day the noise occurs.
- “(8) The duration of the noise.
- “(9) Whether the noise is recurrent, intermittent or constant.
- “(10) Whether the noise is produced by a commercial or noncommercial activity.

“(c) The following acts, among others, are declared to be disturbing, excessive and offensive noises that violate this chapter and are unlawful:
[¶] . . . [¶]

“(2) Using, operating, playing or allowing another person to use[,] operate or play, a radio, musical instrument, phonograph, television set or other device for the production or reproduction of sound:

“(A) That disturbs the peace, quiet and comfort of persons of normal sensitivity residing in the area.

“(B) That exceeds the levels in section 36.404 when measured at a distance of twenty-five feet from a device operating in a public right-of-way.

“(C) That exceeds the levels in section 36.404 when measured at a distance of twenty-five feet from a device for the production or reproduction of sound operated in a County park unless a permit has been obtained from the County Parks and Recreation Department specifying the time, location and other

conditions under which amplified sound may be allowed within a County park. A person using, operating or playing a device for the production or reproduction of sound in a County park, however, shall not exceed a level of 90 decibels when measured fifty feet from the source or exceed the levels in section 36.404 when measured at the park boundary. Subsection 36.414 (c)(2)(C) shall be enforced by the Parks and Recreation Department.

“(3) It shall be a *prima facie* violation of section 36.414(c)(2)(A) if a device for the production or reproduction of sound that is being operated, used or played is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located.”

The Noise Ordinance also provides that the County sheriff is to have “primary responsibility for enforcing sections 36.405, 36.407, 36.411, 36.412, 36.413, 36.414 and 36.415.” (Noise Ord., § 36.418.) A “noise control officer shall have primary responsibility for enforcing all other sections of this chapter.” (*Ibid.*) The provision also clarifies that “a person authorized to enforce this chapter may arrest a person without a warrant if he or she has reasonable cause to believe that the person has committed a misdemeanor in his or her presence that violates this chapter.” (*Ibid.*)

In a section entitled “Additional Remedies” (some capitalization and boldface omitted), the Noise Ordinance clarifies that “[t]he noise control officer may order a person to cease violating any section of this chapter that the noise control officer enforces. The noise control officer may, in addition to using any remedy provided in section 11.121 of this code, summarily abate a public nuisance caused by any act that violates this chapter if the noise control officer determines the[re] is an immediate threat to the health or safety of any person.” (Noise Ord., § 36.419.)

2. *The trial court did not err in interpreting Section 36.414, subdivision (c)(3); however, even if this court accepted plaintiffs' interpretation of the meaning of “structure,” a finding of a violation is not required*

Plaintiffs assert that the trial court erred in interpreting Section 36.414, subdivision (c)(3), which states that “[i]t shall be a *prima facie* violation of section 36.414(c)(2)(A) if a device for the production or reproduction of sound that is being operated, used or played is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located.”¹⁴ According to plaintiffs, the reference to the term “structure” in the ordinance should be interpreted to include either the stage or the Croquet

¹⁴ For ease of reference, we restate the language of Section 36.414, subdivision (c)(2)(A): “(c) The following acts, among others, are declared to be disturbing, excessive and offensive noises that violate this chapter and are unlawful: [¶] . . . [¶]

Lawn itself, such that the Resort's use of an amplification system on the Croquet Lawn would constitute a violation of the Noise Ordinance if sound from the amplification system is audible at a distance more than 50 feet from either the stage or the Croquet Lawn.

■ “In interpreting an ordinance or a voter initiative, we rely on the same rules of statutory construction applicable to statutes.” (*Woodland Park Management, LLC v. City of East Palo Alto Rent Stabilization Bd.* (2010) 181 Cal.App.4th 915, 919 [104 Cal.Rptr.3d 673].) “The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part.’ ” (*Id.* at p. 920.)

Plaintiffs assert that it was error for the trial court to conclude that the term “structure” in Section 36.414, subdivision (c)(3) impliedly refers to a “‘contained enclosure,’ ” such that the referenced device must be *inside* of the structure. Plaintiffs suggest that the trial court placed “undue emphasis on the word ‘in,’ and no emphasis on the stated purpose of the Ordinance,” and in doing so “effectively t[ook] the word ‘structure’ out of the ordinance.” Plaintiffs suggest that in interpreting this provision of the Noise Ordinance, we should borrow the definitions of “building” and “structure” from the County’s Zoning Ordinance, which defines both terms. They point out that the definitions of these terms in the Zoning Ordinance do not require that either a building or a structure be enclosed. Section 1110 of the Zoning Ordinance defines a “building” as “[a]ny structure used or intended for supporting or sheltering any use or occupancy” and defines a “structure” as “[t]hat which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.” Plaintiffs argue that pursuant to the Zoning Ordinance definition of a “structure,” the stage used on the Croquet Lawn is a building or a structure, and the Croquet Lawn, which was constructed by the Resort, is a structure.¹⁵

“(2) Using, operating, playing or allowing another person to use[,] operate or play, a radio, musical instrument, phonograph, television set or other device for the production or reproduction of sound:

“(A) That disturbs the peace, quiet and comfort of persons of normal sensitivity residing in the area.”

¹⁵ Notably, the definition of a “building” under the Zoning Ordinance makes reference to it being a “structure.”

The Resort counters that plaintiffs' proffered construction of Section 36.414, subdivision (c)(3) is unreasonable, and points out that it ignores the words "in which it [the device] is located." They contend that plaintiffs' position that the word "in" must be interpreted to mean "on" when one considers the "purpose" of the Noise Ordinance, is incorrect. They further point out that if one were to apply plaintiffs' interpretation, the provision's inclusion of the word "building" would be rendered meaningless, since, pursuant to the definition of a "building" in the Zoning Ordinance, any building is also a "structure." If these definitions were applied to the Noise Ordinance, the Resort contends, then there would be no need for the Noise Ordinance to include the word "building," since any building would be necessarily included in the term "structure." The Resort suggests that the trial court's interpretation, which gives meaning to the word "in" and does not render the phrase "building" superfluous, is the more reasonable interpretation.

We conclude that the Resort offers the more reasonable interpretation of what Section 36.414, subdivision (c)(3) is attempting to address. A fundamental principle of statutory construction is that "interpretations which render any part of a statute superfluous are to be avoided." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207 [48 Cal.Rptr.3d 108, 141 P.3d 225].) Despite plaintiffs' contention that giving effect to the word "in" as it is ordinarily understood places "undue emphasis" on that word and somehow takes "the word 'structure' out of the ordinance," it is possible to give effect to both the word "in" and the word "structure," while also giving due regard to the underlying purpose of the Noise Ordinance, which is to "regulate noise in the unincorporated area of the County to promote the public health, comfort and convenience of the County's inhabitants and its visitors." (Noise Ord., § 36.401.)

Section 36.414, subdivision (c)(3) speaks specifically about the use of a "device" that produces or reproduces sound. This is a direct reference to the devices referred to in Section 36.414, subdivision (c)(2)(A), which include "a radio, musical instrument, phonograph, television set or other device for the production or reproduction of sound." Subdivision (c)(3) of Section 36.414 makes it a "prima facie violation" of subdivision (c)(2)(A) of the same section (i.e., a violation of the provision making it unlawful to use, operate, play, etc., one of the listed devices in a manner that "disturbs the peace, quiet and comfort of persons of normal sensitivity") if the device being used, operated, played, etc., is "plainly audible at a distance of 50 feet or more from the building, structure or vehicle *in which* it [(the device)] is located." (Italics added.)

Given the types of devices listed—i.e., radios, televisions, and musical instruments—as well as the list of the places "in which" such devices are

considered located—i.e., buildings, structures, and vehicles—the more reasonable interpretation of this provision is that it is intended to prohibit the use of one of these devices at such a significant volume inside a contained enclosure that the sound nevertheless escapes the enclosure and can be heard 50 feet away from an outer edge of the enclosure. In giving the ordinance this interpretation, we give meaning to the County’s use of the phrase “in which it [the device] is located,” and we further acknowledge that the term “structure” in this provision (despite being defined in a very particular manner in Section 1110 of the Zoning Ordinance) is best understood as a general descriptor for a constructed enclosure that is otherwise not typically referred to as a “building,” such as a residence, other dwelling home, or possibly a temporary office or other constructed edifice. (See, e.g., Zoning Ord., § 6952, subd. (c)(2) [setbacks to be measured from “existing *residences or buildings* occupied by civic use types” (italics added)]; Zoning Ord., § 6156, subd. (b) [“One detached poolhouse, art or music studio, or recreation room is permitted, provided the *structure* meets main building setbacks” (italics added)]; City of San Diego Mun. Code, Ch. 9 [Chapter is titled “Building, Housing and Sign Regulations,” suggesting that the term “building” need not necessarily refer to a residence or dwelling].)¹⁶

We acknowledge that this interpretation may not address potentially injurious noise-creating conduct by individuals who use sound producing or reproducing devices outside. However, in our view, through this ordinance, the County was specifically attempting to address situations in which individuals are inside of homes, buildings, or vehicles using radios or other devices to produce sounds that escape the contained enclosure in which they are located. We conclude that the trial court did not err in interpreting Section 36.414, subdivision (c)(3) of the Noise Ordinance in addressing plaintiffs’ complaint in this case.

There is an additional problem with plaintiffs’ position regarding the proper analysis of Section 36.414. Plaintiffs assume that if their interpretation of the meaning of “structure” in Section 36.414, subdivision (c)(3) is given credit, then they have *necessarily* established the existence of a violation and

¹⁶ The Resort also points out that the 50-foot restriction as applied to “structures” under the definition that plaintiffs proffer would be impractical and unreasonable. As the Resort points out, 50 feet is less than 18 yards. If the word “structure” is understood to be *anything* constructed, as plaintiffs suggest, then a sound producing/reproducing device used from a podium, or even a courtroom bench, would be subject to the 50-foot limitation. It seems patently unreasonable that the County intended to apply this limitation to devices used to produce or reproduce sound that could be heard beyond 50 feet from “any piece of work artificially built up or composed of parts joined together in some definite manner,” such as a stage, podium, or even a courtroom bench.

would thus be entitled to enjoin the violation of the Noise Ordinance.¹⁷ We are not convinced that plaintiffs would have established the existence of a Noise Ordinance violation, even if we were to conclude that plaintiffs' interpretation of Section 36.414, subdivision (c)(3) is the more reasonable interpretation. This is because Section 36.414, subdivision (c)(3) states that it "shall be a *prima facie* violation" of a prior regulatory provision if a device used to produce or reproduce sound creates sound that is audible at a distance of 50 feet or more from "the building, structure or vehicle in which it is located." (Italics added.) Although the parties apparently did not focus on this phrase in the trial court, the inclusion of the phrase "prima facie" must serve some purpose in the ordinance. (See *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233 [273 P.2d 5] ["[E]very word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function".])

The Oxford English Dictionary defines "prima facie" as meaning, as an adverb, "[a]t first sight; on the face of it; as it appears at first without investigation," and, as an adjective, "[a]rising at first sight; based or founded on the first impression; (of evidence, etc.) acceptable unless contradicted." (Oxford English Dict. Online (2016) <<http://www.oed.com/view/Entry/151264?redirectedFrom=prima+facie>> [as of Aug. 26, 2016].) Further, consistent with these definitions and as commonly used in the law, the use of the phrase "prima facie" often refers to the creation of a *presumption*, as opposed to a definitive determination. For example, "[a] statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." (Evid. Code, § 602; see also *In re Raymond G.* (1991) 230 Cal.App.3d 964, 972 [281 Cal.Rptr. 625] ["The words "prima facie" mean literally, "at first view," and a prima facie case is one which is received or continues until the contrary is shown and can be overthrown only by rebutting evidence adduced on the other side'"].)

Giving the phrase "prima facie" in Section 36.414, subdivision (c)(3) its usual meaning, it is reasonable to construe Section 36.414, subdivision (c)(3) as creating a rebuttable presumption that operating, using, or playing a sound producing or reproducing device at a level that "is plainly audible at a distance of 50 feet or more from the building, structure or vehicle in which it is located" constitutes a violation of Section 36.414, subdivision

¹⁷ Plaintiffs only specify the nature of the error that they are asserting with respect to the court's interpretation of Section 36.414, subdivision (c)(3) in the headings for their argument, in which they state: "The trial court erred by failing to enjoin . . . the Resort's Violation of the Noise Ordinance," and "The trial court improperly refused to apply the 50 foot limitation of section 36.414(c)(3)" The plaintiffs do not otherwise express in this argument that they believe they are entitled to an injunction. We therefore glean from the headings that plaintiffs believe they are entitled to an injunction if this court determines that the trial court incorrectly interpreted Section 36.414, subdivision (c)(3).

(c)(2)(A).¹⁸ This presumption can be rebutted by evidence demonstrating that the use of a sound producing or reproducing device at a volume that is plainly audible more than 50 feet from the source does not “disturb[] the peace, quiet and comfort of persons of normal sensitivity residing in the area.” (§ 36.414, subd. (c)(2)(A).)

As we explain *post*, after considering all of the evidence, the trial court concluded that the noise emanating from the sound system utilized on the Resort’s Croquet Lawn during its hosted outdoor events, when examined under the objective standard set forth in Section 36.414, subdivision (a), did *not* constitute the making or causing to be made a noise in a manner that would be disturbing to persons of normal sensitivity. Consequently, even if we were to assume that plaintiffs’ proffered interpretation of the meaning of the term “structure” as used in Section 36.414, subdivision (c)(3) is the more reasonable interpretation, we would nevertheless conclude that any error on the trial court’s part in interpreting Section 36.414, subdivision (c)(3) was harmless, given that, as we explain below, the trial court properly analyzed and applied Section 36.414, subdivision (a) of the “General Noise Prohibitions” (some capitalization and boldface omitted), which makes it unlawful for someone to make a “disturbing, excessive or offensive noise” (i.e., which makes it unlawful to do *by any means* what Section 36.414, subdivision (c)(2)(A) makes it unlawful to do by use of a device for producing or reproducing sound).

3. *The trial court considered relevant factors identified in Section 36.414, subdivision (a); the trial court did not err in its application of this provision of the Noise Ordinance in assessing whether plaintiffs were entitled to an injunction with respect to their claim for private nuisance*

Plaintiffs contend, in essence, that the trial court ignored the “general noise prohibitions” in Section 36.414, subdivision (a), and instead focused on whether the noise generated by the Resort during its outdoor functions met the 50-decibel-per-hour average noise measurements level set forth in Section 36.404. Plaintiffs argue that the trial court inappropriately focused on the level of noise generated by the Resort’s outdoor festivities held on the Croquet Lawn, even though “the *level* of noise is only one of a list of 10 nonexclusive factors to be considered when determining whether noise from any source, mechanically produced or not, violates [S]ection 36.414.”

■ As plaintiffs point out, the factors listed in subdivision (a) of Section 36.414 include (1) the level of noise; (2) whether the noise is usual or

¹⁸ Significantly, the ordinance does not state that “it shall be a violation” or that “it shall be a per se violation” to use or play a device at a volume that is plainly audible more than 50 feet away from where the device is located.

unusual; (3) whether the origin of the noise is natural or unnatural; (4) the level of ambient noise; (5) any proximity of the noise to a place where someone sleeps; (6) the nature and zoning of the area from which the noise emanates and where it is heard; (7) the time of day the noise occurs; (8) its duration; (9) whether the noise is recurrent, intermittent or constant; and (10) whether the noise is produced by a commercial or noncommercial activity. (§ 36.414, subd. (b).)

Despite plaintiffs' complaints about the trial court's lack of consideration of factors other than the level of the noise, the court explained that in a case such as this, in which the plaintiffs' "fundamental complaint is not about the nature of the noise or the time of day, but rather that the amplified sounds—voices and music—are simply too loud," the other factors on the list in Section 36.414, subdivision (b), are not as relevant as evidence concerning the volume of the noise. Thus, because plaintiffs' complaint is, at its core, based on the *level* of noise generated by the Resort, the trial court appropriately placed due emphasis on that factor in assessing whether that noise violated the Noise Ordinance.

Further, it is clear from a review of the trial court's thorough statement of decision that the trial court did, in fact, consider, and mention, a great number of these other factors in reaching its determination that the noises generated from the Croquet Lawn—noises that "otherwise comply with the General Sound Level Limits of the County Noise Ordinance," were not "'disturbing, excessive or offensive' within the meaning of section 36.414." For example, the trial court considered the nature of the noise, noting that the sounds were comprised of "music, voices, applause, and laughter," none of which is unusual or unexpected. The court also noted the evening events concluded at 10:00 p.m., so that "it cannot be said that these sounds extend beyond a reasonable hour." The court took into consideration the fact that the noise from the Croquet Lawn events took place intermittently, on more than 30 occasions between early 2013 and the issuance of the court's statement of decision on February 2, 2015. Further, the court considered the effect of ambient noise on the level of noise in general in the area, including bird noise, sprinklers, and aircraft. The court also noted that Linda experienced and took notes regarding the ambient noise, including traffic and vehicle noise, barking dogs, screeching coyotes, and even events occurring on other neighboring properties. The court considered all of these factors, in addition to its finding regarding the *level* of noise—i.e., that "at no time did Croquet Lawn events hosted by Rancho Valencia generate noise exceeding the statutory limit."

It is thus clear that the trial court considered a variety of the factors outlined in Section 36.414, subdivision (b) in making its determination that

the noise emanating from the Resort's property during events on the Croquet Lawn did not violate the objective standards set forth in either Section 36.414, subdivision (a) (which incorporates the objective standard included in the definition of a "'[d]isturbing, excessive or offensive noise'" found in Noise Ordinance, § 36.402, subd. (g)) or Section 36.414, subdivision (c)(2)(A) (which itself includes an objective standard, in that the noise must "disturb[] the peace, quiet and comfort of persons of normal sensitivity").

Secondarily, plaintiffs also suggest that because the trial court referred to plaintiffs' neighbors' testimony at trial as being that they "were disturbed by the noise from the events on the Croquet Lawn," the court made a "finding" that "mandates a ruling in favor of [plaintiffs]" because it demonstrates that the noise was "'disturbing, excessive or offensive'" in violation of Section 36.414, subdivision (c)(2)(A). However, the trial court did not make a finding that the noise from the Croquet Lawn had, in fact, disturbed the peace, quiet and comfort of the neighbors and that these neighbors are persons of normal sensitivity. Rather, the trial court's comments regarding plaintiffs' neighbors were made in noting that *in contrast to Linda*, who seemed quite disturbed by the noise from the Resort, the testifying neighbors, and even Linda's husband, Angel, were not nearly as disturbed by the noise as Linda was. Further, the court ultimately concluded that these individuals' subjective expressions of their displeasure with the sounds from events held on the Croquet Lawn did not necessitate a finding that those sounds were *objectively unreasonable*. The trial court personally visited both the Resort and plaintiffs' property during one such event, and compared both the court's observations and the objective sound measurements from that event with Linda's notes from the evening and her subjective experience of the noise. In addition, the trial court listened to preselected recordings of events proffered by plaintiffs, and considered the objective sound measurements from a number of events other than the event on the evening of the court's site visit. Based on all of this evidence, the court made a specific finding that Linda "is more sensitive than most," and that she "is not the 'person of normal sensitivity' described in section 36.414 of the County Noise Ordinance." The court also made a finding that even though the "noise from Croquet Lawn events is clearly audible to the Mendezes and other neighbors in the surrounding area," it is "not unreasonably disturbing within the meaning of the County Noise Ordinance."

The trial court's findings are entitled to deference, given that the court "review[ed] . . . all the evidence including its first-hand observations during the September 27 event." Based on this evidence, the court could reasonably find that the sounds coming from the Resort a few evenings a month did not amount to a violation of Section 36.414, subdivision (a). The fact that some of plaintiffs' neighbors testified that they had at times been bothered by noise coming from outdoor events at the Resort did not require a

different conclusion.¹⁹ As the trial court noted, “[t]his is one of those situations, so common in discussions of legal philosophy, where reasonable minds can differ. It is not unreasonable for someone . . . to retire for the evening before 10:00 p.m. It is similarly not unreasonable for people . . . to value their solitude and to prefer the sounds of nature to those associated with human habitation. . . . Others find music and laughter, in moderation and at a reasonable hour, pleasant, or at least not disturbing.” Given all of the evidence, the trial court reasonably determined that it “cannot conclude that noise levels from the Resort that otherwise comply with the General Sound Level Limits of the County Noise Ordinance are nonetheless ‘disturbing, excessive or offensive’ within the meaning of section 36.414.”

IV.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

Benke, Acting P. J., and Irion, J., concurred.

¹⁹Indeed, none of plaintiffs’ neighbors joined in plaintiffs’ lawsuit, nor initiated a lawsuit themselves to enjoin events on the Resort’s Croquet Lawn.

[No. C079918. Third Dist. Aug. 25, 2016.]

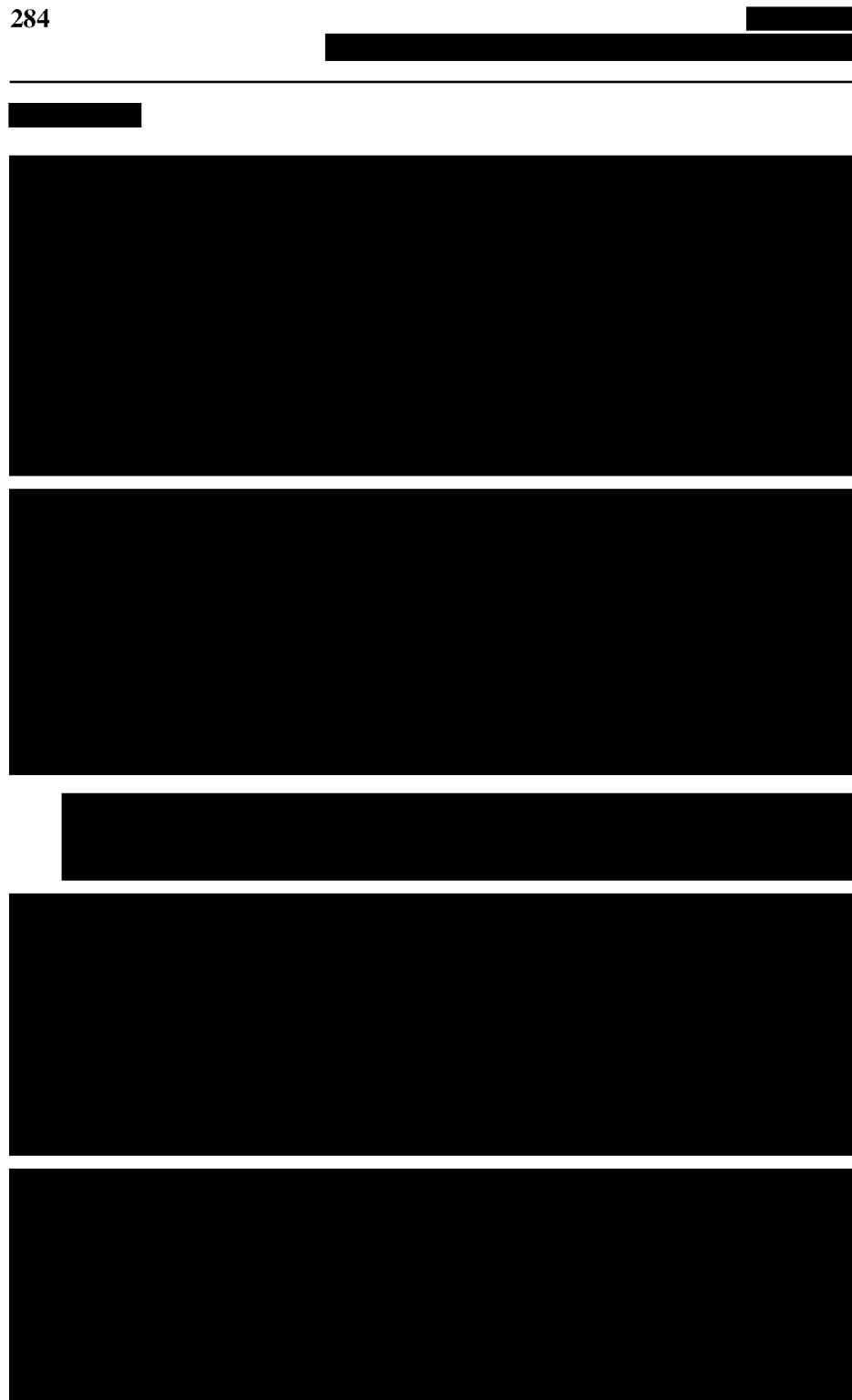
In re A.F., a Person Coming Under the Juvenile Court Law.
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN
SERVICES, Plaintiff and Respondent, v.
CARRIE F., Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Karriem Jamaal Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Robyn Truitt Drivon, County Counsel, Traci F. Lee, Assistant County Counsel, and Lilly C. Frawley, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

BUTZ, J.—Carrie F., mother of minor A.F., appeals from the juvenile court’s orders declaring the minor to be a dependent of the court and removing him from parental custody. (Welf. & Inst. Code, §§ 360, 361, 395.)¹ She contends the jurisdictional findings and removal orders were not supported by substantial evidence. We conclude that there is substantial evidence to support the juvenile court’s findings and orders. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and the father (father) have shared custody of eight-year-old minor A.F. Both parents have a history of heroin addiction and both are on a methadone opiate replacement program.

On March 14, 2015, Sacramento Child Protective Services (CPS) received an emergency response referral stating that mother’s live-in boyfriend was deceased in the home due to a probable drug overdose. The night before, the minor had observed the boyfriend acting as if he was eating white pills from an orange container, and then showing off his muscles. The next morning, the minor woke to find foam coming from the boyfriend’s mouth. The minor was scared and told his mother, who confirmed for the minor that the boyfriend was dead.

When the social worker from the Sacramento County Department of Health and Human Services (DHHS) responded to the residence, she discovered that mother and the minor resided in the garage (although the minor

¹ Undesignated statutory references are to the Welfare and Institutions Code.

sometimes slept in the house). The social worker observed that the garage had five large trash bags, filled primarily with empty beer cans, strewn on the floor. The minor attributed most of the beer cans to his uncle, who lived in the home and drank heavily. Mother said she drank two beers a week; the minor reported that mother drank beer weekly.

The social worker also observed mother's prescribed liquid methadone was in a brown paper bag and placed on top of a two-foot-tall storage bin in the garage. Mother told the social worker that she usually hid her medication behind a curtain in the garage and the minor knew not to touch it. Mother also reported that her boyfriend was bipolar and kept his prescribed medications on top of the television in the garage—about five feet above the ground. The minor stated he knew his mother took methadone and he recognized the paper bag containing the methadone from a photograph of the garage.

A protective custody warrant was issued providing for temporary removal of the minor from parental custody. The social worker told father that there was a safety plan in place and that the minor was to remain in the placement until his home could be assessed. Father agreed not to remove the minor from the temporary placement and to meet with the social worker the next day. Nonetheless, later that day, father attempted to pick the minor up from school. When father met with the social worker the next day, he claimed he had only gone to the school to see the minor, not to pick him up. Father stated he was angry to discover the minor was living in the garage, was concerned that the minor had access to mother's methadone, and would like to file for full custody of the minor. He agreed to a safety plan that the minor was not to be unsupervised with mother and was not to go to the mother's home. Father agreed to a drug test and tested positive for marijuana and benzodiazepines (from his prescribed Alprazolam).

Two weeks later, on April 2, 2015, DHHS received a call from father's methadone counselor, Terry Davidson. Davidson stated that father had been in earlier that day, confused and disoriented. Father believed someone had come in his home and stolen his freshly filled medications (Seroquel, Cymbalta, Alprazolam, and methadone). Father appeared to be sedated. Davidson reported that father had come into the office and appeared manic in the past—which usually happens when father takes himself off of his bipolar medication (Cymbalta). Father has bipolar disorder, intense depression, and audio hallucinations. And father was also being treated with methadone for opiate addiction.

The social worker went to father's home to check on the minor but father was disoriented and unable to tell her where the minor was located. He stated that someone had stolen his medications and helicopters were flying over his

home. He appeared disheveled, and had bloodshot eyes and an unsteady gait. Father subsequently told the social worker he was overwhelmed and the minor was crying for his mother, so he let mother pick up the minor. He was unable to provide the social worker with mother's contact information and provided his own number, instead of mother's, for a contact number. Father explained that he had not slept in three days because of stress and does not take his medications because they make him groggy.

Shortly thereafter, social workers located the minor at mother's house, playing at the neighbor's home. Mother's breath smelled strongly of an alcoholic beverage and she showed obvious signs of intoxication, including slurred speech, bloodshot watery eyes, and an unsteady gait. She announced that she had "rescued [the minor] from the father's care which he is way worse than I am." She claimed she did not know about the safety plan and that there was no reason the minor could not stay with her. The paternal aunt came to pick up the minor from mother's home. The aunt drove up and asked mother the address of where the minor was playing. Mother was so intoxicated, she did not notice it was her sister-in-law who was asking for the directions.

The social worker spoke with both parents a few days later. Mother acknowledged that the minor should not have been unsupervised in her care and in her home. When asked why she violated the safety plan, she said, "Because he is my child." Mother said she is looking to move in with father to "stabilize" her situation and was looking for a job. She was asked to drug test but she said she could not test because she had a job interview.

Father told the social worker that he had a manic episode on April 2, 2015, and had messed up. He said he "lost [his] mind for a sec," but that the agreement he made with mother was that the minor would be at a friend's house, not at mother's house. Davidson told the social worker that, on April 2, 2015, father had tested positive for his prescribed medications. Davidson had not previously seen father in the sedated state he was in on April 2, 2015, and believed it to be an isolated mental episode caused by lack of sleep, stress, and medications.

DHHS filed an amended section 300 petition alleging that the minor comes within section 300, subdivision (b) in that he was at substantial risk of harm due to his parents' mental illness or substance abuse, as follows: (1) the b-1 allegation states that mother has a substance abuse problem that impairs her judgment and ability to adequately care for the minor; (2) the b-2 allegation states that mother provided the minor with inadequate shelter by leaving her methadone and psychiatric medications unlocked and within reach of the minor and by having the minor live amongst piles of beer cans; (3) the b-3 allegation states mother has a mental illness that impairs her judgment and ability to care for the minor; (4) the b-4 allegation states that father has been diagnosed with bipolar disorder and was prescribed medication, which he was

not taking as directed by his treating physician, causing behavioral symptoms that place the minor at risk; and (5) the b-5 allegation states that father, who was diagnosed with bipolar disorder and who was noncompliant with his medications, failed to protect the minor by allowing him to have unsupervised contact with mother, whom he knew to have substance abuse issues and was not permitted unsupervised visits.

Mother testified at the jurisdictional hearing. Mother stated that she keeps her liquid methadone and psychiatric medication in a shoebox on the back of a garage shelf that is approximately six feet high. She did not have them in a locked box and did not talk to the minor about the methadone, but she did advise the minor that pills are dangerous and are not candy. She had taken the methadone down from the shelf the day her boyfriend was found dead to see if her boyfriend had tampered with it. Mother also stated that the five trash bags in the garage living quarters were filled with water and soda bottles, as well as beer cans, and they were meant for recycling.

The social worker's report reflected that mother had admitted to being intoxicated on March 14 and 15, 2015. The maternal grandmother reported that mother was intoxicated on or around April 2, 2015. The paternal aunt also believed that, based on mother's behavior, mother was intoxicated on April 2, 2015. Both the minor and the maternal grandmother reported that mother drinks once or twice a week. The paternal aunt and uncle stated that, based on statements from family members, they believe mother may have a drinking problem. Mother was asked to test for ethyl alcohol twice a week, beginning on April 7, 2015. On May 1, 2015, it was reported mother had already missed several tests.

During her testimony, mother acknowledged that she was instructed not to drink alcohol at all while taking methadone because it was dangerous and possibly lethal. She was also instructed not to drink alcohol while taking her psychiatric medication because it was dangerous. Mother further acknowledged that she knew that it would be problematic to be using alcohol while being evaluated by CPS in this case, if she wanted to regain custody of the minor. Nonetheless, mother admitted that she continues to drink alcohol and drank as recently as four days before the hearing. She denied, however, that she drank weekly or had consumed any alcohol on April 2, 2015. Mother maintained that she does not have a problem with alcohol. She also maintained that, while mixing alcohol and methadone may affect a person's judgment or demeanor, it does not affect her because she does not use the alcohol heavily enough to have it do so.

The juvenile court found mother was not following the directions of her physicians by continuing to drink alcohol while taking methadone and her psychiatric medication. The court further found that as a result mother's honesty, memory, and judgment were negatively affected. The juvenile court

concluded that mother's failure to follow the directions of her physician regarding her medications had affected her judgment and caused her to store her medication in a place accessible to the minor, to allow the minor to live with beer cans covering the floor, and to become extremely intoxicated while the minor was in her care. The juvenile court also found that placement of the minor out of mother's care was necessary because mother was continuing to combine methadone and alcohol, and was in denial about the serious consequences of doing so.

DISCUSSION

1. *Jurisdiction*

Mother claims the order adjudging the minor a dependent of the juvenile court must be set aside because the juvenile court's jurisdictional findings were not supported by substantial evidence. We disagree.

■ “[B]efore courts may exercise jurisdiction under section 300, subdivision (b) there must be evidence ‘indicating the [minor] is exposed to a substantial risk of serious physical harm or illness.’” (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388 [113 Cal.Rptr.2d 163], quoting *In re Rocco M.* (1991) 1 Cal.App.4th 814, 823 [2 Cal.Rptr.2d 429].)

The purpose of section 300 is to protect children from parental acts or omissions that place them at a substantial risk of suffering serious physical harm or illness. (§§ 300, subd. (b), 300.2.) Although there must be a present risk of harm to the minor, the juvenile court may consider past events to determine whether the child is presently in need of juvenile court protection. (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169 [265 Cal.Rptr. 342].) The California Supreme Court has observed that, depending upon the circumstances, a “past failure [can be] predictive of the future.” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 424 [33 Cal.Rptr.2d 85, 878 P.2d 1297].)

Our review of the sufficiency of the evidence is limited to whether the judgment or order is supported by substantial evidence. “Issues of fact and credibility are questions for the trial court and not the reviewing court. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact.” (*In re Christina T.* (1986) 184 Cal.App.3d 630, 638–639 [229 Cal.Rptr. 247].)

“‘When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction, a reviewing court can affirm the juvenile court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence.’ [Citation.] However, we may also exercise our discretion to reach the merits of a challenge to any

jurisdictional finding when the finding may be prejudicial to the appellant” (*In re D.P.* (2014) 225 Cal.App.4th 898, 902 [170 Cal.Rptr.3d 656].)

The jurisdictional finding (in par. b-4 of the petition) that father’s mental illness is not being properly managed, resulting in lethargy, disorientation and paranoia, and thereby placing the minor at risk, was supported by substantial evidence. On April 2, 2015, father was in such a state of impairment and lethargy (described by the minor as father’s “ ‘drunk sleep mode’ ” caused by father’s pills) that he was unable to take care of the minor. In fact, father became so disoriented that he violated the safety plan he knew was in place for the minor’s protection. The minor reported that these episodes occurred randomly. This evidence is sufficient to support the jurisdictional finding.

Mother requests that, should this court conclude, as we do, that there was sufficient evidence to support jurisdictional findings with respect to father’s conduct, we exercise our discretion to address her challenge to the jurisdictional allegations pertaining to her. She contends the jurisdictional findings that she is an offending parent may have a potential impact on future proceedings in this case, and they formed the basis for the removal orders, which are also challenged on appeal. Because the jurisdictional findings regarding mother’s conduct also form the basis for the removal orders, we will exercise our discretion to address her challenge to the court’s jurisdictional findings based on her conduct. Nonetheless, if one of the three jurisdictional bases relative to mother’s conduct is supported by substantial evidence, the juvenile court’s jurisdictional finding must be affirmed regardless of whether either of the other alleged grounds for jurisdiction is supported by the evidence. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [90 Cal.Rptr.3d 44].)

■ Here, there is substantial evidence to support the juvenile court’s findings relative to mother’s conduct, as well as father’s. The petition alleged, in paragraph b-1, that the minor was at substantial risk of suffering serious physical harm as a result of mother’s substance abuse problem. Mother was addicted to heroin for approximately eight years and has been on a methadone opiate replacement program for another eight years. Although she has been instructed not to consume alcohol while taking methadone, as it can be extremely dangerous or even lethal, mother has continued to consume alcohol on a weekly basis. Moreover, she continued to use alcohol up to four days before the hearing, even though she was being tested and she knew a positive test would negatively impact the proceedings.

Mother also admitted she knew the combination of alcohol and methadone could affect her judgment, yet she continued to combine use of the two—claiming she does not drink enough to have it change her demeanor. Mother, however, was observed to be extremely intoxicated on April 2, 2015—the day

she took the minor from father in violation of the safety plan. She was slurring and staggering, and did not even recognize her sister-in-law when she asked for directions to the house where the minor was playing. Nonetheless, mother continues to deny she was intoxicated at the time, and continues to deny she has any problem with alcohol.

Mother also continues to deny that her substance abuse places the minor at risk. But as the juvenile court found, the substance abuse affects her judgment and places the minor at risk. For example, mother showed poor judgment on April 2, 2015, when she picked the minor up from father's house in violation of the safety plan. Thereafter, she showed poor judgment, and placed the minor at risk, by becoming extremely intoxicated while the minor was in her care. Mother also showed poor judgment, placing the minor at risk, in storing her methadone in a place accessible to the minor.² And mother shows poor judgment in continuing to use alcohol and methadone at the same time, against medical instruction. And while mother argues that none of this poor judgment is the result of her substance abuse, the juvenile court reasonably concluded to the contrary.

Mother attempts to analogize her circumstances to those in *In re Drake M.* (2012) 211 Cal.App.4th 754 [149 Cal.Rptr.3d 875] (*Drake M.*), wherein the court found a father's use of legally obtained medical marijuana, "without more," was not substance abuse and did not place the minor at risk. Mother's circumstances, however, are nearly as divergent as possible from those of the father in *Drake M.* Indeed, the fact that mother obtains her substances legally is virtually the only similarity.

Unlike mother's substance abuse here, there was no evidence in *Drake M.* that the father was using a lethal combination of drugs, or using his drugs in a manner contrary to medical advice. In *Drake M.*, the father never used the medical marijuana around the minor, and did not use it if he would be in the minor's presence within four hours of use. (*Drake M.*, *supra*, 211 Cal.App.4th at pp. 760–761.) In contrast, mother drank alcohol (while also using methadone) in the minor's presence and used the substances in a manner which

² The juvenile court found that mother failed to secure her methadone and psychiatric medications in a manner and place not accessible to the minor—which was also a basis for jurisdiction as alleged in paragraph b-2 of the petition. Substantial evidence supported that finding. Although mother had been taking methadone for eight years, she still had not obtained a lock box to store her medication. Instead, she claimed to have told the minor that pills are not candy and kept her liquid methadone and pills in a shoebox on a shelf approximately six feet high. The minor, however, reported that mother kept her medication in a brown paper bag on top of the television. The social worker had also observed mother's methadone to be in a brown paper bag within the minor's reach. The juvenile court discredited mother's testimony that the medication was generally kept where the minor could not access it and also noted that, in any event, six feet high is not inaccessible to an eight-year-old child. It further noted that simply instructing a minor not to take a medication was insufficient to assure the minor's safety.

affected her judgment while the minor was in her care. The father in *Drake M.* kept his medical marijuana in a locked tool box on a shelf in a detached garage, out of reach of the 14-month-old minor. (*Id.* at pp. 761, 767.) Here, mother did not have a lock box and kept her methadone in a place the eight-year-old minor knew about and to which he had access. Thus, unlike *Drake M.*, where there was no evidence of any “‘specific, defined risk of harm,’” mother was abusing the substances and using them in a manner that affected her judgment and placed the minor at risk. (*Id.* at p. 769.)

In sum, we conclude that substantial evidence supports the juvenile court’s exercise of jurisdiction based on mother’s conduct.

2. Removal

Mother also contends there is insufficient evidence that the minor would be at substantial risk of detriment if returned to her care. In an argument similar to that made against jurisdiction, she argues her use of alcohol in conjunction with methadone does not place the minor at risk. Again, we disagree.³

To support an order removing a child from parental custody, the court must find clear and convincing evidence “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s . . . physical custody.” (§ 361, subd. (c)(1); see *In re Heather A.* (1996) 52 Cal.App.4th 183, 193 [60 Cal.Rptr.2d 315].) The court also must “make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor” and “state the facts on which the decision to remove the minor is based.” (§ 361, subd. (d).)

“The jurisdictional findings are *prima facie* evidence that the child cannot safely remain in the home. [Citation.]’ [Citation.] ‘The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.’ [Citation.] The court may consider a parent’s past conduct as well as present circumstances. [Citation.]’ [Citation.] We review a dispositional order removing a child from parental custody for substantial evidence.” (*In re John M.* (2012) 212 Cal.App.4th 1117, 1126 [151 Cal.Rptr.3d 620].)

Here, substantial evidence supports the juvenile court’s order for removal of the minor. The court had before it evidence that mother failed to appreciate

³ Mother also argues that her storage of methadone and psychiatric drugs in a place accessible to the minor, as well as her bipolar disorder, were insufficient to support removal of the minor. Since we find mother’s substance abuse sufficient to support removal, we need not discuss the additional grounds for removal.

that she needed to secure her methadone so that the minor could not access it. Mother also failed to appreciate the serious, and possibly fatal, consequences of using alcohol and methadone together. Indeed, mother continued to use both substances, along with her bipolar medication (for which alcohol was also contraindicated), as recently as four days before the hearing. And mother continues to argue that the use of the alcohol with methadone does not affect her judgment or pose a risk to the minor. “[D]enial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision.” (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [14 Cal.Rptr.2d 179].) In light of mother’s failure to recognize the risks to which she was exposing the minor, there was no reason to believe the conditions would not persist should the minor remain in her home.

Finally, mother contends there were other reasonable means to protect the minor without removal. She argues the minor could have been adequately protected with unannounced visits to ensure her methadone was not accessible to the minor and she was not under the influence of alcohol.

■ Unannounced visits can only assess the situation and mother’s sobriety at the time of the visit. Substance abuse testing can only detect use after the fact—which would be after mother had already placed the minor at risk again. Given mother’s apparent inability to refrain from alcohol use despite being tested and knowing its use would negatively affect these proceedings, coupled with her refusal to acknowledge her substance abuse and its potential effect to her judgment and on the minor, there was no way to guarantee the minor’s physical health, well-being, and protection while living with mother.

We conclude that substantial evidence supports the dispositional order of removal.

DISPOSITION

The juvenile court’s orders and judgment are affirmed.

Blease, Acting P. J., and Renner, J., concurred.

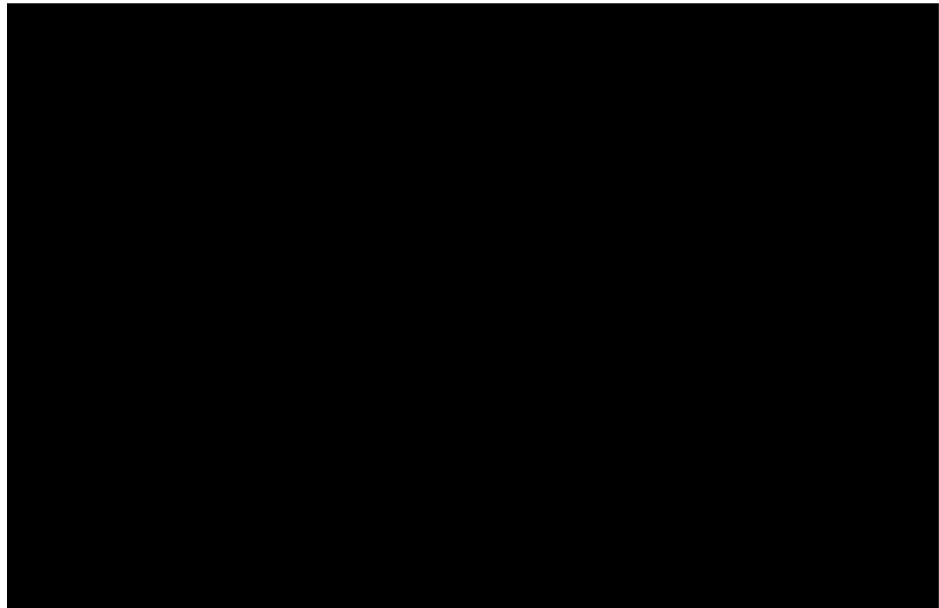
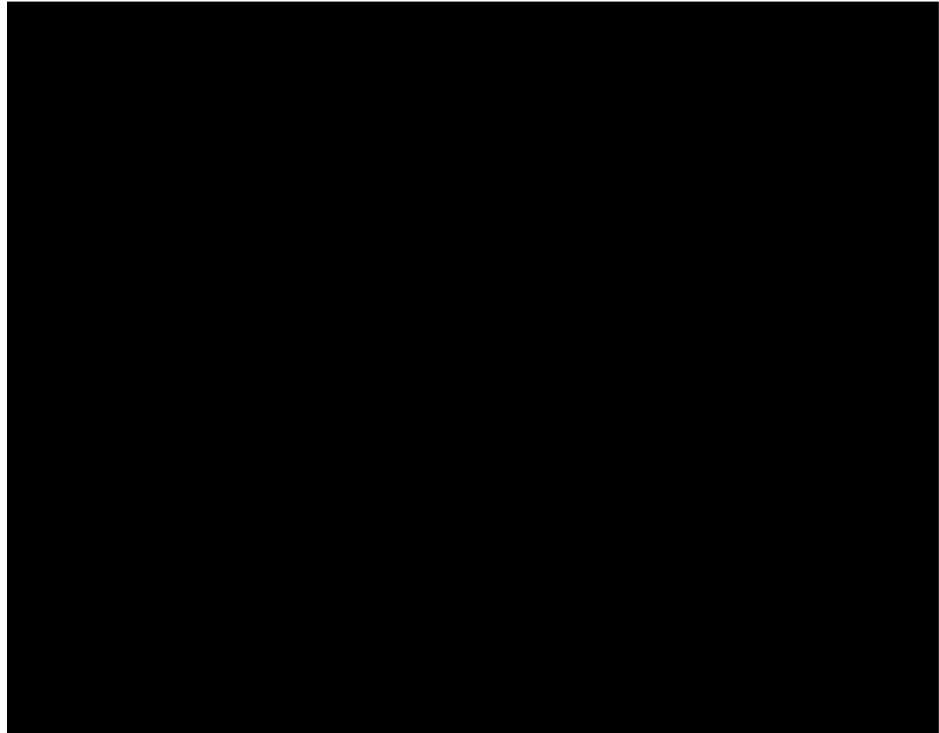
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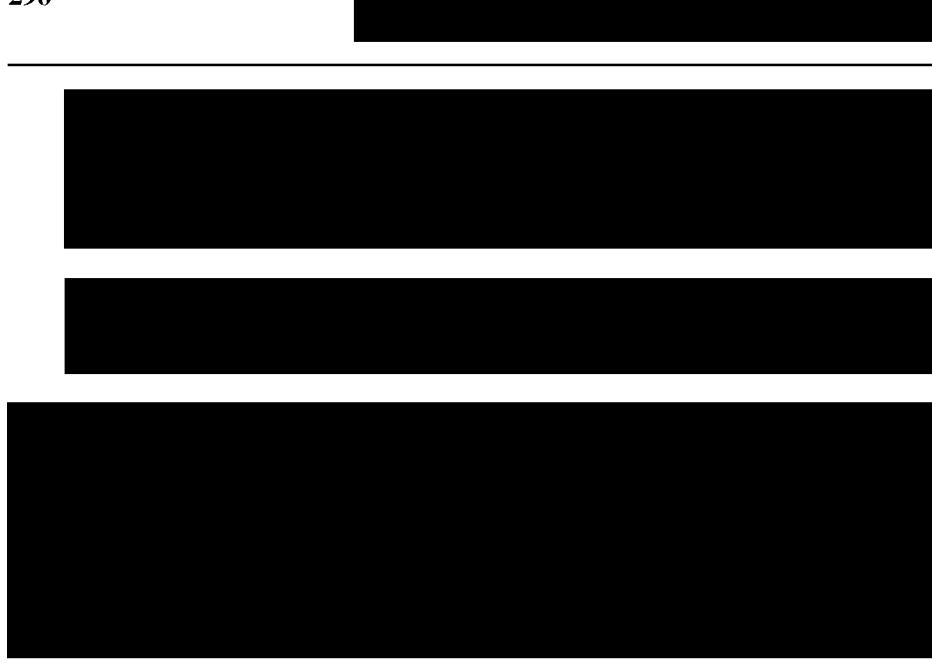
JOSEPH FREITAS, Plaintiff and Appellant, v.
JEAN SHIOMOTO, as Director, etc., Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

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OPINION

SMITH, J.—The Department of Motor Vehicles (DMV) suspended Joseph Freitas's driver's license after it found he violated Vehicle Code section 13353.2 by driving with a blood-alcohol concentration (BAC) of 0.08 percent or more. The suspension was upheld after an administrative hearing. Freitas appeals from the trial court's denial of his petition for a writ of mandate to overturn the hearing officer's decision.

The trial court's ruling was based on its rejection of the unrebutted testimony of Freitas's expert, who opined that the blood-testing procedure used to measure Freitas's BAC was scientifically invalid. The court's conclusions on this point are inconsistent with our holding in *Najera v. Shiromoto* (2015) 241 Cal.App.4th 173 [193 Cal.Rptr.3d 596] (*Najera*). We will reverse the judgment.

FACTS AND PROCEDURAL HISTORY

According to the police report, Officer Bright of the Department of the California Highway Patrol saw Freitas's truck speeding at 10:10 p.m. on July 13, 2013. The truck was weaving between lanes and moving at 65 miles per hour on a street with a 45-mile-per-hour speed limit. It continued after Bright turned on his siren and flashing lights. Instead of stopping, the truck made three turns and then pulled into Freitas's driveway. It rolled backward in the driveway. Finally it stopped and Freitas got out. He stood unsteadily, smelled strongly of alcohol, and had red eyes and slurred speech.

Bright administered four field sobriety tests. Freitas performed poorly. On the horizontal gaze nystagmus test, he had difficulty keeping his eyes on the stimulus. On the Romberg balance test, his 30-second time estimate was close to correct, at 31 seconds, but he swayed three to four inches side to side as well as forward and backward. During the one-leg-stand test, he was very unsteady. He swayed, dropped his foot twice, and hopped and stumbled twice. At that point, he admitted he had had too much to drink to be driving. During the walk-and-turn test, Freitas failed to keep his balance while standing heel to toe as Bright gave the instructions for the test. Then he counted 10 steps while taking nine, failed several times to touch his heel to his toe, did not keep his steps in line, and made the turn improperly. At some point during his encounter with Bright, Freitas admitted he had drunk four beers at a restaurant beginning at 4:00 p.m. and finishing 30 minutes before the stop.

Bright arrested Freitas for driving under the influence and advised him pursuant to Vehicle Code section 23612 that, by driving, Freitas had given his implied consent to a breath or blood test and could choose one or the other. Freitas chose the blood test and was transported to Kern Medical Center. A nurse drew two blood samples at 10:54 p.m.

At the time of the arrest, Bright served Freitas with a DMV form ordering the suspension or revocation of his license. The form advised him of his right to an administrative hearing.

Freitas's blood samples were tested at the Kern Regional Crime Laboratory on July 17 and 18, 2013. They were found to have a BAC of 0.23 percent.

Freitas requested a hearing, which commenced on September 18, 2013, and was continued to July 28, 2014. The DMV submitted a sworn statement by the arresting officer, the police reports, the blood test report, and Freitas's driving record.

Freitas's expert, a chemist named Janine Arvizu, testified about the procedures used by the Kern Regional Crime Laboratory to test Freitas's blood

samples. She said the laboratory used a technique called gas chromatography to test for alcohol in a sample. The testing apparatus, a machine called a gas chromatograph, has a heated chamber containing two long, narrow, coiled columns. The inner surfaces of the columns are treated with chemical preparations, a different preparation in each column. A portion of the sample to be tested is introduced into each column in gaseous form. As a sample passes through a column, compounds in the sample react with the chemicals on the walls of the column. The reactivity of the compounds in the sample determines the length of time it takes for those compounds to reach the end of the column. Compounds that interact more take longer. When a hydrocarbon such as alcohol reaches the end of the column, it is combusted by a device called a flame ionization detector. The length of time from insertion of the sample to combustion at the detector, known as the retention time, is an indication of the identity of the compound.

The reason for using two differently prepared columns is that for any given single column, the retention time for alcohol is the same as the retention time for numerous other volatile organic compounds that can be present in a blood sample. Data from a single column consistent with the presence of alcohol would also be consistent with the presence of a different compound or alcohol plus another compound. A sample yielding a positive result from a single column thus might contain no alcohol or might contain less alcohol than the result indicates. Results from the second column, which are based on a different chemical principle, are necessary to confirm the presence and quantity of alcohol.

Arvizu testified that the necessity of confirmation of a BAC result by the second column was widely recognized in the scientific community. All literature she had reviewed on the subject agreed that gas chromatography cannot determine the presence and quantity of alcohol in a blood sample without the use of two columns. Instructions from the manufacturers of the gas chromatograph and the columns used by the Kern Regional Crime Laboratory also stated that results from two columns must be used for measuring BAC. One column can “tentatively identify” alcohol, but “simply cannot confirm its identity” or “how much might be present.”

Arvizu testified that, although the Kern Regional Crime Laboratory used a dual-column gas chromatograph with two columns installed, the test results issued by the lab reflected data from a single column only. This meant the results were not reliable. Arvizu’s testimony on this point included the following exchange with Freitas’s counsel:

“[Counsel]: And in fact, we—in fact, in just the case prior to this we had essentially the same analyst who did [the blood test in the present case]

[REDACTED]

testify that although they're set up in a dual column analysis, that not only do they not report the second column, no one reviews it, looks at it, cares about it, or even—or even sets it up for running. That they install it and can't figure out for any other purpose other than it's called to be set up that way.

"[Arvizu]: That defies rational explanation.

"[Counsel]: Can you think of any reason, scientifically speaking, why dual column analysis would not be used as a confirmatory method when the entire system is already set up that way?

"[Arvizu]: I really can't. And I can't even imagine why they would set it up that way and then not use it. Even the instrument manufacturers, in their materials, indicate that dual column should be used for ethanol. To set it up with dual columns and then just ignore the second column is scientifically illogical."

The DMV presented no evidence in rebuttal to Arvizu's testimony.

The hearing officer's responsibility was to determine whether a preponderance of the evidence showed three factors: (1) a police officer had reasonable cause to believe Freitas was violating Vehicle Code section 23152 or 23153; (2) Freitas was lawfully arrested; and (3) Freitas was driving with a BAC of 0.08 percent or more. (*Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 638 [39 Cal.Rptr.2d 384]; Veh. Code, § 13557, subd. (b)(3).) He issued his decision on August 9, 2014. He found the arrest was lawful and the officer had reasonable cause to believe Freitas was driving while intoxicated. The hearing officer briefly summarized and rejected Arvizu's testimony, stating that the evidence of a recommendation by the testing equipment manufacturers to use the dual-column method did not establish a violation of the applicable regulations. (Cal. Code Regs., tit. 17, § 1215 et seq.) The hearing officer concluded that the expert testimony did not suffice to show the test results were unreliable. The suspension was upheld.

Freitas filed his petition in the trial court on August 18, 2014. The matter was heard on January 26, 2015. In a minute order issued February 2, 2015, the court found in favor of the DMV. Observing that the DMV was entitled to a presumption that it acted in conformity with state regulations, the court held that it was required to presume that "single[-]column [gas chromatograph] analysis was capable of identifying and quantifying ethyl alcohol concentrations in [Freitas's] blood sample with precision, and that it did so." Then the court found that Arvizu's testimony failed to rebut this presumption. Arvizu did not rely on "calibration or similar maintenance records" to show that the laboratory's gas chromatograph "was producing inaccurate results at the

time” Freitas’s sample was tested. Further, Arvizu did not “testify regarding [Freitas’s] actual BAC, or state that [his] BAC was lower than .23 [percent]. No evidence was presented that [Freitas’s] reported .23 [percent] BAC was, in fact, wrong.” “The evidence that the test result might be wrong is not sufficient to overcome the presumption,” the court concluded.

In addition to finding the blood test results to be valid, the trial court relied on corroborating evidence of Freitas’s alcohol intoxication. It pointed to evidence of his speeding and erratic driving, his failure to pull over until after driving home, his unsteadiness on his feet, smell of alcohol, red eyes, slurred speech, and admission he had been drinking beer.

The court entered judgment against Freitas on February 19, 2015. A stay on the suspension of his license was lifted.

DISCUSSION

In ruling on a petition for a writ of mandate seeking reversal of the suspension of a driver’s license, a trial court must apply its independent judgment to determine whether the weight of the evidence supports the administrative decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456 [65 Cal.Rptr.2d 860, 940 P.2d 311].) We must uphold the trial court’s factual findings if they are supported by substantial evidence in the record. In deciding whether there is substantial evidence, we resolve all evidentiary conflicts and draw all reasonable inferences in favor of the trial court’s decision; we cannot reverse that decision merely because a different decision could also reasonably have been reached. (*Id.* at p. 457.) To the extent the appeal involves pure questions of law, including the interpretation of statutes and regulations, we review those questions de novo. (*Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1121 [121 Cal.Rptr.3d 816]; *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1233 [130 Cal.Rptr.2d 209] (*Manriquez*)).

■ At the administrative hearing, the DMV had the burden of proving by a preponderance of the evidence that Freitas had a BAC of 0.08 percent or more. (*Manriquez, supra*, 105 Cal.App.4th at p. 1232.) The DMV can do this, however, by merely submitting blood-alcohol test results recorded on official forms. (*Shannon v. Gourley* (2002) 103 Cal.App.4th 60, 64 [126 Cal.Rptr.2d 327].) This is because (1) provisions of title 17 of the California Code of Regulations (specifically, Cal. Code Regs., tit. 17, § 1215 et seq.) regulate the collection and testing of blood samples for determination of alcohol concentration; (2) Evidence Code section 664 creates a rebuttable presumption that official duties (such as the duty to follow regulations) have been carried out; and (3) Evidence Code section 1280 establishes a hearsay exception for

records made by public employees. (*Shannon, supra*, at p. 65.) Consequently, “[t]he recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence.” (*Ibid.*)

After the DMV has made its initial showing by means of these official test result records, the burden shifts to the driver “to demonstrate that the test was not properly performed.” (*Imachi v. Department of Motor Vehicles* (1992) 2 Cal.App.4th 809, 817 [3 Cal.Rptr.2d 478].) Among the ways the driver can do this is by showing that the particular machine used to test the sample malfunctioned or was improperly calibrated or employed. (*People v. Vangelder* (2013) 58 Cal.4th 1, 34 [164 Cal.Rptr.3d 522, 312 P.3d 1045].) If the driver does this, the burden of proof shifts back to the DMV to show that the results are reliable despite the facts presented by the driver. (*Manriquez, supra*, 105 Cal.App.4th at p. 1233.)

In this case, it is undisputed that Freitas was lawfully arrested and the officer had reasonable cause to believe he was driving under the influence. It also is undisputed that the DMV submitted official records adequate to make an initial showing that Freitas was driving with a BAC of 0.08 percent or more. The burden of producing evidence to the contrary thus was shifted to Freitas. The trial court concluded that Freitas failed to shift the burden back to the DMV. This conclusion was based primarily on the view that Arvizu’s testimony was inadequate to undermine the blood test results.

■ The court’s view was based on an error of law, for the court misapplied the presumption of regulatory compliance. The applicable regulation requires blood to be tested by a method “capable of the analysis of ethyl alcohol with a specificity which is adequate and appropriate for traffic law enforcement.” (Cal. Code Regs., tit. 17, § 1220.1, subd. (a)(2).) It is rebuttably presumed that the method employed had this capability. Contrary to the trial court’s opinion, however, rebutting this presumption did not require Freitas to prove the gas chromatograph was improperly calibrated or maintained. It also did not require him to present proof of his actual BAC. A driver can rebut the presumption by showing that a testing apparatus was improperly *employed* when the driver’s sample was tested. (*People v. Vangelder, supra*, 58 Cal.4th at p. 34.)

The proper employment of the apparatus includes using the data it produces in a scientifically valid manner. Arvizu’s uncontested testimony showed the laboratory was not using a valid methodology in the process of getting from the raw data produced by the gas chromatograph to the conclusion that the samples had a BAC of 0.08 or more. The point of her

testimony was that, even assuming the machine was working correctly with both columns installed, the reported conclusion that Freitas's samples had a BAC of more than 0.08 percent was based on only one column's data, and, as a matter of well-established scientific principle, one column's data are incapable of supporting this conclusion. The trial court stressed that Arvizu did not show the results were incorrect, but the possibility that the results of a scientifically invalid procedure might *happen* to be correct by chance hardly shows the presumption of validity to be unrebutted.

The nature of the trial court's error is well illustrated by the remark in its minute order that Arvizu must be wrong because "the consequence of accepting [Arvizu's] conclusion would be that single[-]column [gas chromatography] analysis would never be acceptable, even though it strictly complies with [the applicable regulations in Cal. Code Regs., tit. 17]." This remark reflects misunderstanding of both the regulations and the testimony. The regulations state that the blood-testing method must be capable of alcohol analysis adequate for enforcing the law. (Cal. Code Regs., tit. 17, § 1220.1, subd. (a)(2).) Arvizu's testimony, if correct, established that single-column gas chromatography is not capable of determining either the presence or the concentration of blood alcohol. This means that single-column gas chromatography is indeed never valid and therefore cannot comply, strictly or otherwise, with the regulations. The DMV did not attempt to rebut Arvizu's testimony and there is nothing in the record on the basis of which the trial court could reasonably have rejected it.

In so holding, we follow this court's recent decision in *Najera*, *supra*, 241 Cal.App.4th 173. That case involved the same expert, Arvizu, giving the same uncontested testimony that single-column gas chromatography was incapable of valid measurement of BAC. (*Id.* at pp. 177–178.) We held (*id.* at p. 182) that this testimony rebutted the presumption that the laboratory was using methodology "capable of the analysis of ethyl alcohol with a specificity which is adequate and appropriate for traffic law enforcement." (Cal. Code Regs., tit. 17, § 1220.1, subd. (a)(2).)

The above discussion disposes of the DMV's main argument, that Arvizu's testimony failed to rebut the presumption that the blood test results were valid because the regulations are presumed to have been followed. Several additional arguments remain to be addressed.

First, the DMV maintains *Najera* does not apply here because the procedural posture is reversed. There, because the driver won in the trial court, the question was only whether Arvizu's testimony was sufficient to support the trial

court's finding that it rebutted the DMV's *prima facie* case. Here, the driver lost, and the trial court found the expert testimony failed to rebut the DMV's *prima facie* case, so the question is whether a reasonable finder of fact could so conclude. The DMV argues that a reasonable finder of fact could do so even if he or she also could find as the trial court did in *Najera*.

This attempt to distinguish *Najera* fails for two reasons. First, the trial court here committed legal error in holding that the presumption of regulatory compliance could not be rebutted without evidence that the gas chromatograph was improperly maintained and calibrated or that Freitas's BAC was actually below 0.08 percent. In reality, testimony like Arvizu's, attacking the scientific validity of using only one column's data to determine the sample's BAC, also can rebut the presumption. Second, the DMV presented no rebuttal evidence. There is nothing in Arvizu's testimony or elsewhere in the record on the basis of which a reasonable finder of fact could conclude that her testimony failed to carry Freitas's burden and thereby shift the burden back to the DMV.

Next, the DMV contends "there was no evidence that the crime lab's failure to 'report' the results from the second column meant that it did not consider the data from both columns." The record does not support this view. Arvizu testified in effect that, according to her review of the materials provided by the DMV, the reported BAC results from the Kern Regional Crime Laboratory were based on data from only one column of the gas chromatograph. There is no other reasonable interpretation of her testimony. The trial court interpreted the evidence the same way. It ruled not that the evidence failed to show the reported BAC was based on data from only one column, but that it failed to show the lab's use of a single-column method undermined the presumption of regulatory compliance. It would be sheer speculation to say the lab must have employed the second-column data even though the materials it provided reflected only one column's results.

As we held in response to a similar argument in *Najera*, Arvizu's testimony shifted the burden of proof back to the DMV. The DMV was then obligated to present evidence that it used data from both columns, if any such evidence existed. (*Najera, supra*, 241 Cal.App.4th at p. 184.) The DMV presented no such evidence.

The DMV further argues that the data from the second column were provided to Freitas in discovery and Arvizu could have analyzed those data, determined whether they supported the reported BAC result, and testified on that point. Because she failed to do so, the DMV says, her opinion was unsupported.

Freitas never claimed the second column was not operating or the gas chromatograph did not generate data from the second column. The mere facts that the data existed and were produced in discovery have no bearing on the validity of test results derived without reference to those data. As for the DMV's argument that Arvizu should have analyzed the data and determined whether they supported or undermined the first-column results on which the DMV relied when it suspended Freitas's license, this was the DMV's burden, as we held in response to a similar argument in *Najera, supra*, 241 Cal.App.4th at page 183: "If Najera's blood test results really were supported by the data from the second column despite the DMV's failure to use those data when it suspended Najera's license, it was up to the DMV, not Najera, to present evidence to that effect at the hearing."

The DMV also avers that Arvizu could have tested, but did not test, Freitas's blood samples independently, as permitted by regulation. (Cal. Code Regs., tit. 17, § 1219.1, subd. (g).) As we held in *Najera*, this argument again overlooks the fact that the expert testimony shifted the burden back to the DMV. (*Najera, supra*, 241 Cal.App.4th at p. 184.)

■ Next, the DMV contends there is another aspect of the Evidence Code section 664 presumption of regulatory compliance that Arvizu's testimony failed to rebut. The State Department of Health Care Services is required to evaluate a blood laboratory's methods to make sure they satisfy regulatory standards. (Cal. Code Regs., tit. 17, § 1220.1, subd. (b).) The DMV says the trial court was required to presume the State Department of Health Care Services did this evaluation and found the Kern Regional Crime Laboratory was in compliance. Therefore, according to the DMV, the court was compelled to presume the laboratory was found to be using a method "capable of the analysis of ethyl alcohol with a specificity which is adequate and appropriate for traffic law enforcement." (Cal. Code Regs., tit. 17, § 1220.1, subd. (a)(2).) In the DMV's view, this means the court could not rely on expert testimony to find that the method used was not, in reality, capable of valid blood-alcohol analysis.

As we stated in *Najera*, this would be "a presumption too far," because it would contravene the principle that a driver can "'demonstrate that the test was not properly performed.'" (*Najera, supra*, 241 Cal.App.4th at p. 183.) It is incorrect because it "would amount to a presumption that anything the lab does has been approved and thus is unchallengeable." (*Ibid.*) A driver can rebut the presumption that the State Department of Health Care Services found a lab's methods capable of adequate analysis by demonstrating that its methods are not, in fact, capable of adequate analysis. That is what happened here.

Finally, the DMV asserts that the data from one column of the gas chromatograph should count as at least some evidence to be corroborated by other indications of Freitas's intoxication. The DMV's thinking here is that if a positive result from one column means that some volatile organic compound is in the sample at a concentration of 0.08 percent or more, then other evidence, such as the driver's admission to having been drinking, could confirm that the compound is alcohol. This reasoning may be superficially attractive, but it does not appear to us to be correct. Arvizu's testimony indicated that a positive result from one column is consistent with alcohol, some other compound, *or both alcohol and another compound*. If a driver has consumed alcohol, but not enough alcohol to have a BAC of 0.08 percent, a test result based on data from one column could falsely show a BAC of 0.08 percent or more because the sample contained both alcohol and another volatile organic compound. For this reason, the lab's failure to use the data from the second column means the test results cannot be used to support a finding of a BAC of 0.08 percent or more even in conjunction with behavioral evidence of impairment. If this other evidence did not show a BAC of 0.08 percent on its own, the single-column result would not be able to fill the gap, because a single-column positive result is always consistent with the presence of alcohol and another compound in unknown proportions.

The DMV cites *Coffey v. Shiomoto* (2015) 60 Cal.4th 1198 [185 Cal.Rptr.3d 538, 345 P.3d 896] (*Coffey*) in support of its view that the single-column result can be considered in conjunction with behavioral evidence even if Arvizu's testimony rebutted the presumption that the blood test results were reliable. Coffey was pulled over for driving erratically. Fifty-six minutes after the stop, she took a breath test which showed a BAC of 0.08 percent. Three minutes later, a second breath test showed a BAC of 0.09 percent. A blood sample taken 24 minutes after that was found to have a BAC of 0.095 or 0.096 percent. Coffey also had red eyes, failed field sobriety tests, and smelled of alcohol. (*Id.* at pp. 1203–1205.) At the DMV hearing, her expert testified that the breath and blood test results showed Coffey's BAC was rising from 0.08 percent when she was stopped, so he would expect it to have been below 0.08 percent while she was driving. (*Id.* at p. 1205.) The Supreme Court held that this testimony rebutted the presumption that the test results showed Coffey was driving with a BAC of 0.08 percent or more. (*Id.* at pp. 1209–1211.) This shifted the burden back to the DMV, but the test results could still be considered, in conjunction with the other evidence, in determining whether Coffey's BAC was 0.08 percent while she was driving. (*Id.* at pp. 1211–1217.) In light of this, the Supreme Court concluded that substantial evidence supported the trial court's finding against Coffey. (*Id.* at pp. 1217–1218.)

Coffey is distinguishable from this case. In *Coffey*, the expert's testimony did not indicate anything intrinsically wrong with the test results. He only said the results were consistent with Coffey's BAC being lower before the breath and blood samples were taken. There was no evidence that the testing methodology failed to determine validly the BAC in the samples. Here, by contrast, the uncontested expert testimony showed that the blood lab's methodology was incapable of accurately measuring BAC.

It might be supposed that the behavioral, nonquantitative evidence of Freitas's impairment could, in principle, support the trial court's ruling by itself (i.e., even when the blood test results are disregarded) and that we should remand for consideration of this. We do not think so, however. In *Coffey*, the court assumed "that non-chemical-test evidence cannot *by itself* prove a driver's exact BAC at the moment the driver is stopped by a police officer," but refrained from making any definitive statement on that question. (*Coffey, supra*, 60 Cal.4th at p. 1216.) Justice Liu, however, in a concurring opinion, made a persuasive argument that such evidence alone cannot establish that a driver drove with BAC of 0.08 percent or more: "Evidence that a driver's behavior is not impaired tends to prove that her BAC was below 0.08 percent because we can rationally surmise, given the Legislature's choice of the 0.08 percent BAC threshold, that a BAC of 0.08 percent is associated with an unsafe degree of impairment. But the converse is not true. Absent foundational evidence, a driver's impairment does not generally tend to show that her BAC was 0.08 percent or higher because we have no way of correlating a specific type or degree of impairment with a particular BAC in a close case. The fact that 0.08 percent BAC is a threshold associated with an unsafe degree of impairment does not imply that no impairment occurs *below that threshold*. Without evidence that correlates particular behavioral impairments with particular BAC levels, signs of impairment do not generally establish that it is more likely a driver's BAC is 0.08 percent as opposed to 0.06 or 0.07 percent. In other words, signs of impairment do not generally have a tendency in reason to prove a BAC of 0.08 percent or greater." (*Coffey, supra*, 60 Cal.4th at p. 1218 (conc. opn. of Liu, J.).)

Justice Liu concluded that the evidence of behavioral impairment could not by itself have supported the judgment against the driver, but it could properly be used to support the DMV's argument that if Coffey's BAC was at 0.08 percent when she was pulled over, she was probably also over the threshold at the time when she was driving, despite the expert testimony. (*Coffey, supra*, 60 Cal.4th at pp. 1219–1220 (conc. opn. of Liu, J.).) Here, there are no valid chemical test results at all, so there is nothing for the nonquantitative evidence of impairment to bolster.

DISPOSITION

The judgment is reversed. The trial court is directed to issue a writ of mandate ordering the DMV to set aside its order issued August 9, 2014, suspending Freitas's driving privilege. Costs on appeal are awarded to Freitas.

Detjen, Acting P. J., and Franson, J., concurred.

[No. G052158. Fourth Dist., Div. Three. Sept. 14, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
RICHARD REYES CORTEZ, Defendant and Appellant.

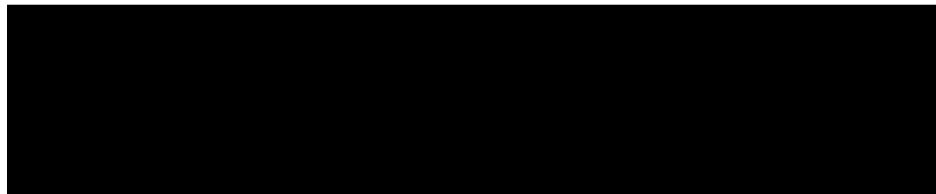
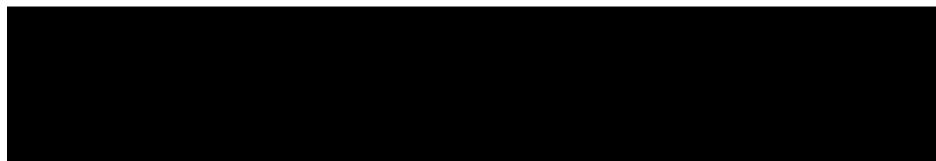
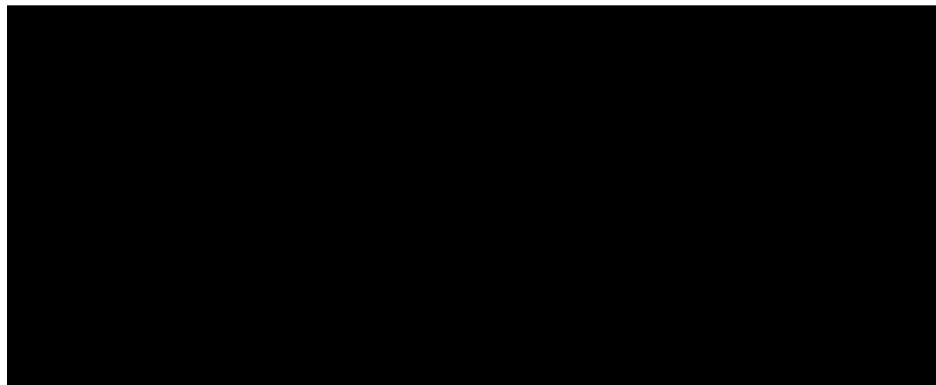
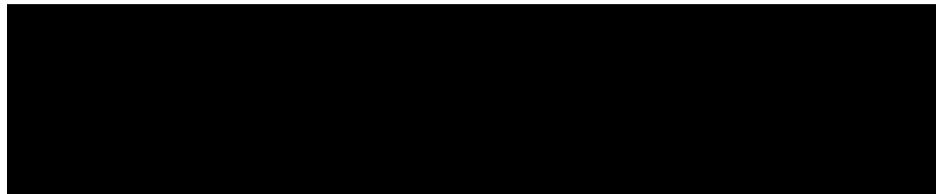
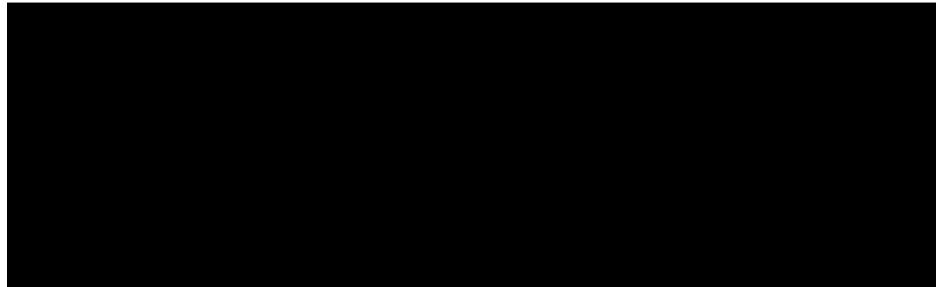
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COUNSEL

Suzanne G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Daniel Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

IKOLA, J.—When a court recalls a felony sentence and imposes a misdemeanor sentence pursuant to Penal Code section 1170.18, subdivision (a) (Proposition 47), may the court revisit the sentence imposed on other misdemeanor counts, not subject to Proposition 47, and impose a harsher punishment?¹ Yes, provided that the new aggregate sentence does not exceed the prior sentence.

PROCEDURAL HISTORY

In July 2012, defendant pleaded guilty to one felony count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1), one misdemeanor count of possessing drug paraphernalia (Health & Saf. Code, former § 11364.1, subd. (a); count 2), and one misdemeanor count of being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a); count 3). Defendant admitted a prior strike (§§ 667, subd. (d), 1170.12, subds. (b), (c)(1)) and a prison prior (§ 667.5, subd. (b)). Defendant's maximum sentencing exposure was seven years in prison and one and one-half years in county jail. The court sentenced defendant to three years' probation on condition he serve 270 days in county jail. Approximately two

¹ All statutory references are to the Penal Code unless stated otherwise.

years later, defendant violated the terms of probation for the second time and was sentenced to 16 months in prison on count 1, which was the low term, and a concurrent term of six months in jail on each of the two misdemeanor counts. As a basis for choosing the low term on count 1, the court stated, “Defendant pled at an early stage of proceedings, small amount of contraband, and no violence.”

In June 2015, defendant filed the petition at issue requesting the court to resentence his felony conviction as a misdemeanor pursuant to section 1170.18, subdivisions (a) and (f). Because defendant was still under supervision, the court found he was still serving his sentence and denied the petition under subdivision (f), but granted the petition under subdivision (a). The court resented defendant to 364 days in county jail on count 1, 129 days *consecutive* in county jail on count 2, and 129 days *concurrent* on count 3, for a total jail term of 493 days. The court found defendant had 494 days of custody credit. It imposed one year of parole pursuant to section 1170.18, subdivision (d), and credited the extra day to defendant’s parole period.²

DISCUSSION

The court had jurisdiction to resentence on the original two misdemeanor counts

Defendant contends the court lacked jurisdiction to resentence defendant on the original two misdemeanor counts. Whereas the court had previously sentenced defendant to six months *concurrent* on the misdemeanor counts, by resentencing defendant to 129 days each on counts 2 and 3, with count 2 running *consecutively*, defendant’s aggregate sentence was 129 days longer than it would have been if the sentence on the original two misdemeanor counts had been unchanged.

We have found no cases directly addressing defendant’s argument. But the recently published decision in *People v. Roach* (2016) 247 Cal.App.4th 178 [1 Cal.Rptr.3d 202] (*Roach*) provides a useful starting point. There, defendant was sentenced on four charges. (*Id.* at p. 181.) The court chose a drug possession charge as the principal term and imposed the upper term of three years. On a reckless driving charge, the court imposed a three-year concurrent sentence. Felony charges of felon in possession of a firearm and receiving stolen property were deemed subordinate, and the court imposed consecutive eight-month sentences for each, for a total sentence of four years four

² The court had originally resented defendant to 365 days in county jail, on count 1, 129 days consecutive on count 2, and 129 days concurrent on count 3. It subsequently corrected the sentence to 364 days in county jail on count 1 as recited above.

months. (*Id.* at p. 182.) The defendant successfully petitioned to redesignate his drug possession conviction, formerly the principal term, and receiving stolen property conviction, to misdemeanors. In refashioning the sentence, the court selected the reckless driving felony as the principal term and imposed a term of three years, imposed one consecutive eight-month subordinate term for possession of a firearm, and imposed a consecutive sentence of 240 days on the two new misdemeanors, for an aggregate term that was, once again, four years four months. (*Ibid.*) On appeal, the defendant argued the court erred by refashioning the sentence to constitute the same aggregate sentence as before the Proposition 47 petition. (*Roach*, at p. 183.)

■ Rejecting that argument, the *Roach* court stated, “A successful petition under section 1170.18 vests the trial court with jurisdiction to resentence the applicant, and in doing so the court is required to follow the generally applicable sentencing procedures in section 1170 et seq.” (*Roach, supra*, 247 Cal.App.4th at p. 184.) Expounding upon the scope of the court’s resentencing jurisdiction, the court analogized the situation to cases where a principal term has been reversed on appeal. “In that situation, the trial court on remand must ‘select the next most serious conviction to compute a new principal term’ and may also modify the sentences imposed on other counts as appropriate. [Citations.] In doing so, ‘“the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.”’ [Citations.] Similarly, where a petition under section 1170.18 results in reduction of the conviction underlying the principal term from a felony to a misdemeanor, the trial court must select a new principal term and calculate a new aggregate term of imprisonment, and in doing so it may reconsider its sentencing choices.” (*Id.* at p. 185.)

Defendant has two responses. First, the court here lacked jurisdiction to revisit his prior misdemeanor sentences because, unlike *Roach*, defendant was not sentenced pursuant to the determinate sentencing scheme in section 1170.1, which requires the court to choose a principal and subordinate terms. For that proposition, defendant cites *People v. Sellner* (2015) 240 Cal.App.4th 699 [192 Cal.Rptr.3d 836] (*Sellner*). *Sellner* arose in a procedural posture similar to *Roach*. The defendant had been sentenced to an aggregate term on two felonies, a Proposition 47 petition resulted in reducing the principal term to a misdemeanor, and the court increased the previously subordinate felony term from eight months to two years. (*Sellner*, at pp. 700–701.) The defendant argued the court lacked jurisdiction to increase the sentence on the formerly subordinate term. (*Ibid.*) The *Sellner* court disagreed, which does not help defendant here, but the court’s rationale arguably does. The court reasoned, “Section 1170.1, subdivision (a) creates an exception to the general

rule that jurisdiction ceases when execution of sentence begins.” (*Id.* at p. 701.) Defendant seizes on this language to argue that no such exception exists here since he did not commit multiple felonies, and thus the principal/subordinate sentencing scheme of section 1170.1 was not employed. And since execution of his misdemeanor sentences had commenced long before, the court had no jurisdiction to alter them.

To understand why this jurisdictional argument fails, we examine the underlying rule itself. “Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced.” (*People v. Karaman* (1992) 4 Cal.4th 335, 344 [14 Cal.Rptr.2d 801, 842 P.2d 100].) “This rule was established in order to provide litigants with some finality to legal proceedings.” (*Id.* at p. 348.)

The nature of the rule was analyzed in *In re Black* (1967) 66 Cal.2d 881 [59 Cal.Rptr. 429, 428 P.2d 293] (*Black*). There, defendant was serving a sentence for a federal crime when he pleaded guilty to grand theft. The court denied probation and ordered that his prison term be served consecutively to his federal prison term. (*Id.* at pp. 883–884.) Three years later, after completing his federal sentence, defendant filed a motion to reconsider the denial of probation on the state sentence, contending he had been rehabilitated. (*Id.* at pp. 885–886.) The court denied the motion on the ground that it lacked jurisdiction. (*Id.* at p. 886.)

Our high court agreed. It explained the rule as follows, “As long as the trial court retains in itself the actual or constructive custody of the defendant and the execution of his sentence has not begun, it retains jurisdiction over the defendant and the res of the action and possesses the power to entertain and act upon an application for probation even after the affirmance of a judgment of conviction on appeal and the going down of the remittitur. [Citations.] ‘The critical requirement for control over the defendant and the res of the action is that the court shall not have surrendered its jurisdiction in the premises by committing and delivering the defendant to the prison authority.’” (*Black, supra*, 66 Cal.2d at p. 888.) Given that defendant had long before been remanded to the federal authorities, the court found it had not retained jurisdiction. (*Id.* at p. 889.)

■ As can be seen from the foregoing, the jurisdictional rule at issue pertains to the court’s *fundamental* jurisdiction over the res of the action. “A court lacks jurisdiction in a fundamental sense when it has no authority at all over the subject matter or the parties, or when it lacks any power to hear or determine the case.” (*People v. Ford* (2015) 61 Cal.4th 282, 286 [187 Cal.Rptr.3d 919, 349 P.3d 98].) And now the flaw in defendant’s argument is made plain. The court here had fundamental jurisdiction to issue sentencing

orders pursuant to section 1170.18, which specifically authorizes a petition to recall a felony sentence and issue a new sentence. In other words, the court regained jurisdiction over the res of the action through the Proposition 47 petition.³ (*People v. Vasquez* (2016) 247 Cal.App.4th 513, 518–519 [201 Cal.Rptr.3d 200] [“Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. [Citations.] Where the trial court relinquishes custody of a defendant, it also loses jurisdiction over that defendant.’ [Citation.] Section 1170.18 provides a narrow exception to the general common law rule” (italics added)].)

This, of course, does not answer the ultimate question in this appeal. It clarifies, however, that the issue here is one of textual interpretation and sound policy rather than jurisdiction. What is the authorized scope of resentencing under section 1170.18?

■ “In interpreting a voter initiative . . . we apply the same principles governing statutory construction. ‘We first consider the initiative’s language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. . . . If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.’” (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 409 [189 Cal.Rptr.3d 234].) “[W]e do not construe statutes in isolation, but rather read every statute “with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.” [Citation.] [Citation.] We must also consider ‘the object to be achieved and the evil to be prevented by the legislation. [Citations.]’ [Citation.] These guiding principles apply equally to the interpretation of voter initiatives.” (*Horwitz v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927].)

■ Defendant’s second argument addresses the statutory text. Under section 1170.18, subdivision (b), if a petitioner is serving a qualifying felony sentence, “the petitioner’s *felony sentence* shall be recalled and the petitioner resentenced to a misdemeanor pursuant to” the code sections amended by Proposition 47. (Italics added.) Defendant contends this language means, in the context of an aggregate sentence, the court is only authorized to alter the portion of the aggregate sentence attributable to the felony subject to Proposition 47.

³ We agree with the result and most of the rationale in *Sellner*. However, for the reasons stated above, we believe the source of the court’s power to resentence is found in section 1170.18, not section 1170.1, although we certainly agree that once the power to resentence has been revested in the trial court, it must proceed in accordance with felony sentencing rules found in section 1170.1 if applicable.

In our view, that interpretation requires a myopic focus on the words “felony sentence,” to the exclusion of the overall context of the statute. While it is plain that section 1170.18 does not explicitly address how resentencing should occur in the context of an aggregate sentence, a close reading of subdivision (a) provides stronger guidance. “A person currently serving *a sentence* for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (*‘this act’*) *had this act been in effect at the time of the offense* may petition for a recall of *sentence* before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.” (§ 1170.18, subd. (a), *italics added.*) The three italicized portions are our focus.

First, “*a sentence*. ” In determining whether a petitioner serving an aggregate sentence qualifies for relief under subdivision (a), we do not look only at the portion of the aggregate sentence attributable to the qualifying felony. Rather, if a petitioner is serving any portion of a sentence that included a qualifying felony, a petitioner falls within the scope of subdivision (a). For example, if a petitioner is in the third year of incarceration, on a sentence made up of a two-year prison term for a qualifying felony plus a consecutive one-year jail term for a misdemeanor, petitioner is eligible for resentencing under section 1170.18, subdivision (a), notwithstanding that he or she has completed the portion of the sentence attributable to the felony.⁴ The petitioner may then petition for a “recall of sentence”—i.e., the entire aggregate sentence.

Second, “*had this act been in effect at the time of the offense*. ” This signals that the resentencing is supposed to occur as if Proposition 47 had already passed at the time of the original sentencing. But if that had occurred, the court would have had broad discretion to set a higher sentence on defendant’s two misdemeanor counts in light of the comparatively shorter punishment for the former felony count so that the aggregate sentence reflected the seriousness of the criminal conduct.⁵ (See *People v. Lent* (1975) 15 Cal.3d 481, 486 [124 Cal.Rptr. 905, 541 P.2d 545] [“The Legislature has

⁴ Misdemeanor sentences are not subject to the principal term and subordinate term scheme of section 1170.1. (See, e.g., *People v. Erdelen* (1996) 46 Cal.App.4th 86, 91 [53 Cal.Rptr.2d 553] [no error in imposing prison term for felony and full consecutive terms for misdemeanors].)

⁵ In 2012, a violation of Health and Safety Code former section 11364.1, subdivision (a), could be punished by incarceration for a term not less than 15 days nor more than 180 days. (See Health & Saf. Code, § 11374.) A violation of Health and Safety Code section 11550, subdivision (a) could be punished by incarceration for not less than 90 days nor more than one year. In addition, the court could have run the misdemeanor sentences consecutively, resulting

placed in trial judges a broad discretion in the sentencing process”]; § 1170, subd. (a)(1) [“The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense”]; Cal. Rules of Court, rule 4.410(a) [setting forth seven goals of sentencing], (b) [stating, “[b]ecause in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case”].) A close reading of section 1170.18, therefore, indicates a resentencing encompasses the entire sentence, not merely the portion attributed to the qualifying felony.

That interpretation is also sound policy for the reasons articulated in *Roach*, *supra*, 247 Cal.App.4th 178. Analogizing the scope of resentencing under Proposition 47 to the court’s discretion to revisit all sentencing decisions when a principal felony term is reversed on appeal, the court stated, “In that situation, the trial court on remand must ‘select the next most serious conviction to compute a new principal term’ and may also modify the sentences imposed on other counts as appropriate. [Citations.] In doing so, ‘the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.’” (*Roach*, at p. 185.) While this rationale is driven to some extent by the requirement in section 1170.1, subdivision (a), that the court select principal and subordinate terms, the court is not limited to simply selecting new principal and subordinate terms. Rather, the court is entitled to revisit sentencing decisions that have nothing to do with section 1170.1, subdivision (a). The court may, for example, impose an upper-term punishment when the middle term had previously been imposed. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256–1257 [131 Cal.Rptr.2d 628].) A court may also impose a previously stayed sentence. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87–88 [26 Cal.Rptr.2d 31].) And, apropos to the present case, a court may choose to run counts consecutively that were previously run concurrently. (*People v. Hill* (1986) 185 Cal.App.3d 831, 836 [230 Cal.Rptr. 109].)

The reason courts are entitled to revisit sentencing decisions beyond merely selecting a new principal term in accordance with section 1170.1, subdivision (a), is that the aggregate length of a term matters. As the court

in a total exposure on the misdemeanors to one and one-half years. (See, e.g., *People v. Hibbard* (1991) 231 Cal.App.3d 145, 149 [282 Cal.Rptr. 351] [upholding consecutive sentences totaling 10 years for 12 misdemeanors].)

stated in *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1457 [253 Cal.Rptr. 173], “A judge’s subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge’s experiences with prior cases and the record in the defendant’s case, cannot be ignored. A judge’s subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.”

Aggregate misdemeanor sentencing, though not subject to the principal/subordinate scheme set forth in section 1170.1, subdivision (a), is nonetheless comprised of interdependent components designed to achieve the goals of sentencing based on the individual circumstances of the case. Allowing a court to revisit all of its misdemeanor sentencing decisions under section 1170.18, therefore, is not only consistent with the statutory text, but sound public policy.

The court nevertheless erred by imposing punishment exceeding the original sentence

Although we have concluded the court did not err by running count 2 consecutively, it did err by imposing the term of 129 days. Section 1170.18, subdivision (e) states, “Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.” The parties agree that the original aggregate sentence was a total of 488 days. The new sentence amounted to 493 days (364 + 129), five days too many. Accordingly, we will modify the sentence by reducing it by five days, resulting in an aggregate sentence of 488 days.

DISPOSITION

The order is modified by reducing defendant’s sentence by five days, resulting in a total sentence of 488 days. The order is affirmed as modified.

Moore, Acting P. J., and Aronson, J., concurred.

Appellant’s petition for review by the Supreme Court was denied December 14, 2016, S237967.

[No. A144572. First Dist., Div. Two. Sept. 14, 2016.]

In re LESLIE BRIGHAM on Habeas Corpus.



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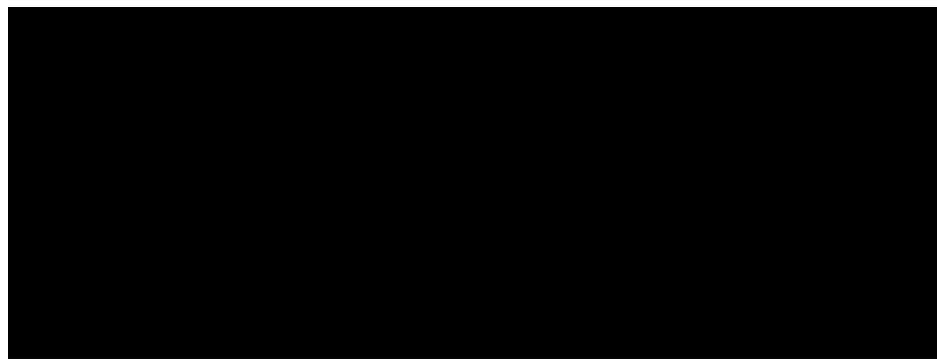
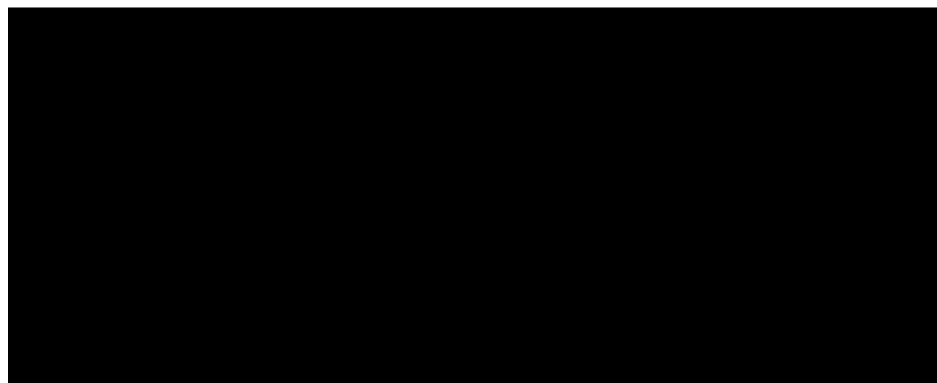
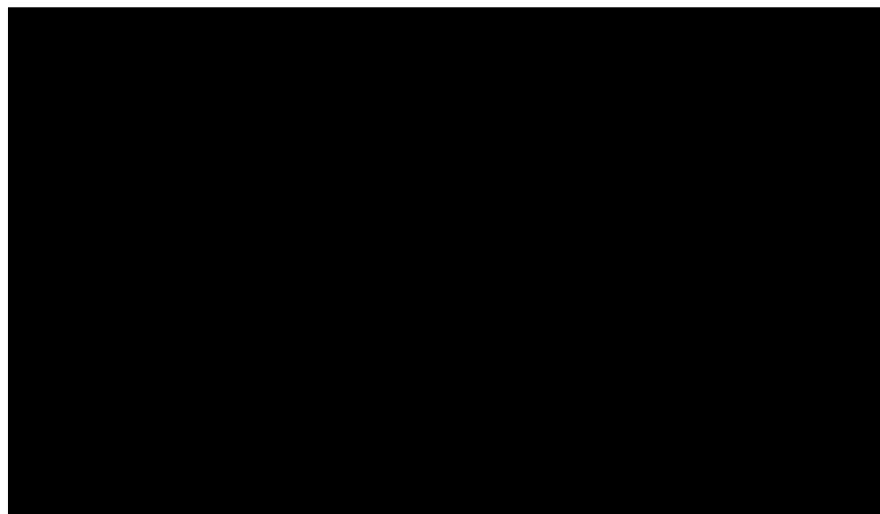
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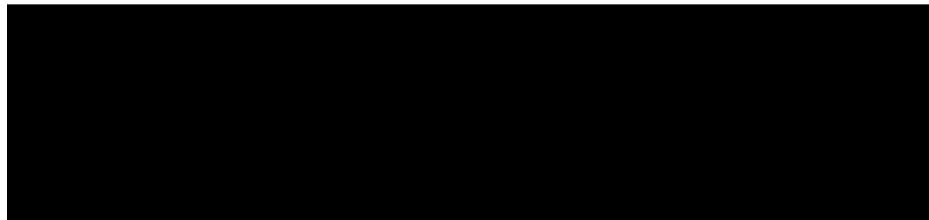
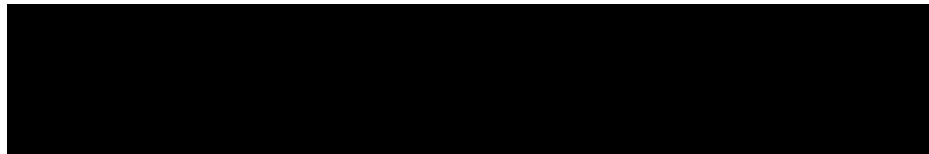
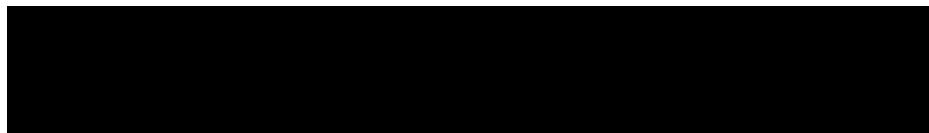
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COUNSEL

Paula Rudman, under appointment by the Court of Appeal, for Petitioner Leslie Brigham.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Seth K. Schalit and Dorian Jung, Deputy Attorneys General, for Respondent The People.

OPINION

MILLER, J.—Petitioner was convicted in 1987 of first degree murder as an aider and abettor. In 2014, the California Supreme Court held that an aider and abettor may be convicted of first degree premeditated murder only under direct aiding and abetting principles, not under the natural and probable consequences doctrine. (*People v. Chiu* (2014) 59 Cal.4th 155, 158–159 [172

Cal.Rptr.3d 438, 325 P.3d 972] (*Chiu*.) Petitioner filed this writ, claiming the record does not establish beyond a reasonable doubt that the jury convicted him of first degree murder on a legally authorized ground. He seeks reversal of his conviction and remand for a new trial or reduction of the conviction to second degree murder. We will grant the petition.

STATEMENT OF THE CASE

As described in our opinion on petitioner's appeal from his 1987 conviction (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1042 [265 Cal.Rptr. 486] (*Brigham*)), petitioner was charged by information with the first degree murder of Hosea Barfield (Pen. Code, § 187),¹ with allegations that he personally used a firearm and inflicted great bodily injury on the victim, and that he had been convicted of a serious felony for which he received probation in New Mexico. (§§ 12022.5, 667.) A jury convicted petitioner of first degree murder, but found that he did not personally use a firearm or inflict great bodily injury. Petitioner waived jury trial on the enhancement allegation of prior serious felony conviction, and the court found it true. Petitioner was sentenced to a prison term of 25 years to life on the murder conviction, with a consecutive five-year term for the prior. (*Brigham, supra*, 216 Cal.App.3d at p. 1042.)

On appeal, a different panel of this court struck the five-year enhancement, affirmed the judgment (over the dissent of Presiding Justice Kline), and denied a contemporaneous petition for writ of habeas corpus. (*Brigham, supra*, 216 Cal.App.3d at p. 1057.)

The present petition was filed on March 19, 2015. After considering respondent's informal opposition to the petition and petitioner's reply thereto, we issued an order to show cause why the requested relief should not be granted. Respondent filed its return on November 17, 2015, and petitioner filed his traverse on December 11, 2015.

STATEMENT OF FACTS²

On the evening of January 21, 1986, Barbara Dawson and her cousin Catherine Barfield experienced car trouble while parked on East 14th Street, near 61st Avenue. Mrs. Barfield, who lived nearby in the 65th Village, telephoned her husband and 14-year-old son Hosea Barfield (Barfield), who both agreed to come help. As the two women walked back to the car, they

¹ Further statutory references will be to the Penal Code.

² The statement of facts is taken from our opinion on the prior appeal. (*Brigham, supra*, 216 Cal.App.3d 1039.)

saw Barfield across the street walking along East 14th to meet them. (*Brigham, supra*, 216 Cal.App.3d at p. 1042.)

Upon reaching the car, while starting to unlock the door, Ms. Dawson saw a man wearing dark clothes and a ski mask pulled down over his face come around the corner. The man lifted a rifle-type gun and shot it several times. Ms. Dawson ducked down, then flagged a passing car. She did not see the man when she got up. (*Brigham, supra*, 216 Cal.App.3d at p. 1043.)

As Ms. Dawson approached the driver's side of the car, Mrs. Barfield went to join her son at the passenger side. Noticing a clicking noise, she turned and saw a man standing by the corner barbershop with a dark ski mask covering his face and a rifle-type gun in his hands. Barfield told her to run, and as she did so, she saw the gun fire. Mrs. Barfield called the police from a store, then returned to find her son dead on the sidewalk. (*Brigham, supra*, 216 Cal.App.3d at p. 1043.)

The driver of the car Ms. Dawson flagged down testified that he heard shots as he was driving down East 14th, approaching 61st. He looked to his left and saw a man crouched down and running. The man appeared to be wearing a drab-colored army jacket with a fur collar; the driver could not see the man's face or hands. (*Brigham, supra*, 216 Cal.App.3d at p. 1043.)

A pathologist testified that Barfield had at least three gunshot wounds to his neck, back, arm, and chest, and extensive internal injuries in his chest and brain. The police recovered three spent .223-caliber casings at the scene, which a ballistics expert said could have been fired by either an AR-15 or an HK-93. In his opinion, however, the bullets had not been fired from an HK-93. (*Brigham, supra*, 216 Cal.App.3d at p. 1043.)

Nearly nine months after the murder, when the police investigation had reached a dead end, petitioner approached an Oakland police officer and asked to talk to a homicide investigator about a "mistaken identity murderer" on East 14th Street. After a voluntary preliminary interview, petitioner was admonished about his rights and gave two taped statements. Petitioner related that on the night of the murder, he and another man, Norbert Bluitt (Bluitt), were ordered by "The Man" (a person petitioner refused to identify) to kill "Chuckie," whom "The Man" had held a grudge against for some time and petitioner considered an enemy of the group. Petitioner thought the group Chuckie was part of was "out to kill me." (*Brigham, supra*, 216 Cal.App.3d at pp. 1043–1044.)

"The Man" arranged for automatic weapons to be delivered to petitioner and Bluitt; petitioner said his was an "HK-9," Bluitt had a similar gun and

Dual Moore had a handgun. A ballistics expert testified that petitioner must have been referring to an HK-93. (*Brigham, supra*, 216 Cal.App.3d at p. 1044.)

Petitioner, Bluitt and Moore set out to find Chuckie, with Moore driving. Petitioner said that he was wearing dark clothes and a rolled-up ski mask, and Bluitt was wearing a baseball cap marked with an “ ‘N’ ” pulled low over his face. Petitioner, an experienced hit man, stated that the only time he would put a ski mask “ ‘on my face’ ” was “ ‘when I’m tryin’ ta hit, kill somebody.’ ” Petitioner had “ ‘worked’ ” with Bluitt before and knew Bluitt was “ ‘just hardheaded.’ ” (*Brigham, supra*, 216 Cal.App.3d at p. 1044.)

The hit men arrived at the 65th Village, where Chuckie was supposed to be, parked, and walked “ ‘in the back way’ ” to a porch where a group of men was gathered. The group scattered. Following one of the departing men, petitioner and his companions ran back to their car and drove toward East 14th on 64th, by a place known as “Plucky’s,” where they saw “ ‘a young guy.’ ” (*Brigham, supra*, 216 Cal.App.3d at p. 1044.) Seeing Barfield from the car, petitioner said it was Chuckie and Bluitt said, “ “[“]we’re gonna get him.[”]” As they got closer, petitioner said, “ ‘man, that is not Chuckie, man.’ ” Bluitt said, “ ‘we’re gonna get him’ ” and directed the driver to make a right turn and stop. Petitioner and Bluitt both got out of the car with their weapons. Petitioner went, with his weapon, to the street corner near where the shooting occurred, saw an officer in a police car, then returned his gun to the car and told Bluitt, “ ‘[P]olice right there, man. Don’t do it. It ain’t cool. That’s not the dude, man. Come on.’ ” Bluitt said, “ “[“]M]an, fuck dat. We’s gonna waste it up. We’s gonna let dese niggers know we serious.[”]” Petitioner tried to grab Bluitt’s arm, but Bluitt fired more than twice, hitting Barfield in the face. (*Brigham, supra*, 216 Cal.App.3d at pp. 1044–1045.)

At the end of the police interview, petitioner identified photographs of Bluitt, Moore and the AR-15 rifle Bluitt carried. (*Brigham, supra*, 216 Cal.App.3d at p. 1045.) Ms. Dawson had identified the AR-15 military rifle as being most like the gun she saw in the hands of the shooter, choosing it over an HK-93 assault rifle. (*Brigham, supra*, 216 Cal.App.3d at p. 1043.)

The investigating officer testified that Moore told him Bluitt was wearing a dark gray hood. Both Ms. Dawson and Mrs. Barfield testified that the killer was not wearing a baseball cap. (*Brigham, supra*, 216 Cal.App.3d at p. 1044.)

DISCUSSION

I.

■ Petitioner has filed this petition for writ of habeas corpus without seeking relief from the trial court, and respondent has raised no objection to

‘this court exercising original jurisdiction. “ ‘It has long been the law in California that, while a Court of Appeal may have original jurisdiction in a habeas corpus proceeding, it has the discretion to deny a petition without prejudice if it has not been first presented to the trial court.’ (*In re Kler* (2010) 188 Cal.App.4th 1399, 1403 [115 Cal.Rptr.3d 889].) ‘ “Generally speaking, habeas corpus proceedings involving a factual situation should be tried in superior court rather than in an appellate court, except where only questions of law are involved.” ’ (*In re Hillery* (1962) 202 Cal.App.2d 293, 294 [20 Cal.Rptr. 759], quoting 24 Cal.Jur.2d (1955) *Habeas Corpus*, § 68, pp. 524–525; *In re Davis* (1979) 25 Cal.3d 384, 389 [158 Cal.Rptr. 384, 599 P.2d 690] [exercising original jurisdiction where the petitions raised issues of law and there were no material factual issues].)’ (*In re Johnson* (2016) 246 Cal.App.4th 1396, 1402 [201 Cal.Rptr.3d 214] (*Johnson*).) Resolution of the issue presented here does not require further factual determinations but rather analysis of legal argument and assessment of prejudice, both issues appropriate for an appellate court. Accordingly, we elect to exercise our jurisdiction to resolve the writ petition.

II.

■ As we have said, petitioner was “convicted of first degree murder as an aider and abettor.” (*Brigham, supra*, 216 Cal.App.3d at p. 1042.)³ “There are two distinct forms of culpability for aiders and abettors. ‘First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also “for any other offense that was a ‘natural and probable consequence’ of the crime aided and abetted.” ’ (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [108 Cal.Rptr.2d 188, 24 P.3d 1210])’ (*Chiu, supra*, 59 Cal.4th at p. 158.) “A nontarget offense is a ‘natural and probable consequence’ of the target offense if, judged objectively, the additional offense was reasonably foreseeable. ([*People v. Medina*] (2009)] 46 Cal.4th [913,] 920 [95 Cal.Rptr.3d 202, 209 P.3d 105].) The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. (*Ibid.*) Rather, liability ‘“is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.” ’ (*Ibid.*) Reasonable foreseeability ‘is a factual issue to be resolved by the jury.’ (*Id.* at p. 920.)” (*Chiu, supra*, 59 Cal.4th at pp. 161–162.)

■ “The natural and probable consequences doctrine is based on the principle that liability extends to reach ‘the actual, rather than the planned or “intended” crime, committed on the *policy* [that] . . . aiders and abettors

³ In its return to the petition for writ of habeas corpus, respondent “assumes that Norbert Bluit, and not petitioner, was the direct perpetrator,” for purposes of determining the existence of error.

should be responsible for the criminal *harms* they have naturally, probably, and foreseeably put in motion.’ (*People v. Luparello* (1986) 187 Cal.App.3d 410, 439 [231 Cal.Rptr. 832], italics added; see [*People v. Prettyman*] (1996) 14 Cal.4th [248,] 260 [58 Cal.Rptr.2d 827, 926 P.2d 1013], quoting *Luparello*.)” (*Chiu, supra*, 59 Cal.4th at pp. 164–165.) “In the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing.” (*Chiu, supra*, 59 Cal.4th at p. 165.)

■ *Chiu* considered these principles in the context of a case where the target offense of assault or disturbing the peace resulted in a murder. (*Chiu, supra*, 59 Cal.4th at p. 160.) For policy reasons, the court held that “an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine.” (*Id.* at pp. 158–159.) The court explained: “A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by holding them culpable for the perpetrator’s commission of the nontarget offense of second degree murder.” (*Id.* at p. 165.) “However, this same public policy concern loses its force in the context of a defendant’s liability as an aider and abettor of a first degree premeditated murder. First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty. (*People v. Knoller*[(2007)] 41 Cal.4th [139,] 151 [59 Cal.Rptr.3d 157, 158 P.3d 731].) That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 [119 Cal.Rptr.2d 859, 46 P.3d 335]; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942].) . . . [T]he connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence.” (*Chiu, supra*, 59 Cal.4th at p. 166.)

■ *Chiu* further explained that aiders and abettors “may still be convicted of first degree premeditated murder based on direct aiding and abetting principles,” under which “the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission.” (*Chiu, supra*, 59 Cal.4th at pp. 166–167.) “An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully,

deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder.” (*Id.* at p. 167.)

Respondent maintains that *Chiu* is inapplicable where, as here, the target offense is itself premeditated murder.⁴ The *Chiu* opinion did not suggest any exceptions to the rule it stated. In respondent’s view, however, there is no unfairness in holding petitioner liable for the premeditated murder of Barfield because petitioner intended to facilitate a premeditated murder, albeit the murder of Chuckie rather than Barfield. Respondent argues that where the target offense is premeditated murder and the perpetrator commits that offense against a different victim, there is no “disjunction” between the aider and abettor’s intent to commit the target offense and the perpetrator’s intent to commit the non-target offense. In effect, respondent maintains that petitioner acted with the intent of a direct aider and abettor, albeit with a different intended victim, and limiting the prosecution to second degree murder in this situation would confer a windfall upon petitioner.

Respondent’s argument evokes the doctrine of transferred intent, under which “‘a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had ‘“the fatal blow reached the person for whom intended.’’’’ (*People v. Bland* (2002) 28 Cal.4th 313, 321 [121 Cal.Rptr.2d 546, 48 P.3d 1107], quoting *People v. Suesser* (1904) 142 Cal. 354, 366 [75 P. 1093].) Indeed, respondent argues that in the present case, the prosecutor used the natural and probable consequences theory “as a proxy for the transferred intent doctrine.” But, as respondent points out, the jury was also instructed on transferred intent. This theory would have established petitioner’s liability as a direct aider and abettor without resort to consideration of natural and probable consequences. Respondent does not explain why the prosecutor would have needed to use the natural and probable consequences doctrine to “substitute for” or “supplement” the transferred intent theory.

If the jury rejected petitioner’s defense, the transferred intent theory would have easily directed it to find petitioner guilty of the premeditated murder of

⁴ Respondent has not taken issue with petitioner’s argument that *Chiu* is retroactive. “The *Chiu* decision set forth a new rule of substantive law by altering the range of conduct for which a defendant may be tried and convicted of first degree murder.” (*In re Lopez* (2016) 246 Cal.App.4th 350, 358 [200 Cal.Rptr.3d 559].) Like other cases making similar changes in substantive criminal law (*In re Lucero* (2011) 200 Cal.App.4th 38, 45–46 [132 Cal.Rptr.3d 499] (*Lucero*), *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425] (*Chun*) [retroactive]; *In re Hansen* (2014) 227 Cal.App.4th 906, 918–920 [174 Cal.Rptr.3d 146] (*Hansen*) [*Chun* retroactive]), *Chiu* has been held to apply retroactively. (*In re Lopez, supra*, 246 Cal.App.4th at pp. 357–360; see *Johnson, supra*, 246 Cal.App.4th at p. 1404, fn. 2.)

Barfield.⁵ But if the jury believed that petitioner did not intend to kill or assist in the killing of someone other than Chuckie, told Bluitt the person they were following was not Chuckie and tried to stop Bluitt from shooting, and that Bluitt intentionally and deliberately shot Barfield anyway, the jury instructions would not have permitted reliance on the theory of transferred intent, because this theory applies when the perpetrator intends to kill one victim and *unintentionally* kills another. CALJIC No. 8.65 directs the jury, “When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed.” To the same effect, CALCRIM No. 562 instructs, “If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed.” The natural and probable consequences theory does not expressly refer to concepts such as mistake or inadvertence; it asks whether a reasonable person in the aider and abettor’s position would have known that the perpetrator’s premeditated murder of a different victim was a natural and probable consequence of the originally premeditated murder. Thus the jury could have relied upon this doctrine to find petitioner guilty if it believed that a reasonable person, knowing what petitioner knew about the situation and about Bluitt, would or should have known it was reasonably foreseeable that Bluitt would commit a premeditated murder of a different victim. Natural and probable consequences was not used by the prosecutor as a proxy for transferred intent; it was an alternate theory offered to enable the jury to find petitioner guilty even if it believed he did not intend to aid and abet the *intentional* murder Bluitt actually committed.

Respondent’s argument that *Chiu* does not apply where the target crime is premeditated murder, despite some superficial appeal, is not persuasive. The appeal lies in the fact that, unlike the defendant in *Chiu*, petitioner intended to facilitate a premeditated murder, not some lesser offense. But, if the jury accepted petitioner’s defense, petitioner intended only to facilitate one specific premeditated murder, the murder of Chuckie. Respondent’s argument assumes that the mens rea of a person who knowingly acts with the intention of assisting in the premeditated murder of a specific victim necessarily transfers to an intention to assist in killing a completely unrelated victim the perpetrator independently decides to kill instead.

The *Chiu* decision was based upon the “uniquely subjective and personal” mental state required for conviction of first degree premeditated murder—the “willfulness, premeditation, and deliberation” that trigger the harsher penalty

⁵ Of course, the jury also could have found petitioner guilty as a direct aider and abettor without reliance on the transferred intent theory if it believed petitioner shared Bluitt’s intent to kill Barfield knowing Barfield was not Chuckie.

for first degree murder. (*Chiu, supra*, 59 Cal.4th at p. 166.) It was this subjective element of deliberation and careful weighing of considerations that led *Chiu* to conclude that an aider and abettor who did not personally have the mens rea required for first degree murder could not be held liable under the natural and probable consequences doctrine. (*Id.* at pp. 166–167.) If his defense was believed, petitioner did not intend to kill or assist Bluitt in killing anyone other than Chuckie, and once he realized Chuckie was not the person in their sights, he tried to stop Bluitt from shooting. As we have said, if Bluitt intended to kill Chuckie and thought he was doing so, but accidentally killed Barfield, petitioner would have been liable as a *direct* aider and abettor under the doctrine of transferred intent; his aiding and abetting of the intended murder in essence assumed the risk that the perpetrator would mistakenly kill the wrong victim. But Bluitt's independent, intentional, deliberate and pre-meditated decision to kill a different victim would reflect a personal and subjective state of mind that was insufficiently connected to petitioner's culpability for aiding and abetting the (intended) murder of Chuckie to justify holding petitioner liable for Bluitt's premeditated independent act.

■ As applied to this case, *Chiu* directs that petitioner could be found guilty of the first degree premeditated murder of Barfield as a direct aider and abettor, only if he “aided or encouraged the commission of the murder [of Barfield] with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission.” (*Chiu, supra*, 59 Cal.4th at p. 167.) If he did not intend to commit, encourage or facilitate the premeditated murder of Barfield, he could *not* be found guilty of that offense on the theory that the murder of Barfield was a natural and probable consequence of the crime he did intend to commit, encourage or facilitate (the premeditated murder of Chuckie). As we have said, however, the jury in the present case was instructed on both direct aiding and abetting and the natural and probable consequences theory.

■ Assessing whether the error in *Chiu* was harmless, the court explained, “When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129 [17 Cal.Rptr.2d 365, 847 P.2d 45]; *People v. Green* (1980) 27 Cal.3d 1, 69–71 [164 Cal.Rptr. 1, 609 P.2d 468].) Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.” (*Chiu, supra*, 59 Cal.4th at p. 167.)

Respondent argues that this test should not be employed on collateral review. Instead, respondent argues that petitioner is not entitled to relief on

this petition because he cannot show he was not guilty of first degree murder as a matter of law. Respondent argues that *Chiu* narrowed the scope of substantive liability for the crime but did not redefine it, and that under these circumstances, “petitioner is only ‘entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. [Citations.]’” (*People v. Mutch* (1971) 4 Cal.3d 389, 396 [93 Cal.Rptr. 721, 482 P.2d 633] (*Mutch*), quoting *In re Zerbe* (1964) 60 Cal.2d 666, 667–668 [36 Cal.Rptr. 286, 388 P.2d 182].)” (*Johnson, supra*, 246 Cal.App.4th at p. 1404.) In other words, “a petitioner must demonstrate ‘as a matter of law’ that his conduct did not violate the statute of conviction. (*In re Earley* (1975) 14 Cal.3d 122, 125 [120 Cal.Rptr. 881, 534 P.2d 721], superseded by statute on other grounds in *People v. Vines* (2011) 51 Cal.4th 830, 869 [124 Cal.Rptr.3d 830, 251 P.3d 943].)” (*Johnson, supra*, 246 Cal.App.4th at p. 1404.) Petitioner cannot satisfy this test, respondent urges, because he could have been found guilty of first degree murder under the doctrine of transferred intent.

Respondent’s position on the assessment of *Chiu* error in the habeas context was rejected in *Johnson, supra*, 246 Cal.App.4th at pp. 1406–1407. As *Johnson* explained, cases involving changes in law analogous to *Chiu* have employed the *Chapman*⁶ beyond a reasonable doubt standard on habeas review. In *Chun, supra*, 45 Cal.4th 1172, the Supreme Court “reconsidered the scope of the second degree felony-murder rule and expressly overturned its previous holding that shooting at an occupied vehicle could form the basis for such a conviction.” (*Johnson, supra*, 246 Cal.App.4th at p. 1405.) This change was the basis for a habeas petition in *Lucero, supra*, 200 Cal.App.4th 38, in which the jury instructions permitted a murder conviction to be predicated on such a shooting. After concluding that *Chun* applied, the *Lucero* court found the error “harmless beyond a reasonable doubt” (*Lucero, supra*, 200 Cal.App.4th at p. 52), as “[n]o juror who correctly followed the instructions could arrive at a verdict of attempted murder without addressing the question of malice aforethought and resolving it against Lucero. Hence, this is a case where “other aspects of the verdict . . . leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice” (*Chun, supra*, 45 Cal.4th at p. 1205).” (*Lucero, at p. 51.*)” (*Johnson, supra*, 246 Cal.App.4th at p. 1405.) *Hansen, supra*, 227 Cal.App.4th 906, 922–928, applied the beyond a reasonable doubt standard for harmless error in the long-final case that was expressly overruled by *Chun*, finding prejudice because nothing in the jury’s verdict showed it relied upon the legally valid theory rather than the invalid felony murder theory, or made the findings necessary to support the valid theory.

⁶ *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824].

■ Johnson found the reasoning of *Lucero* and *Hansen* more applicable to the *Chiu* situation than that of *Earley* and *Mutch*, the same cases respondent relies upon in the present case. Johnson explained that “*Chun* and *Chiu* represent changes in the law, not merely a narrowing of the court’s interpretation of the law as advanced by respondent,” and the error does not require the court “‘to review determinations of fact made upon conflicting evidence after a fair trial’”⁷ but rather “goes to the reliability of the conviction and the question of guilt or innocence of the crime for which petitioner was convicted—first degree premeditated murder. As the Supreme Court in *Chiu* noted, there is a significant difference between first degree premeditated murder and second degree murder—a sentence of 25 years to life versus 15 years to life.” (*Johnson, supra*, 246 Cal.App.4th at pp. 1406–1407.)

■ By contrast, *Mutch* and *Earley* “only addressed insufficiency of the evidence claims and the ‘excess of jurisdiction’ exception to the *Waltreus/Dixon* rules limiting relitigation of appellate claims on habeas.”⁸ (*Johnson, supra*, 246 Cal.App.4th at p. 1407, fn. omitted.) In *Mutch* and *Earley*, subsequent to the petitioners’ convictions of kidnapping for the purpose of robbery under section 209, *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225], held—contrary to previous interpretations of the statute—that the asportation element of the offense intended by the Legislature is not satisfied by movements of the victim that are “‘merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself.’” (*Earley, supra*, 14 Cal.3d at pp. 126–127, italics omitted; *Mutch, supra*, 4 Cal.3d at p. 394.) Both cases applied the

⁷ This quote in *Johnson* is from the dissenting opinion in *Neal v. State of California* (1960) 55 Cal.2d 11, 23 [9 Cal.Rptr. 607, 357 P.2d 839] (dis. opn. of Schauer, J.), disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331 [142 Cal.Rptr.3d 546, 278 P.3d 809], which disagreed with the majority’s view that the case was appropriate for habeas corpus review. Contrary to the majority’s view of the case as involving a question of law on undisputed facts, dissenting Justice Schauer viewed the case as presenting a question of sufficiency of the evidence and stated, “The subject use of habeas corpus is squarely contrary to the following rules: ‘[H]abeas corpus may not be used instead of an appeal to review determinations of fact made upon conflicting evidence after a fair trial. [Citations.] Likewise, the writ is not available to correct errors or irregularities relating to ascertainment of the facts when such errors could and should have been raised by appeal. [Citations.]’” (*In re Dixon* (1953) 41 Cal.2d 756, 760 [264 P.2d 513].) (*Neal*, at p. 23 (dis. opn. of Schauer, J.).)

⁸ The referenced rules illustrate the principle that “[p]roper appellate procedure . . . demands that, absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance.” (*In re Harris* (1993) 5 Cal.4th 813, 829 [21 Cal.Rptr.2d 373, 855 P.2d 391]; see *In re Waltreus* (1965) 62 Cal.2d 218, 225 [42 Cal.Rptr. 9, 397 P.2d 1001] [petitioner precluded from raising claim previously raised and rejected on appeal]; *In re Dixon, supra*, 41 Cal.2d at p. 759 [petitioner precluded from raising claim that was not raised on appeal but should have been]; *Johnson, supra*, 246 Cal.App.4th at p. 1407, fn. 4.)

principle that “ ‘a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. [Citations.]’ ” (*Mutch, supra*, 4 Cal.3d at p. 396, quoting *In re Zerbe, supra*, 60 Cal.2d 666, 667–668; *Earley, supra*, 14 Cal.3d at p. 125.) In both, the question was whether the evidence showed that as a matter of law the movement of the victim was incidental to the robbery and, therefore, the defendant’s conduct did not violate section 209. (*Mutch, supra*, 4 Cal.3d at p. 396; *Earley, supra*, 14 Cal.3d at pp. 130–131.) If it did, relief via habeas corpus was appropriate to rectify the error of the court’s act in “ ‘excess of its jurisdiction.’ ” (*Mutch, supra*, 4 Cal.3d at p. 396.)

Unlike the situation in *Mutch* and *Earley*, the issue here is not whether the facts support petitioner’s conviction but whether the jury could have relied upon an invalid legal theory in convicting him. We agree with *Johnson* that “the scope of California habeas corpus review is not so limited as respondent suggests based on *Mutch* and *Earley*. Rather, the Supreme Court’s *Chiu* opinion effected a significant change in the law of aiding and abetting, eliminating the natural and probable consequences doctrine as a basis for a conviction of first degree murder. There is no question that the arguments and jury instructions allowed the jury to base its murder finding on the now-discredited theory of natural and probable consequences; accordingly, as instructed by our Supreme Court, we now turn to the question of prejudice.” (*Johnson, supra*, 246 Cal.App.4th at p. 1407.)

■ We cannot conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that petitioner directly aided and abetted the premeditated murder and not on the legally invalid natural and probable consequences doctrine. No felony-murder theory was offered at trial. The jury rejected the personal use and infliction of great bodily injury enhancements. The jury was instructed on the natural and probable consequences theory, and this theory was argued by the prosecution. This theory would have provided the route to conviction if the jury believed part or all of petitioner’s defense, and that defense was not implausible. While a defendant’s statements to the police might often be dismissed as self-serving, in this case petitioner was not a suspect attempting to dispel suspicion when he spoke with the police. As earlier indicated, petitioner voluntarily contacted the police almost nine months after the murder, after investigation of the murder had reached a dead end, when there is no apparent reason it was in his interest to do so. (*Brigham, supra*, 216 Cal.App.3d at p. 1043.) There is simply no way to tell from the verdict whether the jury relied on the invalid natural and probable consequences theory or viewed appellant as a direct aider and abettor.

Petitioner's first degree murder conviction cannot stand. In this situation, *Chiu* found it appropriate to reverse the first degree murder conviction and allow the People to either accept a reduction to second degree murder or retry the greater offense under a direct aiding and abetting theory. We will grant the petition for writ of habeas corpus to provide the same relief. (*Johnson, supra*, 246 Cal.App.4th at pp. 1408–1409.)

DISPOSITION

The petition for writ of habeas corpus is granted. The judgment of conviction is vacated and the matter is remanded to the superior court with directions to allow the People to accept a reduction of the conviction to second degree murder or elect to retry petitioner on first degree murder under a direct aiding and abetting theory. If the People do not elect to bring petitioner to trial within the time prescribed by law, the trial court shall enter judgment reflecting a conviction of second degree murder and shall resentence petitioner accordingly.

Richman, Acting P. J., and Stewart, J., concurred.

A petition for a rehearing was denied October 7, 2016, and the opinion was modified to read as printed above.

[No. A144252. First Dist., Div. Five. Sept. 15, 2016.]

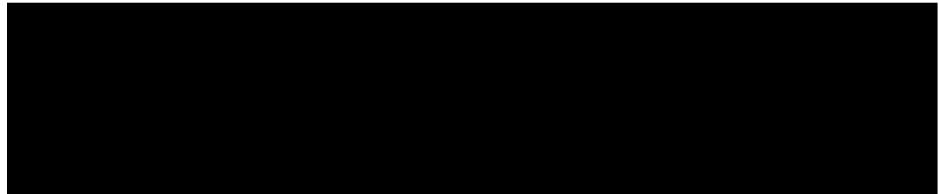
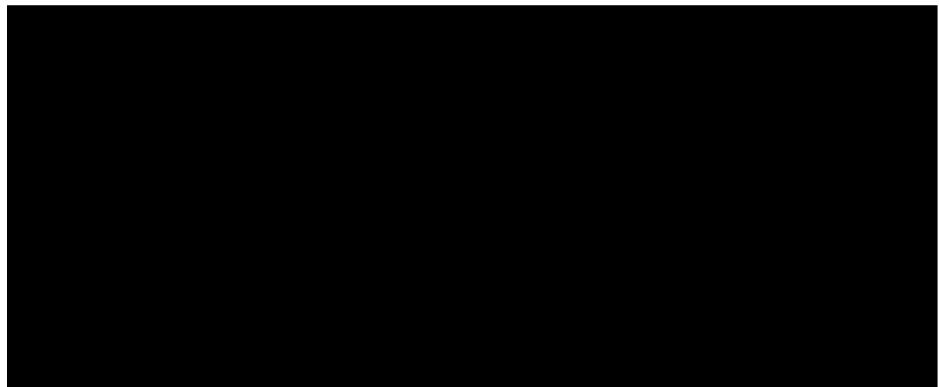
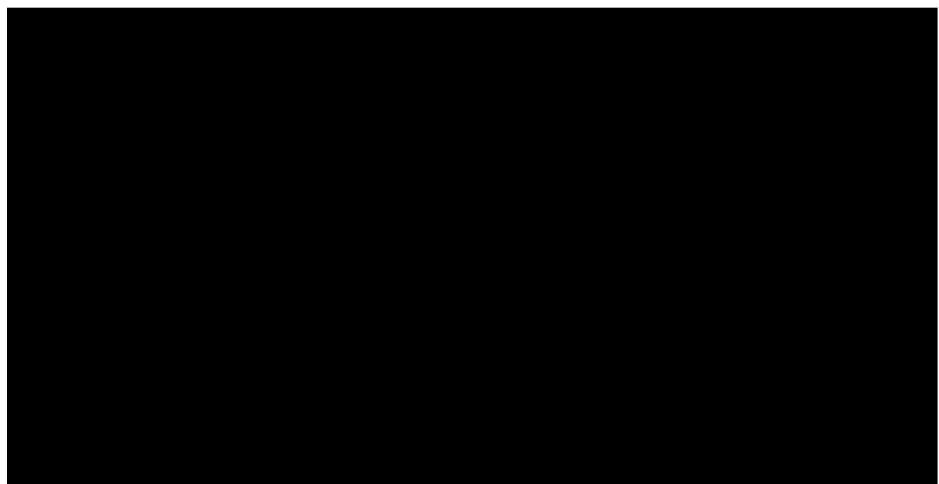
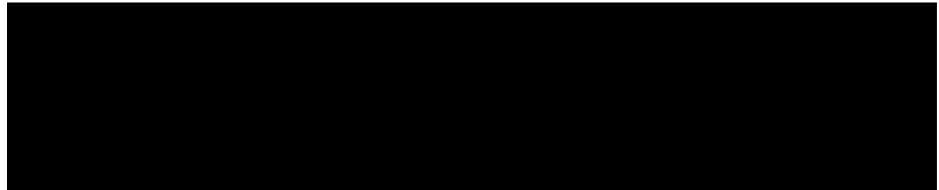
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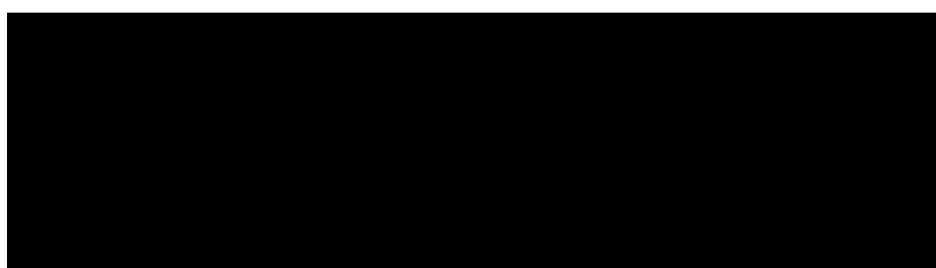
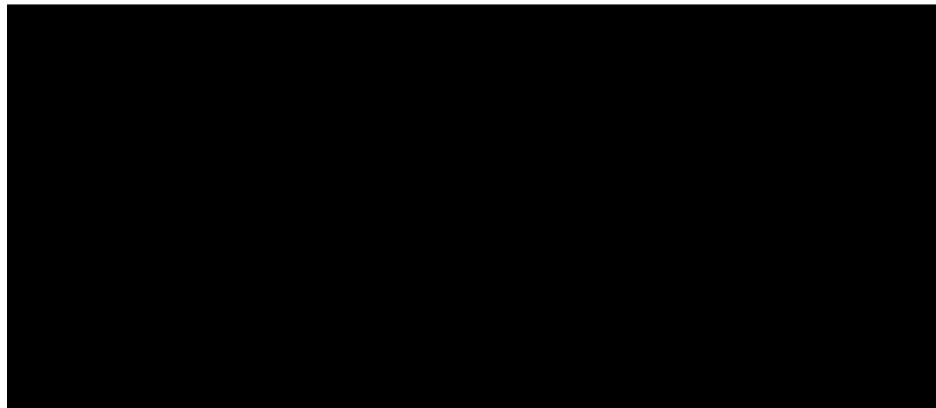
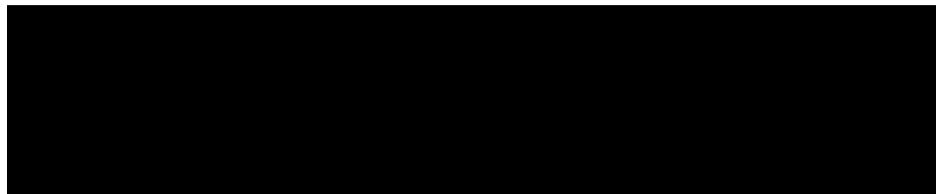
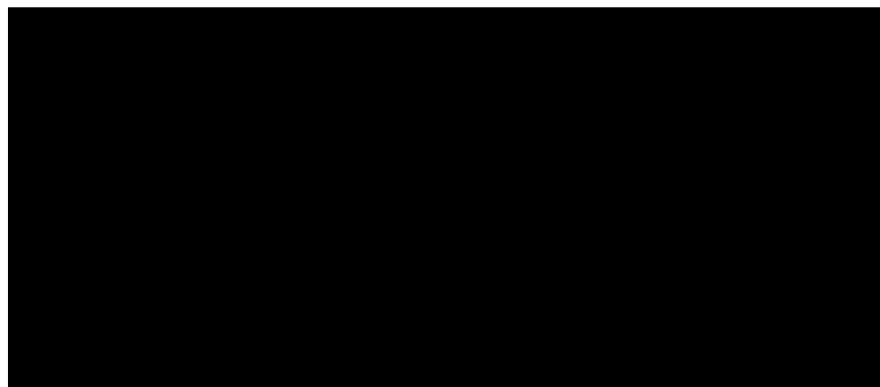
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) December 21, 2016, S238001.

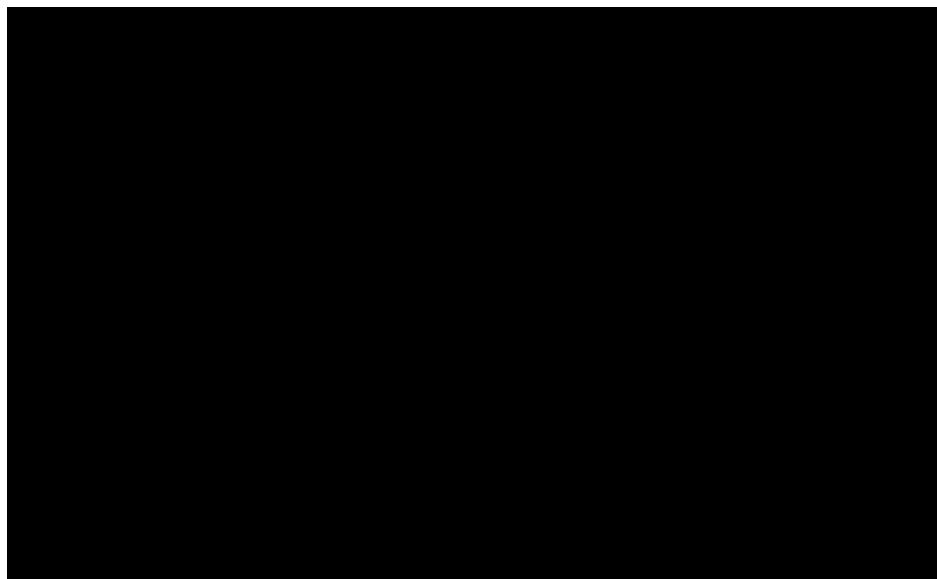
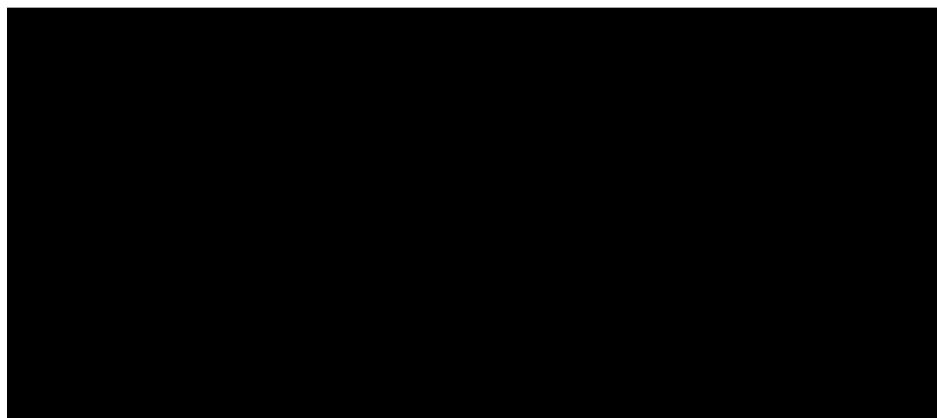
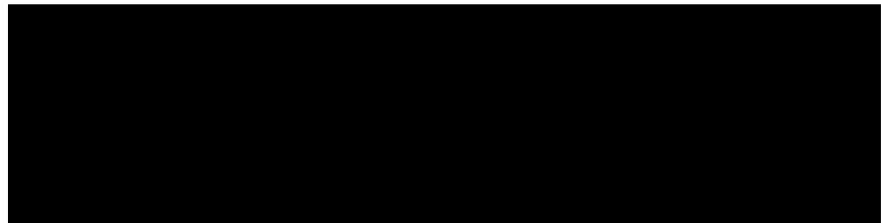
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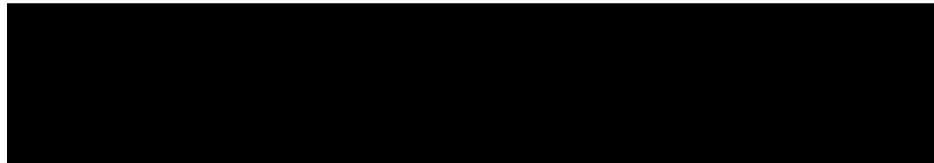
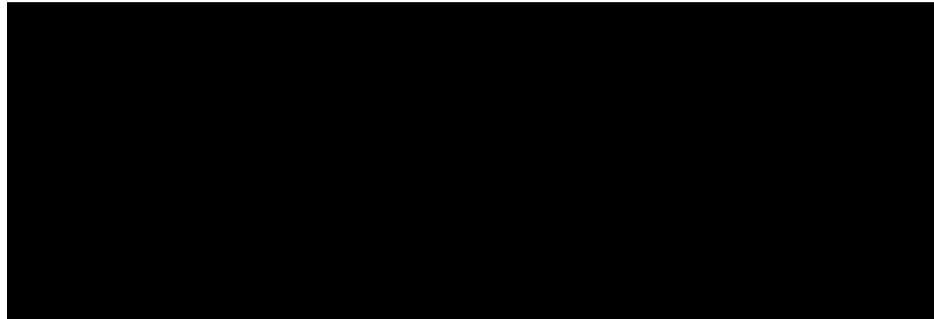
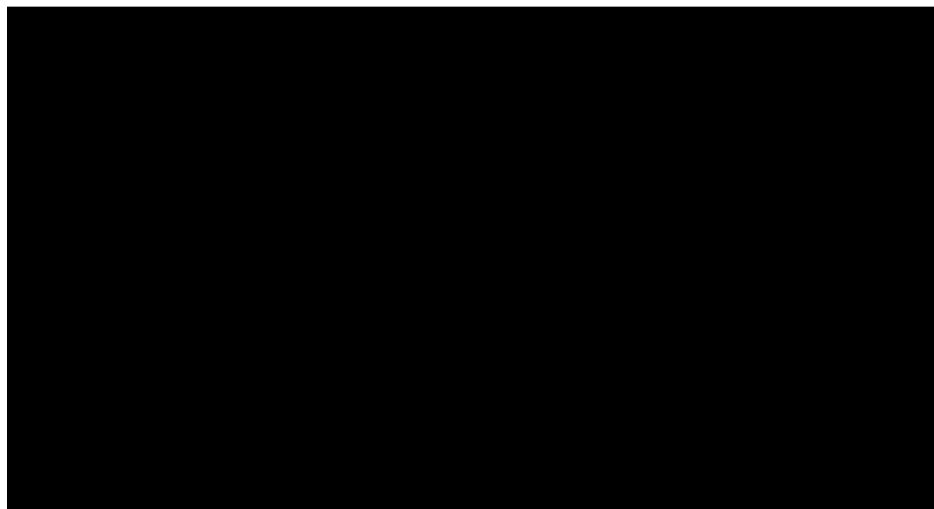
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OPINION

BRUINIERS, J.—Sometimes tension exists between technological advancement and community aesthetics. (*Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 720 (*Palos Verdes Estates*)). We address here the scope of local government authority to adjust the balance of those interests, consistent with statewide regulation.

Telephone and telegraph companies have long exercised a franchise under state law to construct and maintain their lines on public roads and highways “in such manner and at such points as not to incommodate the public use.” (Pub. Util. Code, § 7901;¹ see *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771 [336 P.2d 514] (*Pacific Telephone I*).) State law also provides that local government maintains the right “to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. [¶] . . . The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.” (§ 7901.1, subds. (a), (b).) In 2011, the City and County of San Francisco (City) enacted an ordinance requiring all persons to obtain a site-specific permit before seeking to construct, install, or maintain certain telecommunications equipment, known as “Personal Wireless Service Facilities” (hereafter wireless facilities), in the public right-of-way.² In this appeal, we consider whether the ordinance, on its face, is preempted by sections 7901 and 7901.1. We affirm the trial court’s determination that portions of the ordinance that authorize consideration of aesthetics are not preempted by state law.

¹ Undesignated statutory references are to the Public Utilities Code. Section 7901 provides: “Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommodate the public use of the road or highway or interrupt the navigation of the waters.”

² Under the City’s ordinance, wireless facilities are antennas and related facilities used to provide or facilitate the provision of “Personal Wireless Service,” which is defined as commercial mobile services provided under a license issued by the Federal Communications Commission. (S.F. Pub. Works Code, § 1502.)

I. FACTUAL AND PROCEDURAL BACKGROUND

T-Mobile West LLC, Crown Castle NG West LLC,³ and ExteNet Systems (California) LLC (collectively Plaintiffs) are considered “telephone corporations” under California law. (§ 234.) Plaintiffs’ business requires installation and operation of wireless facilities, including antennas, transmitters, and power supplies, on existing utility poles in the City’s public rights-of-way. These wireless facilities are considered “telephone lines.” (§ 233.)

In January 2011, the San Francisco Board of Supervisors adopted Ordinance No. 12-11 (Wireless Ordinance or Ordinance), which required Plaintiffs to obtain a wireless facility site permit (Wireless Permit) from the City’s department of public works (DPW) before installing or modifying any wireless facility in the public right-of-way.⁴ In adopting the Ordinance, the board of supervisors observed:

“(1) Surrounded by water on three sides, San Francisco is widely recognized to be one of the world’s most beautiful cities. Scenic vistas and views throughout San Francisco of both natural settings and human-made structures contribute to its great beauty.

“(2) The City’s beauty is vital to the City’s tourist industry and is an important reason for businesses to locate in the City and for residents to live here. Beautiful views enhance property values and increase the City’s tax base. The City’s economy, as well as the health and well-being of all who visit, work or live in the City, depends in part on maintaining the City’s beauty.

“(3) The types of wireless antennas and other associated equipment that telecommunications providers install in the public rights-of-way can vary considerably in size and appearance. The City does not intend to regulate the technologies used to provide personal wireless services. However, *the City needs to regulate the placement of such facilities in order to prevent telecommunications providers from installing wireless antennas and associated equipment in the City’s public rights-of-way either in manners or in locations that will diminish the City’s beauty.*” (Italics added.) After the Ordinance was enacted, DPW adopted implementing regulations.

The Ordinance required a showing of technological or economic necessity for permit approval and created three “Tiers” of facilities based on equipment

³ Crown Castle NG West LLC has also appeared in this litigation as Crown Castle NG West Inc. and NextG Networks of California, Inc.

⁴ The Wireless Ordinance was codified as article 25 of the San Francisco Public Works Code.

size. Tier I was defined to include only the smallest equipment (essentially, primary and secondary equipment enclosures, each less than three cubic feet in volume and no greater than 12 inches wide and 10 inches deep). Tier II was defined to allow equipment slightly larger in overall volume than Tier I (four cubic feet), but with the same limits on width and depth. Tier III was defined as any equipment larger than Tier II. The Ordinance conditioned approval of permits for equipment in Tiers II and III on aesthetic approval by a City department responsible for the proposed site.

Within Tiers II and III, three additional subdivisions were created, depending on whether the proposed wireless facility was in a location designated as (1) unprotected, (2) “Planning Protected” or “Zoning Protected,” or (3) “Park Protected.”⁵ Each of those subdivisions, in turn, triggered different aesthetic standards for approval. For example, if a wireless facility was proposed to be installed near a historic building or in a historic district, the City’s planning department needed to determine that it would not “significantly degrade the aesthetic attributes that were the basis for the special designation” of the building or district. Additionally, for any Tier III facility, a “necessity” standard required DPW to find that “a Tier II Facility is insufficient to meet the Applicant’s service needs.” DPW would not issue a Wireless Permit unless the relevant City department determined the proposed wireless facility “satisfie[d]” the applicable aesthetic compatibility standard. The Ordinance also prohibits issuance of a Wireless Permit if the applicant seeks to “[i]nstall a new Utility or Street Light Pole on a Public Right-of-Way where there presently are no overhead utility facilities.”

If DPW approved a Tier III application after recommendation by the planning department, the approval from DPW was only “tentative,” and the applicant was then required to notice the public. “Any person” could protest tentative approval of a Tier III application within 20 days of the date the notice was mailed and then subjected the application to public hearing. After a final determination on a Tier III application, “any person” could appeal to the board of appeals.

On May 3, 2011, Plaintiffs filed an action for declaratory and injunctive relief. The operative second amended complaint asserted five causes of action: (1) violation of Government Code section 65964, subdivision (b);⁶ (2)

⁵ A “Planning Protected” location generally involves proposed locations adjacent to national historic landmarks or that the City has designated as having views rated as “good” or “excellent.” A “Zoning Protected” location is “within a Residential or Neighborhood Commercial zoning district under the San Francisco Planning Code.” A “Park Protected” location is adjacent to a City park or open space.

⁶ Government Code section 65964 provides: “As a condition of approval of an application for a permit for construction or reconstruction for a development project for a wireless telecommunications facility, as defined in Section 65850.6, a city or county shall not do any of the following: [¶] (a) Require an escrow deposit for removal of a wireless telecommunications

an unlawful taking of Plaintiffs' property without due process of law; (3) violation of and preemption by Public Utilities Code sections 7901 and 7901.1; (4) preemption of DPW regulations granting the planning department review authority under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.); and (5) violation of and preemption by the then-newly enacted section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (47 U.S.C. § 1455). Plaintiffs' first and fourth causes of action were resolved by summary adjudication. Plaintiffs voluntarily dismissed their second cause of action before trial.

During the bench trial on the remaining third and fifth causes of action, Plaintiffs and the City stipulated that Comcast, AT&T, and PG&E (Pacific Gas and Electric Company) have also installed certain equipment, including backup battery units, antennas, cutoff switches, power meters, and transformers, on utility poles in the City's public right-of-way. With respect to PG&E, it was stipulated the City granted PG&E a franchise to install its facilities in the public right-of-way and requires it to obtain temporary occupancy permits if the installation will take more than one day. The parties also stipulated that telephone corporations installing facilities on utility poles other than wireless facilities, such as AT&T, and state video providers, such as Comcast, need only obtain utility conditions permits and temporary occupancy permits if the installation will take more than one day. Comcast, AT&T, and PG&E are not required to obtain any site-specific permit as a condition of installing such facilities on existing utility poles.⁷

Following posttrial briefing and argument, the trial court issued its proposed statement of decision, to which both parties objected. On November 26, 2014, the trial court overruled the objections, issued its final statement of decision, and entered final judgment. The court ruled in favor of Plaintiffs on their fifth cause of action, holding that modification provisions of the Ordinance and DPW regulations violate section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012. With respect to Plaintiffs' third cause of action, the trial court found portions of the Ordinance, conditioning issuance of a permit on economic or technological necessity, were preempted by Public

facility or any component thereof. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of removal. In establishing the amount of the security, the city or county shall take into consideration information provided by the permit applicant regarding the cost of removal. [¶] (b) Unreasonably limit the duration of any permit for a wireless telecommunications facility. Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities and counties may establish a build-out period for a site. [¶] (c) Require that all wireless telecommunications facilities be limited to sites owned by particular parties within the jurisdiction of the city or county."

⁷ AT&T also installs "surface-mounted" facilities in the public right-of-way. By separate ordinance, the City requires AT&T to publicly notice its intent to install such a facility at a particular location, allows protests to be filed, and requires a hearing if protests are filed.

Utilities Code section 7901. However, the court held the Ordinance's aesthetics-based compatibility standards were not preempted by sections 7901 or 7901.1.

In concluding that sections 7901 and 7901.1 did not impliedly preempt the City's power to impose aesthetic conditions, the court rejected Plaintiffs' argument that the public right-of-way is incommoded only by physical obstruction of travel. The court concluded *Palos Verdes Estates, supra*, 583 F.3d 716 "correctly viewed the public's right to the 'use of the road' as encompassing far more than merely getting from place to place." The trial court also agreed with the *Palos Verdes Estates* court that "the passage of [section] 7901.1 in 1995 codified and bolstered the right of local government to control and regulate construction of telecommunications facilities and for that reason . . . the Wireless Ordinance is not pre-empted by [section] 7901.1."

The trial court found Plaintiffs' equipment and facilities installed in the public rights-of-way to be "generally similar in size and appearance" to equipment installed by "landline" telephone corporations, cable television operators, and PG&E. Nonetheless, the trial court also rejected Plaintiffs' "secondary argument" that the Ordinance directly conflicts with the equivalence requirement found in section 7901.1, subdivision (b). The court agreed Plaintiffs had failed to sustain their burden of proving the Ordinance was invalid on its face because of this lack of equivalency. The court further explained: "[T]urning to the merits of Plaintiffs' contention[,] the Court agrees that the term all entities means just that and is not limited to telephone and telegraph corporations. However, Plaintiffs have failed to provide reasoning or authority that justifies a finding that [section] 7901.1 requires that all entities, whatever or whoever they may be, must be subject to regulation under the Wireless Ordinance or something similar."

Plaintiffs filed a timely notice of appeal from the judgment.⁸ After Plaintiffs filed their notice of appeal, the board of supervisors adopted Ordinance No. 18-15 (the Amended Ordinance) in order to comply with the trial court's judgment.⁹ In relevant part, the Amended Ordinance retains the same basic permitting structure, but simplifies the standards applicable to proposed wireless facilities by removing the size-based tiers. (See S.F. Pub.

⁸ The City filed a cross-appeal, which was voluntarily dismissed.

⁹ On December 10, 2015, the City asked us to take judicial notice of, among other things, the Amended Ordinance. We deferred ruling on the unopposed request and now grant it with respect to the Amended Ordinance, its implementing regulations, and dictionary definitions of "incommode." (See Evid. Code, §§ 451, subd. (e), 452, subds. (b), (h), 459; *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 244, fn. 1 [167 Cal.Rptr.3d 123] ["we may take judicial notice of postjudgment legislative changes that are relevant to an appeal"].) In all other respects, the request is denied because the documents the City asks us to notice are irrelevant.

Works Code, § 1502; *id.*, former § 1503.) The Amended Ordinance continues to require compliance with aesthetics-based compatibility standards, but the applicable standard is now determined solely by the location of the facility. (See S.F. Pub. Works Code, §§ 1502, 1508–1510.) All wireless facilities are now subject to the public notice and protest provisions formerly only applicable to Tier III facilities. (See *id.*, §§ 1512–1513.)¹⁰

II. DISCUSSION

The question on appeal is whether the Ordinance, on its face, conflicts with and is preempted by sections 7901 and 7901.1. Plaintiffs contend the Legislature preempted local regulation by giving Plaintiffs the right to install telephone lines in the public right-of-way “in such manner and at such points as *not to incommod[e] the public use of the road or highway or interrupt the navigation of the waters.*” (§ 7901, italics added.) Plaintiffs also argue the Ordinance violates the “equivalent treatment” requirement of section 7901.1, subdivision (b), because only wireless providers are required to obtain site-specific permits to install their equipment within the right-of-way. The City, on the other hand, maintains the Ordinance is not preempted by either section 7901 or section 7901.1.¹¹ Specifically, the City insists the plain meaning of the term “incommod[e]” is broad enough “to be inclusive of concerns related to the appearance of a facility” and section 7901.1, subdivision (b), does not apply to the Ordinance. We agree with the City on both points.

We review questions of statutory interpretation and preemption de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10 [72 Cal.Rptr.3d 112, 175 P.3d 1170]; *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 69 [108 Cal.Rptr.2d 715].) “[T]he construction of statutes and the ascertainment of legislative intent are purely questions of law. This court is not limited by the interpretation of the statute made by the trial court” (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 391–392 [20 Cal.Rptr.2d 164].)

■ “Facial challenges consider only the text of a measure, not the application of the measure to particular circumstances.” (*San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 803 [75

¹⁰ Intervening legislative amendments may moot an appeal (*Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18 [81 Cal.Rptr. 440]), but it is undisputed that the Amended Ordinance reenacted aesthetic conditions for issuance of a Wireless Permit. The differences between the 2011 Wireless Ordinance and the Amended Ordinance are irrelevant to our analysis, and we refer to them interchangeably as the Ordinance.

¹¹ The League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors), filed an amicus curiae brief in support of the City’s position.

Cal.Rptr.2d 534]; accord, *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [40 Cal.Rptr.2d 402, 892 P.2d 1145].) “Facial challenges to legislation are the most difficult to successfully pursue because the challenger must demonstrate that ‘‘no set of circumstances exists under which the [law] would be valid.’’ [Citation.]’ [Citation.] Thus, the moving party must establish that the challenged legislation inevitably is in total, fatal conflict with applicable prohibitions.” (*Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 173 [139 Cal.Rptr.3d 897].) “[O]ur task is to determine whether the statute can constitutionally be applied. ‘To support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute Rather, [plaintiffs] must demonstrate that the act’s provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.’” (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267 [5 Cal.Rptr.2d 545, 825 P.2d 438].)¹²

■ Preemption analysis “consists of four questions, which in order of increasing difficulty may be listed as follows: (1) Does the ordinance duplicate any state law? (2) Does the ordinance contradict any state law? (3) Does the ordinance enter into a field of regulation which the state has expressly reserved to itself? (4) Does the ordinance enter into a field of regulation from which the state has implicitly excluded all other regulatory authority?” (*Bravo Vending v. City of Rancho Mirage*, *supra*, 16 Cal.App.4th at p. 397.) “[A]bsent a clear indication of preemptive intent from the Legislature,’ we presume that local regulation ‘in an area over which [the local government] traditionally has exercised control’ is not preempted by state law. [Citation.] ‘The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption.’” (*Action*

¹² In a petition for rehearing, Plaintiffs insist the correct standard requires them “‘to show the statute is unconstitutional in all or most cases.’” (*City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1504 [157 Cal.Rptr.3d 644].) “The precise standard governing facial challenges ‘has been a subject of controversy within [the California Supreme Court],’” (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39 [124 Cal.Rptr.2d 701, 53 P.3d 119].) “Under the strictest test, the statute must be upheld unless the party establishes the statute ‘inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.’” [Citation.] Under the more lenient standard, a party must establish the statute conflicts with constitutional principles “‘in the generality or great majority of cases.’” [Citation.] Under either test, the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases, and “‘cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.’” (*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal.App.4th 1135, 1145 [98 Cal.Rptr.3d 643], italics added; accord, *Boggess*, at p. 1504.) In suggesting we are compelled to apply a more lenient standard, Plaintiffs misplace their reliance on facial challenges involving First Amendment and abortion rights. (See, e.g., *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342–343, 347 [66 Cal.Rptr.2d 210, 940 P.2d 797] (plur. opn. of George, C. J.).)

Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1242 [63 Cal.Rptr.3d 398, 163 P.3d 89]; see *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 [45 Cal.Rptr.3d 21, 136 P.3d 821].)

■ “A local ordinance *duplicates* state law when it is ‘coextensive’ with state law. [Citation.] [¶] A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law. [Citation.] [¶] A local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature ‘expressly manifest[s]’ its intent to occupy the legal area or when the Legislature ‘impliedly’ occupies the field. [Citations.] [¶] When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when ‘“(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the” locality.’” (*O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067–1068 [63 Cal.Rptr.3d 67, 162 P.3d 583].)

A. *Implied Preemption by Sections 7901 and 7901.1*

Plaintiffs raise several discrete arguments for reversal. First, Plaintiffs urge section 7901 gave them a right to construct and maintain their facilities in public rights-of-way throughout the state “without further discretionary approval by local governments.” They do not claim “the City lacks all authority to regulate the telephone corporations’ exercise of their [s]ection 7901 rights, rather Plaintiffs argue that the Wireless Ordinance is an act in excess of the limited [ministerial] authority the Legislature reserved to the City.” In the alternative, Plaintiffs argue that section 7901’s plain language indicates the Legislature impliedly sought to prohibit *any* local government regulation of aesthetics.

■ Plaintiffs’ first argument appears to be premised on the mistaken understanding that local government has no authority to regulate Plaintiffs’ installations unless specifically authorized to do so by statute. The relevant question is not, as Plaintiffs posit, whether section 7901 or section 7901.1 “grants” the City discretionary regulatory power or the power to consider aesthetics. The question is really whether either section *divests* the City of its constitutional powers. Our review of the California Constitution, statutory provisions, and the relevant case law lead us to believe section 7901 is a

limited grant of rights to telephone corporations, with a reservation of local police power that is broad enough to allow discretionary aesthetics-based regulation.

■ The California Constitution provides: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) “Often referred to as the ‘police power,’ this constitutional authority of counties or cities to adopt local ordinances is ‘‘the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare.’’ [Citation.] The police power extends to legislative objectives in furtherance of public peace, safety, morals, health and welfare.’’ (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1557 [69 Cal.Rptr.3d 612].) “Under the police power . . . , [municipalities] have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation.] . . . [¶] If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303, 705 P.2d 876].) The local police power generally includes the power to adopt ordinances for aesthetic reasons. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886 [50 Cal.Rptr.2d 242, 911 P.2d 429] [imposition of aesthetic permit conditions “have long been held to be valid exercises of the city’s traditional police power”]; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416 [124 Cal.Rptr.3d 58] [“settled . . . that cities can use their police power to adopt ordinances for aesthetic reasons”].)

■ Telegraph and telephone corporations have long been granted the right (franchise) to construct their lines along and upon public roads and highways throughout the state. (*Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 272–273 [118 P. 796] [discussing Civ. Code, former § 536]; *Pacific Telephone I*, *supra*, 51 Cal.2d at pp. 770–771.) That franchise, however, also has long been subject to regulation to ensure such lines do not “incommode” the public’s use of those roads and highways. (Civ. Code, former § 536, as amended by Stats. 1905, ch. 385, § 1, pp. 491–492; Stats. 1951, ch. 764, pp. 2025, 2194, 2258 [reenacting Civ. Code, former § 536 as Pub. Util. Code, § 7901].) Since 1951, section 7901 has provided: “Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, *in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.*” (Italics added.)

The Legislature later confirmed local government's "right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed" in its enactment of section 7901.1. (§ 7901.1, subd. (a), added by Stats. 1995, ch. 968, § 1, p. 7388.)

The City concedes Plaintiffs are "telephone corporations" seeking to install "telephone lines" under section 7901. (See §§ 233, 234; *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 587–588 [154 Cal.Rptr.3d 241]; *GTE Mobilnet of California, L.L.P. v. City and County of San Francisco* (N.D.Cal. 2006) 440 F.Supp.2d 1097, 1103 ["wireless carriers are included in the definition of 'telephone corporation' in § 7901, and . . . the definition of 'telephone line' in § 7901 is broad enough to reach wireless equipment".] It is undisputed that local government cannot entirely bar a telephone corporation from installing its equipment in the public right-of-way. (*Pacific Telephone I, supra*, 51 Cal.2d at p. 774.) Furthermore, cities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way. (*Huntington Beach*, at p. 587.) But section 7901 does not grant telephone corporations unlimited rights to install their equipment within the right-of-way. Rather, section 7901 clearly states that such installations must not "incommode the public use of the road or highway or interrupt the navigation of the waters." (§ 7901.) Furthermore, "section 7901 grants [Plaintiffs] the privilege to construct infrastructure upon public rights-of-way, subject to a municipality's 'right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.' (§ 7901.1, subd. (a))." (*Huntington Beach*, at p. 569, fn. omitted.)

In *Pacific Telephone I, supra*, 51 Cal.2d 766, our Supreme Court held the construction and maintenance of telephone lines in public streets is a matter of state concern, not a municipal affair, under article XI of the California Constitution. (*Pacific Telephone I*, at p. 768.) It was, by then, "settled that [former] section 536 of the Civil Code constitutes 'a continuing offer extended to telephone and telegraph companies . . . which offer when accepted by the construction and maintenance of lines' [citation] gives a franchise from the state to use the public highways for the prescribed purposes without the necessity for any grant by a subordinate legislative body." (*Id.* at p. 771.) Accordingly, the City could not require the telephone company to obtain a separate local franchise (*ibid.*), in addition to the state franchise, or in the absence of such a local franchise "exclude telephone lines from the streets upon the theory that 'it is a municipal affair'" (*id.* at p. 774).

■ Plaintiffs suggest the *Pacific Telephone I* holding is determinative and that, if the construction and maintenance of telephone lines is a statewide concern, localities may not regulate Plaintiffs' access to the right-of-way by

requiring a discretionary permit. Plaintiffs read the opinion far too broadly. The *Pacific Telephone I* holding is a narrow one: cities cannot exclude telephone lines from the public right-of-way on the basis that no local franchise has been obtained.¹³ Opinions are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566 [43 Cal.Rptr.3d 1, 133 P.3d 1076].) Importantly, in *Pacific Telephone I*, the telephone company conceded the City retained the power to require it to obtain permits before installation or excavation in the right-of-way. (*Pacific Telephone I, supra*, 51 Cal.2d at pp. 773–774.)

“The right of telephone corporations to construct telephone lines in public rights-of-way is not absolute. It has been observed by our Supreme Court that section 7901 grants ‘a limited right to use the highways and [does so] only to the extent necessary for the furnishing of services to the public.’ (*County of L. A. v. Southern Cal. Tel. Co.* [(1948)] 32 Cal.2d [378,] 387 [196 P.2d 773].) The text of section 7901 provides that telephone lines may not ‘incommode the public use of the road or highway’ (*Ibid.*) Section 7901.1 states ‘[i]t is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.’ (§ 7901.1, subd. (a).) ‘The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.’ (§ 7901.1, subd. (b).) [¶] In addition, section 2902 states that municipal corporations may not ‘surrender to the [Public Utilities Commission] its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.’” (*City of Huntington Beach v. Public Utilities Com., supra*, 214 Cal.App.4th at pp. 590–591.) Thus, “the Public Utilities Code specifically contemplates potential conflicts between the rights of telephone corporations to install telephone lines in the public right-of-way and the rights of cities to regulate local matters such as the location of poles and wires.” (*Id.* at p. 591.)

Instead of preempting local regulation, the statutory scheme (§§ 2902, 7901, 7901.1) and the above authority suggest the Legislature intended the state franchise would coexist alongside local regulation. In arguing “[t]here is

¹³ *Sunset Tel. and Tel. Co. v. Pasadena, supra*, 161 Cal. 265 stands for a similarly narrow proposition. Plaintiffs also misplace their reliance on *In re Johnston* (1902) 137 Cal. 115 [69 P. 973], which is not on point. *Johnston* involved former section 19 of article XI of the California Constitution, which gave gas and water companies a franchise to install pipes in the right-of-way, limited only by “‘such general regulations as the municipality may prescribe for damages and indemnity for damages.’” (*Johnston*, at p. 119.)

no meaningful difference between regulating entry in a blanket fashion versus regulating entry on a case-by-case basis.” Plaintiffs seek to divert our attention from the only question before us. Case-by-case regulation is meaningfully different. Requiring a local franchise, as the City did in *Pacific Telephone I*, has the immediate effect of prohibiting the telephone corporations’ use of the public right-of-way, whereas local regulation on a site-by-site basis does not have the same impact. As stated by amici curiae, the exercise of local planning discretion “is not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of [telephone corporations]. It is used to harmonize the interest and rights of [telephone corporations] with cities’ and counties’ other legitimate objectives” Plaintiffs cannot meet their burden on a facial challenge by suggesting the City may apply the Ordinance so as to prohibit their use of the right-of-way altogether. (*Arcadia Unified School Dist. v. State Dept. of Education, supra*, 2 Cal.4th at p. 267 [“ ‘[t]o support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute.’ ”].) Plaintiffs have not met their burden to show local government can *never*; *in any situation*, exercise discretion to deny a permit for a particular proposed wireless facility. Thus, we turn to Plaintiffs’ second argument—that section 7901 implicitly prohibits *any* local government regulation of wireless facility aesthetics.

■ Plaintiffs appear to concede the Ordinance does not duplicate or contradict state law. Instead, they appear to focus on whether the Ordinance has “manifested its intent to ‘fully occupy’ ” any area of regulation exceeding that necessary to prevent physical obstruction of travel on the public right-of-way. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898 [16 Cal.Rptr.2d 215, 844 P.2d 534].) Accordingly, the question is whether the Legislature impliedly preempted the City’s power to condition approval of a Wireless Permit on aesthetics-based standards. “The Legislature’s ‘preemptive action in specific and expressly limited areas weighs against an inference that preemption by implication was intended elsewhere.’ [Citations.] In addition, . . . ‘[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations.’ ” (*Big Creek Lumber Co. v. County of Santa Cruz, supra*, 38 Cal.4th at p. 1157.)

“In general, courts are cautious in applying the doctrine of implied preemption: ‘[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.’ [Citation.] Where local legislation clearly serves local purposes, and state legislation that appears to be in conflict

actually serves different, statewide purposes, preemption will not be found.” (*San Diego Gas & Electric Co. v. City of Carlsbad, supra*, 64 Cal.App.4th at p. 793.)

The Ordinance unquestionably allows the City to condition approval of a particular Wireless Permit on aesthetic considerations. Plaintiffs contend the Legislature impliedly preempted such local regulation by giving telephone corporations the power to install telephone lines in the public right-of-way “in such manner and at such points *as not to incommod the public use of the road or highway or interrupt the navigation of the waters.*” (§ 7901, italics added.) Plaintiffs’ position is that “incommod” means only physical obstruction of travel in the public right-of-way. The City, on the other hand, points out that the dictionary definition of “incommod” is broader and includes “inconvenience, discomfort, and disturbance beyond mere blockage.” (See Merriam-Webster Online Dict. <<http://www.merriam-webster.com/dictionary/incommod>> [as of Sept. 15, 2016] [defining “incommod” as “to give inconvenience or distress to: disturb”]; Webster’s Dict. 1828—online ed. <<http://webstersdictionary1828.com/Dictionary/incommod>> [as of Sept. 15, 2016] [defining “incommod” as “[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition”; denoting “less than annoy, vex or harass”; e.g., “We are incommoded by want of room to sit at ease”].) We must construe the statute.

■ “The relevant principles that guide our decision are well known. ‘Our function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] To ascertain such intent, courts turn first to the words of the statute itself [citation], and seek to give the words employed by the Legislature their usual and ordinary meaning. [Citation.] When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. (Code Civ. Proc., § 1858.) The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute [citation], and where possible the language should be read so as to conform to the spirit of the enactment. [Citation.]’ [Citations.] [] We also must endeavor to harmonize, both internally and with each other, separate statutory provisions relating to the same subject.” (*Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.*, *supra*, 90 Cal.App.4th at pp. 69–70.) “‘It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.’ A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.’” (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269 [18 Cal.Rptr.2d 120].)

■ “When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.” (*Wasatch Property Management v. Degrade* (2005) 35 Cal.4th 1111, 1121–1122 [29 Cal.Rptr.3d 262, 112 P.3d 647].) “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) “When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008 [239 Cal.Rptr. 656, 741 P.2d 154].) “We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [40 Cal.Rptr.2d 903, 893 P.2d 1224].) “The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable.” (*Wasatch Property Management*, at p. 1122.)

In contending the trial court erred by adopting the broader interpretation of “incommode,” Plaintiffs rely on *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750 [87 P. 1023] (*Visalia*) and *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 152 [17 Cal.Rptr. 687] (*Pacific Telephone II*). In *Visalia*, a telegraph company challenged an assessment imposed on a purported local franchise to operate telegraph lines within the City of Visalia. (*Visalia*, at p. 745.) Our Supreme Court concluded there was no such local franchise because Civil Code former section 536 had already given the telegraph company “the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city.” (*Visalia*, at p. 750.) The court continued: “[N]evertheless [the telegraph company] could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of . . . placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel.” (*Id.* at pp. 750–751.)

In *Pacific Telephone II*, *supra*, 197 Cal.App.2d 133, the City argued that the telephone company could not claim a franchise under former section 536 of the Civil Code without first proving that the construction and maintenance of its poles and lines in San Francisco streets would not “incommode” the public use thereof. (*Pacific Telephone II*, at p. 145.) Division One of this court rejected the argument, reasoning that the City’s interpretation of Civil Code former section 536 was too restrictive. “Obviously, the Legislature in

adopting section 536 knew that the placing of poles, etc., in a street would of necessity constitute some incommodity to the public use, but *the restriction necessarily is limited to an unreasonable obstruction of the public use.* [¶] . . . [¶] It is absurd to contend that the installation of telephone poles and lines, *under the control by the city of their location and manner of construction*, is such an ‘incommodation’ as to make section 536 inapplicable. Such a construction of that section would make it completely inoperable.” (*Pacific Telephone II*, at p. 146, italics added.)

Neither *Pacific Telephone II* nor *Visalia* considered the issue presented here—whether the aesthetic impacts of a particular telephone line installation could ever “incommode the public use.” We decline Plaintiffs’ invitation to consider the opinions as authority for propositions not considered. (*People v. Avila, supra*, 38 Cal.4th at p. 566.) In fact, the *Pacific Telephone II* court stated, “because of the state concern in communications, the state has retained to itself the broader police power of granting franchises, *leaving to the municipalities the narrower police power of controlling location and manner of installation.*” (*Pacific Telephone II, supra*, 197 Cal.App.2d at p. 152, italics added.) Thus, the case does not support Plaintiffs’ position that section 7901 prohibits local government from considering aesthetics when issuing individual Wireless Permits. It simply leaves open the question—what kind of control over location and manner can local government exercise?

Although California courts have not yet addressed this precise issue in any published opinion, authority from the United States Court of Appeals for the Ninth Circuit is directly on point. In *Palos Verdes Estates, supra*, 583 F.3d 716, the City of Palos Verdes Estates denied, for aesthetic reasons, two permits to construct wireless facilities in the public right-of-way. (*Id.* at p. 719.) A city ordinance authorized Palos Verdes Estates to deny such permit applications on aesthetic grounds. (*Id.* at pp. 720–721.)

When the telephone company challenged the permit denials, the *Palos Verdes Estates* court found no conflict between the city’s consideration of aesthetics and section 7901. The key to that conclusion was the court’s observation that article XI, section 7 of the California Constitution grants local government authority to regulate local aesthetics and “neither [section] 7901 nor [section] 7901.1 divests it of that authority.” (*Palos Verdes Estates, supra*, 583 F.3d at pp. 721–722.) The court construed the statutory language, “[t]o ‘incommode’ the public use,” as meaning “to ‘subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience’ or ‘[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.).’ ” (*Id.* at p. 723.) It also observed, “‘public use’ of the rights-of-way is not limited to travel” and that “[i]t is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions.” (*Ibid.*)

Likewise, section 7901.1 did not preempt the local ordinance, as it “was added . . . in 1995 to ‘bolster the cities’ abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction.’” (*Palos Verdes Estates, supra*, 583 F.3d at p. 724, italics added, quoting Sen. Com. on Energy, Utilities and Communications, Analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended Apr. 17, 1995.) “If the preexisting [‘incommodation’] language of [section] 7901 did not divest cities of the authority to consider aesthetics in denying [wireless facility] construction permits, then, a fortiori, neither does the language of [section] 7901.1, which only ‘bolsters’ cities’ control.” (*Palos Verdes Estates, supra*, 583 F.3d at p. 724.) The court concluded, “there is no conflict between [the city’s] consideration of aesthetics in deciding to deny a [wireless] permit” and sections 7901 and 7901.1. (*Palos Verdes Estates*, at p. 724.)

Three years earlier, another panel of the Ninth Circuit reached the opposite conclusion in an unpublished decision *Sprint PCS v. La Cañada Flintridge* (9th Cir. 2006) 182 Fed. Appx. 688, 689, 691 (*La Cañada Flintridge*). The *La Cañada Flintridge* court rejected the dictionary definition of “incommode” and, instead, relied on *Pacific Telephone II*’s narrow construction of “incommode.” (*Id.* at pp. 690–691.) The court determined the city could only prevent “‘unreasonable obstruction of the public use,’” because “[t]he text focuses on the function of the road—its ‘use,’ not its enjoyment. Based solely on § 7901, it is unlikely that local authorities could deny permits based on aesthetics without an independent justification rooted in interference with the function of the road.” (*Ibid.*, italics omitted.)

Plaintiffs ask us to rely on *La Cañada Flintridge*, contending that *Palos Verdes Estates* inadequately addresses California authority. Plaintiffs’ criticism is not well taken. The *Palos Verdes Estates* court cites *Pacific Telephone I* for the proposition that a “telephone franchise is a matter of state concern but city still controls the particular location and manner in which public utility facilities are constructed in the streets.” (*Palos Verdes Estates, supra*, 583 F.3d at p. 723, fn. 3.) We have already expressed our disagreement with Plaintiffs’ broader reading of *Pacific Telephone I* and thus cannot fault the *Palos Verdes Estates* court for implicitly reaching the same conclusion or not discussing *Visalia, supra*, 149 Cal. 744, *In re Johnston, supra*, 137 Cal. 115, or *Sunset Tel. and Tel. Co. v. Pasadena, supra*, 161 Cal. 265.

■ Of course, we are not bound by the Ninth Circuit’s opinion on matters of state law. (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1317 [52 Cal.Rptr.2d 385].) Although the *Palos Verdes Estates* opinion is not binding, we find it persuasive. (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 [3 Cal.Rptr.3d 365]; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 299 [216 Cal.Rptr. 443, 702 P.2d 601].) We agree with the City and the *Palos Verdes Estates* court that Plaintiffs’ interpretation of

“incommode” is too narrow and inconsistent with the term’s plain meaning. Plaintiffs’ other textual arguments, grounded in *La Cañada Flintridge*, are no more convincing. According to Plaintiffs, because the express language of section 7901 provides that telephone corporations may not install their equipment in a location or manner that “incommode[s] the public *use* of the road or highway or *interrupt[s]* the *navigation* of the water,” the Legislature must have intended “incommode” be limited to physical obstructions of travel.¹⁴ Plaintiffs’ argument rests on the faulty assumption that “use” of a public road means nothing beyond transportation thereon. [REDACTED] We agree with the *Palos Verdes Estates* court that public use of the right-of-way is not limited to travel and that streets “may be employed to serve important social, expressive, and aesthetic functions.” (*Palos Verdes Estates, supra*, 583 F.3d at p. 723.)

We believe the *La Cañada Flintridge* court reached the wrong result through a cursory analysis, in which it interpreted “incommode” too narrowly and adopted a myopic view of the function of public roads. (*La Cañada Flintridge, supra*, 182 Fed. Appx. at pp. 690–691.) Furthermore, although we are not precluded from considering unpublished federal decisions, we note that even within the Ninth Circuit *La Cañada Flintridge* has no precedential value. (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6 [11 Cal.Rptr.3d 522]; U.S. Cir. Ct. Rules (9th Cir.), rule 36-3(a) (“[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion”].)

Nothing in section 7901 explicitly prohibits local government from conditioning the approval of a particular siting permit on aesthetic concerns. In our view, “incommode the public use” means “to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use.” (See *Palos Verdes Estates, supra*, 583 F.3d at p. 723.)

We cannot agree with Plaintiffs that our construction of the term “incommode” is limitless and “effectively nullif[ies] the Section 7901 franchise.” We

¹⁴ The Legislature’s use of the terms “use” and “enjoyment” in other, unrelated provisions of state law does not convince us that the omission of the latter term here is significant. (See *Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 595 [30 Cal.Rptr.3d 320] [“when ‘‘ ‘a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute *concerning a related matter* indicates an intent that the provision is not applicable to the statute from which it was omitted’ ’ ” (italics added)].) Nor are we persuaded by Plaintiffs’ reliance on out-of-state tort cases that involved liability related to a utility company’s actual physical obstruction of public roads. Neither these opinions, nor other inapposite out-of-state cases cited by Plaintiffs, address the question before us. Nor do they suggest the meaning of “incommode” is limited to physical obstruction of travel.

can certainly imagine that a large wireless facility might aesthetically “incommode” the public use of the right-of-way, if installed very close to Coit Tower or the oft photographed “Painted Ladies,” but present no similar “incommmodation” in other parts of the urban landscape.¹⁵ Plaintiffs also argue: “Even if aesthetics were a theoretically proper basis for regulating the installation of telephone lines in the public rights of way under Section 7901, the City’s treatment of other equipment in the public rights of way emphasizes that there are no legitimate grounds for claiming that wireless equipment may incommode the use of the public rights of way.” Should Plaintiffs be denied a Wireless Permit in an area already cluttered with other electrical and telecommunications equipment, we again have no doubt they may pursue an as-applied challenge. Presented only with a facial challenge, we cannot assume the City will apply the Ordinance in this manner. (*Arcadia Unified School Dist. v. State Dept. of Education, supra*, 2 Cal.4th at p. 267.)

The trial court did not err in determining the Ordinance is not facially preempted by sections 7901 and section 7901.1.

B. Direct Conflict Preemption by Section 7901.1

Plaintiffs also argue that the Ordinance directly conflicts with section 7901.1, subdivision (b), because the City “has singled out wireless equipment” by requiring providers of commercial mobile services alone to obtain site-specific permits while “ignoring the aesthetics of identical equipment installed by other right of way occupants.” Plaintiffs assert the trial court’s conclusion the Ordinance does not facially conflict with section 7901.1, subdivision (b), “is inconsistent with its [other] factual and legal holdings”—i.e., that other occupants’ equipment is similar in size and appearance and that site-specific permitting requirements are not imposed on other occupants of the right-of-way.

Section 7901.1 provides: “(a) It is the intent of the Legislature, *consistent with Section 7901*, that municipalities shall have the right to exercise

¹⁵ Plaintiffs claim this hypothetical assumes facts that are not possible under the Ordinance because all utilities are underground at the former locations. The Ordinance provides: “The Department shall not issue a [wireless permit] if the Applicant seeks to: [¶] (1) Install a new Utility . . . or Street Light Pole on a Public Right-of-Way where there presently are no overhead utility facilities.” However, Plaintiffs simply ask us to assume there are no overhead utility facilities near Coit Tower or the Painted Ladies. Even if we can assume as much, the Ordinance’s ban on new utility poles is itself a challenge, but seemingly reasonable, aesthetic restriction. By referencing Coit Tower and the Painted Ladies, we do not mean to suggest these are the only areas of aesthetic value where installation of a wireless facility could incommode public use. We merely seek to illustrate why a facial challenge is inappropriate. We decline Plaintiffs’ invitation to assume the Ordinance’s aesthetic restrictions will only affect proposed installation of wireless facilities on existing utility poles that are already cluttered with other electrical and telecommunications equipment.

reasonable control as to the time, place, and manner in which roads, highways, and waterways *are accessed*. [¶] (b) The control, to be reasonable, shall, at a minimum, *be applied to all entities in an equivalent manner*. [¶] (c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities.” (Italics added.) Plaintiffs and the City agree that section 7901.1, subdivision (b), applies only to construction activities. They use the term in different senses, however.

The City maintains: “[T]he use of the phrase ‘time, place, and manner in which the roads, highways, and waterways are *accessed*’ clearly refers to local authority to control *temporary* uses of the public right-of-way during construction. This term implies that the legislature intended to make clear local governments could prevent inconveniences both through section 7901 and by controlling the use of the public right-of-way during construction—even if the facilities once constructed (i.e., underground utility facilities) could not themselves inconvenience the public right-of-way.” (Italics added.) In other words, “[t]he inquiry under section 7901 is whether, *once installed*, those facilities would ‘inconvenience’ the public right-of-way. Construction management regulations permitted under section 7901.1 . . . address *how* the applicant intends to install its facilities in the public right-of-way.” Under the City’s interpretation, subdivision (b) of section 7901.1 has no application to the Ordinance because it is not a regulation of “time, place, and manner of *construction*—but is instead a regulation that permits Wireless Facilities to be installed in the public right-of-way subject to certain siting criteria.” (Italics added.)

Plaintiffs, in their opening brief, contend section 7901.1 defines the limited authority local governments have under section 7901. In their view, sections 7901 and 7901.1 give local governments limited construction management authority, but only to prevent physical obstruction of the roads, not aesthetic inconvenience. In the alternative, they contend that, even if the City has the authority to impose discretionary aesthetic regulation, the City’s application of such control must be equivalent for “all entities.” (See § 7901.1, subd. (b).) In their reply brief and a petition for rehearing, Plaintiffs refine their position and contend that section 7901.1 does not relate solely to temporary construction access to the right-of-way. However, Plaintiffs continue to maintain that section 7901.1 “does not expand [local government] authority,” but defines the limited authority section 7901 reserved for local governments to regulate how the public right-of-way is accessed *and* occupied. “In other words, Section 7901.1 tells us that the way local governments can enforce the limits of telephone corporations’ statewide franchise rights and ensure they do not ‘inconvenience the public use’ of the streets is to assert ‘reasonable control’ over the ‘time, place, and manner’ in which telephone corporations access the public rights of way.” (Fn. omitted.) Plaintiffs maintain “[s]ection 7901 does not describe local authority, [s]ection 7901.1 does.”

“Access” means “a way of getting near, at, or to something or someone”; “a way of being able to use or get something”; “permission or the right to enter, get near, or make use of something or to have contact with someone.” (Merriam-Webster Online Dict. <<http://www.merriam-webster.com/dictionary/accessed>> [as of Sept. 15, 2016].) Although the plain meaning of the word “accessed” is ambiguous, the remainder of section 7901.1 and its legislative history make clear the section is concerned solely with “temporary access” for construction purposes. (See *Palos Verdes Estates*, *supra*, 583 F.3d at p. 725 [agreeing the Legislature’s use of phrase “‘time, place and manner’ ” in which rights-of-way “‘are accessed’ ” “can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way”].)

Enactment of section 7901.1 was premised on an understanding that the section 7901 franchise “provide[s] the telephone corporations with the right to *construct and maintain* their facilities. Local government has limited authority to manage or control that *construction*. [¶] . . . [¶] . . . This bill is intended to bolster the [cities’] abilities with regard to *construction management* and to send a message to telephone corporations that cities have authority to manage *their construction*, without jeopardizing the telephone corporations’ statewide franchise.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, pp. 1, 3, italics added.)

The legislative history of section 7901.1 also provides: “To encourage the statewide development of telephone service, telephone corporations have been given state franchises to build their networks. This facilitates construction by minimizing the ability of local government to regulate construction by telephone corporations. Only telephone companies have statewide franchises; energy utilities and cable television companies obtain local franchises. [¶] . . . [¶] . . . Cities interpret their authority to manage telephone company *construction* differently. Telephone corporations represent their rights under state franchise differently as well, sometimes taking the extreme position that cities have absolutely no right to control *construction*. This lack of clarity causes frequent disputes. Among the complaints of the cities are a lack of ability to plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices. Cities are further concerned that *multiple street cuts caused by uncoordinated construction* shortens the life of the streets, causing increased taxpayer costs, as described in a recently commissioned study.” (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2, italics added.)

If we were to accept Plaintiffs’ construction of section 7901.1, we would necessarily ignore this legislative history and, more importantly, eliminate the

effect of section 7901.1's "consistent with section 7901" language. Had the Legislature intended to narrow and restrict local government's existing authority under section 7901, we cannot imagine it would have included the "consistent with section 7901" language. Nor would an enrolled bill report make clear that Senate Bill No. 621 (1995–1996 Reg. Sess.) "would not change current law, but would simply clarify existing municipality rights" and "reduce disputes between telephone companies and cities, as well as result in fewer inconveniences to citizens without infringing on the telephone companies['] right to construct and maintain their facilities." (Off. of Planning & Research, Enrolled Bill Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) Aug. 31, 1995, p. 3.)

■ We understand section 7901.1 as affirming and clarifying a subset of the local government powers, reserved under section 7901, to regulate telephone lines in the right-of-way. Even if the meaning of "all entities" (§ 7901.1, subd. (b)) is not limited to telephone and telegraph corporations, Plaintiffs have not met their burden to show the Ordinance is preempted because section 7901.1 applies only to construction itself. With respect to temporary access to the right-of-way for construction purposes, the record shows the City uniformly requires AT&T, Comcast, PG&E, and Plaintiffs to obtain temporary occupancy permits to access the right-of-way during construction.¹⁶ Of course, if the Legislature disagrees with our conclusions, or wishes to grant the wireless industry further relief from local regulation, it remains free to amend sections 7901 and 7901.1.

III. DISPOSITION

The judgment is affirmed. The City is to recover its costs on appeal.

Simons, Acting P. J., and Needham, J., concurred.

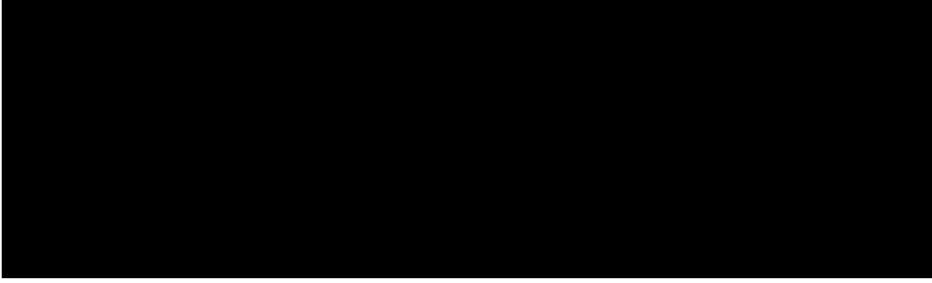
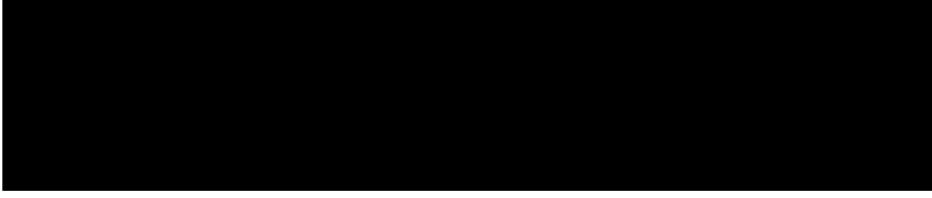
A petition for a rehearing was denied October 13, 2016, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was granted December 21, 2016, S238001.

¹⁶ In their petition for rehearing, Plaintiffs argue for the first time that the Ordinance regulates temporary construction activities. We are not required to address this forfeited argument. (See *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2 [135 Cal.Rptr.3d 713] ["it is 'too late to urge a point for the first time in a petition for rehearing, after the case ha[s] been fully considered and decided by the court upon the points presented in the original briefs' "].) Suffice it to say, Plaintiffs have not met their burden to show the challenged portions of the Ordinance require anything different of them, as compared to AT&T, Comcast, or PG&E, with respect to temporary access to the right-of-way for construction purposes.

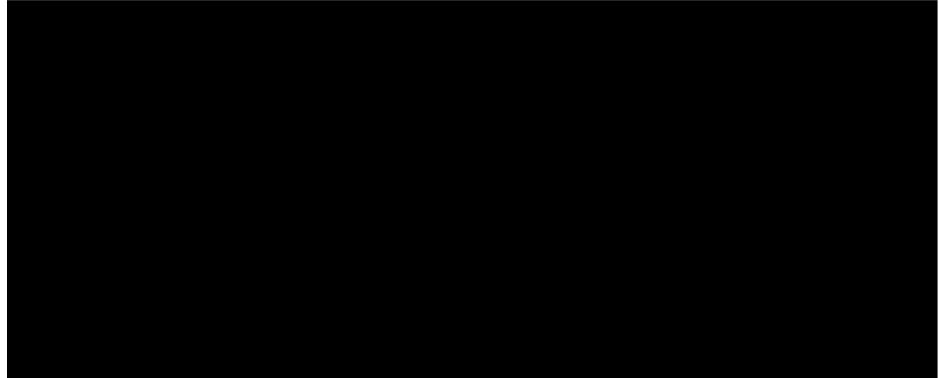
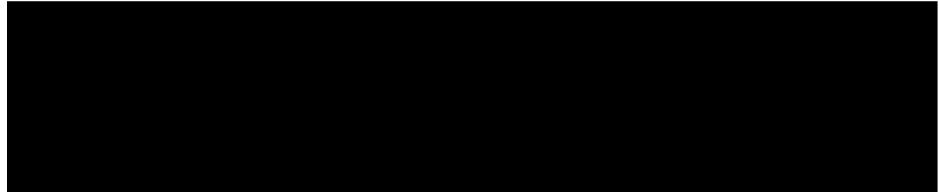
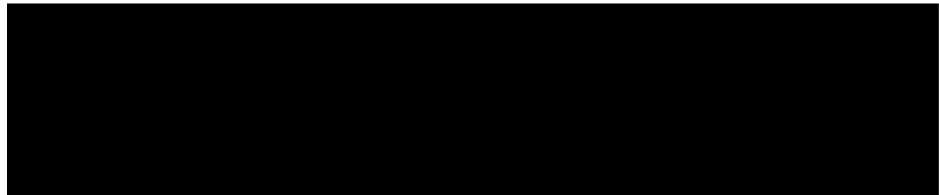
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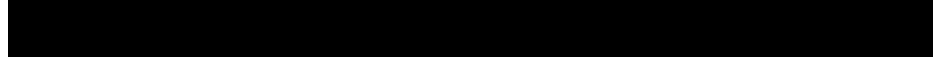
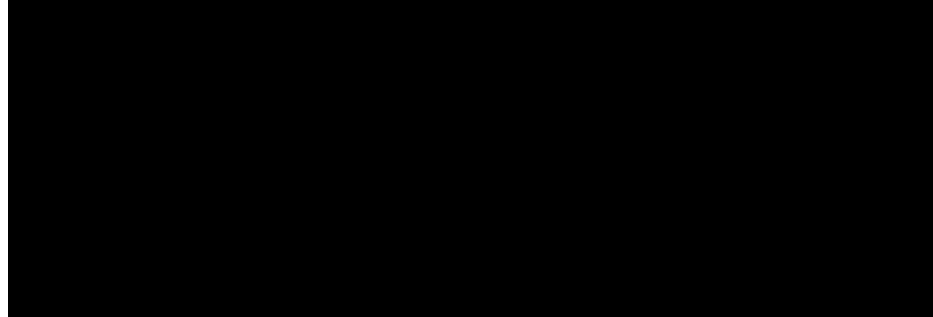
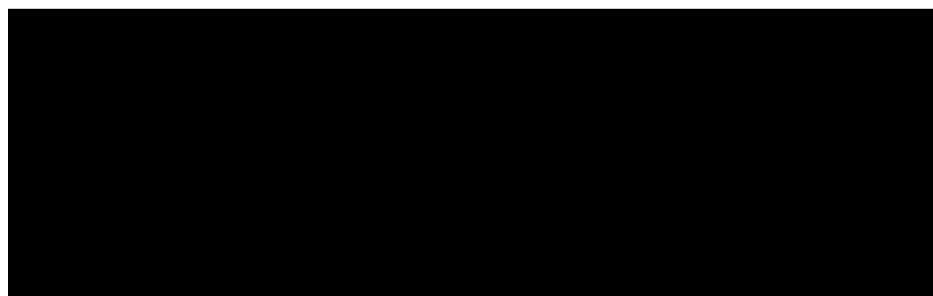
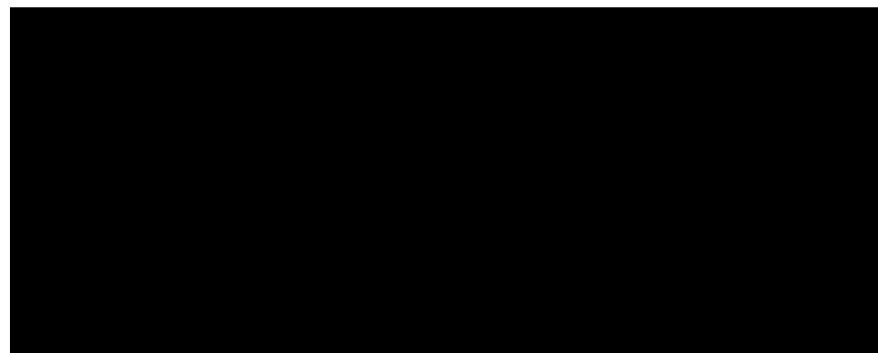
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JAMES RUBIN VARNER, Defendant and Appellant.

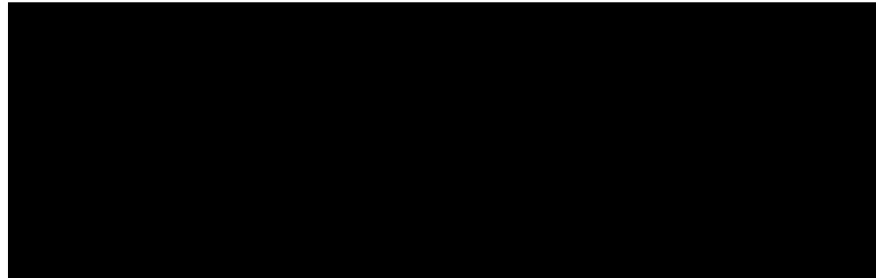
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 23, 2016, S237679.











COUNSEL

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OPINION

MILLER, J.—On November 4, 2014, the voters approved Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47). Proposition 47 reduced certain nonserious, nonviolent felonies to misdemeanors. Proposition 47 allows a person convicted of a felony prior to its passage, who would have been guilty of a misdemeanor under Proposition 47, to petition the court to reduce his or her felony to a misdemeanor and be resentenced.

On July 28, 2014, prior to the passage of Proposition 47, defendant and appellant James Rubin Varner entered a guilty plea to a felony violation of receiving stolen property, specifically a 1986 Yamaha M300 motorcycle, within the meaning of Penal Code section 496d, subdivision (a).¹ Defendant filed a petition to recall his sentence (Petition) stating that his felony conviction should be reduced to a misdemeanor. The trial court denied his Petition on the grounds that his conviction was not eligible for resentencing under Proposition 47.

Defendant now claims on appeal the trial court erred by finding a violation of section 496d does not qualify for resentencing under Proposition 47

¹ All further statutory references are to the Penal Code unless otherwise indicated.

because (1) Proposition 47 redefines all theft-related offenses with the value of the property under \$950 as misdemeanors and (2) if this court finds section 496d was not affected by Proposition 47, the omission from Proposition 47 violated his equal protection rights under the state and federal Constitutions.

■ A conviction for receiving a stolen motor vehicle in violation of section 496d is not an eligible offense under Proposition 47. Defendant also has not shown an equal protection violation. We affirm the denial of the Petition.

FACTUAL AND PROCEDURAL HISTORY

On July 18, 2014, defendant was charged in a felony complaint in San Bernardino County case No. FVI1402682 with one count of receiving a stolen motor vehicle within the meaning of section 496d, subdivision (a). Specifically, he was charged with unlawfully buying or receiving a “1986 Yam[aha] M300.” In addition, he was charged with having served three prior prison terms within the meaning of section 667.5, subdivision (b).

On July 28, 2014, defendant signed a plea agreement agreeing to enter a guilty plea to a violation of section 496d, subdivision (a), receiving stolen property, a vehicle. In addition, he admitted having suffered one prior prison term. The trial court accepted the plea. Defendant was sentenced to three years felony probation and was ordered to serve the first 180 days in county jail. Defendant violated his probation and his sentence was modified on February 3, 2015. He received a sentence of 365 days in county jail.

On March 12, 2015, defendant filed his Petition. It consisted of one page. The sole information on his conviction that was provided to the trial court in the Petition was as follows: “Defendant in the above-entitled case requests that, pursuant to Penal Code section 1170.18, the following felony violation(s) PC496D be designated as misdemeanor(s).” He stated that he was in custody. The People filed a written response that section 496d was not included in Proposition 47. The matter was set for a hearing.

On April 17, 2015, the trial court heard the Petition. Defendant’s counsel argued that section 496d was included in Proposition 47 and that the motorcycle, which defendant was in possession of, was valued at less than \$950. Defendant’s counsel stated he had one of his investigators check into the value of the motorcycle. According to the National Auto Dealers Association, the value, if in good condition, was \$765. The People responded that section 496d was not listed in Proposition 47. The trial court denied the Petition.

DISCUSSION

Defendant contends the trial court erred in denying his petition because the voters intended to include section 496d under Proposition 47. Specifically, he claims that section 496d, although not listed in Proposition 47, was intended to be included under the catch-all provision of section 490.2. Defendant also contends that if this court concludes section 496d was not intended to be included in Proposition 47, his equal protection rights under the state and federal Constitutions have been violated.

These issues are currently under review before the California Supreme Court in *People v. Nichols* (2016) 244 Cal.App.4th 681 [198 Cal.Rptr.3d 227], review granted April 20, 2016, S233055; *People v. Peacock* (2015) 242 Cal.App.4th 708 [195 Cal.Rptr.3d 344], review granted February 17, 2016, S230948; and *People v. Garness* (2015) 241 Cal.App.4th 1370 [194 Cal.Rptr.3d 676], review granted January 27, 2016, S231031.²

A. Proposition 47

■ “The voters approved Proposition 47 at the November 4, 2014 General Election, and it became effective the next day.” (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 [190 Cal.Rptr.3d 479].) “Proposition 47 ‘was intended to reduce penalties for ‘certain’ nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors.’ Those crimes were identified as ‘Grand Theft,’ ‘Shoplifting,’ ‘Receiving Stolen Property,’ ‘Writing Bad Checks,’ ‘Check Forgery,’ and ‘Drug Possession.’” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis by the Legis. Analyst[.])” (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652 [186 Cal.Rptr.3d 620], italics added.)

Section 1170.18, subdivision (a) provides in pertinent part, “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing”

² California Rules of Court, rule 8.1115(e)(1) was amended effective July 1, 2016, to provide as follows: “Pending review and filing of the Supreme Court’s opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.” This only applies to cases in which the Supreme Court granted review on and after July 1, 2016.

■ Proposition 47 amended section 496, buying or receiving stolen property, to provide that if the defendant receives “any property” that is \$950 or less, the offense shall be a misdemeanor except for some ineligible individuals. (§ 496, subd. (a).) The previous version of section 496 gave the prosecution discretion to charge the offense as a misdemeanor if the value of the property did not exceed \$950 and the district attorney or grand jury determined that so charging would be in the interests of justice. (Former § 496, as amended by Stats. 2011, ch. 15, § 372.) Accordingly, Proposition 47 converted the offense of receiving stolen property in section 496 from a wobbler to a misdemeanor.

Proposition 47 did not amend section 496d, the section under which defendant was convicted. Section 496d provides, “Every person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing,” shall be convicted of either a misdemeanor or felony.

B. Eligibility

■ As stated, section 496d is not listed in Proposition 47. In order to be eligible for resentencing, defendant had the burden of showing that he “would have been guilty of a misdemeanor” if Proposition 47 had been in effect at the time of his offense. (See *People v. Sherow* (2015) 239 Cal.App.4th 875, 879–880 [191 Cal.Rptr.3d 295] [defendant has the burden of establishing his or her eligibility for resentencing under Prop. 47].) “When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative’s language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.” (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 [107 Cal.Rptr.3d 265, 227 P.3d 858] (*Pearson*).)

Defendant stated in his Petition only that he had been convicted of “PC496D.” The trial court determined that defendant was not eligible for resentencing. The trial court did not err because section 496d is not included in section 1170.18. Moreover, there is no indication that the drafters of Proposition 47 intended to include section 496d. Construing the plain language of section 1170.18 to include section 496d would be inconsistent with our Supreme Court’s determination that we may not “add to the statute or

rewrite it to conform to some assumed intent not apparent from that language." (*Pearson, supra*, 48 Cal.4th at p. 571.)

Defendant's reliance on the changes made by Proposition 47 to the crimes of grand theft and petty theft do not support that the drafters of Proposition 47 intended to include section 496d. Section 490.2, which was added by Proposition 47, provides a definition of petty theft that affects the definition of grand theft in section 487 and other provisions. Section 490.2 begins with the phrase: "Notwithstanding Section 487 or any other provision of law defining grand theft." Similarly, section 459.5, which was also added by Proposition 47, and which provides a definition of shoplifting that affects the definition of burglary in section 459, begins with the phrase: "Notwithstanding Section 459." The drafters of Proposition 47 knew how to indicate when they intended to affect the punishment for an offense the proposition was not directly amending. This "notwithstanding" language is conspicuously absent from section 496, subdivision (a). Because that provision contains no reference to section 496d, we must assume the drafters intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies. Additionally, Proposition 47 modified both section 496, receiving stolen property, and added section 490.2. If section 490.2 applied to receiving stolen property offenses, there would be no need to amend section 496. The trial court did not err by concluding defendant was ineligible for resentencing based on his conviction of section 496d.

C. Equal Protection

Defendant contends if his conviction of a felony for receiving a stolen vehicle valued at less than \$950³ does not qualify under Proposition 47, his equal protection rights were violated. Specifically, he contends that he is similarly situated to a person who received a stolen vehicle valued under \$950 and was convicted under section 496, subdivision (a) prior to the passage of Proposition 47. He insists that person can seek resentencing under Proposition 47. However, since he was convicted of violating section 496d prior to the passage of Proposition 47, for the same conduct of receiving a stolen vehicle under the value of \$950, he cannot seek resentencing. While he recognizes that it is not an equal protection violation to have overlapping criminal laws with different punishments, because the prosecutor has discretion to choose between these punishments, such reasoning only applies on a prospective basis not on a retrospective basis. Here, the prosecutor did not

³ Defendant presented evidence in the trial court that the motorcycle taken was valued at \$765. For purposes of this argument, we will assume the value of the motorcycle was less than \$950.

exercise such discretion in choosing to convict him under section 496d prior to the passage of Proposition 47.

■ “The United States and California Constitutions entitle all persons to equal protection of the laws. [Citations.] This guarantee means “that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances.” [Citation.] A litigant challenging a statute on equal protection grounds bears the threshold burden of showing “that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citation.] Even if the challenger can show that the classification differently affects similarly situated groups, “[i]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest,” the classification is upheld unless it bears no rational relationship to a legitimate state purpose.’” (*People v. Singh* (2011) 198 Cal.App.4th 364, 369 [129 Cal.Rptr.3d 461].)

■ The California Supreme Court in *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 [16 Cal.Rptr.3d 420, 94 P.3d 551], stated that “[a] defendant . . . ‘does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.’” Accordingly, the rational basis test is applicable to an equal protection challenge involving an alleged sentencing disparity. (*Ibid.*) It additionally found, “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*Ibid.*) (7) Our Supreme Court also has applied the rational basis test to an alleged statutory disparity: “Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, ‘equal protection of the law is denied only where there is no “rational relationship between the disparity of treatment and some legitimate governmental purpose.”’” (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 [183 Cal.Rptr.3d 96, 341 P.3d 1075].) It also stated, “To mount a successful rational basis challenge, a party must ‘“negat[e] every conceivable basis”’ that might support the disputed statutory disparity.” (*Ibid.*) “If a plausible basis exists for the disparity, courts may not second-guess its ‘“wisdom, fairness, or logic.”’” (*Ibid.*)

Defendant’s claim is based on his insistence that prior to Proposition 47, a prosecutor, faced with a defendant in receipt of a stolen vehicle valued under \$950, could choose to charge a defendant under section 496, subdivision (a) or section 496d. As indicated, *ante*, former section 496, subdivision (a) was a wobbler offense but additionally provided, “if the district attorney or the grand jury determines that this action would be in the interests of justice, the

district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed nine hundred fifty dollars (\$950), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.” (Former § 496, subd. (a).) Section 496 has remained the same, penalizing the receipt of a stolen vehicle, no matter what the value, as a wobbler offense.

Defendant contends that after Proposition 47, a prosecutor certainly has the discretion to prosecute under either section 496, subdivision (a), for a vehicle valued under \$950, or section 496d. He argues that since he was prosecuted prior to the passage of Proposition 47, the prosecutor did not exercise his or her discretion to punish him under section 496d instead. He insists the disparate retrospective treatment makes *People v. Wilkinson, supra*, 60 Cal.4th 871, inapplicable. However, prior to the passage of Proposition 47, and after, section 666.5, subdivision (a) provides that a recidivist violator of certain statutes involving a motor vehicle, which includes section 496d, but not a misdemeanor violation of section 496, subdivision (a), was subject to enhanced penalties. Defendant’s plea to a violation of section 496d prior to the passage of Proposition 47 subjected him to possible additional punishment that a plea to receiving stolen property would not have done. The prosecutor’s decision to proceed under section 496d was not without discretion considering the differences between the two sections prior to Proposition 47.

■ Additionally, in *People v. Johnston* (2016) 247 Cal.App.4th 252 [201 Cal.Rptr.3d 886], review granted July 13, 2016, S235041, the defendant argued that Vehicle Code section 10851 should be found to be part of Proposition 47 even though it is not listed in the Proposition, and that it would be illogical for the electorate to punish petty theft of a \$950 vehicle as a misdemeanor but punish the unlawful taking or driving of a \$950 vehicle as a wobbler. The appellate court found the text of Penal Code section 1170.18 did not include Vehicle Code section 10851. It concluded that the plain language of Penal Code section 1170.18 included only a few provisions from a multitude of overlapping crimes. (*Johnston*, at pp. 257–258.) The defendant additionally argued that if Vehicle Code section 10851 was not included, the “dichotomy in punishment” results in a violation of equal protection principles. The court rejected the claim finding, “[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one statute and not the other, violates equal protection principles.” [Citation.] Specifically, the disparity between the former punishment for ‘grand theft auto’ and unlawful taking or driving is not a basis for finding a violation. [Citation.] Even if we assume the two categories of crimes are situated similarly, there is a rational basis for the distinction in treatment: The electorate was not obligated to extend relief under the initiative to *all* similar conduct. It could instead move in an incremental way, gauging the effects of this sea change in penal law.

Particularly given the insignificant numbers of vehicle thefts at issue in light of the present vehicle prices, the electorate could conclude this would not work an injustice. Finally, the electorate could expect a prosecutor to exercise discretion to charge an unlawful taking or driving of a \$950 vehicle as a misdemeanor.” (*Id.* at pp. 258–259.)

■ In *People v. Acosta* (2015) 242 Cal.App.4th 521 [195 Cal.Rptr.3d 121], the court rejected that the defendant’s car burglary conviction should be subject to reduction to a misdemeanor under Proposition 47. The defendant argued that in finding him ineligible, his equal protection rights were violated because a defendant convicted of grand theft of an automobile would be eligible for reduction of his offense under section 490.2. (*Acosta*, at p. 527.) The appellate court first found, “‘At bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses.’” (*Ibid.*) It concluded, “We have no difficulty concluding that the electorate could rationally extend misdemeanor punishment to some nonviolent offenses but not to others, as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system. ‘Nothing compels the state “to choose between attacking every aspect of a problem or not attacking the problem at all.”’ [Citation.] Far from having “to solve all related ills at once” [citation], the Legislature has “broad discretion” to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination.’” (*Id.* at pp. 527–528.)

While the California Supreme Court will ultimately decide the issue, it is reasonable to conclude here that there is no equal protection violation. After the passage of Proposition 47, while it is true a defendant convicted of receiving a stolen vehicle under section 496d cannot obtain relief after Proposition 47, while the same person prosecuted under section 496, subdivision (a) can obtain relief, such disparity does not constitute an equal protection violation. The electorate could consider that only an insignificant number of persons would be prosecuted under section 496d for a vehicle valued under \$950. Most would be prosecuted under section 496, subdivision (a) if the “interests of justice” warranted conviction under that section. Moreover, the electorate could reasonably choose to include section 496, subdivision (a) violations but exclude, for now, violations of section 496d. Based on the foregoing, defendant has failed to show that the exclusion of section 496d from Proposition 47 violated his equal protection rights.⁴

⁴ Defendant also contends in his opening brief that if this court found that section 496d was included in Proposition 47, remand for an evidentiary hearing on the value of the stolen motorcycle involved is required and that the People have the burden of proving the value of the motorcycle was over \$950. However, we have concluded that defendant’s section 496d conviction is not eligible for reclassification and resentencing under section 1170.18 in this case even if the actual value of the stolen motor vehicle was \$950 or less.

DISPOSITION

The trial court's order denying defendant's petition to recall his sentence is affirmed.

Hollenhorst, Acting P. J., and Codrington, J., concurred.

A petition for a rehearing was denied October 4, 2016, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was granted November 22, 2016, S237679.

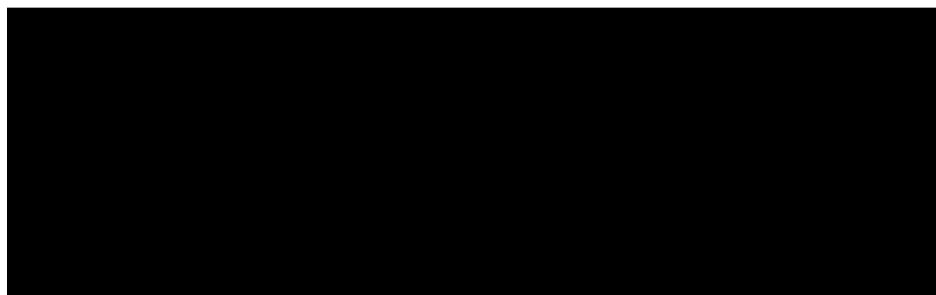
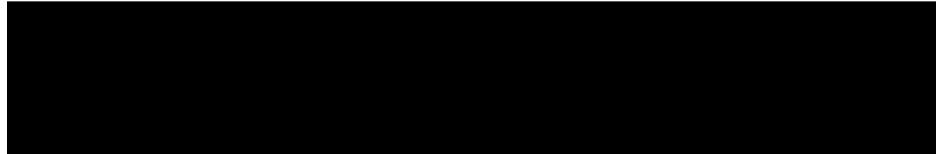
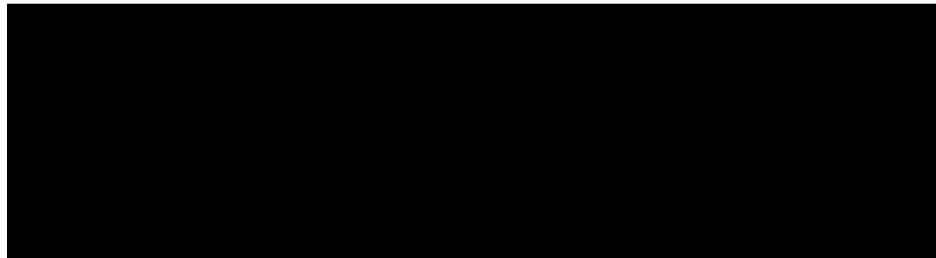
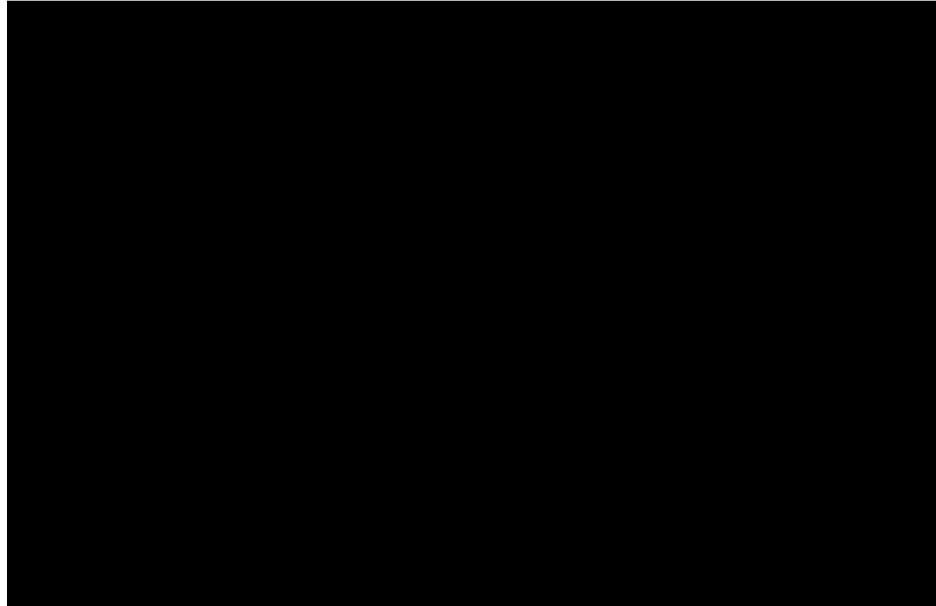
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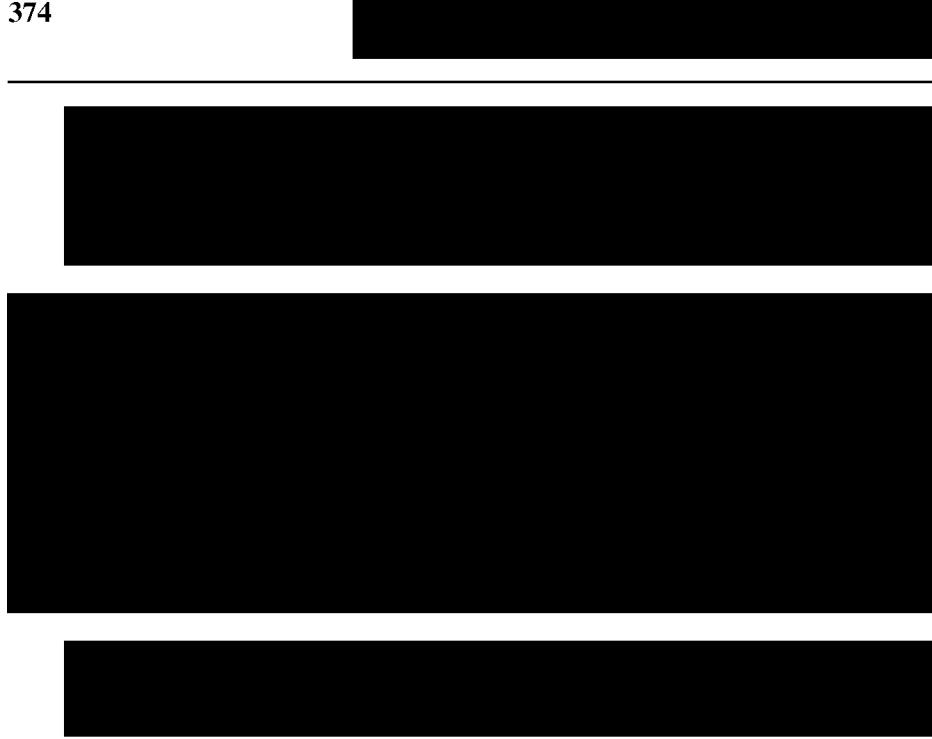
THE PEOPLE ex rel. ALLSTATE INSURANCE COMPANY et al.,
Plaintiffs and Respondents, v.
DANIEL H. DAHAN et al., Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Lerner & McDonald and Kenneth E. McDonald for Defendants and Appellants.

Knox Ricksen, Thomas E. Fraysse, Reid M. Miller and Ryan G. Jacobson for Plaintiffs and Respondents.

OPINION

ALDRICH, J.—

INTRODUCTION

A private party who brings a qui tam¹ action for insurance fraud under Insurance Code section 1871.7,² where the district attorney and the Insurance Commissioner decline to intervene, is entitled to a portion of the proceeds of

¹ The term “qui tam” is short for the expression “‘qui tam pro domino rege quam pro se ipso in hac parte sequitur,’ ” which in Latin means, “ ‘who pursues this action on our Lord the King’s behalf *as well as his own*’ [Citations.]” (*People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 538 [132 Cal.Rptr.2d 165], italics added (*Weitzman*)).

² All further statutory references are to the Insurance Code, unless otherwise noted.

the action plus fees and costs. (*Id.*, subd. (g)(2)(A).) In this case we are confronted with the novel question whether the judgment debtor defendants in such an action have standing to challenge the trial court's postjudgment order allocating the judgment amount between the prevailing plaintiffs, i.e., the private party and the state. We hold that judgment debtor defendants in qui tam insurance fraud actions are not aggrieved by such allocation orders under section 1871.7, subdivision (g)(2)(A), with the result that they do not have standing to appeal. Accordingly, we dismiss their appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Allstate Insurance Company et al. (Allstate)³ as private-party plaintiff or "relator,"⁴ brought a qui tam action on behalf of itself and the State of California (together plaintiffs), against defendants Daniel H. Dahan and his affiliated corporation, Progressive Diagnostic Imaging, Inc. (together defendants), pursuant to the Insurance Frauds Prevention Act (§ 1871.7; IFPA). Neither the district attorney nor the Insurance Commissioner opted to take over the lawsuit. The trial court entered judgment against defendants, finding that plaintiffs had proven 487 claims for violation of Penal Code section 550 by defendants, and awarding a total of \$7,010,668.40, comprised of \$5,788,516.78 in civil penalties and assessments, and \$1,222,151.62 in attorney fees, costs, and expenses of investigation. (The qui tam judgment.)

Following entry of the qui tam judgment, Allstate began efforts to collect it. During its investigation, Allstate learned of a series of real estate transactions conducted by defendants designed to transfer away their assets. Allstate, on behalf of the state, filed an action to set aside the fraudulent transfers of real and personal property. (*People v. Dahan* (Super. Ct. Los Angeles County, No. BC527960).)

Defendants demurred to the operative complaint on the ground that Allstate lacked standing to proceed with the fraudulent transfer suit, in part because the judgment in the qui tam action was never allocated between Allstate and the People pursuant to section 1871.7, subdivision (g)(2)(A), with the result that Allstate had no stake in the qui tam judgment or authority to pursue collection of that judgment from defendants. Defendants argued that section

³ The private party plaintiffs are Allstate Insurance Company, Allstate Indemnity Company, Allstate Property and Casualty Insurance Company, Deerbrook Insurance Company, Allstate County Mutual Insurance Company, and Allstate Fire and Casualty Insurance Company.

⁴ "A 'relator' has been described thus: 'The real party in interest in whose name a state or an attorney general brings a lawsuit. . . . A person who furnishes information on which a civil or criminal case is based; an informer.' " (*Weitzman, supra*, 107 Cal.App.4th at p. 538, quoting from Black's Law Dict. (7th ed. 1999) p. 1292, col. 1 & *In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 925 [88 Cal.Rptr. 303].)

1871.7, subdivision (g)(2)(A) requires that the court determine the amount of the qui tam judgment the relator may collect, and the relator may only enforce the judgment up to that allocated amount, because the remainder of the proceeds belongs to the state.

Allstate obtained a stay of the fraudulent conveyance action and returned to the qui tam court where it filed a motion for an order allocating the qui tam judgment proceeds. The motion was based on a stipulation entered into between the People and Allstate allocating to Allstate 50 percent of the civil penalties and assessments (\$2,894,258.39), plus the reasonable attorney fees and costs the court had awarded (\$1,222,151.62), for a total of \$4,116,410.01. (§ 1871.7, subd. (g)(2)(A).) The People agreed to receive the remaining 50 percent of the civil penalties and assessments.

Defendants opposed the allocation motion. They argued, *inter alia*, that the trial court lacked jurisdiction to enter the order because the qui tam judgment had long since become final depriving the court of power to “‘materially vary[]’” it. Allstate responded that the allocation order did not “‘materially vary the judgment,’” which remained intact. Rather, Allstate argued that the allocation order simply apportioned the judgment proceeds between judgment creditors and thus had no impact on either the rights of the People and Allstate as plaintiffs and judgment creditors on the one hand, or the obligations of defendants as judgment debtors, on the other hand. Regardless of the outcome of the allocation motion, Allstate argued, defendants remain obligated to pay the \$7,010,668.40 judgment.

The trial court in the instant qui tam action granted Allstate’s allocation motion and entered the stipulation as the judgment. Defendants filed their timely appeal.

We requested supplemental briefing from the parties (Gov. Code, § 68081) to address whether defendants were aggrieved by the allocation order such that they would have standing to appeal it.

DISCUSSION

The right to appeal is statutory. (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 67 [153 Cal.Rptr.3d 657].) Code of Civil Procedure section 902 provides that “[a]ny party *aggrieved* may appeal” from a judgment. (Italics added.) “‘One is considered ‘aggrieved’ whose rights or interests are injuriously affected by the judgment.’ [Citation.]’” (*Conservatorship of Gregory D.*, at p. 67.) The appellant’s “interest ‘must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment.’” [Citation.]” (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730,

737 [97 Cal.Rptr. 385, 488 P.2d 953].) Conversely, “‘A party who is not aggrieved by an order or judgment has no standing to attack it on appeal.’ [Citation.]’ [Citation.]” (*Conservatorship of Gregory D.*, at p. 67.) “Thus, notwithstanding an appealable judgment or order, ‘[a]n appeal may be taken only by a party who has standing to appeal. [Citation.] This rule is jurisdictional. [Citation.]’ [Citation.] It cannot be waived. [Citation.]” (*Ibid.*)

1. *The qui tam procedure*

■ Anyone engaging in insurance fraud in violation of Penal Code sections 549, 550, or 551 is subject to penalties and assessments. (§ 1871.7, subd. (b).) Section 1871.7 provides for civil penalties of not less than \$5,000 to \$10,000 for each fraudulent claim presented to an insurance company, plus assessments of not more than three times the amount of each claim for compensation, and equitable relief. (*Id.*, subd. (b).)

Section 1871.7 authorizes “any interested persons, including an insurer” to bring a qui tam civil action “*for the person and* for the State of California” to recover penalties and equitable relief for fraudulent insurance claims. (*Id.*, subds. (b) & (e)(1), italics added.) Procedurally, the interested person or relator files a complaint and serves it on the district attorney and the Insurance Commissioner. (*Id.*, subd. (e)(2).) The complaint is sealed in camera for at least 60 days, during which time the district attorney and the Insurance Commissioner may elect to intervene (*ibid.*) and conduct the action themselves.

When the district attorney intervenes in the qui tam insurance fraud action, subdivision (g)(1) of section 1871.7 entitles the private party relator to a “bounty” of between 30 and 40 percent “of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.” (*Ibid.*; see also *Weitzman, supra*, 107 Cal.App.4th at p. 547.)

When the state declines to intervene, as in this case, the relator tries the action and is entitled by subdivision (g)(2)(A) of section 1871.7 to a “bounty” of between 40 and 50 percent of the proceeds of the action “for collecting the civil penalty and damages” (*ibid.*), along with “an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney’s fees and costs” which fees and costs are imposed against the defendant. (*Ibid.*)⁵

⁵ Section 1871.7, subdivision (g)(2)(A) reads: “If the district attorney or commissioner does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable *for collecting the civil penalty and damages*. Except as provided in subparagraph (B), the amount shall not be less

2. Defendants are not aggrieved by the order they seek to appeal.

Defendants acknowledge that “this Appeal has no effect on that [qui tam] Judgment” and does not alter defendants’ obligation to pay the \$7 million. Notwithstanding their apparent concession that they are not aggrieved by the order they appeal, defendants construct a theory under which they have been injured by the allocation order: Defendants argue that the allocation order “changed the legal rights of Allstate to enable Allstate to arguably be able to legally collect on the judgment” because the allocation order “arguably legitimizes” the insurer’s collection efforts by conferring standing on Allstate. (Italics added.) Citing no authority, defendants argue that Allstate could only enforce the judgment up to the amount of the allocation order, and so until the court allocated the judgment between the People and Allstate, the latter had no right to *collect* any proceeds. In essence, defendants assume that an allocation is a prerequisite or condition precedent to enforcement of a qui tam judgment by an insurer-relator when the state has not intervened.

■ However, based on a plain reading of section 1871.7, subdivision (g)(2)(A), the bounty in cases in which the People do not intervene *is* for trying and collecting the judgment. (3) When the words of a statute are clear and unambiguous, there is no need for statutory construction or resort to other indicia of legislative intent, such as legislative history. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].) Section 1871.7, subdivision (g)(2)(A) states, “If the district attorney or commissioner does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable *for collecting the civil penalty and damages*. . . . [T]he amount shall not be less than 40 percent and not more than 50 percent of the proceeds of the action . . . and shall be paid out of the proceeds.” (Italics added.)⁶ To “collect” is “[t]o receive payment. [¶] To collect a debt or claim is to obtain payment” (Black’s Law Dict.

than 40 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of the proceeds. That person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney’s fees and costs. All of those attorney’s fees and costs shall be imposed against the defendant. The parties shall serve the commissioner and the local district attorney with complete copies of any and all settlement agreements, and terms and conditions, for actions brought under this article at least 10 days prior to filing any motion for allocation with the court under this paragraph. The court may allocate the funds pursuant to the settlement agreement if, after the court’s ruling on objection by the commissioner or the local district attorney, if any, the court finds it is in the interests of justice to follow the settlement agreement.” (Italics added.)

⁶ Also, in cases where the People opted not to intervene, subdivision (g)(2)(A) of section 1871.7 awards the direct-victim relator reasonable expenses, attorney fees, and costs “imposed against the defendant,” *in addition to the bounty*. The judgment here already awarded Allstate reasonable expenses, attorney fees and costs incurred by Allstate who has the right to collect that amount also.

(6th ed. 1990) p. 263, col. 1.) Thus, by employing the word “collecting” in section 1871.7, subdivision (g)(2)(A), the Legislature intended that, when the state does not intervene, the insurer-relator is the plaintiff who levies on the judgment.

■ Our conclusion that the bounty for the prosecuting relator is for trying and collecting the judgment is bolstered by a comparison of subdivisions (g)(2)(A) with (g)(1), in section 1871.7. (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 107 [54 Cal.Rptr.3d 28] (conc. opn. of Croskey, J.) [“A court must harmonize a statute with other laws so as to give effect to all and avoid anomalies, if possible”].) Whereas the section 1871.7, subdivision (g)(2)(A) bounty is for “*collecting* the civil penalty and damages,” the recovery awarded under subdivision (g)(1)(A)(i)—when the district attorney takes over the case—is a percentage “*of the proceeds* of the action or settlement of the claim.” (Italics added.) Under the latter subdivision, the intervening People, not the relator, would collect the judgment. Thus, subdivision (g)(2)(A), relevant here because the state did *not* adopt the action, recognizes that the relator, in addition to trying the insurance fraud action, is the party who collects or levies on the ensuing judgment. “The remaining proceeds *revert* to the State” (58 Cal.Jur.3d (2012) State of California, § 126, p. 330, italics added.) That is, after collecting on the judgment, Allstate would pay the excess over its allocation to the People. “[T]he money generated by the cause of action that the [private party] plaintiff recovers [in a qui tam action] . . . is property owned by the plaintiff.” (11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, § 111, p. 673, discussing *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399 [60 Cal.Rptr.2d 569] [community property interests in a qui tam action].) The reading of section 1871.7, subdivision (g)(2)(A) advocated by defendants would result in the incongruous situation in which the successful insurer-relator would be unable to levy on the judgment it has won through its own efforts until the bounty is allocated between it and the People who had abandoned prosecution of the action.

The right to levy on the \$7 million qui tam judgment was Allstate’s for the additional reason that the insurer was the direct victim of defendants’ insurance fraud. Unlike the federal False Claims Act (31 U.S.C. § 3730(d)) where the relators are people with knowledge of the fraud but not victims of that wrong, under California’s IFPA, the direct victims of the fraud are the relator-insurers and their insureds. (*Weitzman, supra*, 107 Cal.App.4th at pp. 561–562.) Allstate, as the direct victim who prosecuted the action and prevailed without the People’s participation, necessarily had the right to collect the civil penalty and damages *irrespective of an allocation order*. To hold otherwise would be absurd given the California qui tam IFPA action is brought, not merely on behalf of the People, but “*for the person and for the State of California*” (§ 1871.7, subd. (e)(1), italics added), and where the qui

tam judgment here, drafted by defendants, was written in favor of *all* plaintiffs, not just the People. Therefore, an allocation order is not a prerequisite to Allstate's right to enforce the judgment; it neither "changed" nor "legitimized" Allstate's legal right to *collect* the proceeds of the action from defendants, a right Allstate always had as relator.

Defendants argue, citing *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487 [148 Cal.Rptr.3d 361] (*Strathmann*), that Allstate admits that the relator is not entitled to any proceeds absent a court-ordered allocation. Regardless of what Allstate admits, addressing the legal question de novo (*American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1052 [46 Cal.Rptr.3d 541] [we exercise our independent interpretation of the Insurance Code absent disputed facts]), *Strathmann* does not stand for the proposition that an allocation order is a prerequisite to collecting the judgment. *Strathmann* stated, "[T]he 'relator[]' stands in the shoes of the People of the State of California, who are deemed to be the real party in interest. [Citations.] The relator in a qui tam action under section 1871.7 does not personally recover damages but, if successful, receives a substantial percentage of the recovery as a bounty." (*Strathmann*, at p. 500.) For this proposition, *Strathmann* cited generally to subdivision (g) of section 1871.7, without distinguishing between the wording in subdivision (g)(1) (state-prosecuted actions) and (2)(A) (insurer-prosecuted actions).⁷

■ As the allocation order is not a prerequisite to Allstate's ability to levy on the qui tam judgment under section 1871.7, subdivision (g)(2)(A), and given defendants' concession that the appeal has no effect on, and does not alter their obligation to pay the \$7 million qui tam judgment, defendants are not aggrieved by the allocation order and have no standing to appeal from it. (Cf. *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec.* (6th Cir. 1994) 41 F.3d 1032, 1046 [under federal False Claims Act "the Relators'-Share Litigation did not directly involve the *qui tam* defendants . . . [who] had no legal standing or right to participate in the proceedings" (italics added)]; cf. *Kim v. Yi* (2006) 139 Cal.App.4th 543, 549–551 [42 Cal.Rptr.3d 841] [proceeding for apportionment of damages between judgment creditors is a special proceeding that did not involve any defendants].)⁸ In the absence of

⁷ We are unpersuaded by the remaining cases cited by defendants in their letter brief.

⁸ Allstate argues that the False Claims Act (Gov. Code, § 12650 et seq.) was patterned after the federal False Claims Act (31 U.S.C. § 3729 et seq.) and encourages us to look to federal cases applying the qui tam provisions of the federal statute. While the California IFPA in section 1871.7 differs from the federal False Claims Act in "several significant respects" (*Weitzman, supra*, 107 Cal.App.4th at p. 561), the two acts are identical with respect to the bounty when the government declines to adopt the action. (Compare § 1871.7, subd. (g)(2)(A) ["the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages"] with 31 U.S.C. § 3730(d)(2) ["the

standing by defendants as appellants, this court has no jurisdiction to hear the appeal. (*Conservatorship of Gregory D.*, *supra*, 214 Cal.App.4th at p. 69.)

DISPOSITION

The appeal is dismissed. Allstate is to recover its costs of this proceeding.

Edmon, P. J., and Lavin, J., concurred.

person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages”].)

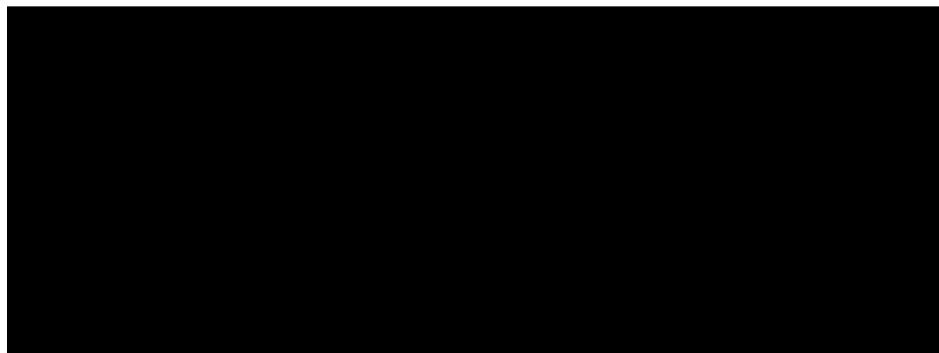
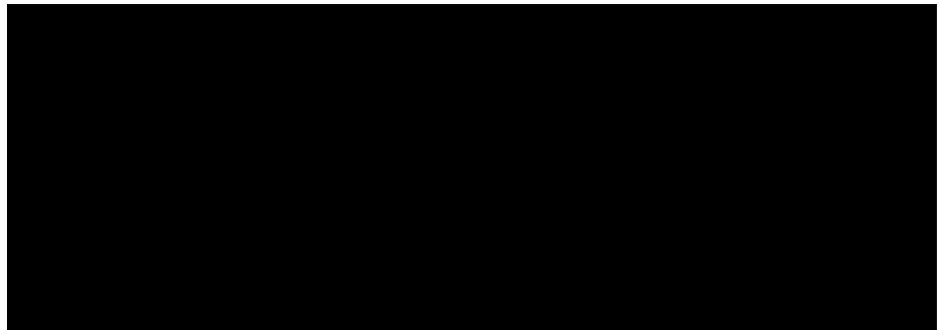
[No. A143545. First Dist., Div. Two. Sept. 16, 2016.]

LEOPOLDO JORGE, JR., Plaintiff and Respondent, v.
CULINARY INSTITUTE OF AMERICA, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Gordon & Rees, Charles S. Custer, Ryan T. Birmingham; Hayes, Scott, Bonino, Ellingson & McLay, Mark G. Bonino and Gabrielle A. Hollingsworth for Defendant and Appellant.

Law Office of Edie Sussman, Edie Sussman; The Veen Firm, Craig M. Peters, Katherine A. Higgins, David L. Winnett; Wester Law Firm and Barry Wester for Plaintiff and Respondent.

OPINION

RICHMAN, Acting P. J.—Respondent Leopoldo Jorge, Jr. (Jorge), sued Almir Da Fonseca (Da Fonseca) and appellant Culinary Institute of America (Culinary Institute or Institute) for injuries sustained when he was struck by a car driven by Da Fonseca, a chef instructor employed by the Culinary Institute. Despite that Da Fonseca had finished his shift at the Culinary Institute and was driving home in his own car at the time of the accident, a jury found the Institute liable for Jorge's injuries on a theory of respondeat superior. The Culinary Institute moved for judgment notwithstanding the verdict on the ground there was no evidence supporting the jury's finding that Da Fonseca was acting in the scope of his employment at the time of the accident. More specifically, it argued that there was no evidence supporting application of the "required vehicle" exception to the "going and coming" rule and so it could not be vicariously liable for Da Fonseca's negligent conduct while he was commuting home from work. The trial court denied the motion.

The Culinary Institute appeals, again arguing that it cannot be liable to Jorge for injuries caused by Da Fonseca's negligence because there was no evidence that at the time of the accident Da Fonseca was acting within the scope of his employment. We agree, and we reverse.

BACKGROUND

The Accident and Jorge's Claims

On February 10, 2010, Da Fonseca drove his car to work to start his shift at the Culinary Institute's campus in St. Helena. At the end of his workday, he left in his car, heading towards his home in Sebastopol. As he was driving down Calistoga Road, he struck two pedestrians, 14-year-old Jorge and his then girlfriend.

Jorge, through his guardian ad litem, filed a complaint for negligence against Da Fonseca. A first amended complaint added a claim against the Culinary Institute based on a respondeat superior theory.¹

The Motion for Summary Judgment

On July 20, 2012, the Culinary Institute moved for summary judgment on the ground that it could not be vicariously liable under the respondeat superior doctrine for damages caused by Da Fonseca's negligent conduct, because he was not acting in the scope of his employment at the time of the accident. The trial court denied the motion in an order that stated in its entirety:

“Defendant Culinary Institute of America’s motion for summary judgment is hereby denied. However thin the evidence, there remains a triable issue of fact as to the issue of whether Defendant Da Fonseca was in the course and scope of his duties for Defendant Culinary Institute of America when the accident occurred.

“The *respondeat superior* doctrine is to be given a broad application as the Supreme Court explained in *Farmer’s Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992 [47 Cal.Rptr.2d 478, 906 P.2d 440]. ‘For example, the fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer.’ Thus, acts necessary to the comfort, convenience, health and

¹ The first amended complaint also added a premises liability claim against the City of Santa Rosa, with the premises liability allegations amended in a second amended complaint. Jorge later dismissed the City of Santa Rosa.

welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment. Moreover, ‘where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of the injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.’ *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 434 [98 Cal.Rptr.3d 837].

“Whether there is an exception to the ‘going and coming’ rule remains, as do consideration of the other salient parameters of *respondeat superior* as they relate to this case, the province of factual determination by a jury. However[] stretched and tortured the logic of the ‘dirty uniforms’ and chef’s knives may be, these factors cannot be ruled out as a matter of law.”²

Trial

Prior to the commencement of trial, the court ordered the issues of liability and damages bifurcated, with the issues of negligence and vicarious liability tried first.

The first phase of trial began on July 11, 2014. At the conclusion of closing arguments, the Culinary Institute moved for a directed verdict on the ground Jorge failed to present sufficient evidence to support his *respondeat superior* theory. The court denied the motion, ruling that the application of the required vehicle exception remained a question of fact for the jury.

During jury instructions, the jury was instructed on the going and coming rule and the required vehicle exception. Specifically, the court instructed: “In general, an employee is not acting within the scope of employment while traveling to and from the workplace, but if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer’s business, then the drive to and from work is within the scope of employment. The employer’s requirement may be either express or implied.

“The drive to and from work may also be within the scope of employment if the use of the employee’s vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if, one, the employee

² Jorge also moved for summary adjudication, arguing that as a matter of law Da Fonseca was acting in the scope of his employment at the time of the accident because the going and coming rule did not apply where he used his car for consulting work and to commute to the St. Helena campus. The court denied the motion, concluding that “there remain questions of material facts that should properly go before a jury.” Jorge filed a petition for writ of mandate, which we denied. (*Jorge v. Superior Court* (July 31, 2014, A142182), petn. den..)

has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly. The employer's agreement may be either expressed or implied.”³

The jury was also instructed on the transport of an employee’s tools, as follows: “The fact that an employee took his or her tools home every night, does not make the use of his or her car a condition of employment or constitute such a special advantage or service to his or her employer as to extend the employment relation off the job site.”

On August 1, the jury reached a verdict in the liability phase of the trial, finding that Da Fonseca was negligent and that he was acting within the scope of his employment by the Culinary Institute when he injured Jorge. The jury found that Jorge was not negligent.

After the verdict on liability, Jorge settled his action against Da Fonseca for \$30,000, resulting in Da Fonseca’s dismissal. The damage phase thus proceeded only as to the Culinary Institute, and on August 19, the jury awarded Jorge \$885,083.

On September 4, the court entered judgment to that effect, and notice of entry of judgment was filed the following day.

The Motion for Judgment Notwithstanding the Verdict

On September 19, the Culinary Institute moved for judgment notwithstanding the verdict, arguing that the evidence was insufficient to support the jury’s finding that Da Fonseca was acting in the scope of his employment at the time of the accident. The court denied the motion.

The Culinary Institute appeals from the judgment and the denial of its motion for judgment notwithstanding the verdict.

EVIDENCE AT TRIAL

Da Fonseca and the Culinary Institute

The Culinary Institute is a nonprofit culinary educational institute with its main campus in New York City and branches in St. Helena (known as Greystone) and other locations. It offers a two-year associate degree program

³ This instruction was based on CACI No. 3725, which was revised effective June 2014, the month before trial commenced.

and provides educational opportunities in the culinary arts to students, professional chefs, and other clients, including businesses, schools, universities, public and private companies, wineries, and more.

Da Fonseca is a native of Brazil. His culinary experience includes work as a chef instructor at the Cordon Bleu and as an executive chef at some of the top restaurants in San Francisco. He successfully competed in food competitions for many years and also travelled to Brazil multiple times to research manioc, a starch made by leaching and drying the root of the cassava plant.

Da Fonseca was hired as a chef instructor by the Culinary Institute in 2007. During the hiring process, he interviewed with Charles Henning, managing director of the Institute, and Adam Busby, supervisor of the Institute's chef instructors (including Da Fonseca).

The Day of the Accident

On the morning of February 10, 2010, Da Fonseca drove his car to the St. Helena campus and parked in the school parking lot. He taught classes that day, working from approximately 6:15 a.m. to 5:30 p.m.

When Da Fonseca left the St. Helena campus that evening, he drove his car towards his home in Sebastopol, with one or two dirty chef's jackets and possibly a set of chef's knives in the car with him. As he was driving down Calistoga Road, he struck two pedestrians, one of whom was 14-year-old Jorge.

Da Fonseca's Teaching Duties in the Associate Degree Program

Da Fonseca's primary duty as a chef instructor at the Institute was to teach courses in the associate degree program, which chef instructors taught in three-week blocks. The classes were taught in two shifts: the morning shift, for which Da Fonseca would arrive between 6:00 a.m. and 6:30 a.m. and finish around 6:30 p.m., and the afternoon shift, for which he would arrive around 11:00 a.m. and finish around 9:15 p.m. Da Fonseca would arrive before class started to prepare his lessons, and would stay after class ended to meet with students and complete his work. He did not take work home with him. As Da Fonseca was a professional instructor, the Culinary Institute did not dictate to him when he was supposed to arrive, what he was supposed to do, when he was supposed to leave, or where he went. Rather, he had the freedom in his professional capacity to make those determinations. Da Fonseca accommodated his employer with regard to his work schedule, and his schedule sometimes changed based on the needs of the students and the school.

Da Fonseca used his personal vehicle to commute to the St. Helena campus. However, he could have carpooled to work if another chef instructor lived near him, his wife could have driven him to work, or he could have taken public transportation. Busby and Henning did not know whether Da Fonseca brought his personal vehicle to work at the St. Helena campus as they had no reason to know. Da Fonseca was paid hourly, but his pay did not include the commute time between the St. Helena campus and his home in Sebastopol.

Da Fonseca was never asked to have his car available during the day and did not make any accommodations to have his car available for the Culinary Institute. He did not need to have his personal vehicle on campus, as chef instructors were not expected to drive their personal vehicles. The Culinary Institute did not have any policies pertaining to the use of personal vehicles, and no one ever told Da Fonseca that a car was required for any of his job duties.

If an instructor wanted to arrange a field trip with students, the Culinary Institute had vans with drivers available to chef instructors. Drivers of the vans required a special license, and the chef instructors were not authorized to drive the vans.

Da Fonseca's Additional Duties at the Culinary Institute

In addition to its regular classes, the Culinary Institute offered many specialized classes that were also taught by the chef instructors. For example, it offered catalog classes, which were “basically continuing education [for] professional chefs.” Such a class could be in the morning or afternoon, and during the week or on the weekend. Sometimes the catalog classes were about a very specific subject in which Da Fonseca had expertise, and the Culinary Institute would have him teach that class.

The Culinary Institute also held customer classes on Saturday for food enthusiasts who wanted to learn “from the best.” According to Henning, the chefs liked to teach those classes because they could make extra money—and the classes were fun.

In addition to teaching classes, chef instructors could also help the Culinary Institute host a variety of on- and off-campus events, conferences, and retreats for students, chefs, the food industry, and the public. Some of the events were held on weekends, allowing chef instructors the option of picking up extra shifts. Although participation in off-campus events was voluntary, chef instructors usually chose to work at these special events if they were not also scheduled to be teaching a course.

For example, the Culinary Institute hosts an annual Latin Flavors conference in San Antonio, and every year Da Fonseca volunteered to attend. It also hosts a three-day retreat for physicians and an annual three-day Worlds of Flavor event for professional chefs and media from around the world. Other Institute activities include the annual retreat for the North American Association of Food Equipment Manufacturers and an annual competition for up-and-coming chefs sponsored by San Pellegrino.

Besides its curriculum, conferences, competitions, and retreats, the Culinary Institute has a consulting arm. When a business, such as a food producer or retailer, asks the Culinary Institute for consulting services, like creating a recipe, the chef instructors provide the services. Henning testified that the Culinary Institute accepted more consulting work if it had the available people and less consulting work if it did not have the resources. While the Institute is a not-for-profit entity, it uses the consulting money it earns to cover its costs.

Consulting, like attending the conferences, was not a required employment duty, but was available to instructors based on expertise and availability. Busby testified that the chef instructors who were available to travel off campus did the consulting work. He had 17 chef instructors to draw from, and Da Fonseca liked to travel. According to Henning, the Culinary Institute assigned the consulting work to its chef instructors based on their abilities, knowledge, and expertise.

Consulting clients met with chef instructors at the St. Helena campus or at the client's business. The particular client's facility operation hours determined the hours the chef instructor worked.

Between 2007 and the date of the accident, Da Fonseca did consulting projects on behalf of the Culinary Institute and presented at conferences, retreats, summits, and international culinary conferences, both on and off campus. His consulting work included the following clients: Mezzetta, Blue Diamond Almonds, Young Corporation, University of San Diego, Olive Garden, Harris Ranch, Stanford University, Rich's Food Products, and the USA Dry Pea and Lentil Council. Da Fonseca's time sheets confirmed that from January 2009 to the date of the incident in February 2010, he did consulting work for "Rutgers," "Mezzetta," "Canola info/trade show," "Sonic" and "Sonic & Coke," "BSH," "Diamond Foods," "USD" (University of San Diego), "USA D.P.L. & C.," and "PJB Demo."

In the month of the accident alone (February 2010), Da Fonseca worked two hours consulting with Mezzetta. He also worked eight hours on Saturday, February 6, at an American Culinary Federation convention doing a demonstration, and he worked nine hours on Sunday, February 7, doing hands-on

training for the North American Association of Food Equipment Manufacturers. On his time sheet, Da Fonseca coded this weekend work to the Culinary Institute's consulting department.

In the month prior to the accident, in addition to traveling and teaching, Da Fonseca spent 14 hours doing education and office class work, and two hours doing conference work for the Culinary Institute's and Harvard School of Public Health's World of Healthy Flavors (WOHF) invitational leadership retreat. He worked eight hours preparing for the retreat, and worked 24 regular-time hours, nine and one-quarter overtime hours, and one-and-a-half double-time hours for WOHF. He also worked eight regular-time hours, as well as an unclear number of overtime hours, on Saturday, January 23, for the Culinary Institute's Produce First retreat.

In addition to the above responsibilities, Da Fonseca did research for the Culinary Institute. Henning testified that the Institute approved Da Fonseca's project to conduct research in Brazil for several weeks on manioc, a food staple for Africa and South America. The Institute paid his salary while he was in Brazil, and subsequently promoted his research findings because the culinary and food industry was interested in knowing what the Institute had potentially discovered or what it could "bring to the table."

Da Fonseca's Travel on Behalf of the Culinary Institute

Henning testified that some of the chef instructor's work activities might require travel. Asked whether there was a limit as to how many hours within a certain time frame a chef instructor could travel, he testified the Culinary Institute did not have a maximum limit, or a minimum requirement. It was a question of availability: if the Institute had the "manpower" allowing a chef instructor to go on a consulting assignment for three or four weeks, and scheduling and staffing permitted, the instructor was permitted to go. The Culinary Institute paid chef instructors for the time they were on-site at a consulting event, which sometimes resulted in overtime.

Between 2007 and 2010, Da Fonseca chose to travel off campus on behalf of the Culinary Institute. While travel was optional for chef instructors, he enjoyed traveling and volunteered for consulting jobs and special events when he was available. He also volunteered to work at and attend conferences, both on and off campus.

In the less than three years prior to the February 10, 2010 accident, Da Fonseca spent over 150 days⁴ working off campus, with each successive year involving more travel. The off-campus locations to which Da Fonseca traveled included two different countries, seven different states, and six different cities (and an air force base) in California. For example, in the weeks preceding the accident, Da Fonseca spent a day travelling to Rutgers University in New Jersey, where he worked for five days doing consulting work. Next, he spent a day travelling to the Culinary Institute's Hyde Park, New York campus, where he spent two days working on curriculum. He then spent one day travelling home.

Da Fonseca testified that he was sometimes paid for his travel time. If a trip involved a substantial amount of travel, he was compensated for the travel time; if it was one or two hours, he would not be.

In response to requests for admissions, Da Fonseca admitted he was entitled to reimbursement for his mileage when he drove to work locations away from the Greystone facility. He also admitted that the Culinary Institute paid him for his travel time when he travelled on behalf of the Culinary Institute anywhere other than the Greystone facility.

When Da Fonseca traveled off campus in his car, he was also reimbursed for his mileage and parking expenses, expenses that were ultimately paid for by the consulting client. To reimburse chef instructors for travel-related expenses, the Culinary Institute used a preprinted expense report. The form contained spaces for employees to specify whether their expenses were budgeted, the dates of their travel, the "Foreign Currency Conversion Rate (if applicable)," the purpose for the travel, whether an "Outside Organization" was reimbursing expenses, and, if applicable, the name of the organization. Da Fonseca submitted expense reimbursement forms for his mileage, and so long as he was conducting business, the Culinary Institute would reimburse him for his mileage. He could not recall how many expense reimbursements he had submitted to his employer, but admitted it could be "many."

Da Fonseca's Use of His Personal Vehicle

If a chef instructor was going to travel, Busby did not tell the instructor what mode of transportation to use. For local travel on consulting trips, the chef instructor could choose to rent a car, take public transportation, carpool, or take a personal vehicle. According to Busby, "It was up to the instructor how they got from point A to point B. It wasn't up to me to decide. It was up

⁴ Jorge's respondent's brief says 153 days; at oral argument his counsel represented it was 178 days.

to them.” For example, if Da Fonseca needed to travel to Stanford and decided to rent a car, the Culinary Institute would reimburse him for that expense.

Henning testified that a personal vehicle was not required for consulting jobs. He further testified that the Culinary Institute had no policies in place for its employees who used their personal cars for work. The Culinary Institute did not require proof of a valid driver’s license or of auto insurance, nor did it do a DMV background check (although it did do a full background check, so if a prospective employee had an arrest for driving under the influence, it would show up).

If a trip required a flight, the Culinary Institute would provide the flight information. But Busby and Henning did not control—or even know—how the instructor got to the airport. An instructor could take a shuttle or a taxi.

Da Fonseca testified that for shorter trips, he would drive himself to the airport. On longer trips, he usually took an airport shuttle or asked his wife to take him, as she did on many occasions. If he flew out of San Francisco, he would make his own way to the airport, either by driving his own car or taking an airport shuttle. When he went on a research trip to Brazil, for example, Da Fonseca took the Airporter from Santa Rosa to the airport. He testified that the Culinary Institute never asked or required him to drive his car to the airport when he traveled, explaining, “No. That’s—you know, we just need to get there. How we get there is our own responsibility.”

Da Fonseca never had a conversation with anyone at the Culinary Institute about using his personal car to participate in consulting work. Nobody told him how to get where he was going when he was doing a consulting job. Da Fonseca acknowledged that he used his car on “many occasions” to get to off-campus jobs, driving for example, to Travis Air Force Base, University of California at Davis, Coalinga, Fresno, and Palo Alto. He drove to the San Francisco International Airport when he was invited to speak at a three-day conference in Seattle, taught a four-day class to the chefs from the food operation of Ohio State University, went to Texas for a three- or four-day conference, and went to other Culinary Institute campuses.

Da Fonseca testified no employee retained as a driver for the Culinary Institute ever drove him to meet with the Institute’s clients. He sometimes rode in a Culinary Institute van when he took a field trip with his students, but the Institute did not authorize him to drive any of its vehicles. And when he was travelling, he did not use the Institute’s vans.

In response to requests for admissions, Da Fonseca admitted that the Culinary Institute had not authorized him to drive an institute-owned vehicle;

that he never drove an institute-owned vehicle; and that no employee retained as a driver for the Culinary Institute ever drove him to meet with any clients (excluding class field trips.)

Da Fonseca testified that he was never transported in the van to a consulting job. The court asked Da Fonseca if the Culinary Institute van would drive just one person to a conference or event. Da Fonseca was not sure, testifying, “I never took a [Culinary Institute] vehicle, but you know, other people have, so I am not sure.” By this, he meant that he never took an Institute van by himself, although he had travelled in it for field trips.

Busby did not recall an Institute-owned vehicle ever transporting Da Fonseca off site from the St. Helena campus. According to Busby, it would have been unreasonable for the Culinary Institute to use a 20-person van to transport Da Fonseca to a consulting job in Coalinga.

The Culinary Institute’s Promotion of Its Chef Instructors’ Experiences

The Culinary Institute promoted its chef instructors’ experience for consulting services, seminars, and conferences. Da Fonseca testified, for example, that the Culinary Institute incorporated his research in Brazil into its programs, including the Latin Flavors program. As he described it, his Brazil research project on manioc was going to help humanity because people with celiac disease could eat it. He had studied this root more than anyone else had, and it was important research. He testified the Culinary Institute’s “bio” for him said he travelled extensively in South America documenting indigenous ingredients and traditional culture, and was a frequent presenter at international culinary summits and conferences. And he admitted potential Culinary Institute clients might see his faculty “bio.”

When Da Fonseca taught at conferences, like the Latin Flavors conference in San Antonio, there would be a “bio” about him in the brochure so people would know about him and his experience. He acknowledged the Culinary Institute shared his information in order to promote its conferences, summits, and seminars. To the extent he became a better instructor, it provided benefit to the Institute because the better he was as an instructor, the better service he could provide to its students. As Henning described it, the “quality of the curriculum, the quality of education provided to our students depends on the quality of [our] faculty.”

Tools of the Trade: Chef’s Knives and Jackets

Like most chef instructors, Da Fonseca owned a personal set of knives, which he used in his teaching, at off-site Culinary Institute events, and for

personal use. The Culinary Institute also has sets of knives available on campus. Da Fonseca sometimes left his knives on campus, but often brought them home with him for safekeeping. He testified that he could not recall if his knives were in his car on the day of the accident. In response to a request for admission, however, Da Fonseca admitted that at the time of the accident, he was travelling with his chef's knives.

Henning testified the Culinary Institute did not "require" chefs to take their own knives when they travelled, but acknowledged that they did. He also testified the Institute did not provide knives to their chef instructors and expected them to use their own knives.

Chef instructors wear chef's jackets with the Culinary Institute logo when they work at, or on behalf of, the Culinary Institute. The Institute provided the instructors with jackets (Da Fonseca had 10 to 12 at the time of the accident) and paid for instructors to have their jackets laundered at Klass Cleaners in St. Helena. Instructors were free, however, to launder their jackets at a different dry cleaner or to launder them at home.⁵ Instructors were not required to use their own car to drop off their chef's jackets.

When Da Fonseca first started working at the Culinary Institute, his wife laundered his jackets for him. At the time of the accident, he was having them laundered at Klass Cleaners. He would leave his dirty jackets in his car at the end of each day and, after accumulating four or five jackets, would drop them off on his way to or from work, about once a week. At the time of the accident, he had one or two chef's jackets in his car.

To get to Klass Cleaners, Da Fonseca would leave the Culinary Institute, take a right, and drive into downtown St. Helena. To get home, he would leave Klass Cleaners, take a left, and go back past the Institute and through Calistoga to get to his home in Sebastopol. Klass Cleaners was in the opposite direction from the route he travelled to and from work. It was undisputed that Da Fonseca was not on his way to Klass Cleaners on the day of the accident.

Da Fonseca testified that he always carried his chef's knives and jackets with him when he travelled back and forth to the St. Helena campus and to other locations where he did consulting, seminars, conferences, or summits.

⁵ Da Fonseca testified that the Institute would reimburse chef instructors if they used a different cleaner, while Henning testified that it would not.

DISCUSSION

A. Standard of Review

“The trial court’s power to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. (Code Civ. Proc., § 629.) ‘A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.’ [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury’s verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.]’” (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138 [76 Cal.Rptr.3d 585]; accord, *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [104 Cal.Rptr.2d 602, 18 P.3d 29] [“As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury’s conclusion.”].) For evidence to be substantial, it must be of ponderable legal significance, reasonable, credible, and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d 191].) The “focus is on the quality, not the quantity, of the evidence.” (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) We resolve all evidentiary conflicts and indulge all reasonable inferences in support of the judgment. (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 308 [145 Cal.Rptr.3d 553, 282 P.3d 1250].)

B. Respondeat Superior: An Employer’s Liability for Torts of Its Employees

1. General Principles Governing Respondeat Superior

Under the theory of respondeat superior, an employer is vicariously liable, irrespective of fault, for the tortious conduct of its employees within the scope of their employment. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1154 [126 Cal.Rptr.3d 443, 253 P.3d 535]; *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565, 574 [124 Cal.Rptr.2d 330].) This doctrine is based on “‘a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer’s enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and

because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.’” (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959–960 [88 Cal.Rptr. 188, 471 P.2d 988] (*Hinman*), quoting Prosser, *Law of Torts* (3d ed. 1964) p. 471; accord, *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 304 [48 Cal.Rptr.2d 510, 907 P.2d 358] [policy goals of the doctrine are “preventing future injuries, assuring compensation to victims, and spreading the losses caused by an enterprise equitably”]; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440] [“central justification for respondeat superior” is that “losses fairly attributable to an enterprise—those which foreseeably result from the conduct of the enterprise—should be allocated to the enterprise as a cost of doing business”].)

2. *The Going and Coming Rule*

■ While an employer’s vicarious liability for the torts of its employees is well established, courts have recognized that an employee’s commute “to and from work is ordinarily considered outside the scope of employment so that the employer is not liable for [the employee’s] torts” committed during the employee’s commute. (*Hinman, supra*, 2 Cal.3d at p. 961; see *Anderson v. Pacific Gas & Electric Co.* (1993) 14 Cal.App.4th 254, 258 [17 Cal.Rptr.2d 534] (*Anderson*) [employee is not acting within the scope of employment when going to or coming from his or her place of work]; *Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114] (*Tryer*) [employer is generally not responsible for torts committed by an employee who is going to or coming from work].) This rule, commonly referred to as the “going and coming rule,” is grounded in the notion that “‘the employment relationship is “suspended” from the time the employee leaves until he returns [citation], or that in commuting he is not rendering service to his employer.’” (*Tryer, supra*, 9 Cal.App.4th at p. 1481, quoting *Hinman, supra*, 2 Cal.3d at p. 961; see *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 162 [49 Cal.Rptr.3d 153] [employee is not ordinarily rendering a service to the employer while commuting]; *Blackman v. Great American First Savings Bank* (1991) 233 Cal.App.3d 598, 602 [284 Cal.Rptr. 491] (*Blackman*) [“employment relationship is suspended from the time the employee leaves his place of work until he returns”].)

3. *The Required Vehicle Exception to the Going and Coming Rule*

There are several exceptions to the going and coming rule, however, that if applicable will result in an employer being liable for its employee’s tortious conduct that occurs during the commute. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 722 [159 Cal.Rptr. 835, 602 P.2d 755] (*Ducey*); see also *Santa*

Rosa Junior College v. Workers' Comp. Appeals Bd. (1985) 40 Cal.3d 345, 352 [220 Cal.Rptr. 94, 708 P.2d 673] [going and coming rule is “‘riddled with exceptions’”].) These exceptions typically arise “where the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.” (*Hinman, supra*, 2 Cal.3d at p. 962; see *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157 [104 Cal.Rptr. 456, 501 P.2d 1176] (*Hinojosa*); *Blackman, supra*, 233 Cal.App.3d at p. 602.) But this means not just any trivial benefit to the employer, but a benefit “sufficient enough to justify making the employer responsible for the risks inherent in the travel.” (*Blackman, supra*, at p. 604.)

The applicability of one such exception—the required vehicle exception—is at the heart of this case.

The required vehicle exception⁶ was first recognized in *Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814 [73 Cal.Rptr. 253, 447 P.2d 365] (*Smith*), a case involving a claim for workers' compensation benefits when a county social worker was fatally injured in a single-car accident while driving to work. His widow's request for workers' compensation benefits was denied on the ground her husband's death did not arise out of his employment since he was not acting in the course of his employment on his drive to work, as per the going and coming rule. Her attempts to obtain reversal by the Workers' Compensation Appeals Board and the Court of Appeal were unsuccessful. (*Id.* at p. 815.)

But the widow had success in the Supreme Court, where she urged the court to recognize an exception to the rule where the employee was bringing his car to work as required by his employer. (*Smith, supra*, 69 Cal.2d at p. 816.) It did, and reversed. The evidence established that the social worker was required to furnish his own car so that he could visit his clients on field days and would be available to see clients in cases of emergency on regular office days. While there were cars available if requested in advance by a worker whose car had broken down, the deceased employee had never requested the use of a county car. According to the Supreme Court, this evidence compelled the conclusion that the employer required the decedent to bring his car to work on the morning of the accident. (*Ibid.*) And since he furnished his own car for the sake of fulfilling his employment obligations, the commute came within the course of his employment. (*Id.* at p. 825.)⁷

⁶ The CACI instruction refers to this exception as the “vehicle-use” exception. (CACI No. 3725.) Consistent with case law, we shall refer to it as the required vehicle exception.

⁷ As noted, *Smith* involved a workers' compensation claim, rather than a tort claim. The tests for determining whether an employee was acting within the course and scope of employment in these two contexts are different, a difference attributable to the purpose of each claim. While both have the goal of compensating injured victims, “[w]orkers' compensation

In *Hinojosa, supra*, 8 Cal.3d 150, an operator of several noncontiguous ranches employed Miguel Hinojosa as a farm laborer. Hinojosa would work at one ranch until completion of the work, at which time the foreman would assign him to a different ranch. He was required to provide his own transportation “not only to get to the fields but for the variable inter-ranch transit necessary to perform the day’s work.” (*Id.* at p. 152.) Hinojosa did not own a car of his own, so he paid another worker for a ride to and from work and between the farms during the day. (*Id.* at pp. 152–153.) On his way home one day, the car in which he was riding was involved in an accident, injuring him. (*Id.* at p. 153.)

A referee awarded Hinojosa workers’ compensation benefits. The appeals board vacated the award on the ground the going and coming rule barred his claim. (*Hinojosa, supra*, 8 Cal.3d at p. 153.) The Supreme Court reversed, concluding that *Smith* controlled: “The necessity for the use of a car to go from one to another of his clients in the case of the social worker in *Smith* is no different than the necessity for the use of a car to go from one to another of the employer’s separate ranches in the instant case.” (*Id.* at p. 161.) And the court further explained: “To get from one noncontiguous field to another within the work day *required* the use of automobile transport. Since the employer furnished no such private transport the employer in effect imposed the requirement that the employees themselves procure such transport in the form of cars driven to and from work each day to one of the seven or eight fields designated by the foreman.” (*Id.* at pp. 161–162.)

Meanwhile, shortly before *Hinojosa*, the Court of Appeal filed *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803 [99 Cal.Rptr. 666] (*Huntsinger*), the first case to apply *Smith*’s required vehicle exception to a

and respondeat superior law are driven in opposite directions based on differing policy considerations. Workers’ compensation has been defined as a type of social insurance designed to protect employees from occupational hazards, while respondeat superior imputes liability to an employer based on an employee’s fault because of the special relationship. [Citation.]” (*Blackman, supra*, 233 Cal.App.3d at p. 605; accord, *Munyon v. Ole’s, Inc.* (1982) 136 Cal.App.3d 697, 702 [186 Cal.Rptr. 424].)

Because Labor Code section 3202 directs that the provisions of the Workers’ Compensation Act are to be construed liberally, “courts have tended to be very generous in finding injured workers are entitled to workers’ compensation benefits. [Citation.]” (*Anderson, supra*, 14 Cal.App.4th at p. 260.) On the other hand, scope of employment for respondeat superior purposes is more restrictive. (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 468 [33 Cal.Rptr.3d 713].) Despite this distinction, in developing the respondeat superior doctrine, “courts have occasionally looked toward workers’ compensation cases for guidance. [Citations.]” (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1562 [56 Cal.Rptr.2d 333]; see *Ducey, supra*, 25 Cal.3d at p. 722 [California courts often cite tort and workers’ compensation cases interchangeably in going and coming cases].)

claim that an employer was vicariously liable for the negligence of its employee.⁸ There, Edward Fell was a service representative whose principal duties included daily contact with customers, both by telephone and in person. On some occasions, Fell would leave home and call on customers prior to driving to the company office; on others, he would call on customers on the way home. And sometimes, he would carry objects connected with company business with him. In carrying out these duties, Fell extensively drove his personal pickup truck, although there was an indication that, at some times, a rental car used by another employee might have been available for his use. (*Huntsinger*, at p. 806.) One evening, while driving his truck from the office to his home, Fell collided with a motorcycle, killing motorcyclist Huntsinger. Huntsinger's survivors sued for wrongful death, naming Fell's employer as a defendant. The trial court granted a nonsuit on the ground that Fell was not acting within the scope of his employment at the time of the accident. (*Id.* at pp. 806–807.) The Court of Appeal reversed, holding there was “ample evidence from which the jury might have concluded that Fell’s use of his vehicle was an implied or express condition of his employment.” (*Id.* at p. 806.)

Since *Huntsinger*, a handful of cases have discussed the issue of the required vehicle exception in the tort context—not one of which has a holding supporting Jorge’s verdict here.

Ducey, supra, 25 Cal.3d 707, is illustrative. Dolores Glass, an employee of Argo Sales Co. (Argo Sales), was involved in a head-on collision, resulting in fatal injuries to herself and serious injuries to the Duceys, the occupants of the other car. The Duceys sued Glass’s estate and Argo Sales, among others. A jury found in favor of the Duceys against the estate but absolved Argo Sales of any liability for Glass’s negligence. The Duceys appealed, arguing that the trial court erred in submitting the issue of Argo Sales’s liability to the jury, because the evidence established as a matter of law that Glass was acting in the scope of her employment at the time of the accident. (*Id.* at p. 711.) Our colleagues in Division Four rejected the Duceys’ position, and affirmed, and the Supreme Court adopted their opinion. (*Id.* at p. 721.)

As described in the opinion, the evidence was as follows: “Glass had been employed by Argo Sales for almost 20 years to clean model homes at various locations in San Jose, Alameda and Union City and . . . she regularly drove up to 45 miles from her residence to such model homes several days a week; the accident in this case occurred when Glass was returning home after performing her job. Although plaintiffs introduced evidence that on occasion Glass carried some cleaning equipment in her car, and at times traveled by

⁸ An earlier case, *Harris v. Oro-Dam Constructors* (1969) 269 Cal.App.2d 911 [75 Cal.Rptr. 544], had discussed *Smith*, but in the context of analysis of a “travel expenses” exception to the going and coming rule.

car to pick up small furnishings for the model homes, there was no evidence that Argo Sales required Glass to do so; Argo Sales introduced evidence demonstrating that it had never reimbursed Glass for commuting expenses and did not pay her for the time she spent driving to work.” (*Ducey, supra*, 25 Cal.3d at p. 714.) Based on that, the court concluded, “The evidence does not establish as a matter of law that the company required Glass, as a condition of her employment, to commute to work in her personal car. The job was not one that embraced driving, and Glass was not required to use her vehicle for field work. Although there was evidence that she occasionally ran errands for her employer, these trips were not conclusively shown to be a condition of her employment. The jury could reasonably have believed that Glass was acting as a volunteer in running occasional errands for replacement items. She was not engaged in such an errand at the time of the accident. There is no evidence that Glass was required to go from location to location during the day. [Citation.]” (*Id.* at p. 723.)

Tryer, supra, 9 Cal.App.4th 1476, is similar. There, Lorraine West was employed by the Ojai Valley School to feed its horses twice a day at its two campuses during two work shifts. She was not paid for travel time to or from work or for travel expenses. West was involved in an accident on her way to her afternoon shift after leaving campus to ride her own horse and eat her lunch at a ranch. In a lawsuit brought by the survivors of the victim of the accident, the trial court granted summary judgment for the school on the ground that West was not engaged in the scope of her work when the accident occurred. (*Id.* at pp. 1479–1480.)

■ The Court of Appeal affirmed, agreeing there was no evidence supporting the application of the required vehicle exception because West merely commuted between two designated school campuses and was never required to use her vehicle for company errands during work hours. It found *Smith, Hinojosa, and Huntsinger* all distinguishable “because they all require the use of a vehicle as an integral part of performing the job at disparate locations throughout the course of work hours.” (*Tryer, supra*, 9 Cal.App.4th at pp. 1482–1483.) As *Huntsinger* summed up the rule: “[W]hen a business enterprise requires an employee to drive to and from its office *in order to have his vehicle available for company business during the day*, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.” (*Huntsinger, supra*, 22 Cal.App.3d at p. 810, italics added.)

These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the drive to and from work is within the scope of employment if the “employer requires [the] employee to drive to and from

the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if "the use of the employee's vehicle provides some direct or incidental benefit to the employer" and "there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly." (CACI No. 3725.)

In light of this law, we turn to the question here: Was there substantial evidence supporting the jury's finding that Da Fonseca was acting in the scope of his employment at the time he struck Jorge?

C. *Jorge Presented No Evidence from Which the Jury Could Conclude That Da Fonseca Was Acting Within the Scope of His Employment at the Time of the Accident*

It was undisputed that at the time of the accident Da Fonseca was commuting home from the Culinary Institute's St. Helena campus. As such, the going and coming rule would typically bar a vicarious liability claim against the Institute. To take his claim outside the rule, Jorge invoked the required vehicle exception, arguing at trial that the Culinary Institute required Da Fonseca to use his personal vehicle to accomplish his job duties. The jury agreed, finding that Da Fonseca was acting within the scope of his employment at the time of the accident. This finding is not supported by substantial evidence.

Under the required vehicle exception, the employer's requirement that an employee use a personal vehicle may be express or implied. (*Hinojosa, supra*, 8 Cal.3d at p. 161; *County of Tulare v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 1247, 1253 [216 Cal.Rptr. 885]; *Huntsinger, supra*, 22 Cal.App.3d at p. 807.) There was no evidence that the Culinary Institute expressly required Da Fonseca to use his car for work purposes. Busby and Henning both testified that chef instructors were never told to use their private vehicles for any purpose. And Da Fonseca confirmed this, that he was never told he was required to use his car for any of his employment duties. Jorge did not present any evidence to the contrary. There was, in sum, no evidence of any express requirement. Or, we conclude, an implied requirement.

Da Fonseca did not need a car for any purpose on the days he fulfilled his regular chef instructor duties at the St. Helena campus. He testified that he commuted from home to the campus and back in his car as a matter of convenience, but he could have taken public transportation, carpooled, or been dropped off. Henning and Busby both testified that they did not

know—and had no reason to know—how Da Fonseca arrived at the campus each day. Da Fonseca was not paid for his commute time to or from the campus. He was never required—indeed, never asked—to run errands on his way to or from the campus or during his workday. Simply, there was no evidence that during his on-campus workdays, Da Fonseca was impliedly required to use his car to fulfill any of his work obligations.

■ Nor was there evidence—substantial or otherwise—Da Fonseca was impliedly required to use his car for the off-campus travel he did to conferences, retreats, seminars, or consulting jobs on behalf of the Institute. The evidence showed only that he used his personal vehicle *to get to and from* his off-campus commitments and that he could have used alternative means to get there. This is insufficient to take Da Fonseca’s negligent conduct outside the scope of the going and coming rule, because the required vehicle exception applies only where the employer requires the employee to use his or her vehicle *to perform his or her work duties during the workday*, as *Smith, supra*, 69 Cal.2d 814, and *Huntsinger, supra*, 22 Cal.App.3d 803, confirm.

Here, unlike *Smith*, *Huntsinger*, or *Hinojosa*, and like *Ducey* and *Tryer*, there was no evidence Da Fonseca needed to use his car or have it be available *during* his workday in order to perform his duties.

The few cases relied on by Jorge are not to the contrary. *Lobo v. Tamco* (2010) 182 Cal.App.4th 297 [105 Cal.Rptr.3d 718] (*Lobo*), heavily relied on by Jorge because of the employee’s relatively infrequent use of the vehicle, held that the applicability of the required vehicle exception was a question for the jury. In that case, Luis Duay Del Rosario, a 16-year employee of Tamco, was driving home from work when he struck and killed Deputy Sheriff Daniel Lobo. (*Id.* at pp. 299, 301.) One of the requirements of Del Rosario’s written job description was, if necessary, to visit customer facilities to answer complaints, obtain information, and maintain customer relations. (*Id.* at pp. 301–302.) Del Rosario testified that if a customer called with quality concerns, he and a sales engineer would go to the site, riding in the engineer’s car. (*Id.* at p. 302.) On occasion, he would use his own car if no sales engineer was available. He had visited customer sites “‘very few’” times, using his own car fewer than 10 times. His supervisor testified that Del Rosario was required to use his personal car on the occasions where it was necessary to visit customers, and no company car was provided. (*Ibid.*)

Lobo’s survivors filed wrongful death suits, naming Tamco as a defendant on a respondeat superior theory. Tamco moved for summary judgment, contending that the evidence established as a matter of law that Tamco was not vicariously liable for Lobo’s death because Del Rosario was not acting within the scope of employment when he was commuting home. The trial

court granted summary judgment. Plaintiffs appealed, and the Court of Appeal reversed. (*Lobo, supra*, 182 Cal.App.4th at pp. 299–300.) Doing so, the court noted that application of the required vehicle exception turned on “whether the employer expressly or implicitly required the employee to make the vehicle available or had reasonably come to expect that the vehicle would be available for work purposes and whether the employer derived a benefit from the availability of the vehicle. [Citations.]” (*Id.* at p. 303.) And, it further noted, the frequency of using the car for business purposes was not determinative: “Here, [the supervisor] testified that Tamco required Del Rosario to make his car available rather than providing him with a company car in part *because* the need arose infrequently. Thus, the availability of Del Rosario’s car provided Tamco with both the benefit of insuring that Del Rosario could respond promptly to customer complaints even if no sales engineer was available to drive him to the customer’s site and the benefit of not having to provide him with a company car. Based on this evidence, a reasonable trier of fact could find that the ‘required-vehicle’ exception does apply.” (*Ibid.*)

Lobo is distinguishable from the facts here in critical ways: Del Rosario was required to visit customer sites during his workday; no company car was provided for that purpose; and Del Rosario’s supervisor testified that the employee was “required to use his personal car to discharge that duty.” (*Lobo, supra*, 182 Cal.App.4th at p. 302.) There was no evidence here that Da Fonseca was required to use any car, let alone his own car, to accomplish his work duties during his workday. Where there is *no* evidence that the employee was required to have his or her car available during the workday, there is no question for the jury as to the applicability of the required vehicle exception.⁹

Moradi v. Marsh USA, Inc. (2013) 219 Cal.App.4th 886 [162 Cal.Rptr.3d 280], the other tort case holding the required use exception applicable, is similarly inapposite. That case involved an employee of an insurance broker who was “required each workday to drive to and from the office in her personal vehicle,” which she “had to use . . . to visit prospective clients.” (*Id.* at p. 890.)

Jorge contends that there was “ample evidence” from which the jury could have found that Da Fonseca’s automobile use was an implied condition of his

⁹ Indeed, it may be said that the case does not assist Jorge at all, as on remand the jury found the required vehicle exception inapplicable. (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 440–441 [178 Cal.Rptr.3d 515] [jury’s finding that exception did not apply was supported by substantial evidence: employee’s occasional use of personal vehicle for work was only for employee’s own convenience and did not benefit employer, and employer never asked employee to use vehicle but merely sometimes acquiesced in employee’s desire to do so].)

employment. He makes much of Da Fonseca's off-campus work assignments, highlighting the extensive travel he did on behalf of the Culinary Institute. But *Anderson*, *supra*, 14 Cal.App.4th 254, dispensed with the notion that the need to show up for work at different sites rendered the employee's commute extraordinary—or for the benefit of the employer. In *Anderson*, a lineman for Pacific Gas and Electric Company (PG&E) worked out of various locations. He would report to work at a company point of assembly, traveling there in his own vehicle and then traveling on to various job sites in a company vehicle. Per a union contract, he received a per diem travel allowance whenever he reported to a point of assembly more than 25 miles from his home. At the time of the accident, he had finished work for the day, had traveled more than 25 miles from his home to the point of assembly, and had another PG&E employee in his car. (*Id.* at pp. 256–257.) Affirming summary judgment for PG&E based on the going and coming rule, the Court of Appeal concluded that the fact the employee reported to work at different, and constantly changing, remote locations did not make his regular commute to and from work part of his job or mean that he was acting within the course and scope of his employment during his trip home (even with a transportation allowance). (*Id.* at p. 262.)

Jorge also argues that Da Fonseca's use of the Culinary Institute's travel expense form evidenced an implied requirement that he drive his personal vehicle for work purposes. In Jorge's words: "Although the [Culinary Institute] did not directly tell Mr. Da Fonseca how to get to the off-campus work [citations], the evidence shows it anticipated and expected he would do so by using his own car. The [Culinary Institute's] own travel expense form stated that it reimbursed mileage for 'employee car only.' Further, it knew early on in his employment that Mr. Da Fonseca was indeed using his car to travel to his off-campus work assignments because Mr. Da Fonseca submitted a travel expense form seeking reimbursement for his mileage in December of 2007 (seven months after starting employment) and the [Culinary Institute] reimbursed him." But Da Fonseca's use of a travel expense form to seek reimbursement for miles traveled to an off-campus work site is not evidence of an implied requirement that he have his car available to fulfill his duties during the workday. Indeed, by that logic, any time an employee drove a personal vehicle to an airport while traveling for work and subsequently sought reimbursement for the miles driven, the employer would be vicariously liable for an accident caused by the employee while driving to his or her regular workplace on a different day. That is not the law.

Jorge also points to evidence that Da Fonseca was paid for travel time to and from off-campus events to support the jury's finding that Da Fonseca was acting in the scope of his employment at the time of the accident. While it is correct that an employee who was compensated for his or her travel time may be found to have been acting within the scope of employment during that

travel (see generally *Hinman, supra*, 2 Cal.3d at p. 963), that is irrelevant here, since Da Fonseca's commute home when the accident occurred was not compensated.

While there was no evidence that Da Fonseca was impliedly required to drive his private vehicle as a condition of his employment, there was direct evidence that he was *not*: Henning, Busby, and Da Fonseca all testified that Da Fonseca was not required to use his private vehicle. As to his on-campus work commitments, Henning and Busby both testified that they did not know how Da Fonseca arrived at work each day because there was no reason for them to know. Da Fonseca testified that as an alternative to driving, he could have carpooled, been dropped off, or taken public transportation. As to off-campus commitments, Henning testified that a personal vehicle was not required, while Busby testified that a chef instructor could travel via a rental car, public transportation, carpool, or personal vehicle. And Da Fonseca testified that no one at the Culinary Institute dictated how he was to get to off-campus work commitments.

But even if there were substantial evidence that Da Fonseca was impliedly required to drive his car to off-campus events or that he agreed to make his car available for off-campus events as an accommodation to the Culinary Institute and the Institute came to rely on it—which there was not—there is no authority holding that such evidence took Da Fonseca's ordinary commute to and from the St. Helena campus outside the going and coming rule. In short, the accident here occurred when Da Fonseca was simply commuting home from a day of performing his regular duties as a chef instructor at the St. Helena campus, a commute that lacked any imaginable connection to the performance of his duties at the Culinary Institute.

Finally, Da Fonseca's use of his car to transport his chef's knives and jackets to and from the St. Helena campus to off-campus work commitments, and, in the case of his soiled chef's jackets, to the cleaner, did not extend liability to the Culinary Institute. Carrying employer-owned tools of the trade to work does not render an employee's commute within the course and scope of employment, as the Supreme Court has recognized: Transporting work materials—even essential ones—to facilitate work does not warrant exception to the going and coming rule “unless such materials require a special route or mode of transportation or increase the risk of injury . . .” (*Wilson v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 181, 185 [127 Cal.Rptr. 313, 545 P.2d 225].) “Such cartage is common and must be viewed as incident to the commute rather than as part of the employment.” (*Ibid.*; see also *Ducey, supra*, 25 Cal.3d at p. 714 [evidence did not establish applicability of required vehicle exception as a matter of law even though employee sometimes transported cleaning equipment and small furnishings in her car].)

The same is true of Da Fonseca's chef's coats. He testified that he generally left his soiled chef's coats in his car until he had collected a few to take to Klass Cleaners as a matter of convenience. He was not required as a condition of his employment to use Klass Cleaners for cleaning his coats, as he could use alternative methods to launder them, including using a different cleaner or washing them himself. Nor did the trips to Klass Cleaners require the use of his car, as he was free to choose alternative methods of transportation to take his coats there. On top of all this, it was undisputed that Da Fonseca was not traveling to Klass Cleaners at the time of the accident.¹⁰

DISPOSITION

The judgment and the order denying the Culinary Institute's motion for judgment notwithstanding the verdict are reversed. The trial court is directed to enter an order granting the motion. The Culinary Institute shall recover its costs on appeal.

Stewart, J., and Miller, J., concurred.

A petition for a rehearing was denied October 12, 2016, and respondent's petition for review by the Supreme Court was denied December 14, 2016. S238015.

¹⁰ Because we reverse the trial court's order denying the Culinary Institute's motion for judgment notwithstanding the verdict, we need not address the evidentiary issue the Culinary Institute raises concerning an admission made by Da Fonseca that he worked a variable schedule to accommodate his employer's needs.

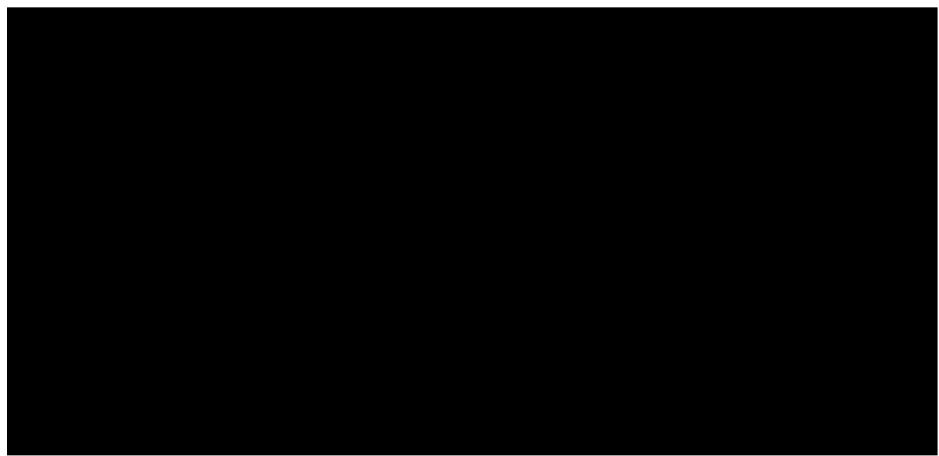
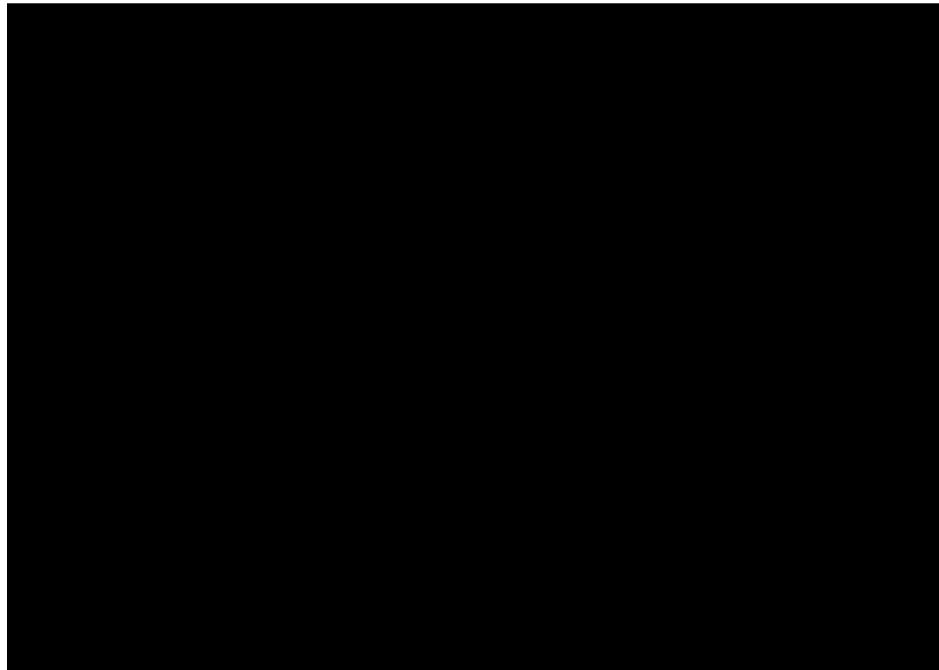
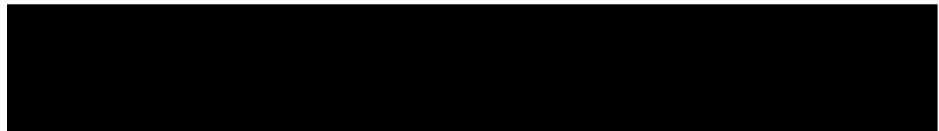
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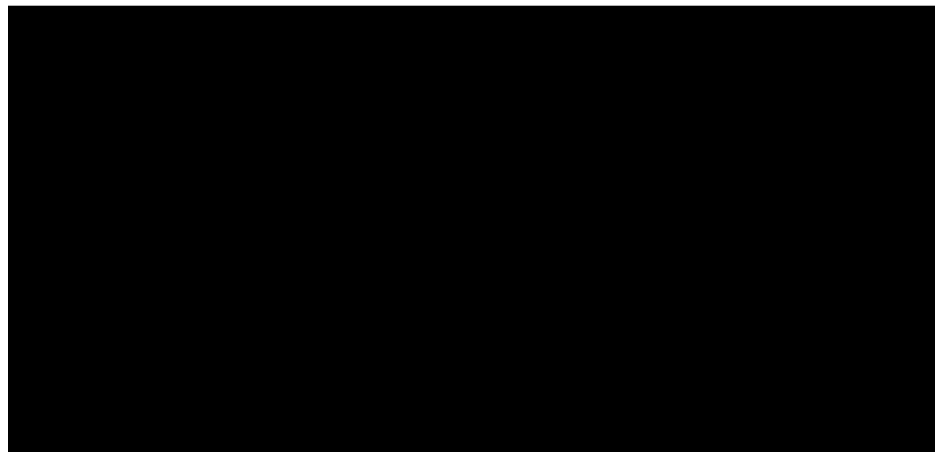
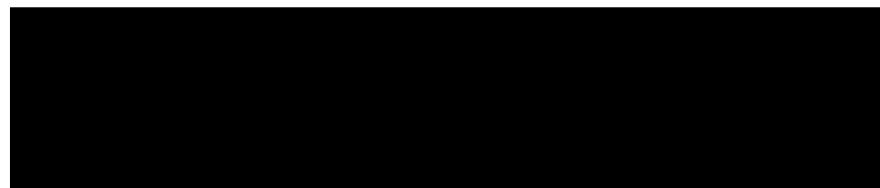
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U-HAUL CO. OF CALIFORNIA, Defendant and Appellant.

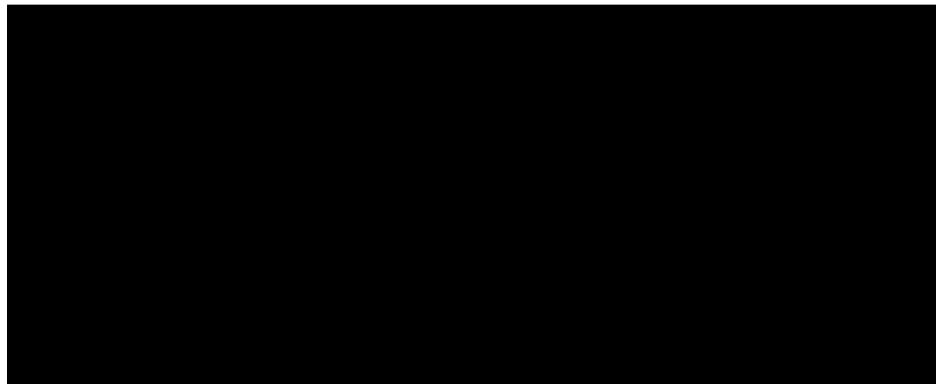
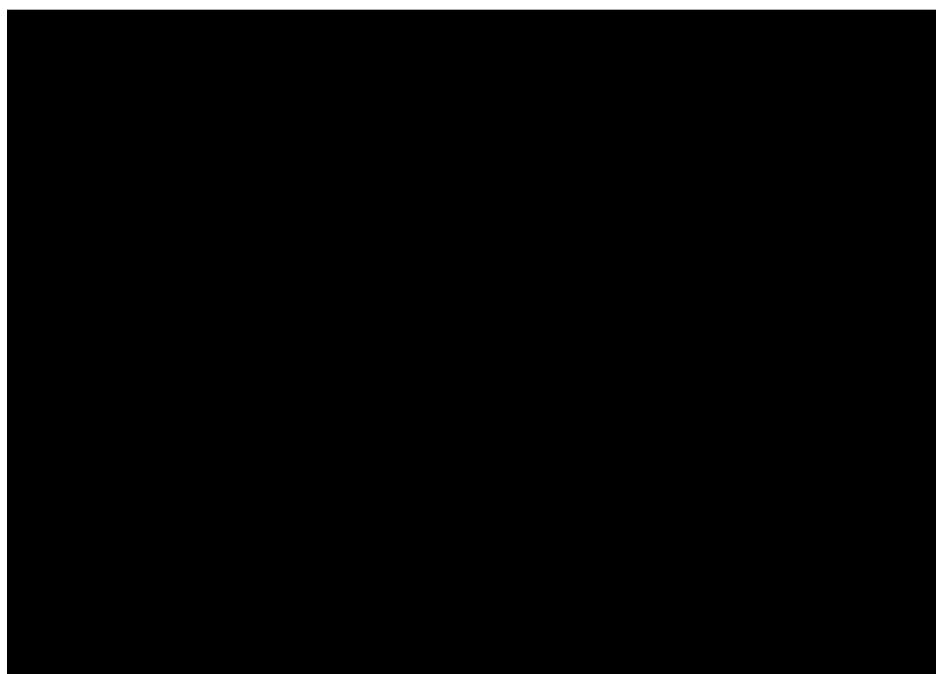
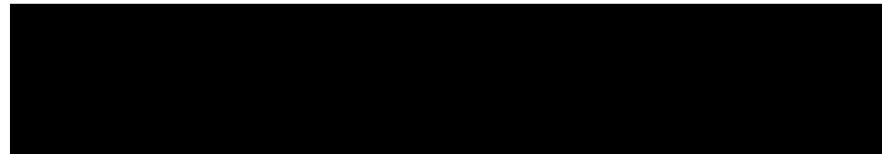
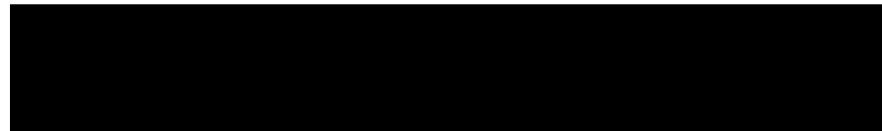
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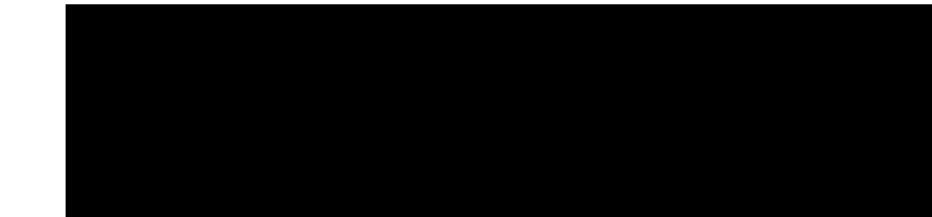
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Diversity Law Group, Larry W. Lee, Nicolas Rosenthal; Law Offices of Sherry Jung and Sherry Jung for Plaintiff and Respondent Erick Veliz.

OPINION

ZELON, Acting P. J.—Plaintiffs Sergio Perez and Erick Veliz Ramos filed a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.), alleging that U-Haul Co. of California (U-Haul) violated several provisions of the Labor Code, including overtime and meal break requirements. U-Haul filed a motion to compel plaintiffs to individually arbitrate whether they qualified as “aggrieved employee[s],” and therefore had standing to pursue a PAGA claim. (See Lab. Code, § 2699, subd. (a).) U-Haul asserted that all other issues regarding the PAGA claim should be stayed pending resolution of the arbitration. The trial court denied the motion, concluding that California law prohibits an employer from compelling an employee to split the litigation of a PAGA claim between multiple forums. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Events Preceding the Motion to Compel Arbitration*

In 2010 and 2011, U-Haul hired plaintiffs Erick Veliz and Sergio Perez (collectively plaintiffs) to serve as customer service representatives. As a condition of their employment, plaintiffs signed a mandatory arbitration agreement that contained the following language: “I agree that it is my obligation to . . . submit to final and binding arbitration any and all claims and disputes . . . that are related in any way to my employment . . . [B]y agreeing to use arbitration to resolve my dispute, both U-Haul and I agree to . . . forego any right to bring claims as a representative or as a member of a class or in a private attorney general capacity. . . .” A separate provision stated that the agreement was “governed by the Federal Arbitration Act [FAA], 9 U.S.C. *et seq.*”

In 2012, plaintiffs each filed a class action complaint against U-Haul for various Labor Code violations including (among other things) unpaid overtime (Lab. Code, §§ 510, 1194 and 1198),¹ failure to provide meal breaks (§ 226.7), failure to pay minimum wages (§§ 1194, 1194.2, 1197, 1197.1), failure to pay wages in a timely manner (§ 204) and failure to provide accurate wage statements (§ 226, subd. (a)). Veliz’s complaint additionally alleged a representative PAGA action seeking to collect penalties “on behalf of all other . . . [a]ggrieved [e]mployees.”

The trial court granted a petition to coordinate the actions, and stayed the matter pending the California Supreme Court’s decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 [173 Cal.Rptr.3d 289, 327 P.3d 129] (*Iskanian*). After *Iskanian* was decided, plaintiffs each filed an amended complaint that alleged a single cause of action under the PAGA seeking to collect penalties on behalf of themselves and other “aggrieved employees” for various Labor Code violations.

B. *U-Haul’s Motion to Compel Plaintiffs to Arbitrate Whether They Are “Aggrieved Employees” Within the Meaning of the PAGA*

On September 22, 2014, U-Haul filed motions seeking to compel plaintiffs to individually arbitrate the “predicate issue of whether” they had personally been subjected to any Labor Code violation, and therefore had standing to assert a PAGA claim. As stated in U-Haul’s motions: “Standing under PAGA requires that the plaintiff be an ‘aggrieved employee’ in order to bring a claim for statutory penalties on behalf of himself and other employees. [Citation]

¹ Unless otherwise noted, all further statutory citations are to the Labor Code.

The Labor Code defines ‘aggrieved employee’ as ‘any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.’ [Citation] ¶¶ Whether plaintiff is an ‘aggrieved employee’ will require a determination of whether U-Haul committed Labor Code violations against him, specifically, whether U-Haul was allegedly in violation of California Labor Codes.” U-Haul further asserted that the “representative portion” of the PAGA claims, which included “the number, scope and identities of other ‘aggrieved employees’ . . . and the amount of representative penalties,” were “non-arbitrable” under the employment agreement, and should be stayed pending the outcome of the arbitration.

Plaintiffs opposed the motion, arguing that the California Supreme Court’s decision in *Iskanian* made clear that “claims brought pursuant to the PAGA are not arbitrable in any manner whatsoever, as it is against public policy.” Plaintiffs further contended that if every employee could be compelled to arbitrate “whether [he or she had] suffered the underlying Labor Code violations to establish that [he or she is an] aggrieved employee,” *Iskanian* would be rendered “meaningless as . . . then this argument could be applied to . . . require every [employee] to first arbitrate whether they are a true ‘aggrieved employee.’”

In reply, U-Haul argued that *Iskanian* did “not hold that part of a PAGA claim cannot be arbitrated or that the predicate issue of whether U-Haul committed Labor Code violations against [plaintiff] cannot be arbitrated. Instead, *Iskanian* requires [only] that ‘aggrieved employees’ be allowed to bring representative PAGA actions.” U-haul further contended that the employment agreement was governed by the FAA, which explicitly “authorizes the severance of arbitrable issues from non-arbitrable issues.” U-Haul argued that several federal decisions applying the FAA had held that when a single claim raises “‘both arbitrable issues and nonarbitrable issues,’” the court must “sever[] the arbitrable issues.” According to U-Haul, because plaintiffs’ status as “aggrieved employee[s]” was an “arbitrable issue” under the employment agreement, the FAA required that the issue be severed from the remaining “representative” issues of the PAGA claim. After a hearing, the court entered an order concluding there was no legal basis to compel arbitration “of the predicate issue of whether U-Haul committed Labor Code violations against Plaintiffs.” The court explained that *Iskanian* had “spoken on this issue and determined that the FAA does not apply to PAGA . . . ¶¶ Contrary to defendant’s arguments . . . , the *Iskanian* Court was unequivocal in finding that a PAGA claim is not subject to the [FAA]. That is the dispute is, in fact, between the State and the employer. Thus, the federal cases [regarding severance] cited by Defendant, which all rely on the FAA, are distinguishable.” The trial court further explained that other California decisions had held that PAGA claims can only be brought in a representative capacity, and “not [as] an individual [claim]. . . . As such, there is no basis for

individuals to arbitrate whether they are individual ‘aggrieved employees’ before proceeding to [a trial on the remainder of the PAGA claim]. [B]ecause the [plaintiffs’] PAGA claim is (1) outside the FAA, and (2) not an individual claim, there is no basis to compel arbitration to first determine whether the representative plaintiffs are ‘aggrieved employees’ under PAGA.”

DISCUSSION

A. Standard of Review and Summary of the Issue on Appeal

■ An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) “In general, ‘[t]here is no uniform standard of review for evaluating an order denying a [petition] to compel arbitration. [Citation.] If the court’s order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court’s denial rests solely on a decision of law, then a de novo standard of review is employed.’” (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406 [117 Cal.Rptr.3d 310].)

The parties do not dispute that (1) the parties entered into a valid, enforceable arbitration agreement that is governed by the FAA; (2) the agreement’s provision precluding employees from asserting a representative PAGA claim is unenforceable as a matter of California law (see *Iskanian, supra*, 59 Cal.4th at p. 384); and (3) the parties did not contemplate arbitrating a representative PAGA action, meaning that the representative claim must proceed in court. They disagree, however, whether the agreement nonetheless requires plaintiffs to individually arbitrate whether they qualify as “aggrieved employee[s],” and therefore have standing to bring a representative PAGA action on behalf of “other current or former employees.” (See § 2699, subd. (a).)² For the purposes of the PAGA, an “aggrieved employee” is defined to “mean[] any person who was employed by the alleged violator and against whom one or more of the alleged [Labor Code] violations was committed.” (§ 2699, subd. (c).)

Plaintiffs contend the analysis and reasoning in *Iskanian* makes clear that employers are not permitted to compel employees to arbitrate any aspect of a PAGA claim, including the question whether they qualify as aggrieved employees. U-Haul disagrees, arguing that *Iskanian* merely held that the

² Section 2699, subdivision (a) states, in relevant part: “Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . , for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.”

PAGA waivers in arbitration agreements are unenforceable as a matter of state law, and that the FAA does not preempt this rule. U-Haul further contends that, in this case, it is not seeking to preclude plaintiffs from pursuing a representative PAGA claim, but rather is seeking only to arbitrate plaintiffs' individual standing to bring a PAGA claim. If the arbitrator determines plaintiffs are aggrieved employees within the meaning of the PAGA, they may then proceed with their representative action in the superior court.

B. Summary of Iskanian

The issues in this appeal turn largely on the Supreme Court's recent holding in *Iskanian, supra*, 59 Cal.4th 348. The plaintiff in *Iskanian* filed a class action against his employer for unpaid overtime and various other Labor Code violations. The complaint also alleged a representative claim under the PAGA seeking penalties on behalf of all aggrieved employees. The employer moved to compel individual arbitration of each claim, contending that the plaintiff had signed an employment agreement that contained a waiver of his right to pursue class or representative claims.

While the motion was pending, the California Supreme Court issued *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [64 Cal.Rptr.3d 773, 165 P.3d 556], which held that "class action waivers in employment arbitration agreements are invalid under certain circumstances." (*Iskanian, supra*, 59 Cal.4th at p. 361.) The employer subsequently withdrew its motion to compel arbitration, and the parties proceeded to litigate the case. After the plaintiff had obtained a class certification order, the United States Supreme Court issued *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 [179 L.Ed.2d 742, 131 S.Ct. 1740] (*Concepcion*), which invalidated a prior California Supreme Court decision that "restricted consumer class action waivers in arbitration agreements." (*Iskanian, supra*, 59 Cal.4th at p. 361 [discussing *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 [30 Cal.Rptr.3d 76, 113 P.3d 1100]]).) The employer then renewed its motion to compel individual arbitration, arguing that *Concepcion* had invalidated *Gentry*'s state law rule precluding the enforcement of class action waivers. The trial court granted the motion, ordered the case into individual arbitration and dismissed the class and representative claims. The Court of Appeal affirmed.

The California Supreme Court agreed that the principles set forth in *Concepcion* made clear that the FAA preempted *Gentry*'s state law rule precluding the enforcement of class arbitration waivers in employment agreements. (*Iskanian, supra*, 59 Cal.4th at p. 362.) The court explained that *Concepcion* had two central holdings: (1) the FAA preempts state rules that are incompatible with the fundamental attributes of arbitration and (2)

classwide arbitration interferes with numerous attributes of arbitration, including its expediency and informality. The court concluded that in light of these holdings, the “*Gentry rule*” was no longer valid. (*Iskanian, supra*, 59 Cal.4th at p. 366.)

■ The court next considered whether state law prohibited the enforcement of representative PAGA claim waivers in employment agreements, and, if so, whether the FAA preempted application of such a prohibition. (*Iskanian, supra*, 59 Cal.4th at pp. 361.) The court began its analysis by summarizing the purpose and structure of the PAGA: “‘The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts. [Citation.]’” (*Iskanian*, at p. 379.) To achieve those goals, the PAGA authorizes “‘an “aggrieved employee” [to] bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. [Citation.] Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the “aggrieved employees.”’ [Citation.] [¶] Before bringing a civil action for statutory penalties, an employee must . . . give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency If the agency . . . does not intend to investigate . . . , the employee may commence a civil action.’” (*Iskanian*, at p. 380.)

The court explained that the purpose and structure of the PAGA statute demonstrated that “‘[a]n employee plaintiff suing . . . under the [statute] does so as the proxy or agent of the state’s labor law enforcement agencies. . . . In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. [Citations.] . . . [¶] . . . [Thus,] an action to recover civil penalties “is fundamentally a law enforcement action designed to protect the public and not to benefit private parties” [citation]. . . .’ [¶] . . . [¶] . . . The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.’” (*Iskanian, supra*, 59 Cal.4th at pp. 380–382.)

■ The court concluded that in light of these “legal characteristics” (*Iskanian, supra*, 59 Cal.4th at p. 380), “an employee’s right to bring a PAGA

action is unwaivable" (*Iskanian*, at p. 383). Hence, an employer cannot compel an employee to waive his right to bring a representative PAGA claim through an agreement. The court reasoned that because "the Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the Agency by empowering employees to enforce the Labor Code as representatives of the Agency," a PAGA waiver "serve[d] to disable one of the primary mechanisms for enforcing the Labor Code. . . . [¶] . . . The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Iskanian*, at p. 383.)

The court further explained that the representative waiver at issue was against public policy even though the plaintiff retained his right to arbitrate a single-claimant PAGA claim on behalf of himself and the state: "[A] prohibition of representative claims frustrates the PAGA's objectives . . . '[because] a single-claimant arbitration . . . for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects. [Citation.] Other employees would still have to assert their claims in individual proceedings.' [Citation.]" (*Iskanian, supra*, 59 Cal.4th at p. 384, italics omitted.)

Finally, the court considered whether the FAA preempted this rule of California law, concluding that it did not: "*Concepcion* made clear [that] a state law rule may be preempted when it 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.' [Citation.] . . . [T]he rule against PAGA waivers does not frustrate the FAA's objectives because . . . the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Agency. [¶] . . . [¶] Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents—either the Agency or aggrieved employees—that the employer has violated the Labor Code. . . ." (*Iskanian, supra*, 59 Cal.4th at pp. 384–387, italics omitted.)

C. *The Trial Court Correctly Concluded Plaintiffs Are Not Required to Individually Arbitrate Whether They Qualify as “Aggrieved Employees”*

Like the arbitration agreement at issue in *Iskanian*, U-Haul’s employment agreement contains language stating that (1) the employee must arbitrate “any and all claims and disputes . . . that are related in any way to [his or her] employment” and (2) both parties “shall forego any right to bring claims as a representative or as a member of a class or in a private attorney general capacity.” U-Haul concedes that under *Iskanian*, the PAGA waiver is not enforceable, and that plaintiffs are therefore permitted to proceed with their PAGA action in court.

U-Haul contends, however, that plaintiffs may nonetheless be compelled to individually arbitrate the “predicate issue of whether” they are “aggrieved employee[s] within the meaning of PAGA, and thus have standing to bring . . . representative claim[s].” According to U-Haul, if the arbitrator determines it did “commit[] Labor Code violations against [plaintiffs]” (thereby establishing standing), plaintiffs may then pursue their “representative PAGA claim [in court], e.g., . . . the number, scope and identities of other ‘aggrieved employees’ that [plaintiffs] will represent, and the amount of representative penalties.” Stated more simply, U-Haul argues that although “neither [party] agreed to arbitrate representative issues, and neither may be compelled to participate in a representative arbitration,” plaintiffs may be compelled to individually arbitrate whether they have standing to bring such a representative claim.

1. *Whether plaintiffs have standing to pursue a PAGA claim is not an issue that falls within the scope of the arbitration agreement*

■ Preliminarily, we address whether the particular issue U-Haul seeks to arbitrate—plaintiffs’ status as “aggrieved employees” with standing to bring a PAGA claim—actually falls within the scope of the parties’ employment agreement. “The scope of arbitration is a matter of agreement between the parties. [Citations.] A party can be compelled to arbitrate only those issues it has agreed to arbitrate. [Citations.]” (*Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227, 230 [90 Cal.Rptr.2d 195] (*Larkin*); see also *Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 787 [43 Cal.Rptr.2d 650] (*Hayes*) “[plaintiff], of course, can be compelled to arbitrate only such issues as it in fact agreed to arbitrate”.) “Any ambiguity in the scope of the arbitration, however, will be resolved in favor of arbitration.” (*Hayes, supra*, 37 Cal.App.4th at p. 788; see also *Larkin, supra*, 76 Cal.App.4th at p. 230 [“doubts as to the scope of an agreement to arbitrate are to be resolved in favor of arbitration”].)

■ In support of its assertion that plaintiffs agreed to arbitrate whether they had standing to bring a PAGA claim, U-Haul relies on a broadly worded clause stating that the parties would arbitrate “any and all claims and disputes . . . related in any way to [plaintiffs’] employment.” U-Haul contends that because plaintiffs’ standing to bring a PAGA claim involves issues related to their employment, the arbitration provision necessarily applies. The agreement, however, contains an additional clause stating that the parties would not seek arbitration (or litigation) of any “claims as a representative . . . or in a private attorney general capacity.” U-Haul acknowledges that this language demonstrates neither party agreed (nor could be compelled) to arbitrate representative claims. *Iskanian*, in turn, held that every PAGA action, including one brought on behalf of a single employee, is a representative claim. (*Iskanian, supra*, 59 Cal.4th at p. 387 [“every PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state” (original italics)].) Given that the parties did not agree to arbitrate representative claims, and that a PAGA action is by definition a form of representative claim, we conclude that PAGA claims are categorically excluded from the arbitration agreement. Moreover, the agreement contains no language suggesting that despite this exclusion of representative claims, the parties did agree to arbitrate whether the complaining party had standing to initiate a representative claim in court. We fail to see how an agreement that excludes representative claims can nonetheless be reasonably interpreted to require plaintiffs to arbitrate their standing to bring a representative claim.

2. *Even if the agreement does require plaintiffs to arbitrate whether they have standing to bring a PAGA claim, the provision is unenforceable under California law*

■ Even if we were to accept U-Haul’s interpretation of the employment agreement, we are not aware of any authority supporting its argument that an employer may legally compel an employee to arbitrate the individual aspects of his or her PAGA claim, while simultaneously preserving its own right to litigate the representative aspects of the claim in court. The only decision that has addressed the issue, *Williams v. Superior Court* (2015) 237 Cal.App.4th 642 [188 Cal.Rptr.3d 83] (*Williams*), held that an employer could not force employees to proceed in such a manner. As in this case, the plaintiff in *Williams* signed an arbitration agreement that contained a waiver of his right to assert a representative claim. The plaintiff subsequently filed “a single-count [PAGA] action” alleging that his employer had “fail[ed] to provide off-duty rest periods, as required by section 226.7.” (*Williams*, at pp. 644–645.) The employer “moved . . . for an order staying the PAGA claim, but sending the ‘individual claim’ that [plaintiff] had been subjected to Labor Code violations to arbitration.” (*Williams*, at p. 645.) The trial court

granted the motion, explaining that while *Iskanian* precluded the employer from “forc[ing] [plaintiff] to waive or arbitrate his PAGA claim[,] . . . the ‘threshold dispute between plaintiff . . . and his former employer as to whether or not he was denied off-duty rest periods’ [was] ‘. . . amenable to arbitration under *Iskanian*.’” (*Williams*, at p. 646.)

The appellate court reversed, concluding there was no basis for the trial court’s “determin[ation] that [the plaintiff] must submit the ‘underlying controversy’ to arbitration for a determination whether he is an ‘aggrieved employee’ under the Labor Code with standing to bring a representative PAGA claim. [Citation.]” (*Williams, supra*, 237 Cal.App.4th at p. 649.) The court noted that neither the employer nor the trial court had “cited [any] legal authority . . . that a single representative action may be split in such a manner Indeed, case law suggests that a single representative PAGA claim *cannot* be split into an arbitrable individual claim and a nonarbitrable representative claim . . . brought solely on the employee’s behalf [because every] ‘. . . PAGA claim [is brought] . . . “as the proxy or agent of the state’s labor law enforcement agencies.”’ [Citation.] Accordingly, petitioner cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an ‘aggrieved employee.’” (*Id.* at p. 649, original italics.)

We agree with *Williams*’s conclusion that California law prohibits the enforcement of an employment agreement provision that requires an employee to individually arbitrate whether he or she qualifies as an “aggrieved employee” under the PAGA, and then (if successful) to litigate the remainder of the “representative action in the superior court.” In *Iskanian*, the Supreme Court explained that “‘every PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state.’” (*Iskanian, supra*, 59 Cal.4th at p. 387.) The court also held that requiring an employee to bring a PAGA claim in his or her “individual” capacity, rather than in a “representative” capacity, would undermine the purposes of the statute. (*Iskanian*, at pp. 383–384.) Given these conclusions, we do not believe an employer may force an employee to split a PAGA claim into “individual” and “representative” components, with each being litigated in a different forum.

■ Moreover, the reasoning of *Iskanian* indicates that an employer is not permitted to impose arbitration provisions that impede an aggrieved employee’s ability to bring a PAGA claim, which is “‘fundamentally a law enforcement action designed to protect the public.’” (*Iskanian, supra*, 59 Cal.4th at p. 381; see *id.* at p. 383 [because PAGA was “‘established for a public reason,’” it “‘cannot be contravened by a private agreement’”]; an

employer may not impose arbitration terms that would “‘frustrate PAGA’s objectives’”].) Under “*Iskanian*’s . . . public policy rationale,” an arbitration provision is unenforceable if it “circumvents [the PAGA’s] intent to empower employees to enforce the Labor Code as agency representatives and harms the state’s interest in enforcing the Labor Code.” (*Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1122 [184 Cal.Rptr.3d 568].) In this cause, U-Haul is, in effect, attempting to impose its preferred forum for different aspects of the PAGA claim by requiring plaintiffs to individually arbitrate whether a Labor Code violation was committed against them, while simultaneously preserving its right to a judicial forum for the “representative” issues.³ We think it clear that a private agreement requiring an employee to litigate his or her PAGA claim in multiple forums that have been selected based solely on the employer’s own preferences interferes with “the state’s interests in enforcing the Labor Code,” and is therefore against public policy. (*Iskanian, supra*, 59 Cal.4th at p. 383.)

For the purposes of this case, we need not determine whether PAGA claims are categorically exempted from private arbitration agreements. We conclude only that California law precludes an employer from requiring an employee to individually arbitrate whether he or she qualifies as an “aggrieved employee” within the meaning of the PAGA, while simultaneously preserving its right to a judicial forum for all other aspects of the claim.

3. *The FAA does not preempt state law rules applicable to PAGA claims*

■ In its appellate briefing, U-Haul repeatedly argues that (1) the FAA requires that all “[a]rbitrable issues within a claim . . . be compelled to arbitration” and (2) because the parties’ employment agreement is governed by the FAA, federal law requires arbitration of the “predicate issue of whether U-Haul committee Labor Code violations against [plaintiffs].” To the extent U-Haul is suggesting the FAA preempts any state law rule that

³ In *Conception, supra*, 563 U.S. 333, which involved the validity of consumer class action waivers, the United States Supreme Court observed that while defendants generally favor arbitration for “individual disputes,” they are unwilling to participate in arbitration on a classwide basis: Although “[t]he absence of multilayered review [in arbitration] makes it more likely that errors will go uncorrected[,] [d]efendants are willing to accept the costs of these errors in [individual] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims” (*Id.* at p. 350.) U-Haul’s preference for arbitration of the individual aspects of plaintiffs’ claim, but not the representative aspects, appears to be motivated by similar interests and concerns.

precludes an employer from forcing its employees to individually arbitrate their status as an “aggrieved employee,” that argument is foreclosed by *Iskanian*, which held that “a PAGA claim lies outside the FAA’s coverage.” (*Iskanian, supra*, 59 Cal.4th at p. 386.) Because the FAA does not apply to “claims belonging to a government agency [or] . . . claim[s] . . . brought by a statutorily designated proxy for the agency” (*Iskanian*, at p. 388), it has no effect on the issues presented herein.

DISPOSITION

The trial court’s order denying the motion to compel arbitration is affirmed. Respondents shall recover their costs on appeal.

Segal, J., and Garnett, J.,* concurred.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

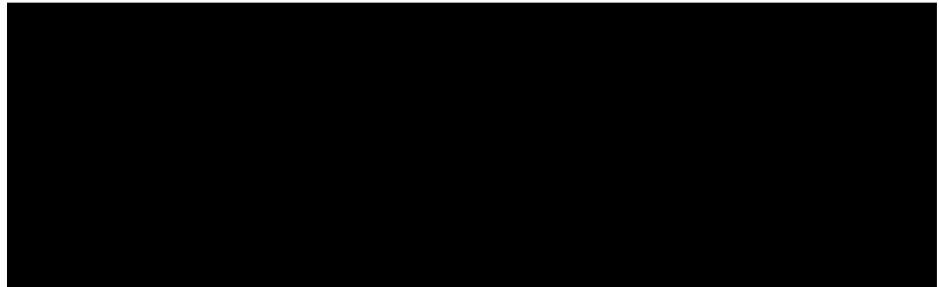
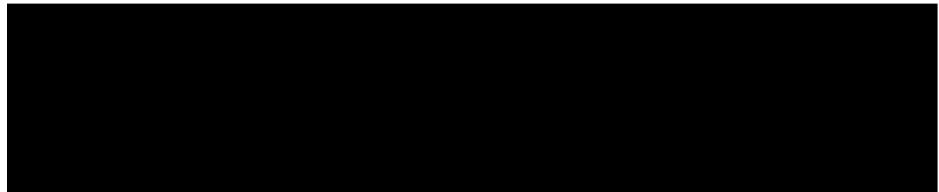
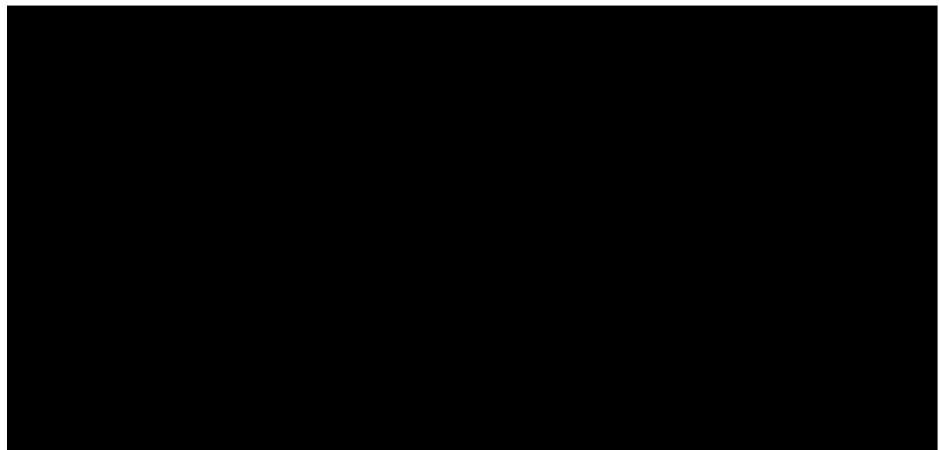
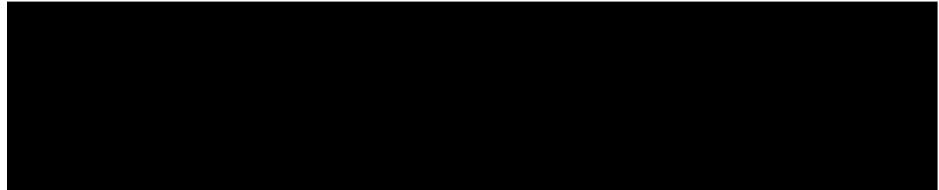
[No. B275603. Second Dist., Div. Five. Sept. 16, 2016.]

MARK ROTHSTEIN, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
PEYMANEH ROTHSTEIN et al., Real Parties in Interest.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Hersh Mannis, Neal R. Hersh, Jeff M. Imerman and Teresa Y. Lin for Petitioner.

No appearance for Respondent.

Jarrette & Walmsley, Robert R. Walmsley and Marlea F. Jarrette for Real Party in Interest Precious Time, LLC.

No appearance for Real Party in Interest Peymaneh Rothstein.

OPINION

BAKER, J.—While a husband and wife were litigating their ongoing marriage dissolution case, a limited liability company run by the wife filed a civil action concerning a disputed debt at issue in the dissolution proceedings. The superior court deemed the two cases related and assigned the civil case to the already assigned judge. The question we decide is whether the limited liability company's Code of Civil Procedure section 170.6 (section 170.6) challenge¹ in the related civil action requires transfer of *both* cases to a new judge.

I

Peymaneh Rothstein (Peymaneh) and Mark Rothstein (Mark) instituted proceedings in January 2014 to dissolve their marriage, Los Angeles Superior Court case No. BD595040 (the Family Law Case). In an income and expense declaration filed in connection with her request for an order concerning child and spousal support (plus attorney fees), Peymaneh included an amended schedule of assets and debts that listed a \$50,000 loan to Mark—made in the name of Precious Time, LLC (Precious Time)—among her separate property assets. After certain other preliminary proceedings, Peymaneh filed a Code of Civil Procedure section 170.6 challenge to the then-assigned judicial officer and the matter was thereafter assigned to Judge Christine W. Byrd.

¹ Statutory references that follow are to the Code of Civil Procedure.

Over the following months, Judge Byrd made findings and orders in the Family Law Case, resolving factual disputes involving child custody and visitation, as well as child and spousal support. Then, in January 2016, Judge Byrd entered a judgment upon stipulation of the parties that terminated Peymaneh and Mark's married status. The judgment provided, however, that the "court reserves jurisdiction over all other issues of the marriage, including, but not limited to, the nature, value and extent of the community property and separate property, the division of property, spousal support, child support, attorneys fees and costs, and all other matters which the court determines appropriate and within the scope of its jurisdiction."

Additional proceedings ensued, and about a month after Judge Byrd granted a motion to impose sanctions against Peymaneh, Real Party in Interest Precious Time, a Virginia limited liability company, filed a civil suit against Mark in case No. LC103883 (the Civil Case). The suit alleged causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. The causes of action were based on alleged facts that Mark asked for a \$100,000 loan "from [Precious Time's] principal and CEO," that Precious Time and Mark thereafter entered an oral agreement for such a loan, and that Mark had repaid only half the amount, leaving a balance due of \$50,000.

Mark filed a notice with the superior court that identified the Family Law Case and the Civil Case as related. The notice of related case explained the two cases were related because the debt alleged to be the basis of the causes of action in the Civil Case was "a matter previously alleged by [Peymaneh] to be in dispute in [the Family Law Case]." The judge presiding in Department 1 of the superior court, which processes related case notices in probate and family law matters, determined the cases were related under the governing local court rule. Specifically, the presiding judge acknowledged the parties were not identical in both suits but concluded the cases were related (a) because a public records search revealed Peymaneh was the director of Precious Time (i.e., the unnamed CEO referenced in the Civil Case complaint), a point she did not dispute, and (b) because the \$50,000 debt alleged in the Civil Case was also in dispute in the Family Law Case. Both cases were therefore ordered related—not consolidated—and the Civil Case was transferred to Judge Byrd, the judge before whom the Family Law Case was then pending.

On May 27, 2016, with both cases now related and assigned to the same judicial officer, counsel for Precious Time filed a section 170.6 peremptory challenge to Judge Byrd in the Civil Case. In a minute order captioned with both case numbers, Judge Byrd found the challenge was timely and ordered as follows: "Pursuant to the direction of Department 2, both actions [the Civil

Case and the Family Law Case] are reassigned for all purposes to the Honorable Tamara Hall”

Mark asked Judge Byrd to reconsider her order granting the section 170.6 challenge and transferring both cases to another judge. He argued the challenge had not been filed in the Family Law Case and there was therefore no basis to transfer that case to another judge. Mark also argued the terms of section 170.6 barred transfer of the Family Law Case to a new judge because Judge Byrd had already made determinations on contested factual issues relating to the merits of the case. And Mark further contended, in part based on documentary evidence he submitted indicating Peymaneh was the sole member of Precious Time, that the Civil Case was merely a “continuation of” the Family Law Case such that the section 170.6 peremptory challenge was improper.

Judge Byrd denied Mark’s request for reconsideration. Mark then sought a writ of mandate in this court, and we issued an alternative writ directing Judge Byrd to enter a new order transferring only the Civil Case pursuant to Precious Time’s section 170.6 challenge (while retaining the Family Law Case) or to show cause why a peremptory writ to that effect should not issue. Judge Byrd issued no new order, and we accordingly proceed to decide whether to issue a peremptory writ.

II

■ We hold a section 170.6 challenge filed in a case that is related to (not consolidated with) an earlier-filed case in which the assigned judge has resolved a disputed factual issue relating to the merits requires transfer of only the later-filed case to another judge. We explain why.

■ “Section 170.6 permits a party in civil and criminal actions to move to disqualify an assigned trial judge on the basis of a simple allegation by the party or his or her attorney that the judge is prejudiced against the party. Various restrictions on the timing of the motion are imposed by this statute, and a party may exercise such a challenge only once during the trial of an action or a special proceeding.”² (*Peracchi v. Superior Court* (2003) 30

² As relevant here, the text of the statute provides as follows: “(1) A judge . . . shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge . . . is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding. [¶] (2) A party to, or an attorney appearing in, an action or proceeding may establish this prejudice by an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury . . . that the judge . . . before whom the action or proceeding is pending . . . is prejudiced against a party or attorney,

Cal.4th 1245, 1248–1249 [135 Cal.Rptr.2d 639, 70 P.3d 1054].) A section 170.6 disqualification motion accompanied by an affidavit or declaration alleging such prejudice is alone sufficient, and the motion requires no proof of actual prejudice. (*Swift v. Superior Court* (2009) 172 Cal.App.4th 878, 883 [91 Cal.Rptr.3d 504].) Although a section 170.6 motion is often referred to as an “automatic” disqualification motion because a court may not inquire into the basis for alleged prejudice, a court presented with such a motion retains authority to determine whether it is “duly presented.” (§ 170.6, subd. (a)(4); *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 410 [132 Cal.Rptr.3d 602]; see also *Jacobs v. Superior Court* (1959) 53 Cal.2d 187, 190 [1 Cal.Rptr. 9, 347 P.2d 9] [assessing whether challenge timely].)

■ One circumstance in which a court may be called to determine whether a section 170.6 challenge was duly presented and in proper form is when confronted with the question of whether the challenge is filed in a case that is a mere continuation of an earlier action. That was the issue before this court in *Pickett v. Superior Court* (2012) 203 Cal.App.4th 887 [138 Cal.Rptr.3d 36] (*Pickett*). We recognized section 170.6 permits a party and other parties aligned on the same side only one peremptory challenge per action, and we reiterated the rule that a party that cannot peremptorily challenge a judge in a newly filed action that qualifies as a continuation of an earlier filed action in which the allotted challenge has already been used. (*Pickett* at pp. 892–893.) Applying this rule, we held the trial judge erroneously struck Pickett’s section 170.6 challenge, reasoning the newly filed action was not a “continuation of” an earlier case. (*Pickett*, at p. 893.) Quoting *NutraGenetics, LLC v. Superior Court* (2009) 179 Cal.App.4th 243 [101 Cal.Rptr.3d 657] (*NutraGenetics*), we explained an action is a continuation of an earlier action for section 170.6 purposes where the subsequent proceeding involves “‘the same parties at a later stage of their litigation with each other, or . . . arise[s] out of conduct in or orders made during the earlier proceeding.’” (*Pickett, supra*, 203 Cal.App.4th at p. 893.)

or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing The fact that a judge . . . has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided. . . . [¶] (4) If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed . . . thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge . . . to try the cause or hear the matter. . . . Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section. In actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.” (§ 170.6, subd. (a).)

Judge Kumar, sitting by designation, concurred separately in *Pickett* to highlight an issue that is the issue we are called to resolve in this case. In the *NutraGenetics* case cited by the *Pickett* majority, the trial judge accepted a section 170.6 challenge filed in a related case and then “transferred both the related case *and* the original case to another judge.” (*Pickett, supra*, 203 Cal.App.4th at p. 896 (conc. opn. of Kumar, J.), original italics.) Judge Kumar noted there was nothing to indicate the two actions at issue in *NutraGenetics* had been consolidated, as opposed to merely related, and he opined that “*NutraGenetics* should not be considered authority for the proposition that, under these circumstances, . . . section 170.6 requires the transfer of the original case to another judge.” (*Id.* at p. 896 (conc. opn. of Kumar, J.), italics omitted; see also *id.* at p. 897 (conc. opn. of Kumar, J.) [concluding, as the parties in *Pickett* represented at oral argument, transfer of the original case would not be required].)

Here, both the majority and concurring opinions in *Pickett* are relevant to our analysis. Following the majority’s articulation of the applicable standard, we cannot say the Civil Case is a mere continuation of the Family Law Case. Even assuming Precious Time were the alter ego of Paymaneh such that the parties in both actions are identical, the Civil Case is not a “later stage” of the marriage dissolution litigation, nor does it “arise out of” conduct or orders made in the Family Law Case; Judge Byrd has yet to determine the status of the alleged \$50,000 debt. We therefore cannot conclude Precious Time’s peremptory challenge in the Civil Case should have been stricken as contrary to the terms of section 170.6. (See, e.g., *NutraGenetics, supra*, 179 Cal.App.4th at p. 254 [continuation rule requires a second proceeding that arises out of a first proceeding, not just out of the same set of facts that gave rise to the first proceeding].)

While we therefore believe the section 170.6 challenge was validly filed in the Civil Case, that does not resolve the controversy before us. Instead, the critical question remains: does Precious Time’s section 170.6 challenge in the Civil Case disqualify Judge Byrd in the related Family Law Case such that both cases must be transferred to another judge. On that point, we agree the *Pickett* concurring opinion has it right.

■ The peremptory challenge Precious Time filed in the Civil Case does not disqualify Judge Byrd in the Family Law Case for the most fundamental of reasons: the cases are merely related, not consolidated, and there has been no challenge filed against Judge Byrd in the Family Law Case. In the words of section 170.6, it has not been established in the Family Law Case that Judge Byrd “is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding.” (§ 170.6, subd. (a)(1).) Indeed, the declaration accompanying the section 170.6 motion in the Civil

Case—submitted by Attorney L. Donald Weissman on behalf of Precious Time—averred only that Judge Byrd was prejudiced against him or his client, not against Peymaneh or her separate counsel in the Family Law Case.

■ Precious Time responds, however, by emphasizing both cases have been deemed related under the superior court’s local rules, which track California Rules of Court, rule 3.300. In Precious Time’s view, this means the Family Law Case pending for well over a year before the filing of the Civil Case should follow the Civil Case when that case is reassigned to another judge. We see nothing in section 170.6 that compels such a result. To the contrary, the judicial administration goals the related case rules ordinarily further must yield to the statutory policy, expressed in section 170.6 itself, of permitting parties a peremptory challenge but preventing use of such a challenge that would result in transfer of a case to a new judge after the currently assigned judge has ruled on disputed matters of fact relating to the merits of a case. (§ 170.6, subd. (a)(2) [“The fact that a judge . . . has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, *and not involving a determination of contested fact issues relating to the merits*, shall not preclude the later making of the motion provided for in this paragraph”] (italics added); *National Financial Lending, LLC v. Superior Court* (2013) 222 Cal.App.4th 262, 270 [166 Cal.Rptr.3d 88] [“[N]either side in a proceeding may make a motion under section 170.6 after trial has commenced or the trial judge has resolved a disputed issue of fact relating to the merits”]; see also *McClenney v. Superior Court* (1964) 60 Cal.2d 677, 683 [36 Cal.Rptr. 459, 388 P.2d 691].) Here, it is undisputed Judge Byrd ruled on such matters in the Family Law Case before Precious Time filed its peremptory challenge. And the substantial rights of a party like Precious Time are fully protected by transfer of only the case in which the challenge was filed; dragging the originally filed case along with it furthers no goal section 170.6 is intended to achieve.³

Precious Time additionally argues that transferring only the Civil Case and not the Family Law Case contravenes principles of judicial economy and could result in inconsistent judicial rulings. The argument is unpersuasive for two reasons. First, where a court has already resolved contested factual issues in a previously filed action, Precious Time’s judicial economy argument gets things backward. Removing a case from a judicial officer who is substantially familiar with the facts and issues in order to keep that case together with a newly filed case that will go to a judicial officer entirely unfamiliar with

³ Were it otherwise such that a party could disqualify a trial judge by engineering the filing of a related suit by an ideologically aligned third party, this could give rise to precisely the sort of forum shopping that is inconsistent with the purpose of section 170.6. (*The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1032 [22 Cal.Rptr.3d 885, 103 P.3d 283] [“[S]ection 170.6 is designed to prevent abuse by parties that merely seek to delay a trial or obtain a more favorable judicial forum”].)

either one will often, if not always, be less optimal from a judicial efficiency perspective. Moreover, transferring only the case in which the section 170.6 challenge was filed does not prohibit the judges assigned from managing their respective cases as specified in the authority Precious Time cites, Government Code section 68607 and California Rules of Court, rule 3.713(c). Second, there is no possibility of inconsistent rulings here given established priority rules in family law proceedings. (See, e.g., *Askew v. Askew* (1994) 22 Cal.App.4th 942, 961 [28 Cal.Rptr.2d 284] [“After a family law court acquires jurisdiction to divide community property in a dissolution action, no other department of a superior court may make an order adversely affecting that division”].) And more generally, where there is a peremptory challenge in a later-filed case related to a previously pending action, we are confident the parties will keep the respective judicial officers aware of relevant developments in both actions so that the possibility of conflicting rulings is minimized, if not eliminated.

DISPOSITION

The petition is granted. Let a writ of mandate issue ordering respondent superior court to vacate its June 1, 2016, order transferring the Family Law Case and the Civil Case to a new judge and to enter a new order transferring only the Civil Case to a new judge, with further proceedings in both cases to be conducted in a matter consistent with this opinion. Petitioner shall recover his costs.

Turner, P. J., and Kriegler, J., concurred.

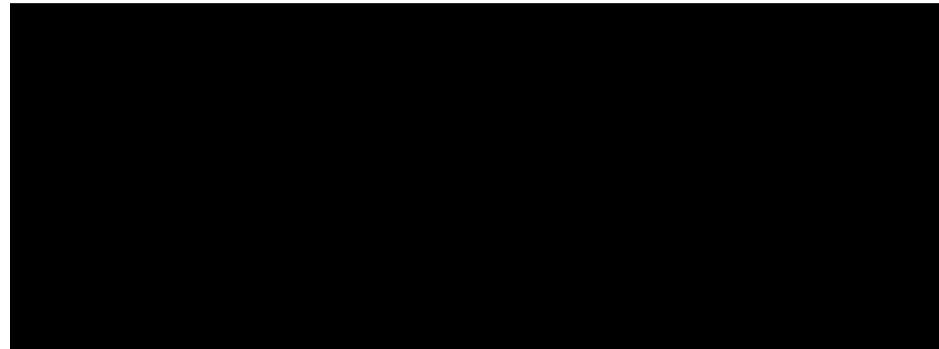
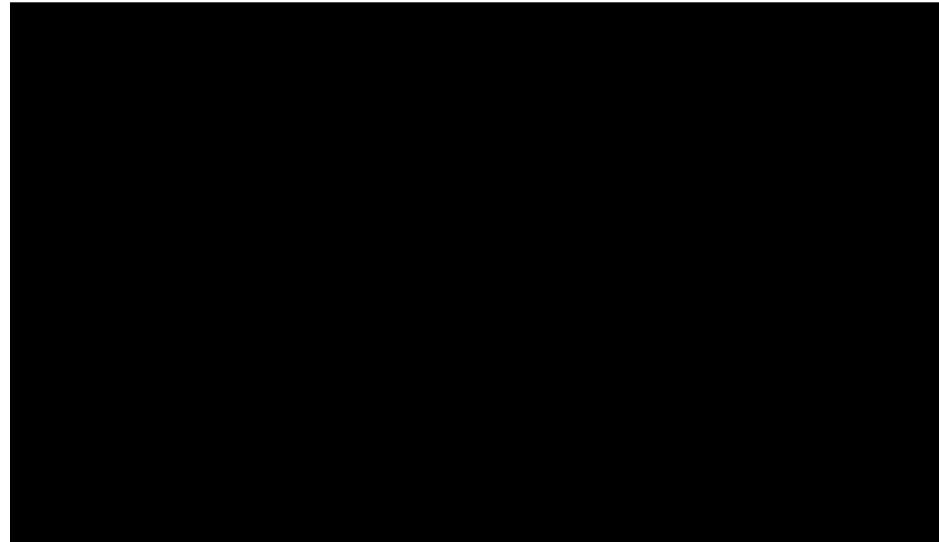
[No. B267529. Second Dist., Div. Five. Sept. 19, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ROBERT EARL WHITE, Defendant and Appellant.

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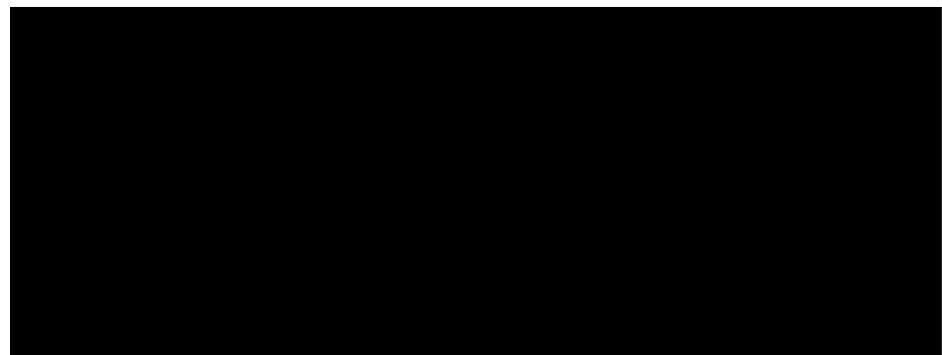
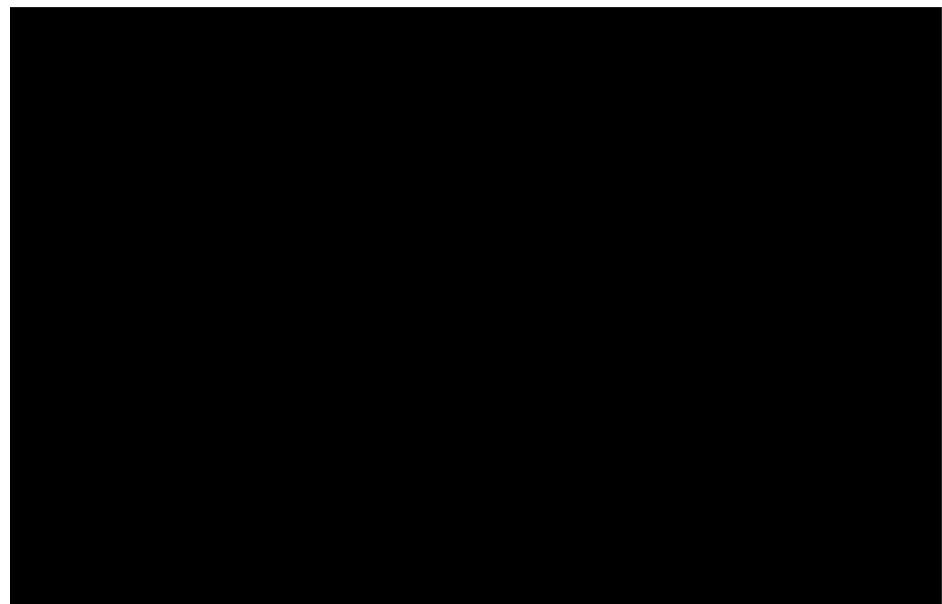
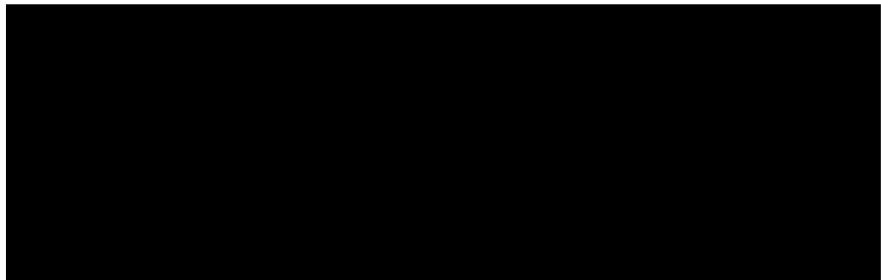
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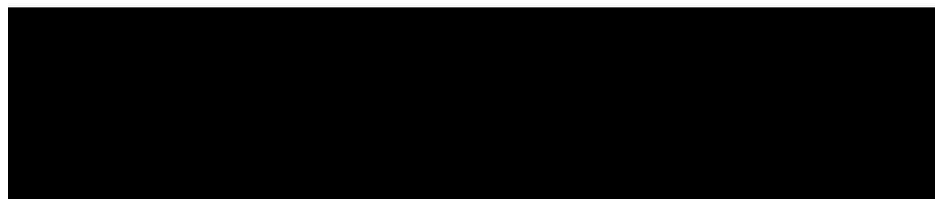
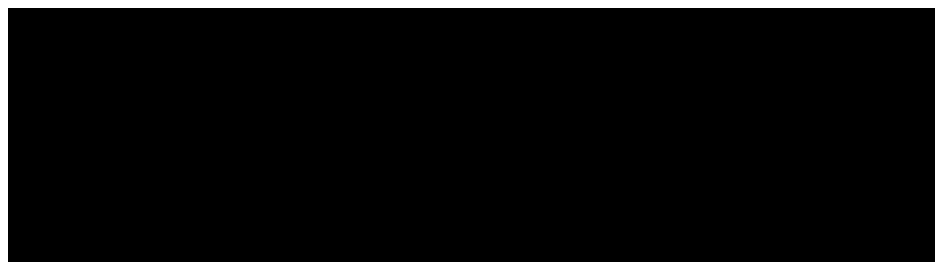
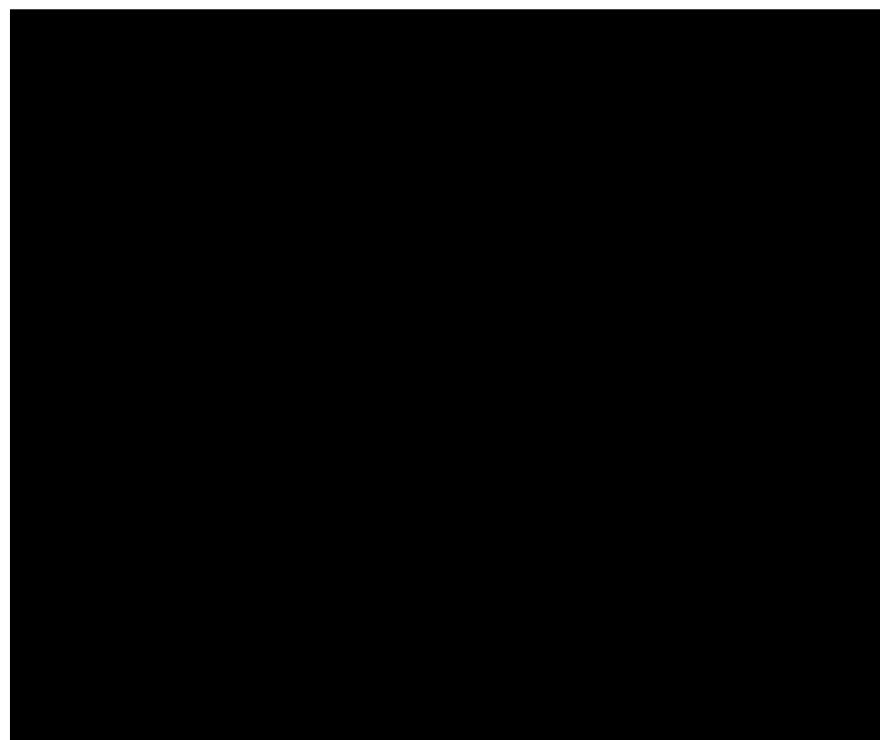
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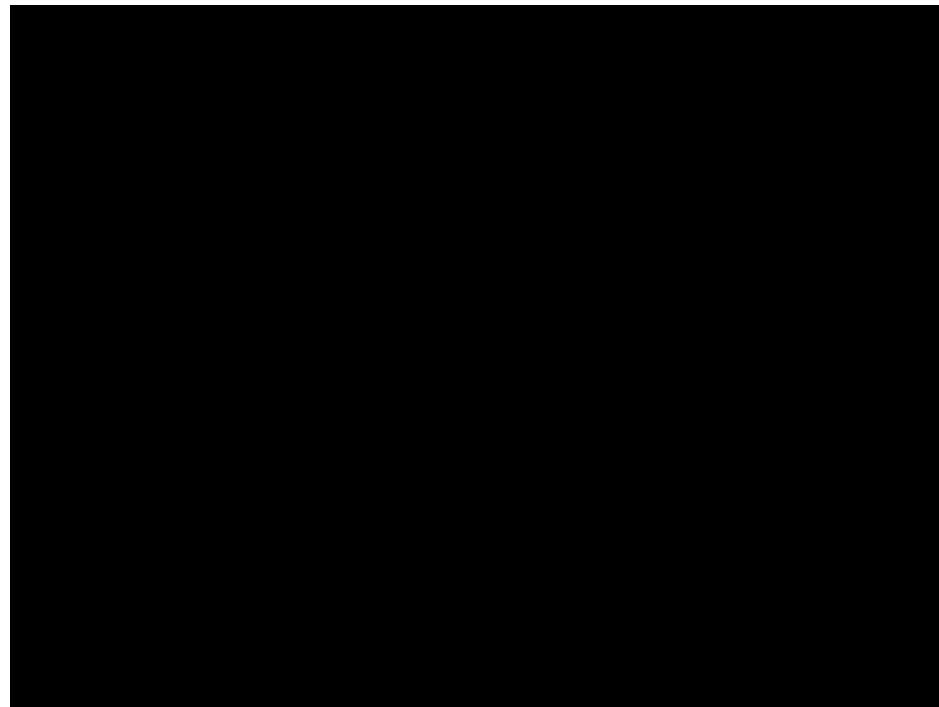
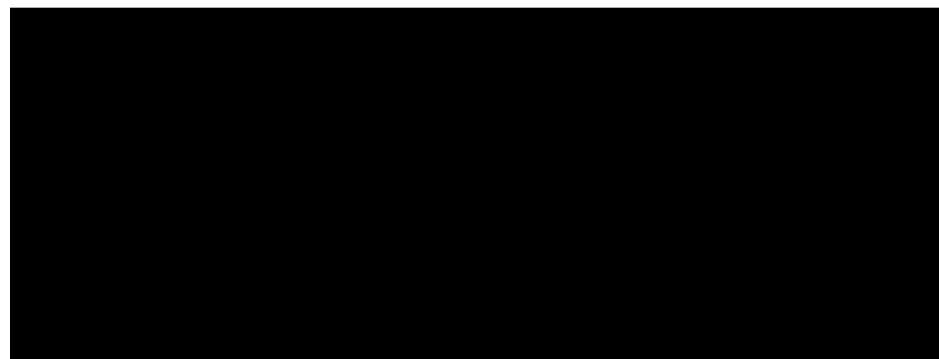
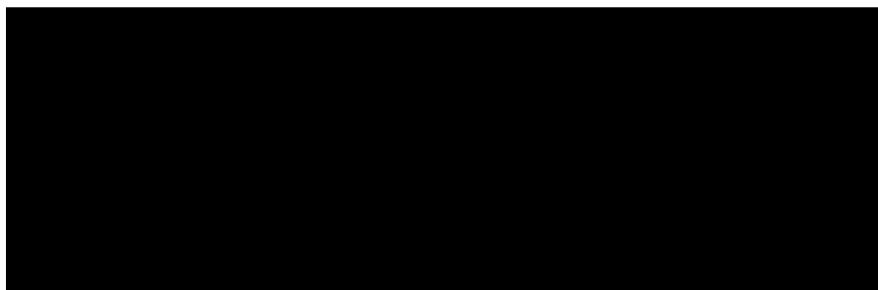
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[REDACTED]

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COUNSEL

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KRIEGLER, J.—The issue in this case is whether a defendant’s various mental conditions,¹ including frotteuristic disorder, exhibitionist disorder, bipolar disorder, and antisocial disorder, which two experts opined would likely result in future acts of sexual battery, satisfy the requirement of the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.)² that a defendant “will engage in sexually violent criminal behavior.” We hold that the trial court properly interpreted the statutory language of the SVPA in finding that under the circumstances in this case sexual battery constitutes sexually violent criminal behavior.

Following a bench trial, the trial court found defendant and appellant Robert Earl White to be a sexually violent predator (SVP). The court’s written statement of decision examined two portions of section 6600, subdivision (a)—the requirement that defendant suffered a conviction of a “sexually violent offense,” and the additional requirement that due to his mental disorder defendant is likely to engage in predatory “sexually violent criminal behavior.” The court determined that two requirements are not synonymous, and the latter provision is broader than the former.

Defendant contends that (1) the trial court incorrectly defined the SVPA’s requirement of “sexually violent criminal behavior” and (2) assuming the trial court used the correct definition, the phrase “sexually violent criminal behavior” is void for vagueness. We affirm.

¹ Additional disorders are described in the summary of the experts’ testimony below.

² Statutory references are to the Welfare and Institutions Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's Criminal History and Institutional Behavior³

Defendant was the subject of a sustained juvenile delinquency petition for assault with a deadly weapon in 1975. Defendant pleaded guilty in 1979 to assault to commit rape after walking up behind a woman on the street, grabbing her breast and crotch, restraining her, and telling her he would kill her if she did not let him touch her. He then "hump[ed]" her, and made motions to unzip his pants. The victim screamed. Defendant fled and was ultimately chased down by a neighbor.

In 1981, defendant was charged with indecent exposure, disorderly conduct, soliciting a lewd act, and immoral acts before a child. He was convicted of immoral acts before a child. The record does not contain any official description of this offense. Defendant said he had been urinating in public.

In April 1983, defendant was convicted of indecent exposure. Defendant approached a female stranger in a parking lot, unzipped his pants, exposed his penis, and asked, "Do you want some of this?"

In October 1983, defendant was charged with annoying or molesting a child, assault to commit rape, rape, fighting, disorderly conduct, and soliciting a lewd act. The charges were dismissed. According to a report, a woman was getting into her parked car when defendant suddenly approached her on his bike and said, "Do you want to suck my big dick?" She was afraid, did not respond, and got into her car. Defendant then said, "Do you want to see my big dick?" She was extremely fearful and quickly left. When police found defendant, he initially lied about what he had been doing, but then said that he knew they were stopping him because he had "made comments about her ass."

In December 1984, defendant was charged with sexual battery and convicted of battery after approaching two different women in a grocery store

³ The description of defendant's criminal history and institutional behavior is drawn from the testimony of Dr. William Damon, Ph.D., one of the experts at trial. In addition to the offenses set forth in this opinion, Dr. Damon testified that defendant had multiple other convictions that were not pertinent to the SVP determination. Dr. Damon reviewed the following documents in connection with his current evaluation of defendant: the State Department of State Hospitals' records, including abstracts of judgments, charging documents, probation officers' reports, and police reports; reports from the California state prisons, including prison mental health, medical records, and disciplinary reports; and state hospital medical, psychiatric, and disciplinary records.

Defendant's statements in this portion of the opinion refer to what he said to Dr. Damon during the SVP investigation.

and fondling their buttocks. The store manager and employees saw this occur through a two-way mirror. Defendant was on probation at the time. He initially denied touching the women, but later claimed his suitcase bumped into one of the women. Three days before this incident, police investigated defendant for touching a female victim on her buttocks, but no charges were brought because the victim was unwilling to sign a complaint report.

In July 1998, defendant was convicted of sexual battery after walking into a children's clothing store with his hand in his pocket. He approached the female store clerk while she was behind the register. The clerk feared that he had a weapon in his pocket. As she walked to the front of the cash register, defendant pinned her against the counter with his body with her back towards him. She could feel something poking her in the buttocks. Defendant grabbed the left side of her buttocks, moved his hand up her left side, and grabbed her breast. When the clerk turned around, defendant let her go and walked to the back of the store. She remained in the front of the store. Defendant walked toward the clerk and bumped into her, causing her to knock over some items on the display table. She believed that she would have been raped if it was not for a nearby restaurant with an open patio to the rear of the store. Defendant was on parole at the time of this offense. He initially denied the incident, later stated he bumped into a woman at a store and should have apologized, and finally said that he just slapped a woman on the butt.

In May 1999, defendant was arrested for sexual battery and convicted of battery. Defendant walked through a grocery store with his hand in his pocket. He deliberately bumped into a female stranger as she walked down the aisle. She believed that she felt his penis through his clothing. She continued to walk through the store. While in the checkout line, defendant walked up to her from behind and intentionally bumped his body into her buttocks. Defendant was on parole at the time.

In October 2000, while on parole, defendant was charged with battery and making criminal threats. Defendant was drinking with a man at the man's residence. The two got into an argument. Defendant punched the man in the face and then fled. The man drove to locate defendant. Once defendant was located, he grabbed the man by the throat. The man fled in fear for his life. The next day, defendant returned to the man's house and threatened the man's wife by saying, "The first chance I get I'm going to rape you and fuck the shit out of you."

Defendant was convicted of sexual battery in 2001, for rubbing his erect penis against a woman on a bus. While standing, he leaned into a woman and pushed his erect penis into her shoulder. She leaned away but he continued to press his penis into her shoulder. After she exited the bus, defendant stood

behind a female juvenile and began pressing his erect penis into her buttocks area. The juvenile did not feel anything because she had her sweatshirt wrapped around her waist.

Defendant incurred 47 serious prison rules violations while incarcerated, including six sex offenses, three acts of physical aggression, three threatening acts, two instances of possessing weapons, and 11 instances of verbal aggression. The sexual incidents include asking to masturbate in front of a female intern, exposing his erect penis, and masturbating in front of female staff. Defendant was sent to Coalinga State Hospital in 2008 after a parole violation.

At Coalinga, defendant engaged in instances of indecent exposure, verbal sexual aggression, verbal nonsexual aggression, and property damage. Between April 2009 and June 2011, there were 13 indecent exposures, 11 acts of physical aggression, and 33 threats. Between July 2011 and November 2013, there were 12 exposures, 22 acts of physical aggression, 36 threats, 10 instances of verbal sexual aggression, 46 instances of verbal nonsexual aggression, 39 instances of property damage, and 14 instances of contraband possession. From December 2013 through July 2015, there were two exposures documented, one act of physical aggression, three threats, two acts of verbal sexual aggression, four acts of nonsexual verbal aggression, two instances of property damage, and two instances of possession of contraband. There were additional acts of misconduct including frequent sexual comments to female staff, grabbing his clothed penis, and exposing himself to a female medical technician.

Defendant's Psychiatric Diagnoses

Dr. William Damon

Dr. Damon, holder of a Ph.D. in clinical psychology, has prepared SVP evaluations in various capacities with the State Department of State Hospitals since 2007. Dr. Damon evaluated defendant in 2008, 2009, 2011, 2014, and 2015. Defendant was interviewed by Dr. Damon in 2008, 2014, and 2015.

Dr. Damon concluded that defendant suffers from frotteuristic disorder in a controlled environment, exhibitionist disorder in a controlled environment, severe alcohol use disorder in a controlled environment, severe cocaine use disorder in sustained remission in a controlled environment, severe phencyclidine use disorder in sustained remission in a controlled environment, mild cannabis use disorder in a controlled environment, and antisocial personality disorder.

Dr. Damon described frotteuristic disorder as including at least six months of intense sexually arousing fantasies, urges or behaviors involving touching

or rubbing against a nonconsenting person, and causing stress or impairment in important areas of function. Defendant “has a longstanding pattern of approaching females and touching or grabbing their breasts, vaginal areas or buttocks or touching, rubbing or humping his penis into their bodies.” Defendant’s behavior has spanned 22 years, including while in the community on supervised release.

Exhibitionism involves recurrent sexual fantasies, urges, or behaviors involving exposing the genitals to a nonconsenting person. Defendant “has a longstanding pattern of exposing his genitals to females,” including while in the community on supervised release and while in the state hospital. Defendant has a “unique presentation.” In Dr. Damon’s experience there were “maybe two other [men] that have committed some kind of sexual offense at the hospital, but none anywhere near the frequency of [defendant].”

Antisocial personality disorder is “a pattern of disregard for and violation of the rights of others, occurring since age 15 and including at least three of the following: [¶] Failure to follow lawful behaviors, deceitfulness, impulsivity or failure to plan ahead, aggressiveness, disregard for the safety of self or others, irresponsibility, lack of remorse. [¶] And the individual needs to have shown signs of conduct disorder prior to age 15.” Defendant “has numerous charges and convictions that have indicated that he’s repeatedly failed to perform or follow lawful behaviors. [¶] In terms of deceitfulness he’s used multiple aliases, birth dates, social security numbers. [¶] His reports of his sex crimes have differed vastly from the narratives of his victims. [¶] He admitted selling bogus drugs and forging checks. [¶] He admitted feigning thought disorder symptoms and suicidal ideation for secondary gain in institutional settings. [¶] And in [Dr. Damon’s] recent interview of [defendant] he’s denied sex offending behavior and substance use despite it being indicated in the records” Defendant continued to engage in antisocial behaviors in the community on supervised release, in prison, and in the state hospital. He admittedly has poor impulse control. He is aggressive, including five sexual offenses that have led to convictions for violent or aggressive behavior. Defendant has fought in prison, including assaulting an officer and assaulting a peer. At the state hospital, he grabbed a nurse by the neck, hit a nurse in the face, and grabbed a nurse and attempted to spit at her. Defendant reports to having remorse about his sex offending behavior but continued to engage in it at the state hospital.

Dr. Damon expressed the opinion that defendant’s “frotteuristic disorder and exhibitionistic disorder predispose him to commit criminal sexual acts. [¶] He has continued to offend despite detections, sanctions, despite being on supervised release and despite being in highly structured environments. [¶] He’s re-offended shortly after sanction. His desire to engage in sex offending

[REDACTED]

[REDACTED]

behavior has overcome barriers like victim distress, potential presence of witnesses in public settings, available consensual sexual partners. [¶] His substance use disorders I think further decrease his ability to control his behavior. [¶] And his antisocial personality disorder affects his emotional capacity because it makes him less likely to respond appropriately to other people's fear and distress.”

On the issue of reoffending, Dr. Damon administered two approved actuarial tests. Defendant's scores on both tests placed him in the high risk of offending group.

Defendant is not amenable to treatment and has not been attending sex offender groups while in the state hospital, claiming they do not apply to him since he is not a rapist or child molester. Defendant is predatory as all of his victims have been strangers or, in the hospital, casual acquaintances.

Dr. Damon opined that defendant is “likely to engage in sexually violent criminal behavior.” Damon came to this conclusion based on six factors: (1) defendant has a “sexual disorder that predisposes him to hands-on offending”; (2) his history of violence (defining violence as “aggressive behavior”) while on supervised release, in prison, and in the state hospital; (3) “he’s highly sexually preoccupied”; (4) “he’s impulsive and has difficulty regulating his behavior”; (5) he has emotional dysregulation and easily feels disrespected, especially by women; and (6) “he continues to use substances which is likely to increase his impulsivity and self-centeredness and decrease his judgment.”

Dr. Damon also believed that defendant “will not necessarily stop with just touching or rubbing a potential victim” given defendant’s “sexual impulse,” aggression, and behavioral regulation. Dr. Damon believes that defendant’s frotteurism is escalating, and believes it is possible for defendant to go out and rape someone or force somebody to orally copulate him.

Dr. Nancy Webber

Dr. Nancy Webber is a clinical and forensic psychologist with a Ph.D. in psychology, who has been a contract evaluator for SVP determinations since January 2007. She performed evaluations on defendant in 2008, 2009, 2011, 2013, and 2015. She interviewed defendant in 2008, 2011, and 2015.

Dr. Webber diagnosed⁴ defendant with frotteuristic disorder in a controlled environment, exhibitionist disorder in a controlled environment, bipolar

⁴ Dr. Webber based her diagnoses on her review of the same materials and history considered by Dr. Damon.

disorder, antisocial personality disorder, and various substance abuse disorders. Defendant's mental health disorders predispose him to committing sexual crimes in a violent, predatory manner. He has a defect in his ability to mediate between impulses and actions, causing him to repeatedly reoffend despite receiving punishment. Defendant has "considerable impulsiveness" and aggressiveness.

Defendant is very poor at predicting his own behavior and does not know what triggers his inappropriate behaviors. Defendant does not intend to do these things but has difficulty controlling his behavior. He lacks remorse or rationalizes his actions. He has "cognitive distortions" and has "made statements such as if he does something sexually inappropriate with a women [sic] and she doesn't get angry it must mean . . . she doesn't object to it."

Dr. Webber evaluated defendant's risk of reoffending using several actuarial assessments. He scored high on each of these assessments.

Dr. Webber expressed the opinion that defendant is at risk of engaging in sexually violent predatory behavior because (1) he has a history of engaging in sexually violent behavior; (2) he is sexually preoccupied and "sees the world through sexual lenses"; (3) he reacts in a "rageful manner" when he feels slighted, wronged, or when his sexual advances are rejected; (4) he has poor control over his anger and escalates quickly, acting out verbally, physically, and sexually; (5) he feels entitled to get what he wants when he wants it; (6) he has poor coping skills; and (7) close monitoring in a highly supervised environment with staff trained to de-escalate situations has not "been sufficient to curb his sexual acting out and anger."

Dr. Hy Malinek

Dr. Hy Malinek, Ph.D., called as a witness by defendant, has been a contract evaluator for the State Department of State Hospitals for 19 years. Dr. Malinek originally evaluated defendant in 2008. He concluded at that time that defendant met the criteria for an SVP, but has since changed his opinion.

Dr. Malinek diagnosed defendant with antisocial personality disorder because of his lengthy criminal history, including sexual offenses, robbery, and burglary. "He has certainly shown a commitment to a lifestyle of criminality, instability, substance abuse, anger." His support for defendant's diagnosis of frotteurism is waning because defendant has not exhibited frotteuristic behaviors in 14 years, even though his exhibitionism has continued. Dr. Malinek believes there would be some evidence of defendant's frotteurism in the last 14 years if the disorder was still active. Defendant does not care about the

[REDACTED]

consequences of his actions and has continued to be aggressive and have persistent exhibitionistic activity.

Dr. Malinek views defendant as a “uniquely difficult and challenging case” because of defendant’s “behaviors, his history, his conduct at the hospital, whether this meets the legal statutory requirement for civil commitment.” At a 2011 SVP probable cause hearing, Dr. Malinek opined that defendant was predisposed to committing sexually violent offenses because defendant was so “decontrolled” that he may not stop with frotteurism. Dr. Malinek later changed his opinion because subsequent research shows the escalation from frotteurism to rape is rare, and defendant “has never recidivated with a qualifying offense since 1979 and he has been intermittently in the community and committed sexual offenses, not SVP.” Dr. Malinek believes that if defendant’s behaviors were to escalate to rape, “we would have had some evidence of it given that he has been so defiant, discontrolled and so much disregard for the law and he has not.” Dr. Malinek no longer believes that frotteurism is a condition that predisposes defendant to committing sexually violent offenses. There is no inherent link between sex offenses and anger issues. In Dr. Malinek’s opinion, defendant is not an SVP. If sexual battery were a qualifying offense, Dr. Malinek would not be sure whether or not defendant would qualify as an SVP, because he is unsure whether defendant’s frotteurism is still active.

Trial Court’s Ruling

The trial court found defendant to be an SVP. In a 28-page written statement of decision and order, the court found that “while there is little substantial evidence in case at bench that [defendant] will commit such sexually violent offenses as rape or other forcible penetrative sex acts or that he will molest children, there is overwhelming evidence that he will commit physically assaultive sexual offenses. The commission of these has their roots in his frotteurism, anti-social personality disorder and related psychopathology, and various substance abuse disorders.” The court did not believe the case raised “the issue of the absolute limits of the phrase ‘sexually violent criminal behavior’ and whether that phrase may be extended to include ‘hands off’ acts. . . . [F]rotteuristic acts, which really are a form of assault, and, even in their most benign form would constitute sexual battery, a crime . . . , are not ‘nuisance’ crimes. They have very real and long-term consequences for their victims.” Considering defendant’s “frotteuristic acts in the Santa Monica clothing store and, to a lesser degree, the bus in Los Angeles, and his repeated threats to kill his victims or force them into other sexual acts, even while incarcerated, there can be no reasonable doubt that there is a serious and well-founded risk that he will engage in sexually violent predatory behavior in the future.”

DISCUSSION

Defendant presents two issues on appeal. First, he contends the trial court erred in interpreting the SVPA. Specifically, defendant argues the phrase “sexually violent criminal behavior” is synonymous with “sexually violent offense.” According to defendant, “the requirement that the person be likely to engage in a sexually violent criminal *behavior* corresponds with the requirement that a person have a qualifying criminal *offense* insofar as the behavior contemplated is that which is deemed sexually violent *under the law*.” Because defendant’s frotteuristic disorder makes him likely to commit sexual battery, an offense not included in the definitions of a “sexually violent offense” within the meaning of the SVPA, defendant asserts he does not qualify for commitment as an SVP.

Second, citing *Johnson v. United States* (2015) 576 U.S. ____ [192 L.Ed.2d 569, 135 S.Ct. 2551] (*Johnson*), defendant argues that if the two terms are not synonymous, “sexually violent criminal behavior” is undefined and unconstitutionally vague.

■ We conclude the opinions of Dr. Damon and Dr. Webber constitute substantial evidence that defendant is likely, at a minimum, to continue to engage in forcible acts of sexual battery as a result of his frotteuristic disorder and other mental disorders. We further conclude that forcible frotteuristic acts of sexual battery, in light of defendant’s specific record of conduct combined with his diagnosed mental disorders, qualify in this case as “sexually violent criminal behavior.” While there are several forms of sexual battery, including a misdemeanor version that does not require unlawful restraint (Pen. Code, § 243.4, subd. (e)(1)), defendant’s likely behavior significantly exceeds the amount of violence necessary for the felony subdivision of the statute (Pen. Code, § 243.4, subd. (a)). (See *People v. Grant* (1992) 8 Cal.App.4th 1105, 1111 [10 Cal.Rptr.2d 828] [unlawful restraint need not be physical]; *People v. Arnold* (1992) 6 Cal.App.4th 18, 31 [7 Cal.Rptr.2d 833] [creation of a coercive atmosphere can constitute unlawful restraint].) The form of sexual battery involving unlawful restraint engaged in by defendant satisfies the requirement of violence in the phrase “sexually violent criminal behavior.” We further conclude “sexually violent criminal behavior” is not vague and the phrase does not violate due process.

Standard of Review

■ We conduct a de novo review of questions of statutory interpretation. (*People v. Prunty* (2015) 62 Cal.4th 59, 70 [192 Cal.Rptr.3d 309, 355 P.3d 480].) The fundamental task of statutory interpretation is to determine the Legislature’s intent so as to effectuate the law’s purpose. (*Kleffman v. Vonage*

Holdings Corp. (2010) 49 Cal.4th 334, 340 [110 Cal.Rptr.3d 628, 232 P.3d 625].) “We begin with the statute’s text, assigning the relevant terms their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme. (See *People v. Cottle* (2006) 39 Cal.4th 246, 254 [46 Cal.Rptr.3d 86, 138 P.3d 230].) Essential is whether our interpretation, as well as the consequences flowing therefrom, advances the Legislature’s intended purpose. (See *People v. Zambia* [(2011)] 51 Cal.4th [965, 976] [127 Cal.Rptr.3d 662, 254 P.3d 965].)” (*People v. Hubbard* (2016) 63 Cal.4th 378, 386 [203 Cal.Rptr.3d 114].) “‘Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507 [247 Cal.Rptr. 362, 754 P.2d 708].)’ (*Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497 [39 Cal.Rptr.2d 348].)” (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 725 [181 Cal.Rptr.3d 59, 339 P.3d 344].)

The Intent and Purpose of the SVPA

The Legislature issued the following statement of intent and purpose in enacting the SVPA: “The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These persons are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence. The Legislature further finds and declares that it is in the interest of society to identify these individuals prior to the expiration of their terms of imprisonment. It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.”

“The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes.” (Stats. 1995, ch. 763, § 1, p. 5921.)

Basis for Commitment as an SVP

■ In its current form the SVPA provides in part: “‘Sexually violent predator’ means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (§ 6600, subd. (a)(1).) The three elements required for an SVP commitment are (1) conviction of “a sexually violent offense”; (2) a diagnosed mental disorder that makes a person a danger to the health and safety of others; and (3) the mental disorder makes it likely the defendant will engage in “sexually violent criminal behavior.” (*Ibid.*)

The second and third elements of the SVPA require a link between a finding of future dangerousness and “a currently diagnosed mental disorder characterized by the inability to control dangerous sexual behavior.” (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1158 [81 Cal.Rptr.2d 492, 969 P.2d 584] (*Hubbart*).) Commitment as an SVP requires proof that a defendant “is likely to engage in future predatory acts” of sexually violent criminal behavior. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1190 [124 Cal.Rptr.2d 186, 52 P.3d 116] (*Hurtado*).) A person is likely to engage in sexually violent criminal behavior if “the person charged as a sexually violent predator poses a substantial danger, that is, a serious and well-founded risk, of committing a sexually violent predatory crime if released from custody.” (*People v. Roberge* (2003) 29 Cal.4th 979, 988–989 [129 Cal.Rptr.2d 861, 62 P.3d 97] (*Roberge*)).

Defendant’s 1979 conviction of assault with intent to commit rape satisfies the requirement of a conviction of a sexually violent offense as defined in section 6600, subdivision (b).⁵ Defendant’s diagnoses of frotteuristic disorder, exhibitionist disorder, bipolar disorder, and antisocial disorder, collectively satisfy the second element of a diagnosed mental condition making him a danger to the health and safety of others. What is at issue here is whether defendant’s frotteurism and other disorders, which in the opinion of two doctors are likely to cause him to commit acts of sexual battery, qualify as “sexually violent criminal behavior.”

⁵ Section 6600, subdivision (b), provides in pertinent part as follows: “‘Sexually violent offense’ means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): . . . any felony violation of Section . . . 220 of the Penal Code, committed with the intent to commit a violation of Section 261 . . . of the Penal Code.”

The SVPA includes a definition of “sexually violent offense.” (§ 6600, subd. (b).) It does not contain a definition of “sexually violent criminal behavior.” It appears case law has not specifically addressed the meaning of “sexually violent criminal behavior,” and in particular, whether it means something different than a “sexually violent offense.” Presumably the issue has not arisen because persons subject to commitment as an SVP are deemed likely to commit the type of sexually violent criminal behavior that is consistent with their prior convictions of a “sexually violent offense.” (See *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 649–650 [160 Cal.Rptr.3d 410, 304 P.3d 1071] [defendant previously convicted of engaging in lewd and lascivious conduct and committed as an SVP deemed by two evaluators as “still an SVP”]; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 236–238 [127 Cal.Rptr.2d 177, 57 P.3d 654] (*Cooley*) [defendant with multiple convictions of lewd conduct with a minor under the age of 14 diagnosed with “the qualifying mental disorder pedophilia, and was likely to engage in sexually violent criminal behavior on his release”]; *Roberge, supra*, 29 Cal.4th at p. 983 [defendant with multiple forcible rape convictions diagnosed with several mental disorders and likely to reoffend]; *Hurtado, supra*, 28 Cal.4th at pp. 1183–1184 [defendant with multiple convictions of sodomy and lewd and lascivious acts on minors, diagnosed with pedophilia, had a likely and considerable risk of reoffending]; *Hubbart, supra*, 19 Cal.4th at pp. 1149–1150 [defendant convicted of various violent sex offenses involving six victims in two cases and diagnosed with a paraphilia had a high risk of reoffending].)

Interpretation of “Sexually Violent Criminal Behavior”

■ We disagree with defendant’s primary contention that “sexually violent criminal behavior” is the equivalent of “sexually violent offense.” We begin with the plain language of the Legislature, focusing first on its distinct phraseology of the first and third elements under the SVPA as found in the statement of legislative intent and in the statutory language. This differentiation in phrases indicates they are not synonymous.

The Legislature’s statement of intent and the language of the SVPA distinguish between the predicate requirement of a conviction of a “sexually violent offense” and third requirement of the likelihood of a defendant engaging in “sexually violent criminal behavior.” While a statutorily defined predicate conviction of a sexually violent offense is required, the focus on a defendant’s likely future conduct is more broadly stated in terms of behavior, specifically avoiding reference to a discrete number of statutorily defined criminal offenses. Rather than limiting the range of conduct to the offenses defined as violent sexual offenses, the Legislature chose instead to look at predatory behavior, subject to the limitation that the conduct be sexual, violent, and criminal. Persons who are likely to engage in such behavior as a

result of a mental disorder present a continuing threat to public safety, as expressed in the Legislature's statement of intent.

■ “The fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the statute as a whole. [Citations.] A corollary rule is that every word and phrase employed is presumed to be intended to have meaning and perform a useful function [citation]; a construction rendering some words in the statute useless or redundant is to be avoided. [¶] Where the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored. [Citations.] [¶] Finally, where general words follow a specific enumeration of particular classes of persons or things, the general words will be presumed as applicable to persons or things of the same general nature or class as those enumerated. [Citations.]” (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 20–21 [201 Cal.Rptr. 207].)

Defendant's interpretation of the statute would deprive the term “criminal behavior” of its independent meaning. Had the Legislature intended to restrict the institutionalization of individuals to those who only pose a risk of committing the selected offenses, it would have done so. As the Legislature chose to use two different terms, we cannot interpret these terms to have the same meaning.

■ The term “sexually violent criminal behavior” is linked to the clause of the SVPA requiring a diagnosed mental disorder. We read the two portions of the statute in context. “[A] finding of ‘likely [to] engage in sexually violent criminal behavior’ is expressly *dependent* on the existence of a statutorily defined mental disorder: ‘a diagnosed mental disorder *that makes the person* a danger to the health and safety of others *in that* it is likely that he or she will engage in sexually violent criminal behavior.’ [Citation.]” (*Cooley, supra*, 29 Cal.4th at p. 248.) An individual's mental illness, as defined by the SVPA, affects the individual's “volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” (§ 6600, subd. (c).) The mental illness makes the individual likely to commit certain actions, or predisposes the person to behave in certain ways. (*People v. Williams* (2003) 31 Cal.4th 757, 769 [3 Cal.Rptr.3d 684, 74 P.3d 779]; *Cooley, supra*, at p. 249.) “The SVPA thus consistently emphasizes the themes common to valid civil commitment statutes, i.e., a current *mental condition or disorder* that makes it difficult or impossible to control volitional behavior and *predisposes* the person to inflict harm on himself or others, thus producing *dangerousness* measured by a high risk or threat of further injurious acts if the person is not

confined. (*Hubbart, supra*, 19 Cal.4th [at pp.] 1152–1164 [rejecting substantive due process challenge to California SVPA statute, noting that the statute validly requires a mental disorder producing dangerousness]; see *Kansas v. Hendricks* (1997) 521 U.S. 346, 358 [138 L.Ed.2d 501, 117 S.Ct. 2072] (*Hendricks*) [upholding similar Kansas SVPA].) (“*People v. Superior Court (Ghilotti*) (2002) 27 Cal.4th 888, 920 [119 Cal.Rptr.2d 1, 44 P.3d 949].) The inquiry into behaviors is not an inquiry into whether an individual’s behavior may trigger future prosecutions, but whether the behaviors indicate a mental illness that predisposes a person to act in certain ways that put the public at risk.

The SVPA is similar to the Kansas statute before the Supreme Court in *Kansas v. Hendricks, supra*, 521 U.S. 346 (*Hendricks*). As the *Hendricks* court observed, commitment under the Kansas act “requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. As we have recognized, ‘[p]revious instances of violent behavior are an important indicator of future violent tendencies.’ [Citations.]’” (*Hendricks, supra*, at pp. 357–358, italics added.)

Having construed the SVPA, we have no difficulty in upholding the trial court’s finding that the opinions of Dr. Damon and Dr. Webber, combined with defendant’s unrelenting history of frotteuristic behavior, make it likely he will engage, at a minimum, in acts of forcible sexual battery. Aggressive frotteurism as exhibited by defendant involves assaulting individuals in a predatory, sexualized manner, without their consent, leading the victims to believe that they are going to be raped. This is undoubtedly sexually violent criminal behavior.⁶ (See, e.g., *People v. Valdez* (2001) 89 Cal.App.4th 1013, 1016 [107 Cal.Rptr.2d 783] [sexual battery is crime of violence for the purposes of the mentally disordered offender statute].) The Legislature views such conduct as sexual in nature, as Penal Code section 290, subdivision (c), requires individuals convicted of felony sexual battery under Penal Code section 243.4, subdivision (a), to register as sex offenders. As the trial court noted, other states have found that sexual battery of the type exhibited by defendant constitutes an act of sexual violence. (See, e.g., *Kansas v. Crane* (2002) 534 U.S. 407 [151 L.Ed.2d 856, 122 S.Ct. 867] [upholding a determination that a repeat sexual batterer with exhibitionism and antisocial personality disorder with some control over his actions could

⁶ As noted by one court, “a woman or a young girl, so closely confined on a crowded subway car that she cannot move, who suddenly feels the erect penis of a stranger repeatedly ground into her body is unlikely to perceive that event as nothing more than a minor annoyance. [Fn. omitted.]” (*State v. Michael R.* (N.Y. Sup. Ct. 2014) 2014 N.Y. Misc. Lexis 532, p. *42.)

be civilly committed and noting that Kansas's scheme required that an individual be likely to engage in repeated acts of sexual violence].)

The trial record supports a finding that defendant is violent, unable to control his behaviors, and has intense sexual fantasies about touching non-consenting women. Even while institutionalized defendant exposes himself with some regularity, believing that women are looking at his crotch and want to see his penis. He asks women to perform acts of oral copulation on him as he approaches them in a threatening manner. He is also prone to rages when rejected. The prosecution experts at trial agreed that defendant's disorders prevent him from controlling his violent sexual behaviors. His behaviors extended to nonconsensual touching by instilling fear of rape. Over an extended number of years, defendant has exhibited behaviors consistent with aggressive frotteurism, including restraining women to grab their buttocks and genitalia and "humping" them from behind.

Our interpretation of the SVPA and application to this case is consistent with what our Supreme Court has identified as the purpose of the statutory scheme. The SVPA has a "narrow and important purpose—confining and treating mentally disordered individuals who have demonstrated their inability to control specific sexually violent behavior through the commission of similar prior crimes." (*Hubbart, supra*, 19 Cal.4th at p. 1164; accord, *People v. McKee* (2010) 47 Cal.4th 1172, 1194 [104 Cal.Rptr.3d 427, 223 P.3d 566] [the purpose of the SVPA scheme is "'to establish "civil commitment" proceedings in order to provide "treatment" to mentally disordered individuals who cannot control sexually violent criminal behavior' "].) "[T]he Act targets sexual offenders who suffer from a diagnosed 'volitional impairment' making them 'dangerous beyond their control.' (*Hendricks, supra*, 521 U.S. [at p.] 358.)" (*Hubbart, supra*, at p. 1157.) "The SVPA also establishes the requisite connection between impaired volitional control and the danger posed to the public." (*Hubbart, supra*, at p. 1158.) "[T]he SVPA plainly requires a finding of dangerousness. The statute then 'links that finding' to a current diagnosed mental disorder characterized by the inability to control dangerous sexual behavior. (*Hendricks, supra*, 521 U.S. [at p.] 358.)" (*Ibid.*) Defendant's mental disorders and conduct satisfy each of the purposes.

■ Although civil commitment based on frotteurism is not common, courts in other jurisdictions have upheld civil commitments for sex offenders suffering from the disorder. (*In re Thompson* (Kan.Ct.App., July 22, 2016, No. 114,617) 2016 WL 3961541, p. *2; *In re Ritchie* (2014) 50 Kan.App.2d 698, 708–709 [334 P.3d 890]; *State v. William W.* (2013) 103 A.D.3d 521 [962 N.Y.S.2d 43, 44]; *In re Hanenberg* (N.D. 2010) 2010 ND 8 [777 N.W.2d 62, 66]; *In re Detention of Hodges* (Iowa 2004) 689 N.W.2d 467, 468–469;

In re Care and Treatment of Kennedy (2003) 353 S.C. 394, 398–400 [578 S.E.2d 27].) Each case is, of course, fact specific, but there is no blanket rule prohibiting civil commitment of a sex offender who suffers from frotteurism.

“Sexually Violent Criminal Behavior” Is Not Void for Vagueness

Defendant also contends that the term “sexually violent criminal behavior” is vague on its face, arguing that judges and juries would be free to determine *ad hoc* what constitutes a sexually violent criminal behavior. We disagree. “California courts have rejected numerous constitutional challenges to the SVPA and have resolved various statutory interpretation questions arising from the statutory scheme. [Citations.]” (*Turner v. Superior Court* (2003) 105 Cal.App.4th 1046, 1055 [130 Cal.Rptr.2d 300].)⁷

■ “The Fifth Amendment provides that ‘[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.’ Our cases establish that the Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. [(*Kolender v. Lawson* (1983) 461 U.S. 352, 357–358 [75 L.Ed.2d 903, 103 S.Ct. 1855].)] The prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process.’ [(*Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 46 S.Ct. 126].)] These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. [(*United States v. Batchelder* (1979) 442 U.S. 114, 123 [60 L.Ed.2d 755, 99 S.Ct. 2198].])]” (*Johnson, supra*, 576 U.S. at p. ____ [135 S.Ct. at pp. 2556–2557].)

■ Our Supreme Court “has recognized ‘the strong presumption that legislative enactments “must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute . . . cannot

⁷ The cases rejecting constitutional challenges to various portions of the SVPA include the following: *Hubbart, supra*, 19 Cal.4th at pages 1151–1170 (SVPA’s definition of “diagnosed mental disorder,” requirement of current dangerousness, and lack of guarantee of treatment do not violate due process; statutory scheme also does not violate equal protection); *People v. Lopez* (2004) 123 Cal.App.4th 1306 at pages 1312–1313 [20 Cal.Rptr.3d 801] (SVPA’s definition of “substantial sexual conduct” is not unconstitutionally vague by failing to define “masturbation”); and *People v. Buffington* (1999) 74 Cal.App.4th 1149 at pages 1153–1154 [88 Cal.Rptr.2d 696] (rejecting argument that SVPA violates due process on the theory that proof that a defendant is “likely” to engage in sexually violent criminal behavior dilutes the requirement of proof beyond a reasonable doubt that the disorder makes defendant likely to engage in sexually violent criminal behavior does not violate due process).

be held void for uncertainty if any reasonable and practical construction can be given to its language.”’ (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 143 [253 Cal.Rptr. 1, 763 P.2d 852].) Therefore, ‘a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that “the law is impermissibly vague *in all of its applications.*” . . . [Citation.]’ (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201 [246 Cal.Rptr. 629, 753 P.2d 585].) Stated differently, ‘ “[a] statute is not void simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language.” [Citation.]’ (*People v. Ervin* (1997) 53 Cal.App.4th 1323, 1329 [62 Cal.Rptr.2d 231].)’ (*People v. Morgan* (2007) 42 Cal.4th 593, 605–06 [67 Cal.Rptr.3d 753, 170 P.3d 129].)

Due process arguments based on vagueness that are essentially indistinguishable from defendant’s contention have been rejected by several courts in other jurisdictions. (*U.S. v. Carta* (1st Cir. 2010) 592 F.3d 34, 43 [rejecting due process challenge for vagueness to 18 U.S.C. § 4248—the federal civil commitment provision for sex offenders—as to language that a defendant has “ ‘serious difficulty in refraining from sexually violent conduct’ ” resulting from a “ ‘serious mental illness, abnormality, or disorder’ ”; the “terms are sufficiently explicit to give notice and prevent arbitrary enforcement, and the present statute also passes muster”]; accord, *U.S. v. Abregana* (D. Hawaii 2008) 574 F.Supp.2d 1123, 1142 [the term “sexually violent conduct” has a plain meaning].) “Other courts addressing void for vagueness challenges to civil commitment statutes employing similar terms have found them to be constitutionally sufficient. [(See *In re K.A.P.* (Pa.Super.Ct. 2007) 2007 PA Super 22 [916 A.2d 1152, 1159]; *Westerheide v. State* (Fla. 2002) 831 So.2d 93, 106; *Martin v. Reinstein* (Ct.App. 1999) 195 Ariz. 293 [987 P.2d 779]; *In Re Young* (1993) 122 Wash.2d 1 [857 P.2d 989].)]” (*U.S. v. Abregana, supra*, at p. 1142.) We agree with the sound reasoning of these authorities.

Defendant’s reliance on *Johnson, supra*, 576 U.S. ____ [135 S.Ct. 346], is misplaced. The *Johnson* court held that the portion of the Armed Career Criminal Act of 1984 (18 U.S.C. § 924(e)(2)(B)) defining “violent felony” as “any felony that ‘involves conduct that presents a serious potential risk of physical injury to another’ ” is unconstitutionally vague. (*Johnson*, at p. ____ [135 S.Ct. at p. 2556].) The court identified two features rendering the provision vague. First, “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” (*Id.* at p. ____ [135 S.Ct. at p. 2557].) Second, “the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” (*Id.* at p. ____ [135 S.Ct. at p. 2558].)

■ That portion of the SVPA requiring evidence that a defendant is likely to engage in sexually violent criminal behavior suffers from neither of the defects identified in *Johnson*. There is no uncertainty regarding the risk involved in sexually violent criminal behavior. Under the SVPA, “a person is ‘likely [to] engage in sexually violent criminal behavior’ if at trial the person is found to present a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes if released from custody. [Fn. omitted.]” (*Roberge, supra*, 29 Cal.4th at p. 988.) The required factual determination lacks the uncertainty deemed fatal to the statute in *Johnson*. Conduct that is violent and sexual is well-defined in the Penal Code, and as noted above, includes the form of sexual battery engaged in by defendant. The SVPA is not vague in regard to the likely behavior of the defendant—it must be predatory, sexual, and violent. These terms have common meanings that require no further definition and fall far short of unconstitutional vagueness.

We have two final points as to why the reasoning of *Johnson* has no application to this case. First, “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.” (*Schall v. Martin* (1984) 467 U.S. 253, 278 [81 L.Ed.2d 207, 104 S.Ct. 2403].) The *Johnson* court made clear that the “dozens of federal and state criminal laws use terms like ‘substantial risk,’ ‘grave risk,’ and ‘unreasonable risk,’ ” are “[n]ot at all” subject to “constitutional doubt,” because “we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree,’ [(*Nash v. United States* (1913) 229 U.S. 373, 377 [57 L.Ed. 1232, 33 S.Ct. 780].)]” (*Johnson, supra*, 576 U.S. at p. ____ [135 S.Ct. at p. 2561].) The SVPA’s requirement of a sexually violent criminal offense, linked to a diagnosed mental disorder, is the type of qualitative standard deemed permissible in *Johnson*. Second, the Supreme Court in *Hendricks* rejected a due process challenge to a Kansas civil commitment statute which required proof that “persons who, due to a ‘mental abnormality’ or a ‘personality disorder, are likely to engage in ‘predatory acts of sexual violence.’ Kan. Stat. Ann. § 59-29a01 *et seq.* (1994).” (*Hendricks, supra*, 521 U.S. at pp. 350, 360.) Nothing in *Johnson* indicates the Supreme Court intended to suggest *Hendricks* was incorrectly decided or that there is a due process issue in statutes akin to the SVPA.

Contrary to defendant’s contentions, the term “sexually violent” provides sufficient notice to the public regarding what conduct might trigger a civil commitment. Defendant contends that the trial court’s definition of “sexually violent” was focused on a hypothetical traumatic risk to a victim, claiming that possessing child pornography could be an act of sexual violence under this definition. This mischaracterizes the trial court’s findings, which explicitly stated that defendant’s frotteurism demonstrated that he is likely to

engage in a form of sexual battery which is predatory, sexual, violent, and criminal in nature. “Sexually violent criminal behavior” does not include the type of “hands off” offenses described by defendant. Simply pointing to marginal, hypothetical cases, that arguably may not be covered by the statute, is insufficient to show that the SVPA is unconstitutionally vague.

DISPOSITION

The judgment is affirmed.

Turner, P. J., and Baker, J., concurred.

Appellant’s petition for review by the Supreme Court was denied December 21, 2016, S237517.

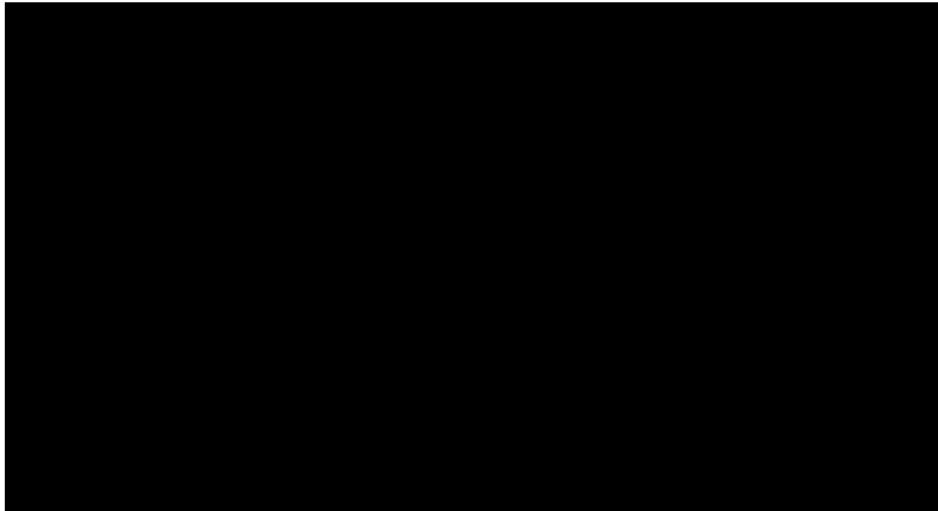
[No. B269253. Second Dist., Div. Six. Sept. 19, 2016.]

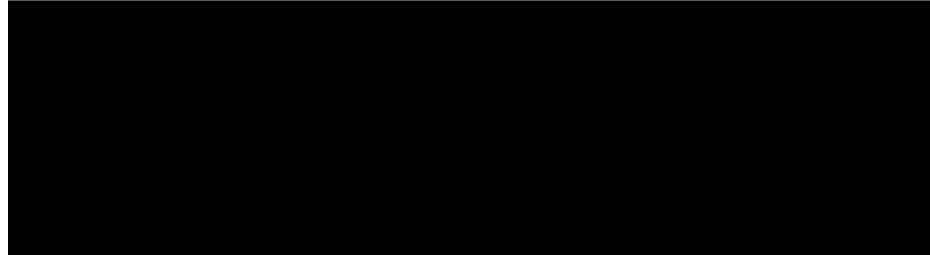
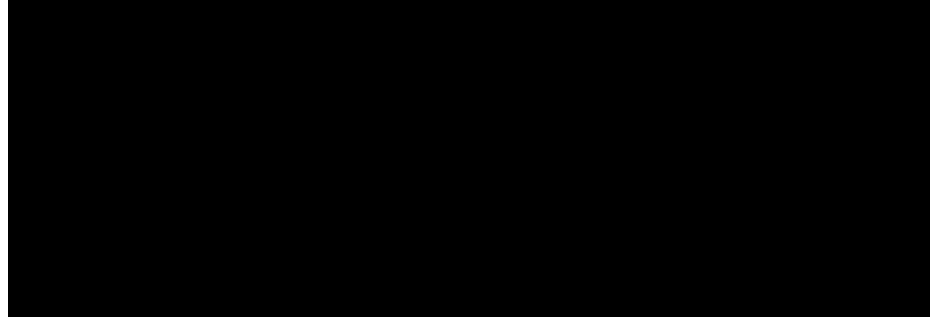
THE PEOPLE, Plaintiff and Respondent, v.
DILLAN MICHAEL WOODS, Defendant and Appellant.

[REDACTED]

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[REDACTED]





COUNSEL

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

PERREN, J.— ■ A prisoner may be committed for treatment under the Mentally Disordered Offender (MDO) Act (Pen. Code, § 2960 et seq.) if, among other things, he or she was sentenced to prison for an enumerated crime of violence or an unenumerated crime involving the use of force or

violence or a threat to use force or violence likely to produce substantial physical harm.¹ In *People v. Stevens* (2015) 62 Cal.4th 325 [195 Cal.Rptr.3d 762, 362 P.3d 408] (*Stevens*), our Supreme Court held that “in a commitment hearing under the MDO Act, the People may not prove the facts underlying the commitment offense (that are necessary to establish the qualifying offense) through a mental health expert’s opinion testimony.” (*Id.* at p. 339.)

■ Appellant Dillan Michael Woods was declared an MDO based on his conviction of resisting an executive officer (§ 69), an offense not specifically enumerated in the MDO Act. The qualifying nature of the crime, however, was established by evidence he pled guilty to a complaint expressly alleging that he used force and violence in committing the offense. We reject appellant’s claim that *Stevens* renders this evidence insufficient to support his MDO commitment. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2014, appellant was convicted of resisting an executive officer and was sentenced to two years in state prison. In October 2015, the Board of Parole Hearings certified him for MDO treatment.

Dr. Brandi Mathews conducted an evaluation of appellant and reviewed his medical records and prior MDO evaluations. She also reviewed the probation report and consulted with appellant’s treating psychologist and psychiatrist. Dr. Mathews concluded that appellant met the MDO criteria. On the issue of appellant’s commitment offense, the People offered copies of the felony complaint charging appellant with resisting an executive officer in violation of section 69 and the abstract of judgment reflecting he was convicted by guilty plea of that crime. The complaint states that appellant “did willfully and unlawfully attempt by means of threats and violence to deter and prevent Contra Costa Sheriff’s Office Deputies D. Roberts, J. Dyer, K. Emley, and J. Hiles, who were executive officers, from performing a duty imposed upon the officers by law, and knowingly resisted by the use of force and violence and by means of threats of violence the executive officers in the performance of duty.” The complaint further reflects that appellant was separately charged with committing a battery against Deputy Roberts in violation of sections 242 and 243.

The prosecutor asked Dr. Mathews if she had determined whether appellant’s commitment offense involved the use of force or violence (§ 2962, subd. (e)(2)(P)) or an express or implied threat to use force or violence (*id.*,

¹ Penal Code section 2962, subdivision (e)(2)(A)–(Q). All statutory references are to the Penal Code.

subd. (e)(2)(Q)). The court sustained appellant's objection on the ground that Dr. Mathews was not qualified to make that determination. The court also noted, "I think you have an argument as we discussed at sidebar that [the commitment offense] would qualify under subdivision [(e)(2)(Q) of section 2962] [B]ut the only evidence that you have on that . . . is an abstract of judgment."

At the conclusion of the hearing, the court found that appellant's commitment offense qualified him for MDO treatment "based on [him] having either . . . used force or violence or threatened [*sic*]." The court further found that the remaining MDO criteria had also been met and accordingly denied appellant's petition and ordered him committed for one year of treatment.

DISCUSSION

Appellant contends the evidence is insufficient to establish that his conviction for resisting an executive officer (§ 69) is a qualifying offense under the MDO Act. He claims the record fails to support a finding that his crime involved either the actual use of force or violence (§ 2962, subd. (e)(2)(P)) or an express or implied threat to use force or violence (*id.*, subd. (e)(2)(Q)). We disagree.

We review the trial court's ruling under the substantial evidence standard. We must affirm if the evidence, viewed in the light most favorable to the judgment, could have led any rational trier of fact to make a finding that appellant's offense of resisting an executive officer involved the threat or use of force or violence. (See *People v. Clark* (2000) 82 Cal.App.4th 1072, 1082–1083 [98 Cal.Rptr.2d 767]; *People v. Martin* (2005) 127 Cal.App.4th 970, 975 [26 Cal.Rptr.3d 174].)

Although five of the six criteria for appellant's MDO commitment were established by expert testimony, the sixth—that he was sentenced to prison for a qualifying offense—was established by his plea to the specific allegations of the accusatory pleading charging him with resisting an executive officer.² "Section 69 can be violated in two ways: first, by attempting with

² To establish that a prisoner is an MDO, "the People have the burden of proving beyond a reasonable doubt [citation] six criteria: (1) the prisoner has been sentenced to prison for a qualifying offense; (2) '[t]he prisoner has a severe mental disorder'; (3) the disorder 'is not in remission or cannot be kept in remission without treatment'; (4) the disorder 'was one of the causes of or was an aggravating factor in the commission of [the] crime'; (5) '[t]he prisoner has been in treatment for the . . . disorder for 90 days or more within the year prior to the prisoner's parole or release'; and (6) specified mental health professionals have evaluated the prisoner and have found that criteria (2) through (4) are satisfied, and the chief psychiatrist of the Department of Corrections and Rehabilitation has certified that criteria (2) through (5) have been satisfied and also that 'by reason of his or her . . . disorder the prisoner represents a

threats or violence to deter an officer from performing his or her duties; and second, by resisting an officer by force or violence.” (*People v. Campbell* (2015) 233 Cal.App.4th 148, 160 [182 Cal.Rptr.3d 491].) Appellant was charged with, and pled guilty to, both deterring *and* resisting. To prove that the crime was a qualifying offense, the prosecution offered a copy of the abstract of judgment reflecting appellant’s guilty plea conviction along with a copy of the felony complaint alleging, among other things, that appellant had “knowingly resisted *by the use of force and violence* and by means of threats and violence the executive officers in the performance of duty.” (Italics added.)

This evidence is sufficient to support the trial court’s finding that appellant’s commitment offense was one “in which the prisoner used force or violence” as set forth in subdivision (e)(2)(P) of section 2962. In arguing otherwise, appellant notes the court appears to have agreed with the prosecution’s assertion that section 69 “is a violent offense on its face” and that a mere conviction of that crime qualifies a prisoner for treatment under both of the MDO Act’s catchall provisions. Although we reject this assertion, we review the legal correctness of the trial court’s ruling, not its reasoning. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [17 Cal.Rptr.2d 122, 846 P.2d 704].)³

Appellant also erroneously interprets the holding in *Stevens* to mean that the People could not prove his commitment offense qualified him for MDO treatment without offering admissible evidence of facts underlying the offense. *Stevens* merely dictates that such facts cannot be proven through expert testimony. The opinion did not contemplate a situation, like the present one, in which the People offered documentary evidence that the prisoner admitted his commitment offense involved the use of force or violence. The crime of resisting an executive officer in violation of section 69, as charged here, included the use of force or violence as an essential element. By pleading guilty, appellant admitted every element of the charged crime. (*In re Chavez* (2003) 30 Cal.4th 643, 649 [134 Cal.Rptr.2d 54, 68 P.3d 347].) Because he admitted using force and violence, proof of the underlying facts was not

substantial danger of physical harm to others.’ [Citations.]” (*People v. Baker* (2012) 204 Cal.App.4th 1234, 1243 [139 Cal.Rptr.3d 594].)

³ The crime of *deterring* an officer by means of *threat* does not fall under section 2962, subdivision (e)(2)(P), because it does not involve the actual use of force or violence. Moreover, the crime would not fall under section 2962, subdivision (e)(2)(Q)’s catchall provision unless the evidence established the defendant “threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. . . .” (*Ibid.*) Although the provision goes on to clarify that “substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury” (*ibid.*), it appears manifest that the requisite showing would require proof beyond the mere fact of the conviction.

essential to a finding that the crime involved the use of force or violence, as contemplated in subdivision (e)(2)(P) of section 2962.

The judgment (MDO commitment order) is affirmed.

Gilbert, P. J., and Yegan, J., concurred.

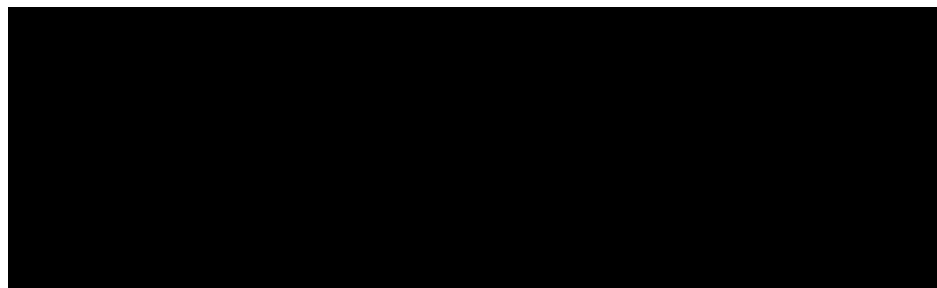
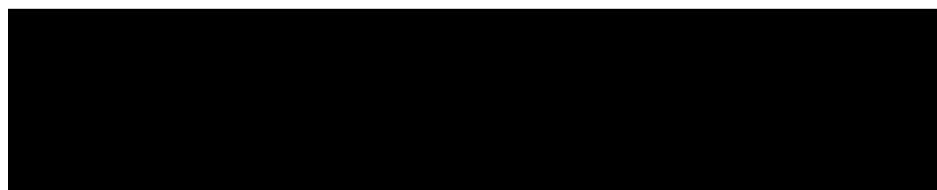
[No. A144702. First Dist., Div. Three. Sept. 19, 2016.]

SAN FRANCISCO APARTMENT ASSOCIATION et al., Plaintiffs and Respondents, v.
CITY AND COUNTY OF SAN FRANCISCO, Defendant and Appellant.

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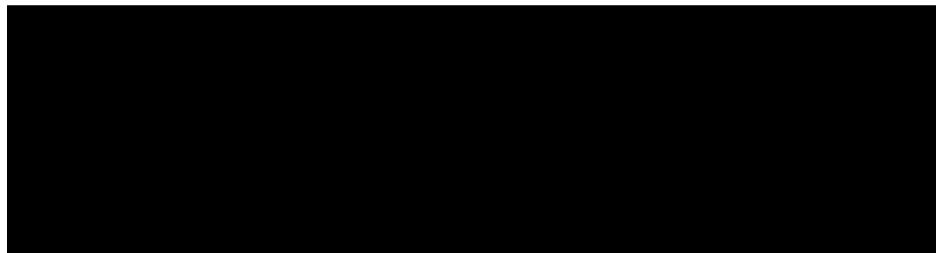
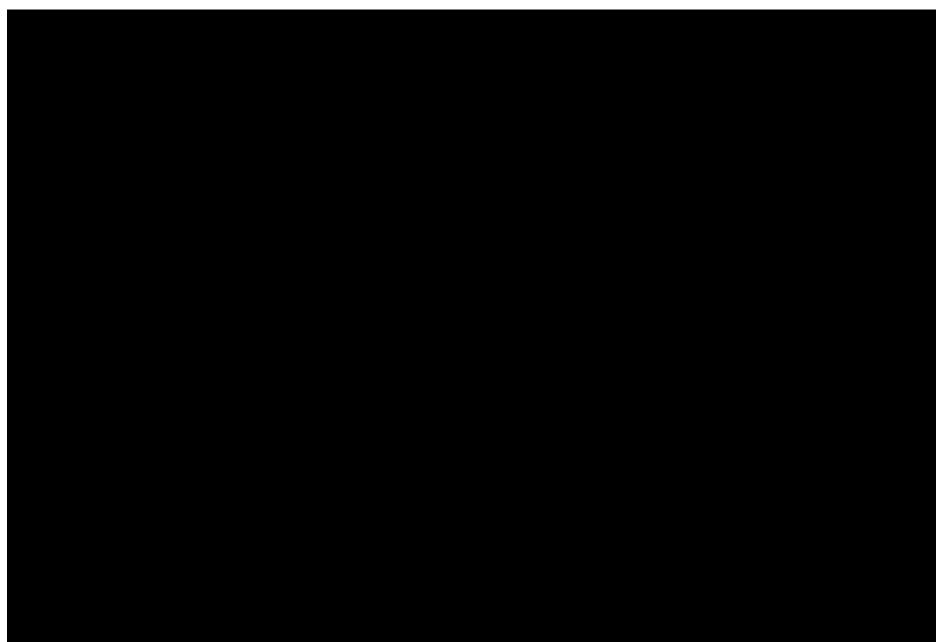
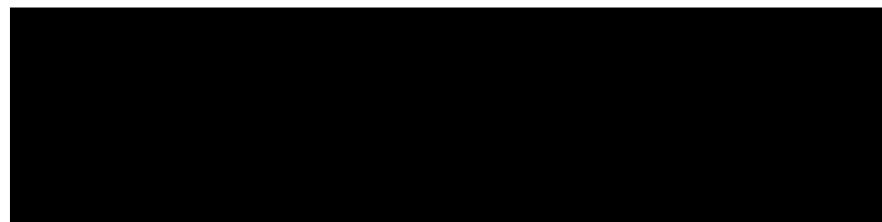
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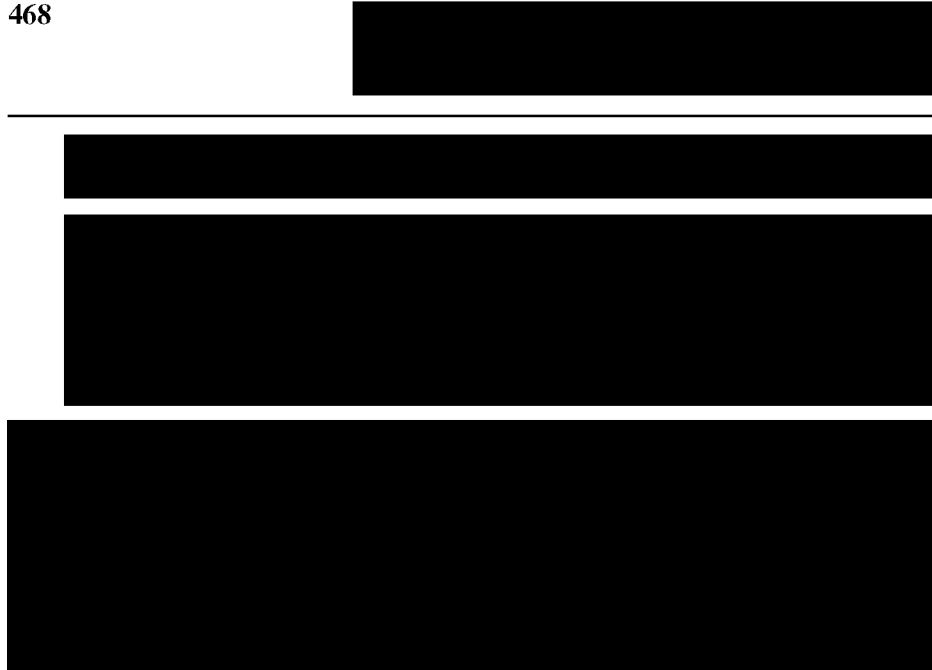
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COUNSEL

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Nielsen Merksamer Parrinello Gross & Leoni, James R. Parrinello, Christopher E. Skinnell and James W. Carson for Plaintiffs and Respondents.

OPINION

JENKINS, J.—This is an appeal from the trial court's grant of a writ of mandate and injunctive relief in favor of plaintiffs San Francisco Apartment Association (SFAA), Coalition for Better Housing (CBH), and San Francisco Association of Realtors (SFAR) (collectively, plaintiffs). Plaintiffs sought this relief against defendant City and County of San Francisco (City/County) on preemption grounds, asserting that a local ordinance, San Francisco Planning Code,¹ article 3, former section 317, subdivision (e)(4) (hereinafter, former section 317(e)(4) or Ordinance), absolutely conflicted with the Ellis Act, Government Code section 7060 et seq. (hereinafter, Ellis Act).

The Ellis Act is a California statute that, among other things, protects property owners' right to exit the residential rental business. The Ordinance, in turn, was enacted in its current form in December 2013 as part of Ordinance No. 287-13 in response to a growing concern by the board of supervisors (and others) about the shortage of affordable local housing and

¹ All further undesignated citations are to the San Francisco Planning Code.

rental properties. Pursuant to former section 317(e)(4), certain residential property owners—to wit, those undertaking no-fault evictions, including so-called Ellis Act evictions—became subject to a 10-year waiting period after withdrawing a rental unit from the market before qualifying to apply for approval to merge the withdrawn unit into one or more other units.² Following several rounds of briefing and a contested hearing, the trial court agreed with plaintiffs that the Ordinance impermissibly penalized property owners for exercising their rights under the Ellis Act and, as such, was facially void on preemption grounds. Accordingly, the trial court entered an order enjoining the City/County from enforcing the Ordinance as to property owners undertaking no-fault evictions pursuant to the Ellis Act.

On appeal, the City/County challenges the trial court’s reasoning and decision as legally flawed, as well as the trial court’s threshold finding that plaintiffs had standing to bring this preemption action.

For reasons to follow, we reject the City/County’s contention that plaintiffs lack standing to bring this preemption action. In addition, we conclude, like the trial court, that former section 317(e)(4) is preempted by the Ellis Act to the extent it requires a landlord effectuating a no-fault eviction to wait 10 years before applying for a permit to undertake a residential merger on the property. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 28, 2014, plaintiffs filed a verified petition for writ of mandate and complaint for injunctive and declaratory relief (petition) alleging the City/County violated the Ellis Act by enacting former section 317(e)(4) as part of the San Francisco Planning Code. This provision provides in relevant part: “The [City’s] Planning Commission shall not approve an application for merger if any tenant has been evicted pursuant to [San Francisco] Administrative Code Sections 37.9(a)(9) through 37.9(a)(14) where the tenant was served with a notice of eviction after December 10, 2013 if the notice was served within ten (10) years prior to filing the application for merger.”³ (Former § 317(e)(4).)

² A “residential merger” is defined by the San Francisco Planning Code as “the combining of two or more legal Residential Units, resulting in a decrease in the number of Residential Units within a building, or the enlargement of one or more existing units while substantially reducing the size of others by more than 25% of their original floor area, even if the number of units is not reduced.” (Former § 317, subd. (b)(7).)

³ As the City/County notes, other subdivisions of the Ordinance create certain exemptions from the requirement that property owners wait 10 years before merging two or more residential units, including exemptions for units that are “demonstrably not affordable or financially accessible housing,” or units owned by various governmental entities. (§ 317, former subds. (e)(3), (g).) In addition, former section 317(e)(4) itself states: “This Subsection (e)(4) shall not apply if the tenant was evicted under Section 37.9(a)(11) or 37.9(a)(14) and the

The San Francisco Administrative Code provisions referred to in former section 317(e)(4)—namely, section 37.9, subdivision (a)(9) through (14)—set forth six permissible grounds for evicting a non-faulting tenant, including conversion of the rental unit into a condominium and temporary removal for the purpose of undertaking capital improvements or rehabilitative work on the unit.⁴

The Ellis Act, in turn, absolutely prohibits local government entities from “compel[ling] the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease, except for guestrooms or efficiency units within a residential hotel . . .”⁵ (Gov. Code, § 7060, subd. (a).)

applicant(s) either (A) have certified that the original tenant reoccupied the unit after the temporary eviction or (B) have submitted to the Planning Commission a declaration from the property owner or the tenant certifying that the property owner or the Rent Board notified the tenant of the tenant’s right to reoccupy the unit after the temporary eviction and that the tenant chose not to reoccupy it.” (Former § 317(e)(4).) However, plaintiffs have challenged only former section 317(e)(4) as it applies to mergers following evictions noticed pursuant to San Francisco Administrative Code section (e)(13), otherwise known as Ellis Act evictions.

⁴ Among other things, the San Francisco Administrative Code establishes mandatory procedures that landlords must follow when withdrawing rental units from the rental market, including service of a notice of termination of tenancy on all tenants in possession of the unit and a notice of intent to withdraw rental units with the San Francisco Rent Board prior to the withdrawal. (S.F. Admin. Code, § 37.9, subd. (a)(13).)

⁵ The Ellis Act was originally enacted to counteract a California Supreme Court decision, *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97 [207 Cal.Rptr. 285, 688 P.2d 894], which upheld the constitutionality of a city ordinance requiring owners of residential rental property who wanted to remove their property from the rental market by demolition or conversion to obtain a permit prior to removing it. As explained by our First District Appellate colleagues: “The city would issue the mandatory permit only where (1) the property was unoccupied by or unaffordable to a low- or moderate-income person, (2) the property’s removal from the rental market would not adversely affect the housing supply, and (3) the owner could not make a reasonable return on investment. (*Nash, supra*, 37 Cal.3d at pp. 100–101.) *Nash* upheld the ordinance, holding that a residential rental property owner does not have a constitutional right, free from government interference, to go out of the rental business. (*Id.* at pp. 103–104.) [¶] The legislative response was passage of the Ellis Act, which prohibits a city or county from enacting legislation that compels the owner of residential real property to offer or continue to offer accommodations in the property for rent or lease.” (*Reidy v. City and County of San Francisco* (2004) 123 Cal.App.4th 580, 587–588 [19 Cal.Rptr.3d 894] (*Reidy*)).

Thus, in enacting the Ellis Act and thereby overturning this case law, the Legislature expressly stated its intent in relevant part as follows: “It is the intent of the Legislature in enacting this chapter to supersede any holding or portion of any holding in *Nash v. City of Santa Monica*, 37 Cal.3d 97 to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business. However, this act is not otherwise intended to do any of the following: [¶] (a) Interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease under this chapter.

“(b) Preempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property.

[REDACTED]

According to plaintiffs' petition, former section 317(e)(4) effectively undermines this provision of the Ellis Act by "penaliz[ing] property owners who exercise their rights under state law and thereby seek[ing] to compel continuing residential rentals, notwithstanding the Ellis Act." Plaintiffs thus sought the writ of mandate to enjoin the City/County from "enforcing section (e)(4) insofar as it applies to owners who notice evictions pursuant to Administrative Code section 37.9(a)(13) [to wit, Ellis Act evictions]."

On February 27, 2014, the City/County answered the petition, denying that former section 317(e)(4) "adversely affect[ed] the ability of [plaintiffs] to purchase, sell, manage or otherwise control real property or to exercise their constitutional and statutory rights with respect to real property they own or manage in San Francisco." The City/County also set forth several affirmative defenses, including lack of standing, police power and separation of powers.

On December 18, 2014, the trial court granted the writ of mandate and declared former section 317(e)(4) facially invalid and unenforceable insofar as it applies to landlords who notice evictions pursuant to the Ellis Act. The trial court reasoned the Ordinance improperly sought to restrain plaintiffs from permanently exiting the residential rental business by requiring a 10-year waiting period before approval could be obtained for merging two or more units of the property. The trial court thus permanently enjoined the City/County and its agents and representatives from enforcing former section 317(e)(4) as to landlords who notice evictions pursuant to the Ellis Act. The trial court entered judgment in plaintiffs' favor on December 18, 2014. This appeal of the trial court's ruling followed.

DISCUSSION

The City/County raises three primary contentions on appeal. First, the City/County contends that, as a threshold matter, plaintiffs have not established their associational standing to bring this action, requiring reversal on jurisdictional grounds without regard to the merits of their petition. Second, the City/County contends that, in any event, the Ordinance is a valid exercise of the police power preserved for local governments by the California Constitution. (Cal. Const., art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].) As such, the City/County reasons, the Ordinance is not preempted by the Ellis Act, a state statute that expressly reserves for local governments the authority to enact such land use

"(c) Override procedural protections designed to prevent abuse of the right to evict tenants.

"(d) Permit an owner to withdraw from rent or lease less than all of the accommodations, as defined by paragraph (1) or (2) of subdivision (b) of Section 7060. . ." (Gov. Code, § 7060.7, subds. (a)-(d), *italics added*.)

laws within their confines.⁶ And finally, the City/County contends that, even assuming the Ordinance could, in certain situations, apply in a manner in conflict with the Ellis Act, plaintiffs herein have mounted a facial challenge to the Ordinance, requiring a showing that “no set of circumstances exist under which the [law] would be valid.” (See *Association of California Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1054 [103 Cal.Rptr.3d 458].) Here, the City/County insists, plaintiffs have failed to make this requisite showing of facial invalidity. We address these issues in turn below.

I. *Do Plaintiffs Have Standing to Bring This Action?*

As an initial matter, the City/County challenges plaintiffs’ associational standing to bring this action for writ relief on behalf of their members. The applicable law is not in dispute.

■ “A litigant’s standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. [Citation.] Standing goes to the existence of a cause of action (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 862, p. 320), and the lack of standing may be raised *at any time* in the proceedings. [Citations.]” (*Apartment Assn. of Los Angeles v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128 [38 Cal.Rptr.3d 575] (*Apartment Association*).) (2) “‘[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’”’’ (*Apartment Association*, *supra*, 136 Cal.App.4th at p. 129.)

■ Here, the City/County disputes the existence of just one of the three identified criteria: The standing of individual members to sue on their own behalf. According to the City/County, plaintiffs have failed to establish their individual members could have challenged the validity of the Ordinance in their own right because they have failed to prove their members are “beneficially interested” in the outcome of these proceedings. (See *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165 [127

⁶ As will be discussed in more detail below, the Legislature amended the Ellis Act in 1999, confirming its intent to protect the right of landlords to go out of business, while adding new language to Government Code section 7060.7 to clarify that the Act is “not otherwise intended to . . . [¶] (a) Interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease under [the Act]. [¶] (b) Preempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property.” (Gov. Code, § 7060.7, subds. (a), (b).)

[REDACTED]

[REDACTED]

Cal.Rptr.3d 710, 254 P.3d 1005] [“As a general rule, a party must be ‘beneficially interested’ to seek a writ of mandate. (Code Civ. Proc., § 1086.)”]; see also *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist.* (2015) 235 Cal.App.4th 957, 962 [185 Cal.Rptr.3d 781] [for standing purposes, the “beneficial interest must be direct and substantial”].)

Below, the trial court found plaintiffs had satisfactorily proved the beneficial interest of their members, reasoning that former section 317(e)(4) “infringes on the[] [members’] right to own, manage and serve as agents for rental properties in San Francisco which are regulated by section 317(e)(4).” According to the trial court: “Section 317(e)(4) directly infringes on the constitutional right of SFAA and CBH members to exit the rental market under the Ellis Act. [Citation.] Similarly, section 317(e)(4) adversely affects the ability of real estate agents and brokers, represented by SFAR, to market, sell, and manage rental properties located in the City and County of San Francisco. [Citation.] Thus, the individual members of the three petitioner organizations will be injured by 317(e)(4) if it is enforced, and as such could have challenged the Ordinance in their own right.”

We conclude the trial court’s findings on the threshold issue of standing are adequately supported by evidence in the record in the form of sworn declarations submitted by three individuals on behalf of plaintiffs. For example, Janan New, executive director of SFAA, filed a declaration attesting that, among other things, the plaintiff organization had 2,800 active members that collectively own more than 65,000 residential units. As soon as the Ordinance passed, New received numerous calls from members protected under the Ellis Act asking how the new law would apply to residential properties in San Francisco and for the organization to file a lawsuit in order to protect their rights.

Brook Turner, executive director of CBH, filed a declaration, in turn, attesting that, collectively, CBH’s members own more than 20,000 residential units in San Francisco, and that each member is protected by the Ellis Act and would be subject to the merger ban under former section 317(e)(4) to their detriment.

And, finally, Walter Baczkowski, chief executive officer of SFAR, filed a declaration attesting that its 4,200 agent/broker members are engaged for their livelihood in the sale or rental of residential real property in San Francisco and would be adversely affected by continued enforcement of former section 317(e)(4). As one example of such adverse effects, Baczkowski pointed out that SFAR members are harmed when the Ordinance discourages prospective buyers from purchasing buildings in San Francisco

where Ellis Act evictions have occurred in situations where the prospective buyers seek to merge units in the building to, e.g., form and occupy a single-family residence.

■ This evidentiary showing is adequate to prove plaintiffs' associational standing. The fact that plaintiffs did not offer proof that each individual member had suffered, or was at imminent risk of suffering, actual injury is of no moment. The City/County directs us to no legal authority suggesting otherwise. Rather, the relevant authority makes clear it is enough if the plaintiff organization proves by a preponderance of the evidence that its members have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." [Citation.] . . . [To the contrary,] [w]rit relief is not available if the petitioner gains no direct benefit from the writ's issuance, or suffers no direct detriment from its denial. [Citation.]" (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 985 [194 Cal.Rptr.3d 444]; accord, *Apartment Association*, *supra*, 136 Cal.App.4th at pp. 127–129 [individual members of a trade organization representing owners and managers of residential rental property in the city had standing to challenge a municipal rent stabilization ordinance where said members were subject to the ordinance and, thus, were or could become subject to its restrictions on collecting excessive rent from qualified low-income, disabled or senior tenants]; *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 363 [87 Cal.Rptr.2d 654, 981 P.2d 499] [“[i]f . . . [plaintiff organization] could demonstrate that the [project stabilization agreement] specification has the effect of infringing its members' rights of association or expression, or that it has an anticompetitive impact on them, then [it] might legitimately claim a beneficial interest within the meaning of Code of Civil Procedure section 1086”].) And, here, this standard has been met given the evidence in plaintiffs' sworn declarations that thousands of their individual members are involved in the sale and rental of residential rental properties in San Francisco, are protected by the Ellis Act, and would or could be negatively impacted by the continued enforcement of the Ordinance's 10-year merger ban in buildings where Ellis Act evictions have occurred.

Accordingly, we affirm the trial court's threshold finding that plaintiffs have associational standing to bring this action and proceed to the merits.

II. *Is Former Section 317(e)(4) a Valid Exercise of Local Government Authority or Fatally Inconsistent with State Law?*

The City/County's central challenge is to the trial court's finding that the Ordinance is facially invalid and unenforceable insofar as it applies to

landlords seeking approval to merge residential units after undertaking an Ellis Act eviction on their property. The parties agree the de novo standard of review governs. (*Johnson v. City and County of San Francisco* (2006) 137 Cal.App.4th 7, 12 [40 Cal.Rptr.3d 8] (*Johnson*); *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 904 [70 Cal.Rptr.3d 324] [“A trial court’s decision invalidating a local ordinance on grounds of preemption is reviewed de novo”].) The well-established principles of preemption are as follows.

A. *The Principles of Preemption.*

■ “[A] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) ‘Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 “We have recognized that a city’s or county’s power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.”’ (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [45 Cal.Rptr.3d 21, 136 P.3d 821], fn. omitted (*Big Creek Lumber Co.*).) Consistent with this principle, ‘when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute.’ (*Id.*, at p. 1149; see [citation].)’ (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 742–743 [156 Cal.Rptr.3d 409, 300 P.3d 494] (*City of Riverside*)).

■ However, a local ordinance may not conflict with state law; if it does, it is void. (*City of Riverside*, *supra*, 56 Cal.4th at p. 743; see also *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 [16 Cal.Rptr.2d 215, 844 P.2d 534] (*Sherwin-Williams*).) For purposes of the preemption analysis, local legislation conflicts with state law if it “‘‘‘‘‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’’’ [Citations.]” (*Sherwin-Williams*, *supra*, at p. 897.) To “duplicate” state law, the local legislation must be “coextensive therewith.” (*Ibid.*) To “contradict” state law, the local legislation must be “inimical thereto.” (*Id.* at p. 898.) Moreover, the “‘‘‘contradictory and inimical’ form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands.” (*City of Riverside*, *supra*, 56 Cal.4th at p. 743.) In other words, if “it is reasonably possible to comply with both the state and local laws,” there is no inimical conflict. (*Ibid.*)

■ To enter an area “fully occupied” by general law, in turn, the Legislature must either expressly or impliedly manifest the intent to so occupy the area. Express intent is where the Legislature has directly stated that the field has been occupied. Implied intent, on the other hand, is where “‘(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.’” (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898; see *City of Riverside, supra*, 56 Cal.4th at p. 743; see also *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 188 [127 Cal.Rptr.3d 726, 254 P.3d 1019].) In the words of the California Supreme Court: “[W]e have been particularly “reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.”’ [Citation.] ‘The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.’” (*City of Riverside, supra*, 56 Cal.4th at p. 744.)

■ Finally, in performing the preemption analysis, we must keep in mind the general rule that the validity of a legislative enactment hinges on the enactment’s actual operation and effect rather than the subjective motivation of the legislators: “[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, *except as they may be disclosed on the face of the acts*, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments.”’ (*County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726 [119 Cal.Rptr. 631, 532 P.2d 495], italics added, citing *Soon Hing v. Crowley* (1885) 113 U.S. 703, 710–711 [28 L.Ed. 1145, 5 S.Ct. 730].) Thus, “[p]urpose alone is not a basis for concluding a local measure is preempted. While [reviewing courts] have occasionally treated an ordinance’s purpose as relevant to state preemption analysis [citations], we have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself.” (*California Grocers Assn. v. City of Los Angeles, supra*, 52 Cal.4th at p. 190, fn. omitted.)

Returning to this case, the trial court found former section 317(e)(4) preempted by the Ellis Act because the Ordinance “penalizes landlords for leaving the rental business by banning any mergers in a building for ten years after a landlord removes the property from the rental market under the Ellis Act. Such punishments are preempted, regardless of whether they take the form of formal permits, additional notification requirements, waiver of future rights, or burdens on a landlord’s exercise of his or her rights, because they directly contradict state law by penalizing and discouraging conduct that the Ellis Act expressly authorizes.”⁷ In so finding, the trial court noted that, according to statistics from the San Francisco Rent Board, of the four types of no-fault evictions subject to the 10-year merger ban under former section 317(e)(4), Ellis Act evictions are “by far the most common ground [for eviction], and so is the *de facto* prime target of [the Ordinance].” Accordingly, the trial court declared the Ordinance facially void. Having applied the legal principles set forth above, we agree with the trial court’s conclusion. To explain why, we first look more closely at these two laws.

B. *The Interplay Between the Ellis Act and Former Section 317(e)(4).*

■ As stated above, the Ellis Act provides real property owners the absolute right to exit the residential rental business. “The legislative history of the Act consistently demonstrates the purpose of the Act is to allow landlords who comply with its terms to go out of the residential rental business by evicting their tenants and withdrawing all units from the market, even if the landlords could make a fair return, the property is habitable, and the landlords lack approval for future use of the land. In addition to the statement of legislative intent contained in the Act (Gov. Code, § 7060.7), the various legislative committee reports concerning the Act indicate the Act was intended to overrule the *Nash* decision so as to permit landlords the unfettered right to remove all residential rental units from the market, consistent of course, with guidelines as set forth in the Act and adopted by local governments in accordance thereto. (See Sen. Com. on Judiciary (1985–1986) Analysis of Sen. Bill No. 505, Local Controls Residential Real Property, p. 2 [“The purpose of this bill is to overturn *Nash* and to provide landlords the unfettered right to remove rental units from the marketplace”]; [citations].) Thus, the Ellis Act was clearly meant to preempt any local ordinance that prohibited a landlord from removing its rental units from the marketplace. (Gov. Code, § 7060.7; *Javidzad v. City of Santa Monica*, *supra*, 204 Cal.App.3d 524, 530 . . . ; *City of Santa Monica v. Yarmark* [(1988)] 203 Cal.App.3d [153,] 165

⁷ In finding the Ordinance preempted by the Ellis Act, the trial court expressly relied on the following cases, which will be discussed in depth *post: Reidy, supra*, (2004) 123 Cal.App.4th 580, 588; *Javidzad v. City of Santa Monica* (1998) 204 Cal.App.3d 524, 530 [251 Cal.Rptr. 350] (*Javidzad*); and *Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles* (1997) 54 Cal.App.4th 53, 61–62 [62 Cal.Rptr.2d 600] (*Lincoln Place I*).

[249 Cal.Rptr. 732]; accord, *Channing Properties v. City of Berkeley* (1992) 11 Cal.App.4th 88, 94 [14 Cal.Rptr.2d 32]" (*Lincoln Place I, supra*, 54 Cal.App.4th 53, 61–62.)

■ At the same time, however, courts both recognize and respect the reservations of power set forth in the Ellis Act with respect to local government authorities: "Notwithstanding Section 7060, nothing in this chapter does any of the following: [¶] . . . [¶] (b) Diminishes or enhances . . . any power which currently exists or which may hereafter exist in any public entity to grant or deny any entitlement to the use of real property, including, but not limited to, planning, zoning, and subdivision map approvals." (§ 7060.1, subd. (b).) Meanwhile, elsewhere in the Ellis Act, the legislature expressly denies any intent to, among other things, "[i]nterfere with local governmental authority over land use," "[p]reempt local . . . land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property," or "[o]verride procedural protections designed to prevent abuse of the right to evict tenants." (Gov. Code, § 7060.7, subds. (a)–(c).) Considered in its entirety, "the Ellis Act does not prohibit local governments from providing procedural protections designed to prevent abuse of the right to evict tenants (§ 7060.7, subd. (c)), [but] it 'completely occupies the field of substantive eviction controls over landlords who wish to withdraw' all units from the residential rental market. [Citation.]" (*Johnson, supra*, 137 Cal.App.4th at p. 14.)

Not surprisingly, in our case, the parties disagree on whether former section 317(e)(4) has the effect of regulating in the very field the state has expressly reserved to itself vis-à-vis the Ellis Act, or of regulating in one of the fields reserved under the Act for local government entities. For its part, the City/County denies the Ordinance violates any conduct or activity prohibited under the Ellis Act, and insists the preemption doctrine is simply not applicable. In support of its contention, the City/County argues, first, that the Ordinance does not "target" properties subject to Ellis Act evictions because it imposes the same 10-year waiting period on applications to merge housing units that have been the subject of several types of "no-fault" evictions, not just Ellis Act evictions. Additionally, the City/County denies the Ordinance in any way penalizes property owners for exercising their rights under the Ellis Act because it "does not condition the right to leave the rental market on fulfillment of any prerequisites, payment of any fee, or satisfaction of any pre-condition that could result in a defense to an unlawful detainer action."

Turning to the City/County's first point, we disagree with its premise that the preemption analysis turns on whether a local ordinance "targets properties" subject to the Ellis Act. Rather, as the case law from above makes clear,

our analysis focuses more broadly on whether the local ordinance “‘duplicates, contradicts, or enters an area fully occupied by general law’” (*Sherwin-Williams, supra*, 4 Cal.4th at p. 897.) Further, as our First District colleagues have held, the state, by means of the Ellis Act, “completely occupies the field of substantive eviction controls over landlords” desiring to exit the residential rental market. (*Johnson, supra*, 137 Cal.App.4th at p. 14.) As such, the key issue here is not whether the Ordinance imposes a 10-year waiting period only on Ellis Act evictions, or on a variety of no-fault evictions. Rather, the issue is whether the Ordinance enters into the field of “substantive eviction controls over landlords” that has been reserved for the state.⁸ (See *Johnson, supra*, at p. 14.) And, for reasons explained below, when the Ordinance is considered in this light, it becomes clear the City/County’s second point—to wit, that the Ordinance does not amount to a substantive limit on the right of a landlord to withdraw units from the rental market—lacks merit.

Specifically, we conclude the Ordinance does in fact penalize property owners who leave the residential rental market, at least those property owners leaving the market for the purpose of merging a withdrawn rental unit with one or more of the owners’ other units. In fact, the Ordinance also penalizes owners seeking to merge multiple units of their property for the purpose of selling the property as a single-family residence, and not just to exercise their personal right to exit the residential rental market. In both situations, the Ordinance imposes a mandatory 10-year waiting period on the property owners, running from the date on which notice of eviction is served upon the tenant of the unit to be withdrawn from the rental market, before the owners may apply to the planning commission for the appropriate permit to merge the units. In doing so, the Ordinance imposes a mandatory restriction on the rights of property owners that far exceeds the scope of permissible local governance delineated by the Ellis Act.

■ The City/County nonetheless maintains that the Ordinance merely, and permissibly, regulates the particulars of a landlord’s proposed merger of residential units. We disagree. Indeed, our appellate colleagues in this district

⁸ Below, the trial court took judicial notice of the San Francisco Rent Board’s published statistics on eviction notices from 2013 through 2015. Based upon these statistics, the trial court found that, as a practical matter, Ellis Act evictions are the primary type of no-fault eviction affected by the Ordinance. Specifically, pointing out that several types of evictions fall outside the Ordinance’s 10-year ban (including owner move-ins, capital improvements and lead abatement), the trial court explained that, “[u]ltimately, only four no-fault eviction types face an absolute 10-year ban: (1) condominium conversion, (2) demolition of unit, (3) substantial rehabilitation, and (4) Ellis Act.” However, of these four types of no-fault evictions subject to the 10-year ban, Ellis Act evictions are “by far the most common [one], and so is the *de facto* prime target of [the Ordinance].” The City/County has not challenged this finding by the trial court. And while it is certainly not a dispositive factor, it is nonetheless relevant under our preemption analysis to whether the City/County invaded a field fully occupied by state law.

have aptly explained the difference between permissible local “regulation” of residential rental property and impermissible infringement upon a landlord’s exercise of Ellis Act rights: “Following the 1985 enactment of the Ellis Act, appellate courts uniformly concluded that the act bars local ordinances that condition a residential landlord’s right to go out of business on compliance with requirements that are not found in the Ellis Act. The courts also uniformly concluded that a city retains its traditional police power to regulate the subsequent use of the property after the property’s removal from the rental market. Thus, for example, if an ordinance requires a residential landlord to obtain a removal permit before removing a rent-controlled rental unit from the rental housing market by demolition or conversion, and further requires that the landlord must satisfy specified criteria before the removal permit will issue, the ordinance infringes on the landlord’s decision to go out of the rental housing business and conflicts with the Ellis Act. However, the city retains the authority to regulate the particulars of the demolition and the redevelopment of the property after it is withdrawn from the rental market.” (*Reidy, supra*, 123 Cal.App.4th 580, 588.)

We agree with this analysis. Further, we conclude, contrary to the City/County’s contention, that a 10-year prohibition on removing a rental unit from the market for the purpose of merger is more akin to a substantive requirement triggered upon a landlord’s notice of intent to remove a rental unit from the rental housing market than to local regulation of “the particulars of the demolition and the redevelopment of the property after it is withdrawn” (*Reidy, supra*, 123 Cal.App.4th at p. 588.) Specifically, rather than regulating the particulars of a landlord’s proposed merger (or demolition or conversion) of a residential unit, former section 317(e)(4) prohibits a landlord withdrawing a residential unit from the rental market from merging the unit with another unit for 10 years. In doing so, former section 317(e)(4) imposes a penalty on the very class entitled to protection under the Ellis Act—to wit, landowners seeking to exit the residential rental business. As such, under the legal authority cited above, former section 317(e)(4) is indeed invalid. (Accord, *Lincoln Place I, supra*, 54 Cal.App.4th at pp. 63, 65 [rejecting argument that “its ordinance is not preempted because it does not provide a substantive barrier to a landlord’s right to go out of the rental business but only imposes a procedural requirement that must be met before the application to demolish is granted”]; *Javidzad, supra*, 204 Cal.App.3d 524.) Moreover, contrary to the City/County’s related argument, the fact that this 10-year ban on applying for merger approval begins to run when the landlord exits the residential rental business rather than before the landlord exits the business does not make this ban any less of a penalty triggered by the landlord’s exercise of Ellis Act rights.

The City/County attempts to distinguish this case from those striking down local ordinances as fatally inconsistent with the Ellis Act, including *Lincoln*

Place I, Reidy and *Javidzad*. The City/County reasons that, unlike in those other cases, here, a landlord remains free to exit the rental market and to use his or her property in any number of authorized ways, subject only to the Ordinance's 10-year waiting period if the landlord intends to merge the withdrawn unit with another. However, examination of these cases reveals the flaw in the City/County's analysis.

In *Javidzad*, for example, the invalidated local ordinance prohibited a landowner from demolishing a rental unit unless the landowner first qualified for and obtained a removal permit. To qualify and obtain this permit, the landowner had to do one of three things: (1) demonstrate the landowner could not make a fair return on the rental unit(s); (2) demonstrate the property was uninhabitable; or (3) promise to develop new units subject to rent control. Finding this ordinance invalid on preemption grounds, our appellate colleagues reasoned that it impermissibly conditioned the landowner's right to exit the residential rental business on compliance with requirements not found in the Ellis Act. In so finding, the court rejected the defendant's argument, similar to the City/County's argument herein, that the local ordinance was merely a land use regulation that, consistent with the Ellis Act, authorized permanent demolition, conversion, or alteration of the withdrawn units: "[Appellants] submit that in passing the Act, the Legislature intended nothing more than to enable a landlord to go out of business by evicting all the tenants residing in a building, and a property owner who has done so has obtained the full benefit of the Act. Appellants do recognize the denial of a removal permit precludes the redevelopment of a property. They insist, however, a landlord who is thereby left with a vacant apartment building is merely paying the price of choosing to go out of business! [¶] Appellants' strained reading of the Act would result in an absurdity. Denying a . . . removal permit to a landlord who has gone out of the rental housing business imposes a prohibitive price on the exercise of the right under the Act." (*Javidzad, supra*, 204 Cal.App.3d at pp. 530–531.)

Similarly, in *Reidy, supra*, 123 Cal.App.4th 580, a preemption challenge was made under the Ellis Act to a local ordinance making it unlawful to change the use of, eliminate, or demolish a residential hotel unit without first obtaining a permit to convert. However, before this permit would issue, the hotel owner was required to provide one-for-one replacement of the units to be converted by constructing or bringing onto the market new residential units meeting certain requirements or, alternatively, by paying an in-lieu fee. Again, the appellate court declined to accept the defendant/local government's argument that this permit to convert was merely a land use regulation that did not implicate or infringe upon a landlord's right to exit the residential rental business: "Because section 41.20, subdivision (a)(1) of the HCO makes it unlawful for a residential hotel owner to change the use of, or eliminate a residential hotel unit without first obtaining a permit to convert, and sections

41.13 and 41.14 do not allow the issuance of a conversion permit until the owner provides replacement housing, these sections effectively conditioned the right of a City and County of San Francisco hotel owner to go out of the rental business before January 1, 2004, on compliance with requirements that were not found in the pre-2004 Ellis Act.” (*Reidy, supra*, 123 Cal.App.4th at p. 593.) As such, the plaintiffs’ challenge succeeded. (*Ibid.*)

Lastly, in *Lincoln Place I*, a city ordinance prohibited the plaintiff landowners from demolishing their rental units unless they first obtained a removal permit, which, in turn, required as a precondition their agreement to sign a covenant restricting use of the property for either themselves or for “‘any purchaser, encumbrancer, assignee, devisee and transferee’” for a period of 10 years after the date of demolition. (*Lincoln Place I, supra*, 54 Cal.App.4th at p. 64.)⁹ According to our Second District, Division Five colleagues, this local ordinance was void as applied to the plaintiff landowners because it imposed a “prohibitive price” on their right to exit the rental business by preconditioning issuance of the necessary demolition permit on meeting requirements not found in the Ellis Act. (*Lincoln Place I*, at pp. 64–65 [declining to “construe th[e] ordinance as simply a means by which the city is exercising its power to determine whether a future use of the property will conflict with its general plan because the ordinance also impermissibly prevents the plaintiffs from exercising their right to simply go out of the rental business”].)

■ The principle readily distilled from these cases is that a public entity may not impose an inevitable and undue burden (to wit, a “prohibitive price”) on a landlord’s exercise of its right under the Ellis Act to exit the residential rental business. (E.g., *Lincoln Place I, supra*, 54 Cal.App.4th at p. 65; see also *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 893 [40 Cal.Rptr.3d 629] (*Pieri*); *Johnson, supra*, 137 Cal.App.4th at p. 14 [“Placing requirements on landlords that are inconsistent with their right to go out of business under the Ellis Act ‘imposes a prohibitive price on the exercise of the right under the Act’”].) Further, applying this principle here, we find no valid basis to distinguish former section 317(e)(4) from the invalidated local ordinances discussed above. Reasonably construed, former section 317(e)(4), like the other invalidated measures, prevents landowners from exercising their right to simply go out of business. (*Javidzad, supra*, 204 Cal.App.3d at pp. 530–531; see also *Reidy, supra*, 123 Cal.App.4th at pp. 590–591.) While the City/County may be correct that local governments retain the right under the Act to “to regulate the subsequent use of the property following its removal from the rental market,” here, the City/County has, in effect, barred landowners from using their property if their proposed

⁹ There was an exemption under the ordinance for those landowners intending to use the property to develop low-income housing. (*Lincoln Place I, supra*, 54 Cal.App.4th at p. 64.)

use involves merging a withdrawn unit with another. The fact that the City/County may have been motivated in part by the worthy goal of preserving the stock of affordable housing is of no moment. Under the legal authority cited above, such exercise of local power is invalid, as it constitutes local intrusion into the wholly state-occupied field of substantive eviction controls over landlords wishing to withdraw units from the residential rental market.¹⁰ (See *Reidy, supra*, 123 Cal.App.4th at p. 592 [“Legislature did not intend the 2000 amendments [to the Ellis Act] to permit cities to promulgate land use regulations applicable to property subsequent to an Ellis Act filing, if those regulations effectively compel residential rental use and prevent the property owner from quitting the rental business”]; *First Presbyterian Church v. City of Berkeley* (1997) 59 Cal.App.4th 1241, 1249 [69 Cal.Rptr.2d 710] [“the trial court correctly ruled: (1) the Ellis Act ‘provides landlords with the right to go out of the rental business’; (2) the Ellis Act preempts the NPO and the LPO ‘in so far as they interfere with and restrain the ability of landlords seeking to remove . . . rental units from the rental market’; and (3) the NPO is therefore ‘invalid and of no force and effect to the extent that issuance of a demolition permit [under the NPO] would require findings as to future construction of units or habitability of the structure to be demolished’ ”]; cf. *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 451 [66 Cal.Rptr.3d 120] (*Lincoln Place II*) [mitigation conditions approved by the city’s planning commission did not impermissibly

¹⁰ If there could be any doubt former section 317(e)(4) was intended—at least on some level—to punish or, at minimum, discourage landlords from conducting Ellis Act and other no-fault evictions, it is dispelled by the Ordinance’s legislative history. Prior to its enactment, the Ordinance’s sponsor, Supervisor John Avalos, stated that his intent was to “propose an additional amendment to prevent owners from evicting tenants to either alter a nonconforming unit or to convert, merge, or demolish a unit,” albeit in furtherance of the commendable goal of protecting tenants and preserving the City’s stock of affordable housing. And while the motive or purpose of individual legislators does not determine the validity of an ordinance (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1093 [40 Cal.Rptr.2d 402, 892 P.2d 1145]), in this case, the legislative body (board of supervisors) incorporated into section 1, subdivision (c) of ordinance No. 287-13 the express findings that “the Department is supportive of efforts to discourage displacing tenants through no-fault evictions” and that “the proposed additional modifications would create a disincentive to evict by linking no-fault evictions to a prohibition to merge, convert, or to demolish a unit.” (See also Planning Com. Res. No. 19009.) As such, the legislative purpose to, essentially, interfere with those exercising their State-guaranteed Ellis Act rights has been made part of the San Francisco Planning Code itself. And, as mentioned above, legislative intent is relevant in the preemption context when determining whether a local ordinance “enters a field ‘fully occupied’ by [state] law” (see *Sherwin-Williams, supra*, 4 Cal.4th at p. 898), because such intent may be reflective of the intended scope of local control. (See *Johnson, supra*, 137 Cal.App.4th at p. 14 [noting the Ellis Act “‘completely occupies the field of substantive eviction controls over landlords who wish to withdraw’ [units] from the residential rental market,” but leaves to local public entities the right to, among other things, regulate land use].) As such, we conclude the undeniable fact that the Board sought to discourage or penalize Ellis Act evictions when enacting former section 317(e)(4) is relevant to (and weighs in favor of) our preemption analysis, even if it is not dispositive.

burden landowner's right to go out of the rental business because: (1) the landowner agreed to the conditions; (2) the landowner could exit the rental business upon completion of the conditions; and (3) the conditions "are not particularly onerous, and do not preclude [the landowner] from ultimately going out of the rental business at the site"]; *Pieri, supra*, 137 Cal.App.4th at p. 892 ["We cannot conclude . . . the imposition of relocation assistance payments must inevitably place an undue burden on a landlord's right to withdraw from the rental business" given that, "[i]n stating that it neither diminishes nor enhances the power of public entities to mitigate adverse impacts on displaced tenants, [Government Code section 7060.1, subdivision (c)] clearly contemplates that public entities have some such power under existing law"].) Thus, because the Ordinance constructs an inevitable substantive barrier to the statutorily protected right of a landlord to leave the residential rental business, we stand by the trial court's decision to invalidate it.¹¹

■ In attempting to avoid this conclusion, the City/County raises the additional argument that *Reidy*, *Javidzad* and *First Presbyterian Church* are no longer good law in light of the Legislature's 1999 amendment to the Ellis Act. In doing so, the City/County directs us to a select part of the legislative history of the 1999 amendment to the Ellis Act, quoted in *Lincoln Place II*: "'Since the Ellis Act was adopted in 1986, a string of court decisions has undermined the compromise reached in Ellis between the rights of a property owner to remove rental units from the market and the ability of a local government to mitigate the effects of tenant displacement and to regulate the subsequent use of the property.' (Sen. Housing & Community Development Com., Analysis of Sen. Bill No. 948 (1999–2000 Reg. Sess.) Apr. 5, 1999, Comments, para. 4.) The amendments to the Ellis Act 'make[] it clear that local governments have authority to regulate the demolition of rental property and the authority to regulate the conversion of non-residential use following its withdrawal from rent or lease.' (Sen. Housing & Community Development Com., 3d reading analysis of Sen. Bill No. 948 (1999–2000 Reg. Sess.) as amended Aug. 16, 1999, Comments, para. 3.)" (*Lincoln Place II, supra*, 155 Cal.App.4th at p. 443.) We conclude nothing in the above-quoted passage establishes legislative intent to overrule long-standing case law. When our

¹¹ As the City/County points out, the San Francisco Planning Code provides for a review process whenever a landowner applies for a permit to demolish, merge or convert a residential unit, which, among other things, requires the planning commission to consider the effect of the proposed demolition, merger or conversion on the number of affordable rental units in the surrounding area. There is no challenge under the Ellis Act to this discretionary process. In any event, it appears consistent with the inherent police power of local governments to regulate land use, a power expressly recognized by the Act, in that planning commission review of permit applications does not, in and of itself, extract a penalty from landlords seeking to exit the residential rental market. However, for the reasons stated above, the Ordinance at issue goes far beyond mandating a discretionary review.

[REDACTED]

[REDACTED]

Legislature intends to overrule case law, it makes such an intent clear, as it did when enacting the Ellis Act in the first place. (See, e.g., Gov. Code, § 7060.7 [“It is the intent of the Legislature in enacting this chapter to supersede any holding or portion of any holding in *Nash v. City of Santa Monica*, 37 Cal.3d 97 [207 Cal.Rptr. 285, 688 P.2d 894] to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business” (italics added)].) Here, the Legislature does not even mention the aforementioned cases, much less express the intent to overrule them. Rather, the Legislature expressly states that its intent in passing the 1999 amendment was to clarify the Ellis Act does not “[p]reempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property” (Gov. Code, § 7060.7, subd. (b)), diminish or enhance “any power which currently exists or which may hereafter exist in any public entity to grant or deny any entitlement to the use of real property, including, but not limited to, planning, zoning, and subdivision map approvals.” (Gov. Code, § 7060.1, subd. (b).) Under these circumstances, we decline the City/County’s invitation to in any way alter or add to the Legislature’s express intent with respect to the 1999 amendment.¹² (*People v. Davenport* (1985) 41 Cal.3d 247, 266 [221 Cal.Rptr. 794, 710 P.2d 861] [“it should not be presumed that the legislative body intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication”]; cf. *Pieri, supra*, 137 Cal.App.4th at pp. 891–892 [rejecting plaintiffs’ statutory interpretation argument where the Legislature, by recent amendment, eliminated the very statutory language relied upon by plaintiffs and the case law they cite (without expressly overruling this case law)].)

Finally, following oral argument in this matter, the parties were asked to submit supplemental letter briefs to address the issue of whether, if an owner uses the Ellis Act to remove a two-unit residential property from the rental market and thereafter obtains a permit to merge the two units, the displaced tenants would have a right to reoccupy the newly merged property. (See Gov. Code, § 7060.2, subd. (c) [“A public entity . . . may require . . . that an owner who offers accommodations again for rent or lease within a period not exceeding 10 years from the date on which they are withdrawn, and which are subject to this subdivision, shall first offer the unit to the tenant or lessee displaced from *that unit* by the withdrawal” (italics added)].) This request stemmed from the City/County’s contention at oral argument that the Ordinance was designed to prevent landlords from evading certain requirements under the Ellis Act with respect to tenants displaced by the landlord’s

¹² To the extent *Lincoln Place II* suggests otherwise, we respectfully disagree with our colleagues’ decision in this limited regard. (See *Lincoln Place II, supra*, 155 Cal.App.4th at p. 443.)

removal of rent-controlled property from the residential rental market, including offering the tenants the opportunity to re-occupy the property. In its supplemental brief, the City/County again defends the Ordinance by arguing that, by “requiring owners who evict tenants under the Ellis Act to wait to merge until the tenants’ re-occupancy rights have expired, Section 317(e)(4) ensures that if the owner elects to reenter the residential rental market within 10 years, the evicted tenant will at least have the opportunity to re-occupy his former residence.”

■ We reject this argument. The City/County acknowledges that, when two units are merged, the two original units no longer exist, but have effectively been demolished. As such, the right to re-occupancy under Government Code section 7060.2, subdivision (c)—which applies only when a particular unit removed from the market is returned to the market within 10 years—is simply not triggered. At the same time, another Ellis Act provision, section 7060.2, subdivision (d), is in fact triggered. This provision provides in relevant part that, if “the accommodations are demolished, and new accommodations are constructed on the same property, and offered for rent or lease *within five years* of the date [of their withdrawal], the newly constructed accommodations shall be subject to any system of controls on the price at which they would be offered on the basis of a fair and reasonable return on the newly constructed accommodations” (Gov. Code, § 7060.2, subd. (d), italics added.) As such, we reject the City/County’s suggestion that the Ordinance serves a legitimate local purpose wholly consistent with the Ellis Act. ■ While the City/County may be entitled to enact an ordinance imposing restrictions on the rent that may be charged for merged or reconstructed units within five years of removal of the former units from the rental market, the Ordinance before us exceeds any such restriction. To wit, the Ordinance also prohibits an owner from removing a property from the rental market and for 10 years merging the unit with another unit for the purpose of residing in or selling the merged units—inconsistent, as we have explained, with the Ellis Act. For this reason, we stand by our conclusion that the Ordinance is fatally inconsistent with the Ellis Act.

III. Did Plaintiffs Successfully Prove the Ordinance facially Void?

Next, the City/County challenges the trial court’s finding that former section 317(e)(4) is facially void under the Ellis Act with respect to the 10-year prohibition of mergers following notice of intent to undertake an Ellis Act eviction. According to the City/County, plaintiffs failed their burden as the party making a facial challenge (as opposed to an “as applied” challenge) to establish “the challenged [law] ‘inevitably pose[s] a present total and fatal conflict’ with applicable prohibitions.” (See *Association of California Ins. Cos. v. Poizner, supra*, 180 Cal.App.4th at p. 1054; see also *Sanchez v. City of*

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Modesto (2006) 145 Cal.App.4th 660, 678 [51 Cal.Rptr.3d 821]; accord, *United States v. Salerno* (1987) 481 U.S. 739, 745 [95 L.Ed.2d 697, 107 S.Ct. 2095].) The City/County reasons that the Ordinance applies to all landlords seeking to merge residential units after undertaking a no-fault eviction, not just those seeking to merge units after an Ellis Act eviction, such that a challenge limited to landlords effectuating Ellis Act evictions cannot invalidate the Ordinance in its entirety. Additionally, the City/County faults plaintiffs for failing to establish all landlords effectuating Ellis Act evictions would, if permitted, seek approval to merge units within 10 years of serving notice of eviction.¹³ Under these circumstances, the City/County insists, there is one or more conceivable set of circumstances under which the Ordinance and the Ellis Act could operate consistently, rendering a facial challenge inappropriate.

■ We reject these arguments. “In considering a facial challenge, we consider ‘only the text of the measure itself, not its application to the particular circumstances of an individual.’ (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th 1069, 1084 [40 Cal.Rptr.2d 402, 892 P.2d 1145].) Thus, [as the City/County correctly notes] we can only invalidate the relocation ordinance if it presents a ‘“total and fatal conflict”’ with state law.” (*Pieri, supra*, 137 Cal.App.4th at p. 894.) To make this determination, however, we must focus on the interplay between the relevant state and local law, rather than the local law viewed in isolation. (See *Planned Parenthood v. Casey* (1992) 505 U.S. 833, 894 [120 L.Ed.2d 674, 112 S.Ct. 2791] [“Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant”].) Having done so in this case, it is clear that, in every case where a San Francisco property owner exercises his or her right under the Ellis Act to withdraw a rental unit from the residential rental market in order to merge the unit with another, the property owner is met head-on with a locally imposed legal barrier—to wit, the 10-year prohibition on applying to the planning commission for merger approval.

Viewed in this light, we agree with the trial court that the legality of former section 317(e)(4) does not hinge on the circumstances of any particular individual; rather, its legality hinges on “only the text of the measure itself.” (See *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) As such, we conclude plaintiffs’ facial challenge to the Ordinance was appropriate. (See

¹³ As the City/County notes, the Ordinance creates several exemptions from the mandatory 10-year waiting period, including for landlords who temporarily evict tenants for the purpose of lead abatement or other capital improvement projects, or who are seeking to comply with a court-ordered eviction. (E.g., former § 317, subd. (e)(3)); S.F. Admin. Code, § 37.9, subd. (a)(11), (14).)

also *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767 [16 Cal.Rptr.3d 404, 94 P.3d 538] [a facial challenge to an ordinance is one “‘predicated on a theory that the mere enactment of the . . . ordinance worked a [constitutional violation]’”].)

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded costs on appeal.

Pollak, Acting P. J., and Siggins, J., concurred.

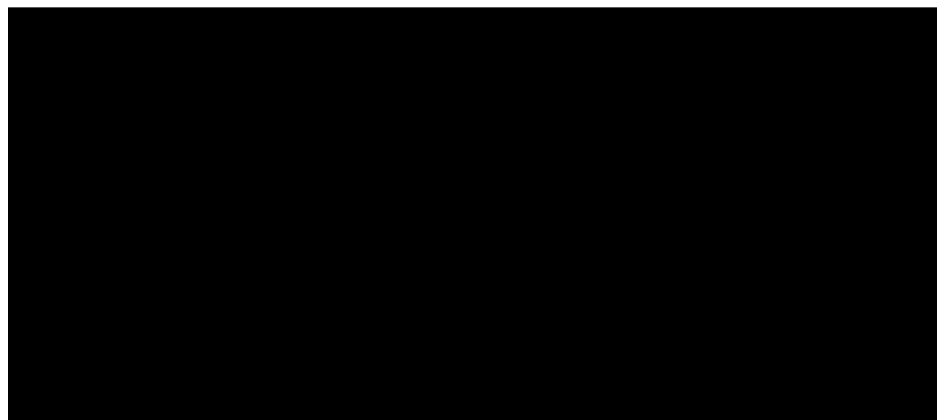
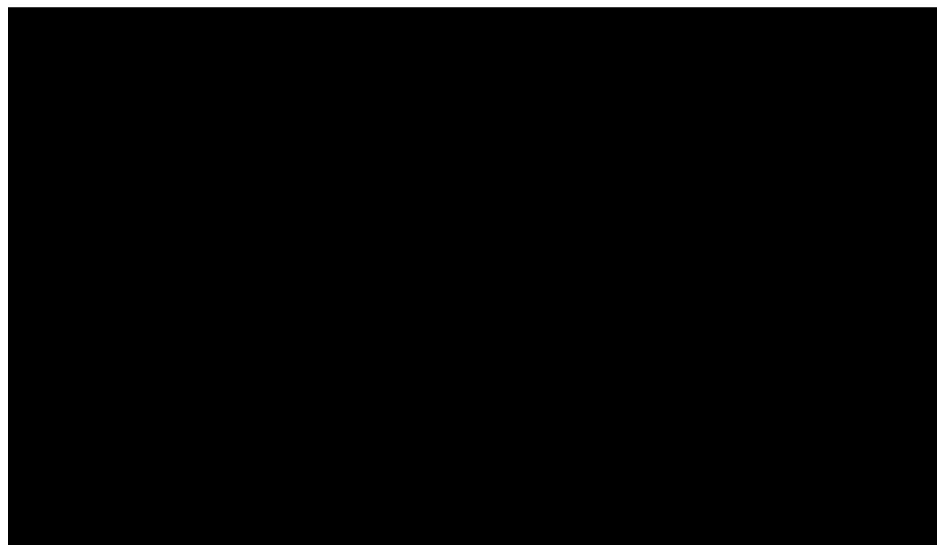
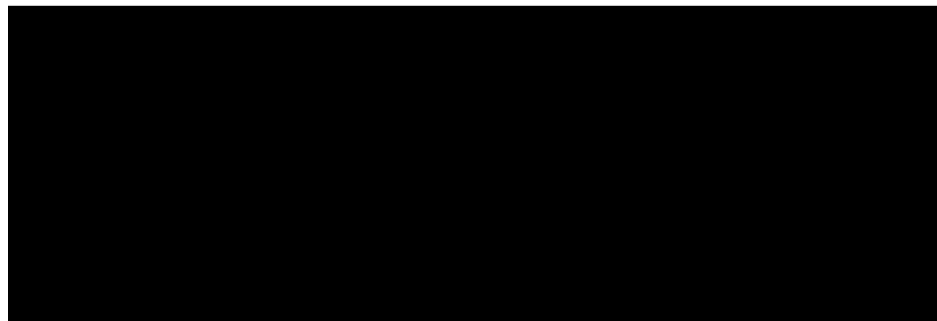
[No. D069629. Fourth Dist., Div. One. Sept. 19, 2016.]

In re WILLIAM ILASA on Habeas Corpus.

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[REDACTED]

[REDACTED]



COUNSEL

William Ilasa, pro. per.; and Richard Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Phillip J. Lindsay, Assistant Attorney General, and Rachael A. Campbell, Deputy Attorney General, for Respondent.

OPINION

IRION, J.—In this habeas corpus proceeding, we consider whether a decision of the Board of Parole Hearings (Board) that denies an inmate parole following a review procedure enacted pursuant to a federal court order is subject to state court judicial review and, if so, whether the Board violated petitioner's due process rights in denying him early release in this case. The federal court order at issue was issued by a three-judge court in prison class action litigation *after* the court found that California state prisoners' federal constitutional rights had been violated as a result of overcrowding, *after* the court found that a prison release order was the only relief capable of remedying the constitutional deficiencies, *after* the United States Supreme Court affirmed those rulings, *after* the three-judge court issued its remedial order in reliance on the state defendants' representation and agreement that they would develop comprehensive and sustainable prison population-reduction reforms, and *after* the state defendants agreed not to contest the remedial order.

We issued an order to show cause in response to the petition of William Ilasa based on his allegations that he was denied due process of law when, at the conclusion of a prison-reduction procedure developed pursuant to the order of the three-judge court, the Board did not grant him parole as a nonviolent, non-sex-registrant second strike (NVSS) inmate. We conclude that, because the Board's decision involves a constitutionally protected liberty interest, Ilasa is entitled to judicial review of the decision. We further

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conclude that, because the record of what was presented to the Board during the review process contains some evidence to support the Board's decision, Ilasa's due process rights were not violated.

Accordingly, we will consider Ilasa's petition on its merits and deny it.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ilasa's Commitment Offense and Sentence*

In February 2010, Ilasa was convicted of possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1);¹ subsequent unidentified statutory references are to this code) with a true finding as to a gang allegation (§ 186.22, subd. (b)(1)). This conviction was a second strike, and in May 2010 the superior court sentenced Ilasa to a determinate term of nine years—the upper term of three years on the felony, doubled due to the second strike, and three years on the enhancement.

B. *Federal Court Litigation; February 2014 Order of the Three-judge Court*

On April 23, 1990, a group of plaintiffs filed a class action in the United States District Court for the Eastern District of California, entitled *Coleman v. Deukmejian*, No. 2:90-cv-00520-LKK (*Coleman*). On April 5, 2001, a group of plaintiffs filed a class action in the United States District Court for the Northern District of California, entitled *Plata v. Davis*, No. 3:01-cv-01351-TEH (*Plata*). The amended complaints in both class actions raised federal constitutional and statutory claims based on alleged inadequacies in the delivery of mental health care (*Coleman*) and medical care (*Plata*) to inmates in the California adult prison system.²

¹ The Legislature has since repealed Penal Code former section 12021 and replaced it with Penal Code section 29800. (Stats. 2010, ch. 711, § 10, operative Jan. 1, 2012.)

² On our own motion, we have taken judicial notice of the records of the district courts in *Coleman* and in *Plata*. (Evid. Code, §§ 459, subd. (a), 452, subd. (d)(2); *In re Taylor* (2001) 88 Cal.App.4th 1100, 1103, fn. 2 [106 Cal.Rptr.2d 454].)

Each action named a number of individual and state agency defendants (collectively Defendants), including as the lead defendant the Governor of the State of California. In the text, *ante*, we provided the original case names and docket numbers in both *Coleman* and *Plata*. Under federal court case management, the case names and docket numbers changed from time to time. Because the lead plaintiff in each case remained constant throughout, for consistency and ease of reading in this opinion, we will refer to the 1990 case as *Coleman* and the 2001 case as *Plata*.

In each of the class actions, the district court entered an order granting the plaintiffs' motion to convene a three-judge court to consider limiting the prison population by issuing a prisoner release order.³ (*Coleman v. Schwarzenegger* (E.D.Cal., July 23, 2007, No. CIV S-90-0520 LKK JFM P) 2007 WL 2122636, p. *8; *Plata v. Schwarzenegger* (N.D.Cal., July 23, 2007, No. C01-1351 TEH) 2007 WL 2122657, pp. *6-*7.) Each district court recommended that the two cases be assigned to the same three-judge court. (See *Coleman v. Brown* (E.D.Cal. 2013) 922 F.Supp.2d 1004, 1009.) The chief judge of the United States Court of Appeals for the Ninth Circuit agreed and in July 2007 convened a three-judge district court pursuant to 28 United States Code section 2284. (922 F.Supp.2d at p. 1009.) From this point forward, all orders of the three-judge court were entered in both *Coleman* and *Plata*.

In August 2009, the three-judge court, having heard 14 days of testimony, issued a 122-page opinion. (*Coleman v. Schwarzenegger* (E.D.Cal. 2009) 922 F.Supp.2d 882, 916.) The court found by clear and convincing evidence that overcrowding was the primary cause of the constitutional inadequacies in the delivery of mental (*Coleman*) and medical (*Plata*) care to California inmates and that no relief other than a "prisoner release order," as that term is defined in 18 United States Code section 3626(g)(4), was capable of remedying the constitutional deficiencies. (922 F.Supp.2d at pp. 949-951.) The three-judge court concluded by ordering the Defendants to "reduce the prisoner population to 137.5% of the adult institutions' total design capacity" within two years. (*Id.* at p. 962; see *id.* at pp. 970, 1003.) The Governor appealed to the United States Supreme Court from this order. (See *Brown v. Plata* (2011) 563 U.S. 493 [179 L.Ed.2d 969, 131 S.Ct. 1910].)

While the appeal was pending, the Defendants proposed a specific plan to reduce the state's prisoner population. (*Coleman v. Schwarzenegger* (E.D.Cal., Jan. 12, 2010, Nos. CIV S-090-0520 LKK JFM P, C01-1351 TEH) 2010 WL 99000, p. *1.) Other parties, including the intervenors, objected, and the three-judge court extended the deadline by which the Defendants were required to reduce the population of California's 33 adult prisons to no more

³ "Section 3626(a)(3)(C) of Title 18 of the United States Code authorizes a party to a civil action concerning prison conditions to file a request for a prisoner release order. As defined by the statute, a prisoner release order 'includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.' 18 U.S.C. § 3626(g)(4). A prisoner release order may 'be entered only by a three-judge court in accordance with section 2284 of title 28,' if other statutory requirements have been met. 18 U.S.C. § 3626(a)(3)(B). A request for a prisoner release order must be accompanied by a request for a three-judge court and 'materials sufficient to demonstrate that' the statutory requirements for issuance of such an order have been met. 18 U.S.C. § 3626(a)(3)(C)." (*Coleman v. Schwarzenegger*; *supra*, 2007 WL 2122636 at p. *1.)

than 137.5 percent of design capacity. (*Id.* at pp. *1-*3.) The three-judge court also set intermediate goals and deadlines and stayed the effective date of its order—and thus, the two-year deadline for complete compliance—pending the United States Supreme Court’s disposition of the appeal from the August 2009 order. (*Id.* at p. *4.) The Governor also appealed to the United States Supreme Court from this order, and the Supreme Court affirmed both orders in *Brown v. Plata*, *supra*, 563 U.S. at page 545.

After receiving the United States Supreme Court’s ruling in *Brown v. Plata*, *supra*, 563 U.S. 493, in June 2011 the three-judge court filed an order setting specific dates for the Defendants’ interim and final compliance with the requirement to reduce the California prisoner population to no more than 137.5 percent of total design capacity. Those deadlines were later extended by an order of the three-judge court filed February 10, 2014 (February 2014 Order).⁴

Among various other rulings, in order to reach the required goals established in the February 2014 Order, the three-judge court ordered—and the Defendants agreed—that the Defendants would “immediately implement” a number of measures, including as relevant to the present proceeding, the creation of “*a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board . . . once they have served 50% of their sentence.*” (Italics added.)

C. *The Defendants’ Compliance with the February 2014 Order*

Pursuant to the above-quoted directive in the February 2014 Order, the Department of Corrections and Rehabilitation (CDCR) created a process entitled “Non-Violent, Non-Sex-Registrant, Second-Strike (NVSS) Review,” which was implemented on January 1, 2015. (Non-violent, Non-sex-registrant, Second-strike Review Results <http://cdcr.ca.gov/boph/nvns_sec-strkreview.html> [as of Sept. 19, 2016] (the NVSS Procedures).) As set out on the CDCR website, the NVSS Procedures set forth eligibility requirements and an administrative review process for those inmates determined to be eligible for review. (NVSS Procedures, *supra*, Eligibility; *id.*, Hearing Officers and Procedure.) The purpose of the administrative review is to determine—and, thus, the standard to be applied by the Board is—whether the inmate’s release “would pose an unreasonable risk to public safety.” (*Id.*, Hearing Officers and Procedure.)

⁴ While not relevant to any issue in this proceeding, the February 2014 Order extended the Defendants’ deadline until February 28, 2016, for the reduction in the California prisoner population to no more than 137.5 percent of total design capacity.

D. *Ilasa's Review*

Inmates eligible for NVSS review include those whose terms were doubled under either section 667, subdivisions (b) through (i), or section 1170.12 and who have served 50 percent of their actual sentence. (NVSS Procedures, *supra*, Eligibility.)

Applying the NVSS Procedures to Ilasa, the Board determined that it had jurisdiction, found that Ilasa was eligible for NVSS review, provided Ilasa with NVSS review, and denied release in a written ruling in August 2015. The Board determined that, if released, Ilasa would “pose[] an unreasonable risk of violence on the community,” based on the following general findings: Ilasa’s current commitment offense was an aggravating factor; Ilasa’s prior criminal record was an aggravating factor; Ilasa’s institutional behavior was a mitigating factor; and Ilasa had no medical condition that would impact his ability to reoffend.⁵ Ilasa timely requested reconsideration, and in September 2015, the Board affirmed the decision to deny release. Pursuant to the review criteria in California Code of Regulations, title 15, section 2042, the Board found that there was no mistake of law or fact in the denial of Ilasa’s release.⁶

E. *Ilasa's Petitions for Writ of Habeas Corpus*

Dissatisfied with the Board’s decision to deny release, Ilasa filed a petition for writ of habeas corpus with the superior court, case No. HCN1417 and *In re Ilasa* (Super. Ct. San Diego County, 2015, No. SCN233219). The court denied this petition in December 2015.

Representing himself, Ilasa initiated the present habeas corpus writ proceeding in this court by filing a petition in January 2016.⁷ In April 2016, the

⁵ We set forth and discuss certain specific factual findings, to the extent necessary for our analysis, at part II.B., *post*.

⁶ “The purpose of the decision review process is to assure complete, accurate, consistent and uniform decisions and the furtherance of public safety. Criteria for disapproval of a decision include a determination by the board that the panel made an error of law, or that the panel’s decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board, has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In deciding if a decision should be approved, board staff shall review the information available to the panel that made the decision and any information received as provided in § 2028.” (Cal. Code Regs., tit. 15, § 2042. Subsequent references to “Regulations” are to tit. 15 of Cal. Code Regs.)

⁷ The present writ proceeding is an original proceeding. (Cal. Const., art. VI, § 10 [Courts of Appeal have original jurisdiction in habeas corpus proceedings]; *In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7 [21 Cal.Rptr.2d 509, 855 P.2d 729] [no appeal lies from superior court’s denial of petition for writ of habeas corpus; “a prisoner whose petition has been denied by the

Attorney General filed an informal response, and in May 2016 we issued an order to show cause why the requested relief should not be granted.⁸ Ilasa filed a supplement to the petition; the Attorney General filed a return; and Ilasa filed a traverse.

Ilasa argues that he was not afforded due process when the Board denied him parole pursuant to the NVSS Procedures. More specifically, Ilasa contends that the record before the Board contains “no evidence” to support its conclusion that his release would pose an unreasonable risk to public safety.

In opposition, the People argue principally that, because the NVSS Procedures do not affect a liberty interest protected under the federal Constitution’s due process clause, as a matter of law Ilasa is not entitled to judicial review of the Board’s decision on early release.⁹ According to the Attorney General, the Board, through its commissioner responsible for reviewing the inmate’s NVSS information, “has unfettered discretion to determine whether an inmate should be approved for release.” Alternatively, on the merits, the People contend that, because “some evidence” supports the Board’s decision, Ilasa did not meet his burden of establishing entitlement to relief.

II.

DISCUSSION

■ The state may not deprive any person of life, liberty or property without due process of law. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, §§ 7, subd. (a), 15.) A procedural due process challenge raises two questions: “the first asks whether there exists a liberty or property interest which has been interfered with by the State, [citation]; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient [citation].” (*Kentucky Dept. of Corrections v. Thompson* (1989) 490 U.S. 454, 460 [104 L.Ed.2d 506, 109 S.Ct. 1904] (*Thompson*) [state procedures regarding inmates’ visitation privileges].) “Protected liberty interests ‘may arise from two sources—the Due Process Clause itself and the laws of the States.’ ” (*Ibid.*; see *id.* at p. 461 [“state law may create enforceable liberty interests in the prison setting”].)

Both of the questions posed in *Thompson* are at issue in this proceeding. In his petition, Ilasa contends his due process rights were violated in the Board’s

superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal”].) There is no issue in this appeal related to the superior court case.

⁸ We also appointed counsel for Ilasa.

⁹ We do not read Ilasa’s petition or briefing as limiting his due process claim to one under the federal Constitution.

denial of parole following NVSS review; and in their return, the People challenge whether an inmate is entitled to judicial review of the Board's decision in denying parole following NVSS review. Before we reach the issue raised by Ilasa in his petition, we must first reach the issue raised by the People in their return.

As we explain, because the NVSS administrative review process affects a protectable liberty interest of the inmate, Ilasa is entitled to judicial review of the Board's decision denying him parole. As we further explain, in reviewing the Board's decision here, because there is some evidence to support the conclusion that Ilasa's release would pose an unreasonable risk to public safety, Ilasa did not meet his burden of establishing a due process violation.

A. Because the NVSS Administrative Process Creates a Protected Liberty Interest, Ilasa Is Entitled to Judicial Review of the Board's Decision

The People contend that the separation of powers doctrine precludes judicial review of the executive branch's decision to deny early release to Ilasa. Their position is based on the premise that there is no statute or regulation either authorizing judicial review of the Board's decision or providing a liberty interest protected by the due process clause in the NVSS administrative process. We decide the separation of powers issue de novo. (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1535–1536 [80 Cal.Rptr.3d 521] (*Lugo*) [whether court order regarding Board's procedures violated separation of powers doctrine]; *State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67 [60 Cal.Rptr.2d 342] [whether state statute violated due process and equal protection].)

We disagree with the People's premise that the NVSS administrative process does not affect an inmate's liberty interest and, accordingly, conclude that an inmate like Ilasa is entitled to judicial review of the Board's decision.

1. Separation of Powers

■ The separation of powers doctrine is found in our state Constitution at article III, section 3, which provides in full: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The effect of this doctrine is to "limit[] the authority of one of the three branches of government to arrogate to itself the core functions of another branch. [Citations.]' [Citation.] ' . . . ' . . . Its mandate is 'to protect any one branch against the overreaching of any other branch.' " " ("In re Rosenkrantz" (2002) 29 Cal.4th 616, 662 [128 Cal.Rptr.2d 104, 59 P.3d 174] (*Rosenkrantz*)).

“ ‘By its nature, the determination whether a prisoner should be released on parole is generally regarded as an executive branch decision. [Citations.] The decision, and the discretion implicit in it, are expressly committed to the executive branch.’ ” (*Lugo, supra*, 164 Cal.App.4th at p. 1537; see Cal. Const., art. V, § 8; Pen. Code, §§ 3040 et seq., 5075 et seq.) Thus, “[i]ntrusions by the judiciary into the executive branch’s realm of parole matters may violate the separation of powers.” (*Lugo*, at p. 1538 [trial court order requiring Board to state significant change in circumstances to justify its decision denying parole for more than one year following a prior one-year denial violated separation of powers]; see *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095, 1099 [97 Cal.Rptr.2d 382] [trial court order allowing inmate to question Board commissioners regarding their parole-related decision process violated separation of powers].)

However, not all parole actions of executive branch are immune from review by the judicial branch. As our Supreme Court explained in *Rosenkrantz, supra*, 29 Cal.4th 616, “the requirement of procedural due process embodied in the California Constitution (Cal. Const., art. I, § 7, subd. (a)) places some limitations upon the broad discretionary authority of the Board”—limitations subject to court review and enforcement by writ of habeas corpus. (*Rosenkrantz*, at p. 655.) Thus, we next consider whether, and if so to what extent, the judiciary may—in the language of *Lugo, supra*, 164 Cal.App.4th at page 1538—“[i]ntru[de] . . . into the executive branch’s” parole review process.

2. *Parole Following an Indeterminate Sentence*

“The parole consideration procedures are governed by section 3040 et seq. and apply to all inmates not serving a determinate sentence.” (*In re Jackson* (1985) 39 Cal.3d 464, 468 [216 Cal.Rptr. 760, 703 P.2d 100].) Thus, in the case of an *indeterminate sentence*, the Board’s parole authority is governed by a body of statutes and regulations as mandated by the Legislature—most notably section 3041 and Regulations section 2402. (*In re Prather* (2010) 50 Cal.4th 238, 249–250 [112 Cal.Rptr.3d 291, 234 P.3d 541] (*Prather*) [Regs., § 2402 provides factors the Board is to consider in implementing the statutory mandate in Pen. Code, § 3041].)

Under specified standards set forth in section 3041, subdivision (b), “‘the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction.’ ” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204 [82 Cal.Rptr.3d 169, 190 P.3d 535] (*Lawrence*), italics omitted, quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 654.) As a result, indeterminately sentenced inmates have a “*due process liberty interest in parole*.”

(*Lawrence*, at p. 1191, italics added; see *In re DeLuna* (2005) 126 Cal.App.4th 585, 591 [24 Cal.Rptr.3d 643] [§ 3041, subd. (b) “creates a conditional liberty interest for a prospective parolee”].) This liberty interest is based on “an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.” (*Lawrence*, at p. 1204, quoting *Rosenkrantz*, at p. 654.)

As such—i.e., where a due process liberty interest in parole is at stake—the separation of powers doctrine does not preclude the judiciary’s review of the executive’s exercise of discretion. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 652 [“under California law the factual basis for a Board decision granting or denying parole is subject to a limited judicial review”]; *Lawrence*, *supra*, 44 Cal.4th at p. 1191, 1212 [review of Board’s finding whether the inmate poses a current threat to public safety].) To the contrary, in reviewing parole suitability determinations, the scope of judicial review, while “limited,” is nonetheless “meant to serve the interests of due process by guarding against arbitrary or capricious parole decisions, without overriding or controlling the exercise of executive discretion.” (*In re Shaputis* (2011) 53 Cal.4th 192, 199 [134 Cal.Rptr.3d 86, 265 P.3d 253] (*Shaputis II*)).

3. *Parole Following a Determinate Sentence Under NVSS Review*

In the present case, unlike those discussed *ante*, where the inmate has been sentenced to a *determinate term*, there is no statute (like § 3041, subd. (b)) or regulation (like Regs., § 2402) that creates an inmate’s expectation of parole. Based on this distinction, the Attorney General argues that without such directive, an inmate like Ilasa can have no expectation of parole; that without such expectation, an inmate like Ilasa can have no protectable due process liberty interest in parole; and that without a due process liberty interest in parole, the separation of powers doctrine precludes judicial review of the Board’s NVSS review. The Attorney General’s position is simply that the Board has “unfettered discretion” to determine whether an inmate (like Ilasa) who is eligible for NVSS review will be approved for release. We disagree.

The NVSS Procedures, although not a result of statute or regulation, were not created in a vacuum. A three-judge federal court ruled that California state prisoners’ federal constitutional rights had been violated as a result of prison overcrowding and that a prison release order was the only relief capable of remedying the constitutional deficiencies. (*Coleman v. Schwarzenegger*, *supra*, 922 F.Supp.2d at pp. 949–951.) The United States Supreme Court affirmed those rulings. (*Brown v. Plata*, *supra*, 563 U.S. at p. 545.) The three-judge court issued its remedial February 2014 Order *in reliance on the Defendants’ representation and agreement* that the Defendants would develop

comprehensive and sustainable prison population-reduction reforms, and *the Defendants agreed not to contest the February 2014 Order*. The NVSS Procedures were created and implemented pursuant to the February 2014 Order. (NVSS Procedures, *supra*, NVSS Overview.) Given the history behind the February 2014 Order and the enactment of the NVSS review process,¹⁰ an inmate like Ilasa does have a protectable liberty interest—and thus a right to due process—in the NVSS review process.

a. *NVSS Procedures*

The NVSS review process resulted from one of the “narrowly tailored” remedies ordered by the three-judge court based on the constitutional violations identified by the *Coleman* and *Plata* courts that were affirmed by the United States Supreme Court in *Brown v. Plata*, *supra*, 563 U.S. 493.¹¹ More specifically, the California executive branch Defendants expressed an affirmative intent to “enact[] programs . . . [and] develop[] . . . additional measures regarding reforms to state penal and sentencing laws designed to reduce the prison population,” and with the agreement of the executive branch Defendants, the three-judge court ordered them to create and implement “*a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence.*” (Italics added; see NVSS Procedures, *supra*, NVSS Overview.)

As agreed to by the Defendants and ordered by the three-judge court, the CDCR created and implemented the NVSS Procedures, which became effective January 1, 2015. (NVSS Procedures, *supra*, NVSS Overview.) After an introduction that explains the three-judge court’s February 2014 Order, which includes the italicized language set forth in the preceding paragraph, the NVSS Procedures set forth seven separately identified topics: eligibility; input from inmates, district attorneys, victims, and the public; access to inmate

¹⁰ We do not accept the Attorney General’s description of the process as just “an administrative process created in response to a federal court order” or “[o]ne reform measure authorized” by the February 2014 Order or a mere “discretionary power delegated to [the Board].” In issuing its February 2014 Order, the three-judge court relied on the Defendants’ representations and agreements that the Defendants would create and implement comprehensive and sustainable prison population-reduction reforms and that the Defendants would not contest the issuance or implementation of the order.

¹¹ The three-judge court ruled that the various remedies ordered in the February 2014 Order were “narrowly tailored”; the parties in the *Coleman* and *Plata* class actions, including the Defendants, agreed to the remedies ordered in the February 2014 Order; and no party in the present case argues that the creation and implementation of the review process under the NVSS Procedures are not narrowly tailored.

central files; risk assessments; hearing officers and procedure; decision review; and release of inmate.¹² (NVSS Procedures.)

In the section on “Eligibility,” the NVSS Procedures first identify those who qualify for consideration of the required “new parole determination process” ordered by the three-judge court: “Inmates whose terms doubled pursuant to Penal Code section 667(b)–(i) or Penal Code section 1170.12 and who have served 50 percent of their actual sentence, or who are within 12 months of having served 50 percent of their actual sentence are eligible for review for possible release. Inmates are not eligible if they are required to register as sex offenders pursuant to Penal Code section 290 based on a current or prior conviction. Inmates are also not eligible if they have a current violent offense pursuant to Penal Code section 667.5(c). In addition, certain inmates will be ineligible based on specified negative institutional behavior.” (NVSS Procedures, *supra*, Eligibility.) The NVSS Procedures then explain when an inmate will be screened for eligibility (“Inmates will be screened for eligibility at their annual unit classification committee review once they have served 50 percent of their actual sentence or are within 12 months of having served 50 percent of their actual sentence . . .”); what an inmate may do in preparation for the screening (“Inmates may request to review their central file prior to their annual classification committee review, consistent with existing policies and procedures for requesting review of central files . . .”); when an inmate will be advised of a decision on eligibility (“At the conclusion of the unit classification committee [review]”); and what options an inmate will have if the inmate is referred to the Board for possible release (the inmate “may submit a written statement to the [B]oard”). (NVSS Procedures, *supra*, Eligibility.)

If an inmate is referred to the Board for possible release, the NVSS Procedures’ section “Input from Inmates, District Attorneys, Victims, and the Public” allows for input from the inmate, as well as notice to and input from the district attorney of the inmate’s county of commitment and any victims registered with the CDCR.

The NVSS Procedures section entitled “Access to Inmate Central Files” advises that inmates and district attorneys may access inmate files—in anticipation of both the initial annual classification committee review and the later referral to the Board for possible release—and sets forth the basic procedure for requesting file review.

¹² The NVSS Procedures also contain online links to “Weekly NVSS Results”; “Monthly NVSS Results”; “Annual NVSS Results”; “Board of Parole Hearings” (with separate links to “Board of Parole Hearings Overview,” “Executive Officer,” “Chief Counsel,” “Chairperson,” “Commissioners,” “Deputy Commissioners” and “[Board] Divisions”); “Executive Board Meetings”; “Proceedings”; “Legal Authorities”; “Statistical Data”; “Resources”; “Panel Attorneys”; and “MDO Independent Evaluators.”

Under the heading “Risk Assessments,” the NVSS Procedures give notice that the Board will not prepare risk assessments for the NVSS inmates who are being considered for parole.

In a section entitled “Hearing Officers and Procedure,” the NVSS Procedures explain what inmates can expect if, after a determination of eligibility, they are referred to the Board for possible release. Inmates are first advised of the timing of the review (“The review will occur within 50 days from the date the unit classification committee referred the inmate to the [B]oard, or if the inmate has not yet served 50 percent of his or her sentence, the [B]oard will conduct the review once the inmate is within 60 days of serving 50 percent of his or her sentence.”). (NVSS Procedures, *supra*, Hearing Officers and Procedure.) This section also advises inmates what will be considered at the review (“The deputy commissioner will review all relevant and reliable information, including the inmate’s criminal history, institutional behavior, rehabilitation efforts, and any written statements received.”). (*Ibid.*) Most importantly, this section sets forth the standard to be applied and by whom: “*A deputy commissioner will conduct an administrative review to determine if the inmate’s release would pose an unreasonable risk to public safety.*” (*Ibid.*, italics added.) Although there is no hearing, the Board is required to issue a written decision and provide copies to specifically identified people who participated in or are administratively involved in the review process. (*Ibid.*) Even after an inmate is referred to the Board for consideration for release, the Board will be notified of any disciplinary action taken against an inmate, and the classification committee may rescind a referral to the Board prior to an inmate’s release if the inmate’s case factors change. (*Ibid.*) Finally, a Board decision not to release an inmate will not affect the inmate’s entitlement to a future review for referral to the Board for possible release at the inmate’s next annual unit classification committee review. (*Ibid.*)

The NVSS Procedures section entitled “Decision Review” provides information regarding further review of any decision of the Board concerning release of NVSS inmates. This further review is conducted by an associate chief deputy commissioner, who is tasked with issuing a decision upholding or vacating the original decision and providing notification of the outcome.

The final section provides that an inmate who is approved by the Board will be released either “to state parole or post release community supervision as required by statute” within 50 days of the Board’s decision. (NVSS Procedures, *supra*, Release of Inmate.)

b. *Due Process Protection of Liberty Interest*

The People appropriately acknowledge that a due process right results when a state statute provides an expectation of parole, thereby creating a

constitutionally protected liberty interest and a right to judicial review of the executive branch parole decision. (See *Lawrence, supra*, 44 Cal.4th at p. 1191, 1212 [§ 3041, subd. (b)]; *Rosenkrantz, supra*, 29 Cal.4th at p. 652 [same]; see pt. II.A.2., *ante*.) Similarly, statewide regulations for the administration of prisons may result in a protected liberty interest that requires due process in their application and subsequent judicial review. (*In re Davis* (1979) 25 Cal.3d 384, 390 [158 Cal.Rptr. 384, 599 P.2d 690] [Regs., § 3315, subd. (b)].)

The issue, therefore, is whether the NVSS Procedures (which are neither statutes nor regulations) also result in the type of expectation that creates a constitutionally protected liberty interest entitling an inmate to due process in—and, thus, potential court review of—their application. We believe so; together, the February 2014 Order¹³ and the NVSS Procedures provided Ilasa with a constitutionally protected liberty interest.

■ The Attorney General has not cited, and our independent research has not disclosed, authority to support her argument that *because the NVSS Procedures were not created as the result of a statute or a regulation*, the Board has “unfettered discretion” to determine whether an inmate will be approved for early release. To the contrary, “it is clear that prison regulations and policies can confer liberty interests”; “in assessing whether [the] state has created a liberty interest ‘*the appropriate constitutional analysis looks beyond the State’s statutes to administrative rules, regulations, contractual commitments, and the like.*’ ”¹⁴ (*Smith v. Sumner, supra*, 994 F.2d at p. 1405, italics added.)

The United States Supreme Court explained more than a quarter century ago that “‘a State creates a protected liberty interest by placing substantive limitations on official discretion.’ [Citation.] A State may do this in a number of ways. . . . [T]he most common manner in which a State creates a liberty interest is by establishing ‘substantive predicates’ to govern official decision-making, [citation], and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.” (*Thompson, supra*, 490 U.S. at p. 462.) In *Hewitt v. Helms* (1983) 459 U.S. 460 [74 L.Ed.2d 675, 103 S.Ct. 864], the court explained that “the repeated use of explicitly

¹³ Our reliance on the February 2014 Order includes the events that preceded it: the United States Supreme Court’s affirmance of the three-judge court’s orders finding a constitutional violation and entitlement to a prison release order; the three-judge court’s reliance on the Defendants’ representation and agreement that the Defendants would develop comprehensive and sustainable prison population-reduction reforms; and the Defendants’ agreement not to contest the February 2014 Order or its implementation.

¹⁴ We note both that the Attorney General describes the NVSS Procedures as “*administrative guidelines*” and that the Ninth Circuit expressly included “*administrative rules*” in its non-inclusive list of how liberty interests may be created (See *Smith v. Sumner* (9th Cir. 1993) 994 F.2d 1401, 1405).

mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.” (*Id.* at p. 472 [due process challenge to state’s procedures regarding inmate’s administrative segregation].) Significantly, although a routine judicial order issued by a federal court “would not seem to satisfy the requirement that liberty interests arise out of either the Due Process Clause or state law[,] . . . because a state necessarily enters into a consent decree voluntarily, . . . any rules which a decree establishes are by any meaningful measure state-created.”¹⁵ (*Smith v. Sumner, supra*, 994 F.2d at p. 1406, citation omitted & italics added.) For these reasons, we cannot accept the Attorney General’s position that there can be no protected liberty interest in the review process solely because the NVSS Procedures are not a product of state statutes or regulations that created a reasonable expectation of parole.

■ Applying these standards to the present case, we conclude that the NVSS Procedures at issue here—i.e., procedures put in place pursuant to the February 2014 Order—created reasonable expectations and, therefore, a protected liberty interest for second strike inmates like Ilasa. We are not persuaded by the Attorney General’s argument that, unlike indeterminately sentenced inmates, determinately sentenced inmates like Ilasa could never have an expectation of parole because at the time they were sentenced there were no early release procedures in place. The head of the executive branch (i.e., the Governor), along with other executive branch Defendants in the *Coleman* and *Plata* class actions agreed to the terms of the February 2014 Order, including specifically that the CDCR would “immediately . . . [¶] . . . [c]reate and implement a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board . . . once they have served 50% of their sentence.” (Italics added.) The CDCR accordingly created and implemented the NVSS Procedures, which provide in part: “Inmates will be screened for eligibility at their annual unit classification committee review once they have served 50 percent of their actual sentence or are within 12 months of having served 50 percent of their actual sentence . . .” (*id.*, Eligibility, italics added); if an inmate is eligible for this early release, then *within a specified time* “[t]he deputy commissioner will review all relevant and reliable information . . .” and “will conduct an administrative review to determine if the inmate’s release would pose an unreasonable risk to public safety” (*id.*, Hearing Officers and Procedure, italics added); the deputy commissioner “will document his or her decision” in writing on a specified form and “will” notify all involved of the decision (*ibid.*, italics added); if the inmate submits a proper request, a further review

¹⁵ Although the February 2014 Order does not contain the words “consent decree,” it is based on and reflects the Defendants’ express representation that they would develop “a new parole determination process,” which resulted in the NVSS Procedures, and the Attorney General has confirmed that the “[D]efendants agreed” to create and implement this process.

“will be conducted” by an associate chief deputy commissioner, and the Board “will . . . issue a decision upholding or vacating the original decision” and “will . . . notify[ly]” those affected by the decision (*id.*, Decision Review, italics added);¹⁶ and, significantly, when an inmate is approved for release, the Board “will . . . release[the inmate] to state parole or post release community supervision” within a specified time (NVSS Procedures, *supra*, Release of Inmate, italics added).

With a protected liberty interest and, thus, an entitlement to due process in the NVSS review, Ilasa is entitled to judicial review of the Board’s decision.¹⁷

B. Because the Record Contains Some Evidence to Support the Board’s Decision, Ilasa’s Due Process Rights Were Not Violated

Ilasa contends that he was not afforded due process of law when the Board denied him parole under the NVSS Procedures. In denying parole, consistent with the NVSS Procedures, the Board based its decision on the finding that Ilasa poses “an unreasonable risk of violence to the community.” Ilasa’s argument is that he was denied due process because the record contains “no evidence” that he would pose an unreasonable risk to public safety.

Although our research has not disclosed any authority that discusses the standard to be applied in reviewing the Board’s decision to deny parole under the NVSS Procedures, we are not deciding this issue without some guidance. We have the benefit of years of judicial review of Board decisions denying parole to inmates sentenced to indeterminate terms.

■ In *Prather*, our Supreme Court summarized its conclusions in *Lawrence*, *supra*, 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241 [82 Cal.Rptr.3d 213, 190 P.3d 573] (*Shaputis I*), as follows: “[T]he standard governing judicial review of parole decisions made either by the Board or by the Governor is whether ‘some evidence’ supports the determination that a prisoner remains currently dangerous.” (*Prather*, *supra*, 50 Cal.4th at p. 243.)

¹⁶ We note that in reviewing and upholding the initial denial of parole in Ilasa’s case, the Board applied the review criteria in Regulations section 2042, which contains the criteria for review of initial parole decisions for inmates serving *indeterminate* sentences. This suggests that the Board did not consider this portion of the NVSS Procedures different from that applied in reviewing parole decisions of indeterminately sentenced inmates who unquestionably have a due process liberty interest in parole. (*Lawrence*, *supra*, 44 Cal.4th at p. 1191; see pt. II.A.2., *ante*.)

¹⁷ Because we decide that Ilasa is entitled to judicial review of the Board’s decision based on a protected liberty interest—and, thus, an entitlement to due process—in the NVSS review process on the grounds stated in the text, *ante*, we have not considered and express no opinion as to any other arguments raised by Ilasa in the supplement to his petition or in his traverse.

Indeed, courts apply the same “‘some evidence’” standard in reviewing Board decisions rescinding parole. (*In re Powell* (1988) 45 Cal.3d 894, 903–904 [248 Cal.Rptr. 431, 755 P.2d 881].) This is a standard that “does not usurp the executive’s discretionary authority over parole matters or otherwise violate the separation of powers doctrine. Rather, such review simply ensures that parole decisions are supported by a modicum of evidence and are not arbitrary and capricious.” (*Rosenkrantz, supra*, 29 Cal.4th at p. 626; see *Shaputis II, supra*, 53 Cal.4th at p. 215 [“The ‘some evidence’ standard is intended to guard against arbitrary parole decisions, without encroaching on the broad authority granted to the Board and the Governor.”]; *Lawrence, supra*, 44 Cal.4th at pp. 1204–1205.)

Our review of the Board’s decision following a denial of parole under the NVSS Procedures presents the same issues and concerns as courts’ review of Board decisions granting, denying or rescinding parole of inmates sentenced to indeterminate terms. Accordingly, we will apply the same standard here and review the Board’s decision denying parole to Ilasa for *some evidence*.¹⁸

In this context, “some evidence” means that, in support of its decision, the Board must be able to point to “factors beyond the minimum elements of the crime for which the inmate was committed.” (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1071 [23 Cal.Rptr.3d 417, 104 P.3d 783] [review of Board’s decision denying parole from indeterminate sentence].) Such factors could include, for example and without limitation, details (beyond the minimum elements) of the crime itself, prior crimes, or any other unsuitability factor such as the inmate’s institutional behavior. We look at the evidence before the Board to determine whether the evidence supports the *conclusion* that the inmate poses an unreasonable risk of violence to the community, not merely whether some evidence supports a specific factual finding made in reaching the ultimate conclusion. (*Lawrence, supra*, 44 Cal.4th at p. 1191 [review of Governor’s decision reversing Board’s grant of parole from indeterminate sentence].) The relevant inquiry is whether the identified facts are probative of the ultimate issue whether the inmate poses a *current* unreasonable risk of violence to the community. (*Shaputis I, supra*, 44 Cal.4th at p. 1254 [review of Governor’s decision reversing Board’s grant of parole from indeterminate sentence].) The reviewing court does not decide whether the inmate currently poses an unreasonable risk of violence; that issue is left to the Board. (*Shaputis II, supra*, 53 Cal.4th at p. 221 [review of Board’s decision denying parole from indeterminate sentence].) The reviewing court “is not empowered to reweigh the evidence,” but only considers “whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness.” (*Ibid.*)

¹⁸The parties agree that we should apply the “some evidence” standard to review the Board’s decision here.

We reject Ilasa's suggestion that, in our review of whether the record contains some evidence to support the Board's conclusion that Ilasa poses "an unreasonable risk to public safety" (NVSS Procedures, *supra*, Hearing Officers and Procedure), we apply Proposition 47's definition of "unreasonable risk of danger to public safety." The Proposition 47 definition is found in section 1170.18, subdivision (c), which provides in full: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that *the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.*" (Italics added.) First, by its terms the Proposition 47 definition applies only to the Penal Code (§ 1170.18, subd. (c)), and we are considering a review under the NVSS Procedures. Second, a successful petition under Proposition 47 results in a defendant's felony sentence being recalled and the defendant being resentenced to a misdemeanor pursuant to specified sections of the Penal Code (§ 1170.18, subd. (b)), whereas a successful petition for writ of habeas corpus results in "discharge . . . from . . . custody or restraint" (§ 1485). Third, there is no indication that the crime of which Ilasa was convicted (namely, felon in possession of a firearm (former § 12021, subd. (a)(1)) is included among those to which Proposition 47 applies (namely, §§ 459.5, 473, 476a, 490.2, 496, 666; Health & Saf. Code, §§ 11350, 11357, 11377). (Pen. Code, § 1170.18, subd. (a).) Fourth, in determining whether the inmate poses an unreasonable risk of danger to public safety, Proposition 47 requires the court to determine whether the inmate "will commit a new violent felony" (§ 1170.18, subd. (c)), whereas the NVSS Procedures contain no such standard. Finally, since Proposition 47 became effective in November 2014 (*People v. Johnson* (2016) 1 Cal.App.5th 953, 957 [205 Cal.Rptr.3d 246]; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [183 Cal.Rptr.3d 362]) and the NVSS Procedures became effective almost two months later in January 2015 (NVSS Procedures, *supra*, NVSS Overview), the CDCR could have included the Proposition 47 definition of "unreasonable risk of danger to public safety" had the CDCR intended it to apply in the NVSS parole review proceedings.

■ Under the applicable standards, we have no difficulty concluding that *some evidence* (other than the minimum elements of the crime for which Ilasa was committed) supports both the Board's finding that "the inmate does not hesitate to use violence and weapons to get the things he believes he wants" and the Board's ultimate determination that Ilasa poses a current unreasonable risk to public safety. As part of the search that preceded the arrest for the crime of which Ilasa was convicted (felon in possession of a firearm), police found a substantial amount of ammunition stored in boxes in an entertainment center and his bedroom closet; a small armory in his children's room; a 7.35-caliber rifle in the closet in a spare bedroom; a loaded nine-millimeter magazine containing 10 rounds next to a nine-millimeter pistol in his vehicle;

and three red bandanas in a closet.¹⁹ Red is the color of two criminal street gangs with which Ilasa was associated, and Ilasa told police that he needed the nine-millimeter pistol for protection because he lived in rival street gang territory. Ilasa's prior criminal record includes a 1991 conviction of misdemeanor battery, a 1992 conviction of second degree burglary, and a 1993 conviction of two counts of felony robbery for which he was sentenced to five years in prison. The first robbery involved taking a vehicle from the victim at gunpoint; and the second robbery occurred at a liquor store, where Ilasa violently attacked the clerk with a beer can until the clerk was able to escape by crawling away and hiding in a cooler.

■ At oral argument, counsel for Ilasa stressed that, because the record contains no evidence of gang activity since his conviction of the commitment offense—i.e., no evidence of gang activity since Ilasa's incarceration—there cannot be some evidence that he presents a *current* unreasonable risk of violence to public safety. However, the standard is not current evidence of an unreasonable risk of violence; “the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be *predictive of current dangerousness* many years after commission of the offense.” (*Shaputis I, supra*, 44 Cal.4th at pp. 1254–1255, italics added.) Ilasa’s prior gang activity is only one part of Ilasa’s history of violent conduct that includes battery, burglary, two robberies (one involving an assault and one involving a battery) and the stockpiling guns and ammunition in his residence. In determining whether to parole an inmate serving an indeterminate sentence, the Board may consider circumstances which, when taken alone may not establish unsuitability for parole, nonetheless “may contribute to *a pattern which results in a finding of unsuitability*.²⁰ (Regs., § 2402, subd. (b), italics added.) Based on the pattern of Ilasa’s *past* violent conduct cited by the Board, the record here provides

¹⁹ The existence of considerable ammunition is not among the elements of the crime of which Ilasa was committed. He pled guilty to one count of *possession of a firearm* by a felon under former section 12021, subdivision (a)(1)—the elements of which were “conviction of a felony and ownership, possession, custody or control of a firearm capable of being concealed on the person.” (*People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42]; cf. former § 12316, subd. (b)(1) & (3) [*possession of ammunition* by a person prohibited from owning or possessing a firearm is a different crime].)

²⁰ We acknowledge that the standards for parole under the Regulations and under the NVSS Procedures are not identical. (Compare Regs., § 2402, subd. (a) [whether the inmate’s release “will pose an unreasonable risk of danger to society”] with NVSS Procedures, *supra*, Hearing Officers and Procedures [whether the inmate’s release “would pose an unreasonable risk to public safety”].) However, since we have determined the standard of judicial review of the Board’s decisions for parole of NVSS inmates based on the standard of judicial review of the Board’s decisions for parole of indeterminately sentenced inmates, we find persuasive the language in the Regulations regarding the information the Board may consider in determining indeterminately sentenced inmates’ suitability for parole.

some evidence sufficient to support the Board's ultimate determination that, if Ilasa were released, he would pose a *current* unreasonable risk to public safety.

Accordingly, Ilasa has not demonstrated that his due process rights were violated during the Board's review under the NVSS Procedures.

III.

DISPOSITION

Ilasa's petition for writ of habeas corpus is denied.

McConnell, P. J., and Nares, J., concurred.

A petition for a rehearing was denied October 4, 2016, and petitioner's petition for review by the Supreme Court was denied November 30, 2016, S237773.

[No. B269429. Second Dist., Div. Four. Sept. 19, 2016.]

In re KORBIN Z., a Person Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
MICHAEL W., Defendant and Appellant.

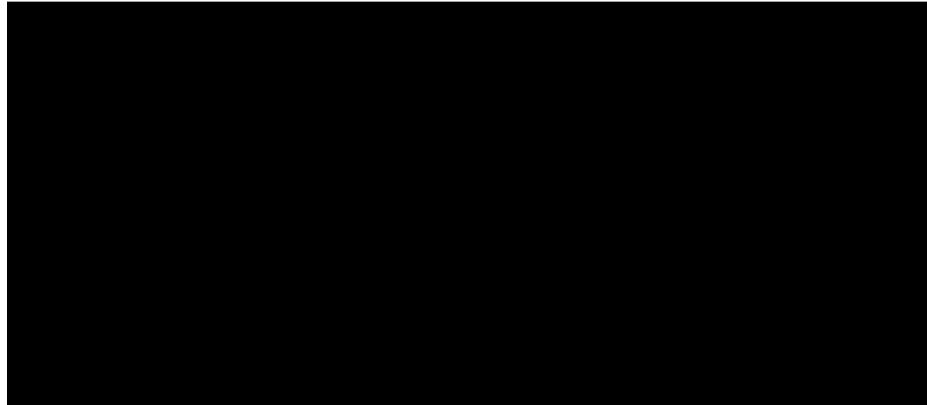
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COUNSEL

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Linda B. Puertas, under appointment by the Court of Appeal, for Minor.

OPINION

WILLHITE, Acting P. J.—Michael W. (Father) appeals from an order of the juvenile court on his petition under Welfare and Institutions Code section 388¹ giving his minor son, Korbin Z. (Korbin), sole discretion whether Father will have visits with him. Korbin (the sole respondent on appeal)² contends that Father had no right to visitation under the circumstances of this case, and that therefore it was not improper to delegate to Korbin the decision whether he will visit with Father.

As we explain below, we conclude that where, as here, the court has not ordered reunification services because, under section 361.5, subdivisions

¹ Unspecified statutory references are to the Welfare and Institutions Code.

² The Los Angeles County Department of Children and Family Services takes no position in this appeal and therefore did not file a brief.

(b)(1) and (d), the parent's whereabouts were unknown for more than six months after the child's out-of-home placement, the parent has no right to visitation. Nonetheless, the court may order visitation in the exercise of its discretion under section 362, subdivision (a), on a finding that such visitation will serve and protect the child's best interests. But, as is the rule when visitation is ordered as part of a reunification plan, the court cannot give the child sole discretion to determine whether such visitation will occur. Rather, once the court determines that visitation is in the child's best interests, the court must, as part of its duty to protect and serve those interests, ensure that such visitation occurs under terms set by the court. Otherwise, by placing sole discretion whether visitation will occur in the hands of the child, the court will have ceded to the child the determination whether visitation is in the child's best interests. Therefore, we reverse the order regarding Father's visitation, and remand for the court to reconsider whether to order visitation, and if so, to set the terms of that visitation.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2013, Korbin (born Oct. 2004) lived with his mother, K.T. (Mother), his half sister (born Jan. 2010), and Mother's male companion, Rene A.³ On December 4, 2013, the Los Angeles County Department of Children and Family Services (DCFS or agency) filed a section 300 petition on behalf of Korbin and his half sister, asserting jurisdiction under section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect). Father's whereabouts were unknown.

The section 300 petition alleged that Mother and Rene engaged in a violent confrontation in the children's presence; Mother and maternal grandmother engaged in a violent confrontation in the children's presence; Mother had mental and emotional problems and failed to take her psychotropic medication; and Mother was a current abuser of marijuana and alcohol.

Mother and Korbin had not had contact with Father since Korbin was three weeks old. According to Mother, Father had made no efforts to contact her or Korbin since then. Mother told the caseworker that she had obtained a temporary restraining order against Father because of domestic violence.

Father was not present at the December 4, 2013 detention hearing. He was deemed to be Korbin's presumed father and was granted reunification services and, if he contacted DCFS, monitored visits. The juvenile court found a *prima facie* case was established for detaining Korbin and ordered him detained with his maternal aunt.

³ The half sister and Mother are not parties to this appeal.

In February 2014, DCFS filed a declaration of due diligence, indicating that the agency had searched numerous sources, including prison, military, voter registration, Department of Motor Vehicles, and LexisNexis records, and found seven addresses for Father. (See § 361.5, subd. (b)(1) [a finding that a parent's whereabouts are unknown shall be supported by an affidavit showing "a reasonably diligent search" was performed].) The agency mailed certified notices to all seven addresses.

At the February 19, 2014 jurisdiction/disposition hearing, the juvenile court found that due diligence as to Father's whereabouts had been completed. The court found that Father was Korbin's legal father and vacated the prior finding of presumed father status. The court declared Korbin a dependent of the court under section 300, subdivision (b), based on the allegation that Mother's mental and emotional problems rendered her unable to care for the children. The court dismissed the other allegations in the interest of justice. The court did not order reunification services for Father but ordered monitored visits once he contacted the court or DCFS.⁴

At the six-month review hearing in August 2014, the court found that Mother was not in compliance with her case plan. At the 12-month review hearing in February 2015, the court terminated reunification services for Mother and scheduled a section 366.26 hearing for permanent placement. (See § 366.21, subd. (g)(4) [if court does not return child to parent at 12-month hearing, court may order § 366.26 hearing].)

In July 2015, DCFS mailed notice to Father about the section 366.26 hearing on selection of a permanent plan for Korbin. Father contacted DCFS and said that he had been trying to contact the agency for a month. He had not seen Korbin for nine years, but he expressed willingness to have Korbin placed with him. The section 366.26 report stated that Korbin missed Mother and wanted to live with her, but he did not wish to have visits with Father.

Father appeared at the August 2015 section 366.26 hearing. The court continued the hearing and denied Father's request for DNA testing.

Father filed a section 388 petition in October 2015, asking the court to set aside its February 2014 finding that DCFS issued proper notice to him and to order that Korbin be released to his custody. He argued that DCFS should have found his address because he had "maintained a current address with child support." He further argued that the requested order would be better for Korbin because it would provide him with "the love and stability a child deserves."

⁴ Father was not entitled to reunification services under section 361.5, subdivision (b)(1), which states that services need not be provided if the court finds that the parent's whereabouts are unknown.

The court held a hearing on October 28, 2015, and denied Father's section 388 petition. The court found that the agency exercised due diligence, noting that Father's address on his driver's license still was not correct at the time of the section 388 hearing. The court further concluded that Father had not met his burden of showing that changing the prior order would be in Korbin's best interests, citing the following reasons: Korbin's desire to remain with his maternal aunt and uncle, whom he considered to be his family; Father's lack of a relationship with Korbin, due in part to the restraining order against him for three years; and Korbin's age. (See *In re A.A.* (2012) 203 Cal.App.4th 597, 611 [136 Cal.Rptr.3d 912] [under § 388, the parent has the burden of establishing "by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child"].)

The court concluded that changing the prior order would be too disruptive for Korbin but expressed the opinion that as Korbin matured, he might want a relationship with Father. Mother objected to any visits, stating that Father had burned her other child with cigarettes and beaten her while she was pregnant. Counsel for Korbin also stated that Korbin did not want any visits with Father. The court expressed the desire to allow monitored visits in the future in case Korbin changed his mind but explained that the decision to have any visits would be Korbin's. The court thus ordered DCFS to facilitate monitored visits with Korbin and Father in a therapeutic setting at Korbin's discretion. The court found that the permanent plan of legal guardianship was appropriate and continued the section 366.26 hearing. Father appealed.

DISCUSSION

Father contends that the juvenile court erred in giving Korbin sole discretion over Father's visitation. We agree. Although the court was not required to order visits for Father, once it did so, it could not delegate the decision whether visitation would occur to Korbin. Rather, the court had the continuing obligation to supervise any such visitation and determine the terms under which visitation would occur. We therefore reverse the visitation order and remand for the court to reconsider whether to order visitation, and if so, the terms of the visitation.

Case law consistently holds that the juvenile court cannot delegate the decision whether visitation will occur to any third party, including the child, the social services agency, or the guardian. (See, e.g., *In re Ethan J.* (2015) 236 Cal.App.4th 654, 656 [186 Cal.Rptr.3d 740] (*Ethan J.*) [juvenile court may not terminate dependency jurisdiction knowing that child refused to participate in visitation]; *In re T.H.* (2010) 190 Cal.App.4th 1119, 1123 [119 Cal.Rptr.3d 1] (*T.H.*) [“The power to determine the right and extent of

visitation by a noncustodial parent in a dependency case resides with the court and may not be delegated to nonjudicial officials or private parties. [Citation.]”; *In re Kyle E.* (2010) 185 Cal.App.4th 1130, 1136 [111 Cal.Rptr.3d 199] [juvenile court improperly delegated authority to department of health and human services regarding whether visitation would occur]; *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505 [48 Cal.Rptr.3d 823] (*Hunter S.*) [juvenile court erred in failing to enforce visitation order where child refused any contact with his mother]; *In re S.H.* (2003) 111 Cal.App.4th 310, 319 [3 Cal.Rptr.3d 465] [“In no event . . . may the child’s wishes be the *sole* factor in determining whether any visitation takes place”]; *In re Julie M.* (1999) 69 Cal.App.4th 41, 48–49 [81 Cal.Rptr.2d 354] [juvenile court abused its discretion in giving children “absolute discretion” to decide whether mother could visit them because this order “essentially delegated judicial power to the children”].) “A visitation order may delegate to a third party the responsibility for managing the details of visits, including their time, place and manner. [Citation.] That said, ‘the ultimate supervision and control over this discretion must remain with the court’ [Citation.]” (*T.H., supra*, 190 Cal.App.4th at p. 1123.) The juvenile court “improperly delegate[s] its authority and violate[s] the separation of powers doctrine” if it “delegates the discretion to determine whether any visitation will occur” to a third party. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1009 [57 Cal.Rptr.2d 861].)

Korbin notes that these decisions limiting a juvenile court’s authority to delegate visitation arise under circumstances where the parent has the right to visit the child as part of a reunification plan. Here, however, Father had no right to visitation. Therefore, Korbin argues, these decisions do not apply to Father’s case.

It is true that Father had no right to visitation. At the February 2014 hearing, the court found that DCFS had established due diligence as to Father. Once that finding was made, Father was not entitled to reunification services, and the court ordered that he be offered no reunification services. (See § 361.5, subd. (b) [“Reunification services need not be provided to a parent or guardian . . . when the court finds, by clear and convincing evidence . . . [t]hat the whereabouts of the parent or guardian is unknown. . . .”].) Although “[v]isitation is an essential part of a reunification plan,” it “is not integral to the overall plan when the parent is not participating in the reunification efforts.” (*In re J.N.* (2006) 138 Cal.App.4th 450, 458–459 [41 Cal.Rptr.3d 494] (*J.N.*); see also *In re D.B.* (2013) 217 Cal.App.4th 1080, 1090 [158 Cal.Rptr.3d 915] [the court’s discretion over visitation is less constrained after reunification services are terminated, when the focus is “on permanency and stability for the child”].)

Had Father's whereabouts become known within six months of Korbin's out-of-home placement, Father would have been entitled to reunification services. (See § 361.5, subd. (d) ["If reunification services are not ordered pursuant to paragraph (1) of subdivision (b) and the whereabouts of a parent become known within six months of the out-of-home placement of the child, the court shall order the social worker to provide family reunification services in accordance with this subdivision."].) But Father's whereabouts did not become known until he appeared in court in August 2015, 20 months after Korbin was removed from Mother's custody in December 2013.

■ Thus, because section 361.5, subdivision (d) did not apply, Father was not entitled to reunification services. And because he was not entitled to reunification services, he had no right to visitation. Nonetheless, no statute precluded the court from ordering visitation even though, under section 361.5, subdivision (b)(1), the court did not order reunification services.⁵ Further, section 362, subdivision (a) provides: "If a child is adjudged a dependent child of the court on the ground that the child is a person described by Section 300, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment, subject to further order of the court." ■ This provision grants "broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion. [Citations.]" (*In re Corrine W.* (2009) 45 Cal.4th 522, 532 [87 Cal.Rptr.3d 691, 198 P.3d 1102]; see also § 362, subd. (d) [“The juvenile court may direct any reasonable orders to the parents or guardians of the child who is the subject of any proceedings under this chapter as the court deems necessary and proper to carry out this section”].) Given this broad discretion, upon a finding that visitation would serve and protect Korbin's interests, we conclude that the court had the authority to order visitation.

But we also conclude that, having made the decision to order visitation, the court had the obligation to supervise that visitation, and could not delegate to Korbin the authority to determine whether such visitation would occur at all.

⁵ We note that section 361.5, subdivision (f) provides, in substance, that when the court does not order reunification services under subdivision (b)(2) through (16) or subdivision (e)(1), it "may," pending the section 366.26 hearing, "continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." These listed subdivisions concern circumstances where no reunification services are ordered for reasons such as mental disability, death of another child, sexual abuse, severe physical harm, and conviction of a violent felony. They do not include the situation here, where no reunification services were ordered under subdivision (b)(1) of section 361.5, because Father's whereabouts were unknown. Nonetheless, while section 361.5, subdivision (f) does not specifically authorize the court to order visitation when no reunification services are ordered under subdivision (b)(1), it also does not preclude such an order.

Rather, the standard rule precluding the delegation of sole authority over visitation to the minor applies: “If the juvenile court orders visitation, ‘it must also ensure that at least some visitation, at a minimum level determined by the court itself, will in fact occur.’ [Citation.] When the court abdicates its discretion and permits a third party, including the dependent child, to determine whether any visitation will occur, the court impermissibly delegates its authority over visitation and abuses its discretion. [Citation.]” (*Ethan J.*, *supra*, 236 Cal.App.4th at p. 661; see *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138 [106 Cal.Rptr.2d 465] (“[V]isitation may not be dictated solely by the child involved although the child’s desires may be a dominant factor”); *Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505 (“In no case may a child be allowed to control whether visitation occurs.”].)

■ Any other rule would cede to Korbin the court’s duty under section 362, subdivision (a) to determine what is in Korbin’s best interests. In other words, under the circumstances present here, where under section 361.5, subdivisions (b)(1) and (d) reunification services have not been ordered, the court may order parental visitation in the exercise of its discretion under section 362, subdivision (a), on a finding that such visitation will serve and protect the minor’s interests. But the court must set the parameters of such visitation. It cannot place in the minor’s hands the sole discretion to determine whether such visitation, which the court has determined is in the child’s best interests, will occur at all.

Thus, we conclude that the court improperly delegated authority to Korbin to decide whether visits with Father would occur. We reverse that portion of the October 2015 order regarding Father’s visitation and remand for further proceedings. On remand, in light of Korbin’s opposition to visits with Father, the court may reconsider whether the visits are in Korbin’s best interests. (See *Hunter S.*, *supra*, 142 Cal.App.4th at p. 1508 [“In conducting a new section 388 hearing, given the passage of time and the consistent intensity of Hunter’s resistance, it may be appropriate for the juvenile court to further consider if, under the circumstances and in light of current information, visits would be detrimental to Hunter”]; *J.N.*, *supra*, 138 Cal.App.4th at p. 459 [no abuse of discretion in court’s finding that contact with the mother would not be in the child’s best interest where the mother had “not seen him for nine years,” and it was reasonable to infer there was not a strong relationship between them].) If the court nonetheless orders visitation, it must set the terms of such visitation, mindful of the rule that “[a] visitation order may delegate to a third party the responsibility for managing the details of visits, including their time, place and manner. [Citation.] That said, ‘the ultimate supervision and control over this discretion must remain with the court . . .’ [Citation.]” (*T.H.*, *supra*, 190 Cal.App.4th at p. 1123.)

DISPOSITION

The portion of the October 28, 2015 order regarding Father's visitation is reversed. The matter is remanded for the juvenile court to reconsider whether to order visitation, and if so, the terms of such visitation. In all other respects the order is affirmed.

Manella, J., and Collins, J., concurred.

[No. A147463. First Dist., Div. Three. Sept. 6, 2016.]

In re J.G., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
J.G., Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Leila H. Moncharsh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Assistant Attorney General, Eric D. Share and Huy T. Luong, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

POLLAK, J.—The minor appeals from a juvenile court order finding that his probation terminated “unsuccessfully” because he failed to pay restitution ordered as a condition of probation. We shall reverse the order upon concluding that unpaid restitution debts do not foreclose a finding of satisfactory completion of probation. (Welf. & Inst. Code, § 786, subd. (c)(2).)¹

Statement of Facts and Juvenile Court Proceedings

Minor was 17 years old in January 2011 when he committed a residential burglary. (Pen. Code, §§ 459, 460, subd. (a).) He was adjudged a ward of the juvenile court and placed in a youth rehabilitation center for nine months. (§ 602, subd. (a).) Minor was ordered to pay victim restitution of \$2,100 and a restitution fine of \$100. (§ 730.6, subds. (a)(2)(B), (b)(1).)

Minor arrived at the youth rehabilitation center in April 2011 and was granted early release in September 2011, graduating from the program in six months. In a later report to the court, a probation officer stated: “According to institutional records and staff, [minor’s] adjustment to the program was very good. [He] abided by institutional rules; he adhered to staff directions; he interacted well with his peers; and he performed well in school. As part of his therapeutic treatment plan at the [center], [minor] participated in anger management, impact of crime on victims, life skills, and substance abuse programs.”

Minor returned home. It was reported at a December 2011 review hearing that minor “has fully complied with the conditions of his probation. . . . [¶] Regarding his adjustment at home, his attitude and behavior have been good according to his mother. [She] reports that [minor] had been following her rules, completing household chores, abiding by his curfew, and contributing to household expenses. Each time [the probation officer] has spoken to [minor’s mother], she has related nothing but positive information regarding her son’s conduct at home. [¶] As to school, [minor] has been participating in the GED program” and “hopes to take his GED examination within the next few months.” He has been working part time in a restaurant. “As to his other conditions of probation, [minor] has been drug tested on a regular basis and has not tested positive for any illicit substances. [Minor] has reported to probation as directed and he has been available for home visits. According to probation records, he has not committed any new law violations.” Minor had not yet paid restitution but said he “expects to begin making payments in the

¹ All further section references are to the Welfare and Institutions Code, except as indicated.

near future." The probation officer concluded by noting minor's "positive adjustment in the community." As recommended by the probation department, the court ordered minor's parole "terminated successfully" and maintained his wardship. The order was issued on December 29, 2011, when minor was age 18.

No further proceedings were had until a January 26, 2016 review hearing, when minor was age 22. The probation department filed a report asking for termination of wardship because minor's age put him beyond the jurisdiction of the juvenile court.² The report stated that minor "perform[ed] well in the community" from the time of the 2011 review hearing to date. Minor "continued to follow his parents' rules at home, obtained his GED," "obtained employment" at a restaurant, and was free of any law violations. Minor had not paid restitution.

At the hearing, minor's counsel asked the court to vacate wardship and "dismiss successfully," arguing that unpaid restitution was not a basis for finding unsuccessful completion of probation. Counsel relied upon section 786, subdivision (c)(2), which provides: "An unfulfilled order or condition of restitution, including a restitution fine that can be converted to a civil judgment under Section 730.6 or an unpaid restitution fee shall not be deemed to constitute unsatisfactory completion of supervision or probation . . ." The prosecutor argued that the restitution order could not be converted to a civil judgment "at this point in time," when minor was over 21 years old, so restitution remained an "unfulfilled" condition of probation preventing a finding that probation was successfully completed. The court appears to have accepted the prosecutor's argument and, believing it had no authority to issue a civil judgment, found it had no authority to find a successful completion of probation. The court stated, "if I have the authority to issue an abstract of judgment, I can make it successful" but "if I don't have authority for an abstract of judgment, it will be unsuccessful completion." Defense counsel, apparently believing the court had no authority to issue a civil judgment for the unpaid restitution, presented an estoppel argument. Counsel maintained that minor should not be penalized by the probation department's failure to set a review hearing before minor turned age 21, when the court "still had jurisdiction" to convert the restitution orders to a civil judgment and terminate minor's probation successfully. The court was not persuaded: "I'm going to terminate probation unsuccessfully. There have been no attempts to make payments. He's had extra years to make those payments and nothing has been paid. He knew that was an obligation of probation. [¶] So the probation is terminated unsuccessfully. The wardship is vacated. That closes the case."

² The juvenile court, with limited exceptions, loses jurisdiction over a ward who reaches the age of 21 years. (§ 607, subd. (a).)

Discussion

Minor contends the juvenile court erred by ruling that his probation terminated unsuccessfully. Consideration of the contention requires, as an initial matter, clarification of the meaning and consequences of an order issued at the end of a term of probation that adjudicates its completion to be unsuccessful or unsatisfactory. When referring to the completion of probation, judges and litigants often use the terms “successful” and “satisfactory” interchangeably. But the terms are not always interchangeable and even the same term can have different statutory definitions. Differing statutes require that care be taken to identify the statute at issue, use the correct statutory term, and apply the definition specific to that statute to avoid confusion as to the nature of the court’s finding and its effect.³

The juvenile court’s minute order terminated probation “unsuccessfully” without statutory citation. It is clear, however, that the finding relates to section 786, which was the central topic of discussion at the review hearing. Section 786, subdivision (a), uses the term *satisfactory* completion of probation, and we shall use that term here when referring to the juvenile court’s finding.

Satisfactory completion of probation under section 786 “shall be deemed to have occurred if the person has no new findings of wardship or conviction for a felony offense or a misdemeanor involving moral turpitude during the period of supervision or probation and if he or she has not failed to substantially comply with the reasonable orders of supervision or probation that are within his or her capacity to perform.” (§ 786, subd. (c)(1).) Satisfactory completion of probation under section 786 has significant benefits for a juvenile offender. A minor who satisfactorily completes probation is entitled to have the petition of wardship dismissed and the records pertaining to the petition sealed. (§ 786, subd. (a).) With satisfactory completion of probation, “the arrest and other proceedings in the case shall be deemed not to have occurred and the person who was the subject of the petition may reply accordingly to any inquiry by employers, educational institutions,” and others. (§ 786, subd. (b).)

The only ground offered by the prosecution for finding unsatisfactory completion of probation was unpaid restitution. As noted earlier, an “unfulfilled order or condition of restitution, including a restitution fine that can be

³ For example, Penal Code section 290.46, subdivision (e)(2)(D)(i) and (iv) provides that a convicted sex offender may apply for exclusion of his or her identity from the Internet if the offender “successfully completed probation,” defined as completing the term of probation without being incarcerated for a probation violation nor convicted of another offense resulting in incarceration. Freedom from incarceration marks a “successful” completion under that statute without regard to other conditions.

converted to a civil judgment . . . or an unpaid restitution fee shall not be deemed to constitute unsatisfactory completion of supervision or probation.” (§ 786, subd. (c)(2).) On its face, the statute seems to provide that an unfulfilled restitution order does not constitute unsatisfactory completion of probation under any circumstance, as the statute includes, but does not limit its reach, to orders that can be converted to a civil judgment. However, the parties read the provision to state that an unfulfilled restitution order shall not be deemed to constitute unsatisfactory completion of probation *if and only if* the order can be converted to a civil judgment. The juvenile court was operating under that interpretation when it found—at the prosecutor’s urging—that the court lost jurisdiction to enter a civil judgment when minor turned 21, thus leaving minor’s obligation to pay restitution unsatisfied and completion of probation unsatisfactory. The prosecutor and court were mistaken on this jurisdictional point, as the Attorney General concedes on appeal.

■ A juvenile court’s authority to issue an abstract of judgment commanding payment of a restitution order does not end on minor’s 21st birthday. (*In re Keith C.* (2015) 236 Cal.App.4th 151, 155–157 [186 Cal.Rptr.3d 339]; *In re J.V.* (2014) 231 Cal.App.4th 1331, 1335–1336 [180 Cal.Rptr.3d 711].) “[I]f a juvenile court enters a valid restitution order when the juvenile is under 21—at a time when the court indisputably has jurisdiction—that order remains enforceable beyond the period of wardship in the same manner as any civil judgment.” (*In re Keith C.*, *supra*, at p. 157, italics omitted.) The juvenile “court has continuing authority to enforce a prior, validly issued order.” (*Ibid.*)

■ Thus, the different possible interpretations of section 786, subdivision (c)(2), noted above, are immaterial in this case. It makes no difference whether the statute is read to allow for satisfactory completion of probation when there is an unpaid restitution order or to allow satisfactory completion only if unpaid restitution orders can be converted to civil judgments. It is undisputed on appeal that the restitution order here can be converted to a civil judgment, thus creating no barrier to a finding of satisfactory completion.

The remedy on appeal is to direct entry of the proper orders. There is no need for another probation review hearing, which is the remedy suggested by the Attorney General. Minor’s good performance on probation is undisputed. The record shows he had no new findings of wardship or convictions and complied with all orders of probation apart from the restitution order. (§ 786, subd. (c)(1).) The only basis for finding unsatisfactory completion of probation was the court’s mistaken belief that it could not enter a civil judgment directing payment of restitution. The court had the authority to enter a judgment and minor agrees that a judgment should have been entered. Another hearing to review minor’s performance on probation is unnecessary.

Disposition

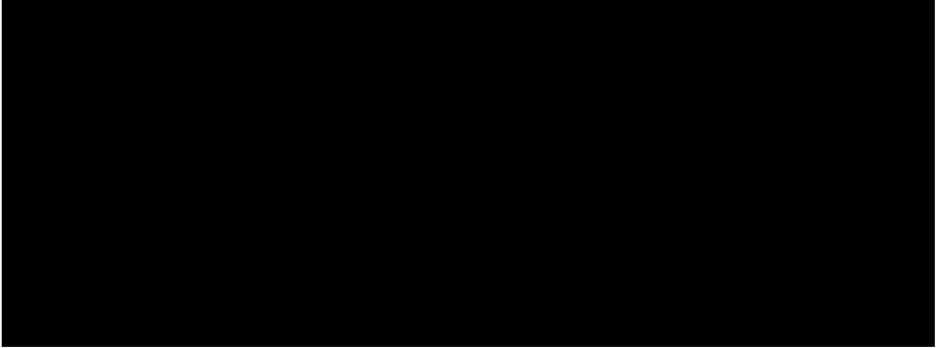
The juvenile court's order is reversed and the matter remanded with directions to issue an order under section 786, subdivision (a) dismissing the petition, finding satisfactory completion of probation, and ordering sealed all records pertaining to the dismissed petition in the custody of the juvenile court, law enforcement agencies, the probation department, and the Department of Justice. The court shall provide a copy of its order and notice of the order's issuance consistent with the statute. The court shall also issue an abstract of judgment for collection of minor's unpaid restitution debts. (§ 730.6, subds. (i), (r).)

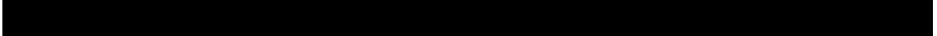
McGuiness, P. J., and Jenkins, J., concurred.

[No. C072644. Third Dist. Sept. 20, 2016.]

TRENT MILLS, an Incompetent Person, etc., Plaintiff and Appellant, v.
AAA NORTHERN CALIFORNIA, NEVADA AND UTAH INSURANCE
EXCHANGE, Defendant and Respondent.



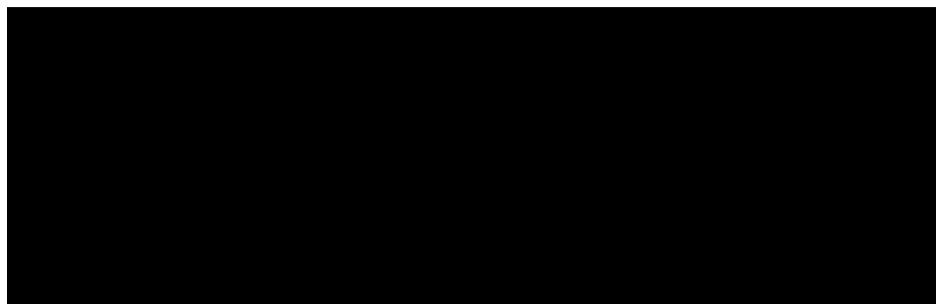
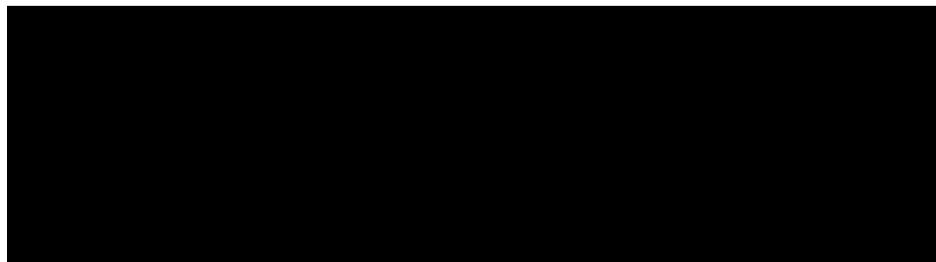
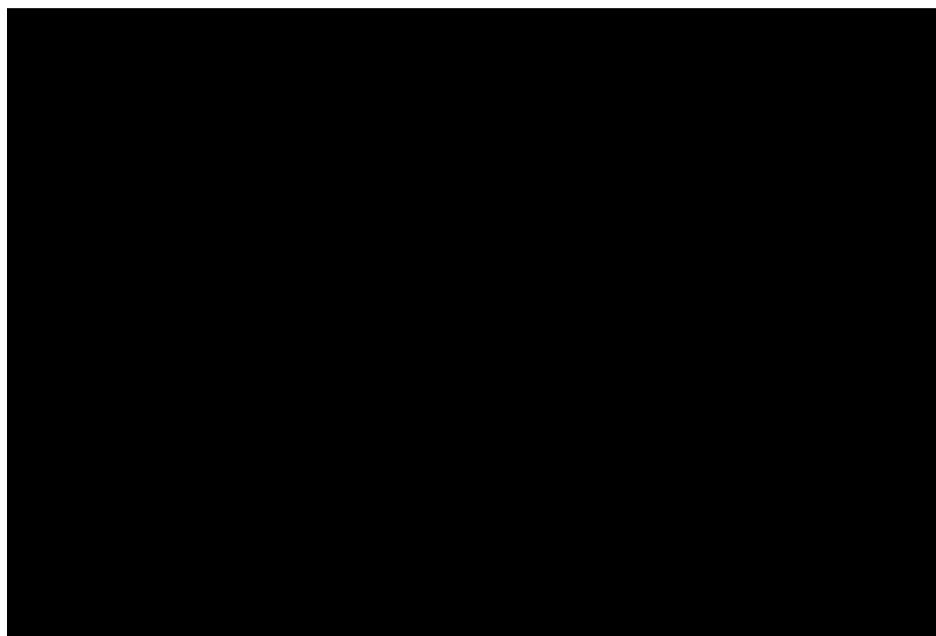




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COUNSEL

Farmer Smith & Lane and Blane A. Smith for Plaintiff and Appellant.

Coddington, Hicks & Danforth, R. Wardell Loveland and Carrie Dupic Huynh for Defendant and Appellant.

OPINION

NICHOLSON, Acting P. J.—Defendant insurance company denied uninsured motorist coverage to a third party beneficiary injured in an automobile accident because it had cancelled the policy before the accident occurred. The third party sued, and the insurer sought summary judgment. The third party opposed, contending the cancellation was invalid because a written notice seeking information sent by the insurer to the insureds prior to cancellation was unreasonable as a matter of law, and disputed facts existed as to whether the insurer had mailed the notice of cancellation and actually cancelled the policy. The trial court granted summary judgment, and we affirm.

FACTS AND PROCEDURAL HISTORY

California law grants an insurer the right to cancel an automobile insurance policy prior to its expiration due to “a substantial increase in the hazard insured against.” (Ins. Code, § 1861.03, subd. (c)(1).)

A “substantial increase in the hazard insured against” occurs when, among other events, the insured refuses or fails to provide the insurer, “within 30 days after reasonable written request to the insured, information necessary to accurately underwrite or classify the risk.” (Cal. Code Regs., tit. 10, § 2632.19, subd. (b)(1).) The written request for information must inform the insured “his or her failure to provide the requested information within the time required may result in the cancellation or nonrenewal of his or her policy.” (*Ibid.*)

Defendant AAA Northern California, Nevada and Utah Insurance Exchange (AAA) issued an auto insurance policy to plaintiffs Jeff and Denise Fields for an annual period commencing March 18, 2004. The policy identified Jeff Fields, Denise Fields, and their daughter, plaintiff Krystal Fields, as the insured drivers. It granted AAA the right to cancel the policy for any reason permitted by California law by mailing notice to the Fieldses no less than 20 days prior to the date of cancellation.

On February 5, 2005, Jeff and Denise Fields’s son, Patrick, collided with a parked vehicle while driving one of the cars insured under the policy. Patrick was not listed as an insured driver on the policy at that time.

AAA renewed the policy on March 18, 2005, for one year. However, by letter dated March 23, 2005, AAA informed Jeff and Denise Fields it sought information it claimed was necessary to underwrite their policy accurately. It offered them the opportunity to exclude Patrick from coverage by completing and returning an enclosed form. Alternatively, if they wanted to add Patrick to the policy or if they had other questions, they were to call AAA. The letter stated that if the Fieldses did not respond by April 22, 2005, AAA would cancel their policy. We address the letter in greater detail below.

AAA received no response to its request for information from the Fieldses.

By letter dated April 28, 2005, AAA notified the Fieldses it was cancelling their policy effective May 28, 2005. The decision to cancel the policy was “based on the refusal or failure to provide necessary information to accurately underwrite your policy following the request for the same.” AAA again received no response from the Fieldses.

On July 6, 2005, plaintiff Krystal Fields and her passenger, plaintiff Trent Mills, were injured in an automobile accident. Krystal was driving a car her parents had insured under their AAA policy. An uninsured motorist drove the other car. Mills suffered severe injuries, including traumatic brain injury and multiple fractures. He was in a coma for six weeks and suffered permanent cognitive impairments.

Krystal tendered an uninsured motorist claim to AAA under her parents' policy. AAA denied the claim because it had cancelled the policy prior to the accident.

Mills filed a complaint for personal injuries against the driver and registered owner of the other uninsured vehicle as well as Krystal and her parents. The Fieldses tendered the suit to AAA for defense and indemnity. AAA denied the tender because the policy was not in effect at the time of the accident.

Mills dismissed Jeff and Denise Fields from his action prior to trial, and the court found in favor of Krystal. However, the court granted Mills a default judgment in excess of \$12.7 million against the driver and owner of the other uninsured vehicle. Mills requested uninsured motorist benefits from AAA and demanded AAA arbitrate his claim against the Fieldses' policy. AAA denied the demand, again because it had cancelled the policy before the accident occurred.

In consolidated actions, the Fieldses and Mills sued AAA. Krystal Fields and Mills alleged AAA breached its insurance policy with the Fieldses when it denied their claims for uninsured motorist coverage. Jeff, Denise, and Krystal Fields alleged AAA breached its insurance policy by refusing to defend them against Mills's action. All plaintiffs alleged AAA breached the implied covenant of good faith and fair dealing. All plaintiffs sought punitive damages.

AAA filed for summary judgment. It contended it lawfully cancelled the Fieldses' policy prior to the accident due to the Fieldses' failure to provide necessary information AAA had requested in order to underwrite the policy accurately. AAA introduced evidence showing it forwarded the March 23 request for information and the April 28 notice of cancellation to the Fieldses, those notices complied with all statutory requirements imposed on them, and it acted reasonably in compliance with the implied covenant of good faith and fair dealing.

Plaintiffs opposed the motion for summary judgment, and they also filed a motion for summary adjudication against AAA's affirmative defense that it lawfully cancelled the insurance policy prior to the accident. They contended AAA had not lawfully cancelled the policy because AAA's request for information and notice of cancellation failed to comply strictly with statutory requirements, the request for information was not a "reasonable written request" because it did not actually request any information, and AAA had not established any facts showing there had been a substantial increase in the hazard insured against. Plaintiffs further claimed they did not receive AAA's

letters, and contested facts existed as to whether AAA had actually mailed the letters and cancelled the policy. Alternatively, plaintiffs asked the court to deny AAA's motion or continue the hearing to allow them time to conduct further discovery on their punitive damages claim, as AAA had allegedly obstructed plaintiffs' attempts to depose AAA personnel over a period of 17 months.

The trial court granted summary judgment in favor of AAA and denied plaintiffs' motion for summary adjudication. It ruled that undisputed facts demonstrated AAA lawfully cancelled the insurance policy prior to the accident. AAA requested information from the Fieldses it claimed it needed in order to underwrite the insurance policy, the written request was reasonable, and the Fieldses did not respond to it. The court found no disputed issues of material fact regarding the adequacy of the request for information and whether AAA actually mailed the notice of cancellation and cancelled the policy. Because there was no breach of contract, the court found there could be no breach of the implied covenant. The court also refused to continue its consideration of the motion pending further discovery on the issue of punitive damages.

Only plaintiff Mills appeals from the trial court's judgment. He contends the court erred in its judgment because:

1. The March 23, 2005, written request for information was not, as a matter of law, a reasonable written request to secure information necessary for AAA to underwrite the risk accurately;
2. Triable issues of material fact exist regarding whether AAA actually sent the notice of cancellation and whether the policy was actually cancelled as of the date of the accident;
3. Triable issues of material fact exist regarding AAA's alleged breach of the implied covenant; and
4. The trial court abused its discretion by not continuing the hearing on the punitive damages claim as AAA had obstructed all of plaintiffs' attempts to depose witnesses.

DISCUSSION

I

Standard of Review

Our scope of review is the same as the trial court's, and we exercise our independent judgment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317,

334 [100 Cal.Rptr.2d 352, 8 P.3d 1089]; *Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 37 [105 Cal.Rptr.2d 525].) A trial court must grant summary judgment “‘if all the papers submitted show’ that ‘there is no triable issue as to any material fact’ ([Code Civ. Proc.,] § 437c, subd. (c))—that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations]—and that the ‘moving party is entitled to a judgment as a matter of law’ (Code Civ. Proc., § 437c, subd. (c)). . . . In ruling on the motion, the court must ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom ([Code Civ. Proc.,] § 437c, subd. (c)), and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

In determining whether there is a triable issue of material fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.)

II

Reasonableness of the Request for Information

Mills argues the trial court erred in granting summary judgment because the request for information, contrary to governing regulation, was not a reasonable request that sought information necessary for AAA to underwrite the risk accurately. He contends the request was not a reasonable request as a matter of law because it did not request any specific information, and, in particular, it did not request any information AAA actually needed to determine its risk. We disagree with Mills’s contention. The request for information was a reasonable request.

■ In 1988, voters passed Proposition 103, which made “numerous fundamental changes in the regulation of automobile and other types of insurance.” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812 [258 Cal.Rptr. 161, 771 P.2d 1247], fn. omitted.) One of those changes prohibited an auto insurer from cancelling an insurance policy prior to its expiration date except on certain limited grounds. As already mentioned, one of those grounds allows an insurer to cancel an auto insurance policy due to “a substantial increase in the hazard insured against.” (Ins. Code, § 1861.03, subd. (c)(1).) The Insurance Code does not define what constitutes “a substantial increase in the hazard insured against.”

A regulation promulgated by the Department of Insurance defines what constitutes a “substantial increase in the hazard insured against.” Such an

increase occurs when, among other events, the insured refuses or fails “to provide to the insurer, within 30 days after reasonable written request to the insured, information necessary to accurately underwrite or classify the risk.” (Cal. Code Regs., tit. 10, § 2632.19, subd. (b)(1) (hereafter section 2632.19).) Other than to require the written request to inform the insured in English and Spanish that “his or her failure to provide the requested information within the time required may result in the cancellation or nonrenewal of his or her policy” (*ibid.*), the regulation imposes no requirement on what a request for information must contain or request in order to be considered reasonable. The parties have not found any other authority directly on point, and neither have we.

To determine what a “reasonable written request” is, we rely first on the regulation’s plain language. (*Butts v. Board of Trustees of the California State University* (2014) 225 Cal.App.4th 825, 835 [170 Cal.Rptr.3d 604] (*Butts*).) The term “reasonable” has many meanings, but those most appropriate here are: “Within the limits of what it would be rational or sensible to expect; not extravagant or excessive; moderate. . . . [I]n accordance with reason; not irrational, absurd, or ridiculous; just, legitimate; due, fitting. . . . Sufficient, adequate, or appropriate for the circumstances or purpose; fair or acceptable in amount, size, number, level, quality, or condition.” (Oxford English Dict. (3d ed. 2009) <<http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid>> [as of Sept. 20, 2016].)

The term “reasonable” has so many meanings, we also look to the voters’ intent for the statutory scheme to define the term’s meaning in section 2632.19. (See *Butts, supra*, 225 Cal.App.4th at p. 838.) The voters enacted Proposition 103 “to protect consumers from *arbitrary* insurance rates and *practices*, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.” (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) text of Prop. 103, § 2, p. 99, some italics omitted.) The initiative states it “shall be liberally construed and applied in order to fully promote its underlying purposes.” (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) text of Prop. 103, § 8, p. 144, italics omitted.)

■ Thus, to be a “reasonable” written request for information necessary to underwrite or classify the risk accurately, the request must be rational, appropriate for the circumstance, and necessary to the insurer’s ability to evaluate the risk of offering the policy. The request cannot be arbitrary or unrelated to the insurer’s need to reevaluate the risk it incurs.

With these concepts in mind, we turn to the written request for information AAA sent to the Fieldses. The body of the request reads in full:

"It has been brought to our attention that we do not have the necessary information to list a driver who resides in your household or has regular use of your vehicle(s).

"All licensed operators in your household or who have regular usage of your vehicle(s) are potential exposures, and we must ask for certain underwriting information to accurately underwrite your automobile policy to determine the qualification and rating of your policy.

"We do not have all the information necessary to accurately underwrite your automobile insurance policy. We are required to advise you in writing that if you fail to provide the necessary information requested within 30 days of the above date, your policy will be cancelled.

"No hemos obtenido toda la informacion necesaria para subscribir adecuadamente la poliza de seguro de su automovil. Nuestra empresa esta obligada a notificarle por escrito que, de no suministrar los datos requeridos antes del termino de 30 dias a partir de la fecha arriba indicada, su poliza sera cancelada.

"If you choose not to provide the information, you can exclude the driver from your policy.

"To exclude PATRICK FIELDS (son), sign, date, and return the enclosed form in the envelope provided. Please read the endorsement carefully. There is no coverage afforded under the policy while any motor vehicle is being used or operated by an excluded person.

"If the required information or the exclusion is not provided to us by 04/22/2005 your policy will be mid term cancelled due to a substantial increase in the hazard insured against.

"If you choose to add the driver or have any questions, please contact the Sacramento—Madison District Office at (916) 331-7610 or the Member Service Center at 800-922-8228."

Included with the letter was a form for the Fieldses to use if they chose to exclude Patrick from their policy.

■ This letter was a reasonable written request for information necessary to underwrite or classify AAA's risk. There is no evidence showing the letter

was arbitrary or unrelated to AAA's needs. It arose from having a car AAA insured incur damage in an accident by a family member who was not named on the policy. It was reasonable for AAA to attempt to seek information to determine whether Patrick would be a regular driver of a family vehicle or, if not, to seek to have Patrick excluded from coverage.

Mills contends the written request is unreasonable because it does not contain a request for the information Mills claims AAA needed in order to evaluate its risk from Patrick's use of the family vehicles. He argues the insurance policy authorized AAA to cancel the policy if the driver's license of any operator who either lives in the insured's household or customarily operates the insured's autos is suspended or revoked. Thus, Mills argues, in order to evaluate its risk regarding Patrick under the terms of the policy, AAA had to know only whether Patrick resided with his parents, held a driver's license, and regularly used their cars. He claims the written request was not reasonable because it did not specifically ask for that information. Indeed, he asserts the request does not request any specific information at all.

■ We disagree with Mills's assertion. Section 2632.19 does not require a written request to contain certain questions or identify specific information requested. Rather, it requires the written request to be reasonable, and the request here satisfies that requirement. The writing asks if the Fieldses intend to include or exclude Patrick from coverage. If the Fieldses were willing to exclude Patrick from coverage, AAA would not likely need any additional information, as its risk would remain unchanged. If, however, the Fieldses were not willing to exclude Patrick from coverage, AAA would need additional information. Hence, AAA asked the Fieldses to call AAA to include Patrick in their coverage or ask other questions. Had the Fieldses made that call, AAA then could request the additional information Mills suggests it would need to determine whether to continue underwriting the policy.

■ Mills also asserts AAA's use of the letter somehow failed to comply strictly with Insurance Code provisions that govern cancellation of insurance policies. Mills correctly states that policy cancellation "can only be accomplished by strict compliance with the terms of any statutory provisions applicable to cancellation" (*Mackey v. Bristol West Ins. Service of Cal., Inc.* (2003) 105 Cal.App.4th 1247, 1258 [130 Cal.Rptr.2d 536]), and with the terms of the policy itself. (*Lee v. Industrial Indemnity Co.* (1986) 177 Cal.App.3d 921, 924 [223 Cal.Rptr. 254].) However, as shown above, there are no statutory or regulatory requirements imposed on the written request for information except that it be reasonable, and Mills has not alleged AAA's written request somehow violated the terms of AAA's policy with the Fieldses.

Based on the undisputed facts, we cannot say AAA sent the letter for an arbitrary purpose or sought irrelevant or unnecessary information unrelated to its analysis of risk under the particular circumstances. The letter was a reasonable written request within the meaning of section 2632.19, and the trial court did not err in finding so as a matter of law.

III, IV*

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DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant AAA. (Cal. Rules of Court, rule 8.278(a).)

Murray, J., and Duarte, J., concurred.

*See footnote, *ante*, page 528.

[No. E065365. Fourth Dist., Div. Two. Sept. 21, 2016.]

THE PEOPLE, Plaintiff and Appellant, v.
JULIA ROSA HUERTA, Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Michael A. Hestrin, District Attorney, and Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

Caroline R. Hahn, under appointment by the Court of Appeal, for Defendant and Respondent.

OPINION

SLOUGH, J.—The People appeal from the trial court’s order granting defendant Julia Rosa Huerta’s petition to redesignate a prior felony conviction as a misdemeanor under The Safe Neighborhoods and Schools Act (Proposition 47). (Pen. Code, § 1170.18.)

Huerta pled guilty to one felony count of second degree commercial burglary (Pen. Code, § 459)¹ based on her theft of eight bottles of perfume worth \$463 from a Sears department store. Huerta sought to have her conviction redesignated as the newly created misdemeanor of shoplifting—entering an open commercial establishment with intent to commit larceny of \$950 or less. (§ 459.5, subd. (a).) Huerta’s petition says “the value of the . . . property does not exceed \$950.00.” At a hearing, the People did not contest the value of the stolen property, but contended Huerta’s burglary offense does not qualify as shoplifting because she entered the store with another person with whom she shared the intent to commit conspiracy. The trial court concluded Huerta had the intent to commit larceny and the loss did not exceed \$950, and redesignated her conviction as misdemeanor shoplifting.

The People appeal, contending the trial court erred by (i) reaching the merits when Huerta failed to satisfy her initial burden by attaching evidence to her petition and (ii) concluding Huerta was eligible for relief when her conduct could have been punished as felony burglary even after Proposition 47, because she entered Sears with the intent to commit conspiracy. (§ 182.)

We find no error and affirm.

I**FACTUAL BACKGROUND**

According to a Riverside County Sheriff’s Department incident report prepared on April 18, 2009, a loss prevention agent stopped Huerta and a companion as they exited a Sears department store and found “eight bottles of fragrance worth \$463 . . . in the shopping bag belonging to Huerta” and “four bottles of fragrance . . . worth \$174.50” in a “purse belonging to [Huerta’s companion].” After law enforcement informed her of her *Miranda*² rights, “Huerta stated she is guilty of stealing the fragrances” but “she did not enter the business with the intent to steal the fragrance.”

¹ Unlabeled statutory citations refer to the Penal Code.

² *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

The Riverside County District Attorney charged Huerta with one felony count of grand theft (§ 487, subd. (a); count 1), one felony count of petty theft with a prior (§§ 484, 666, subd. (a); count 2), and one felony count of second degree commercial burglary (§ 459; count 3). The complaint also alleged Huerta committed the offense while released from custody on a prior case within the meaning of section 12022.1.

On October 29, 2009, Huerta pled guilty to one count of second degree commercial burglary. At the plea hearing, the trial court asked Huerta how she pled to the charge that on “April 18, 2009 . . . you did willfully, unlawfully enter a building (that being Sears, 22550 Town Circle, Moreno Valley) with the intent to commit theft or a felony.” Huerta replied, “Guilty.” The trial court found a factual basis for her plea and imposed a state prison sentence of 16 months.

■ On November 4, 2014, the voters of California passed Proposition 47, reducing some felony theft-related offenses to misdemeanors when the value of the stolen property does not exceed \$950. (E.g., §§ 459.5, subd. (a), 490.2, subd. (a).) The initiative also created a procedure allowing offenders who have completed their sentences to apply to redesignate prior convictions if they “would have been guilty of a misdemeanor under” provisions added or amended by Proposition 47. (§ 1170.18, subd. (f).)

On April 7, 2015, Huerta filed her petition for relief under section 1170.18, subdivision (f). Huerta used the mandatory form for petitioning for resentencing in the Riverside County Superior Court. Her attorney checked the boxes describing her conviction offense and the box indicating she “believes the value of the . . . property does not exceed \$950,” and signed the form under penalty of perjury. Huerta did not submit any additional supporting documents or evidence. The People responded only that it was “D Burden” to show eligibility. The trial court set the matter for an evidentiary hearing, indicating the issue to be addressed was the “value of stolen property.”

At the hearing, held on December 11, 2015, defense counsel represented Huerta “was caught with eight bottles of perfume totalling \$463 . . . [and] a codefendant . . . had four bottles of perfume totalling \$174.50.” The trial court said, “So still under \$950.” The People did not contest the representation of value. Instead, they objected to redesignation of the offense as shoplifting on the ground Huerta had the “intent to commit theft, which is a wobbler, because she went in with another accomplice and they did this together” so “[i]t’s an uncharged conspiracy.” The trial court granted the petition, finding Huerta was convicted for entering Sears with the intent to commit larceny and that the value of the stolen property did not exceed \$950, “even including the codefendants’ amounts.”

The People submitted the April 18, 2009 incident report to support their position Huerta's conviction was for a burglary predicated on conspiracy. The incident report categorizes Huerta's offense as a "Burglary" of the type "S L Shop Lift" and confirms defense counsel's representations about the value of the stolen property.

II

DISCUSSION

The People contend the trial court erred by granting the petition because (i) Huerta failed to meet her initial burden to show eligibility for relief under Proposition 47 by attaching evidence to her petition and (ii) Huerta is ineligible for relief because her conduct supported a burglary conviction predicated on the felony of conspiracy. We disagree with both contentions.

A. *Petitioner's Burden*

The People contend the trial court's ruling is erroneous because Huerta's "section 1170.18 petition failed to present any evidence regarding the underlying facts of her section 459 conviction." In effect, the People contend the trial court abused its discretion by reaching the merits of Huerta's petition without first finding she had made a *prima facie* case of entitlement to resentencing.

■ We have concluded elsewhere that section 1170.18 cannot be read to limit the trial court's discretion as the People propose. (*People v. Abarca* (2016) 2 Cal.App.5th 475 [205 Cal.Rptr.3d 888].) The People present neither contrary authority nor any other reason to conclude the trial court was *required* to summarily deny Huerta's petition because she failed to attach evidence to her petition. We conclude the trial court acted within its discretion to consider evidence contained in court records and to set an evidentiary hearing to establish the facts underlying Huerta's conviction.

■ Even if the trial court *had* exercised its discretion to consider whether to dismiss Huerta's petition as deficient, it would have been an abuse of discretion to deny her the opportunity to cure the failure through amendment. "[T]he general rule of liberal allowance of pleading amendment" requires the reviewing court to grant leave to amend if there is a "reasonable possibility" the party can amend the pleading to cure its defects. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387 [272 Cal.Rptr. 387], italics omitted; see *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1042 [134 Cal.Rptr.2d 260] (*Kong*) ["If there is a reasonable possibility [amendment will] . . . cure the defects,

leave to amend *must be granted*" (italics added).) The same liberal amendment principles apply in the criminal context. (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, § 242, p. 501 ["The court may order or permit an amendment for any defect or insufficiency [in the accusatory pleading], at any stage of the proceedings"]; *People v. Duvall* (1995) 9 Cal.4th 464, 482 [37 Cal.Rptr.2d 259, 886 P.2d 1252] [same for habeas corpus pleadings].)

Here, denying Huerta's petition without leave to amend would have led to a premature dismissal of a meritorious petition. The appellate record demonstrates there is at least a reasonable possibility Huerta could have amended her petition to allege facts to cure the alleged deficiency. (*Kong, supra*, 108 Cal.App.4th at pp. 1042–1043, 1048 [reversing order sustaining demurrer and directing trial court to allow amendment because plaintiff's representations at oral argument on appeal indicated a reasonable possibility he could amend his complaint to state a cause of action].) At the hearing, Huerta's counsel represented she "was caught with eight bottles of perfume totaling \$463 . . . [and] a codefendant . . . had four bottles of perfume totalling \$174.50," and the People did not contest these amounts. The prosecutor's silence during defense counsel's representations of these facts effectively forfeited the People's objection that defendant did not carry his burden. (*People v. Gerold* (2009) 174 Cal.App.4th 781, 784 [94 Cal.Rptr.3d 649].) The People also submitted a sheriff's incident report confirming the truth of defense counsel's representations and, in this court, admitted Huerta and her companion stole "eight bottles of . . . fragrance valued at \$463" and "four bottles of . . . fragrance valued at \$174.50," respectively.³ These facts show Huerta could amend her petition to include a declaration to satisfy her burden under section 1170.18.

Under these circumstances, we cannot find the trial court abused its discretion by failing to deny Huerta's petition as deficient.⁴

B. Intent to Commit Larceny

The People argue Huerta did not act "with the sole intent to commit larceny under \$950. Rather, she entered the department store in concert with [an accomplice] with the intent to commit the crime of conspiracy therein." On this basis, the People contend Huerta was not eligible under Proposition 47

³ The People contend section 1170.18 does not limit the courts to the record of conviction in determining eligibility and argue we "should consider the facts outlined in the police report." We agree. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 959–960 [205 Cal.Rptr.3d 246]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 140 & fn. 5 [197 Cal.Rptr.3d 743].)

⁴ The People do not appeal the trial court's finding the stolen perfume was worth less than \$950, nor do they argue its finding was not supported by substantial evidence.

to have her commercial burglary conviction redesignated as misdemeanor shoplifting. We find this argument unpersuasive because it ignores the plain text of the statute.

■ The People's argument raises the question, conspiracy to do what? They answer the uncharged conspiracy was a conspiracy to commit larceny. They argue intent to commit conspiracy is not shoplifting, and burglary predicated on such a conspiracy may be charged as a felony even after the electorate enacted Proposition 47. That may be true for some forms of conspiracy. It is not true, however, for conspiracy to commit larceny. If Huerta harbored the intent to conspire to commit larceny, she necessarily harbored the intent to commit larceny as well. Indeed, it is the People's position that Huerta engaged in a conspiracy because she shared the intent to commit larceny with an accomplice. If Huerta harbored the intent to commit larceny, the new shoplifting provision directs the offense "shall be charged as shoplifting" and further that "[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b), italics added.) The alleged conspiracy was directed at the theft of the same bottles of perfume as Huerta's intent to commit larceny. It follows under the plain text of the statute that prosecutors would have been required to charge her with shoplifting and could not have charged her with burglary predicated on conspiracy had Proposition 47 been in effect at the time of her offense. She therefore qualifies to have her burglary conviction redesignated as misdemeanor shoplifting.⁵

In addition, the trial court based its ruling on the finding that Huerta's conviction was predicated on her intent to commit larceny. On review, we indulge in every presumption to uphold the judgment and look to the appellant to show error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [59 Cal.Rptr.3d 876].) The People have pointed us to no reason to question the trial court's finding. Conspiracy played no role in the prosecution of Huerta. The People charged her with burglary, petty theft, and grand theft. The People entered a plea bargain with Huerta whereby she pled guilty to burglary and the People agreed to dismiss the grand and petty theft counts. Huerta entered a plea agreement based on these facts. Based on this history, we conclude the trial court did not abuse its discretion in finding larceny was the predicate of the burglary charge, and therefore did not err in granting Huerta's petition.

⁵ The People's contention Huerta would be entitled to have her felony conviction redesignated as misdemeanor shoplifting only if her "sole intent" was to commit larceny fails for the same reason.

III

DISPOSITION

We affirm the order granting Huerta's petition for resentencing.

Ramirez, P. J., and McKinster, J., concurred.

[No. F071761. Fifth Dist. Sept. 21, 2016.]

EMMA ESPARZA, Plaintiff and Appellant, v.
KAWeah DELTA DISTRICT HOSPITAL, Defendant and Respondent.

[REDACTED]

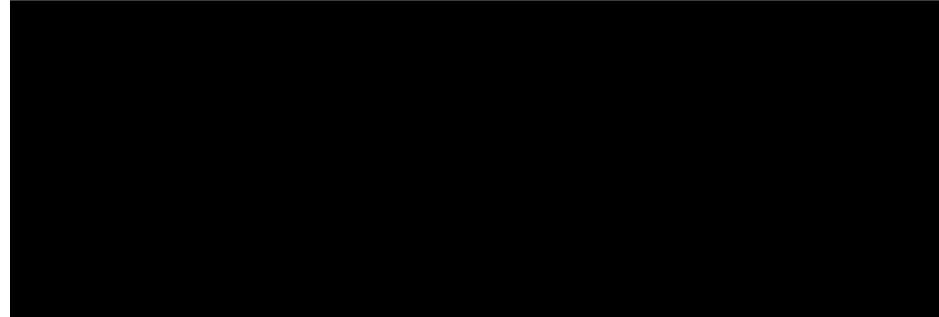
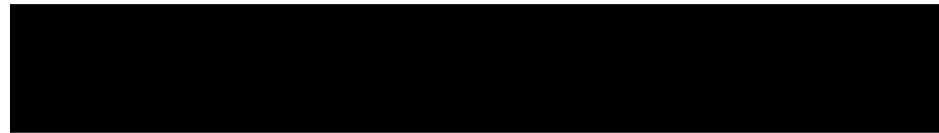
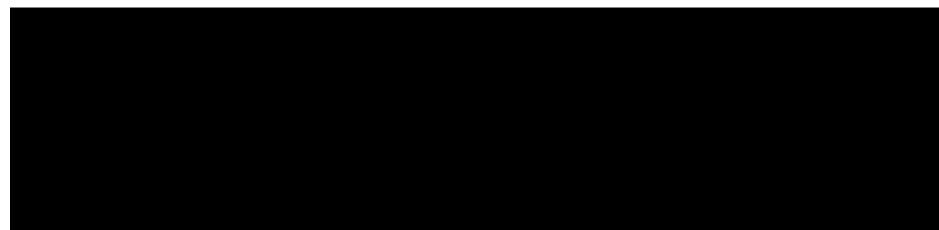
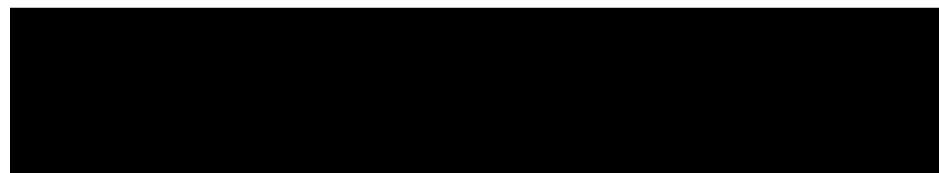
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COUNSEL

Quinlan, Kershaw & Fanucchi and David M. Moeck for Plaintiff and Appellant.

Weiss Martin Salinas & Hearst, Lisa M. Martin and Carol A. O'Neil for Defendant and Respondent.

OPINION

FRANSON, J.—This appeal from a judgment of dismissal raises the following question about proper pleading: What facts must a plaintiff allege to adequately plead he or she complied with the claims presentation requirement of the Government Claims Act?¹

This question was answered in *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228 [147 Cal.Rptr.3d 709] (*Perez*), where we held that “a plaintiff may allege compliance with the claims presentation requirement in the Government Claims Act by including a general allegation that he or she timely complied with the claims statute.” (*Id.* at p. 1237, fn. omitted.)

In this case, plaintiff checked the boxes to item 9.a of the Judicial Council form for pleading a personal injury cause of action and thereby alleged that

¹ The act is set forth in division 3.6 of title 1 of the Government Code, which begins with section 810. All unlabeled statutory references are to the Government Code.

she was required to comply with a claims statute and had complied with applicable claims statutes. Later in her pleading, plaintiff alleged that she “served a claim on Kaweah Delta District Hospital pursuant to Cal. Gov. Code §910 et seq. on or at December 3, 2013.”

Plaintiff’s additional allegation about serving a claim on or at a specific date does not contradict her general allegation of compliance. Consequently, applying the rule adopted in *Perez*, we conclude she adequately alleged compliance with the Government Claims Act and the demurrer should have been overruled. We publish this decision to confirm the holding of *Perez* and set forth our interpretation of the California Supreme Court’s decision in *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983 [150 Cal.Rptr.3d 111, 289 P.3d 884] (*DiCampli*). We do not read *DiCampli*, a summary judgment case that did not address the adequacy of the pleadings, as impliedly disapproving *Perez* or the rule allowing plaintiffs to plead compliance with the claims statutes using a general allegation.

We therefore reverse the judgment and remand for further proceedings.

FACTS AND PROCEEDINGS

The Medical Malpractice Claim

Plaintiff Emma Esparza was hospitalized at defendant Kaweah Delta District Hospital² from about June 3, 2013, to about June 8, 2013. During her stay, defendant’s employees administered the wrong dosage of a medication named Gentamicin to plaintiff. Specifically, they gave her 100 milligrams instead of the prescribed amount of 10 milligrams. The actions of defendant’s employees breached the applicable standard care. This breach caused plaintiff to suffer vertigo, loss of hearing, balance issues, visions issues and other damages including, but not limited to, medical expenses.

The Pleadings

On June 2, 2014, plaintiff filed a medical malpractice action against defendant. The operative pleading in this case is plaintiff’s second amended complaint, which consisted of a completed Judicial Council form PLD-PI-001 (rev. Jan. 1, 2007)—the form complaint for personal injury claims—and a one-page attachment.

² Plaintiff alleged that defendant Kaweah Delta District Hospital is an entity that is part of Kaweah Delta Health Care District, a public entity. In its demurrer, defendant stated that it is Kaweah Delta Health Care District and was erroneously sued as Kaweah Delta District Hospital. Defendant also stated that Kaweah Delta District Hospital is a division of the district.

The second amended complaint alleged: “Plaintiff is required to comply with a claims statute, and [¶] . . . has complied with applicable claims statutes . . .” Plaintiff made this allegation by checking the boxes for item 9.a on the Judicial Council form. The page attached to the form complaint included the additional allegation that plaintiff had “served a claim on Kaweah Delta District Hospital pursuant to Cal. Gov. Code §910 et seq. on or at December 3, 2013.”

The Demurrer

Defendant demurred to the second amended complaint on the grounds that it failed to allege compliance with the Government Claims Act or, alternatively, its allegations were uncertain, ambiguous, or unintelligible with regard to compliance with the Government Claims Act. Defendant asserted plaintiff’s allegation that she served a claim on defendant did not match up with the requirements of Government Code sections 910 and 915, subdivision (a). Defendant also asserted that the second amended complaint failed to state how it responded to plaintiff’s claim—that is, whether defendant “acted on Plaintiff’s government claim or was deemed to have rejected the claim by not acting on it.” Based on these purported deficiencies, defendant contended that plaintiff failed to allege facts showing a disposition of her claim that would authorize her to file a complaint.

The Trial Court’s Ruling

In November 2014, the trial court filed a minute order sustaining the demurrer without leave to amend. The minute order stated that the court could not discern from the facts stated in the second amended complaint if plaintiff’s medical malpractice claims were “viable, time-barred, or that plaintiff timely presented a proper claim to [defendant] to comply with the requirements of the Government Claims Act.” The minute order also stated plaintiff did not allege facts showing that she had presented her claim to defendant by one of the methods of service authorized by subdivision (a) of section 915 and defendant acted on her claim and rejected it or, alternatively, was deemed to have rejected it by failing to act within the statutory period. The minute order also noted plaintiff had not alleged facts showing she was excused from complying with the Government Claims Act.

In December 2014, a signed order sustaining the demurrer was filed by the trial court. In March 2015, after a motion to vacate and set aside the order sustaining the demurrer was denied, the trial court entered a judgment in favor of defendant. Plaintiff filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

When a trial court sustains a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, the appellate court independently reviews the allegations and determines their sufficiency. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171].) When conducting this independent review, appellate courts “treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 [62 Cal.Rptr.3d 614, 161 P.3d 1168] (*Dinuba*).) Where a pleading includes a general allegation and an inconsistent specific allegation, the specific allegation controls over the inconsistent general allegation. (*Perez, supra*, 209 Cal.App.4th at p. 1236.)

II. How to Allege Compliance with the Claim Requirement

A. A General Allegation of Compliance Is Allowed

■ In *Perez*, we discussed *State of California v. Superior Court* (2004) 32 Cal.4th 1234 [13 Cal.Rptr.3d 534, 90 P.3d 116], Code of Civil Procedure section 459,³ and *Ley v. Babcock* (1931) 118 Cal.App. 525 [5 P.2d 620], before concluding “that a plaintiff may allege compliance with the claims presentation requirement in the Government Claims Act by including a general allegation that he or she timely complied with the claims statute.”⁴ (*Perez, supra*, 209 Cal.App.4th at p. 1237, fn. omitted.) That discussion need not be repeated here because it already is published. (*Id.* at pp. 1236–1237.)

In this appeal, defendant argues that *Perez* is no longer good law because it was decided two months before the California Supreme Court decided *DiCampli, supra*, 55 Cal.4th 983 and was impliedly overruled. We disagree.

³ Code of Civil Procedure section 459 provides in part: “In pleading the performance of conditions precedent under a statute . . . , it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part required thereby” In *Perez*, we concluded that this specific provision controlled over the general rule that statutory causes of action must be pleaded with particularity. (*Perez, supra*, 209 Cal.App.4th at p. 1237, fn. 3.)

⁴ Restating this principle using language from the standard of review applicable to demurrs, we conclude: When a pleading states that the plaintiff has complied with the claims statute, it has properly pleaded an ultimate fact—that is, the statement of compliance is not a conclusion of law. (Cf. *Skopp v. Weaver* (1976) 16 Cal.3d 432, 437 [128 Cal.Rptr. 19, 546 P.2d 307] [allegation that defendants were plaintiff’s agents during the transaction in question is an averment of ultimate fact, not a conclusion of law].)

In *DiCampli*, a patient sued two surgeons and a county hospital for malpractice. (*DiCampli, supra*, 55 Cal.4th at pp. 987–988.) The patient’s attorney prepared a letter notifying the defendants, in accordance with Code of Civil Procedure section 364, of her intent to sue them for negligence. (*DiCampli, supra*, at p. 987.) The attorney personally delivered the letter to an employee of the medical staffing office in the hospital’s administration building, but did not deliver a copy to the county’s clerk or auditor or the clerk of the county’s board of supervisors. (*Ibid.*) The county filed a motion for summary judgment, contending the patient failed to comply with the Government Claims Act because her claim was never presented to or received by a statutorily designated recipient as required by section 915. (*DiCampli, supra*, at p. 989.) The trial court granted the motion for summary judgment. (*Ibid.*) The court of appeal reversed the trial court, concluding the patient had substantially complied with the claim presentation requirements of the Government Claims Act. (*DiCampli, supra*, at p. 989.) The California Supreme Court reversed the court of appeal, which reinstated the order granting the county’s motion for summary judgment. (*Id.* at p. 998.) The Supreme Court determined the plain language of section 915 required delivery of the claim to one of the persons designated in the statute. (*DiCampli, supra*, at p. 992.) Consequently, the court rejected the statutory interpretation that allowed substantial compliance with the claim delivery requirement. (*Ibid.*)

■ For the reasons stated below, we conclude that the California Supreme Court’s decision in *DiCampli* did not overrule *Perez* or otherwise disapprove the principle that the ultimate fact of compliance with the claims presentation requirement in the Government Claims Act can be pled using a general allegation.

First, *DiCampli, supra*, 55 Cal.4th 983, did not mention *Perez* or the adequacy of the pleadings before it. Consequently, the court did not explicitly disapprove *Perez* or its rule that a general allegation is sufficient to plead compliance.

■ Second, *DiCampli* cannot be interpreted as impliedly disapproving *Perez*. The applicable and long-established rule is that cases are not authority for propositions not considered. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 254 [85 Cal.Rptr.3d 466, 195 P.3d 1049].) It is important to note that *DiCampli* was not a pleading case and did not purport to address, in dicta or otherwise, what was necessary to plead compliance with the claims presentation requirement in the Government Claims Act. Instead, *DiCampli* addressed the merits of a motion for summary judgment, the proper interpretation of the claim delivery requirements in section 915, and whether there was a triable issue of material fact regarding the patient’s compliance with the statutory delivery requirements. Consequently, *DiCampli* is not authority

for the proposition that a general allegation of compliance with the claims presentation requirement is inadequate.

Our interpretation of the impact of *DiCampli* on *Perez* is supported by the fact that defendants have cited, and we have located, no published decision that concludes *DiCampli* implicitly disapproved *Perez*. A decision from the Second Appellate District issued a year and a half after *DiCampli* cited *Perez* for the following principle: “A plaintiff may allege compliance with the claims requirements by including a general allegation that he or she timely complied with the claims statute.” (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 374 [171 Cal.Rptr.3d 881] (*Gong*).) The court in *Gong* did not explicitly consider the effect of *DiCampli* on *Perez* or even mention *DiCampli*. Consequently, *Gong* suggests that *Perez* was not impliedly overruled by *DiCampli*, but is not authority for that proposition. (*Vasquez v. State of California*, *supra*, 45 Cal.4th at p. 254.) To summarize, no court has explicitly interpreted *DiCampli* in the manner urged by defendants and at least one published decision has cited *Perez* with approval.

Based on the foregoing, we conclude the holding in *Perez* remains good law and plaintiffs are allowed to plead compliance with the claims presentation requirement in the Government Claims Act using a general allegation. Consequently, we apply the holding in *Perez* to the allegations made in plaintiff’s second amended complaint.

B. Plaintiff’s Allegations of Compliance

1. The General Allegation

Here, plaintiff checked the boxes for item 9.a on Judicial Council form PLD-PI-001 and alleged: “Plaintiff is required to comply with a claims statute, and [¶] . . . has complied with applicable claims statutes” In comparison, the first amended complaint in *Perez* alleged: “‘On January 15, 2010, Plaintiff filed a timely claim complying with the required claims statute.’” (*Perez, supra*, 209 Cal.App.4th at p. 1237.) We concluded this allegation was “sufficient to plead compliance with the claim presentation requirement of the Government Claims Act.” (*Ibid.*)

First, we note that the inclusion of the word “timely” in the allegation made in *Perez* was not essential and does not distinguish it from the general allegation made in this case. An allegation that a plaintiff has “complied with applicable claims statutes” is reasonably interpreted as meaning the claim was timely. (See *Dinuba, supra*, 41 Cal.4th at p. 865 [complaint given a reasonable interpretation by reviewing court]; Code Civ. Proc., § 452 [liberal construction of pleadings].)

■ Second, defendant's argument that Judicial Council pleading forms are not demurrer-proof, while relevant, does not address directly to the adequacy of the allegations made in this case. (See *People ex. rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1482 [7 Cal.Rptr.2d 498] [Judicial Council form complaints are not invulnerable to demurrer].) We agree with the general principle that Judicial Council form complaints are not invulnerable to a demurrer. Conversely, Judicial Council form complaints do not always fail to state a cause of action and, thus, they are not necessarily susceptible to demurrer. The logical implication from these polar opposite principles is that use of a Judicial Council form complaint is not a determinative factor in deciding whether or not to sustain a demurrer. Instead, a reviewing court must examine the particular allegations in the form pleading and determine whether those allegations satisfy the pleading requirements established by California law.

■ In this case, the pleading requirements established by California law are set forth in *Perez*. Applying the pleading requirement adopted in *Perez* to plaintiff's general allegation of compliance with applicable claims statutes, we conclude plaintiff's allegation was adequate under California law. Accordingly, we have not held plaintiff's allegations were adequate simply because they were made by checking boxes on a Judicial Council form complaint. Rather, plaintiff's allegation that she "has complied with applicable claims statutes" was adequate because it properly pleaded an ultimate fact and thereby satisfied the pleading requirements set forth in *Perez* and reiterated in *Gong*. As a result, a plaintiff is not required to specifically plead (1) the method of service used to present the claim to the defendant or (2) whether the defendant explicitly rejected the claim or, alternatively, was deemed to have rejected the claim by failing to act within the statutory period.

2. *The Additional Allegation and Its Effect*

Defendant's second challenge to the adequacy of plaintiff's pleading relates to the wording of the allegation in the attachment to the form complaint, which states she "served a claim on Kaweah Delta District Hospital pursuant to Cal. Gov. Code §910 et seq. on or at December 3, 2013." Defendant argues that this specific allegation is ambiguous and the ambiguity renders it inconsistent with plaintiff's general allegation of compliance. In particular, defendant emphasized the uncertainty and ambiguity created by the phrase "on or at" the specified date.

Our analysis of defendant's argument about inconsistency begins by defining the word "inconsistent." In the context of propositions, ideas and beliefs, "inconsistent" means "so related that both or all cannot be true or containing parts so related <~ statements>." (Webster's 3d New Internat. Dict. (1993)

p. 1144.) Therefore, statements or allegations of fact are “inconsistent” when both cannot be true. (*McDonald v. Southern California Ry. Co.* (1894) 101 Cal. 206, 212 [35 P. 643].) For example, it is inconsistent for a plaintiff to state in a declaration that the defendant used force greater than necessary after testifying in a deposition that the defendant did not apply any force. (*King v. Andersen* (1966) 242 Cal.App.2d 606, 610 [51 Cal.Rptr. 561].)

Here, plaintiff’s general allegation of compliance can be true even if she served a claim on defendant on or at December 3, 2013. Therefore, her allegations are not inconsistent. Defendant’s attempt to create inconsistency through ambiguity is not supported by a citation to authority and appears as little more than an effort to resurrect the long-abandoned common law rule that pleadings must be taken most strongly against the pleader. In *Perez*, we explicitly rejected this approach to interpreting pleadings because it was contrary to Code of Civil Procedure section 452’s rule of liberal construction. (*Perez, supra*, 209 Cal.App.4th at p. 1238.) Consequently, we conclude that plaintiff’s general allegation of compliance with the claims presentation requirement was not contradicted by or inconsistent with her allegation about service of her claim on or at December 3, 2013.

As a result, we conclude that plaintiff adequately alleged compliance with the claims presentation requirement in the Government Claims Act. Accordingly, the demurrer should have been overruled.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining the demurrer and to enter a new order overruling the demurrer and requiring defendant to answer the second amended complaint. Plaintiff shall recover her costs on appeal.

Hill, P. J., and Smith, J., concurred.

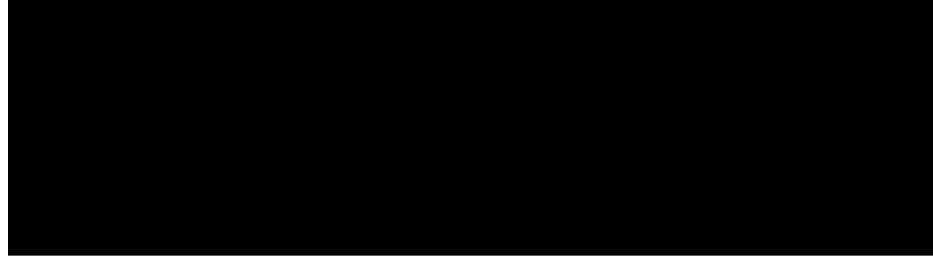
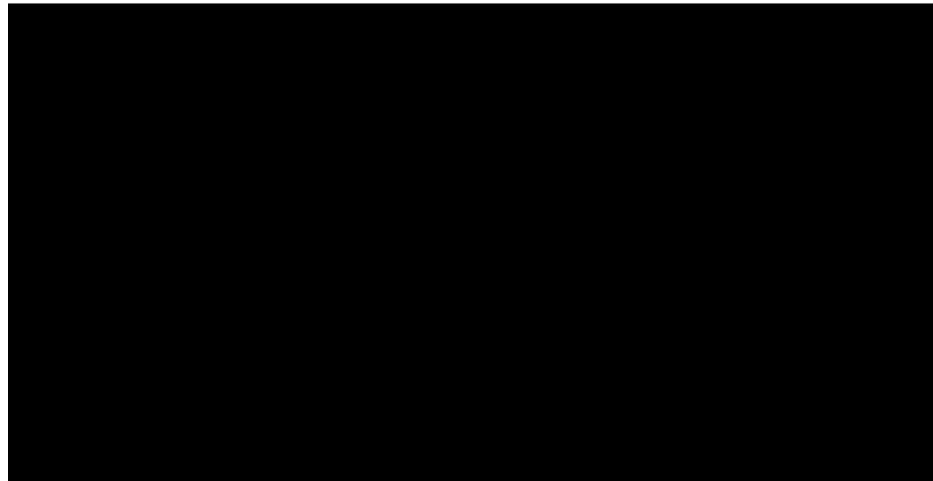
[No. A147724. First Dist., Div. Three. Sept. 21, 2016.]

In re J.E., a Person Coming Under the Juvenile Court Law.
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and
Appellant, v.
T.G., Defendant and Respondent.

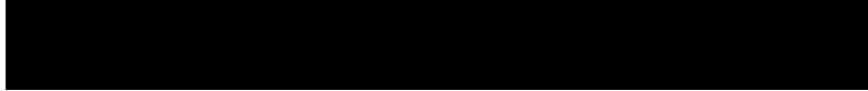
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COUNSEL

Donna R. Ziegler, County Counsel, and Samantha N. Stonework-Hand, Deputy County Counsel, for Plaintiff and Appellant.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Respondent.

Valerie Lankford, under appointment by the Court of Appeal, for Minor.

OPINION

POLLAK, Acting P. J.—The Alameda County Social Services Agency (agency) appeals an order continuing an 18-month review hearing and extending the family's reunification services for up to 24 months. The agency contends the court erred in extending services based on a finding that the agency had failed to provide reasonable reunification services. Although significant services undoubtedly were provided, we shall affirm the juvenile court's finding that the services were not reasonably sufficient because they were not tailored to the particular needs of the family arising out of the unique circumstances of the situation. We also conclude that amendments made to Welfare and Institutions Code sections 361.5 and 366.22¹ do not restrict the court's authority under section 352 to extend reunification services from 18 to 24 months upon a showing of good cause.

Factual and Procedural Background

On August 9, 2014, the then 14-year-old minor was taken into protective custody by the Oakland Police Department after running away from her mother's home. The mother had refused to allow her to return home and asked that she be taken into the custody of child protective services.

¹ All statutory references are to the Welfare and Institutions Code.

On August 11, 2014, the agency filed a juvenile dependency petition alleging that minor came within section 300, subdivisions (b) and (g). The petition alleged that mother was overwhelmed and unable to supervise minor due to minor's behavioral challenges, which included fire-setting, chronically running away, and suicidal ideations.

According to the detention report prepared by the agency, minor had been residing in Oakland with her mother, her older sister (then age 18) and a younger sister (then age eight). Mother "reported feeling very stressed and overwhelmed for some time because of [minor's] behaviors." Mother stated that minor "is 'manipulative' and 'lies a lot.' Further [mother] is concerned about [minor's] cutting behaviors, statements of suicidal ideation, an attempt to set her bedroom on fire, smoking marijuana, drinking alcohol, chronic running away, and an incident in November 2013 in which [minor] molested her younger sister. [Mother] believes that she is not able to meet [minor's] needs at this time." Minor reported to the agency that she ran away because she was beaten by her mother and also claimed that she had been molested by her older sister when they were younger. At the uncontested detention hearing, minor was detained with temporary placement and care vested with the agency.

In a combined jurisdiction/disposition report, the agency recommended that minor be declared a dependent of the juvenile court, out-of-home placement continue, and family reunification services be provided to mother. According to the social worker, mother expressed concern for minor's safety and well-being as well as a desire to protect her younger daughter from minor's behavior. Mother wanted minor to receive the help she needs and admitted she had struggled to obtain consistent therapy for minor and other supportive services for the family. Mother articulated her need for family therapy for herself, minor, and her younger daughter. Minor also expressed her desire to participate in family therapy with her mother to work on their relationship.

The social worker reported that a referral was made for individual therapy and a psychological evaluation for minor. In the meantime, minor would be seen by a clinician through her group home. The initial reunification case plan required minor to "participate in and complete a psychological evaluation and comply with the recommendations provided therein" and to participate in individual and family therapy. Mother was also required to engage in family therapy.

At the uncontested jurisdictional hearing, mother submitted to the petition on the basis of the social worker's report, and the court found the allegations true. The court ordered the agency to provide family reunification services to "the child and to the mother." Visitation was ordered to be as frequent as possible consistent with the child's well-being.

At the six-month status review, in February 2015, the agency recommended that minor remain in her out-of-home placement and reunification continue. Minor reported that she wanted to return home to her mother, participate in family therapy, and visit with her younger sister. The agency and mother were concerned, however, about minor returning to the home because of her previous molestation of her younger sister. The social worker reported that both mother and minor were participating in weekly individual therapy and had begun family therapy in January 2015. The agency reported that the family therapist would incorporate the younger sister in the family therapy when appropriate.² The six-month review was submitted on the social services report. The court found that reasonable services had been provided by the agency and mother's progress was partial. The court ordered reunification services continued.

At the time of the 12-month status review, in July 2015, the agency recommended that minor remain in out-of-home placement and family reunification services be continued. Although minor wanted to return home and participate in services, mother was not able or willing to have minor returned to her home because of her ongoing concerns for the safety of minor's younger sister. The report explains, "[mother] believes that her daughter . . . requires therapeutic services and intervention to address her history of self-injurious behaviors and harm to others." The agency reported minor's younger sister had attended several family therapy sessions, but minor was a "trigger" for her younger sister because of the past sexual abuse. Mother reported that minor's younger sister had either been taken to the emergency room for unsafe behaviors or placed on a section 5150 hold on eight occasions since April 2015. The younger sister's treating psychiatrist recommended that visits between minor and her younger sister be temporarily suspended.

Since the last review hearing, minor's placement had been changed twice. At the time of the hearing, minor was residing with a "fictive family member" in Sacramento. Because of transportation problems after moving to Sacramento, minor missed several family therapy sessions and her individual therapy was interrupted. The agency attempted to mitigate the transportation problems by providing minor Amtrak tickets. In May 2015, minor completed a medication evaluation, but was not taking the prescribed medication. Mother continued to attend family therapy each week, even when minor was not present, and continued her individual therapy. The 12-month review was

² Although the status review report describes minor as having participated in a "psychological evaluation with Joe Torres, LCSW" who diagnosed her as having a "Depressive Disorder NOS [Not Otherwise Specified]," the agency later acknowledged that a complete psychological evaluation was not completed. The evaluation, which was described by counsel at the 18-month review hearing as an "initial" or "clinical" assessment, was never submitted to the court.

submitted on the agency's report. The court found that reasonable services were provided by the agency and minor's out-of-home placement was necessary and appropriate.

At the time of the 18-month status review hearing in January 2016, the agency recommended that minor remain a dependent in out-of-home placement and that family reunification services be terminated. The agency reported that after going AWOL from her Sacramento foster home in early January, minor was placed in a group home in Oakland on an emergency basis. Minor was very unhappy in the placement and wanted to return home. The agency did not think she should be returned home because her younger sister continued to be "triggered" by minor. The report states that the younger sister "has a history of unsafe behaviors and 5150 hospitalizations in part due to sexual abuse [she] experienced by her sister . . . [Minor] cannot live in the home with her mother and sister because she is a trigger to her sister, until the issue is fully addressed." The report also states that mother and minor "need to participate in family therapy and then incorporate [the younger sister] into family therapy in order to make reunification possible and sustainable." The family therapist, however, had discharged the family from therapy in August because of minor's missed sessions. The report indicated that mother and minor had not participated in family therapy since the termination in August in part because mother rejected the social worker's offer to find a therapist in the Sacramento area and in part because minor's "inconsistent contact" prevented minor's individual therapist from conducting collateral family sessions with mother.

At the 18-month review hearing, the court rejected the agency's recommendation that reunification services be terminated. The court expressed significant concerns about the agency's failure to provide services specifically targeted at resolving the impediment to minor's reunification: minor's sexual abuse of her younger sister. The court explained, "even if we're just here about reasonable services to the mother, and tailoring, narrowly tailoring to the specific needs of the family, the mother and the child who is a dependent of the court, even there the agency falls short because there's never been any assessment as to whether or not the dependent minor needs sexual offender treatment, a specific type of therapy. There's never been any resources that I can see that have been provided to the mother about that specific subject, knowing that that is the core issue as to why mom and her daughter . . . cannot reunify at this point. [¶] . . . [W]e all know that [minor] cannot come home because the victim is in the home as well and the victim cannot handle [minor] being there. Maybe the services should be tailored to that specifically." The court reiterated that when the agency "know[s] that a child cannot be returned to the home based upon a core issue" and it does not "specifically address that issue with mother and the child . . . [t]hat is a lack of reasonable

services.” The court also questioned the agency’s failure to have a psychological evaluation of the minor performed, noting that “[t]here’s not been an assessment as to what type of therapy the minor should have, specifically as to whether or not there should be sexual offender treatment.” In ordering reunification services continued up to 24 months, the court stated, “mother has gotten her other child into therapy, and surrounded that child with services to help promote an environment where the possibility of reunification is very much an appropriate vision for the court at this time. . . . [T]he expectation of the court is that we sure-up all those things by doing assessments that are necessary to determine going forward what kind of therapy or services are necessary for the dependent minor in this matter . . . includ[ing] an assessment on sexual offender treatment. Or also to find a way, if the therapy that the minor is engaging in right now is helpful to her, to make sure we scaffold that and support it so that she can stay in therapy.” The court found a substantial probability that minor can be returned to and safely maintained in the custody of mother within the extended period of services. The court observed, “Why wouldn’t there be a substantial probability that the child would be returned to the mother at this point if all of the resources are in place and everyone is accessing those resources? It’s not as if minor doesn’t want to go home. It’s not as if mother is not putting in the work to get what she needs to get done.”

The agency filed a timely notice of appeal.³

DISCUSSION

1. *The dependency court did not err in extending reunification services to 24 months.*

■ “The 18-month hearing represents a critical juncture in dependency proceedings. [Citations.] At the 18-month hearing ‘critical’ decisions concerning parental rights are made. [Citations.] The Court of Appeal has held: ‘The Legislature has determined that the juvenile court must embrace or forsake family preservation at this point by circumscribing the court’s options.’ [Citation.] The minor must either be returned to the physical custody of his or her parent or the court must terminate reunification services and set a hearing

³ The notice of appeal was filed on March 14, 2016, and although briefing was completed in a timely manner, with no extensions of time requested, the case was not fully briefed until the middle of July and assigned to this court on its August calendar. Because the minor was removed from her home on August 9, 2014, services cannot as a matter of law be extended beyond August 9, 2016. While this appeal might be considered moot in that the period of additional services ordered by the trial court has by now expired and cannot be extended further, we reach the merits as the issue is capable of repetition and would otherwise evade review. (*In re Raymond G.* (1991) 230 Cal.App.3d 964, 967 [281 Cal.Rptr. 625].)

for the selection and implementation of a permanent plan.” (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1015 [70 Cal.Rptr.2d 603].) It is, however, within the court’s discretion under section 352 to continue the 18-month review hearing and extend reunification services up to 24 months upon a showing of good cause.⁴ (*Mark N.*, at p. 1016 [failure to provide reasonable reunification services is grounds for continuance]; see also *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1510 [33 Cal.Rptr.3d 89] [juvenile court may extend services beyond the 18-month statutory period if it finds “extraordinary circumstances ‘involv[ing] some external factor which prevented the parent from participating in the case plan’”]; *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1792, 1796 [42 Cal.Rptr.2d 200] [juvenile court has discretion “in a special needs case” to extend the reunification period].) In exercising its discretion under section 352, “the juvenile court should consider: the failure to offer or provide reasonable reunification services; the likelihood of success of further reunification services; whether [the minor’s] need for a prompt resolution of her dependency status outweighs any benefit from further reunification services; and any other relevant factors the parties may bring to the court’s attention.” (*Mark N.*, at p. 1017.)

Contrary to the agency’s argument, the amendment of sections 361.5, subdivision (a)(4) and 366.22, subdivision (b), effective January 1, 2009, did not limit the court’s discretion to continue an 18-month hearing and extend services under section 352. These amendments, which permit the extension of reunification services up to 24 months to certain parents in substance abuse programs or recently discharged from incarceration or institutionalization,⁵ were intended to “provide additional circumstances in which court-ordered

⁴ Section 352 states: “Upon request of counsel . . . the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor’s interests, the court shall give substantial weight to a minor’s need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. . . .”

⁵ Section 361.5, subdivision (a)(4) provides in relevant part: “Notwithstanding paragraph (3), court-ordered services may be extended up to a maximum time period not to exceed 24 months after the date the child was originally removed from physical custody of his or her parent or guardian if it is shown, at the hearing held pursuant to subdivision (b) of Section 366.22, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that it is in the child’s best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, or that reasonable services have not been provided to the parent or guardian. If the court extends the time period, the court shall specify the factual basis for its

services may be extended” and to “require the court, in determining whether court-ordered services may be extended, to consider the special circumstances of an incarcerated or institutionalized parent or parents, or parent or parents court-ordered to a residential substance abuse treatment program.” (Legis. Counsel’s Dig., Assem. Bill No. 2070, 5 Stats. 2008 (2007–2008 Reg. Sess.) Summary Dig., p. 202.) While section 366.22, subdivision (b) is not applicable in this instance, the new provision did not limit the court’s discretion to extend services based on a finding that reasonable reunification services were not provided.

■ The agency’s reliance on *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215 [173 Cal.Rptr.3d 538] is not persuasive. In that case, the court held that services could not be extended where there was no substantial evidence to support any of the trial court’s findings under section 366.22, subdivision (b). (*San Joaquin, supra*, 227 Cal.App.4th at pp. 223–224.) The appellate court also concluded that there was no substantial evidence to support the trial court’s finding that mother had not been provided reasonable reunification services. (*Id.* at p. 224.) Then,

conclusion that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period. The court also shall make findings pursuant to subdivision (a) of Section 366 and subdivision (e) of Section 358.1.”

Section 366.22, subdivision (b) provides in relevant part: “If the child is not returned to a parent or legal guardian at the permanency review hearing and the court determines by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services to a parent or legal guardian who is making significant and consistent progress in a court-ordered residential substance abuse treatment program, a parent who was either a minor parent or a nonminor dependent parent at the time of the initial hearing making significant and consistent progress in establishing a safe home for the child’s return, or a parent recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security and making significant and consistent progress in establishing a safe home for the child’s return, the court may continue the case for up to six months for a subsequent permanency review hearing, provided that the hearing shall occur within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following: [¶] (1) That the parent or legal guardian has consistently and regularly contacted and visited with the child. [¶] (2) That the parent or legal guardian has made significant and consistent progress in the prior 18 months in resolving problems that led to the child’s removal from the home. [¶] (3) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan postdischarge from incarceration, institutionalization, or detention, or following deportation to his or her country of origin and his or her return to the United States, and to provide for the child’s safety, protection, physical and emotional well-being, and special needs.”

in dicta, the court stated, “In any event, the juvenile court did not, and could not (on these facts) make the necessary findings to extend services beyond 18 months, regardless of whether or not reasonable services were provided. As we have discussed, the statutorily required factors were not present. Nor did any external factors prevent mother from participating in a case plan, as set forth in *In re Elizabeth R.*, *supra*,] 35 Cal.App.4th 1774, and the cases cited therein.” (227 Cal.App.4th at pp. 224–225.) The appellate court did not consider, however, whether the trial court had discretion under section 352 to continue the 18-month review hearing and extend reunification services up to 24 months upon a showing of good cause. Nor did the court consider whether the Legislature intended to limit the court’s discretion under section 352 by enacting section 366.22 subdivision (b). It is well established that “[a]n opinion is not authority for propositions not considered.” (*Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [81 Cal.Rptr.2d 521, 969 P.2d 613].) To the extent the court’s dicta suggests a contrary rule, we respectfully disagree.

■ Substantial evidence supports the court’s finding that reasonable reunification services were not provided. To support a finding reasonable services were offered or provided, “the record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained *reasonable* contact with the parents during the course of the service plan, and made *reasonable* efforts to assist the parents in areas where compliance proved difficult.” (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414 [286 Cal.Rptr. 592].) The “adequacy of reunification plans and the reasonableness of the [agency’s] efforts are judged according to the circumstances of each case.” (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1164 [39 Cal.Rptr.2d 743].) Reunification services should be tailored to the particular needs of the family. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 793 [20 Cal.Rptr.3d 336].) The social services agency must make a “good faith effort” to provide reasonable services that are responsive to each family’s unique needs. (*Mark N. v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1010.) “The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances.” (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547 [3 Cal.Rptr.2d 217].)

■ Here, the petition was sustained based on allegations that minor was contemplating suicide and engaging in behaviors that posed a substantial danger to herself. The case plan expressly required a psychological evaluation. Although the agency reported at the six-month review hearing that a “psychological evaluation” had been completed, the agency conceded at the 18-month review hearing that in fact an evaluation had not been conducted. Although the molestation of the younger sister was not alleged in the petition

as a ground for the dependency, it was apparent to all involved that it was a “core issue” and the primary barrier to reunification. Despite this recognition, minor was offered only general individual and family therapy. The trial court reasonably concluded that the provision of generalized therapy, without a further assessment, was not tailored to meet the family’s specific needs.

The court was not required to find, as the agency suggests, that there was a substantial probability that the mother and minor will reunify within the extended time period. Rather, the court was required to balance a number of factors, including “the likelihood of success of further reunification services,” in determining whether the continuance was in the minor’s best interests. (*Mark N. v. Superior Court, supra*, 60 Cal.App.4th at p. 1017.) Given minor’s expressed desire to return home and mother’s commitment to participate in services, the court reasonably concluded that there was a strong likelihood minor would reunify with proper treatment. We find no abuse of discretion in the extension of services under these circumstances.

Finally, the court did not exceed its authority by directing the agency to provide a specific type of therapy. The court faulted the agency for failing to properly evaluate minor to determine whether the treatment it was providing was sufficient to eliminate the core obstacle to reunification. In extending services, the court directed the agency to complete the psychological evaluation initially included in the minor’s case plan and to provide services consistent with the results of that assessment.

Disposition

The juvenile court order is affirmed.

Siggins, J., and Jenkins, J., concurred.

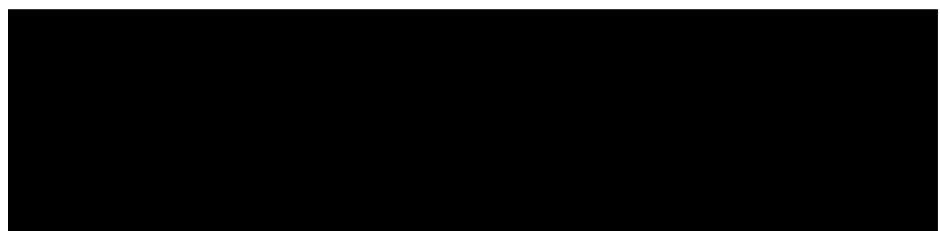
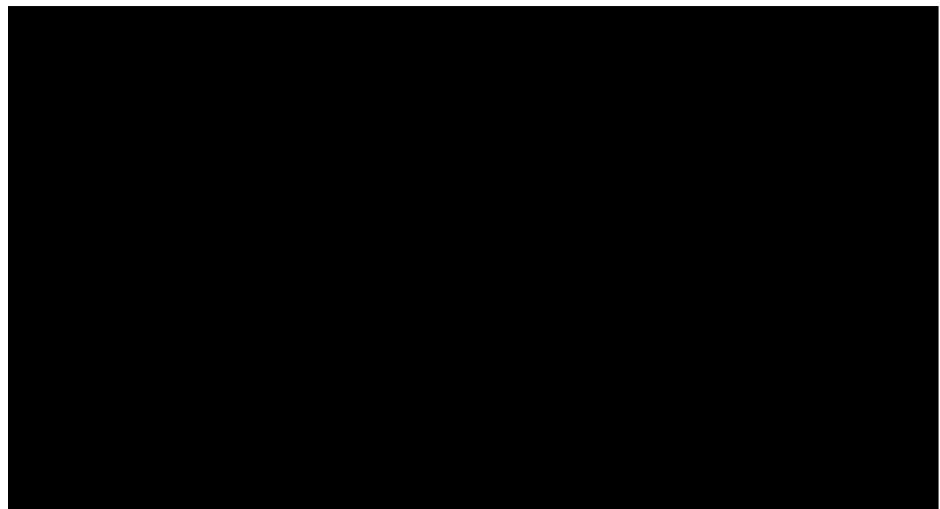
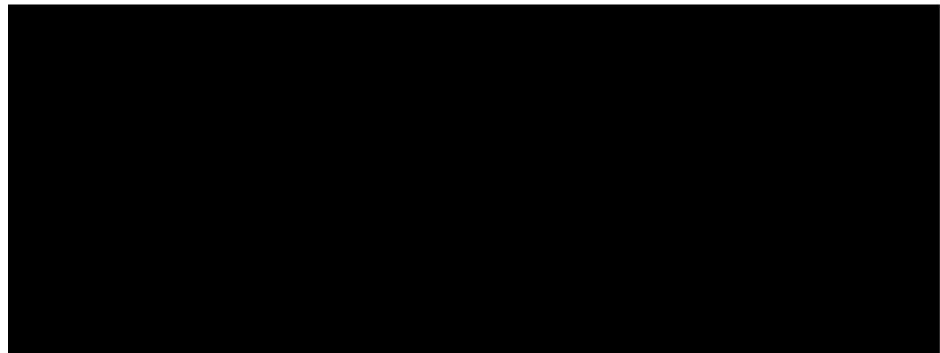
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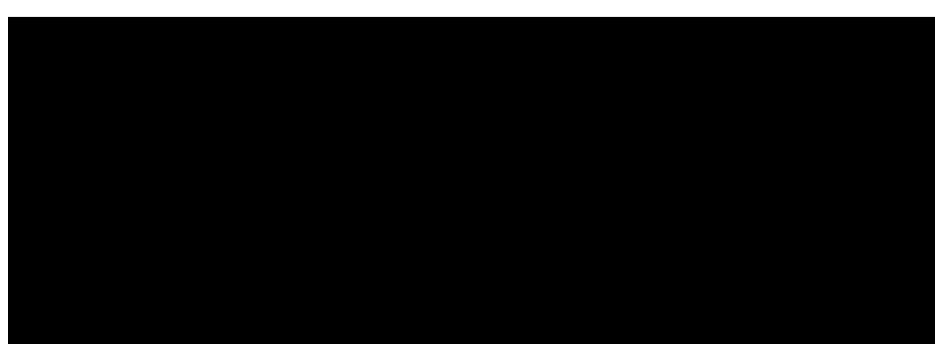
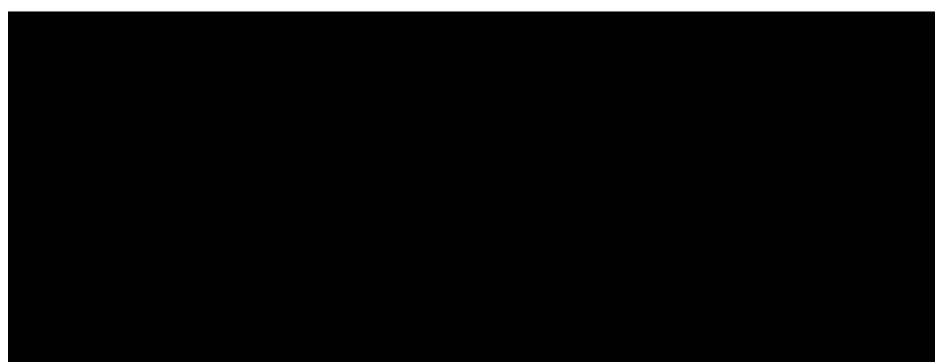
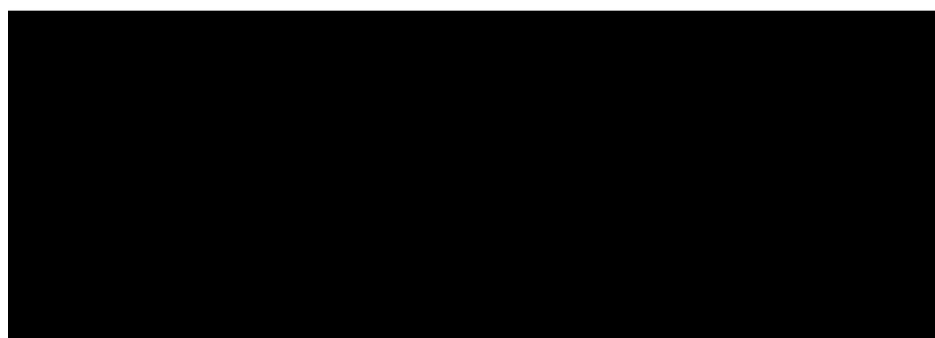
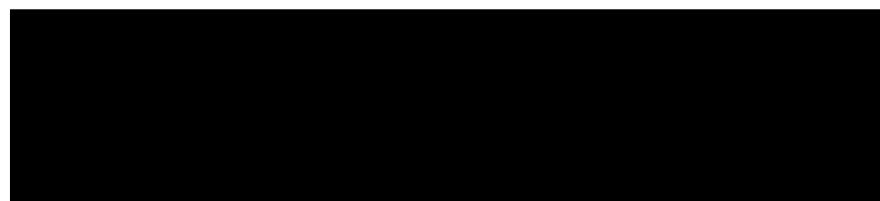
CITY OF SAN DIEGO, Plaintiff and Appellant, v.
SAN DIEGANS FOR OPEN GOVERNMENT, Defendant and Respondent.

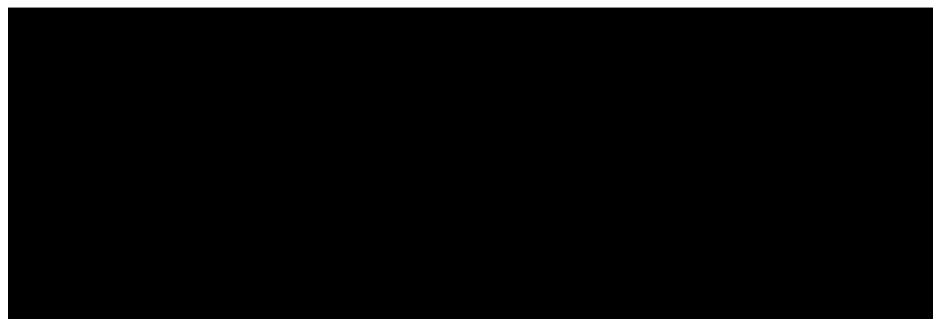
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COUNSEL

Jan I. Goldsmith, City Attorney, Daniel F. Bamberg, Assistant City Attorney, Catherine Richardson and M. Travis Phelps, Deputy City Attorneys, for Plaintiff and Appellant.

Briggs Law Corporation, Cory J. Briggs, Anthony N. Kim and Kelly E. Mourning for Defendant and Respondent.

OPINION

HUFFMAN, Acting P. J.—San Diegans for Open Government (SDOG), represented by Briggs Law Corporation (BLC), filed a verified answer in response to the City of San Diego’s (City) complaint in a validation action regarding the City’s plan to levy a special tax to finance the expansion of the San Diego Convention Center. By way of its verified answer, SDOG represented that it was an interested party to the litigation. However, at the time it filed its answer, both SDOG and its counsel knew that SDOG was a suspended corporation and neither SDOG nor its attorney informed the superior court or the City of this fact. After SDOG and another defendant ultimately proved successful in the validation action, SDOG sought its attorney fees under Code of Civil Procedure¹ section 1021.5.

¹ Statutory references are to the Code of Civil Procedure unless otherwise specified.

The City discovered after a final judgment was entered in SDOG's favor that SDOG had been suspended when it filed its verified answer and was not revived until well after the time period by which an interested party had to answer the validation action. As such, the City moved to strike SDOG's answer and motion for attorney fees. The superior court denied the City's motion and awarded SDOG attorney fees under section 1021.5, but limited those fees because SDOG first appeared when it was suspended and did not inform the court or the City of its status.

Because of some procedural ambiguity, the City filed two separate appeals relating to the denial of its motion to strike and the award of attorney fees to SDOG. We consolidated those appeals here.

This case presents an issue of first impression. Under section 1021.5, should attorney fees be awarded when a suspended corporation files an answer in a validation action and both the corporation and its attorney know it is suspended and it is not revived before the expiration of the deadline to appear in that action? We answer this question in the negative, and thus, reverse the order granting SDOG its attorney fees. We affirm the court's order denying the City's motion to strike both the answer and SDOG's motion for attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

On January 24, 2012, the City approved resolution No. R-307243, which created the Convention Center Facilities District (CCFD). The purpose of the CCFD was to provide the City with the ability to levy a special tax to finance the expansion of the San Diego Convention Center. In May 2012, the City filed a complaint against all interested parties seeking validation of the CCFD and associated special tax plan (Validation Action). Any interested persons who objected to the validity of the City's actions were required to file an answer to the complaint by July 10, 2012. Melvin Shapiro filed an answer to the Validation Action on July 6, 2012.

On July 9, 2012, SDOG filed an answer to the Validation Action. SDOG is a nonprofit corporation. In its answer, SDOG verified under oath that it was an interested party. Several other parties answered the Validation Action or filed reverse validation actions. These other actions were consolidated with the Validation Action.

The Validation Action eventually proceeded to trial in March 2013. The trial court found in favor of the City and entered judgment consistent with that finding. SDOG and Shapiro appealed.

This court reversed the trial court's judgment and remanded the matter to the trial court with directions to enter judgment in favor of SDOG and Shapiro and conduct any further necessary ancillary proceedings consistent with the opinion. (See *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 793 [175 Cal.Rptr.3d 670].)

After remand, the superior court entered judgment in favor of Shapiro and SDOG on March 5, 2015. The judgment reserved the issue of attorney fees until the appropriate motion was filed.

Shapiro and SDOG filed a joint motion for attorney fees on December 29, 2014. In that motion, SDOG sought \$862,404.92 out of the total requested fees of \$2,006,278.02 for both parties. The City opposed the motion. Among other arguments not relevant here, the City asserted that SDOG was not entitled to any fees because it was suspended at the time it filed its answer in the Validation Action.

The City presented evidence that SDOG's attorney, BLC, was aware that SDOG was a suspended corporation no later than May 16, 2012, when a BLC paralegal discovered that fact. Apparently, SDOG had been suspended because it did not pay or file its past due corporate tax returns. Shortly thereafter, the paralegal prepared and submitted various forms to have SDOG reinstated. Some of these forms were purportedly signed by Ian Trowbridge as the chief executive officer of SDOG. Nevertheless, on July 9, 2012, SDOG filed a verified answer in the Validation Action, which Trowbridge verified. There was no mention in the answer that SDOG was a suspended corporation. Further, the City points out that SDOG filed at least five lawsuits while it was a suspended corporation. SDOG was effectively revived on November 20, 2012. The City further emphasizes that SDOG's corporate status was not revived until after its time to answer the Validation Action had expired.

The City claimed that it did not become aware of SDOG's suspended status until sometime in October 2014, after our opinion in *City of San Diego v. Shapiro, supra*, 228 Cal.App.4th 756 was final. Through discovery in a completely unrelated case, the City learned SDOG was a suspended corporation when it filed the answer in the Validation Action.

In its reply memorandum of points and authorities in support of its motion for attorney fees, SDOG ignored the City's argument about its suspended status. However, in response to the City's subsequently filed motion to strike SDOG's answer and motion for attorney fees, SDOG finally addressed the allegation that it was a suspended corporation at the time it filed an answer in the Validation Action. SDOG did not refute that it was suspended at the time it answered the Validation Action. Nor did it argue that its attorney was not

aware it was suspended. Instead of offering any explanation for its actions or those of its attorney, SDOG contended its status was “widely known” as early as 2012. To this end, it emphasized that an article published in the San Diego Union-Tribune on August 5, 2012, noted that SDOG was a suspended corporation. SDOG also claimed that as early as August 24, 2012, at least one deputy city attorney was aware of SDOG’s suspended status because that deputy city attorney talked to SDOG’s counsel at a hearing in the Validation Action and discussed SDOG’s suspension. SDOG also points out that, on November 26, 2012, in another action filed by SDOG, the superior court sustained a demurrer the County of San Diego filed to SDOG’s complaint based on the fact that SDOG was a suspended corporation at the time it filed the complaint and the statute of limitations had run.

The superior court heard Shapiro and SDOG’s motion for attorney fees with the City’s motion to strike SDOG’s answer and motion for attorney fees. After considering the pleadings, evidence, and hearing oral argument, the court denied the City’s motion to strike and granted Shapiro and SDOG’s motion for attorney fees. In denying the City’s motion to strike, the court found that had the City raised a statute of limitations defense as to SDOG, it probably would have been successful. Nevertheless, the court noted this affirmative defense was only available to the City prior to or at trial. As such, the court found the City could not use the statute of limitations as a mechanism to strike SDOG’s answer. Thus, the court denied the City’s motion to strike SDOG’s answer as untimely.

In addition, the court denied the City’s motion to strike SDOG’s motion for attorney fees. It found that SDOG prevailed in the Validation Action and that it was entitled to an award of attorney fees. However, even though it denied the City’s motion, the court observed: “This court is, however, greatly concerned with what occurred here, i.e., a very experienced, capable attorney entered an appearance in litigation on behalf of a corporation which he evidently knew had been suspended and, thus, was a corporation without legal capacity to participate, and thereafter proceeded with the litigation without advising either the court or opposing counsel. By doing this, SDOG escaped what would have been certain death via the statute of limitations and, instead, ultimately entitled itself to a large award of attorney’s fees as a prevailing party. Moreover, the evidence before this court indicates that the Briggs law firm filed five other lawsuits on behalf of SDOG during this same period of corporate suspension (in addition to continuing to maintain other SDOG lawsuits which had been filed prior to SDOG’s becoming suspended). Such litigation misconduct constitutes, at best, an ethical lapse, and at worst, criminal behavior.”

The court further stated that it could not “condone what occurred here” and exercised its discretion to award SDOG no fees for work done during the

period of time it was suspended. In addition, it did not award SDOG any fees incurred in opposing the City's motion to strike. Yet, the court still found SDOG was entitled to attorney fees and ordered the parties to meet and confer "to create a proposed fee schedule order based upon the hourly rates and subtractions set forth in this ruling for the Court's signature and approval."

Apparently, the parties were somewhat unclear regarding the court's ruling on SDOG's motion for attorney fees, and thus, they returned to court twice for clarification. The court produced an "Amendment to Notice of Ruling and Statement of Reasons" wherein the court addressed the issue of SDOG's attorney fees incurred prior to when it was suspended. The court set forth that SDOG was to be compensated for 50 percent of its attorney fees that were incurred prior to suspension. The court again directed the parties to "meet and confer to prepare a final order for the court, reflecting the arithmetic figures resulting from the original ruling and this amendment thereto."

As ordered, counsel for the City and SDOG met and conferred but were unable to agree on the arithmetic. SDOG's counsel prepared, filed, and served a document titled "Notice of Entry of Orders/Rulings on Fee Motion," which attached, as exhibits, the court's notice of ruling and statement of reasons and its amendment to notice of ruling and statement of reasons. Following that notice, the City appealed.

Because the notice of ruling and the amendment to notice of ruling ordered the parties to meet and confer regarding the final arithmetic calculation of the attorney fee award and did not contain the calculation of the attorney fees awarded, in an abundance of caution, the City filed an ex parte application to obtain a signed order from the trial court. SDOG opposed the application due to the pending appeal. The trial court noted the objection, granted the application, and signed the order on February 24, 2016. That order sets forth that SDOG is awarded \$258,629.89 in attorney fees.

The City timely appealed that order, and subsequently moved to consolidate its appeal with its previous appeal. We granted the motion.

DISCUSSION

Here, the City does not challenge the amount of attorney fees awarded to SDOG, but instead, argues SDOG was not entitled to any fees whatsoever under section 1021.5. We view the City's contention as raising only a legal question that we review independently. (See *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal.App.4th 477, 480 [10 Cal.Rptr.3d 13].)

■ Section 1021.5 codifies the private attorney general doctrine. (*Punsly v. Ho* (2003) 105 Cal.App.4th 102, 109 [129 Cal.Rptr.2d 89].) An award of attorney fees is appropriate, under section 1021.5, when a litigant has been a successful party “‘in any action which has resulted in the enforcement of an important right affecting the public interest.’” (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 601–602 [57 Cal.Rptr.3d 215].) “Three basic criteria are required to support an award of attorneys’ fees under section 1021.5: (1) the action resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit was conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement were such as to make the award appropriate.” (*Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 663 [46 Cal.Rptr.3d 206] (*Abouab*).)

■ The private attorney general doctrine “is designed to encourage private enforcement of important public rights and to ensure aggrieved citizens have access to the judicial process where statutory or constitutional rights have been violated.” (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 690 [98 Cal.Rptr.2d 263]; see *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1767 [17 Cal.Rptr.2d 457] [“The fundamental objective of the private attorney general theory is to encourage suits effecting a strong public policy by awarding substantial attorney fees to those whose successful efforts obtain benefits for a broad class of citizens.”].) “The private attorney general doctrine is based on the theory that ‘privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.’” (*Abouab, supra*, 141 Cal.App.4th at p. 663.) Therefore, section 1021.5 clearly operates as a financial incentive for attorneys to protect the public against certain government encroachment or missteps. However, it should not be such a tantalizing carrot that it causes an attorney to behave unethically and unprofessionally or otherwise forget his or her role as an officer of the court. In the instant matter, this is precisely what occurred as to BLC’s representation of SDOG.

■ On May 10, 2012, the City filed a validation action regarding the CCFD special tax. “[I]n its most common and practical application, the validating proceeding is used to secure a judicial determination that proceedings by a local government entity, such as the issuance of municipal bonds and the resolution or ordinance authorizing the bonds, are valid, legal, and binding.” (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842 [73 Cal.Rptr.2d 427].) Section 861.1 requires that the summons in any

validation action be directed to all persons interested in the matter. The City complied with section 861.1 and named “all persons interested in this matter.” The City did not specifically name SDOG as a defendant.

“Any party interested may, not later than the date specified in the summons, appear and contest the legality or validity of the matter sought to be determined.” (§ 862.) Here, the summons indicated that any interested party must respond by July 10, 2012. Shapiro filed an answer in the Validation Action on or about July 6, 2012. In his answer, Shapiro represented to the court that he was an “interested person” as he was a “citizen, resident, voter, and taxpayer located within the City and within the boundaries of the [CCFD].”

On July 9, 2012, SDOG filed an answer verified by Trowbridge as an officer of SDOG. An attorney from BLC, representing SDOG, also signed the verified answer. By way of the answer, SDOG admitted it was an interested party in the Validation Action. In addition, it requested attorney fees as authorized under the Code of Civil Procedure and the Government Code.

It is undisputed that SDOG was a suspended corporation at the time it appeared in the Validation Action. Indeed, the same individual who verified the complaint (Trowbridge) signed some of the forms submitted to revive SDOG. Further, it is undisputed that BLC was aware that SDOG was suspended at the time one of its attorneys signed and filed the answer. There is no indication in the record that BLC ever informed the court or the City of SDOG’s suspended status. And SDOG’s corporate status was not revived until November 20, 2012, more than four months after the expiration of the deadline to appear in the Validation Action.

■ The law is clear that SDOG lacked the capacity to appear in the Validation Action. A corporation that has had its powers suspended “lacks the legal capacity to prosecute or defend a civil action during its suspension.” (*Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1512 [266 Cal.Rptr. 619] (*Sade*.)) “The ‘corporate powers, rights and privileges’ of any domestic corporate taxpayer may be suspended for failure to pay certain taxes and penalties. (Rev. & Tax. Code, § 23301.)^[2] This means the suspended corporation cannot sell, transfer or exchange real property in California, and contracts entered into during the time of suspension are voidable . . . through legal action. [Citation.] . . . Nor, during the period of suspension, may the corporation prosecute or defend an action, seek a writ of mandate, appeal from an adverse judgment, or renew a judgment obtained before suspension.”

² Similarly, a domestic corporation that has failed to file a tax return also may be suspended. (Rev. & Tax. Code, § 23301.5.)

(*Center for Self-Improvement & Community Development v. Lennar Corp.* (2009) 173 Cal.App.4th 1543, 1552 [94 Cal.Rptr.3d 74] (*Center for Self-Improvement*).)

Despite this clear authority, SDOG, represented by BLC, filed an answer in the Validation Action. Such conduct was clearly wrong. Additionally, BLC's explicit approval of SDOG's appearance and representation of SDOG was, as described by the superior court, unethical. (See *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 562 [102 Cal.Rptr.2d 350] ["The firm urges that it could not discharge its ethical duties to represent its client, if it had to reveal the client's suspended status to the court and counsel. Not so. If the corporation had been suspended for nonpayment of taxes, the client's disability would have been clear, and the attorney's duty to report that to the court would also have been clear."]; Rev. & Tax. Code, § 19719, subd. (a) [crime punishable by a fine up to \$1,000 and one year imprisonment for "[a]ny person who attempts or purports to exercise the powers, rights, and privileges of a corporation that has been suspended pursuant to Section 23301"].) Moreover, the record indicates that not only did SDOG appear in the Validation Action, but it filed five other actions as a plaintiff while suspended. Neither SDOG nor BLC dispute that they made these additional filings.

We are perplexed by BLC's and SDOG's actions here. We do not understand why BLC would represent SDOG in the Validation Action and file a verified answer on behalf of SDOG when it knew, as did the corporation, that SDOG was suspended. In light of this clearly unethical conduct, we expect some explanation of BLC's actions. BLC provides none. BLC does not explain why it felt compelled to violate the law and make an appearance on behalf of SDOG. BLC does not discuss any exigency in the matter that induced its improper actions. BLC does not clarify what value SDOG's presence in the action added, especially considering that the public interest was already being protected by Shapiro. There is no indication that SDOG obtained unique relief that Shapiro did not or could not achieve in the Validation Action. In other words, BLC offers absolutely no justification for its actions.

Further exacerbating BLC's conduct here, BLC does not accept responsibility for its actions. Instead, it blames the City for failing to discover earlier that SDOG was a suspended corporation. To this end, it points out that an article in the local newspaper referred to SDOG as a suspended corporation. In a separate case, a defendant successfully demurred to SDOG's complaint on the grounds it was a suspended corporation; and a BLC attorney discussed SDOG's suspended status with a deputy city attorney while waiting for the

court to call the Validation Action for a hearing. We agree with the superior court that BLC's argument on this point is not of the moment. In blaming the City for not being more diligent, BLC is merely trying to deflect attention from its unethical conduct. Such blame shifting and obfuscation does not carry the day.

■ BLC points out that its corporate status was revived, and the effect of such revival, validated otherwise invalid prior proceedings. (See *Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1490 [277 Cal.Rptr. 541].) However, courts have distinguished "between procedural steps taken on behalf of the suspended corporation while under suspension, which can be resuscitated by revival, and substantive defenses that accrue during the time of suspension, which cannot." (*Center for Self-Improvement, supra*, 173 Cal.App.4th at p. 1554.) The statute of limitations is regarded as a substantive defense. If an action is commenced while the corporation is suspended, the corporation's subsequent revival does not prevent the running of the statute of limitations; if the statute runs prior to revival, the corporation's actions will be time-barred, even if the complaint would have otherwise been timely. (*Ibid.*; *Sade, supra*, 217 Cal.App.3d at p. 1513.) ■ In a validation action, any interested party has a statutory deadline by which he or she must appear to contest the government's action. (§ 862.) If the interested party does not appear during the prescribed time, he or she loses the opportunity to challenge the government's action. (*Ibid.*) Here, any interested party was required by statute to respond to the complaint in the Validation Action by July 10, 2012. SDOG filed its answer on July 9, 2012, but it was suspended at that time and was not revived until more than four months later. We view the time limit established by section 862 like a statute of limitations. Put differently, if any interested party appears in a validation action after the time period permitted by the applicable summons, the government would have a valid defense, preventing that interested party from further challenging the government's proposed action. Thus, the fact that SDOG was revived four months after the time expired by which it had to appear in the Validation Action does not excuse BLC's furtive conduct of filing SDOG's answer while it knew its client was a suspended corporation.

Finally, we disagree with SDOG that the City waived any lack of capacity defense as to SDOG's motion for attorney fees. In opposition to SDOG's motion for attorney fees under section 1021.5, the City raised the argument that SDOG was suspended at the time it first appeared in the Validation Action. This was the earliest the City could raise such a challenge to SDOG's claimed entitlement to attorney fees because SDOG had not previously moved for fees. Moreover, the City filed a motion to strike SDOG's motion for attorney fees shortly thereafter. There was no waiver.

■ In summary, we conclude as a matter of law, under the unique facts of this case, attorney fees under section 1021.5 are not available for SDOG. SDOG was a suspended corporation at the time it appeared in the Validation Action and its corporate status was not revived until well after the period to appear in the Validation Action had expired. SDOG and its attorney, BLC, were aware SDOG was suspended at the time the answer was filed. BLC did not inform the superior court or the City of SDOG's suspended status. It did not seek a continuance so SDOG could be revived and, once revived, file an answer. BLC offers no explanation for its improper conduct. Nor does it explain what additional benefit it provided in this matter in light of the fact that Shapiro had already appeared and was protecting the public interest. Put differently, BLC does not elucidate why it was imperative that it knowingly represent a suspended corporation in this matter. We can draw no other conclusion but that BLC proceeded in bad faith in the instant action.

■ Here, SDOG was only eligible to recover its attorney fees under section 1021.5 if it appeared in the Validation Action by the prescribed deadline. It is undisputed that it could not legally do so in the instant action. The private attorney general doctrine is intended to encourage litigants to protect the public interest by providing a financial incentive to do so. (See *Bell v. Vista Unified School Dist.*, *supra*, 82 Cal.App.4th at p. 690; *Hull v. Rossi*, *supra*, 13 Cal.App.4th at p. 1767; *Abouab*, *supra*, 141 Cal.App.4th at p. 663.) That said, we determine that attorney fees cannot be awarded to a party whose attorney violates the law to appear in the action and offers no justification whatsoever for his or her conduct. To require taxpayers to compensate a party or a law firm for unethical and unprofessional conduct, under the guise that the litigant is protecting the public interest, would turn the private attorney general statute on its head. We cannot countenance such a result.

Having concluded that SDOG is not entitled to attorney fees under section 1021.5, we briefly address the City's challenge to the superior court's order denying its motion to strike SDOG's answer and motion for attorney fees. We view the City's motion to strike as an alternative challenge to the award of attorney fees to SDOG. As such, we do not reach this issue. Because we determine SDOG is not entitled to attorney fees, the City's motion to strike SDOG's motion for attorney fees is moot. Likewise, if successful, the City's motion to strike the answer would merely result in striking SDOG's name from the judgment in the Validation Action, and thus, deprive SDOG of any claim to attorney fees as a prevailing party. It would not reverse the judgment in the Validation Action because Shapiro remains a valid defendant and prevailing party. Therefore, we conclude City's motion to strike SDOG's answer is moot and do not address that issue as well.

DISPOSITION

The order granting SDOG attorney fees under section 1021.5 is reversed. The order denying the City's motion to strike is affirmed. The City is awarded its costs on appeal.

Nares, J., and Haller, J., concurred.

A petition for a rehearing was denied October 17, 2016, and the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied January 11, 2017, S238140.

[No. D069647. Fourth Dist., Div. One. Sept. 16, 2016.]

VICTOR M. REGALADO, Plaintiff and Respondent, v.
JEFFREY M. CALLAGHAN, Defendant and Appellant.

[REDACTED]

[REDACTED]

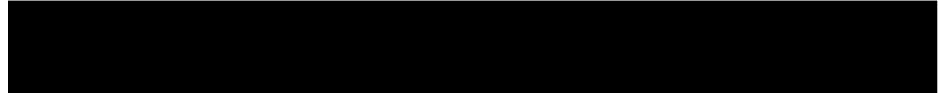
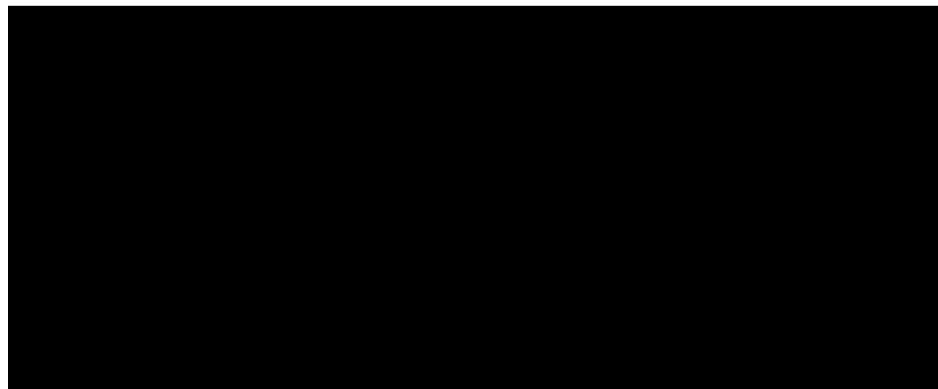
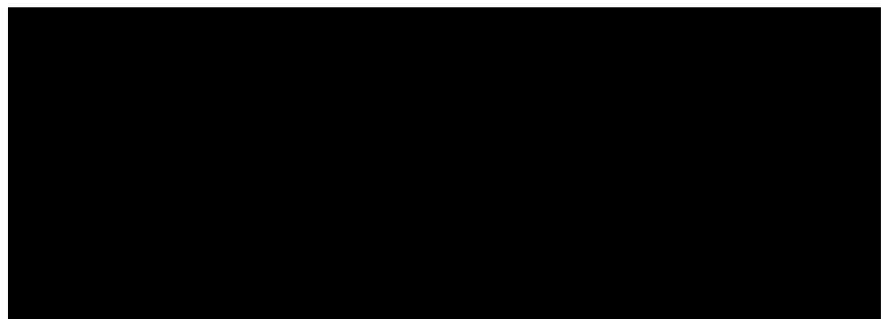
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COUNSEL

Wood, Smith, Henning & Berman, R. Gregory Amundson, Christopher Perez; Greines, Martin, Stein & Richland, Robert A. Olson and Alana H. Rotter for Defendant and Appellant.

Thon Beck Vanni Callahan & Powell, Daniel P. Powell; Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Respondent.

OPINION

HUFFMAN, Acting P. J.—Jeffrey M. Callaghan hired Dunn's Designer Pools (Dunn's), a landscape and pool contractor, to build a pool and spa at his home. Victor M. Regalado, a Dunn's employee, suffered injuries when he installed a propane fueled pool heater on Callaghan's property. Regalado sued Callaghan for negligence and premises liability. The jury found Callaghan was negligent and assigned 40 percent of fault to him. After applying the jury's fault allocation and setoffs, the trial court entered judgment against Callaghan in the amount of approximately \$3 million.

Callaghan appeals, contending (1) the court erred by failing to instruct the jury that a person who hires an independent contractor is not liable for injuries to the contractor's employee unless the hirer's negligent exercise of retained control "affirmatively contributed" to the employee's injury, (2) insufficient evidence supported the jury's verdicts on both premises liability and negligence, (3) Regalado's counsel committed misconduct by urging the jury to base its verdict on protecting the community, (4) the trial court erred by permitting Regalado to recover past wages because Dunn's had continued to pay his salary after the accident, and (5) the jury's award of future medical costs must be reduced because it was not supported by substantial evidence. We reject Callaghan's arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Callaghan, a licensed concrete subcontractor, wanted to build a dream house for his wife in the Coachella Valley. He decided to act as an owner-builder for his home project. An owner-builder is a property owner that obtains permits for the construction job at his or her own home and serves as the person responsible for the construction, similar to a general contractor. After obtaining a building permit for the house, Callaghan did the concrete work himself and hired licensed subcontractors to complete other work. Callaghan was at the site daily, kept track of progress, and asked his subcontractors whether things were ready so that he could call for inspections.

Callaghan planned to have Richard Clark of Canyon Pools build his pool and spa. In order to minimize noise, Callaghan wanted to have the pool equipment installed in an underground vault, which he had seen at other homes. Clark purchased a pre-engineered vault for Callaghan. Clark and Callaghan installed the vault. The vault had a hole on top for entry and exit. Callaghan put a collar on the hole to extend it upward so that the vault could be buried further underground and put a mesh grate over the top of it.

Callaghan's property did not have natural gas service so he hired a plumbing subcontractor, SSW, to run propane lines to the house and backyard. Under SSW's contract, it was not required to obtain permits for its work. Instead, Callaghan obtained the permits for the plumbing.

Callaghan requested that SSW run a propane line in the backyard for a pool heater. SSW's common practice at the time was to warn homeowners about the dangers of propane, including that if propane was to be used in a vault, certain safety precautions had to be taken because propane is heavier than air. However, SSW could not recall whether it specifically warned Callaghan about the dangers of propane. SSW ultimately ran a pipe into the backyard to a location Callaghan had specified, capped it, and left a marker on it so the pool contractor could later extend it to the heater.

Approximately one year after the vault was installed, Callaghan hired Dunn's to build the pool and spa instead of Clark because Clark was busy at that time. Callaghan was friends with Nathan Dunn, the president of Dunn's, and had worked with him for a long time. Callaghan informed Dunn's that he wanted to have the pool equipment installed in the underground vault. Callaghan did not know that a propane fueled heater should not be placed underground because it is dangerous to do so.

Dunn's built the shell for the pool and spa, completed the plumbing, and selected and purchased a natural gas heater for the pool and a kit to convert it

to propane. Dunn's designed the layout of the equipment in the vault, including where the propane line would enter the vault and where to place the joint for purging air out of the propane line before starting the heater. Callaghan's role was to call the County of Riverside (the County) for inspections.

Callaghan had obtained permits for the pool and spa. The site plan he submitted to the County in connection with his pool and spa application depicted a pool vault. However, Callaghan did not obtain separate permits for the vault and propane line or have the County inspect the vault. The County and Regalado's expert testified the vault required a permit. Clark, on the other hand, testified that based on his experience, a precast, pre-engineered vault like the one he installed on Callaghan's property did not require a permit.

Employees of Dunn's, including Regalado, installed the pool equipment in the vault. Regalado had not previously installed a propane heater in a vault. Further, neither Regalado nor his supervisor, David Fleming, had read the instruction manuals for the spa heater or the propane conversion kit that Dunn's had purchased for Callaghan's project. Those instruction manuals warned of a risk of explosion if a propane heater is installed in a pit or low spot where propane gas can collect.

After the pool and spa were completed, Fleming asked Regalado to turn on the pool equipment and get everything ready for the County's final inspection. Fleming believed that the County had inspected the pressure in the propane line before he asked Regalado to start up the equipment. Fleming thought Callaghan had told him the line was pressure tested, but could not recall the specific conversation.

Regalado entered the vault and bled the propane line until he smelled gas. He then exited the vault and told Fleming he was ready to turn the heater on. Fleming told Regalado to go ahead. Regalado reentered the vault and turned on the filter pump and heater.

As Regalado was climbing out of the vault, there was an explosion. The explosion was caused by the propane that Regalado had bled into the vault igniting when Regalado turned on the heater. Regalado was propelled into the air, landing on the ground outside the vault. He was severely burned, injured his back, and suffered other substantial injuries.

Regalado sued Callaghan for negligence and premises liability. Regalado alleged Callaghan negligently installed the underground vault and unventilated propane heater in that vault. Regalado asserted that Callaghan knew or

should have known the installation of the unventilated pool heater was dangerous. At trial, Regalado argued Callaghan was liable because Callaghan retained control over the project by submitting plans, pulling permits, and calling for inspections, furnished the vault and propane line, asked Dunn's to put the pool equipment in the vault, and did not get separate permits for the vault and propane line while representing to Dunn's that he did so.

Following trial, the jury found Callaghan was negligent and that his negligence was a substantial factor in causing harm to Regalado. The jury awarded Regalado \$158,080 in past economic damages, \$426,000 in future economic damages, \$2 million for past noneconomic harm, and \$4 million for future noneconomic harm. The jury also found that Regalado and Dunn's were negligent. It apportioned 40 percent of fault to Callaghan, 5 percent to Regalado, and 55 percent to Dunn's. After applying the jury's fault allocation and setoffs, the trial court entered judgment against Callaghan in the amount of approximately \$3 million.

DISCUSSION

I. *Alleged Instructional Error*

A. *General Legal Principles*

■ “Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work. . . . [¶] By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor’s employees to ensure the safety of the specific workplace that is the subject of the contract.’ [Citation.] One of the doctrine’s underpinnings is the availability of workers’ compensation to the injured employee: ‘[W]hen the person injured by negligently performed contracted work is one of the contractor’s own employees, the injury is already compensable under the workers’ compensation scheme and therefore the [law] should provide no tort remedy, for those same injuries, against the person who hired the independent contractor.’ [Citation.] . . . [¶] Thus, subject to certain exceptions, when a general contractor hires a subcontractor, the general contractor is not liable for injuries that occur to the subcontractor’s employees.” (*Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170, 1175–1176 [142 Cal.Rptr.3d 336] (*Brannan*)).)

One exception is set forth in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 [115 Cal.Rptr.2d 853, 38 P.3d 1081] (*Hooker*). “In *Hooker*, the court considered whether the hirer of an independent contractor could be held liable for injuries to the contractor’s employee resulting from the

contractor's negligence under the theory the hirer retained control of the work but negligently exercised that control. The high court held in *Hooker* 'a hirer of an independent contractor was not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but was liable to such an employee insofar as its exercise of retained control affirmatively contributed to the employee's injuries.' [Citation.] In such cases, the liability of the hirer is not 'vicarious' or 'derivative' in the sense that it derives from the act or omission of the hired contractor, but is direct." (*Brannan, supra*, 206 Cal.App.4th at p. 1176.)

■ "[A]ffirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.) Further, "'[a]ffirmative contribution' occurs where a general contractor 'is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished.'" (Millard v. Biosources, Inc. (2007) 156 Cal.App.4th 1338, 1348 [68 Cal.Rptr.3d 177].)

B. Additional Factual Background

Citing to *Hooker*, Callaghan proposed multiple jury instructions (Special Instructions) to cover the rule that a hirer may be held liable for injuries to a subcontractor's employee only if the hirer's negligent exercise of retained control affirmatively contributed to the employee's injury. Specifically, he sought to instruct the jury that: "An owner-builder owes no duty of care to an employee of a contractor to prevent or correct unsafe procedures or practices. An owner-builder's mere failure to exercise a power to compel the contractor to adopt safer procedures does not, without more, violate any duty. An owner-builder can only be held liable for injuries to the employee of its contractor if the owner-builder affirmatively contributed to the unsafe procedures or practices by direction, induced reliance, or other affirmative conduct." (Special Instruction No. 2.)

"An owner-builder 'hirer' who hires an independent contractor to perform work is not liable for a work-related injury suffered by the independent contractor's employee, unless two criteria are met: [¶] (1) the hirer retains the ability to control some aspect of the employee's safety, and [¶] (2) the hirer's retention of control affirmatively contributed to the employee's injuries." (Special Instruction No. 7.)

[REDACTED]

“Passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution.” (Special Instruction No. 8.)

At the jury instruction conference, the parties agreed that the court should instruct the jury with a modified version of CACI No. 1009B, which provided:

“Victor M. Regalado claims that he was harmed by an unsafe condition while employed by Dunn’s Designer Pools and working on Jeffrey M. Callaghan’s property. To establish this claim, Victor M. Regalado must prove all of the following:

- “1. That Jeffrey M. Callaghan owned the property;
- “2. That Jeffrey M. Callaghan retained control over safety conditions at the worksite;
- “3. That Jeffrey M. Callaghan negligently exercised his retained control over safety conditions regarding design and installation of the vault and Pentair MasterTemp heater;
- “4. That Victor M. Regalado was harmed; and
- “5. That Jeffrey M. Callaghan’s negligent exercise of his retained control over safety conditions was a substantial factor in causing Victor M. Regalado’s harm.”

Callaghan agreed that CACI No. 1009B was an accurate statement of the law, but continued to argue that the court should give an additional instruction that in order for him to be liable, he must have “affirmatively contributed” to Regalado’s injury. Callaghan focused on Special Instruction No. 8 and urged the court to use that instruction to define “affirmative contribution” for the jury. The court declined to give the special instruction, reasoning that although it was an accurate statement of law, the concept was covered by CACI No. 1009B. Specifically, the court noted that CACI No. 1009B required the jury to find that Callaghan “*negligently exercised his retained control,*” which required affirmative conduct rather than “just passively allowing something to exist.”

Without objection, the trial court also instructed the jury on general negligence principles. First, the trial court instructed the jury with CACI No. 400 on the essential factual elements of negligence as follows:

“Victor M. Regalado claims that he was harmed by Jeffrey M. Callaghan’s negligence. To establish this claim, Victor M. Regalado must prove all of the following:

- “1. That Jeffrey M. Callaghan was negligent;
- “2. That Victor M. Regalado was harmed; and
- “3. That Jeffrey M. Callaghan’s negligence was a substantial factor in causing Victor M. Regalado’s harm.”

The trial court went on to instruct the jury with CACI No. 401, providing: “[n]egligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.”

Callaghan agreed to a special verdict form which simply asked the jury to determine whether he was negligent without differentiating between the multiple theories of negligence on which it was instructed. Callaghan had proposed another special verdict form, but the substance of that form is not in the record before us and, in any event, he agreed to the form ultimately provided to the jury.

C. Analysis

Callaghan argues the court erred by failing to instruct the jury with his special instructions regarding *Hooker*’s “affirmative contribution” requirement. He contends CACI No. 1009B coupled with the general negligence instructions (CACI Nos. 400, 401) misled the jury and allowed it to find Callaghan negligent on a retained control theory based on his failure to correct an unsafe condition. Regalado responds that Callaghan cannot challenge the instructions because he agreed to the general negligence instructions.

1. Invited Error

■ “The doctrine of invited error bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant’s request.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653 [57 Cal.Rptr.2d 525].) Indeed, the invited error doctrine “applies ‘with particular force in the area of jury instructions. . . .’” (*Ibid.*) Reviewing courts will not consider claims regarding errors in jury instructions where the

record does not show who requested the instructions. (*Faulk v. Soberanes* (1961) 56 Cal.2d 466, 471 [14 Cal.Rptr. 545, 363 P.2d 593] [“appellant . . . has the burden to present a record sufficiently complete to establish that the claimed errors were not invited by her, and in the absence of such a showing she may not properly complain”].)

Under the invited error doctrine, where the record does not disclose which party requested an allegedly erroneous instruction, “the reviewing court *must presume that the appellant requested the instruction* and therefore cannot complain of error.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678 [71 Cal.Rptr.3d 775], italics added.) Where the record is silent, we assume the appellant invited the instructional error. (*Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 559 [85 Cal.Rptr. 308] [absent “any indication before us which party requested the challenged instruction in the first instance . . . , it is presumed to have been given at appellant’s request”].)

Here, Callaghan does not point to and we see nothing in the record that discloses which party requested CACI Nos. 400 and 401 regarding the essential factual elements of general negligence and the basic standard of care in negligence cases. The parties provided the court with a list of jury instructions in dispute. CACI Nos. 400 and 401 were not on that list. Further, Callaghan did not complain about the impact of CACI Nos. 400 and 401 on CACI No. 1009B at the jury instruction conference. Without an indication to the contrary, we presume the court instructed the jury with CACI Nos. 400 and 401 at Callaghan’s request and he is barred from complaining about these instructions on appeal. (*Bullock v. Philip Morris USA, Inc., supra*, 159 Cal.App.4th at p. 678; *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1091 [44 Cal.Rptr.3d 14].) Accordingly, we reject Callaghan’s instructional challenge to the extent it rests on supposed confusion resulting from the giving of CACI Nos. 400 and 401.

2. *Special Instruction on “Affirmative Contribution”*

■ “A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [34 Cal.Rptr.2d 607, 882 P.2d 298].) However, “[i]nstructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]’ [Citation.] Finally, ‘[e]rror cannot be predicated on the trial court’s refusal to give a requested instruction if the subject

matter is substantially covered by the instructions given.’” (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 359–360 [48 Cal.Rptr.3d 875].)

■ “The court is not required to instruct in the specific words requested by a party so long as the jury is adequately instructed on the applicable law.” (*Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1332 [16 Cal.Rptr.2d 297].) “We independently review claims of instructional error viewing the evidence in the light most favorable to the appellant.” (*Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333 [172 Cal.Rptr.3d 876].)

Here, the trial court instructed the jury with CACI No. 1009B, which provided that for Callaghan to be liable, he must have “negligently exercised his retained control over safety conditions” and that his “negligent exercise of his retained control over safety conditions was a substantial factor in causing Victor M. Regalado’s harm.” Based on *Hooker*, Callaghan sought to amplify CACI No. 1009B with Special Instruction No. 2, which provided: “an owner-builder can only be held liable for injuries to the employee of its contractor if the owner-builder affirmatively contributed to the unsafe procedure or practices by *direction, induced reliance, or other affirmative conduct*” (italics added). Additionally, based on *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521], Callaghan requested Special Instruction No. 8 that “[p]assively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution” (italics added).

Although drawn directly from case law, Callaghan’s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to “affirmatively contribute” to the plaintiff’s injuries, the hirer must have engaged in some form of active direction or conduct. However, “affirmative contribution need not always be in the form of actively directing a contractor or contractor’s employee. There will be times when a hirer will be liable for its omissions.” (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.) The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including “affirmative contribution” language in CACI No. 1009B. The committee’s Directions for Use state: “The hirer’s retained control must have ‘affirmatively contributed’ to the plaintiff’s injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the ‘affirmative contribution’ requirement simply means that there must be causation between the hirer’s conduct and the plaintiff’s injury. Because ‘affirmative contribution’ might be construed by a jury to require active conduct rather than a failure to act, the committee

believes that its standard ‘substantial factor’ element adequately expresses the ‘affirmative contribution’ requirement.” (Directions for Use for CACI No. 1009B.)

We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the affirmative contribution requirement set forth in *Hooker*. Callaghan’s proposed Special Instructions Nos. 2 and 8 had the potential of misleading the jury and did not provide a clear statement of the law. Thus, the trial court did not err in refusing these proposed special instructions.

Callaghan also proposed Special Instruction No. 7, which stated: an owner-builder is not liable unless “(1) [he] retains the ability to control some aspect of the employee’s safety, and [¶] (2) [his] retention of control affirmatively contributed to the employee’s injuries.” These requirements were mirrored in CACI No. 1009B. Specifically, that instruction required that Callaghan “retained control over safety conditions at the worksite” and Callaghan’s “negligent exercise of his retained control over safety conditions was a substantial factor in causing Victor M. Regalado’s harm.”

Callaghan argues CACI No. 1009B is inadequate because “[a]ffirmative contribution . . . requires something more than ordinary substantial factor causation.” Indeed, “affirmative contribution must be based on a *negligent exercise* of control.” (*Tverberg v. Fillner Construction, Inc.*, *supra*, 202 Cal.App.4th at p. 1446.) It is that negligent exercise of retained control that must have affirmatively contributed to the plaintiff’s injuries. (*Hooker*, *supra*, 27 Cal.4th at p. 210.) Callaghan’s Special Instruction No. 7 was not an accurate statement of the law because it failed to specify that the hirer must have negligently exercised his retained control. Supplementing CACI No. 1009B with Special Instruction No. 7 would have raised a danger of misleading the jury because the special instruction was duplicative and did not include the critical requirement of negligent exercise of retained control. In our view, CACI No. 1009B adequately instructed on the applicable law set forth in *Hooker*. (*Hooker*, at p. 210.) Accordingly, the trial court properly refused to instruct the jury with proposed Special Instruction No. 7.

II. *Sufficiency of the Evidence*

Callaghan argues insufficient evidence supported the jury’s verdicts on both premises liability and negligence. We reject Callaghan’s argument.

Under the well-established standard of review applicable to a claim that a judgment or finding is not supported by the evidence in the record, “we must consider all of the evidence in the light most favorable to the prevailing party,

giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631 [85 Cal.Rptr.2d 386] (*Howard*)).

Where two theories are presented to a jury, of which only one is supported by substantial evidence, and a general verdict is returned in favor of the plaintiff, it is presumed that the verdict was based on the theory that is supported by the evidence. (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 480 [104 Cal.Rptr.2d 545] (*Lundy*).) "Thus, on review of the underlying judgment, the general verdict will be upheld if sufficient as to any one of the causes of action alleged." (*Stonelight Tile, Inc. v. California Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 39 [58 Cal.Rptr.3d 74].)

Here, the trial court instructed the jury on multiple theories of liability, including general negligence, premises liability, and liability based on retention of control over safety conditions. The jury found Callaghan was negligent, but did not specify which theory of liability it relied upon. Thus, we will uphold the jury's verdict if any theory was supported by substantial evidence. (*Lundy, supra*, 87 Cal.App.4th at p. 480.)

Viewing the evidence in the light most favorable to Regalado, there was substantial evidence supporting liability based on Callaghan's negligent exercise of his retained control over safety conditions. Under that theory, the jury had to find (1) Callaghan owned the property, (2) Callaghan retained control over safety conditions, (3) Callaghan negligently exercised his retained control over safety conditions regarding the design and installation of the vault and propane heater, (4) Regalado was harmed, and (5) Callaghan's negligent exercise of his retained control was a substantial factor in causing Regalado's harm (CACI No. 1009B). Callaghan does not dispute the first and fourth elements. Thus, we focus on whether there was substantial evidence to support findings that Callaghan retained control over safety conditions and negligently exercised that control in a manner that affirmatively contributed to Regalado's injuries.

The County and Regalado's expert testified that the vault and propane line required a permit. According to Regalado's expert, the purpose of obtaining permits and inspections is to ensure the work is done safely. Callaghan was responsible for obtaining permits and calling for inspections. Thus, there was sufficient evidence that he retained control over safety conditions.

Without obtaining permits for the vault and propane line, Callaghan and another contractor installed the vault, modified its entry and exit point, and ran a propane line that would eventually be connected to the vault. According to Regalado's expert, it was below the standard of care for an owner-builder such as Callaghan to fail to obtain permits for the vault and propane line. In the expert's opinion, Callaghan's failure to go through the proper permitting and inspection process was a substantial factor in causing the accident. Specifically, the expert testified that if Callaghan would have gone through the appropriate process, he would not have had a design that included an underground vault with propane piped into it without a proper ventilation system. The expert explained that permits are "a double-check so that people don't just build whatever they want, wherever they want, in any way they want. They have very specific rules that they have to follow, and the permitting process is a process by which that double-check is created." Further, according to Fleming, Callaghan represented that the County had inspected the pressure in the propane line before the accident and that all steps of the construction had passed inspection. Based on this evidence, a reasonable trier of fact could conclude that Callaghan negligently exercised his retained control over safety conditions in a manner that affirmatively contributed to Regalado's injuries.

We recognize that Callaghan presented conflicting evidence on many points. However, our task is not to reweigh the evidence or substitute our judgment for that of the trier of fact. Rather, based on our standard of review, we resolve all conflicts in the evidence in favor of Regalado and give him the benefit of every reasonable inference. (*Howard, supra*, 72 Cal.App.4th at pp. 630–631.) Based on that standard and the record before us, there is substantial evidence to support of the judgment.

III. *Alleged Attorney Misconduct*

A. *Additional Background*

During closing argument, Regalado's counsel told the jury that its decision would impact the community. Regalado's counsel started off his argument by telling the jury members that acting as a juror is an important civic duty. He continued, "Your voice really is going to have an impact. [¶] . . . You are the voice. You are the conscience of this community. You are going to speak on

behalf of all the citizens in Riverside County and, in particular, Coachella Valley. [¶] You are going to make a decision what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe. You are going to announce it in a loud, clear, public voice. And that is going to be the way it is.”

Regalado’s counsel went on to state that “[t]hese courtrooms, these courthouses, exist for one reason: It’s to keep the community safe. Period. That is the sole function of courtrooms, and it’s why the state spends so much money on courtrooms. [¶] In the criminal part of the system, the jury identifies criminals and gets rid of them. . . . It’s a matter of public policy, public safety. [¶] On the civil end of things, same function it’s all about keeping the community safe. You identify bad conduct, negligent conduct. You don’t send anybody to jail, but you announce what it is, and everybody is going to live by it. And in the civil end, you, the jury, tells the wrongdoer, ‘You are going to compensate the person you hurt.’ [¶] . . . And you are going to tell the wrongdoer, ‘If you do this stuff in our community, you are going to pay.’”

After a break and after Regalado’s counsel had continued through a significant portion of his closing argument, Callaghan’s counsel objected, stating, “[Regalado’s] counsel is making a reptile argument where he’s talking about the role of the jury verdict in enforcing the greater good for the general public.” The trial court found the objection was untimely.

B. Analysis

Callaghan argues Regalado’s counsel committed misconduct by urging the jury to base its verdict on protecting the community.

■ “The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury.” (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 566 [189 Cal.Rptr.3d 325].) For example, “[a]n attorney representing a public entity commits misconduct by appealing to the jurors’ self-interest as taxpay- ers.” (*Ibid.*) “An attorney’s appeal in closing argument to the jurors’ self-interest is improper and thus is misconduct because such arguments tend to undermine the jury’s impartiality.” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796 [16 Cal.Rptr.3d 374, 94 P.3d 513] (*Cassim*)).

■ To preserve a claim of attorney misconduct for appeal, a timely and proper objection must have been made at trial; otherwise, the claim is forfeited. (See *Cassim, supra*, 33 Cal.4th at pp. 794–795; *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211 [260 Cal.Rptr. 431].) “In addition to objecting, a litigant faced with opposing counsel’s misconduct must

[either] ‘move for a mistrial or seek a curative admonition’ [citation]” unless an admonition would have been inadequate under the circumstances. (*Cassim*, at p. 794.)

Here, although in our view the remarks from Regalado’s counsel telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe were improper, the comments were so brief that they were not prejudicial in our view. (See *Cassim, supra*, 33 Cal.4th at pp. 802–803.) Regardless, we need not reach the issue because Callaghan failed to timely object to the remarks and failed to request a curative admonition. There is nothing in the record that indicates an objection and admonition would not have cured the prejudice, if any, arising from those remarks. Accordingly, Callaghan forfeited his argument on appeal. (*Id.* at pp. 794–795.)

IV. *Collateral Source Rule*

A. *Additional Background*

Regalado did not work for four years after the accident. He received worker’s compensation benefits. Dunn’s continued to pay his salary during that time. At an Evidence Code section 402 hearing, Dunn testified that he continued to pay Regalado because he knew worker’s compensation benefits were less than the salary Regalado regularly made and Regalado was the only income earner in his household. According to Dunn, he continued to pay Regalado to help Regalado and Regalado’s family. Dunn hoped that if he was in the same position and the only person working in his household, someone would do the same thing for him. Dunn did not expect to receive anything in return for paying Regalado’s salary. Regalado returned to work for Dunn’s in June 2014, as a cost estimator.

The trial court found that payments Dunn’s made to Regalado during the four years Regalado did not work were intended as a gift. Thus, the trial court excluded evidence of those payments under the collateral source rule. The jury ultimately awarded Regalado \$158,080 in past lost earnings.

B. *Analysis*

Callaghan argues the trial court erred by permitting Regalado to recover past wages because Dunn’s continued to pay his salary. Specifically, Callaghan contends wage payments from Dunn’s do not fall within the collateral source rule because Dunn’s was a joint tortfeasor.

Under the collateral source rule, “if an injured party receives some compensation for his injuries from a source wholly independent of the

tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.” (*Helpend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61].) However, “‘payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing pro tanto the amount of the damages he may be entitled to recover.’ Hence, the rule applies only to payments that come from a source entirely independent of the tortfeasor and does not apply to payments by joint tortfeasors or to benefits the plaintiff receives from a tortfeasor’s insurance coverage” (*Id.* at p. 8, fn. 7, italics omitted.)

In *Arambula v. Wells* (1999) 72 Cal.App.4th 1006, 1009 [85 Cal.Rptr.2d 584] (*Arambula*), the court rejected the defendant’s argument that because the plaintiff’s employer gratuitously paid his wages, the plaintiff was precluded from recovering the value of his lost wages. The court reasoned that “[i]f a generous person chooses to pay the wages of someone who has been injured, intending to add the gift to the latter’s compensation, ‘there seems to be no good reason for denying effect to such intention or for diverting it to another beneficiary, whether that other is a wrongdoer or not.’” (*Id.* at p. 1013.) “The rationale of the collateral source rule thus favors sheltering gratuitous gifts of money or services intended to benefit tort victims” (*Id.* at p. 1014.)

Here, substantial evidence supported the trial court’s conclusion that payments from Dunn’s to Regalado during the four years Regalado did not work were intended as gifts. Callaghan does not dispute the trial court’s factual finding, but argues Dunn’s is not a collateral source because it was a joint tortfeasor. Callaghan further argues *Arambula* does not apply because the opinion did not indicate whether the plaintiff’s injury was work related and whether the employer was a joint tortfeasor. We are not persuaded.

Regalado’s sole remedy as against Dunn’s was through the worker’s compensation system. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15–16 [276 Cal.Rptr. 303, 801 P.2d 1054].) “[T]he legal theory supporting such exclusive remedy provisions is a presumed ‘compensation bargain,’ pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.” (*Id.* at p. 16.) Thus, although the jury found Dunn’s was 55 percent at fault for Regalado’s injuries, Dunn’s had no legal obligation to pay

his salary and was not liable for any damages payments. According to Dunn, he did not expect anything in return and merely wanted to help Regalado and Regalado's family. In this case, we see no reason why a gift from Dunn's should be treated differently than a gift from any other third party.

Where, as here, the evidence supports the trial court's conclusion that Dunn's made payments to Regalado as a gift and Dunn's had no obligation to make the payments, we see no reason why the payments should be considered anything other than gratuitous payments covered by the collateral source rule. The reasoning set forth in *Arambula* is equally applicable whether or not the jury found Dunn's was negligent because Dunn's had no obligation to pay Regalado's damages. (*Arambula, supra*, 72 Cal.App.4th at pp. 1011–1014.)

V. Future Medical Costs Award

A. Additional Background

Dr. David Tahernia, an orthopedic spine surgeon, treated Regalado after his accident. Regalado complained that he had pain in his back radiating down his left leg. Dr. Tahernia concluded that Regalado suffered from spinal stenosis and spondylolisthesis, which is misalignment of part of the spine. Dr. Tahernia attempted to treat Regalado with conservative treatment options, but Regalado ultimately needed surgery. Regalado underwent surgery without complications, but continued to complain of back and leg pain with numbness.

Dr. Tahernia explained that an effect of the surgery for spondylolisthesis is that stress can be transferred to a neighboring spinal segment. In Dr. Tahernia's opinion, it is more likely than not that Regalado will require a future surgery to fix the problem. Dr. Tahernia testified that Regalado began to develop hypermobility in one of his spinal segments. He continued, "from a biomechanical perspective, the stress is transferred to the level above, and that level above is starting to move a little bit more than it normally would. When that happens, it is more likely to develop instability, more likely to develop arthritic changes that could lead one to need additional surgery in the future." Callaghan's expert testified that the likelihood that Regalado will need future surgery on an adjacent spinal segment is less than 25 percent.

Regalado's expert testified that the present value of Regalado's future medical costs is \$578,460 with a spine fusion surgery or \$276,229 without it. The jury awarded Regalado \$426,000 in future medical damages.

B. Analysis

Callaghan argues the jury's award of future medical costs must be reduced because it was not supported by substantial evidence. Specifically, he argues that Dr. Tahernia's opinion that it was more likely than not that Regalado will require future surgery was conjecture and lacked a factual basis. We disagree.

■ “Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.” (Civ. Code, § 3283.) It is well settled that “[p]rospective detriment must be so proven that from the proof the [trier of fact] can reasonably conclude that the claimed detriment is reasonably certain to occur.” (*Khan v. Southern Pac. Co.* (1955) 132 Cal.App.2d 410, 416 [282 P.2d 78].) “[I]t is generally a question for the [trier of fact] to determine from the evidence whether or not the claimed prospective detriment is reasonably certain to occur.” (*Ibid.*) It is “not required” for a doctor to “testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty.” (*Paolini v. City & County of S. F.* (1946) 72 Cal.App.2d 579, 591 [164 P.2d 916].) The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery. (*Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745 [203 P.2d 778].)

■ An award of damages must be predicated on something more than mere possibilities. (*Metcalf v. Drew* (1947) 78 Cal.App.2d 226, 232 [177 P.2d 620].) “[I]t is fundamental that ‘damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.’” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88].)

As detailed *ante*, Dr. Tahernia opined that it was more likely than not that Regalado will need future surgery because Regalado began to develop hypermobility in one of his spinal segments. Callaghan claims Dr. Tahernia's opinion was speculative because Dr. Tahernia testified that individuals with hypermobility are “*more likely* to develop arthritic changes that *could* lead one to need additional surgery.” (Italics added.) The fact that there was some uncertainty as to whether Regalado would develop arthritic changes requiring additional surgery does not preclude a finding that it was reasonably certain he would need future surgery. For example, in *Ostertag v. Bethlehem etc. Corp.* (1944) 65 Cal.App.2d 795 [151 P.2d 647], the plaintiff's expert testified, based on his examination of the plaintiff, “‘it is reasonable to assume he is going to have trouble . . . in the future. Just how much, I don't know. Just what the course of that trouble will be, I don't know.’” (*Id.* at

pp. 805–806.) The court found this testimony “sufficient to support a finding of future damages with reasonable certainty.” (*Id.* at p. 806.) Similarly, the plaintiff’s expert in *Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511 [274 P.2d 443] based his opinion on future damages on the fact the plaintiff was still experiencing pain two years after the accident and his experience that “[f]requently in this type of neck injury a patient will continue to have symptoms indefinitely” and “[i]t may last forever; . . . it may get worse; he may improve somewhat.” (*Id.* at pp. 518–519.) The court held, “[f]rom such testimony the jury could reasonably conclude that plaintiff was reasonably certain to experience some pain and disability for the rest of his life.” (*Id.* at p. 519.)

Dr. Tahernia testified that Regalado had surgery on one segment of his spine that had healed, but as a person ages, some stress can be transferred to an adjacent spinal segment. Based on his review of Regalado’s X-rays, Dr. Tahernia stated Regalado demonstrated hypermobility in an adjacent spinal segment and, as a result, Regalado was more likely to develop arthritic changes requiring surgery in the future. In Dr. Tahernia’s opinion, Regalado would more likely than not need future surgery. Based on this evidence, the jury could conclude it was reasonably certain that Regalado would require a future spinal surgery.

DISPOSITION

The judgment is affirmed. Regalado is entitled to recover costs on appeal.

Nares, J., and Haller, J., concurred.

[No. B269005. Second Dist., Div. Two. Sept. 1, 2016.]

KHANH DANG, Plaintiff and Appellant, v.
MARUICHI AMERICAN CORPORATION, Defendant and Respondent.

[REDACTED]

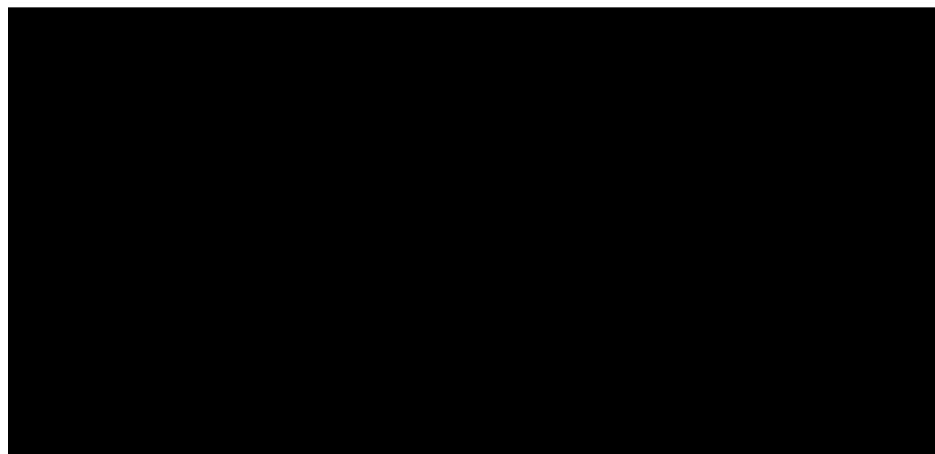
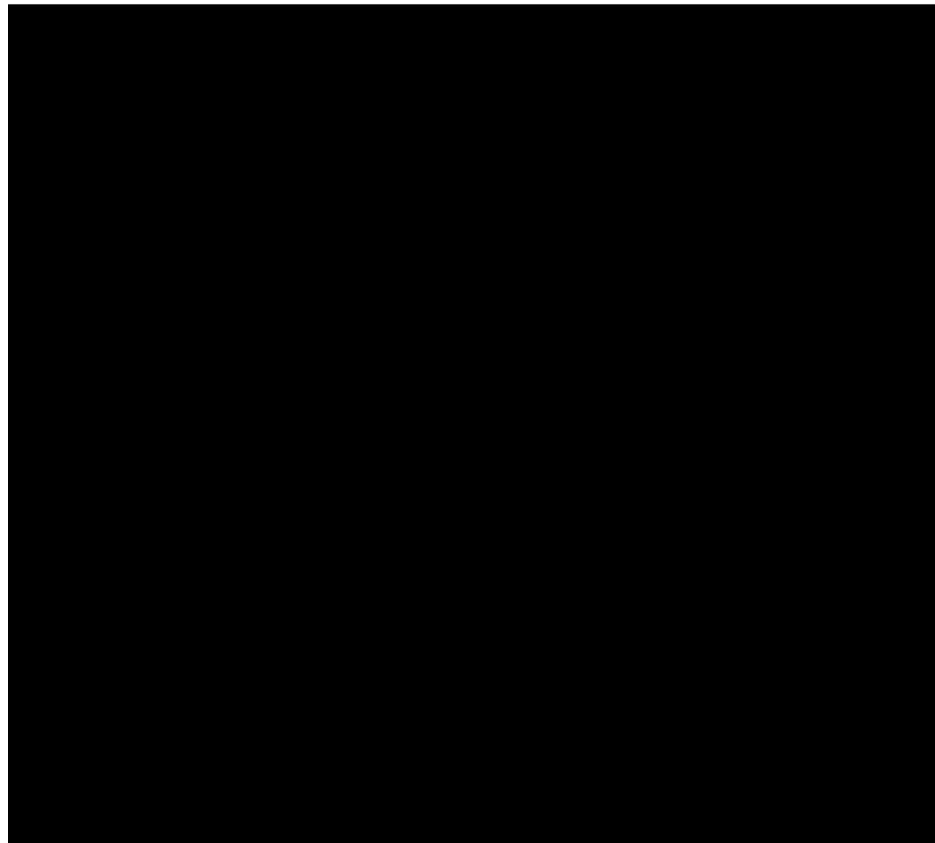
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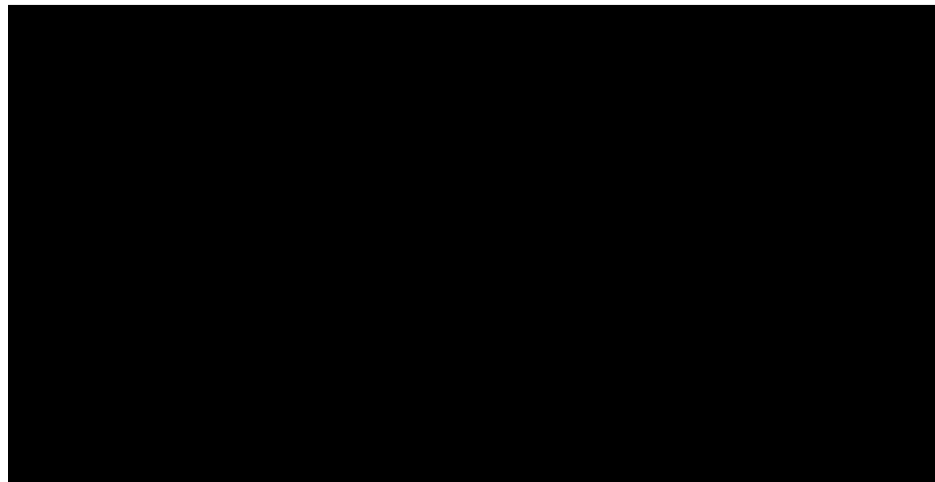
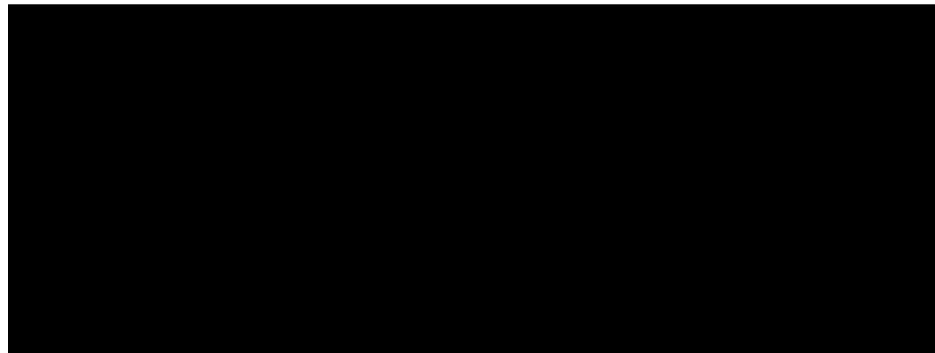
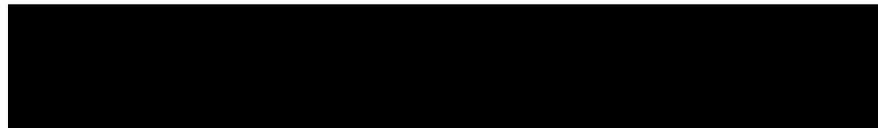
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COUNSEL

Gould & Associates, Michael A. Gould and Aarin A. Zeif for Plaintiff and Appellant.

Cummins & White, Larry M. Arnold, Erick J. Becker and Scott R. Carpenter for Defendant and Respondent.

OPINION

BOREN, P. J.—Plaintiff and appellant Khanh Dang sued his former employer, defendant and respondent Maruichi American Corporation (Maruichi), for wrongful termination in violation of public policy, claiming that Maruichi discharged him for engaging in concerted activity relating to unionizing efforts. The trial court granted summary judgment in Maruichi's favor. The court found it lacked jurisdiction because Dang's claim was preempted by the National Labor Relations Act (NLRA; 29 U.S.C. § 151 et seq.) under *San Diego Unions v. Garmon* (1959) 359 U.S. 236 [3 L.Ed.2d 775, 79 S.Ct. 773] (*Garmon*).

On appeal, Dang argues that, as a supervisor, he is not covered under the NLRA, and that the NLRA does not reach his claim. Based on the evidence presented on the motion for summary judgment, we find there is no basis to conclude Dang's claim is arguably subject to the NLRA. Accordingly, we reverse.

BACKGROUND

Khanh Dang filed a complaint in July 2014 against Maruichi for wrongful termination in violation of public policy. The complaint contained only cursory allegations, stating that Dang worked as a maintenance supervisor for Maruichi until it terminated his employment because he was involved in concerted activity, including attempts to join a union.

Maruichi moved for summary judgment in August 2015, arguing primarily that Dang's claim was preempted by the NLRA. In support of the motion, Maruichi presented evidence that, in July 2013, it became aware of an effort by the United Steelworkers to organize employees at Dang's place of employment, Maruichi's Santa Fe Springs facility. The union won an election among Maruichi employees and was certified as their collective bargaining representative in September 2013. Prior to the election, Dang was discharged because, according to Maruichi's general manager, Maruichi employees indicated Dang's mistreatment of them was the reason they wanted to unionize.

Dang opposed the motion for summary judgment, arguing that, as a supervisor, his employment was not subject to the NLRA. He asserted that he was fired for engaging in concerted activity related to potential unionizing. According to Dang, the activity he engaged in included: discussing the organization of the union with several employees; asking an employee how meetings about the union went; asking an employee "How['s] the union deal going"; asking what certain employees thought about unionizing; telling an

employee that, as a supervisor, he could not give advice relating to the union; talking with an employee about the good points and bad points of a union; and telling a fellow supervisor that the union might make their jobs as supervisors more difficult. When talking to employees, Dang tried not to express an opinion for or against the union.

In deciding Maruichi's motion for summary judgment, the trial court found that it lacked authority to determine whether the NLRA applied to plaintiff's claim, and that this was a decision that should be left to the National Labor Relations Board (NLRB). Based on its determination that state court jurisdiction was preempted, the court granted summary judgment.

Dang appealed.¹

DISCUSSION

■ The NLRA preempts a putative state law claim based on activity subject to section 7 (section 7; 29 U.S.C. § 157) or 8 (section 8; 29 U.S.C. § 158) of the NLRA. (*Garmon, supra*, 359 U.S. 236, 244–245.) Section 7 guarantees the right of employees to organize, join labor organizations, bargain collectively, and engage in other concerted activities. (29 U.S.C. § 157; *Garmon*, at p. 241.) Section 8, as pertinent here, prohibits employer interference with employees' exercise of section 7 rights. (29 U.S.C. § 158, subd. (a)(1); *Garmon*, at p. 241.)

The NLRB, and not a state court, has exclusive authority to determine whether a claim “arguably subject to” section 7 or 8 is preempted. (*Garmon, supra*, 359 U.S. 236, 244–245.) “[W]hen an activity is arguably prohibited or protected by section 7 or section 8 . . . the state courts must defer to the exclusive competence of the NLRB in order to avoid state interference with national labor policy.” (*Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal.App.4th 521, 527–528 [22 Cal.Rptr.2d 453], citing *Garmon*, at p. 245.) State jurisdiction is “extinguished” when there is preemption under *Garmon*. (*Longshoremen v. Davis* (1986) 476 U.S. 380, 391 [90 L.Ed.2d 389, 106 S.Ct. 1904] (*Davis*).) Matters that are only a “peripheral concern” of the NLRA, however, or that are “deeply rooted in local feeling and responsibility,” are not subject to *Garmon* preemption. (*Garmon*, at pp. 243–244.)

Despite the NLRB's broad authority, state courts still have a role in the preemption analysis. “A claim of *Garmon* pre-emption is a claim that the

¹ An order granting summary judgment is not appealable. In the interests of justice and efficiency, we construe the order granting summary judgment as an appealable judgment. (*H.N. & Frances C. Berger Foundation v. City of Escondido* (2005) 127 Cal.App.4th 1, 6–7, fn. 5 [25 Cal.Rptr.3d 19].)

state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court.” (*Davis, supra*, 476 U.S. 380, 393.) The requirement that conduct “‘arguably’” be subject to section 7 or 8 for preemption to apply “is not without substance.” (*Davis*, at p. 394.) The party claiming preemption “must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.” (*Id.* at p. 396.)

■ Arguable preemption under *Garmon* is not a given in this matter. Evidence presented on the motion for summary judgment showed that Dang was a supervisor at Maruichi.² Supervisors are explicitly excluded from the definition of “employee” under the NLRA and therefore are not entitled to the protections afforded by section 7. (29 U.S.C. § 152(3); *Operating Engineers v. Jones* (1983) 460 U.S. 669, 671, fn. 1 [75 L.Ed.2d 368, 103 S.Ct. 1453].)

Nevertheless, discharge of a supervisor may constitute an unfair labor practice under section 8(a)(1), and therefore be subject to the NLRA, “if it infringes on the [section] 7 rights of the employer’s nonsupervisory employees.” (*Davis, supra*, 476 U.S. 380, 384, fn. 4.) The “post-1982 standard” for finding NLRA violations in disciplinary actions against supervisors was explained in *Parker-Robb Chevrolet, Inc.* (1982) 262 NLRB 402 (*Parker-Robb*), affd. *sub nom. Automobile Salesmen’s Union v. N.L.R.B.* (D.C. Cir. 1983) 711 F.2d 383 (*Automobile Salesmen*). (*Davis*, at p. 385, fn. 4.) *Parker-Robb* held that discharge of a supervisor may violate section 8 “in certain circumstances,” including when an employer discharges a supervisor “for giving testimony adverse to an employer’s interest either at an NLRB proceeding or during the processing of an employee’s grievance under the collective-bargaining agreement,” “for refusing to commit unfair labor practices,” or “because the supervisor fails to prevent unionization.” (262 NLRB at pp. 402–403, fn. omitted.) Termination of a supervisor’s employment in these situations is unlawful because “it interferes with the right of employees to exercise their rights under Section 7.” (*Id.* at p. 404.)

■ Discharge of supervisors merely because of their participation in union or concerted activity is not unlawful, however, because supervisors (unlike employees) are not protected by section 7. (*Parker-Robb, supra*, 262 NLRB 402, 404.) An employer may insist on the loyalty of its supervisors,

² On appeal, Maruichi asserts that Dang may not have been a supervisor and that his status should be determined by the NLRB. This assertion is contrary to evidence presented by Maruichi below, in which its general manager, in deposition testimony, referred to Dang as a “supervisor.” In any event, Maruichi bore the burden of submitting evidence sufficient to support a finding that Dang was an employee, not a supervisor. (*Davis, supra*, 476 U.S. 380, 395.) Maruichi did not carry this burden.

who are “not free to engage in activity which, if engaged in by a rank-and-file employee, would be protected.” (*Automobile Salesmen, supra*, 711 F.2d 383, 386.) Thus, even when the termination of a supervisor is part of “‘a pattern of conduct aimed at coercing employees in the exercise of their section 7 rights’” (*id.* at p. 385), there will be no violation unless the discharge “directly interferes with the section 7 rights of the statutorily protected employees.” (*Id.* at pp. 387–388.)

■ Based on the evidence presented on the motion for summary judgment, there are no grounds to find that the discharge of Dang may have interfered with Maruichi employees’ section 7 rights. None of the circumstances that *Parker-Robb* held may constitute a violation of section 8 because they interfere with section 7 protections (termination for testifying adversely to an employer’s interest, refusing to commit an unfair labor practice, or failing to prevent unionization) (*Parker-Robb, supra*, 262 NLRB 402, 402–403) is present. Indeed, Maruichi’s stated reason for terminating Dang’s employment—that he mistreated employees, spurring them to consider unionizing—was not arguably likely to impact its employees’ ability to engage in activity protected by section 7. And Dang’s explanation for his discharge—that he asked benign questions relating to potential unionization and expressed no opinion to employees regarding the union—could (at most, and only under a very liberal view of the evidence) possibly constitute a supervisor’s participation in concerted activity, termination for which is not a basis for finding a section 7 or 8 violation. (*Parker-Robb*, at p. 404).³

Thus, based on the evidence presented, there was no reasonable basis to find that Dang’s discharge was arguably prohibited by the NLRA, and the trial court erred by finding preemption. (*Davis, supra*, 476 U.S. 380, 394 [“no dispute” that if the plaintiff was a supervisor he was legally fired “and there is no pre-emption”]; *Balog v. LRJV, Inc.* (1988) 204 Cal.App.3d 1295, 1302 [250 Cal.Rptr. 766] [“The *Parker-Robb* board specifically differentiated between the unlawful (and thus preempted) discharge of supervisors who refuse to commit unfair labor practices and the lawful (and therefore not preempted) discharge of supervisors for their participation in union or concerted activities.”].) As held by the *Davis* court, in finding that the state court properly found no preemption, “a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the [NLRA].” (*Davis*, at p. 398.) The evidence here was insufficient to support such a conclusion.

Prior California decisions applying *Garmon* preemption do not assist Maruichi. *Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal.App.3d 707

³ We make no determination whether, based on the evidence, Dang can actually prove his claim for wrongful termination in violation of public policy under California law.

[202 Cal.Rptr. 328], in which the discharge of a supervisor was found to arguably fall within the jurisdiction of the NLRB, was decided prior to *Davis* and relied on authority predating *Parker-Robb* and *Automobile Salesmen*. Because *Henry* did not consider potential preemption under the “post-1982 standard” summarized in these decisions (*Davis, supra*, 476 U.S. 380, 384, fn. 4), it provides no guidance here. In *Bassett v. Attebery* (1986) 180 Cal.App.3d 288 [225 Cal.Rptr. 399], a supervisor’s claim was the “functional equivalent” of discharge based on testimony before the NLRB. (*Id.* at p. 295.) There are no allegations in this matter that Dang was fired for giving testimony or its equivalent. Similarly, in *Kelecheva v. Multivision Cable T.V. Corp., supra*, 18 Cal.App.4th 521, 528–529, the plaintiff supervisor was discharged because he refused to engage in union-busting activity. Such a termination would likely fall within *Parker-Robb*’s exception for supervisor discharge based on “refusing to commit unfair labor practices” (*Parker-Robb, supra*, 262 NLRB 402, 402–403). Again, no similar allegations or evidence are present in this case.

In summary, the evidence presented on the motion for summary judgment does not show that Dang’s discharge was arguably subject to section 7 or 8. A finding of preemption was therefore not warranted and the motion should have been denied.

DISPOSITION

The judgment is reversed. The order granting summary judgment is vacated and the case is remanded for trial proceedings.

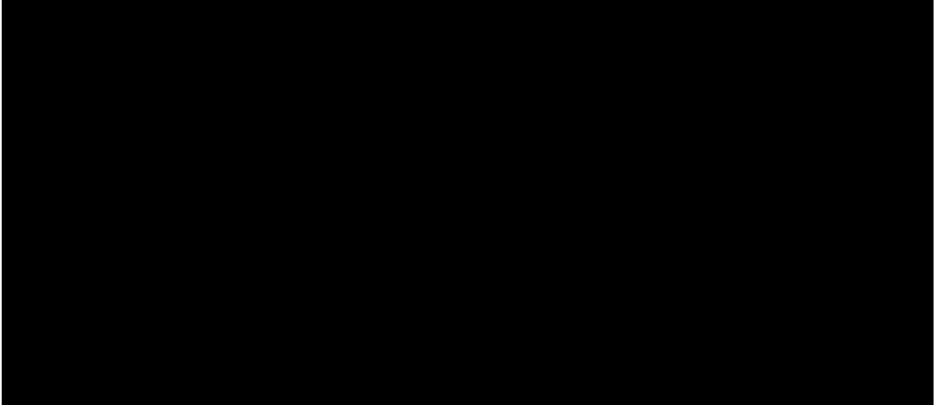
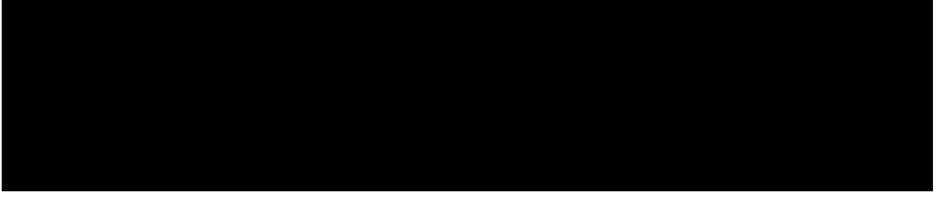
Dang is awarded his costs on appeal.

Ashmann-Gerst, J., and Chavez, J., concurred.

Respondent’s petition for review by the Supreme Court was denied January 11, 2017, S238115.

[No. G050927. Fourth Dist., Div. Three. Aug. 1, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JOSHUA PEREZ, Defendant and Appellant.



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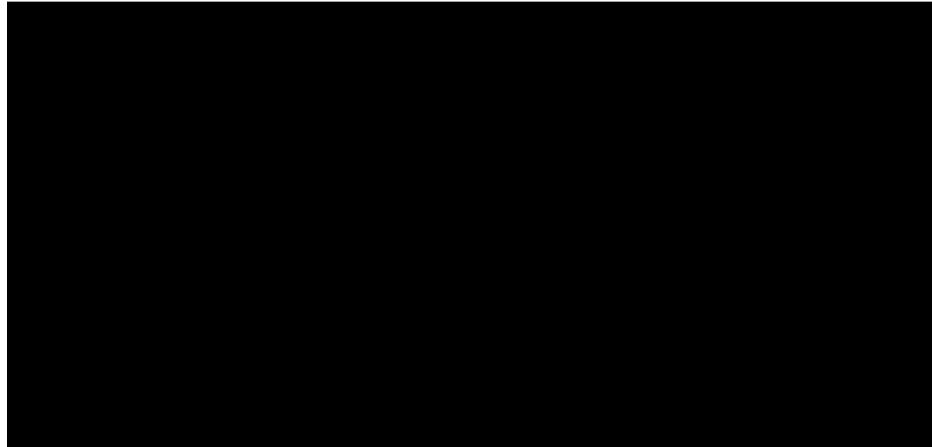
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COUNSEL

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette Cavalier and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

O'LEARY, P. J.—Joshua Perez appeals from a judgment after a jury convicted him of three counts of attempted premeditated murder, discharging a firearm with gross negligence, and vandalism and found true firearm enhancements. Perez argues his 86-year-to-life sentence constitutes cruel and unusual punishment. Although we disagree his 86-year-to-life sentence constitutes cruel and unusual punishment, we must remand the matter for further proceedings consistent with this opinion. We affirm the judgment and order a limited remand.

FACTS

One evening, “Mobbing our Professions Crew” (MOPC) gang member Julio Diaz and MOPC associates Gregorio Ariza and Christian Rodriguez were in front of Ariza’s apartment. A dark-colored car stopped in front of a

nearby home. Two heavyset Hispanics were in the car. Moments later, someone fired several shots at Diaz, Rodriguez, and Ariza. The gunman yelled “EBK” and ran away. MOPC and the “Every Body Killer” (EBK) gang were rival gangs, and they had recent skirmishes. Diaz suffered gunshot wounds to his torso and lower back.

The next day, officers interviewed 20-year-old Perez at the police department. After waiving his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602], Perez admitted he had a “beef” with Diaz and they had fought in the past. Perez initially denied any involvement in the shooting. Perez eventually admitted he “did it,” claiming he did so because Diaz was going to “smoke” him. Perez claimed he “did it all [him]self” because he was “tired of that guy.” Perez admitted he unloaded his weapon, a .45-caliber handgun, at the three victims. He disposed of the gun in the ocean; officers found .45-caliber ammunition in a box in his bedroom. Perez admitted he yelled “EBK” after the shooting.

An amended information charged Perez with three counts of attempted premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a); all further statutory references are to the Penal Code) (counts 1–3), discharging a firearm with gross negligence (§ 246.3, subd. (a)) (count 4), street terrorism (§ 186.22, subd. (a)) (count 5), vandalism (§ 594, subds. (a) & (b)(1)) (count 6), and gang-related vandalism (§§ 186.22, subd. (d), 594, subds. (a) & (b)(1)) (count 7).¹ The information alleged Perez committed counts 1, 2, 3, 4, and 6 for the benefit of a criminal street gang (§ 186.22, subd. (b)). As to count 1, the information alleged he personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). With respect to counts 2 and 3, the information alleged he personally discharged a firearm (§ 12022.53, subd. (c)).

At trial, Perez testified that on the night of the shooting he drank two 40-ounce beers. Perez got his gun and walked to his friend’s house. When Perez saw Diaz, he shot in Diaz’s direction to scare him. He did not shoot directly at him and was not trying to kill anyone.

The jury convicted Perez of counts 1, 2, 3, 4, and 6 but acquitted him of counts 5 and 7. The jury found true the premeditation and firearm enhancements. Both the prosecution and Perez’s defense counsel filed sentencing briefs; Perez argued, among other things, that although he was not a juvenile, his youth meant the maximum sentence would constitute cruel and unusual punishment.

¹ Counts 4, 5, 6, and 7 concern events that occurred on other occasions and are not relevant to the issues presented in this appeal.

The trial court sentenced Perez to a determinate term of 40 years in prison and an indeterminate term of 46 years to life in prison as follows: count 1—seven years to life plus 25 years to life for the personal use of a firearm enhancement; count 2—seven years to life plus 20 years for the personal use of a firearm enhancement; and count 3—seven years to life plus 20 years for the personal use of a firearm enhancement. The court imposed two-year consecutive sentences on counts 4 and 6.

DISCUSSION

■ The United States Supreme Court has made it clear that absent gross disproportionality in the defendant's sentence, no Eighth Amendment violation will be found. (See, e.g., *Ewing v. California* (2003) 538 U.S. 11 [155 L.Ed.2d 108, 123 S.Ct. 1179] [upholding 25-year-to-life sentence for grand theft with priors]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [155 L.Ed.2d 144, 123 S.Ct. 1166] [upholding 50-year-to-life sentence for petty thefts with priors].) Similarly, a sentence will not be found unconstitutional under the California Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (See *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697]; *In re Lynch* (1972) 8 Cal.3d 410, 424 [105 Cal.Rptr. 217, 503 P.2d 921].)

■ In *Roper v. Simmons* (2005) 543 U.S. 551, 575 [161 L.Ed.2d 1, 125 S.Ct. 1183] (*Roper*), the court held the imposition of capital punishment on juvenile offenders for any offense whatsoever violated the Eighth Amendment. In *Graham v. Florida* (2010) 560 U.S. 48, 74 [176 L.Ed.2d 825, 130 S.Ct. 2011] (*Graham*), the court held the imposition of a life-without-possibility-of-parole sentence on a juvenile offender for a nonhomicide offense violated the Eighth Amendment. ■ Finally, in *Miller v. Alabama* (2012) 567 U.S. 460, 471, 479 [183 L.Ed.2d 407, 132 S.Ct. 2455, 2464, 2469] (*Miller*), the court held “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” although a trial court could in its discretion impose such a sentence after considering how children are different and how the differences weigh against a life sentence.

■ In *People v. Caballero* (2012) 55 Cal.4th 262, 268 [145 Cal.Rptr.3d 286, 282 P.3d 291] (*Caballero*), the California Supreme Court concluded that, under the reasoning of these United States Supreme Court cases, “sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.”

Relying on *Roper*, *Graham*, *Miller*, and *Caballero*, Perez, who was 20 years old at the time of the offenses, argues their rationales although “not directly applicable to him,” should “appl[y] equally to defendants of [his] age.” Perez acknowledges two cases from the Second District, Division Four, *People v. Argeta* (2012) 210 Cal.App.4th 1478 [149 Cal.Rptr.3d 243] (*Argeta*), and *People v. Abundio* (2013) 221 Cal.App.4th 1211 [165 Cal.Rptr.3d 183] (*Abundio*), rejected similar claims.

In *Argeta*, *supra*, 210 Cal.App.4th at page 1482, the court stated as follows: “[Defendant] was 18 and was convicted of first degree murder as a principal. His counsel argue[d] that since the crime was committed only five months after [defendant’s] 18th birthday the rationale applicable to the sentencing of juveniles should apply to him. We do not agree. These arguments regarding sentencing have been made in the past, and while ‘[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules . . . [, it] is the point where society draws the line for many purposes between childhood and adulthood.’ [Citations.] Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude [defendant’s] sentence is not cruel and/or unusual under *Graham*, *Miller*, or *Caballero*.” (See *Abundio*, *supra*, 221 Cal.App.4th at pp. 1220–1221.)

We conclude the reasoning in *Argeta* is persuasive and adopt it here. Thus, because Perez was not a juvenile at the time of the offenses, *Roper*, *Graham*, *Miller*, and *Caballero* are not applicable. We decline Perez’s invitation to conclude new insights and societal understandings about the juvenile brain require us to conclude the bright line of 18 years old in the criminal sentencing context is unconstitutional. Our nation’s, and our state’s, highest court have concluded 18 years old is the bright-line rule and we are bound by their holdings. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [81 Cal.Rptr. 457, 460 P.2d 129] [Courts of Appeal bound by Supreme Court of United States on federal law matters]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937] [Courts of Appeal bound by Supreme Court precedent].)

Perez contends that if this court concludes *Miller* and *Caballero* “do not categorically apply” to him, the considerations in those cases and others concerning juveniles do apply in a proportional analysis. He cites to language

from *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380 [171 Cal.Rptr.3d 421, 324 P.3d 245], where the court, citing to *Miller*, stated, “[D]evelopmental immaturity persists through late adolescence.” Perez’s reliance on *Gutierrez* is misplaced. *Gutierrez* involved two 17-year-old offenders who were sentenced to life without the possibility of parole. (*Id.* at p. 1360.) The *Gutierrez* court considered the sentences in light of section 190.5, subdivision (b), a statute concerning 16 and 17 year olds who commit special circumstances murder, and *Miller*. (*Gutierrez, supra*, 58 Cal.4th at p. 1360.) None of the concerns present in *Gutierrez* are present here.

■ Perez was 20 years old when he committed the offenses and, therefore, he was not a juvenile. Thus, pursuant to the factors articulated in *Miller, supra*, 567 U.S. at pages 478–480 [132 S.Ct. at pages 2468–2469], and adopted in *Gutierrez, supra*, 58 Cal.4th at pages 1388–1390, Perez’s 86-year-to-life sentence did not constitute cruel and unusual punishment. That does not end our inquiry however.

■ In response to *Graham*, *Miller*, and *Caballero*, the California Legislature passed Senate Bill No. 260 (2013–2014 Reg. Sess.), which became effective January 1, 2014, and enacted sections 3051, 3046, subdivision (c), and 4801, subdivision (c), to provide a parole eligibility mechanism for juvenile offenders. Section 3051, subdivision (b), requires the Board of Parole Hearings to conduct a “youth offender parole hearing” during the 15th, 20th, or 25th year of a juvenile offender’s incarceration depending on the controlling offense. (§ 3051, subd. (b).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is “eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.” (§ 3051, subd. (b)(3).) Section 3051, subdivision (h), excludes several categories of juvenile offenders, none of which are applicable here. In October 2015, the Legislature amended section 3051, and effective January 1, 2016, anyone who committed his or her controlling offense before reaching 23 years of age is entitled to a youth offender parole hearing. (§ 3051, subd. (a)(1), amended by Stats. 2015, ch. 471, § 1.)

A few months ago, the California Supreme Court filed its opinion in *People v. Franklin* (2016) 63 Cal.4th 261 [202 Cal.Rptr.3d 496, 370 P.3d 1053] (*Franklin*). In *Franklin*, the trial court sentenced the defendant to two mandatory terms of 25 years to life for offenses committed when he was 16 years old. The court held the defendant’s constitutional challenge to the sentence had been mooted by the enactment of sections 3051 and 4801,

which gave the defendant the possibility of release after 25 years of imprisonment. (*Franklin, supra*, 63 Cal.4th at p. 268.) The court concluded that although resentencing was unnecessary, the court had to remand the matter because it could not determine whether the defendant had sufficient opportunity in the trial court “to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing.” (*Franklin, supra*, 63 Cal.4th at p. 284.) The court concluded as follows: “If the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender’s culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.” (*Ibid.*)²

Here, the trial court sentenced Perez in October 2014. Effective January 1, 2016, section 3051 provided youth offender parole hearings for those who committed their controlling offense under 23 years of age, and in May 2016, the Supreme Court decided *Franklin, supra*, 63 Cal.4th 261. The record establishes Perez did not have a sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. Thus, we order a limited remand for both parties “to make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth-related factors . . . in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime” (*Franklin, supra*, 63 Cal.4th at p. 284, citation omitted.)

DISPOSITION

The matter is remanded for the limited purpose of affording both parties the opportunity to make an accurate record of Perez’s characteristics and

² In his petition for rehearing, Perez argues the Legislature’s amendment of section 3051 and the Supreme Court’s decision in *Franklin, supra*, 63 Cal.4th 261, both of which occurred after briefing was complete in this case, require a limited remand. We invited the Attorney General to file an answer to Perez’s petition for rehearing. The Attorney General declined our invitation.

[REDACTED]

circumstances at the time of the offense as set forth in *Franklin, supra*, 63 Cal.4th 261. In all other respects, the judgment is affirmed.

Moore, J., and Fybel, J., concurred.

A petition for a rehearing was denied August 30, 2016, and the opinion was modified to read as printed above.

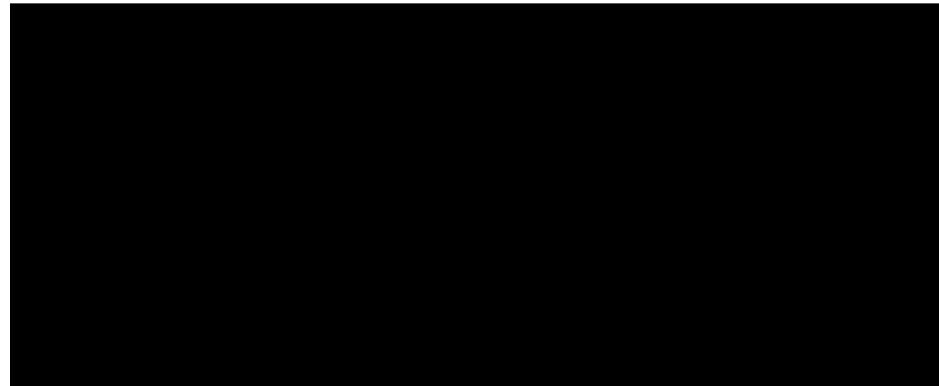
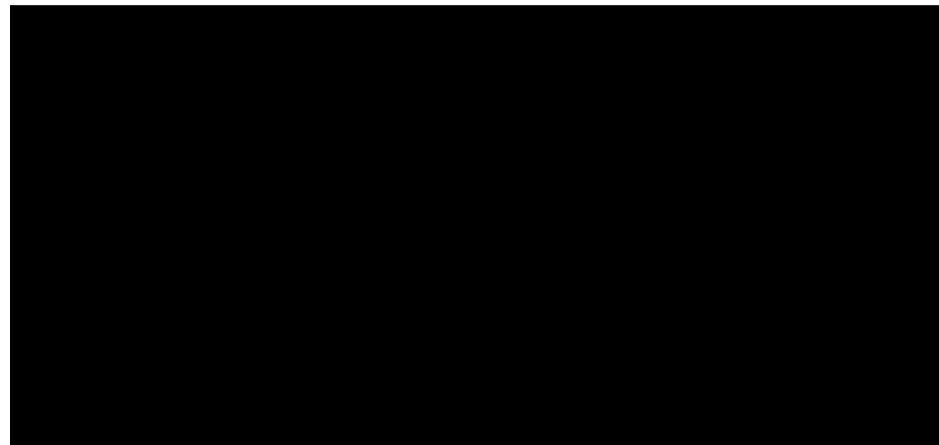
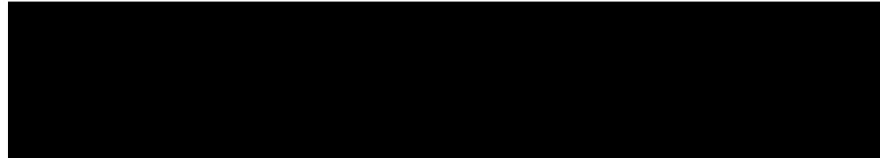
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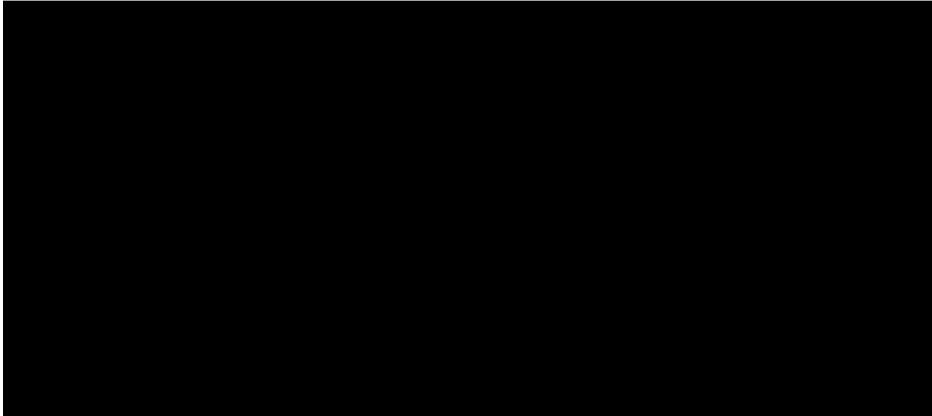
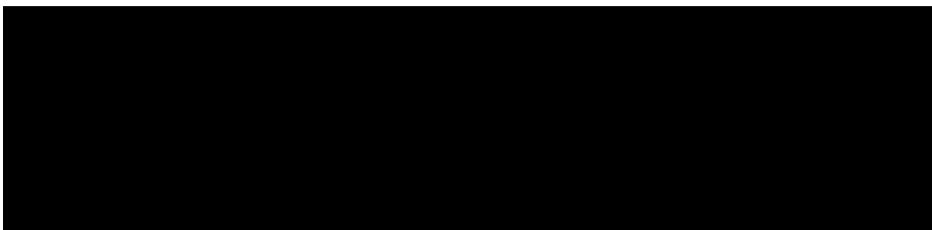
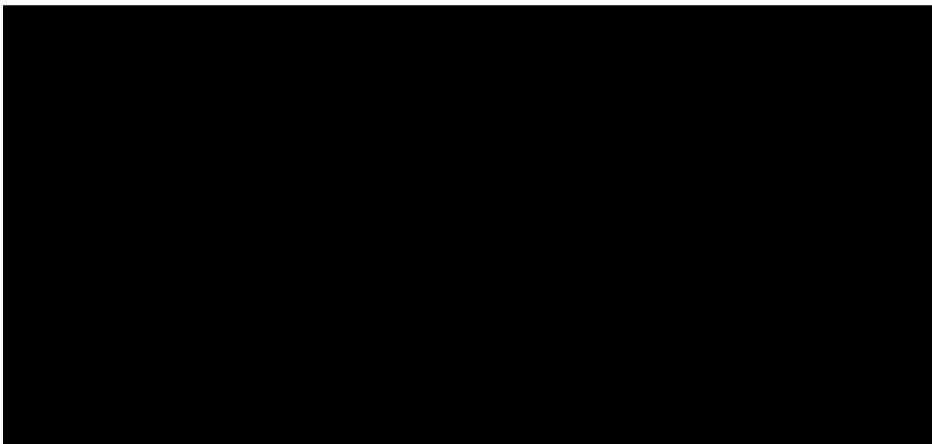
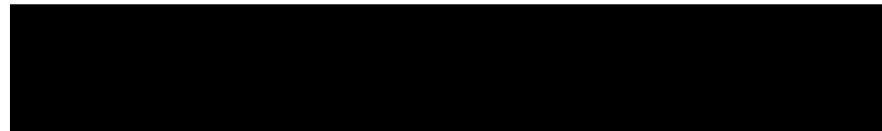
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CITY OF WEST HOLLYWOOD, Defendant and Respondent.

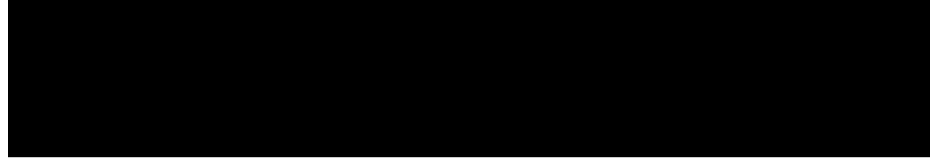
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COUNSEL

Rutan & Tucker and David P. Lanferman for Plaintiffs and Appellants.

Jenkins & Hogin, Michael Jenkins, Christi Hogin and Gregg W. Kettles for Defendant and Respondent.

OPINION

LUI, J.—Plaintiffs Shelah and Jonathan Lehrer-Graiwer and 616 Croft Ave., LLC (collectively Croft), appeal from a superior court order denying their petition for a writ of mandamus to compel the City of West Hollywood (the City) to return fees the City collected when Croft applied for building permits. Croft argues the City's collection of the fees was invalid (1) facially under the due process clause of the United States Constitution and (2) “as applied” because the City did not bear its burden in proving the fees were “reasonably related” to the deleterious public impact caused by Croft’s development. We disagree and affirm.

BACKGROUND

Croft is the developer of 612–616 North Croft Avenue, an “in-fill” complex of residential rental units in West Hollywood.¹ In 2004, Croft applied to the City for permits to demolish two single-family homes sitting on adjacent lots and construct in their place an 11-unit condominium complex on the combined lots. In reviewing Croft’s permit applications, the City determined Croft’s proposed development fell under the City’s inclusionary housing

¹ “In-fill” projects refer to developments on unused bits of urban land to maximize the use of urban space and existing infrastructure and reduce urban sprawl.

ordinance (the Ordinance), West Hollywood Municipal Code (WH Mun. Code) section 19.22.010 et seq., which the City enacted to increase the availability of affordable housing in West Hollywood. The Ordinance requires developers to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an “in-lieu” fee designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside. (WH Mun. Code, §§ 19.22.030–19.22.040).² The City calculates the “in-lieu” fee according to a schedule developed via resolution by the West Hollywood City Council (the City Council). (WH Mun. Code, § 19.64.020.) When issuing its approval of Croft’s permits, the City inquired how Croft would comply with the Ordinance. Croft responded it would pay the in-lieu fee.

In 2005, the City approved Croft’s permits application. The City conditioned the approval on, and would not issue demolition and construction permits until, Croft agreed to a number of conditions, including paying the fees at issue here. The City also specified that if it altered the fee schedule prior to Croft obtaining the building permits, Croft would be subject to the new schedule. The City set the permits’ approval to expire in 2007, two years from its issuance of approval. In November 2005, Croft executed an “acceptance affidavit,” indicating it accepted “all conditions of approval,” including paying the fees.

Croft was unable to move forward with its development plans due, in part, to the economic downturn that began in 2007. At Croft’s request, the City extended its approval of Croft’s permits application several times. During this time, the City revised its fee schedule. Croft agreed again, via at least one additional signed affidavit, to be subject to this new schedule as part of the conditions for renewal.

In 2011, Croft finally requested its building permits. The City supplied Croft with the revised fee schedule, showing the fees the City required as a condition to issue the permits. According to the fee schedule, Croft would owe \$581,651.15 in fees for in-lieu housing (\$540,393.28), parks and recreation (\$36,551.59), wastewater mitigation (\$675.00), and traffic mitigation (\$4,031.28). The in-lieu housing fee had nearly doubled since 2005. Croft paid the fees in December 2011, but in a letter indicated it did so “under protest” pursuant to the Mitigation Fee Act (Gov. Code, §§ 66000–66025). According to Croft, the City was unjustified and premature in its collection of fees. Croft also facially challenged the in-lieu fee under the so-called *Nollan/Dolan* line of Fifth Amendment takings cases (*Nollan v. California Coastal Comm’n* (1987) 483 U.S. 825 [97 L.Ed.2d 677, 107 S.Ct. 3141];

² The in-lieu fee is available only to “[d]evelopers of residential projects with 10 or fewer units.” (WH Mun. Code, § 19.22.040, subd. A.) Croft qualified, seemingly, because it added only nine net units.

Dolan v. City of Tigard (1994) 512 U.S. 374 [129 L.Ed.2d 304, 114 S.Ct. 2309] and requested the City to furnish information regarding whether Croft had “any available process for appeal or administrative review.” The City did not respond to Croft’s inquiry about the possibility of an administrative appeal or review because, according to the City, “[i]t was then, and continues to remain, unclear to the City that Petitioners were entitled to such under the City’s code.”

On December 21, 2012, Croft sued the City. Croft brought five causes of action: (1) declaratory relief establishing the in-lieu fees were illegal; (2) declaratory relief establishing the City violated the Mitigation Fee Act; (3) refund of the fees collected from Croft; (4) an injunction to prevent the City from further collecting in-lieu fees; and (5) a writ of mandate to compel the City to return the funds or, alternatively, hold an administrative hearing to determine the validity of the collection. The parties agreed to stay the suit while the City held an administrative hearing before the City Council. On April 15, 2013, the City Council approved Resolution No. 13-4426, which upheld the City’s collection of the majority of the fees, save the \$675 wastewater mitigation fee, which the City conceded it had prematurely collected. Croft then returned to court and added a sixth cause of action for administrative mandate. Croft agreed to sever the administrative mandate cause of action for an immediate hearing. After a hearing, the court denied the writ. Croft voluntarily dismissed its remaining claims and appealed. During the litigation, Croft completed the condominium complex.

DISCUSSION

On appeal, Croft argues the fees are invalid (1) generally and (2) as applied to it. Croft further argues that the trial court erroneously shifted the burden of proof from the City to Croft and that the City did not carry its burden in showing the fees were reasonably related to public needs caused by the development.

We apply two standards of review. First, we review the facial challenge de novo because it is a pure question of law. (*Alviso v. Sonoma County Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 204 [111 Cal.Rptr.3d 775].) Second, we review the as-applied challenge for substantial evidence, but in doing so we determine whether the *administrative record* supports the City Council’s decision, not whether the evidence at trial supported the trial court’s decision. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 217–218 [130 Cal.Rptr.2d 564].)

A. *The in-lieu fees were proper*

1. *Social and legal context*

The lack of affordable housing has been a statewide issue of concern for almost 40 years. In 1977, the Legislature codified its finding that “there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income, including the elderly and handicapped, can afford. This situation creates an absolute present and future shortage of supply in relation to demand, as expressed in terms of housing needs and aspirations, and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state’s housing supply for all its residents.” (Health & Saf. Code, § 50003, subd. (a).) By 1982, the Legislature called “[t]he lack of housing . . . a critical problem that threatens the economic, environmental, and social quality of life in California.” (Gov. Code, § 65589.5, subd. (a)(1).) Government Code section 65583, subdivision (c)(2) mandated cities like West Hollywood must “[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households” to help address the housing crisis as part of the statutory obligation to “adopt a comprehensive, long-term general plan for [its] physical development” (Gov. Code, § 65300). This context elucidates both the City’s adoption of the Ordinance and our deferential recognition of it as a land use regulation rather than as an exaction or special tax, explained further in part A.3., *post*.

2. *Croft’s facial challenge is time-barred*

As an initial matter, Croft argues the trial court mischaracterized its facial argument as a “‘constitutionality’” challenge rather than a “‘validity’” challenge. Croft, however, argued the fees are invalid because they do not satisfy the Fifth Amendment due process requirements of the *Nollan/Dolan* line of takings cases. This is plainly a constitutional challenge. Even if it were not a constitutional challenge, re-characterizing the argument would not save the claim from procedural failure because Croft’s challenge is untimely.

■ Government Code section 65009, subdivision (c)(1)(B)–(C) requires that “no action or proceeding shall be maintained . . . by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body’s decision” if the action is to “attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance” or “determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan.” This 90-day limitation applies even if the facial challenge is part of an as-applied challenge. (*Travis v. County of Santa Cruz* (2004) 33

Cal.4th 757, 776 [16 Cal.Rptr.3d 404, 94 P.3d 538].) Here, Croft challenges the City's enactment of the Ordinance and its attendant fee schedule. Croft's challenge is untimely because Croft brought it more than 90 days after the City enacted the Ordinance and adopted the fee schedule. The City adopted the Ordinance in 2001 and approved the fee schedule, as modified, on June 20, 2011, but Croft did not bring its challenge until, at the earliest, December 22, 2011, if we consider Croft's protest letter a proper facial challenge. Croft's argument that the City waived this defense because the City did not plead it is unavailing. The record contains the City's answer, which clearly pleads "every purported cause of action therein, is barred by any and all applicable statutes of limitation."

3. *Croft's as-applied challenge improperly places the burden on the City and incorrectly states how the fee must be reasonable*

a. *Croft bears the burden, not the City*

■ Croft argues the City bears the burden to prove its fees were reasonable under the Mitigation Fee Act, articles XIII C and XIII D of the California Constitution, and its own municipal code.³ These provisions do not place the burden on the City either at all or in the way Croft argues.

■ The Mitigation Fee Act applies when "a monetary exaction other than a tax or special assessment . . . is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . ." (Gov. Code, § 66000, subd. (b).) In *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 443–444 [189 Cal.Rptr.3d 475, 351 P.3d 974] (*San Jose*), the California Supreme Court held that an affordable housing provision similar to the Ordinance here was not an "exaction" which invoked the United States Constitution's Fifth Amendment due process takings protections. (*San Jose, supra*, at p. 461; see *id.* at pp. 443–444.) Instead, such a restriction "is an example of a municipality's permissible regulation of the use of land under its broad police power." (*Id.* at p. 457.) Although the facts here are slightly different than in *San Jose* because Croft challenges paying an in-lieu fee rather than actually setting aside a number of units, the reasoning in *San Jose* applies. Croft paid the in-lieu fee voluntarily as an *alternative* to setting aside a number of units. If a set-aside requirement is not governed by *Nollan* or *Dolan*, then "the validity

³ Croft references "art. XIII D, § 6 subd. (b)(6)" of the California Constitution several times in its appellate argument, but no such paragraph exists. We construe this incorrect reference as a typographical error and assume Croft intended to reference article XIII D's provisions about special taxes in light of its statement one of its "alternative position[s]" is that the fees "are in reality in the nature of invalid 'special taxes.' (Cal. Const., art. XIII A, XIII C, XIII D.)"

of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development’s impact on the city’s affordable housing need” under *Nollan* or *Dolan* either. (*San Jose*, at p. 477.)

■ In addition, and as in *San Jose*, the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft’s specific development project, but rather to combat the overall lack of affordable housing. (*San Jose*, *supra*, 61 Cal.4th at p. 444.) This type of fee is not “for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low-and moderate-income households.” (*Id.* at p. 454.) Assuming the fee is such a land use regulation, “[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner’s future use of his or her property.” (*Id.* at p. 462.)⁴ This is especially true when the regulation, like the one here, broadly applies nondiscretionary fees to a class of owners because the risk of the government extorting benefits as conditions for issuing permits to individuals is unrealized. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 668–670 [117 Cal.Rptr.2d 269, 41 P.3d 87]; see also *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 860, 880–881 [50 Cal.Rptr.2d 242, 911 P.2d 429] [applying the *Nollan/Dolan* requirements to an individual fee charged to a developer, in part, because it was not “a generally applicable development fee or assessment”].)

■ Croft further argues even if the in-lieu fee is not an exaction, the City’s “right of first refusal” to buy the set-aside units, if the targeted renters or buyers do not buy them, is an exaction under Government Code section 66020 and *Sterling Park*. (See *Sterling Park*, *supra*, 57 Cal.4th at pp. 1207–1208 [“Compelling the developer to give the City a purchase option is an exaction under section 66020”].)⁵ This argument is unavailing. First, Croft did not set aside units. Croft can therefore challenge this portion of the

⁴ Croft argues the California Supreme Court held in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193 [163 Cal.Rptr.3d 2, 310 P.3d 925] (*Sterling Park*) that a similar inclusionary ordinance was not a land use regulation, but rather imposed exactions. *Sterling Park* does not adversely bear on our analysis, however, because, as the *San Jose* court held, “*Sterling Park* did not address or intend to express any view whatsoever with regard to the legal test that applies in evaluating the substantive validity of the affordable housing requirements imposed by an inclusionary housing ordinance.” (*San Jose*, *supra*, 61 Cal.4th at p. 482.)

⁵ Under the Ordinance, “[a]fter offering the units to eligible households displaced by demolition, the developer of a project shall be required to give right of first refusal to purchase any or all inclusionary units to the city, or a city-designated agency or organization, for at least 60 days from the date of construction completion.” (WH Mun. Code, § 19.22.090, subd. C.)

Ordinance on only a theoretical level. If the challenge is theoretical, it cannot be as-applied and must be facial. As described above, a facial challenge is time-barred. Second, and also as described above, the Mitigation Fee Act does not apply to the in-lieu fee. Any language in Government Code section 66020 defining a right of first refusal as an exaction is therefore inapplicable here.

■ Croft's cited California Constitution articles also do not place the burden on the City to demonstrate individual reasonableness. Croft argues that if the fees are not exactions then they are special taxes masquerading as fees and the City constitutionally bears the burden to prove otherwise under articles XIII C and XIII D. Under article XIII C, section 1, a "local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Article XIII D, section 1, subdivision (b), however, establishes that "[n]othing in this article or Article XIII C shall be construed to: [¶] . . . [¶] (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development." Courts have held that fees like the ones here, which are a condition of property development, are not special taxes.

For example, and as the City argues, *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892 [223 Cal.Rptr. 379] held that fees collected under an ordinance aimed at replacing residential hotel rooms, which had been available to lower income and elderly residents but were lost when developers converted them to tourist hotel rooms or condominiums, were not special taxes. (*Id.* at pp. 898, 906–907.) The fees were not special taxes because they were not "earmarked for general revenue purposes or to pay for a variety of public services. Nor [we]re they imposed upon the land, but rather upon the privilege of converting residential hotel units to other uses. Moreover, the ordinance [wa]s not compulsory in nature, since fees are exacted only if the property owner elects to convert his property to another use. And, finally, the regulatory fees imposed by the ordinance have no impact upon general government spending and do not contravene that broad objective of article XIII A. [Citation.] [¶] Since, simply stated, the ordinance is *not* a revenue producing measure, we find that neither the costs incurred to provide replacement housing nor the *in lieu* fees are in the nature of a 'special tax' under section 4." (*Id.* at pp. 906–907.) That reasoning applies to the in-lieu housing fee here: The fees are not deposited into the general coffers; the fees are not used to offset the increased demand for public services; the fees are not imposed on the land, but rather on building residential developments; the fees are not compulsory because

developers could choose the set-aside option or to build a different type of development; and, finally, the fees do not impact government spending. Because the City has shown the fees are not special taxes under *Terminal Plaza*, articles XIII C and XIII D of the California Constitution do not require the City to demonstrate the reasonableness of Croft's individual fee.

■ Croft argues that even if the City is not statutorily or constitutionally obligated to demonstrate reasonableness, the City took that responsibility upon itself in its municipal code. West Hollywood Municipal Code section 19.64.040, subdivision C.1 states: "Any person subject to a fee required by this chapter may apply to the Council for an adjustment, reduction, postponement, or waiver of that fee based upon the absence of a *reasonable relationship* between the impact of that person's commercial or residential development project on the demand for affordable housing." (Italics added.) Croft is incorrect. This provision does not necessarily place the burden on the City to demonstrate reasonableness. Given that ordinarily in "a challenge to a legislative decision, the petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law" (*Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 966 [188 Cal.Rptr.3d 557]), we will not shift the burden to the City absent evidence it was the City's intent to do so.

b. *The reasonableness test applies to the creation of the fee schedule, not its application*

Croft mischaracterizes the nature of the reasonableness inquiry and does not present evidence relating to the correct inquiry; even if it had, the claim related to such an inquiry would be facial and time-barred, as described above in part A.2.

■ Croft characterizes the nature of the reasonableness inquiry as the City proving that, dollar for dollar, the fee it charged Croft was proportional to the negative impact Croft's development had on the demand for affordable housing. This is incorrect. To start, as described above, the burden is on Croft, not the City. Second, although the fee must be reasonable, the inquiry is not about the reasonableness of the individual calculation of fees related to Croft's development's impact on affordable housing.⁶ The inquiry is whether

⁶ As an as-applied challenge, Croft could, of course, have disputed the City's *actual mathematical calculation* of its individual fee. For example, Croft could have argued the City exaggerated the number of square feet or made a multiplication error. Croft makes no such arguments here, however; instead, Croft disputes the reasonableness of the overall fee to the deleterious public impact of its individual project on the City. The only viable as-applied argument Croft does make, about the timing of the City's collection, is addressed in part C., *post*.

the fee schedule *itself* is reasonably related to the overall availability of affordable housing in West Hollywood. As the *San Jose* court held, “when a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in . . . the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.” (*San Jose, supra*, 61 Cal.4th at p. 474.) Croft does not challenge the City’s method in creating the fee schedule.⁷

Because Croft did not dispute the City’s creation of the fee schedule, and in light of the statute of limitations, we do not address whether the evidence demonstrates the reasonableness of the fee schedule itself. (See *San Jose, supra*, 61 Cal.4th at p. 479 [declining to comment on “the validity of the amount of the particular in lieu fee at issue in *City of Patterson* [(2009) 171 Cal.App.4th 886 [90 Cal.Rptr.3d 63], disapproved on another point in *San Jose*] or of the methodology utilized in arriving at that fee” when it was not at issue].)

B. *The parks and recreation and traffic mitigation fees were proper*

1. *The City correctly calculated the parks and recreation fee*

Croft argues the City incorrectly calculated the parks and recreation fee because it used the total number of units resulting from Croft’s development instead of the net number of units. Croft argues it added only nine new units overall because it tore down two existing dwellings before it built its 11 new units. Government Code section 66477, subdivision (a)(2) states, however, that parks and recreation fees “shall be based upon the *residential density*, which shall be determined on the basis of the approved or conditionally approved tentative map or parcel map and the average number of persons per household.” (Italics added.) Croft cited no law permitting a “net” exception to this rule, and the cases it does cite are inapposite. (E.g., *Warmington Old Town Associates v. Tustin Unified School Dist.* (2002) 101 Cal.App.4th 840, 845 [124 Cal.Rptr.2d 744] [considering school-impact fees, not parks and recreation fees]; *Cresta Bella, LP v. Poway Unified School Dist.* (2013) 218

⁷ Even if it had, “[a]s a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible,” and in “‘deciding whether a challenged [land use] ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor.’” (*San Jose, supra*, 61 Cal.4th at p. 455.)

Cal.App.4th 438, 442–443 [160 Cal.Rptr.3d 437] [same].) We uphold the City’s calculation under the statutory language and in the absence of an exception.

2. *Croft abandoned its traffic fees claim on appeal*

On appeal, Croft stated it does “not challenge the City’s resolutions setting fees for . . . the purpose of traffic mitigation actually caused by new development in general, and does not now challenge the *traffic fees* as applied to the net increase of nine (9) units created by” Croft’s development. Because Croft abandoned its traffic fees claim, we do not consider it.

C. *The City collected the fees at an appropriate time*

Croft argues the City collected the fees too early. According to Croft, Government Code section 66007, subdivision (a) mandates that “most fees imposed on residential development projects may not be demanded any earlier than the time of completion [of] either (a) final inspection or (b) certificate of occupancy.” Croft argues this limitation applies to both the in-lieu fee and the parks and recreation fee. Section 66007’s timing limitation applies to neither.

■ Government Code section 66007, as part of the Mitigation Fee Act, does not apply to the in-lieu fee, as described above.⁸ Croft fails to cite any additional law stating the collection of the in-lieu fee was untimely. Absent Croft identifying some other law indicating this timing was unlawful, we will not hold the City collected the fees too soon.

■ As to the parks and recreation fee, under Government Code section 66007, subdivision (b)(1)(B), the City was permitted to collect fees “to reimburse” itself “for expenditures previously made” prior to the final inspection or issuance of the certificate of occupancy. In its administrative ruling, the West Hollywood City Council determined that the parks and recreation fees “were used to offset the cost of the recent renovation of nearby West Hollywood Park.” This lone statement, although thin, is substantial evidence supporting the City’s claim, and Croft presented no evidence this statement was untrue. In light of the absence of evidence of this

⁸ Even if it did, Croft omits a critical phrase from its interpretation of the statute’s timing limitation. The statute imposes this timing limitation only “on a residential development *for the construction of public improvements or facilities.*” (Gov. Code, § 66007, subd. (a), italics added.) Here, the City collected the fees for nonprofit corporations to develop residential units to be sold to private entities. (WH Mun. Code, § 19.22.040, subd. E.) Although the creation of these units supports a public goal, the units themselves are not public improvements nor are they public facilities. That is, the City does not operate, own, or profit from the finished units.

statement's untruthfulness, we uphold the timing of the City's collection of the parks and recreation fee.

D. *We need not reach the City's remaining affirmative defenses*

The City alleges Croft was barred from bringing this suit because (1) it waived its right to do so when it agreed to pay the fees and (2) Government Code section 66020, subdivision (d) time bars the claims. We need not address the waiver argument because we are upholding the judgment on different grounds. (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 513 [89 Cal.Rptr.3d 615], quoting *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1029 [204 Cal.Rptr. 913] ["Ordinarily, when an appellate court concludes that affirmance of the judgment is proper on certain grounds it will rest its decision on those grounds and not consider alternative grounds which may be available".]) We do not address the Mitigation Fee Act's statute of limitation because the City argues the Mitigation Fee Act does not apply to the Ordinance, and we agree.

DISPOSITION

The judgment is affirmed. The City of West Hollywood is awarded its costs on appeal under California Rules of Court, rule 8.278.

Chaney, Acting P. J., and Johnson, J., concurred.

Appellants' petition for review by the Supreme Court was denied December 21, 2016, S238136.

[No. F071531. Fifth Dist. Sept. 23, 2016.]

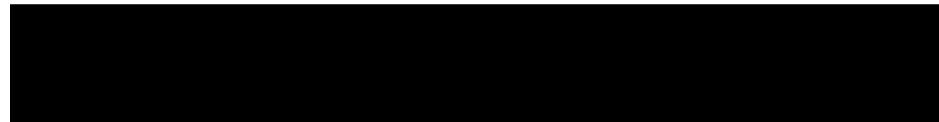
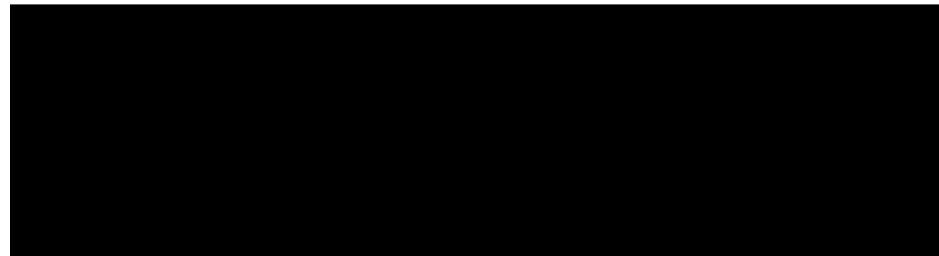
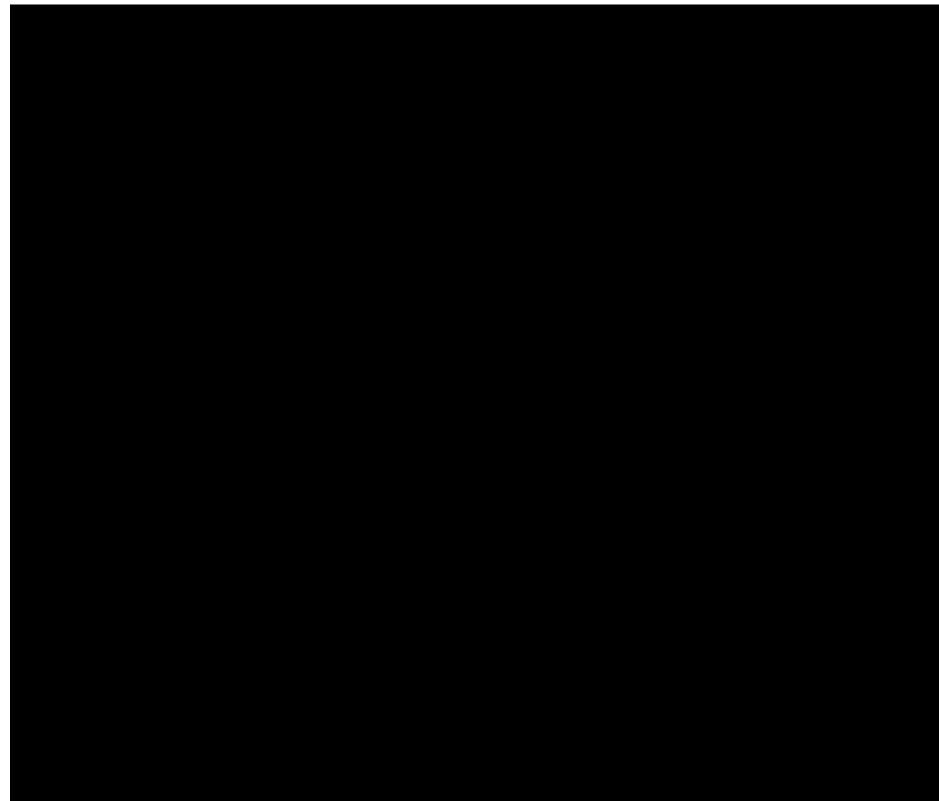
THE PEOPLE, Plaintiff and Respondent, v.
JUAN ANTONIO SAUCEDA, Defendant and Appellant.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 30, 2016, S237975.

[REDACTED]

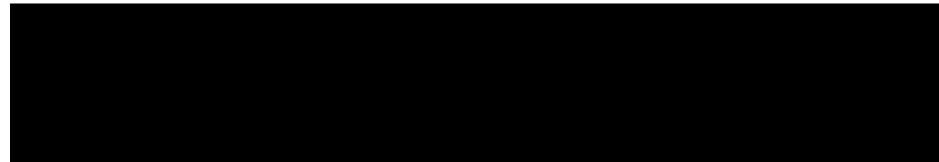
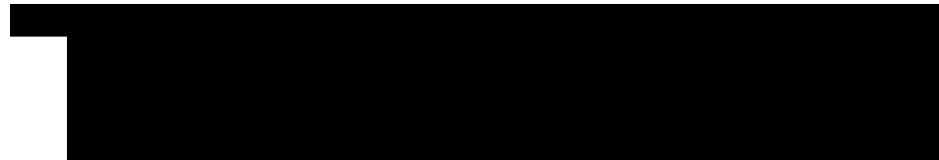
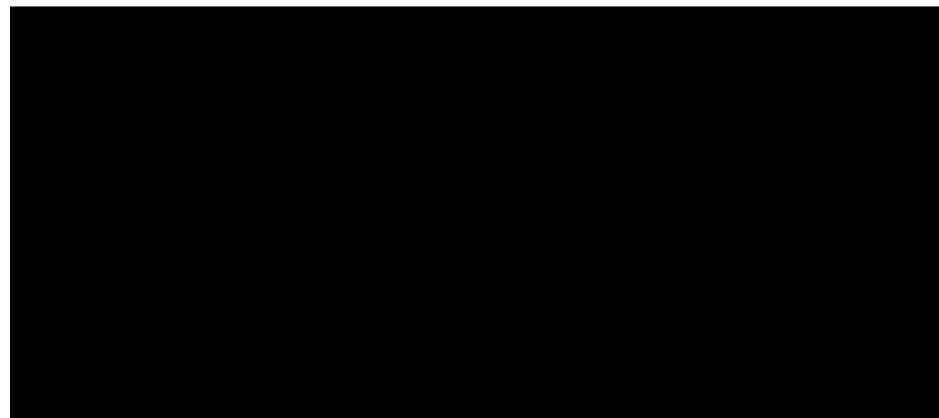
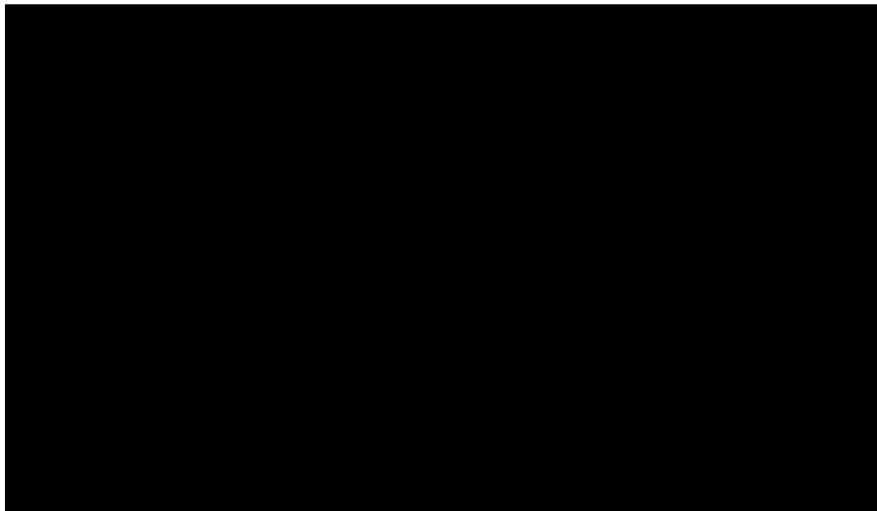
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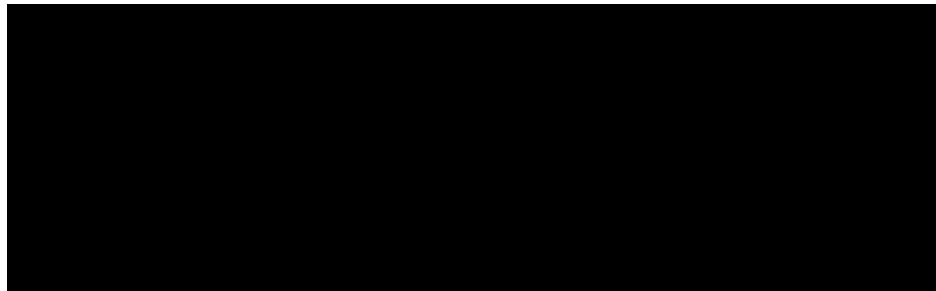
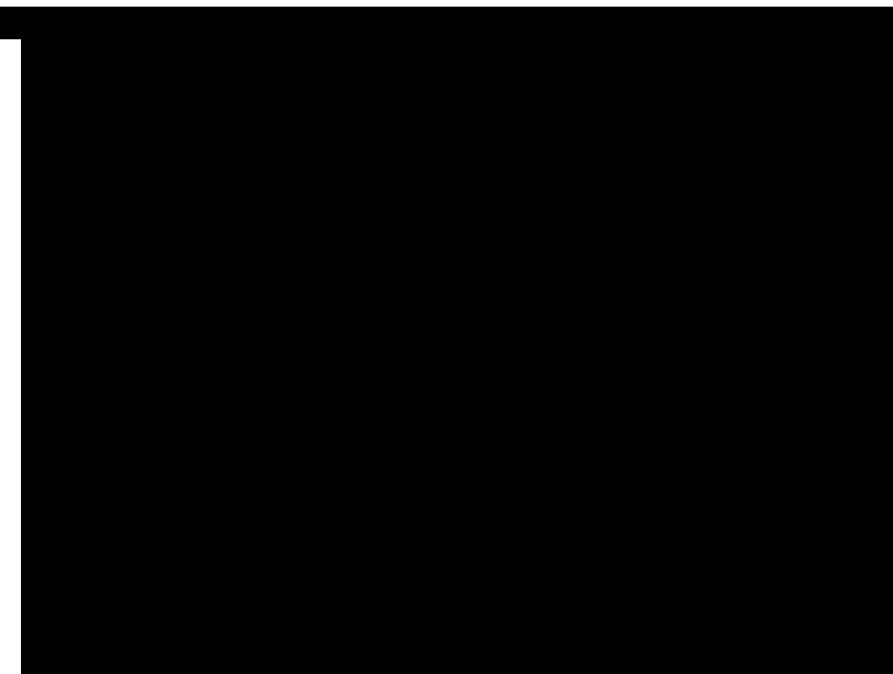
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COUNSEL

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, and Carlos A. Martinez, Deputy Attorney General, for Plaintiff and Respondent.

OPINION**KANE, J.—****INTRODUCTION**

Appellant Juan Antonio Saucedo appeals from the denial of his petition for resentencing under Penal Code section 1170.18, a statute added by Proposition 47. Appellant unsuccessfully requested a reduction in the sentence imposed on his prior conviction for theft and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). Appellant contends that a conviction under Vehicle Code section 10851 is eligible for resentencing under Proposition 47 because the voters intended that Proposition 47 change the punishment scheme for all automobile thefts through Penal Code section 490.2. Appellant further contends that equal protection concerns require treating convictions under Vehicle Code section 10851 the same as convictions for theft of all other property valued at less than \$950, as convictions which are eligible for resentencing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 2006, appellant was sentenced in two separate cases. In Kings County Superior Court case No. 05CM4286, appellant received an eight-year sentence on a conviction under Vehicle Code section 10851, with a prior prison term enhancement. In Kings County Superior Court case No. 06CM0096, appellant received a consecutive eight-year sentence on a conviction under Penal Code section 4532, with a prior prison term enhancement. The facts supporting appellant's prior convictions, including the conduct supporting his conviction and the value of the vehicle involved, are not within the record on appeal.

On December 22, 2014, appellant petitioned for resentencing under Proposition 47, alleging his conviction under Vehicle Code section 10851 was for auto theft and, thus, was subject to resentencing under Penal Code sections 490.2 and 1170.18. The trial court denied the petition.

This timely appeal followed.

STANDARDS OF REVIEW

The court's review of the meaning of a voter initiative is de novo. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 [195 Cal.Rptr.3d 482].)

The determination of a statute's constitutionality is a question of law and is thus considered de novo. (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445 [104 Cal.Rptr.2d 618].)

DISCUSSION

Proposition 47

“‘On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act’ [Citation.] ‘Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).’” (*People v. Morales* (2016) 63 Cal.4th 399, 404 [203 Cal.Rptr.3d 130, 371 P.3d 592] (*Morales*)).

“Proposition 47 also created a new resentencing provision, to wit, [Penal Code] section 1170.18. Under that statute, ‘[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the [Act] had [the Act] been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with’ the various statutes that were amended or added by the Act. ([Pen. Code,]§ 1170.18, subd. (a).)” (*People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1256–1257 [201 Cal.Rptr.3d 431].)

Prior to enactment, the proposed law for Proposition 47 declared the initiative was offered “to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from th[e] act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)¹ With respect to the intent behind Proposition 47’s changes to the law, the proposed law explained “the purpose and intent of the people of the State of California” was to “[e]nsure that people convicted of murder, rape, and child molestation will not benefit from th[e] act”; “[r]equire

¹ The voter information guide can be accessed online at <<http://vigararchive.sos.ca.gov/2014/general/en/propositions/47/>> (as of Sept. 23, 2016).

misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes”; and “[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subds. (1), (3), (4), p. 70.)

According to the Legislative Analyst’s analysis provided with the voter’s guide, Proposition 47 proposed to “reduce[] the penalties for the following crimes: [¶] . . . **Grand Theft** . . . [¶] . . . **Shoplifting** . . . [¶] . . . **Receiving Stolen Property** . . . [¶] . . . **Writing Bad Checks** . . . [¶] . . . **Check Forgery** . . . [¶] [and] **Drug Possession.**” (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) The summary explained the proposed changes to grand theft laws. “Under current law, theft of property worth \$950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (such as cars) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of \$950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved or because the defendant had previously committed certain theft-related crimes.” (*Ibid.*)

With respect to resentencing, the Legislative Analyst’s analysis explained that the “measure allows offenders currently serving felony sentences for the above crimes to apply to have their felony sentences reduced to misdemeanor sentences. In addition, certain offenders who have already completed a sentence for a felony that the measure changes could apply to the court to have their felony conviction changed to a misdemeanor.” (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 36.) As our Supreme Court has explained, the analysis “explains in simple language that certain offenders currently serving felony sentences for the reduced crimes may have their sentences reduced to misdemeanor sentences.” (*Morales, supra*, 63 Cal.4th at pp. 406–407.)

These changes were reflected in added sections to the Government Code (Gov. Code, §§ 7599, 7599.1, 7599.2), amended and added sections to the Penal Code (Pen. Code, §§ 459.5, 490.2, 1170.18, 473, 476a, 496, 666), and amended sections to the Health and Safety Code (Health & Saf. Code, §§ 11350, 11357, 11377). (See Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, §§ 4–14, pp. 70–74.) To the extent relevant, individual section additions and amendments will be discussed in the context of the analysis.

Principles of Construction for Voter Initiatives

When it comes to interpreting the meaning of laws passed by voter initiative, the court's analysis is governed by the voters' intent. (*People v. Park* (2013) 56 Cal.4th 782, 796 [156 Cal.Rptr.3d 307, 299 P.3d 1263] (*Park*); *People v. Jones* (1993) 5 Cal.4th 1142, 1146 [22 Cal.Rptr.2d 753, 857 P.2d 1163].) However, the court submits to that intent through application of the well-settled principles of statutory construction applied to legislatively enacted statutes. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593 [197 Cal.Rptr.3d 122, 364 P.3d 168] (*Arroyo*); *Park, supra*, at p. 796.) "We therefore first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.'" (*Park, supra*, at p. 796.) "'When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'" (*Arroyo, supra*, at p. 593.) Ultimately, "'[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.'" (*Park, supra*, at p. 796.)

In this process, the court presumes the electorate is "'aware of existing laws and judicial constructions in effect at the time legislation is enacted' [citation], 'and to have enacted or amended a statute in light thereof.'" (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1015 [171 Cal.Rptr.3d 86] (*Cervantes*); see *People v. Licas* (2007) 41 Cal.4th 362, 367 [60 Cal.Rptr.3d 31, 159 P.3d 507] (*Licas*).) "'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.' [Citation.]'" (*Licas, supra*, at p. 367.)

In conducting its analysis, the court may encounter potentially conflicting statutory schemes. It is a "well-settled principle of statutory interpretation that 'all presumptions are against a repeal by implication.'" (*Park, supra*, 56 Cal.4th at p. 798.) This presumption is not absolute, however. "[T]he provisions of a voter initiative may be said to impliedly repeal an existing statute when 'the two acts are so inconsistent that there is no possibility of concurrent operation,' or 'the later provision gives undebatable evidence of an intent to supersede the earlier' provision. [Citations.]'" (*Ibid.*)

Applicability of Penal Code Section 1170.18 to Vehicle Code Section 10851

The primary question before the court is whether an individual convicted of violating Vehicle Code section 10851 is eligible for a reduction in sentence under Penal Code section 1170.18. Penal Code section 1170.18,

subdivision (a) permits a person currently serving a sentence for a felony conviction “who would have been guilty of a misdemeanor under the act,” had the act “been in effect at the time of the offense,” to petition for “resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section[s] 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by [the act].”

As an initial matter, Vehicle Code section 10851 was not directly modified by Proposition 47 and is not listed as one of the sections under which resentencing can be requested. Any argument that one is eligible for resentencing under Penal Code section 1170.18 when convicted of violating Vehicle Code section 10851 therefore depends upon whether any of the statutes added or modified by Proposition 47 would have led to a misdemeanor conviction, rather than a felony conviction, under Vehicle Code section 10851.

It is argued by appellant that one of the added statutes does just that. Penal Code section 490.2 added an explicit definition for petty theft, which was previously defined pursuant to Penal Code section 488 as simply “[t]heft in other cases,” meaning theft not qualifying as grand theft. Penal Code section 490.2, subdivision (a) provides: “Notwithstanding Section 487 [defining grand theft generally] or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor” According to appellant’s argument, Vehicle Code section 10851 is a theft crime and, thus, convictions under that statute involve “obtaining any property by theft.” (Pen. Code, § 490.2, subd. (a).) Under this reading, if the value of the vehicle involved in the Vehicle Code section 10851 conviction is less than \$950, Penal Code section 490.2 mandates that the conviction be for a misdemeanor. If accepted, because the conviction would be a misdemeanor due to Proposition 47, Penal Code section 1170.18 would allow one to petition for resentencing according to Penal Code section 490.2.

The argument, however, is flawed.

*Violating Vehicle Code Section 10851 Is Not Obtaining Any Property
by Theft*

■ Theft is defined by Penal Code section 484. Originally enacted in 1872, California’s theft statute was designed to combine the common law crimes of theft by larceny, theft by trick, and theft by false pretenses, such that a conviction could be had for conduct that satisfies any of the common law crimes regardless of the “criminal acquisitive techniques” used to obtain possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258

[267 P.2d 271] (*Ashley*); see *People v. Williams* (2013) 57 Cal.4th 776, 785 [161 Cal.Rptr.3d 81, 305 P.3d 1241] [also referring to embezzlement].) In simpler terms, theft under California law does not care how property was stolen, only why. Thus, while the common law crimes of theft by larceny, theft by trick, and theft by false pretenses each required a criminal intent to permanently deprive the owner of their property, these crimes were differentiated according to how the property was taken. (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1445–1446 [97 Cal.Rptr.2d 684]; *Ashley, supra*, at p. 258.) When one obtains property by theft, one must obtain the property with the requisite intent to commit a common law theft crime.

■ Vehicle Code section 10851 is different. At the outset, it must be acknowledged that Vehicle Code section 10851 criminalizes conduct that may also qualify as common law theft. (*People v. Garza* (2005) 35 Cal.4th 866, 871 [28 Cal.Rptr.3d 335, 111 P.3d 310] (*Garza*) [“Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft For this reason, a defendant convicted under [Vehicle Code] section 10851[, subdivision](a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction”].) Accordingly, one who takes a vehicle with the intent to steal has violated Vehicle Code section 10851. But this fact is not dispositive because a violation of Vehicle Code section 10851 does not require one to have an intent to steal. Vehicle Code section 10851 also criminalizes conduct that either does not rise to the level of theft or does not ultimately qualify as theft. (Veh. Code, § 10851, subd. (a) [defining public offense when one “drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle*” (italics added)]; *U.S. v. Vidal* (9th Cir. 2007) 504 F.3d 1072, 1082 [finding that Veh. Code, § 10851, subd. (a), extends to cover accessories after the fact and, therefore, covers conduct that falls outside the generic definition of a theft offense]; *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486] (*Allen*) “[O]n its face Vehicle Code section 10851 can be violated either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding.”].)

For this reason, the sole fact that one has violated Vehicle Code section 10851 does not demonstrate one has obtained any property by theft under the ordinary meaning of the term. (See *Garza, supra*, 35 Cal.4th at p. 881 [finding that “once a person who has stolen a car has [completed their journey from the locus of the theft], further driving of the vehicle is a separate violation of [Vehicle Code] section 10851[, subdivision](a) that is properly regarded as a nontheft offense for purposes of the dual conviction prohibition of [Penal Code] section 496(a)”]; *Allen, supra*, 21 Cal.4th at pp. 862, 865–866

[burglary accomplished by entering home with intent to commit theft is not functional equivalent of theft offense and, thus, does not prevent concomitant conviction for receiving stolen property obtained in burglary].) Regardless of the underlying conduct supporting the conviction, the statutory requirements for conviction lack all the elements of common law theft because a violation of Vehicle Code section 10851 can be fully and completely satisfied whether or not the required intent for theft has been proven.

■ Turning back to Penal Code section 490.2, one is guilty of petty theft when “obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950).” (Pen. Code, § 490.2, subd. (a).) The ordinary meaning of “obtaining any property by theft” in this context is clear. One obtains property by theft when the crime he or she commits is one of the common law crimes covered by California’s theft statute. (Cf. *Allen*, *supra*, 21 Cal.4th at p. 863 [holding the term “theft” in Pen. Code, § 496 was limited to “the meaning the term has in the general theft statute”].) Thus, if one’s conviction does not necessarily require a conviction for theft, the property has not been obtained by theft. Vehicle Code section 10851 does not require a theft occur for conviction. Upon a conviction of the law generally, one is not guilty of obtaining any property by theft because the law has not required proof of intent to permanently deprive and, thus, none of the crimes covered by California’s theft statute have been necessarily met.

There is an argument that a subset of criminal convictions under Vehicle Code section 10851 could be eligible for resentencing due to the California Supreme Court’s analysis in *Garza*, *supra*, 35 Cal.4th 866. As noted above, in that case the California Supreme Court found that one convicted of “unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession” has “suffered a theft conviction” for the purposes of Penal Code section 496. (*Garza*, *supra*, at p. 871.) *Garza*, however, appears distinguishable in the context of Proposition 47 on at least three grounds.

First, *Garza* involved the application of a statute designed to codify a common law proscription against double punishment. California has long recognized the common law’s prohibition on separate convictions for stealing and receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706] (*Jaramillo*) [recognizing the “fundamental principle that one may not be convicted of stealing and of receiving the same property”].) However, there were previously dueling interpretations of this principle, one which held that mere evidence supporting a theft offense would bar a receiving stolen property charge and another which held that only conviction of a theft offense would bar such a charge. (*Garza*, *supra*, 35 Cal.4th at p. 875.) In 1992, Penal Code section 496 codified the narrower of

the two principles, that an actual conviction of a theft offense is required. (*Garza, supra*, at p. 875.) *Garza*, seeking to reconcile this history in relation to a conviction under Vehicle Code section 10851, found that in extremely specific circumstances a conviction under Vehicle Code section 10851 qualified as a theft conviction for the purposes of precluding a conviction under Penal Code section 496. (*Garza, supra*, at pp. 871, 881.)

Contrary to *Garza*, in this case there is no long-standing history suggesting an interplay between a conviction under Vehicle Code section 10851 and the rights introduced under Proposition 47. Indeed, whereas in *Garza* the law suggested a long-standing right to be protected from double punishment, here the law is being enacted to change a long-standing punishment scheme related to property crime convictions. Thus, there is little reason to see the analysis under *Garza* as applicable in determining whether a conviction under Vehicle Code section 10851 qualifies as grand or petty theft under Proposition 47.

Second, as a legal precedent on the meaning of Vehicle Code section 10851, *Garza* did not hold that all “taking” convictions are necessarily theft offenses. *Garza*’s analysis was concerned with situations where the underlying conviction was predicated on facts showing an unlawful taking of a vehicle “with the intent to permanently deprive the owner of possession.” (*Garza, supra*, 35 Cal.4th at p. 876.) Indeed, taking a vehicle with the intent only to temporarily deprive the owner of his or her property would not qualify as theft, but would constitute a taking offense under Vehicle Code section 10851. In this context, to be considered a theft offense the record must show the conviction was necessarily for a theft and not for driving the vehicle. (See *Garza, supra*, at p. 881.)

As applied to this case, *Garza*’s conclusion that Vehicle Code section 10851 can constitute a theft offense is not applicable due to the lack of evidence showing it was “reasonably probable” appellant “took the vehicle but did not engage in any posttheft driving.” (*Garza, supra*, 35 Cal.4th at p. 872.) In *Garza*, the California Supreme Court concluded that, although Penal Code section 496 could be read to bar a conviction for receiving stolen property when there was a concurrent conviction under Vehicle Code section 10851 for taking the property stolen, it allowed the conviction to stand because such a prohibition could only apply where the facts showed the defendant was only convicted under Vehicle Code section 10851 for a theft offense. (*Garza, supra*, at p. 882.) In cases where the facts (or fact of conviction) could support either a theft or nontheft offense, the dual convictions could stand.² In this case, there is no factual support for the conclusion that appellant was

² In *Garza*, the California Supreme Court left open whether failing to define the conviction as a theft offense for purposes of Penal Code section 496 could affect recidivist punishments

convicted only of a theft-based Vehicle Code violation. We take no position on whether, given such specific limited facts, the offense may qualify for resentencing.³

Third, *Garza*'s conclusion that one factual scenario supporting a conviction under Vehicle Code section 10851 is a theft offense does not indicate that Proposition 47 was intended to modify the punishment for that type of conviction. To the contrary, it further suggests that no modification was intended. It is presumed that the electorate is aware of cases bearing on enacted statutory schemes. (*Cervantes, supra*, 225 Cal.App.4th at p. 1015.) In that case, the California Supreme Court was abundantly clear that convictions under Vehicle Code section 10851 cover a wide range of offending conduct, not all of which constitute theft offenses. (*Garza, supra*, 35 Cal.4th at p. 881 ["further driving of the vehicle is a separate violation of [Vehicle Code] section 10851[, subdivision](a) that is properly regarded as a nontheft offense for purposes of the dual conviction prohibition of [Penal Code] section 496[, subdivision](a)"]; *Jaramillo, supra*, 16 Cal.3d at pp. 757–758 ["Vehicle Code section 10851 proscribes a wide range of conduct. It prohibits taking or driving a vehicle with intent to either permanently *or* temporarily deprive the owner of title *or* possession of, and *with* or *without* intent to steal the vehicle. . . . The jury could have found [the] defendant guilty of a violation of Vehicle Code section 10851 simply because some doubt existed as to whether [the] defendant intended to steal or merely to temporarily deprive the [owners] of possession and to drive their vehicle."].) Presuming the electorate was aware that Vehicle Code section 10851 did not constitute a theft offense in all instances, there appears little persuasive value in *Garza*'s analysis when seeking support for the conclusion that Proposition 47 intended to modify the punishment for Vehicle Code section 10851. Despite precedent demonstrating that Vehicle Code section 10851 extended to conduct constituting both theft and nontheft offenses, punishing them equally, the drafters of Proposition 47 chose not to directly modify the punishment scheme under Vehicle Code section 10851, or otherwise connect their amendments with the statute.

Voter Intent Does Not Demonstrate a Desire to Amend Vehicle Code Section 10851

The conclusion that the ordinary meaning of the term "obtaining any property by theft" does not cover a violation of Vehicle Code section 10851 is further supported by the available evidence showing California voters' intent in passing Proposition 47. The summary statements made in Proposition

for auto theft such as those under Penal Code section 666. (*Garza, supra*, 35 Cal.4th at p. 882, fn. 3.) This question does not appear to have been resolved.

³ It is the applicant's burden to demonstrate eligibility for resentencing. (*People v. Johnson* (2016) 1 Cal.App.5th 953 [205 Cal.Rptr.3d 246].)

47's text only vaguely define the specific scope of the proposition with respect to modifications to the criminal law. For example, the purpose of the law was stated to be "to maximize alternatives for nonserious, nonviolent crime" and its intent was to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, §§ 2, 3, subd. (3), p. 70.) To the extent any real specificity was provided, Proposition 47's text was limiting, explaining that resentencing was only available to those "currently serving a sentence for *any of the offenses listed herein* that are now misdemeanors." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subd. (4), p. 70, italics added.) The statutes listed in the text do not include Vehicle Code section 10851.

The Legislative Analyst's analysis provided a more specific statement to the public based on the proposed legislation. In that document, it was made clear that penalties for only certain crimes, those of grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession would be modified, and that only persons "currently serving felony sentences *for the above crimes*" could "apply to have their felony sentences reduced to misdemeanor sentences." (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, pp. 35–36, italics added.) With respect to grand theft, the analysis explained that the "measure would limit when theft of property of \$950 or less can be charged as grand theft" and would eliminate charges of grand theft initiated "solely because of the type of property involved." (*Id.*, analysis of Prop. 47 by Legis. Analyst, p. 35.)

Reviewing these statements, there is no evidence supporting the claim that Vehicle Code section 10851 would be amended by the provisions of Proposition 47 and, thus, fall within the provisions of Penal Code section 1170.18. The primary intent expressed in these statements, with respect to this issue at least, is to modify the definitions of grand theft and petty theft in the context of charges for property crimes generally. There is no suggestion that separately defined offenses that may cover similar conduct will be changed, nor is there any indication that the people intended to eliminate any crimes specifically dealing with automobiles through incorporation of those offenses into the crimes of grand or petty theft.

It is worth noting that the Legislative Analyst's analysis pointed out that a "wobbler charge can occur if the crime involves the theft of certain property (such as cars)" before explaining the "measure would limit when theft of property of \$950 or less can be charged as grand theft" and that "such crimes would no longer be charged as grand theft solely because of the type of property involved." (Voter Information Guide, Gen. Elec., *supra*, analysis of

Prop. 47 by Legis. Analyst, p. 35.) These statements do not, however, demonstrate an undebatable intent to modify Vehicle Code section 10851. (*Park, supra*, 56 Cal.4th at p. 798.) Rather, they are most readily understood as explaining how the definition of grand theft is changing.

Prior to Proposition 47, under Penal Code section 487, grand theft was generally defined by the value of the property stolen, save for three circumstances: (1) where property was taken from the person of another; (2) where the property was an automobile; and (3) where the property was a firearm. (Pen. Code, § 487, subds. (c), (d).) In cases where one of these three circumstances occurred, the value of the property was irrelevant to the charge. For all other grand theft crimes under Penal Code section 487—those defined by the value of the property—a petty theft charge was required where the value of the property stolen did not exceed a statutory cap. By enacting Proposition 47, voters changed that scheme to eliminate grand theft charges in all instances where the value of the stolen property supporting the theft charge was below \$950. The Legislative Analyst's summary plainly describes this change. It does not include language suggesting a wholesale change to all related laws.

The Overall Statutory Scheme Does Not Demonstrate a Desire to Amend Vehicle Code Section 10851

The conclusion that the ordinary meaning of “obtaining any property by theft” does not cover a violation of Vehicle Code section 10851 is further supported by the general statutory scheme of Proposition 47. As noted above, the amendments to the statutory scheme enacted under Proposition 47 were limited, in the context of this issue, to changing the definition of petty theft by adding Penal Code section 490.2. None of the changes effectuated a substantive change to the criminal laws defining various theft crimes, only changing the punishment scheme enacted to enforce those laws. In light of the focused nature of the changes enacted, there is no evidence in the broader statutory scheme indicating Vehicle Code section 10851 should be considered a common law theft crime subject to punishment under the new grand and petty theft definitions.

In contrast, the statutory scheme indicates that Vehicle Code section 10851 was considered to be separate and distinct from those crimes that constitute grand or petty theft. Prior to the enactment of Proposition 47, Penal Code section 666 doubled the maximum sentence for petty theft (from six months to one year) where the defendant had been convicted of certain prior crimes and had served a prior prison term therefore. Proposition 47 made no substantive changes to that part of Penal Code section 666, despite eliminating a three strikes clause and making nonsubstantive changes to the prior

prison term clause. Thus, as modified, the additional punishment continued to apply to “any person described in subdivision (b) [defining those subject to the enhancement] who, having been convicted of *petty theft, grand theft*, a conviction pursuant to subdivision (d) or (e) of [Penal Code] Section 368, *auto theft under Section 10851 of the Vehicle Code*, burglary, carjacking, robbery, or a felony violation of [Penal Code] Section 496” and having served a prior prison sentence, is later convicted of petty theft. (Pen. Code, § 666, subd. (a), italics added.)

If a general conviction under Vehicle Code section 10851 necessarily constituted “obtaining any property by theft” and, thus, must be sorted between petty and grand theft, there would be no reason to separately identify auto theft from grand and petty theft as a prior crime. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934] [refusing to construe initiative in way which would exclude the word “any” from the statute because “[s]ignificance should be given, if possible, to every word of an act.”].) Moreover, the fact that Vehicle Code section 10851 was expressly included in the revised version of Penal Code section 666 demonstrates that the drafters of Proposition 47, and the public, were aware of the statute at the time Proposition 47 was presented to the electorate. The fact that Vehicle Code section 10851 was not amended to conform to the petty theft definition in the face of an explicit mention in the modified sentencing statute as a separate prior offense from grand and petty theft therefore affords a strong inference that Vehicle Code section 10851 was not intended to be a part of, or amended by, the provisions of Proposition 47.⁴ (*Licas, supra*, 41 Cal.4th at p. 367 [reference to a subject in one statute, but not in related statutes, shows different intent between the two]; *Park, supra*, 56 Cal.4th at p. 798 [all presumptions are against a repeal by implication].)

Excluding Vehicle Code Section 10851 from Proposition 47 Does Not Lead to Absurd Results

■ Although there is little ambiguity in the language or statutory history, one settled principle of statutory interpretation states that “‘consideration should be given to the consequences that will flow from a particular interpretation’ such that ambiguities should not be interpreted in a manner that provides “an absurd result, or a result inconsistent with apparent legislative intent.” (*People v. Cruz* (1996) 13 Cal.4th 764, 782–783 [55

⁴ This conclusion is also supported by the prior discussion of *Garza*. As noted above, the California Supreme Court concluded that a theft offense only occurs under Vehicle Code section 10851 when the evidence mandates the conclusion that the defendant was convicted of taking a vehicle with the intent to permanently deprive the owner. (*Garza, supra*, 35 Cal.4th at p. 882.) Thus, the crime as a whole is neither petty nor grand theft and, unless definitively shown otherwise, is not theft at all.

Cal.Rptr.2d 117, 919 P.2d 731].) Appellant argues that excluding those who have violated Vehicle Code section 10851 from resentencing would create such an absurdity due to the fact that violation of Vehicle Code section 10851 is considered a lesser included offense of grand theft auto, a violation of Penal Code section 487, subdivision (d)(1), and that the definition of grand theft auto has been modified to constitute a petty theft, according to Proposition 47's addition of Penal Code section 490.2, when the value of the automobile is less than \$950.

This argument is flawed for at least three reasons. First, Vehicle Code section 10851 covers more criminal conduct than just what qualifies as a lesser included offense to grand theft auto. As noted above, it also criminalizes conduct such as after-the-fact liability and completed auto theft itself. This shows the statutory penalties are designed to protect against more than just failed grand theft auto prosecutions and highlights a basis for separately punishing these crimes. Second, there is no reason why a lesser included offense must be punished less severely than the primary offense to which it attaches. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 839 [16 Cal.Rptr.3d 420, 94 P.3d 551] (*Wilkinson*) [no equal protection violation where “[t]he Legislature’s actions tend to demonstrate it contemplated that the ostensible ‘lesser’ offense of battery without injury sometimes may constitute a more serious offense and merit greater punishment than the ‘greater’ offense of battery accompanied by injury.”].) Here, such a scheme could rationally be explained by a desire to seriously punish conduct that may affect vulnerable citizens but may not qualify as theft, such as temporarily taking a vehicle to prevent a victim from fleeing. Finally, given the explanation in the Legislative Analyst's summary that Proposition 47 is designed to modify the definition of a limited set of crimes, specifically grand theft, the true absurdity would appear to occur where a specific and separately designated legislative scheme is dismantled due to an overreliance on the Penal Code theft statute. Accepting that Vehicle Code section 10851 is subject to resentencing under Proposition 47 would not only read new elements into that statute, effective as to only a portion of the conduct criminalized therein, but would specifically undo a separate legislative act that regulates the taking of automobiles with or without the intent to steal. This appears to be the more absurd result of the two.

■ For all of these reasons, a violation of Vehicle Code section 10851 should not be considered eligible for resentencing under Penal Code section 1170.18.

The Equal Protection Clause Does Not Require a Different Result

As an alternative argument in support of the claim that Vehicle Code section 10851 falls within the ambit of Proposition 47, appellant argues that the equal

protection clause requires those convicted under Vehicle Code section 10851 to be treated equally with those who have been convicted of theft involving an automobile or other low-value property. This argument fails on well-settled principles.

Summary of Equal Protection Principles

“The concept of equal treatment under the laws means that persons *similarly situated* regarding the legitimate purpose of the law should receive like treatment. [Citation.] ‘‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘‘whether they are similarly situated for purposes of the law challenged.’’’ (*Morales, supra*, 63 Cal.4th at p. 408, italics added & omitted.)

If this showing is met, a further analysis is undertaken. ‘‘The concept [of equal protection] recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not . . . require absolute equality. [Citations.] Accordingly, a state may provide for differences as long as the result does not amount to invidious discrimination.’’ (*People v. Cruz* (2012) 207 Cal.App.4th 664, 675 [143 Cal.Rptr.3d 742].) ‘‘In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose.’’ (*Ibid.*)

There Is No Indication Similarly Situated Defendants Are Receiving Disparate Treatment

There are two variations of the equal protection argument presented in the briefing. In the first, the two alleged groups of similarly situated persons are those that have stolen general property worth less than \$950 and those that have stolen a vehicle worth less than \$950. In the second, the two alleged groups are those that are charged with petty theft under the Penal Code for stealing a vehicle worth less than \$950 and those charged with a felony for stealing a vehicle worth less than \$950 under Vehicle Code section 10851. The first is essentially a variation of the second, as the difference in results turns on the fact that there are different statutes punishing general property

theft crimes and vehicle thefts in that instance. In both examples, therefore, the groups are not similarly situated.

■ Under the instruction of *United States v. Batchelder* (1979) 442 U.S. 114 [60 L.Ed.2d 755, 99 S.Ct. 2198], the California Supreme Court has definitively held that “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*Wilkinson, supra*, 33 Cal.4th at p. 838.) Absent an argument that one was “‘singled out deliberately for prosecution on the basis of some invidious criterion,’ ” there is no cognizable claim that equal protection principles have been violated due to different statutes providing different penalties for similar conduct. (*Id.* at p. 839.) No such additional allegations have been made here and, thus, there has been no showing of disparate treatment sufficient to trigger a further equal protection inquiry.

■ It is worth noting that the framing of this issue in the briefing is generally ancillary to the true issue that must be decided when resentencing requests have been denied. More germane to the issues faced by appellant here is the argument that persons originally sentenced under Vehicle Code section 10851 for conduct qualifying as vehicle theft where the value of the vehicle is less than \$950, are similarly situated to those who were previously sentenced under the Penal Code for grand theft auto where the value of the vehicle was less than \$950, but are being treated differently because those sentenced under Vehicle Code section 10851 are not eligible for resentencing while those convicted of grand theft auto are eligible for resentencing in certain circumstances. However, this argument fails as well because there is no obligation to make sentencing provisions retroactive. “Persons resentenced under Proposition 47 were serving a proper sentence for a crime society had deemed a felony (or a wobbler) when they committed it. Proposition 47 did not have to change that sentence at all. Sentencing changes ameliorating punishment need not be given retroactive effect. ‘‘The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.’’” (*Morales, supra*, 63 Cal.4th at pp. 408–409.)⁵

⁵ Even if it were shown that similar groups were being treated differently for the purposes of Penal Code section 1170.18, a rational basis analysis applies. As discussed above, it is possible to imagine a rational basis for treating charges brought under the Vehicle Code differently from other property theft offenses, even where overlap exists, as the Vehicle Code criminalizes a much broader range of conduct and may be designed to further different goals. (See *Wilkinson, supra*, 33 Cal.4th at pp. 839–840 [decision of how long a particular punishment should be is left to the Legislature, provided it acts rationally].)

For these reasons, there is no violation of equal protection requiring the court to construe Proposition 47 to include violations of Vehicle Code section 10851 for the purposes of determining eligibility for resentencing.

DISPOSITION

The judgment is affirmed.

Levy, Acting P. J., and Poochigian, J., concurred.

Appellant's petition for review by the Supreme Court was granted November 30, 2016, S237975.

[No. G052124. Fourth Dist., Div. Three. Aug. 26, 2016.]

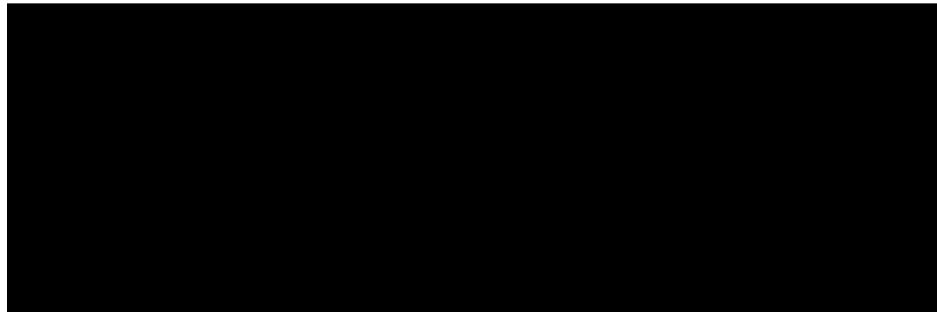
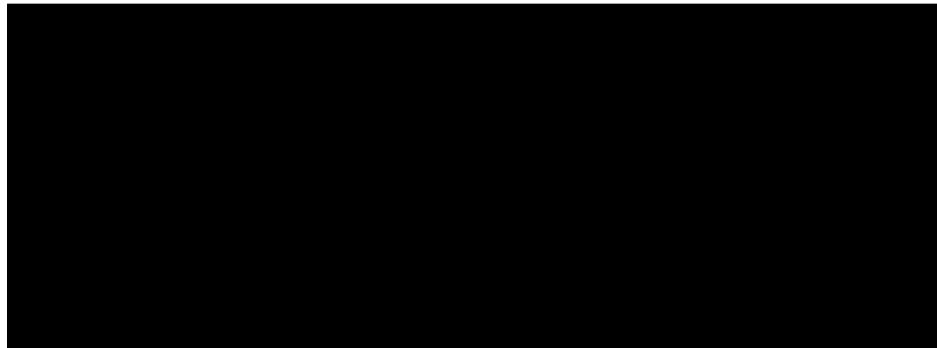
CELIA S., Appellant, v.
HUGO H., Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Gibson, Dunn & Crutcher, Blaine H. Evanson, Krista Hernandez, Jennafer M. Tryck, Krista DeBoer, Vania Wang; Family Violence Appellate Project, Jennafer Dorfman Wagner, Shuray Ghorishi, Erin C. Smith, Nancy K.D. Lemon; Legal Aid Society of Orange County, Robert Cohen, Yolanda Omana and Jamie Sanderson for Appellant.

Law Offices of D. Michael Bush and D. Michael Bush for Respondent.

OPINION

ARONSON, J.—Family Code section 3044 establishes a rebuttable presumption that prevents a trial court from awarding sole or joint physical or legal custody of a child to a parent who commits an act of domestic violence

against the other parent, unless the offending parent establishes by a preponderance of the evidence that an award of custody to that parent is in the child's best interest.¹

Here, the trial court found respondent Hugo H. committed an act of domestic violence against appellant Celia S., and therefore awarded her sole legal and physical custody of the couple's two children because Hugo presented no evidence showing an award of custody to him was in the children's best interest. Nonetheless, the court also awarded Hugo "visitation" consistent with the "50/50 timeshare" arrangement agreed upon by Celia and Hugo nearly a year earlier. Under that arrangement, the children alternated living with Celia for one week and then Hugo for a week.

Celia appeals, arguing the trial court may not circumvent section 3044 by characterizing its order as merely an award of visitation. We agree. The nature of any order must be determined by its legal effect, not its label. Based on the Family Code definition of "joint physical custody" and the case law applying that definition, we conclude an arrangement authorizing children to spend roughly equal time with each parent is a joint physical custody arrangement. The trial court therefore abused its discretion in awarding Hugo equal time with the children without requiring him to establish the arrangement was in the children's best interest. We reverse that portion of the court's order and remand for further proceedings.

I

FACTS AND PROCEDURAL HISTORY

Celia and Hugo maintained a romantic relationship for many years, but never married. They have two children: Christian, age 12, and Jayleen, age 6. According to Celia, several acts of domestic violence marred their relationship and eventually led to their separation. In February 2014, Celia and Hugo stipulated to joint legal and physical custody of their children with a "50/50 timeshare" under which the children alternated weeks with each parent. The trial court entered the stipulation as an order.

In January 2015, Celia invited Hugo to her apartment to have dinner with her and the children. While Celia prepared dinner in the kitchen, Christian did his homework at the dining room table and Jayleen took a nap on the living room couch. Hugo also sat at the dining room table waiting for Christian to finish his homework. According to Celia, Hugo was watching loud videos on

¹ All statutory references are to the Family Code.

his cell phone that disrupted Christian. Hugo denies this, and instead testified he simply was playing on his phone without disturbing anyone.

When Christian asked Celia for help with his math homework, she came to the dining room table and set up her laptop computer to look up how to do Christian's homework. At that point, Hugo received a phone call and got up from the table to answer it. Celia sat down in the chair where Hugo had been sitting and worked with Christian on his homework. According to Celia, when Hugo returned he demanded that Celia give him the chair back. When she refused to move, Celia claims Hugo grabbed her by the hair and pulled her toward him. Celia then tried to push Hugo away and he punched her in the ribs or stomach, causing her to lose her breath. An argument ensued and Celia demanded Hugo leave. Celia called the police when Hugo continued to loiter outside the apartment. The police arrived and arrested Hugo for domestic violence after Christian told them he saw Hugo hit his mother. The police issued an emergency protective order requiring Hugo to stay away from Celia and the children.²

The next day, Celia filed a petition for a domestic violence restraining order against Hugo and for an order awarding her sole legal and physical custody of the children. The trial court issued a temporary restraining order and scheduled an evidentiary hearing.

At that hearing, Celia testified Hugo pulled her hair and punched her in the stomach or ribs when she refused to yield her chair to him. Hugo testified he did not pull Celia's hair or hit her. According to Hugo, Celia came to the dining room table and started an argument about whether he was talking to other women. He testified he left the apartment without touching Celia, and then the police arrested him based on Christian's false statement that Hugo had punched Celia.

Neither child testified at the hearing, but the court received a report from a social worker who had interviewed both children. Although Christian told the police he saw Hugo punch Celia, he told the social worker he left to go to the bathroom when Celia came to the dining room table and he only heard the fight from the other room. But he also told the social worker he previously saw Hugo spit in Celia's face. Jayleen told the social worker she woke up when her parents started to argue and she saw Hugo pull Celia's hair and punch her. She also told the social worker she had seen Hugo hit Celia before, that she was afraid of Hugo when he hit her mother. At the time of these events, Christian was 10 years old and Jayleen had just turned five.

² The record does not include any information on how the criminal domestic violence proceedings against Hugo were resolved.

The trial court acknowledged the many conflicts between Celia's and Hugo's testimony, the inconsistencies in the versions Christian told the police and the social worker, and the impact Jayleen's age had on her ability to recollect and recount what she saw, but the court concluded Celia's version of the events "hung together better" and was "more credible." The court therefore found Celia "is a victim of domestic violence perpetrated by [Hugo]" and issued a one-year domestic violence restraining order that required Hugo (1) not to harass, threaten, assault, disturb or contact Celia or the children, "except in the course of court-ordered visitation with [the children]," and (2) to stay 100 yards away from Celia, her work and apartment, the children, and their school. The court also ordered Hugo to complete a 52-week batterer intervention program.

As to custody, the court awarded Celia sole legal and physical custody, but ordered that Hugo "will have visitation with the minor children as the court will find that is still in the best interest." The court explained the section 3044 rebuttable presumption against awarding sole or joint custody to a parent who committed domestic violence required the court to award Celia sole custody, but the court set a hearing to review the matter after Hugo completed the 52-week batterer intervention program to determine whether he could present evidence to rebut the section 3044 presumption.

Next, the court acknowledged the parties' current custody arrangement called for a "50/50 timeshare" with Celia and Hugo having the children in alternating weeks. The court explained it was "going to leave the order the way it is," and only change the location where the parties exchanged the children each week in recognition of the restraining order's prohibition against Hugo coming to Celia's apartment. The court's written order awarded Celia sole legal and physical custody, and awarded Hugo visitation described in an attachment to the order. The attachment was a copy of the page from the parties' February 2014 stipulation awarding them joint legal and physical custody and establishing their 50/50 timeshare. The court crossed out the two provisions regarding joint legal and physical custody, but adopted the provision concerning the 50/50 timeshare without any change other than the location where Celia and Hugo would exchange the children each week.

Celia timely appealed the trial court's decision awarding Hugo a 50/50 timeshare despite the domestic violence restraining order and the award of sole legal and physical custody to Celia.

II

DISCUSSION

A. Governing Legal Principles on Child Custody and Domestic Violence

■ When deciding a petition for a domestic violence restraining order, the court has broad discretion also to “make an order for the custody of a child . . . that seems necessary or proper.” (§ 3022; see § 3021; see *Erika K. v. Brett D.* (2008) 161 Cal.App.4th 1259, 1268 [75 Cal.Rptr.3d 152].) The guiding principle for the court in making any custody or visitation order is that the order must be in the child’s best interest. (See §§ 3011, 3020, 3040.)

In this context, the Legislature has found and declared that (1) “it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court’s primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children”; (2) “the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child”; and (3) “it is the public policy of this state to assure that children have frequent and continuing contact with both parents . . . and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child.” (§ 3020, subds. (a) & (b).)

■ To further these policies, section 3044 establishes a rebuttable presumption that awarding physical or legal custody to a parent who has committed domestic violence is detrimental to a child’s best interest: “Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child” (§ 3044, subd. (a).)

This presumption is mandatory and the trial court has no discretion in deciding whether to apply it: “[T]he court *must* apply the presumption in any situation in which a finding of domestic violence has been made. A court may not ‘call . . . into play’ the presumption contained in section 3044 only when the court believes it is appropriate.’” (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498 [179 Cal.Rptr.3d 569] (*Fajota*); see *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736 [177 Cal.Rptr.3d 178] (*Christina L.*) [“Because a [Domestic Violence Prevention Act] (DVPA) restraining order must be based on a finding that the party being restrained committed one or more acts of

domestic abuse, a finding of domestic abuse sufficient to support a DVPA restraining order necessarily triggers the presumption in section 3044' "].)

The section 3044 presumption is rebuttable and “‘may be overcome by a preponderance of the evidence showing that it is in the child’s best interest to grant joint or sole custody to the offending parent.’” (*Christina L.*, *supra*, 229 Cal.App.4th at p. 736; see § 3044, subd. (a) [“This presumption may only be rebutted by a preponderance of the evidence”]; *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1055 [96 Cal.Rptr.3d 298] (*Keith R.*).) The legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence. (*Christina L.*, at p. 736.)

Section 3044 also prohibits the parent who committed domestic violence from using the statutory preference for frequent and continuing contact with both parents to rebut the presumption, “in whole or in part.”³ (§ 3044, subd. (b)(1); see *Keith R.*, *supra*, 174 Cal.App.4th at p. 1056.) If the trial court determines a parent has overcome the section 3044 presumption and awards sole or joint custody to a parent who committed domestic violence, the court must state the reasons for its ruling in writing or on the record. (§ 3011, subd. (e)(1).)

“We review custody and visitation orders for an abuse of discretion, and apply the substantial evidence standard to the [trial] court’s factual findings. [Citation.] A court abuses its discretion in making a child custody order if there is no reasonable basis on which it could conclude that its decision advanced the best interests of the child. [Citation.] A court also abuses its discretion *if it applies improper criteria or makes incorrect legal assumptions.*” (*Fajota*, *supra*, 230 Cal.App.4th at p. 1497.)

³ Section 3044 establishes the following nonexclusive list of factors for the trial court to consider in determining whether the presumption has been overcome: “(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. . . . [¶] (2) Whether the perpetrator has successfully completed a batterer’s treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code. [¶] (3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate. [¶] (4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate. [¶] (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole. [¶] (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions. [¶] (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.” (§ 3044, subd. (b).)

B. *The Trial Court Abused Its Discretion by Effectively Awarding Joint Physical Custody Without Requiring Hugo to Rebut the Section 3044 Presumption*

Celia contends the trial court erred by leaving the parties' 50/50 timeshare arrangement in place despite finding Hugo had committed domestic violence against her. According to Celia, section 3044 prohibited the court's 50/50 timeshare arrangement because it effectively awarded joint physical custody without requiring Hugo to present evidence showing the arrangement is in the children's best interest. We agree.

The trial court repeatedly acknowledged its finding that Hugo committed domestic violence against Celia triggered section 3044's rebuttable presumption and prohibited the court from awarding Hugo sole or joint custody of the children unless he presented evidence showing an award of custody to him was in the children's best interest. But Hugo did not even attempt to make that showing, and the court impliedly found he failed to do so when it acknowledged section 3044 required the court to award Celia sole legal and physical custody of the children, and it scheduled a review hearing for a year later to determine whether Hugo could present evidence to rebut section 3044's presumption based on his successful completion of a 52-week batterer intervention program.

■ Nonetheless, the trial court's order effectively awarded Hugo joint physical custody of the children by maintaining the existing 50/50 timeshare arrangement even though the court characterized the children's time with Hugo as "visitation." Under the Family Code, "'[j]oint physical custody' means that each of the parents shall have significant periods of physical custody." (§ 3004; see *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 760 [76 Cal.Rptr.2d 717] (*Biallas*) ["Joint physical custody exists where the child spends significant time with both parents"]; cf. § 3007 ["'Sole physical custody' means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation"].)

The Family Code does not define what amounts to "significant" time with each parent for identifying a joint physical custody arrangement, but case law establishes guidelines to help answer that question. (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715 [121 Cal.Rptr.2d 356] (*Lasich*), disapproved on other grounds in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1097 [12 Cal.Rptr.3d 356, 88 P.3d 81].) "Where children 'shuttle[] back and forth between two parents' [citation] so that they spend nearly equal times with each parent, or where the parent with whom the child does not reside sees the child four or five times a week, this amounts to joint physical custody." (*Lasich*, at p. 715; see *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 964

[124 Cal.Rptr.2d 683]; *Biallas, supra*, 65 Cal.App.4th at p. 760 [joint physical custody exists when children spend four days each week with one parent and three days with other parent].)

In contrast, where “a father has a child only 20 percent of the time, on alternate weekends and one or two nights a week, this amounts to sole physical custody for the mother with ‘liberal visitation rights’ for the father.” (*Lasich, supra*, 99 Cal.App.4th at p. 715; *Biallas, supra*, 65 Cal.App.4th at p. 760 [custody one day per week and alternate weekends constitutes liberal visitation, not joint custody]; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 138, 142 [61 Cal.Rptr.2d 559] [same].)

■ Here, by ordering the children to continue to evenly split their time with Celia and Hugo on alternating weeks, the trial court necessarily awarded Hugo joint physical custody regardless of the label the court attached to the arrangement. The court apparently believed it complied with section 3044 by awarding Celia sole legal and physical custody of the children, and describing the children’s time with Hugo as “visitation.” But in determining the true nature of the court’s order, we must consider the legal effect of the order, not the label the court attached to it. (*Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 77 [26 Cal.Rptr.3d 735].) Hugo does not explain how maintaining the previous arrangement, which provided for joint physical custody with a 50/50 timeshare, could be characterized as anything other than an award of joint physical custody. Indeed, the trial court acknowledged it was “going to leave the [previous] order the way it is.”

The trial court therefore abused its discretion by failing to properly apply section 3044’s rebuttable presumption and awarding Hugo joint physical custody without evidence showing that custody arrangement was in the children’s best interest. (*Fajota, supra*, 230 Cal.App.4th at p. 1500 [after trial court found one parent had committed domestic violence against another, court abused its discretion by leaving in place an earlier order that awarded both parents joint legal custody].)

We reverse the trial court’s order and remand for further proceedings. On remand, the court may not award Hugo sole or joint custody because he failed to present any evidence to overcome section 3044’s presumption, but the court may award Hugo visitation that does not amount to joint custody because nothing in section 3044 prevents a trial court from awarding visitation. In doing so, however, the court must comply with statutory provisions governing a visitation award in proceedings involving allegations of domestic violence. (See, e.g., § 3031, subd. (c) [“When making an order for custody or visitation in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has

been issued, the court shall consider whether the best interest of the child, based upon the circumstances of the case, requires that any custody or visitation arrangement shall be limited to situations in which a third person, specified by the court, is present, or whether custody or visitation shall be suspended or denied”]; § 3100.) The court also may hear a request from Hugo to modify custody subject to section 3044’s presumption.

C. *Hugo Forfeited His Challenge to the Sufficiency of the Evidence by Failing to Cross-appeal*

The principal thrust of Hugo’s brief challenges the sufficiency of the evidence to support the trial court’s finding that he committed domestic violence against Celia. Hugo contends no objective evidence supported the trial court’s ruling. Specifically, he argues the description of events Christian provided the police was inconsistent with the description he provided the social worker, and the court should not have considered the social worker’s interview of Jayleen because she was only five years old at the time and would not speak to the social worker without Celia present. Hugo, however, did not cross-appeal from the trial court’s order, and therefore forfeited this issue.

“As a general matter, ‘‘a respondent who has not appealed from the judgment may not urge error on appeal.’’ [Citation.] ‘To obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants.’’ (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 585 [199 Cal.Rptr.3d 600]; see *Lima v. Vouis* (2009) 174 Cal.App.4th 242, 252 [94 Cal.Rptr.3d 183] [respondent who did not cross-appeal from order vacating dismissal prevented from challenging validity of order on appeal].)

Here, Celia appealed from the trial court’s order and challenged the court’s decision to maintain the 50/50 timeshare arrangement that existed before the domestic violence incident. She did not raise any issues about the court’s finding that Hugo had committed domestic violence against her. Hugo appeared in this court solely as a respondent; he did not file his own appeal to challenge the trial court’s order. The sufficiency of the evidence to support the court’s domestic violence finding therefore is not before us and Hugo forfeited all challenges to that finding.

D. *The Appeal Is Not Moot*

■ Hugo also contends Celia’s appeal is moot because the one-year domestic violence restraining order the trial court issued has expired. Not so. Section 3044’s presumption remains in effect for five years regardless of

whether an underlying domestic violence restraining order has expired. (§ 3044, subd. (a) [“Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence . . . *within the previous five years*, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child” (italics added)].) Moreover, it is the finding of domestic violence that triggers the presumption, not the issuance of a restraining order. (*Ibid.*) Accordingly, even though the restraining order may have expired, the trial court still may not award Hugo sole or joint legal or physical custody unless he establishes awarding him custody would be in the children’s best interest.

III

DISPOSITION

The order is reversed and remanded for further proceedings as described in the last paragraph of part II.B. of this opinion. Celia shall recover her costs on appeal.

Moore, Acting P. J., and Ikola, J., concurred.

On September 23, 2016, the opinion was modified to read as printed above.

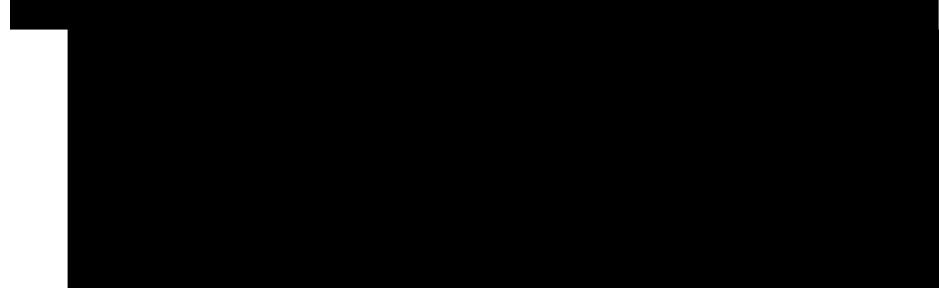
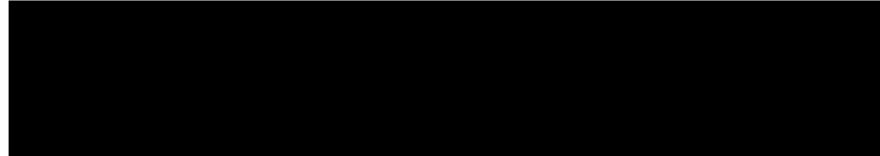
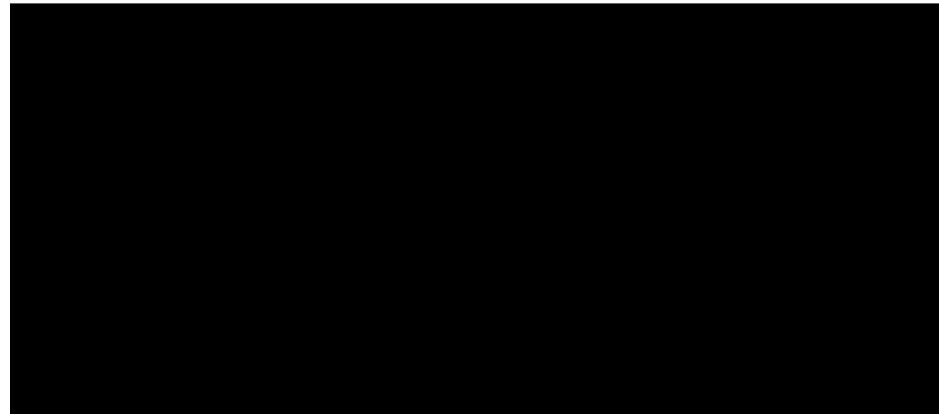
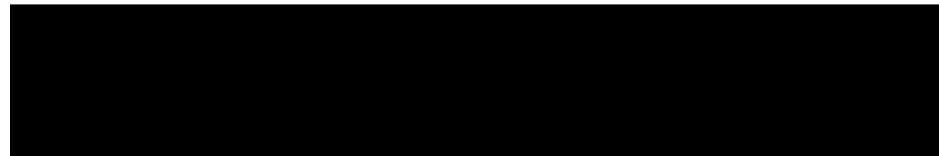
[Nos. B259704, B260574. Second Dist., Div. Four. Sept. 26, 2016.]

In re Marriage of SHARY NASSIMI and ESTHER NASSIMI.
SHARY NASSIMI, Appellant, v.
ESTHER NASSIMI, Respondent.

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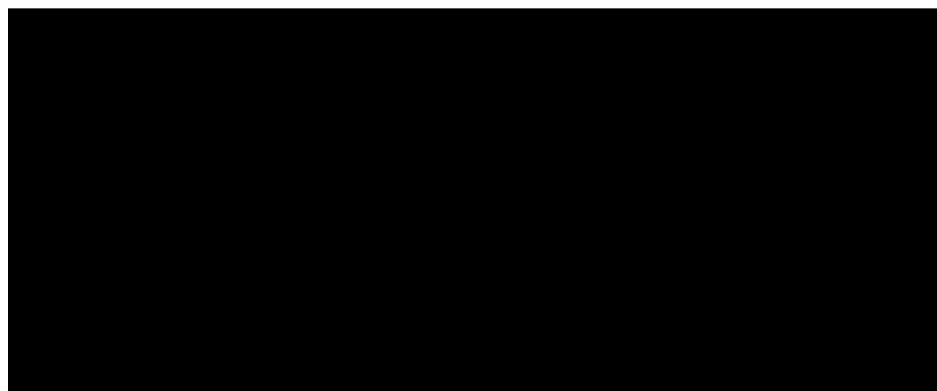
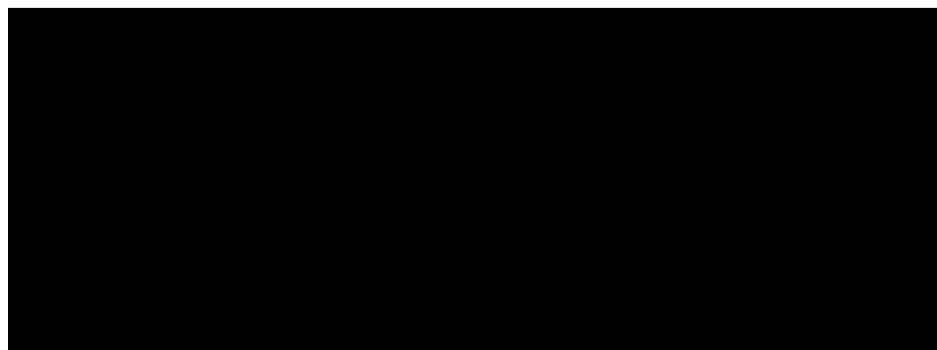
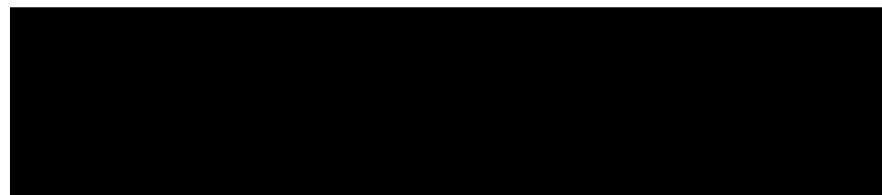
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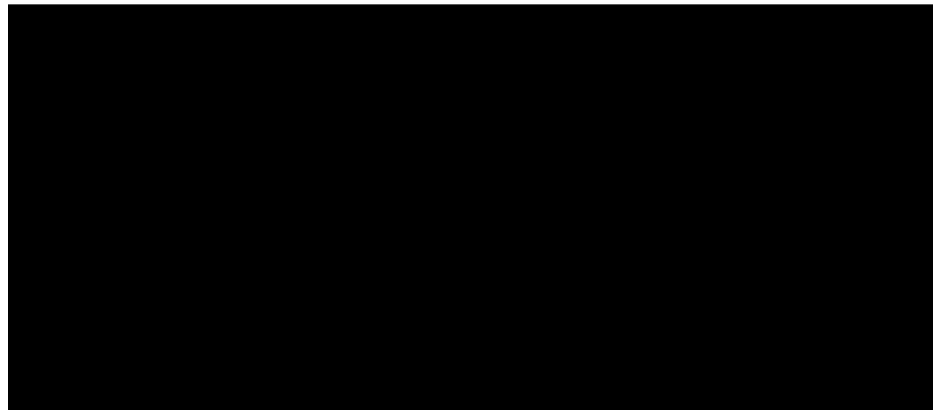
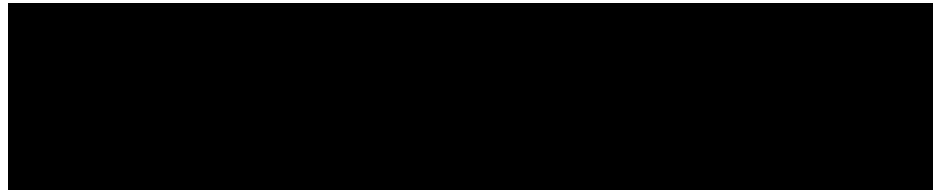
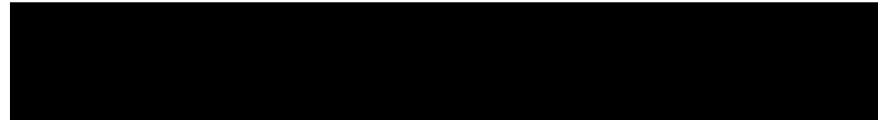
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COUNSEL

Honey Kessler Amado for Appellant.

Lurie, Zepeda, Schmalz, Hogan & Martin, Kurt L. Schmalz and Shawn M. Ogle for Respondent.

OPINION

MANELLA, J.—Appellant Shary Nassimi, formerly married to respondent Esther Nassimi, contends the trial court erred in concluding that he, alone, was financially responsible for defending and settling a claim brought by a third party seeking, among other things, rescission of an agreement to sell the business he owned and operated during the marriage. We conclude the liability arising from the claim for rescission and other relief initiated by the third party was a community obligation omitted from the marital dissolution

judgment that divided the couple's assets and obligations, subject to division under Family Code section 2556.¹ We find, therefore, that respondent was obligated to pay half the cost of settling the litigation and reverse the court's order to the extent it denied appellant this relief.

With respect to the costs and attorney fees appellant incurred prior to the settlement, appellant's litigation expenses included the cost of his unsuccessful pursuit of certain counterclaims. The expense of pursuing those claims was allocated to him by the judgment, and appellant failed to present sufficient evidence to enable the trial court to distinguish fees and costs potentially chargeable to respondent for defense of the third party's claims for affirmative relief from fees and costs incurred in pursuit of appellant's counterclaims. Accordingly, we affirm the court's order to the extent it denied appellant's request for reimbursement of attorney fees and costs.

The trial court, having found against appellant on the above issues and on other issues raised in the underlying family law proceeding that are not part of this appeal, awarded respondent attorney fees as the "prevailing party" pursuant to the terms of the judgment. We agree the prevailing party provision of the judgment controlled. However, in view of our partial reversal of the trial court's order, we reverse the attorney fee award in favor of respondent and remand for reconsideration of the identity of the prevailing party, if any.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and respondent were married for 21 years. In August 2008, they separated. Their judgment of dissolution was entered in June 2009.

A. Sale of Appellant's Business

In July 2007, one year prior to the couple's separation, appellant sold International Electronics, Inc. (IEI), the business he owned and operated during the marriage, to The Chamberlain Group, Inc. (Chamberlain).² Under their agreement (hereafter, the Purchase Agreement), Chamberlain agreed to pay \$14 million up front, a \$12,000-per-month consulting fee for two years, and a percentage of net sales revenue attributable to IEI products for five

¹ Family Code section 2556 provides that in a proceeding for dissolution of marriage, "the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding." Undesignated statutory references are to the Family Code.

² IEI manufactured and sold a number of radio-wave-controlled devices, including wireless intercom systems, walkie-talkies and baby monitors. Chamberlain is a large manufacturer of radio-wave-controlled products.

years, up to a total of an additional \$10 million.³ One million dollars of the up-front payment was held in an escrow account as a reserve against any claims by Chamberlain against appellant that might arise within 24 months of the sale.⁴ The Purchase Agreement stated that “[t]o Seller’s Knowledge, no event has occurred or circumstance exists that . . . may cause [IEI] to violate any Law . . .”⁵

Although appellant owned all the shares of IEI in his own name and signed the Purchase Agreement as the sole “Seller,” he has never disputed that IEI was community property. In July 2007, respondent signed a “Consent of Spouse” document, consenting to the sale, approving the provisions of the Purchase Agreement, and acknowledging that IEI and its assets, “including any community property interest that [she] may have in them,” were subject to the Purchase Agreement. A substantial portion of the cash proceeds from the sale were spent on the couple’s residence on Sea View Drive in Malibu, which they owned free of mortgage at the time of separation.⁶

B. *Judgment of Dissolution*

In June 2009, the parties entered into a stipulated judgment of dissolution, which included a mediated financial settlement. The judgment incorporated the parties’ agreement concerning the division of property, referred to as the marital settlement agreement.⁷ The couple’s two residences, including the home on Sea View, were deemed community property, as was the \$12,000 per month consulting fee due appellant under the Purchase Agreement. Each spouse was awarded 50 percent of these assets.

The 2009 judgment addressed the funds in the escrow account. Paragraph 7(g) of the judgment provided: “All right, title, and interest in the following claims is awarded to the parties equally: Escrow claim against IEI in the amount of \$1 million. The parties shall share in any recovery equally, and shall pay the cost of pursuing such claim (including attorneys’ fees) equally.”

³ The payments due based on a percentage of net sales are referred to as “[e]arn-[o]ut” payments.

⁴ After the payment into escrow and subtraction of certain closing costs, the couple received just over \$12 million.

⁵ “‘Law’” was defined to include “any . . . regulation . . . of any Governmental Body.” “Knowledge” was defined as “the actual knowledge after reasonable investigation of Seller” and three other employees, including Jim Crider, IEI’s chief engineer.

⁶ The remaining \$1.5 million from the sale of IEI was divided by the couple equally when they separated. The Sea View property was sold in February 2013 for approximately \$8.7 million.

⁷ We refer to both the judgment and the incorporated marital settlement agreement as “the 2009 judgment” or “the judgment.”

The next paragraph, 7(h), dealt with earn-out payments. It provided: “All right, title, and interest in any claim against Chamberlain arising from conflicting interpretations of the earn-out provisions of the sale of [IEI] to Chamberlain is awarded to [appellant]. Respondent shall have no right to share in any recovery, and no obligation to pay all or any part of the cost of pursuing any such claim (including attorneys’ fees). [Appellant] shall indemnify and hold respondent harmless against liability on account of any counter-claim or cross-complaint that may be filed by Chamberlain against the parties, excluding any claim covered by paragraph 7.g.i. *[sic]* of this Judgment.”⁸

Paragraph 10 dealt with “[c]ommunity [d]ebts.” Paragraph 10(f) stated: “Except as otherwise provided in this Judgment, any community debt or joint debt that has not been previously paid or provided for shall be paid by the party who incurred such debt who shall indemnify and hold the other party harmless against any liability on account thereof.”

Paragraph 13 was entitled “Separate Liabilities.” Subparagraph (a) provided that appellant “shall pay and discharge as and when due all debts incurred by him after the date of separation and shall indemnify and hold respondent free and harmless against any liability on account thereof.” Subparagraph (b) imposed a similar liability on respondent. Subparagraph (c) provided: “[T]he parties acknowledge and agree that neither party has an obligation to pay any expense incurred by the other except as provided in this Judgment. Unless the parties agree to allocate payment responsibility between themselves for an expense incurred by one of them, the expense shall be paid by the party who incurred it, who shall indemnify and hold the other party harmless against liability on account thereof.”

Paragraph 34 contained the parties’ mutual releases. In paragraphs 34(a) and (b), appellant and respondent released each other from “any and all rights, claims, demands, debts, obligations, liabilities, costs, expenses, causes of action, and judgments, which exist or which [appellant] may claim to exist in favor of [appellant] and against respondent with regard to or arising out of any transactions or event[s] that occurred prior to the date of this Judgment.” Paragraph 34(c) stated: “[T]he parties understand and agree that the released claims are intended to and do include all claims, known or unknown, suspected or unsuspected, foreseen or unforeseen, which either [appellant] or respondent ha[s] or may have against the other arising out of or relating to

⁸ There is no paragraph 7.g.i. The parties agree the reference is to 7(g).

any transaction or event that occurred prior to the date of this Judgment” Paragraph 34(c) included a waiver of rights under section 1542 of the California Civil Code.⁹

C. Chamberlain Litigation

In April 2008, nine months after the sale and several months before the parties separated, Chamberlain sent a “Claim Notice of Buyer to Seller and Escrow Agent,” asserting that there were eight IEI products not in compliance with Federal Communications Commission (FCC) regulations, as they were “not being manufactured in accordance with the approved specifications,” and that necessary certification could not be located for three other products.¹⁰ The letter stated: “Seller’s failure to disclose that numerous products failed to meet FCC regulations prior to and as of the closing date of the transaction constitutes a breach of [various provisions in the Purchase Agreement]. [¶] . . . [¶] Jim Crider [IEI’s chief engineer] has admitted . . . that he had actual knowledge of these issues and has admitted . . . that Seller had actual knowledge of these issues. Indeed, Mr. Crider will testify that Seller instructed him to make the change to the Transmitter [one of the products identified as noncompliant] which resulted in noncompliance with FCC regulations.” The next month, Chamberlain sent a follow-up letter, in which it estimated the cost of addressing the product noncompliance identified in the April letter at approximately \$285,000, not including any FCC fines or penalties that might be imposed.¹¹

⁹ Civil Code section 1542 provides: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

¹⁰ The escrow instructions provided that within two years of the date of the Purchase Agreement, “Buyer may deliver a claim notice . . . to Seller and Escrow Agent. The Claim Notice will briefly state the factual basis or circumstances for the Claim, and either (i) specify in reasonable detail . . . the amount of Buyer’s Losses, (ii) provide a reasonable estimate of Buyer’s Losses, or (iii) indicate if Buyer, in good faith, is unable to specify the amount of Buyer’s Losses or make a good faith, reasonable estimate of its Losses.”

¹¹ During this same period, appellant was in communication by e-mail with an attorney and the broker who assisted him with the sale of IEI, discussing the possibility of suing Chamberlain for failing to produce and market IEI products subject to the earn-out provisions. The e-mails discussed in detail the IEI products appellant believed Chamberlain could have sold to produce earn-out payments and why he believed he had a viable claim under the earn-out provisions. They also discussed Chamberlain’s claim on the escrow account. In one e-mail, appellant stated his belief that Chamberlain intended “to hit [him] for more than [\$1 million].” In another, appellant stated he anticipated “a fight” and needed “to start . . . a strong and robust offense.” The broker urged appellant to “file a counterclaim” and “sue them in California”

In July 2009, Chamberlain filed suit against appellant in the United States District Court for the Western District of Washington.¹² The complaint was based on the provision in the Purchase Agreement representing that IEI was in compliance with all applicable laws and regulations. It alleged that Chamberlain had discovered that “many, if not all” of the devices manufactured by IEI did not comply with applicable regulations. Chamberlain contended that IEI’s employees, acting under appellant’s direction, modified software coding to make it appear the devices at issue were transmitting in a low-power range when tested by FCC laboratories, but thereafter restored the higher power levels for manufacture and sale. Chamberlain sought to rescind the transaction or, in the alternative, to obtain monetary damages for breach of contract and misrepresentation.

Appellant filed a counterclaim seeking release of the escrow sums. In addition, the counterclaim alleged that Chamberlain had breached the Purchase Agreement by failing to provide earn-out payments. Appellant contended, among other things, that Chamberlain violated its duty of good faith and fair dealing by failing to focus any of its resources and sales efforts on IEI products.

In 2010, the district court granted summary adjudication on certain issues involved in the competing claims. The court granted Chamberlain summary adjudication in part on its claim for breach of contract, finding that many IEI devices exceeded the power limits set by the FCC in violation of the express warranty of the Purchase Agreement, that Chamberlain had established as a matter of undisputed fact that IEI’s chief engineer, James Crider, had modified certain IEI devices for testing in order to create the appearance of compliance with FCC regulations, and that Crider’s knowledge bound appellant under the terms of the Purchase Agreement.¹³ The court did not resolve whether the breach was sufficiently material to justify rescission or determine any damage issues, but indicated that based on the parties’ experts’ testimony, damages could range from hundreds of thousands of dollars to \$16 million.

The court granted summary judgment to Chamberlain on appellant’s counterclaim seeking the escrow monies, finding that Chamberlain’s viable breach of contract claim precluded their immediate release. The court denied

¹² Respondent was not named. In December 2009, appellant and respondent entered into an agreement that “preserve[d] any claim for contribution for or indemnity against liability, fees, and costs incurred in the [Chamberlain] Lawsuit, while avoiding any need to name [respondent] as a party or third-party in the . . . Lawsuit.” Appellant subsequently sought to dismiss the Chamberlain lawsuit for failure to join an indispensable party, but the district court rejected the request.

¹³ With respect to appellant’s knowledge, the court found that Crider “discussed with [appellant]” that “at least some of the IEI devices at issue” exceeded FCC power limits.

Chamberlain's motion for summary judgment on appellant's earn-out counterclaim, finding that a jury could reasonably conclude Chamberlain's failure to market, develop and sell IEI products in the years following the sale breached either the Purchase Agreement or Chamberlain's duty of good faith and fair dealing.

In January 2011, a few months after the order of summary adjudication issued, Chamberlain and appellant settled. Appellant agreed to pay Chamberlain \$1 million from his own funds, and to release the \$1 million in the escrow account to Chamberlain.¹⁴

D. *Proceedings Below*

1. *February 2010 Order Finding Chamberlain's Rescission-related Claims to Be an Omitted Obligation*

In September 2009, prior to the Washington court's grant of summary adjudication and the ensuing settlement, appellant moved in the court below for an order requiring respondent to share equally in the ongoing costs of the Chamberlain litigation. Appellant contended that because the Purchase Agreement was entered into during the marriage and involved community property, the expenses of the litigation were owed by the community. He further contended that the claims asserted by Chamberlain were not covered by the provisions of the 2009 judgment, urging the court to treat it as an "unadjudicated debt of the marriage" subject to section 2556.¹⁵ He also sought declaratory relief establishing that respondent would be responsible for half of any judgment, should Chamberlain prevail.

Respondent filed opposition, disputing that any part of the Chamberlain litigation or its associated costs were liabilities omitted from the 2009

¹⁴ Appellant did not have the funds on hand to pay the additional \$1 million. Accordingly, he provided Chamberlain a promissory note secured by a deed of trust on the Sea View property, and Chamberlain was paid with interest when the property sold in February 2013.

¹⁵ As noted, section 2556 grants the family court continuing jurisdiction to divide community assets and liabilities not previously accounted for in any judgment entered in the dissolution proceedings. It further provides: "A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability."

judgment.¹⁶ She contended (1) that under paragraph 7(h) of the judgment of dissolution, appellant was obligated to pay the expenses of litigation between himself and Chamberlain, without regard to whether appellant or Chamberlain initiated it, unless the expenses related to a claim on the escrow fund; (2) that paragraph 34 (the parties' mutual release of unknown claims) released her from any liability for the costs of the litigation; (3) that appellant "incurred" the debt for purposes of paragraph 10(f) (applicable to unknown community debt), as he was "the party to the contract and the party that allegedly defrauded Chamberlain," while respondent "never had any knowledge regarding the operation and business practices of IEI"; and (4) that the attorney fees and other litigation expenses were "incurred" after the date of separation and were appellant's separate and sole responsibility under paragraph 13.¹⁷

In February 2010, following a hearing, the court entered an order granting in part and denying in part appellant's petition. The order stated: "The Court finds that the liability of the parties with respect to the action for *rescission and other related relief filed by [Chamberlain] against [appellant] in the . . . [Chamberlain litigation]* constitutes an undisposed of obligation of the Community Estate of the parties in this action." (Italics added.)¹⁸ The finding was made "without prejudice to all claims and defense[s] of the parties under the Judgment of Dissolution of Marriage," and the court reserved jurisdiction "to the fullest extent permissible under the law to make such other further findings and orders concerning the rights and liabilities of the parties under the Judgment." The court stated that it was "satisfied . . . that the parties never contemplated that Chamberlain would sue for rescission," rendering the Chamberlain litigation "an undisposed of [liability]." However, the court explained that it did not intend its order "to be fully dispositive of all the rights of [respondent] to claim certain defenses that might be available to

¹⁶ Respondent acknowledged in her opposition that pursuant to paragraph 7(g), she was responsible for one-half of the costs of pursuing a claim to the \$1 million escrow fund. She estimated, however, that claims related to the escrow fund represented a de minimis percentage of the litigation.

¹⁷ To support her position, respondent filed a declaration in which she stated: "During . . . negotiations, . . . I told [appellant] that I did not want to be financially obligated to pay attorney's fees, costs or other expenses for litigation between [appellant] and Chamberlain beyond our making a claim to collect the \$1 million held in an escrow fund from the IEI transaction. . . . I did not want to bankroll [appellant's] fight with Chamberlain over the IEI transaction or [appellant's] purported \$10 million 'earn-out' claim against Chamberlain."

¹⁸ Appellant urged the court to include in its order language indicating that respondent was responsible for one-half of all attorney fees and costs incurred in connection with the Chamberlain litigation. Instead, the court order stated only that the action for "rescission and other related relief filed by Chamberlain" constituted an omitted obligation of the community.

her,’ ” and stated its intention to conduct an evidentiary hearing “ ‘to litigate the scope of the liability of the parties.’ ”¹⁹

2. 2014 Evidentiary Hearing

The evidentiary hearing took place in the first half of 2014. Three witnesses testified: appellant, respondent and Randall Beighle, one of the attorneys who had represented appellant in the Chamberlain litigation. Appellant, who was not an engineer, testified that he had not instructed IEI’s engineers to design products to violate FCC requirements. He understood that some products were modified prior to testing for the convenience of the laboratory: for example, products that were designed to transmit radio frequencies intermittently were modified to transmit the frequencies continuously so they could be more easily measured. In addition, Chamberlain had its own testing facilities, and it was appellant’s understanding that Chamberlain had tested IEI’s products prior to the sale. In any event, he believed the problems identified by Chamberlain could easily have been mitigated had Chamberlain desired to manufacture and sell IEI products.

Concerning the circumstances surrounding the execution of the 2009 judgment, appellant testified that at the time, he was aware of Chamberlain’s claim seeking reimbursement of a portion of the escrow funds. In addition, he and respondent had discussions with a Washington attorney about the possibility of pursuing a claim against Chamberlain under the earn-out provisions of the Purchase Agreement. He denied anticipating that Chamberlain would bring a suit for rescission of the entire agreement.²⁰

Respondent testified that she knew little about the sale to Chamberlain. She was not aware when she signed the 2009 judgment that Chamberlain had claimed that IEI’s products were not FCC compliant. At the time, her main concern was the funds in the escrow account.

Concerning the expenses of the Chamberlain litigation, attorney Beighle testified that appellant paid his firm over \$1 million, including fees, costs and

¹⁹ Respondent noticed an appeal. By order dated May 9, 2011, this court dismissed the appeal as premature, stating: “[T]he written order and the family court’s accompanying remarks establish that further proceedings must occur before the court determines whether and how the cost and liability arising from the Chamberlain action should be allocated under section 2556. Because the order is not final for purposes of section 2556, it is not appealable. [Citation.]”

²⁰ The court sustained objections to all questions concerning the parties’ understanding of the meaning of the provisions of the 2009 judgment, finding it to be inadmissible parol evidence. The court stated repeatedly that the provisions were not ambiguous, and during the hearing, issued an order precluding the attorneys from asking either party about the interpretation of the agreement. Neither party challenges the court’s decision to exclude parol evidence.

interest—\$322,558.67 during the litigation and \$769,375 when the Sea View property sold. Beighle acknowledged that significant amounts of time were spent on appellant's earn-out counterclaim. He also acknowledged that some of the work included in the billing was contrary to respondent's interests, such as attempting to have her joined as a necessary party in the litigation and assisting appellant with the family law dispute.

Although the 2009 judgment assigned to appellant the costs of litigating claims related to the earn-out provisions of the Purchase Agreement and the court's February 2010 order stated that the omitted obligations were those related to Chamberlain's action for rescission and other affirmative relief, Beighle had made no attempt to allocate attorney fees between the defense of Chamberlain's action and the pursuit of appellant's earn-out counterclaim. He took the position that appellant's counterclaim had been filed defensively and that, in any event, all the claims and counterclaims were related, eliminating the need to differentiate. He was not asked by appellant's counsel to determine the percentage of attorney time spent on the earn-out counterclaim. When asked on cross-examination if any billing entries pertained to "whether or not Chamberlain had a right to obtain the escrow money," he replied "probably 50 percent or 75 percent" or "more" based on his belief that the escrow dispute and Chamberlain's general damage claims were one and the same. He did not explain how he arrived at that percentage or indicate that he had undertaken any review of the bills.

Appellant, too, initially testified that all the attorney fees and costs billed by Beighle's firm should be divided equally between himself and respondent as, in his view, the claims and counterclaims were related and the pursuit of the earn-out counterclaim may have induced Chamberlain into a more favorable settlement. As the hearing progressed, he made an attempt to allocate the fees for work on different issues in the litigation, a task rendered difficult by the fact that attorneys in Beighle's firm tended to include work on both the claims and counterclaims in the same entry.²¹ Appellant reviewed the bills and prepared an exhibit purporting to summarize the portion

²¹ To illustrate, an entry on one of the bills from Beighle's firm stated that an attorney spent 4.20 hours "draft[ing], edit[ing], and revis[ing] answer, affirmative defense, and counterclaims for purposes of preparing pleading for filing, and review amended complaint for purpose of finalizing answer and counterclaims." This is a form of "block billing," which occurs when "a block of time [is assigned] to multiple tasks rather than itemizing the time spent on each task." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010 [156 Cal.Rptr.3d 26]; see *Robinson v. City of Edmond* (10th Cir. 1998) 160 F.3d 1275, 1284, fn. 9 ["The term 'block billing' refers to 'the time-keeping method by which each lawyer . . . enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks' "]; *In re Tom Carter Enterprises, Inc.* (Bankr. C.D.Cal. 1985) 55 B.R. 548, 550 ["[R]ather than breaking out the time spent on each function on a daily basis, counsel has one charge for each day and then indicates all the services rendered during that day"].) In addition, multiple entries referred to work on the "summary judgment" motion without distinguishing

excludable as time spent on the earn-out counterclaim. He explained that if an entry for a single block of time indicated the attorney had performed work on multiple issues, one of which was the earn-out counterclaim, he would divide that block of time by the number of issues to arrive at the percentage attributable to each. He then multiplied the time in the entry by that percentage to arrive at the amount to exclude for work on the counterclaim.²² The court admitted the exhibit into evidence, but stated that appellant's formula did not appear to represent a reasonable approximation of the amount incurred for fees potentially recoverable from respondent, as it was "just multiply[ing] a gross number by a formula that [appellant] created."

After the court questioned his allocation exhibit, appellant tried another approach. He went through each of the billing statements he had received from Beighle's firm and marked entries for blocks of time that were, in his view, completely unrelated to his earn-out counterclaim. Many of these entries, however, reflected attorney time spent in ways that were antithetical to respondent's interests, such as work on the request to join respondent as a necessary party, or otherwise not specifically related to defending Chamberlain's claims, such as work on a tax issue. Appellant did not summarize these entries or present the court with a total of the fees they represented.²³ Moreover, in the midst of this testimony, appellant stated that he had changed his mind about a number of the billing entries he had marked, further confusing the record.

Respondent presented evidence to undermine appellant's attempted allocation. She prepared a spreadsheet summarizing time billed by the attorneys at Beighle's firm for work actively opposed to her interests, work on matters personal to appellant, and time spent on appellant's counterclaims, which she identified by the presence of the word "counterclaim" in the billing entry. She concluded \$297,410 of the amount billed fell into one of these categories. She did not attempt to allocate entries that did not include the term "counterclaim" but might have been related to it, such as work on the "summary judgment" or "discovery."

between opposing Chamberlain's or preparing appellant's. Similarly, references to work on "discovery" seldom indicated whether the discovery pertained to Chamberlain's claims, appellant's counterclaim or both.

²² The exhibit is not in the record, but according to the court's order, appellant estimated that the excludable amounts ranged from \$43,424 to \$164,307.

²³ The court inquired whether appellant intended to prepare a new exhibit. Counsel stated proper allocation would be dealt with in closing argument. Instead of closing argument, the parties filed posthearing briefs. Appellant's posthearing brief is not in the record provided by the parties.

3. September 2014 Order Resolving Respondent's Obligation to Share in the Costs of the Chamberlain Litigation

After hearing the evidence and reviewing the parties' posthearing memoranda, the court issued a written order denying appellant's request that respondent share in the settlement costs, attorney fees or other expenses of the Chamberlain litigation.²⁴ The basis for the court's denial was explained in a detailed written order.

The order reflected a change in the court's previously expressed view that the expenses of the action for rescission filed by Chamberlain were an undisposed of community obligation. Noting that paragraph 7(h) stated appellant was to indemnify and hold respondent harmless against liability on account of any "counter-claim . . . by Chamberlain," the court concluded that "whether Chamberlain filed a 'complaint' against [appellant] alone and not a 'cross-complaint' or 'counter-claim' against 'the parties'" was "immaterial," and that "[t]he timing or the technical name of pleadings that resulted in the Chamberlain Litigation should not control." The order explained, however, that this analysis represented a possible "alternative basis for the court's ruling," and that "the court does not, and need not, determine the cause based on this alternative consideration."

The order went on to explain that respondent was clearly not obliged to share in the cost of matters "not related to the defense of the Chamberlain lawsuit," such as attorney work performed in pursuit of appellant's earn-out counterclaim. Nor was she required to share in the expenses of "legal work . . . that was adverse to [her]." Thus, appellant was required to present credible evidence allocating the fees and costs. The court found that appellant "failed to carry his burden of proof to show the amounts he incurred as a result of the Chamberlain litigation are amounts for which [respondent] should be liable." Referencing appellant's attempt to untangle the entries in the attorneys' bills, the court stated: "Even on direct examination, [appellant] could not properly establish his arbitrary percentages to support his calculations for the billing statements of his attorney. Simply because [he] reconstructed billing statements as a means of supporting his claims, there was no foundation for the application of these calculations to support his requested recovery." The court further found: "[Appellant's] case in support of the

²⁴ In the proceedings below, appellant also sought to be compensated for his time and efforts in maintaining the Sea View property after the parties' separation and prior to its sale. Respondent contended that appellant breached the 2009 judgment and his fiduciary duty to her by transferring her share of the escrow account to Chamberlain without her express permission. The court found that appellant was entitled to no compensation for his efforts in connection with the Sea View property. It rejected respondent's claim that appellant had breached his fiduciary duty to her in connection with the funds in the escrow account. The parties do not challenge these findings.

amount of the billing chargeable to [respondent] is nothing more than speculative recasting of past block billing statements of his attorneys which are buttressed by his own self-serving conjecture as to a percentage of the work that should be chargeable to [respondent].” In short, appellant’s attempts to allocate the fees was based on “speculative unsubstantiated assumptions,” and devoid of “reliable, credible evidence.”²⁵

With respect to the cost of settlement, the court ruled that respondent would not be required to reimburse appellant for a share of the additional \$1 million, plus interest, he paid Chamberlain to settle the litigation. The court concluded that the interest was appellant’s responsibility, and that the settlement was not a “community settlement,” because respondent and the community were not included in the settlement agreement or the release.

4. November 2014 Order Awarding Respondent Attorney Fees as the “Prevailing Party” in the Underlying Family Law Proceeding

After the court denied appellant’s request for reimbursement, both sides sought an award for the attorney fees and costs of the underlying family law proceeding. Appellant based his claim to entitlement on a traditional family law need-based theory (§ 2030).²⁶ He further contended he was entitled to attorney fees as sanctions (§ 271).²⁷ Respondent also sought fees under section 271, but primarily contended she was entitled to fees as the prevailing party under the attorney fee provision in the 2009 judgment.²⁸

²⁵ The court also found that the dollar amount of appellant’s claim was “padded,” pointing to \$140,000 in interest charges and improperly included or “double count[ed] . . . travel and other expenses.” The court found that excluding such amounts would reduce the attorney fees to approximately \$810,000.

²⁶ Subdivision (a)(1) of section 2030 provides: “In a proceeding for dissolution of marriage, . . . and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation . . . to preserve each party’s rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party’s attorney, whatever amount is reasonably necessary for attorney’s fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.”

²⁷ Section 271, subdivision (a), provides: “Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.”

²⁸ Paragraph 38(b) stated: “If either party files an Order to Show Cause or other proceeding to interpret or enforce any of the provisions of this Judgment, the Court shall award the prevailing party his or her actual attorneys’ fees, accountants’ fees, other experts’ fees, and costs reasonably and necessarily incurred in connection therewith without regard to need or ability to pay.”

In an order filed November 17, 2014, the court rejected both sides' requests for fees as sanctions under section 271, stating: "The parties had a legitimate dispute concerning the Chamberl[a]in litigation." The court found the secondary claims pursued by the parties "lacked merit," but "d[id] not conclude that it was unreasonable for the parties to assert [them]." Concerning appellant's need-based theory, the court stated that "[i]f fees were recoverable under section 2030, it is arguable that [appellant] might have a basis for recovery" because "[he] had substantially higher attorney's fees and costs associated with the litigation." It found, however, that "the parties contracted for a prevailing party standard in lieu of section 2030" based on paragraph 38(b), citing *In re Marriage of Guilardi* (2011) 200 Cal.App.4th 770 [132 Cal.Rptr.3d 798].

The court then examined the parties' entitlement to attorney fees and costs under the 2009 judgment's fee provisions. The court found that each party prevailed on some issues: respondent prevailed on the issues related to the expenses of the Chamberlain litigation and appellant's claim for compensation for maintaining the Sea View property, and appellant prevailed on respondent's claim of breach of fiduciary duty. Offsetting the fees attributable to the countervailing claims, the court awarded respondent \$391,915.86.²⁹ Appellant noticed appeals of the court's September 2014 and November 2014 orders.³⁰ The appeals were consolidated.

DISCUSSION

A. Status of Chamberlain Litigation Debt

1. Status as Community Debt

■ Preliminarily, we explain why the expenses of the Chamberlain litigation—the attorney fees and costs, as well as the settlement incurred—would be a community debt in the absence of any alternative arrangement between the parties.³¹ Under California law, "all property . . . acquired by a

²⁹ Although respondent's appeal of the February 2010 order had been dismissed, the court concluded that the appeal "advance[d] the principal object of the litigation," and included the fees expended on the appeal in her award.

³⁰Appellant is represented by new counsel on appeal.

³¹ Generally, appellate review of a trial court's resolution of the character of a particular item of property as separate or community "is limited to a determination of whether any substantial evidence supports the finding." (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 849 [21 Cal.Rptr.2d 642].) Where, as here, the resolution "requires a critical consideration, in a factual context, of legal principles and their underlying values," the determination involves "a mixed question of law and fact that is predominantly one of law," and is reviewed de novo. (*In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1015 [16 Cal.Rptr.3d 220]; accord, *In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 734 [91 Cal.Rptr.3d 427].)

married person during the marriage while domiciled in this state is community property” (§ 760), including the fruits of both spouses’ “expenditures of time, talent, and labor” (*In re Marriage of Dekker, supra*, 17 Cal.App.4th at p. 850.) Thus, although it was a sole proprietorship held in appellant’s name, IEI was community property—and the profit derived from the sale of IEI to Chamberlain was community profit. (See *id.* at p. 851 [“It is well settled in California that income produced by an asset takes on the character of the asset from which it flows”].)

■ As the obligations arising from the sale of IEI to Chamberlain were incurred during the marriage, the community estate was liable for them. (*Lezine v. Security Pacific Fin. Services, Inc.* (1996) 14 Cal.4th 56, 64 [58 Cal.Rptr.2d 76, 925 P.2d 1002] (*Lezine*); § 910, subd. (a) [community is liable for “a debt incurred by either spouse . . . during marriage, regardless of which spouse has the management control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt”]; see *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 942 [43 Cal.Rptr.3d 468] [where husband entered into contract on behalf of family business, “[wife] with a community property interest in the business, . . . would be legally obligated to pay a judgment against him”]; *Reynolds and Reynolds v. Universal Forms, Labels* (C.D.Cal. 1997) 965 F.Supp. 1392, 1396 [where multiple couples were sued based on husbands’ alleged violations of contractual promises of confidentiality, court dismissed wives, but observed that plaintiff could potentially recover from the couples’ community estates].)³²

■ As explained in *In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 622–626 [47 Cal.Rptr.2d 312] (*Feldner*), the conclusion that the community is responsible for breaches of contract committed by either spouse follows from a reading of two related provisions in the Family Code: (1) section 903, which states that “‘a contract . . . debt’ is ‘incurred’ . . . [when] the contract is made” and (2) section 910, which states that “‘[e]xcept as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse . . . during marriage’” (*Feldner, supra*, 40 Cal.App.4th at p. 622, quoting §§ 903 & 910.) “When [sections 903 and 910 are] read together . . . , the effect . . . is to characterize contract debts as community [debts] when the contract is ‘made’ . . . during the marriage.” (40

³² As our Supreme Court explained in *Lezine*, community property is liable to third party creditors not only for “debts incurred for the benefit of the community,” but also for “debts incurred by one spouse alone exclusively for his or her own personal benefit.” (*Lezine, supra*, 14 Cal.4th at p. 64.) A spouse who has incurred debt solely for his or her own benefit “may be required to reimburse the community for the misuse of community assets” (*Ibid.*) However, as is discussed further in part A.4., *post*, the community estate received the entire benefit of the contract with Chamberlain—the \$12 million Chamberlain paid was used to pay off loans on the Sea View property, and the remaining cash was divided equally by the parties after the dissolution. Accordingly, there is no basis for reimbursement.

Cal.App.4th at p. 622; accord, *In re Soderling* (9th Cir. 1993) 998 F.2d 730, 733 [“Under California law, all community property is liable for debts of either spouse incurred . . . during marriage. [Citations.] In this context, a ‘debt’ is ‘an obligation incurred by a married person . . . during marriage, whether based on contract, tort, or otherwise’ ”].)

Here, the contractual obligation was incurred during the marriage, but the suit seeking to enforce the obligation did not commence until after the couple dissolved the marriage. As the reasoning of the *Feldner* court makes clear, this had no bearing on the community status of the liability. In *Feldner*, the husband, a contractor, entered into a contract to build—and essentially completed—a structure during the marriage, but failed to perform necessary repair work after the couple had separated. The husband was sued for breach of contract, and the wife contended the liability had been “‘incurred’ ” postseparation, when the husband ceased his repair efforts. (*Feldner, supra*, 40 Cal.App.4th at pp. 621–622.) The family court found the “entire liability represented by the suit was community in character,” subjecting the wife to “half the potential liability from the suit,” and the appellate court affirmed: “The character of the debt is clearly community because the contract giving rise to the debt was . . . ‘made’ during the marriage. All the consideration given (the promise to build and, if necessary, do any remedial work to make the building conform to the agreed plans) and received (the right to a lump sum payment) was exchanged before separation.” (*Feldner, supra*, at p. 619, italics omitted.) Put another way, “[t]he consideration [for the contract] . . . [was] necessarily exchanged . . . [at] the time of the exchange of promises . . .” (*Id.* at pp. 623–624.) Because this occurred during the marriage, “there can be no doubt that the trial court was correct in determining that the character of the potential liability from the . . . lawsuit . . . was community.” (*Id.* at p. 625.)

Although *Feldner* did not specifically address attorney fees or other litigation costs, the obligation of both spouses to pay their share was implicit in the court’s affirmation of the trial court’s ruling that the “entire liability represented by the suit” was a community obligation. (*Feldner, supra*, 40 Cal.App.4th at p. 619.) An explicit holding that separated spouses are obliged to share in the costs of defending lawsuits threatening community assets can be found in *In re Marriage of Hirsch* (1989) 211 Cal.App.3d 104 [259 Cal.Rptr. 39]. There, the husband had been a member of the board of directors of a bank during the marriage, receiving remuneration which was undisputedly community property. (*Id.* at p. 106.) After the parties separated, he was named as a defendant in multiple lawsuits against the board, asserting both tort and contract claims. (*Ibid.*) He settled the lawsuits and sought reimbursement from his estranged wife for one-half the amount expended in settling, including attorney fees and costs. (*Ibid.*) The trial court denied reimbursement, finding that as the litigation was the result of the husband’s

“tortious conduct,” its expenses should be his separate responsibility. (*Id.* at p. 108.) The Court of Appeal reversed, holding that the husband could be denied his claim for one-half the costs of the litigation only if the court found that his conduct was “intentional” *and* that there had been “no benefit to the community.” (*Id.* at p. 110.) Because “even criminal or intentionally tortious conduct which results in obtaining substantial ill-gotten assets for the community creates a shared community debt,” there was “no legitimate basis to characterize the settlement obligations as [the husband’s] separate debt.” (*Id.* at p. 111.)

■ The fact that the expenses of the Chamberlain litigation ordinarily would be a community obligation subject to equal division under the Family Code is, however, immaterial if such expenses were dealt with in the 2009 judgment. “ ‘A property settlement agreement . . . that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court’ ” even if it results in a “lopsided division of community property . . .” (*In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 897–898 [163 Cal.Rptr.3d 551]; accord, *Mejia v. Reed* (2003) 31 Cal.4th 657, 666 [3 Cal.Rptr.3d 390, 74 P.3d 166] [although family court charged with dividing couple’s assets and liabilities is generally obliged to divide them equally, no law requires the couple to do so, “and the court does not scrutinize the [marital settlement agreement] to ensure that it sets out an equal division”].) Accordingly, we turn to the issue whether the Chamberlain litigation, or any part of it, was addressed in the 2009 judgment.

2. Status as an Omitted Debt Under the 2009 Judgment

a. Neither Paragraph 7(g) nor 7(h) of the Judgment Addressed a Lawsuit by Chamberlain for Rescission or for Claims in Excess of \$1 Million

Appellant contends that the possibility that Chamberlain would initiate litigation seeking rescission of the Purchase Agreement or damages in excess of the \$1 million in the escrow account was not contemplated by the parties in June 2009. Thus, no provision addressing this possibility was included in the 2009 judgment, and the amount incurred to settle Chamberlain’s claims, as well as a portion of the expenses incurred litigating them, constituted an omitted obligation subject to division by the court under section 2556. Respondent contends the final sentence of paragraph 7(h) relieves her of the obligation to share the cost of any litigation between appellant and Chamberlain, with the exception of litigation over the \$1 million in the escrow account. For the reasons discussed, we agree with appellant.

■ “Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of

contracts generally.” (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439 [64 Cal.Rptr.2d 766].) The primary object of contract interpretation is to ascertain and carry out the mutual intention of the parties at the time the contract was formed, determined from the writing alone, if possible. (Civ. Code, §§ 1636, 1639; *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238 [52 Cal.Rptr.2d 82, 914 P.2d 160]; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 [71 Cal.Rptr.2d 830, 951 P.2d 399].) When the language of a contract is “clear, explicit, and unequivocal, and there is no ambiguity, the court will enforce the express language.” (*In re Marriage of Iberti, supra*, 55 Cal.App.4th at p. 1440).³³

■ “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (Civ. Code, § 1641.) This means that “[c]ourts must interpret contractual language in a manner which gives force and effect to every provision” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329], italics omitted), and avoid constructions which would render any of its provisions or words “surplusage.” (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 [105 Cal.Rptr.3d 404, 225 P.3d 538].) Put simply, “[a] contract term should not be construed to render some of its provisions meaningless or irrelevant.” (*Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1754, fn. 4 [34 Cal.Rptr.2d 449].)

■ We also follow the rule that the language of a provision should be construed in context, in view of the intended function of the provision and of the contract as a whole. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 [10 Cal.Rptr.2d 538, 833 P.2d 545].) This may require inquiry into the circumstances under which the contract was made. (Civ. Code, § 1647; *Medical Staff of Doctors Medical Center in Modesto v. Kamil* (2005) 132 Cal.App.4th 679, 683 [33 Cal.Rptr.3d 853].) “‘We interpret words in a contract in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. [Citation.]’” (*Starlight Ridge South Homeowners Assn. v. Hunter-Bloor* (2009) 177 Cal.App.4th 440, 447 [99 Cal.Rptr.3d 20].) When possible, courts

³³ If the trial court finds an ambiguity (two or more reasonable interpretations of contractual language), it may receive parol evidence to aid in determining the parties’ intentions. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [6 Cal.Rptr.2d 554].) When no parol evidence is introduced or when the evidence is not conflicting, “construction of the instrument is a question of law, and the appellate court will independently construe the writing.” (*Id.* at p. 1166.) In other words, we defer to the trial court’s interpretation of a contract only where an ambiguity exists, parol evidence is admitted, and the parol evidence is in conflict. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351 [8 Cal.Rptr.3d 649]; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913 [75 Cal.Rptr.2d 573].) Here no parol evidence was admitted. Thus, we independently interpret the parties’ agreement by applying the relevant principles of contract interpretation. (*California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 143–145 [78 Cal.Rptr.3d 561].)

should “‘avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.’” (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269 [35 Cal.Rptr.3d 343]; accord, *Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1013 [146 Cal.Rptr.3d 90].)

The two provisions of the 2009 judgment that refer to the prospect of litigation with Chamberlain are paragraphs 7(g) and 7(h). Neither their plain language nor the circumstances that prevailed when they were drafted indicate that they were intended to cover the rescission-related claims Chamberlain pursued in the Washington district court. Paragraph 7(g) provided that the right, title and interest in any claim on the escrow funds was to be divided equally between the parties, and that the parties “shall pay the cost of pursuing such claim (including attorneys’ fees) equally.” The \$1 million in escrow funds were part of the sale price for IEI, set aside to provide compensation to Chamberlain if it discovered a breach. In the two months preceding the entry of the 2009 judgment, Chamberlain submitted a formal written claim against the funds, contending a handful of IEI products did not comply with regulations and estimating its damages and the cost of mitigation to be approximately \$300,000. Thus, the parties included paragraph 7(g), covering contemplated litigation with Chamberlain over alleged breaches of contract, but limiting the scope of damages to the \$1 million in the escrow account.

During the same general time frame, appellant became increasingly unhappy over Chamberlain’s failure to produce and sell IEI products and generate earn-out payments. He and respondent held discussions with an attorney about pursuing a claim against Chamberlain under the earn-out provisions, but respondent wanted nothing to do with the risks associated with a claim of this type and was willing to forgo any potential benefits. Paragraph 7(h) addressed the possibility that appellant would pursue a claim under the earn-out provisions of the Purchase Agreement. The first sentence specified that appellant would own “[a]ll right, title and interest” in any such claim. The second relieved respondent of any “obligation to pay all or any part of the cost of pursuing any such claim (including attorneys’ fees).” The final sentence obligated appellant to “indemnify and hold respondent harmless against liability on account of any counter-claim or cross-complaint that may be filed by Chamberlain,” excluding a claim covered by 7(g). Thus, by its terms, paragraph 7(h) addressed the respective rights and obligations of the parties if appellant pursued a claim against Chamberlain under the earn-out provisions, and Chamberlain was provoked into a counterclaim or cross-claim by such suit. Paragraph 7(h) said nothing about a claim or complaint initiated by Chamberlain, and did not address the possibility that Chamberlain would sue to rescind the entire contract and recoup the purchase price.

Respondent argues that the final sentence of paragraph 7(h) should be interpreted to require appellant to indemnify her for the expenses of *any* litigation between appellant and Chamberlain, other than that related to the escrow funds. Such an interpretation effectively eliminates the prefixes in the words “counter-claim” and “cross complaint.” Moreover, it ignores the context in which the sentence appears—a paragraph dealing with the consequences of appellant’s potential assertion of a claim against Chamberlain over the earn-out provisions. Taken in that context, 7(h) can reasonably be read to relieve respondent of liability only for the consequences of a claim appellant might assert under the earn-out provisions, and to which Chamberlain might respond with a cross-complaint or counterclaim. In sum, neither 7(g) nor 7(h) addressed the possibility of an action by Chamberlain to unwind the multi-million dollar Purchase Agreement.³⁴

b. No Other Provision of the 2009 Judgment Addressed Chamberlain’s Rescission-related Claims

Respondent argues that the expenses of defending and settling Chamberlain’s claims were covered by provisions of the 2009 judgment other than paragraphs 7(g) and 7(h). First, she raises paragraph 34(a), the paragraph dealing with claims between appellant and respondent in existence in June 2009, under which appellant agreed to release respondent from claims “which exist or which [appellant] may claim to exist in favor of [appellant] and against respondent with regard to or arising out of any transaction or event that occurred prior to the date of this Judgment.” She asserts that in paragraph 34(b), appellant released all his claims for costs or liabilities against respondent arising out of the Purchase Agreement. We reject this argument, as appellant had no claim against respondent under the Purchase Agreement. Chamberlain and appellant had potential claims against each other, which had not yet ripened into actual litigation when the 2009 judgment was executed. Appellant’s claim against respondent for litigation expenses arose a month later, when Chamberlain filed the lawsuit, and appellant began paying the expenses of the litigation without contribution from respondent.

Next, respondent contends that appellant is solely responsible for the expenses of the Chamberlain litigation because under paragraph 10(f), he agreed that any community debt not provided for in the 2009 judgment would be paid by “the party who incurred such debt.” As we have seen, the community “incurred” the debt by virtue of the fact that the contractual obligations arose during the marriage. (*Lezine, supra*, 14 Cal.4th at pp. 63–64; *Feldner, supra*, 40 Cal.App.4th at p. 619.)

³⁴ While paragraph 7(g) did not address the costs of an action for rescission or of defending a multi-million dollar claim for damages, it did manifest the parties’ intention that any reduction in the purchase price resulting from claims of defective products would be born equally by the parties.

■ In a similar vein, respondent points out that paragraph 10(g) provides that “[e]ach party shall pay all debts incurred by such party after the date of separation,” and claims that all the attorney fees and other expenses incurred during the Chamberlain litigation fit into this category. It is true that appellant took the responsibility of hiring attorneys, ensuring they were paid, and settling the litigation, but this does not mean he alone “incurred” the obligation. A spouse or former spouse cannot transform a debt incurred by the community into separate debt by refusing to participate and forcing the other spouse to bear the entire burden of protecting the community’s interest. (*In re Marriage of Hirsch, supra*, 211 Cal.App.3d at pp. 110–111; see also *In re Cohen* (Bankr. C.D.Cal. 2014) 522 B.R. 232, 241–242, 244–245 [where taxes were incurred but not paid during the marriage, fact that postseparation, husband entered into settlement with IRS without wife’s participation or consent did not transform obligation into one “‘incurred’ ” after the marriage, or exonerate the community or wife]; *Reynolds and Reynolds v. Universal Forms, Labels, supra*, 965 F.Supp. at p. 1397 [innocent spouse who declined to participate in litigation over alleged misconduct that allegedly benefitted the community “cannot later contest the determinations of liability and community responsibility made in that [spouse’s] absence”].)

Finally, respondent contends that paragraph 13(c) allocates all responsibility for the Chamberlain litigation to appellant. Paragraph 13 covers “Separate Liabilities.” Paragraph 13(c) provides that “neither party has an obligation to pay any expense incurred by the other except as provided in this Judgment,” and that “[u]nless the parties agree to allocate payment responsibility between themselves for an expense incurred by one of them, the expense shall be paid by the party who incurred it, who shall indemnify and hold the other party harmless against liability on account thereof.” As discussed *ante*, the expenses of defending Chamberlain’s claims were a community liability, not a separate one, and were incurred by the community, not by appellant separately. In sum, none of the alternate provisions raised by respondent to support her contention that appellant is solely responsible for the costs of defending Chamberlain’s claims applies.

3. *Res Judicata*

■ Respondent contends that principles of res judicata preclude appellant from pursuing his claim for reimbursement of litigation expenses and settlement costs, contending the 2009 judgment was binding on issues that “could have been” raised prior to its entry. As explained in *In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492 [136 Cal.Rptr.3d 887], “once a marital dissolution judgment has become final, the court loses jurisdiction to modify or alter it. [Citations.] Under the doctrine of res judicata, ‘[i]f a property settlement is incorporated in the divorce decree, the settlement is

merged with the decree and becomes the final judicial determination of the property rights of the parties.”” (*Id.* at p. 499.) However, there are exceptions, including the one covered by section 2556: the trial court may divide a community property asset or liability that has not been “‘previously adjudicated by a judgment in the proceeding.’” (*In re Marriage of Thorne & Raccina*, at pp. 500–501, quoting § 2556.)³⁵ “[T]he crucial question is whether the [asset or liability was] actually litigated and divided in the previous proceeding.” (*In re Marriage of Thorne & Raccina*, at p. 501, quoting *Miller v. Miller* (1981) 117 Cal.App.3d 366, 371 [172 Cal.Rptr. 745]; accord, *In re Marriage of Georgiou & Leslie* (2013) 218 Cal.App.4th 561, 575 [160 Cal.Rptr.3d 254].) “The mere mention of an asset in the judgment is not controlling.” (*In re Marriage of Thorne & Raccina, supra*, 203 Cal.App.4th at p. 501.)³⁶

Here, for the reasons discussed, we conclude the obligations deriving from the Chamberlain-initiated rescission claim were not addressed in the 2009 judgment. Accordingly, the doctrine of res judicata does not preclude appellant’s claim for a share of the expense of defending and settling the litigation.

4. Unclean Hands

Section 2556 provides that the court “shall equally divide the omitted or unadjudicated community estate asset or liability,” unless it “finds upon good cause shown that the interests of justice require an unequal division of the asset or liability.” Respondent contends that she should escape all liability for the expenses of the Chamberlain litigation under section 2556 because appellant has “‘unclean hands.’” The facts on which respondent relies, however, would not permit the court to impose on appellant the entire obligation of defending and settling Chamberlain’s claims.

³⁵ The rule that division of a community asset or liability is not precluded by collateral estoppel or res judicata merely because it could have been disposed of in a prior judgment of dissolution predates the enactment of section 2556. (See *Henn v. Henn* (1980) 26 Cal.3d 323, 331, fn. 6 [161 Cal.Rptr. 502, 605 P.2d 10] [disapproving proposition that “any judicial division of community property necessarily preclude[d] the subsequent litigation of community property rights in an asset known to exist at the time of the earlier proceedings, and which could have been adjudicated at that time”].)

³⁶ *In re Marriage of Mason* (1996) 46 Cal.App.4th 1025 [54 Cal.Rptr.2d 263], on which respondent relies, is inapposite. In *Mason*, the husband moved to set aside a stipulated dissolution judgment on the ground of fraud, contending the wife had concealed the fact that she was planning to reopen a business she had closed prior to the divorce. After the motion was denied, the husband filed an order to show cause, contending for the first time that the value of the goodwill of the wife’s business was an omitted asset under section 2556. The Court of Appeal held that all issues pertinent to the wife’s business should have been raised when the husband first moved to set aside the judgment. The court did not suggest the dissolution judgment itself operated as a bar.

Respondent asserts that she “was not a shareholder, officer, director or employee of IEI and had no involvement in the business,” that she “did not participate in the sale or the negotiation of the sale,” that she “did not sign the [Purchase Agreement],” that she was unaware that appellant “had falsely represented to Chamberlain [in the Purchase Agreement] that all of IEI’s products were compliant with all laws and regulations,” and that appellant “had far more knowledge about the potential Chamberlain Litigation than [she].” She contends appellant’s conduct in “illegally manipulating and selling his products in violation of FCC regulations . . . is substantial evidence of good cause to support the trial court’s finding that all of the Chamberlain Litigation liabilities and expenses should be allocated to [appellant].”³⁷

■ The fact that a spouse has intentionally engaged in misconduct that harms a third party without his or her spouse’s knowledge does not relieve the community—or the innocent spouse’s share of community assets—from the obligation to the third party where the community obtained the benefit of the conduct. (See, e.g., *In re Marriage of Hirsch*, *supra*, 211 Cal.App.3d at p. 111 [criminal or tortious conduct which results in benefit to the community creates “shared community debt”]; *In re Marriage of Bell* (1996) 49 Cal.App.4th 300, 310 [56 Cal.Rptr.2d 623] [at time of dissolution and division of community assets, equal share of the cost of reimbursing victim of wife’s embezzlement fell on husband, where “there was uncontradicted testimony that the community received the benefit of the embezzlement”]; see also *In re Marriage of Schultz* (1980) 105 Cal.App.3d 846, 855–856 [164 Cal.Rptr. 653] [husband’s negligent failure to appear in court to defend action brought by creditor, resulting in default judgment, did not “require[] an unequal division of the . . . debt”]; § 910, subd. (a).) Assuming the truth of the allegations that appellant deliberately misrepresented the status of IEI’s products, his doing so necessarily furthered the goal of selling the company to Chamberlain for the agreed price. Thus, his actions benefitted the community and the obligations that derived from them cannot be unequally divided by the court on that basis.

Respondent contends we should follow *In re Marriage of Stitt* (1983) 147 Cal.App.3d 579 [195 Cal.Rptr. 172]. *Stitt* is distinguishable. There, the wife, after being convicted of embezzlement, was sued for fraud and misappropriation of funds. She paid over \$10,000 in attorney fees to defend herself and to reimburse the wronged party. (*Id.* at p. 584.) She argued these expenses should be regarded as community debt. (*Id.* at p. 586.) However, she

³⁷ The court below found that appellant “did not disclose to Chamberl[a]in that IEI products were not in compliance with federal standards and regulations; and he attempted to hide this information from Chamberl[a]in.” The court also found that appellant “withheld information from [respondent] concerning IEI’s noncompliance with federal regulations regarding the radio frequency limitations.”

presented “no evidence the embezzlement jointly benefited husband and wife.” (*Ibid.*) Because the husband did not participate in the embezzlement and no benefit to the community was shown, the court concluded “[n]o principle of law required the innocent spouse to share the loss created by the [other].” (*Id.* at p. 588.) Here, there was a clear benefit to the community. Respondent and appellant received over \$12 million from the sale of IEI, the bulk of which went into the Sea View property. They split \$1.5 million at the time of separation, and the Sea View property sold for \$8.7 million in 2013. The principle we follow was set forth in *In re Marriage of Bell*, where the wife used the embezzled funds for the benefit of the community: “The community . . . shared in the benefit and could properly be asked to share in the cost.” (*In re Marriage of Bell, supra*, 49 Cal.App.4th at p. 310.)

B. Cost of Settlement

Our conclusion that the liability arising out of Chamberlain’s claims was a community obligation omitted from the 2009 judgment requires us to reverse the court’s conclusion that respondent had no obligation to contribute her share of the \$2 million settlement. The court’s finding that respondent was relieved of the obligation because appellant settled with Chamberlain without including respondent or the community in the settlement or release misconstrues the effect of the settlement. Appellant’s actions were the conduit through which Chamberlain could assert a claim on community funds, including those held by respondent. Having settled its claims against appellant and received payment of the amount due, Chamberlain had no basis to pursue respondent or the community. (See *Reynolds and Reynolds v. Universal Forms, Labels, supra*, 965 F.Supp. at pp. 1395–1397 [although judgment against spouse acting for benefit of the community binds community estate and his separate property, innocent spouse has no personal liability].)

C. Attorney Fees and Costs

1. Fees in the Chamberlain Litigation

Our conclusion does not, however, resolve respondent’s obligation to pay a share of the attorney fees and costs arising from that litigation. Although the court concluded that paragraph 7(h) assigned all the fees and costs of the Chamberlain litigation—including the cost of defending Chamberlain’s rescission-related claims—to appellant, it rejected appellant’s fee request on an alternative ground. It found that appellant’s reimbursable fees and costs could not include the expenses of pursuing his earn-out counterclaim under any interpretation of the 2009 judgment, and that appellant failed to meet his burden of establishing the amount of his reimbursable fees and costs. We agree.

Appellant concedes the court was correct to describe the billing entries at issue as “block billing.” He further concedes that the court “correctly said that [respondent] would not be responsible for any . . . fees incurred in working against her interests,” and that appellant’s own attempt to allocate fees between allowed and disallowed claims was “too speculative to be valuable.” He contends, however, that substantial evidence to support his claim for attorney fees can be derived from (1) Beighle’s testimony that “probably 50 percent to 75 percent” or “more” of the billed time was devoted to whether “Chamberlain had a right to obtain the escrow money”; and (2) respondent’s spreadsheet, in which she attempted to identify billing entries reflecting work on issues not pertinent to defending Chamberlain’s claims. We disagree.

Preliminarily, we observe that appellant has directed us to nothing in the record demonstrating that he urged the trial court to allocate between reimbursable and unreimbursable fees based on Beighle’s estimation or respondent’s spreadsheet. “As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried [I]t would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.’” (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [119 Cal.Rptr.3d 253], quoting Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2009) ¶ 8.229, p. 8-155 (rev. # 1, 2009).)

■ More important, the court’s conclusion is supported by the principles governing the scope of evidence necessary to support a fee award, especially where block billing is involved. “[T]he [party] . . . seeking fees and costs ‘bear[s] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.’ [Citation.]” (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 [81 Cal.Rptr.3d 866].) “To that end, the court may require [a] defendant[] to produce records sufficient to provide ‘a proper basis for determining how much time was spent on particular claims.’” [Citation.]” (*Ibid.*) “The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended. [Citation.]” (*Ibid.*) “The court . . . may properly reduce compensation on account of any failure to maintain appropriate time records. [Citation.]” (*Ibid.*)

■ Block billing presents a particular problem for a court seeking to allocate between reimbursable and unreimbursable fees, and trial courts are granted discretion “to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not.” (*Heritage*

Pacific Financial, LLC v. Monroy, supra, 215 Cal.App.4th at p. 1010; accord, *Welch v. Metropolitan Life Ins. Co.* (9th Cir. 2007) 480 F.3d 942, 948 [“The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. [Citation.] It was reasonable for the district court to conclude that [the applicant] failed to carry her burden, because block billing makes it more difficult to determine how much time was spent on particular activities”].) “If counsel cannot . . . define his billing entries so as to meaningfully enlighten the court of those related to the [fee claim],” the trial court may “exercise its discretion in assigning a reasonable percentage to the entries,” or “simply cast them aside.” (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689 [98 Cal.Rptr.2d 263].)

It also is true that when a fee claim is inflated with “a multitude of time entries” devoted to matters other than reimbursable fees, the claimant’s credibility is “undermin[ed],” and the court is “justified . . . in taking a jaundiced view of the fee request.” (*Christian Research Institute v. Alnor, supra*, 165 Cal.App.4th at p. 1325.) “An attorney’s chief asset in submitting a fee request is his or her credibility, and where vague, block-billed time entries inflated with noncompensable hours destroy an attorney’s credibility with the trial court, we have no power on appeal to restore it.” (*Id.* at pp. 1325–1326.)

In its February 2010 order, the court found that the liabilities of the parties “with respect to the action for rescission and other related relief” filed by Chamberlain against appellant in the Washington district court constituted an undisposed of obligation under the 2009 judgment; it specifically rejected appellant’s contention that *all* the costs of the litigation fell into this category. Appellant thus had both notice and incentive to come to the evidentiary hearing prepared to address allocation. Instead, he claimed entitlement to one-half of all the attorney fees he paid to Beighle’s firm, although Beighle himself acknowledged substantial time was spent pursuing the earn-out counterclaim. Moreover, even a cursory look at the bills established that the firm had spent significant time on matters personal to appellant or contrary to respondent’s interests. Appellant undertook at the last minute to fill in the gap in the evidence by personally reviewing the bills and preparing an exhibit summarizing them, but the court found his methods questionable and gave no credence to his testimony or the exhibit he prepared.

On appeal, appellant does not dispute the court’s conclusion that the evidence he presented was of little value in resolving the attorney fee allocation issue. The evidence he now claims the court should have relied on does not fill in the gaps. With respect to Beighle’s estimate, “[t]he trial court is not bound by an attorney’s evidence in support of his requested fee.” (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 524 [198 Cal.Rptr. 725].)

Beighle repeatedly testified to his belief that all fees billed by his firm should be shared between appellant and respondent. Not only had he made no effort to identify entries related to the earn-out counterclaim, he failed to separate out time spent on matters unrelated to the litigation or adverse to respondent. Nor was there any evidence he had reviewed the bills in preparation for his testimony or even thought about allocation. Looked at in the context of his testimony as a whole, his offhand statement that “probably 50 percent or 75 percent” or “more” was spent on “whether or not Chamberlain had a right to obtain the escrow money” did not represent a reasoned conclusion concerning the amount of time devoted to defending Chamberlain’s affirmative claims to which the court was required to give credence.

We also reject appellant’s alternative contention that the spreadsheet prepared by respondent was sufficient to support an award. Respondent, a lay person unfamiliar with the Washington litigation or the billing records, relied on appellant’s documents to discredit his claim. Her review of the records attempted to identify work done on matters adverse to her interest, unrelated to the Chamberlain litigation or labeled as relating to the counterclaim. Such a review could not substitute for an adequate breakdown of the time spent on Chamberlain’s rescission-related claims. In sum, neither Beighle’s estimation nor respondent’s spreadsheet made up for the shortfalls in appellant’s evidentiary presentation, and the trial court did not err in rejecting the attorney fees claim for lack of evidence.

2. Fees in the Underlying Proceedings

The trial court determined that the costs of the instant litigation were governed by paragraph 38(b) of the 2009 judgment, which called for an award of attorney fees and costs to the prevailing party in any proceeding brought “to interpret or enforce any of the provisions of this Judgment.” We reject appellant’s argument that the proceedings below did not represent an effort to “interpret or enforce” the judgment because “an omitted debt is outside the Judgment.” His motion under section 2556 required the court to interpret the 2009 judgment, particularly paragraphs 7(g) and 7(h), to determine whether the Chamberlain litigation, or any part of it, fell under its terms. Where the litigation centers on the proper interpretation of a contract containing an attorney fee provision, a party is entitled to attorney fees as prevailing party under Civil Code section 1717 “even when the party prevails on grounds the contract is inapplicable” (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 [39 Cal.Rptr.2d 824, 891 P.2d 804].) Moreover, the court found, contrary to appellant’s assertion, that fees incurred to pursue his earn-out counterclaim were included in the judgment and therefore were not allocable to respondent. Accordingly, there is no question that the underlying litigation interpreted and enforced the judgment, allowing the court discretion to award attorney fees under the contractual attorney fee provision.

■ Nevertheless, our conclusion that appellant is entitled to recover from respondent one-half the additional one million dollars he paid Chamberlain requires reversal of the court's award of attorney fees to respondent under the attorney fee provision of the 2009 judgment, and to remand for reconsideration of the identity of the prevailing party, if any. (See *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 [86 Cal.Rptr.2d 614, 979 P.2d 974] ["If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees"]; *Hsu v. Abbara, supra*, 9 Cal.4th at p. 876 ["[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions' "].)

DISPOSITION

The court's order of September 10, 2014, is reversed with respect to its denial of reimbursement for one-half the settlement funds appellant paid Chamberlain. In all other respects, the order is affirmed. The court's order of November 17, 2014, awarding attorney fees to respondent is reversed. The matter is remanded for entry of an order requiring respondent to reimburse appellant one-half the settlement paid to Chamberlain from appellant's individual funds, and for reconsideration of attorney fees in the family court proceeding. Each party is to bear his or her own costs.

Epstein, P. J., and Willhite, J., concurred.

On October 14, 2016, the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied December 14, 2016, S238203.

[No. A144049. First Dist., Div. Two. Sept. 26, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
NICHOLAS ALLEN NASSETTA, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Sejal H. Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Seth K. Schalit and John H. Deist, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MILLER, J.—Defendant Nicholas Allen Nassetta pleaded no contest to possession for sale of cocaine (Health & Saf. Code, § 11351) and driving under the influence (DUI) with a prior DUI conviction (Veh. Code, § 23152, subd. (e)), and was placed on formal probation for five years. Among the terms and conditions of probation, the court imposed a curfew from 10:00 p.m. to 6:00 a.m.

Nassetta contends the curfew condition is invalid under *People v. Lent* (1975) 15 Cal.3d 481 [124 Cal.Rptr. 905, 541 P.2d 545] (*Lent*) and unconstitutional. We agree the curfew condition is invalid under *Lent*, and modify the probation order to strike it.

FACTUAL AND PROCEDURAL HISTORY

Around 2:15 a.m. on March 18, 2014, California Highway Patrol officers observed a Nissan pickup truck straddling two lanes of northbound I-880 for an extended period before moving to a single lane.¹ The officers had the truck pull over. Nassetta was the driver and sole occupant of the truck. One of the officers noticed Nassetta was perspiring significantly, and his face paled during the traffic stop. The officer saw a syringe sticking out of a duffel bag on the backseat of the truck. Nassetta was asked to get out of his truck, and the officer checked his arms. Nassetta's wrists were swollen and each wrist had fresh puncture marks associated with intravenous drug use. He told the officer he had used heroin in the previous two hours. Nassetta was placed under arrest and his truck was searched. In Nassetta's truck, an officer found multiple containers with white powdery substances, crystalline substances, and waxy substances—which Nassetta identified as cocaine, methamphetamine, and hash wax respectively—and paraphernalia for drug use: a scale, about 300 small plastic bags, and a notebook containing names and amounts owed or paid. A nine-millimeter semiautomatic firearm in a locked container was also recovered from the truck.

The Alameda County District Attorney filed a 14-count criminal complaint against Nassetta alleging various drug, firearm, and driving offenses. In

¹ Because Nassetta entered a plea, and his attorney stated the arresting officer's declaration of probable cause provided a factual basis for the plea, this recitation of the facts of the offenses is based on the officer's declaration and the probation officer's report.

October 2014, pursuant to a negotiated plea agreement, Nassetta entered a plea of no contest to two of the charges, felony possession for sale of cocaine (count 3; Health & Saf. Code, § 11351) and misdemeanor DUI with a prior DUI conviction (count 12; Veh. Code, § 23152, subd. (e)), in exchange for dismissal of the remaining counts and with the understanding that he would be placed on probation for five years.

At the sentencing hearing on November 20, 2014, the trial court suspended imposition of sentence and granted Nassetta formal probation for five years. Nassetta was ordered to serve 36 days in jail, but was awarded 36 days of presentence credits.

The probation officer's report recommended 18 terms and conditions of probation. Number 16 was "Abide by curfew limits as set by the court or the Probation Department (10:00 p.m. to 6:00 a.m.)." Nassetta's attorney objected to number 16, the curfew limit. He argued it was not part of the plea bargain, and it was "a substantial burden upon an adult" unrelated to future criminality. He asserted that courts had allowed curfews "in young adults and gang cases," but that in unpublished decisions, courts had reversed curfew limits for adults. He argued, "[D]rug dealing and drug possession is a 24/7 operation. I don't think that there's any cause to believe that it happens more frequently between the hours of 10:00 to 6:00 as opposed to other hours."

The trial court observed that in its experience, "about two-thirds of [DUI cases] happen in the middle of the night, and I see very few during daytime hours, and for that reason, it seems curfew is very closely related to the behavior in this case and the future criminality." The court further stated that, in light of Nassetta's "significant substance abuse problems, both with narcotics and with alcohol, curfew seems like a really reasonable and sensible idea." The trial court imposed the curfew condition by marking a box on a preprinted probation form next to the condition, "Abide by curfew limits set by Probation or the Court (10:00 p.m. to 6:00 a.m.)."

DISCUSSION

Nassetta contends the curfew condition is unreasonable under *Lent, supra*, 15 Cal.3d 481. We agree.

When granting probation, a trial court may impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." (Pen. Code, § 1203.1, subd. (j).) Penal Code section 1203.1 grants trial courts

broad discretion, and “[a]s with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances.” (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702 [25 Cal.Rptr.3d 873].)

In *Lent*, our Supreme Court set forth the criteria for assessing the validity of a condition of probation: Upon review, “[a] condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.’” (*Lent, supra*, 15 Cal.3d at p. 486.) “Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Ibid.*)

■ The *Lent* “test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379 [87 Cal.Rptr.3d 199, 198 P.3d 1].) We therefore consider the curfew condition with respect to each prong. Does the condition relate to the criminal offense at issue? Does the condition relate to conduct that is itself criminal? Is the condition reasonably related to preventing future criminality? (*Id.* at p. 380.) If the answer to any of these questions is “yes,” the condition is valid under *Lent*; if the answer to all of them is “no,” it is invalid. In this case, we conclude the answer to all the questions is “no.”

First, the curfew condition bears no relationship to the offenses Nassetta was convicted of. Neither possession of cocaine for sale nor driving under the influence requires the offense be committed at night. The mere fact that Nassetta was pulled over at night does not demonstrate a relationship between the curfew condition and the offenses he committed, and the Attorney General does not argue otherwise. Second, it is undisputed that it is not a crime for an adult to be outside between 10:00 p.m. and 6:00 a.m.

Having concluded the answer to the first two questions is “no,” we consider the third question, whether the curfew condition is reasonably related to preventing future criminality. Nassetta argues it is not and the trial court’s reasoning was inadequate: “The court’s anecdotal apportionment of DUI offense times cannot be a substitute for qualitative data or probabilities. If that evidence bore legitimate weight in the court’s analysis, then the court should have looked closely at holidays, sporting events, or concerts as evidence of a greater chance of DUI offenses at a given time. Merely noting, without factual or statistical predicate, that DUI’s occur at night, is an insufficient basis for asserting deterrence.” We agree with Nassetta that there is no basis on this record to conclude a curfew is reasonably related to

preventing him from driving under the influence. He could be out at night as a pedestrian, a passenger in a car, or on public transportation and pose no risk of committing a DUI. Nothing in the record suggests Nassetta is more likely to use drugs at night or is more likely to drive while under the influence at night.

The Attorney General responds that the curfew condition is related to preventing drug-related crimes in general because “drug crimes are more likely to occur under the cover of darkness.” She relies for this proposition on *Solis v. Superior Court* (1966) 63 Cal.2d 774 [48 Cal.Rptr. 169, 408 P.2d 945] (*Solis*), but the case is nothing like our case. In *Solis*, the California Supreme Court addressed the question whether there was good cause for a provision in a search warrant that the search could be made “‘at any time of the day or night’” of a home where drug sales were allegedly occurring. (*Id.* at pp. 775–776.) In reaching its conclusion that there was good cause to permit a nighttime search, the court observed, “It is common knowledge, at least to those engaged in law enforcement, that heroin is the most dangerous of the illicit drugs; that heroin pushers are among the most dangerous of drug peddlers; and that heroin pushers are as active at night as during the day and probably more so.” (*Id.* at p. 776.) The observation that law enforcement in 1966 commonly knew “heroin pushers” were active during the day and “probably more so” at night sufficient to justify the particular nighttime search warrant at issue in *Solis* is hardly support for the Attorney General’s broad assertion here that “drug crimes are more likely to occur under the cover of darkness.”² Certainly, *Solis* does not suggest the curfew condition in this case is reasonably related to preventing Nassetta from committing drug-related crimes.

As the parties note, there is no California case law addressing whether a curfew is a valid probation condition under *Lent* for an adult convicted of

² By 1977, a Court of Appeal suggested, “[I]f *Solis* were before that court today, it would be decided differently.” (*People v. Watson* (1977) 75 Cal.App.3d 592, 596 [142 Cal.Rptr. 245] (*Watson*).) This is because in 1967, the California Supreme Court held, “a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes,” and the generic type of crime or evidence involved is insufficient. (*People v. Gastelo* (1967) 67 Cal.2d 586, 588 [63 Cal.Rptr. 10, 432 P.2d 706], italics added.) Relying on *Gastelo*, the *Watson* court held a nighttime search could not be justified “based solely on the nature of the contraband to be seized or the type of crime involved.” (*Watson*, at p. 597.) Subsequently, in *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320, 328 [174 Cal.Rptr. 576], the appellate court concluded that an affidavit stating “‘drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband’” was too general to establish good cause for a night search. (See also *People v. Flores* (1979) 100 Cal.App.3d 221, 234 [160 Cal.Rptr. 839] [“it is true that the mere assertion of suspected unlawful drug activities in the place to be searched is insufficient to justify night service”]; Pen. Code, § 1533 [a search warrant is to be “served only between the hours of 7 a.m. and 10 p.m.,” except that “[u]pon a showing of good cause,” the magistrate has discretion to allow service “at any time of the day or night”].)

drug- and driving-related offenses. The Attorney General cites out-of-state cases that approve curfew conditions for adults on probation. We find these cases unpersuasive.

In *State v. Donovan* (Ct.App. 1977) 116 Ariz. 209 [568 P.2d 1107] (*Donovan*), the defendant was convicted in a court trial of possession of marijuana for sale and possession of a narcotic drug. (*Id.*, 568 P.2d at p. 1108.) He was placed on probation, with conditions requiring him “to (1) live with his parents; (2) not be out after 10:00 p.m. for a period of eight months; (3) continue his education and seek employment and (4) not associate with [a former codefendant].” (*Id.*, at p. 1109.) The Arizona appellate court rejected the defendant’s argument that these conditions “were not related to the offense which he committed.” (*Ibid.*) The court’s entire discussion of the curfew condition is as follows: “We believe that the first three conditions contribute to both appellant’s rehabilitation and the protection of the public. They provide for a modicum of supervision over appellant’s activities and are intended both to prevent future criminal activity and to facilitate appellant’s entry into a law-abiding society.” (*Id.*, at p. 1110.)

Although the age of the defendant in *Donovan* is not mentioned, the requirements that he live with his parents and continue his education suggest that he was young, likely still a teenager.³ But, here, Nassetta was 28 years old when he was placed on probation, and he was not ordered to live with his parents or continue his education. Thus, the facts of *Donovan* are distinguishable. Further, putting aside the defendant’s apparent youth in *Donovan*, the case is unpersuasive because the court provided no analysis explaining how a curfew would “prevent future criminal activity.” (*Donovan, supra*, 568 P.2d at p. 1110.)

³ There is no question that in California a curfew condition is permissible for a *minor* on probation. (Welf. & Inst. Code, § 729.2, subd. (c); *In re Jason J.* (1991) 233 Cal.App.3d 710, 719 [284 Cal.Rptr. 673], disapproved on another point in *People v. Welch* (1993) 5 Cal.4th 228 [19 Cal.Rptr.2d 520, 851 P.2d 802].) But “[d]eprivation of a minor’s liberty does not necessarily amount to confinement in the same way that it may for an adult.” (*In re Walter P.* (2009) 170 Cal.App.4th 95, 101 [87 Cal.Rptr.3d 668]; see *id.* at p. 102 [home supervision probation condition for minor that was more restrictive than a 10:00 p.m. to 6:00 a.m. curfew was “in line with the [juvenile] court’s mission to rehabilitate the minor and strengthen family ties”].) So, for example, “[l]oitering and vagrancy ordinances purporting to regulate the nocturnal activities of all persons have been frequently struck down by the courts as an unreasonable interference with the activities of the citizenry,” but a Sacramento curfew ordinance for minors has withstood constitutional challenge. (*In re Nancy C.* (1972) 28 Cal.App.3d 747, 757 [105 Cal.Rptr. 113] [“It is well settled . . . that juveniles may be reasonably classified differently from adults . . .”].)

State v. Sprague (1981) 52 Or.App. 1063 [629 P.2d 1326] (*Sprague*) involved a 20-year-old woman who was convicted after jury trial of misdemeanor harassment for striking a police officer who had arrested her companion. She was placed on probation with a 10:00 p.m. curfew. (629 P.2d at p. 1327.) The defendant was unemployed and had an 11-month-old child. The trial court “believed that the people [the] defendant was associating with were a bad influence and that [she] would be wise to disassociate herself from them.” (*Id.*, at pp. 1327–1328.) The court noted that “‘everybody that testified in her behalf had a tattoo [which was] the same tattoo she had, obviously a member of some sort of group.’” (*Id.*, at p. 1328.) The Oregon appellate court affirmed the curfew condition, explaining: “[W]e view the condition as being reasonably related to the needs of an effective probation. [Citation.] The trial judge saw this defendant as a young person who had formed unfortunate associations. Those associations, in the late evening hours, had led her into trouble. Clearly, there are a variety of alternatives available to the judge in terms of restructuring the defendant’s life to eliminate the potential for trouble. [Citation.] The judge chose, on balance, a less restrictive alternative than he might have, e.g., jail.” (*Ibid.*)

There was a dissent in *Sprague*. (*Sprague, supra*, 629 P.2d at p. 1329 (dis. opn. of Roberts, J.).) The dissenting judge reasoned: “The offense for which defendant was arrested was totally unrelated to her care of the child, which would, of course, more likely be required in the daytime than after 10:00 p.m. The court indicated it did not even know whether the child was living with defendant. While the altercation and defendant’s subsequent arrest apparently occurred after 10:00 p.m., the underlying event, a stop for driving while suspended, might occur at any time of day. There was no integral relationship between the offense and the hours during which defendant was barred from the streets. The curfew was thus not, in my mind, in any way related to defendant’s offense. Second, the condition was not related to ‘public safety.’ There is no showing that defendant was, or was likely to be, any more a threat to the public after 10:00 p.m. than at any other hour of the day. [¶] Lastly, the curfew was unrelated to defendant’s likelihood of rehabilitation. While obviously disapproving of defendant’s friends, the court did not forbid defendant from associating with them before 10:00 p.m., or in her own home or otherwise indoors after that hour.” (*Id.*, at p. 1329, italics omitted (dis. opn. of Robert, J.).) We believe the dissent has the better argument, and decline to follow *Sprague*.

Finally, in *Kominsky v. State* (Fla.Dist.Ct.App. 1976) 330 So.2d 800, a jury found the defendant guilty of possession of marijuana, and the trial court placed him on probation and appointed his parents his “probation advisers.” (*Id.*, at p. 801.) The court imposed probation conditions restricting the defendant from driving more than 35 miles per hour, and subjecting him to a curfew of 8:00 p.m. to 6:00 a.m. (*Ibid.*) With respect to

the curfew, the Florida appellate court modified it to run from 11:00 p.m. until 6:00 a.m. (*Id.*, at p. 802.) The appellate court did not, however, explain why any curfew was appropriate. We decline to follow *Kominsky* because the court offered no reasoning to support its conclusion.

■ Having rejected the out-of-state authority, we conclude the curfew condition here is not reasonably related to preventing future criminality. Since the curfew condition is not related to Nassetta's criminal offenses and it does not relate to conduct that is itself criminal, the curfew condition is invalid under *Lent*. Accordingly, we will strike the curfew condition imposed by the trial court. Because the condition is invalid under *Lent*, we do not reach Nassetta's constitutional argument.

DISPOSITION

The probation order is modified to strike the condition, "Abide by curfew limits set by Probation or the Court (10:00 p.m. to 6:00 a.m.)." In all other respects the judgment is affirmed.

Kline, P. J., and Richman, J., concurred.

[No. C080545. Third Dist. Sept. 27, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
KENNETH RALPH DAVIS, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Charles M. Bonneau, Jr., for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

BUTZ, J.—In February 2014, a jury found defendant Kenneth Ralph Davis guilty of two 2010 misdemeanors, diverting the natural course of a stream (Fish & G. Code, § 1602—count 2) (acquitting him of obstructing it in count 1) and petty theft (of water) (Pen. Code, § 488—count 3).¹ It also found him guilty of a trespass injuring wood or timber in 2010 in another case (which was consolidated solely for purposes of trial) that involved a road he had bulldozed across neighboring property to his own. (§ 602, subd. (a).) The court placed him on a three-year period of informal probation, conditioned on a 90-day jail term.

Defendant sought review of his convictions in the Appellate Division of the Butte County Superior Court. (§ 1466, subd. (b)(1).) The appellate division issued an opinion in October 2015 that affirmed the judgments (*People v. Davis* (Butte County Super. Ct., 2015, No. APP 3985)). On defendant’s request, it then certified the case for transfer. (Cal. Rules of Court, rule 8.1005(b).) We ordered transfer to this court solely on the issue of whether defendant could be prosecuted and convicted of *petty theft* of water. (*Id.*, rules 8.1008(a), 8.1012(e)(1).)

Defendant asserts there cannot be a theft in this case as a matter of law because the natural stream at issue was nuisance groundwater that the owner was diverting from its property, and the State of California has only a regulatory interest in use of these public waters that otherwise are not personality that can be the subject of a larceny. We agree that there cannot be

¹ Undesignated statutory references are to the Penal Code.

a simple larceny of uncaptured flowing water. We thus reverse his conviction for petty theft with directions to dismiss that count.

FACTUAL AND PROCEDURAL BACKGROUND

As the result of a complaint from a neighbor in September 2009 about defendant maintaining a field of marijuana and diverting water from a stream, a deputy assigned to the Yankee Hill area of the county (located between State Route 70 and the Rich Gulch arm of Lake Oroville) went to defendant's home. The deputy knew of the cultivation of marijuana, having conducted several checks of the field for compliance with medical use. He asked defendant whether he was taking water from a stream. Defendant denied doing this, showing the deputy the well on the property that supplied water.

The neighbor told the deputy that defendant was lying, and in January 2010 took the deputy to the location of the makeshift well. About 130 feet north of train tracks, on what was Union Pacific Railroad (Union Pacific) property, there was a 2,500-gallon tank embedded in a large hole in the ground. Only the top of the tank was visible. It appeared that almost the entirety of water that was flowing from a train tunnel for about 80 feet along the north side of the tracks was being captured in a large PVC pipe to fill the tank. Some of the water continued spilling down what looked like it had been the water's previous streambed, which led to Rich Gulch. Rich Gulch (in which water flowed intermittently to Lake Oroville) ran under the train tracks through a culvert about 100 feet away and 30 feet lower. A makeshift electrical panel powered a submersible pump in the bottom of the tank that sent the water in the tank uphill through more PVC piping to the marijuana field.

In February 2010 the deputy returned with a warden from the Department of Fish and Game (now the Department of Fish and Wildlife).² The deputy took photographs of the site, and the warden took videos. The warden identified riparian vegetation both above and below the diversion that would require a constant water supply, and therefore considered the watercourse to be a stream flowing to Rich Gulch that was accordingly subject to state regulation. Only a small amount of water was flowing below the diversion at this point. The warden had not seen the site previously. Defendant did not have permission from the state for the diversion.

A Union Pacific agent testified that he went to the diversion site in July 2010, where he saw a tank buried in the ground in the middle of "a waterway

² In 2012 section 700 of the Fish and Game Code was amended to change the name of the Department of Fish and Game to the Department of Fish and Wildlife; any references herein are to this department. (Fish & G. Code, § 700, subd. (c), as amended by Stats. 2012, ch. 559, § 8.)

that actually ran down the hill toward a ravine" (presumably Rich Gulch). Defendant did not have the permission of the railroad for this diversion of water on its property.

The train tunnel was built with a drainage system to relieve hydrostatic pressure from an aquifer in the hill above it. This collected the percolating water and discharged it through the tunnel's entrance on both sides of the tracks, a sluice box diverting water on the south side to the north side. There is also water flowing along the south side down toward Rich Gulch (which is not at issue). The system is designed to prevent erosion of the tracks. The water is grayish, presumably because it percolates through concrete.

The prosecution's expert hydrologist (a commissioner on the Butte County Water Commission) first investigated the site in September 2012 after the removal of the tank. Water flowed from the tunnel to a trench, where it seeped into the ground; the soil was very porous at the site. As there was still 2.2 cubic feet (about 16 gallons) per second of water flowing even at summer's end, the hydrologist believed this water flowed year round. It appeared that the water used to flow below the diversion site because water-loving plants had grown below it, and thus he believed it was a tributary of the Rich Gulch streambed (which was dry north of the culvert at the time of his visit), but he otherwise did not have any way to confirm this opinion.

Both in his testimony and in a discussion in the summer of 2010 with the district attorney and the deputy sheriff, defendant asserted that he had thought the diversion site was his property. A tenant was maintaining the marijuana field. The wells on the property were inadequate for growing the plants (in his opinion because the water pressure was leaking out through the train tunnel underneath it). Defendant offered to install a tank that the tenant provided and set up the pumping system. He claimed the water ran onto the site at five gallons per minute (about 0.68 cubic feet), and seeped into the ground without flowing downhill except during torrential rain. At trial, he denied concealing the existence of the diversion from the deputy.

Defendant's expert hydrogeologist also first examined the site in 2012. He concluded that there had not been an established waterway; the water percolated in the tunnel, then drained via Union Pacific's engineered system to the diversion site, where it ponded and seeped into the very porous soil without going further. He based his conclusion on the representations defendant made to him. If there was evidence that the water had flowed down to Rich Gulch, he would change his opinion about it being a natural waterway.

The sole closing argument regarding theft came from the prosecution: "In this case I have to prove beyond a reasonable doubt that the defendant took

possession of water, and it belonged to someone else. Well, who owns the water? We all own the water. But we don't get to do whatever we want with it. As people who live in the State of California, we have entrusted the water to the Department of Fish and Game. They control it on our behalf. They're the ones who give us permission to use it. And so, in terms of the defendant not having consent, he would have to get the permission from Fish and Game. They ultimately have the control over how our water is [used]. And we know he did not have the consent of the Department of Fish and Game to use this water." Defense counsel argued generally that this was discarded water that seeped into the ground without forming a natural waterway.

The court instructed on the requirements for finding the water flow at issue to be a natural stream connecting with the waterways of the state. In connection with theft, it instructed, "The fish and wildlife resources of this state are owned by the people of the State of California and held in trust for the people of the state, by and through the Department of Fish and Game."

DISCUSSION

■ As an essential element of larceny, there must be personal property that is subject to ownership. (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 17, p. 41.) It is sufficient for a victim to have a possessory interest in an item superior to the defendant, regardless of the actual form of legal title. (*People v. Smith* (2009) 177 Cal.App.4th 1478, 1491 [100 Cal.Rptr.3d 24]; *People v. Brunwin* (1934) 2 Cal.App.2d 287, 296 [37 P.2d 1072] (*Brunwin*)).

Defendant contends, however, that the State of California does not have *any* possessory interest in the waters of the state (other than such riparian or appropriative rights it acquires under law), putting primary reliance on *State of California v. Superior Court* (2000) 78 Cal.App.4th 1019 [93 Cal.Rptr.2d 276] (*State of California*). The People concede the state does not "own" the water, but assert the state's authority over waterways is sufficient to establish this element because this demonstrates defendant's *absence* of a possessory interest. We must agree with defendant.

■ Water is a resource for which "[o]wnership . . . is vested [collectively] in the state's residents" (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 888 [177 Cal.Rptr.3d 735]). "Hence, the cases do not speak of the ownership of water, but only of the right to its use." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100 [227 Cal.Rptr. 161].) The public trust doctrine (dating to Roman law) rests on the need for the public's unfettered access to a " 'gift[] of nature's bounty' " like water, such that private property rights

are not recognized in the resource; “ ‘the rule of water law [is] that one does not own a property right in water in the same way [one] owns [a] watch or . . . shoes, but . . . only [a] usufruct—an interest that incorporates the needs of others.’ ” (*Zack’s, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175–1176 [81 Cal.Rptr.3d 797]; cf. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 436 [189 Cal.Rptr. 346, 658 P.2d 709] [public trust applies to diversions from nonnavigable tributaries of navigable waters].) Indeed, a resource subject to a public trust is considered *inalienable*, such that the state could not grant a property right in it: “ ‘The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust [in] which they are held, therefore, is governmental and cannot be alienated’ ” (*National Audubon, supra*, 33 Cal.3d at p. 438.)

State of California makes clear that the state in its role as public trustee does not have any *proprietary ownership* of public waters, beyond any riparian or appropriative rights it might acquire as a property owner. (*State of California, supra*, 78 Cal.App.4th at pp. 1022, 1030 & fn. 16 [state does not own groundwater for purposes of exclusionary clause in insurance policy].)

A characterization of a state as a “trustee” is merely a legal fiction of the 19th century expressing the state’s police power over its resources. (*People v. Brady* (1991) 234 Cal.App.3d 954, 958 [286 Cal.Rptr. 19] (*Brady*).) In actuality, these resources do not have *any* owner until lawfully captured, at which point they become the personal property of the captor. (*Ibid.* [wild creatures are not subject to private ownership]; *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 447 [188 Cal.Rptr.3d 141] [water belongs “to the people” and does not become property of any individual user unless lawfully captured]; *State of California, supra*, 78 Cal.App.4th at p. 1026 [“ ‘The People[’s]’ ” ownership of water does not authorize individual Californians to take water without right]; *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598 [153 Cal.Rptr. 518] (*Fullerton*) [no private property interest in corpus of flowing water]; see *Strawberry Water Co. v. Paulsen* (Ct.App. 2008) 220 Ariz. 401, 407 [207 P.3d 654, 660] (*Strawberry Water Co.*) [no right of ownership in water until lawful withdrawal from common supply]; *Clark v. State* (1917) 1917 OK CR 206 [14 Okla. Crim. 284, 170 P. 275, 276] [running water often compared “to wild animals, birds, and fishes, which, before capture and confinement, belong to no one, but after capture belong to [those] who capture[] them”].) If the captor releases the water, “ ‘the water becomes again nobody’s property.’ ” (*Strawberry Water Co., supra*, 207 P.3d at p. 660).³

³ In an aside, defendant suggests the water flow did not have any inherent value because Union Pacific was discarding it. (*People v. Cuellar* (2008) 165 Cal.App.4th 833, 837 [81 Cal.Rptr.3d 252] [item must have intrinsic value to sustain charge of petty theft].) It is beyond

■ As a result, at common law there could not be larceny of public resources because these are not anyone's personal property. (*Brady, supra*, 234 Cal.App.3d at p. 958–960 [abalone in public water not anyone's personal property, taking of wild creature thus cannot be a larceny; legislative history indicates an express intent to preserve rule of common law, limiting larceny to marine products of aquaculture]; 3 Wharton's Criminal Law (15th ed. 2015) § 371, p. 439 [though stored water could be subject of larceny at common law, "running water could not"].) Similar to *Brady*, the only larceny provision expressly premised on taking water involves theft of water as the captured product of a utility company, along with gas and electricity. (§ 498; see *Ex parte Helbing* (1884) 66 Cal. 215, 215–216 [5 P. 103] [involving predecessor statute limited to water companies].) While the People may prosecute defendant for transgressing the state's regulatory police power (*Brady, supra*, 234 Cal.App.3d at pp. 961–962), they do not provide any authority to counter the above stated principle that their ability to regulate his behavior does not create any possessory interest in the water that constitutes larceny. Consequently, this was an invalid legal theory on which to premise defendant's larceny conviction.⁴

But this is not the end of the analysis. The People allude to section 495, which categorizes the severance of real property interests as a larceny, and *Brunwin, supra*, 2 Cal.App.2d 287 (severance of oil), and contend defendant's actions came within the meaning of this statute. Other than refer to *Brady*, which is inapposite because no analogous "severance" statute exists with respect to wild creatures on the property of another, defendant does not address section 495.

■ To get our metaphysics up and running, there is no ownership of water, gas, or oil on the land other than in usufruct. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Personal Property, § 1, p. 15; 12 Witkin, *supra*, Real Property, §§ 792, p. 921, 917, pp. 1106–1107.) Water in its natural state is categorized as a type of real property until severed from the realty "and confined in portable receptacles," at which point the water transmutes to personal property. (*Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 725 [93 P. 858] (*Stanislaus Water Co.*); see 13 Witkin, *supra*, Personal Property, § 91, p. 113.) Water that is diverted for purposes of irrigation, however, "is not deemed severed and thus remains [realty]" (13 Witkin, *supra*, § 91, p. 113); "In the case of water for irrigation, delivered in ditches or pipes, the

dispute that the water had inherent value to the marijuana growers. However, the point is ultimately irrelevant. Discarding the water is not relevant to its lack of value to the railroad, it is relevant to whether any water was personality of Union Pacific through capture.

⁴ We note that the interference with Union Pacific's riparian water right cannot of itself be a basis for larceny because it is a form of realty, not personality. (*Fullerton, supra*, 90 Cal.App.3d at p. 598; see *Strawberry Water Co., supra*, 207 P.3d at p. 660 [same rule for tort of conversion].)

severance does not take place at all" (*Copeland v. Fairview Land & Water Co.* (1913) 165 Cal. 148, 154 [131 P. 119], italics added (*Copeland*); accord, *Stanislaus Water Co., supra*, 152 Cal. at pp. 726–727 [wrongful diversion of water is injury to realty]).

In a usually overlooked part of *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697] (*Dillon*)—in contrast with the always distinguished holding that the imposition of life punishment on the defendant for first degree murder was constitutionally disproportionate under the facts of that case (*id.* at p. 489)—it discussed the evolution of severance of realty as a basis for larceny. Originally, in “a hypertechnical remnant of an archaic formalism that can no longer be seriously defended” (*id.* at p. 457), the common law limited larceny to personal property because land could not be asported. However, as the definition of real property broadened, it began to include “many items that can be more or less readily detached and removed from the land.” (*Ibid.*) Given a reluctance to expand the class of offenses then subject to capital punishment, courts “clung to the artificial distinction” between personality and realty, and developed the principle that severed realty (which ordinarily *would* become personality had the landowner accomplished it) asported in a single transaction with the severance never became the owner’s personality, so a larceny did not take place. (*Ibid.*) “Thus, in a perverse and unintended application of the work ethic, thieves industrious enough to harvest what they stole and to carry it away without pause were guilty at most of trespass, while those who tarried [before returning to take it away] or enjoyed fruits [severed by others], faced the hangman’s noose.” (*Id.* at p. 458.)

People v. Williams (1868) 35 Cal. 671 confessed “we do not comprehend the force of these distinctions The more sensible rule . . . would [be], that by the act of severance the thief had converted the property into a chattel; and if he then removed it . . . he would be guilty of a larceny” (*Id.* at p. 676.) It nonetheless considered itself bound under the common law to preserve the distinction, imploring the Legislature to change the rule. (*Id.* at pp. 676–677.) It thus upheld the dismissal of an indictment for grand larceny that did not make clear whether the defendant severed 52 pounds of gold-bearing quartz rock from the lode in the victim’s mine, or whether he carried away already severed rock. (*Id.* at pp. 673–674, 677.)

In enacting the Penal Code, the Legislature responded. Section 495 abrogated the common law, redefining detachable realty “as personality subject to larceny, ‘in the same manner as if the thing had been severed by another person at some previous time.’ ” (*Dillon, supra*, 34 Cal.3d at p. 458.) It also enacted what are now sections 487b and 487c dividing the crime of larceny by severance into grand and petty theft. (*Dillon*, at p. 458.)

Because “the rule requiring an interruption between severance and asportation has suffered such erosion and criticism . . . that we no longer feel compelled to preserve it” (*Dillon, supra*, 34 Cal.3d at p. 459) and the generally accepted modern rule is to the contrary (*id.* at p. 460; see 3 LaFave, *Substantive Criminal Law* (2d ed. 2003) Theft, § 19.4(a), p. 79 [trend in modern criminal codes to include any sort of property capable of being moved, even those “savoring of real property”]), *Dillon* refused to extend the principle to the new context of robbery, and thus the severed marijuana was properly the basis of the defendant’s conviction for attempted robbery (*Dillon*, at pp. 461–462).

Brunwin is the only other case we have been able to identify in which larceny by severance was at issue. The information alleged that the defendants had entered onto the victim’s land and severed 1,004 barrels of oil valued at \$572.28, and carried it away. (*Brunwin, supra*, 2 Cal.App.2d at p. 289.) The trial court sustained a demurrer on the ground the facts did not constitute a public offense, the defendants arguing that larceny of realty “is unknown to the law.” (*Ibid.*) *Brunwin* concluded section 495 was not limited to fixtures, but applied to anything forming a part of the realty that is severed and taken. (*Brunwin*, at pp. 290–291.) Whatever the exact nature of the possessory right to extracted oil, it was sufficient to support larceny by severance. (*Id.* at pp. 298–299.)

■ In accordance with the adage that water and oil do not mix, *Brunwin* is not of any succor to the People. While, as we have noted, the *identity* of the actual owner is not an element of larceny (*People v. Melson* (1927) 84 Cal.App. 10, 20–23 [257 P. 555] [name of owner of stolen property merely serves to identify transaction at issue to facilitate any subsequent plea of double jeopardy]; accord, *People v. Nunley* (1904) 142 Cal. 105, 107–110 [75 P. 676]; *People v. Price* (1941) 46 Cal.App.2d 59, 62 [115 P.2d 225] [“It is . . . a matter of no concern to a thief” that legal title to stolen property is not in the complainant]; *People v. Larrabee* (1931) 113 Cal.App. 745, 747–748 [299 P. 85]), and the exact *nature* of the superior possessory interest is also immaterial (*Brunwin, supra*, 2 Cal.App.2d at p. 296), there must be a superior possessory interest of some kind. Unlike crops or oil, individual particles of water flowing upon one’s realty are not personality unless captured. (*Palmer v. Railroad Com. of California* (1914) 167 Cal. 163, 168 [138 P. 997]; *San Bernardino Valley Municipal Water Dist. v. Meeks & Daley Water Co.* (1964) 226 Cal.App.2d 216, 221 [38 Cal.Rptr. 51].) As the railroad had not itself captured any of the flowing water, and the creation of an irrigation system would not have effected a severance from realty had the railroad accomplished it (*Copeland, supra*, 165 Cal. at p. 154), a possessory interest superior to defendant did not exist when he diverted the water from the railroad’s realty, and section 495 accordingly cannot apply as an alternative basis for this count.

DISPOSITION

The conviction for petty theft (count 3) is reversed, with direction to dismiss the count. The judgment is otherwise affirmed. The trial court shall prepare an amended probation order and issue such corrected minute orders as necessary.

Blease, Acting P. J., and Mauro, J., concurred.

A petition for a rehearing was denied October 19, 2016.

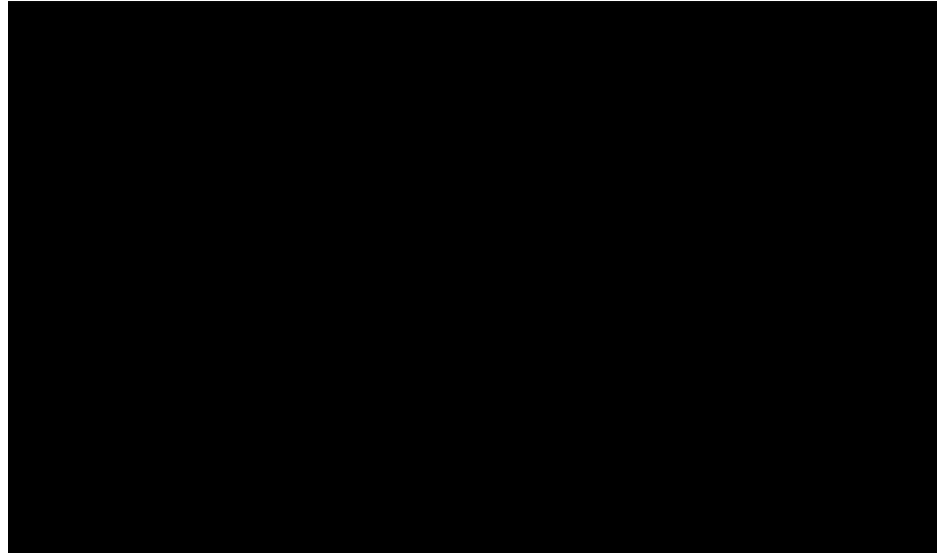
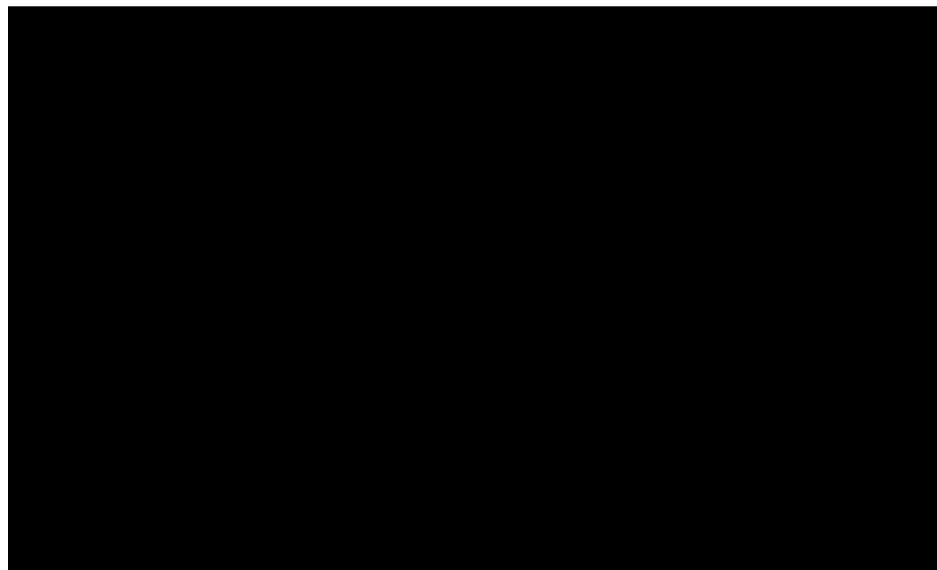
[No. C079615. Third Dist. Sept. 27, 2016.]

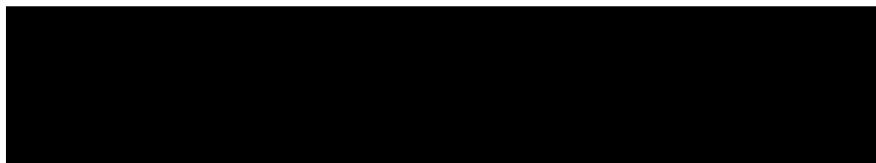
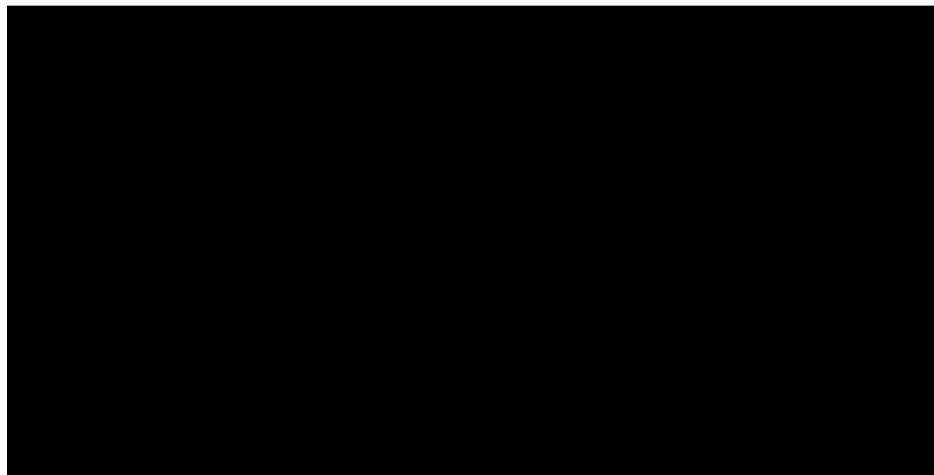
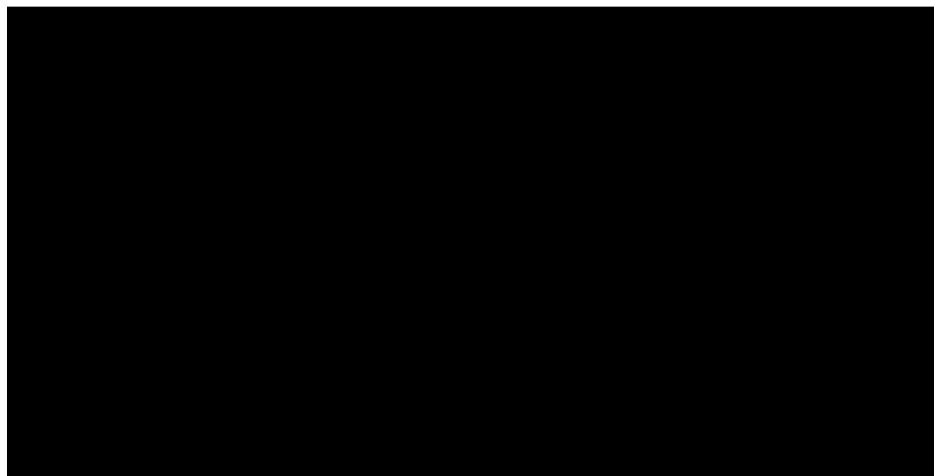
In re the Marriage of JUDY KAY and PHILIP KURTIS CHAPMAN.
JUDY KAY CHAPMAN, Respondent, v.
PHILIP KURTIS CHAPMAN, Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Walzer Melcher, Steven K. Yoda and Christopher C. Melcher for Appellant.

Michael R. Locks for Respondent.

OPINION

ROBIE, J.—The main issue in this case is whether one spouse's unilateral election (after a marital settlement agreement and judgment of dissolution) to change from one type of military benefit (military retirement that is taxable and community property) to another type of military benefit (combat-related special compensation that is not taxable and separate property) can defeat the community property interest of the other spouse set forth in the marital settlement agreement.

The answer is "no." "It is a 'settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.' " (*In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 423 [174 Cal.Rptr. 493, 629 P.2d 1].)

The trial court here correctly determined that "the post-judgment election" by appellant Philip Kurtis Chapman (Philip) "of Combat[-]Related Special Compensation in lieu of military pension payments" does not "relieve[] [Philip] of his agreement to pay [respondent Judy Kay Chapman] \$475 per month for her community property share of his military retirement." We reverse the trial court's order, however, because the remedy the court selected was improper. The trial court imposed a constructive trust on the funds received by Philip as combat-related special compensation benefits. But the remedy of a constructive trust is available only for wrongful conduct.

(*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116 [191 Cal.Rptr. 571].) Here, Philip's election was not wrongful; he had every right to choose to receive combat-related special compensation benefits in lieu of military retirement benefits. But he could not, by that election, defeat Judy's right to receive \$475 per month for her community property interest in the pension payments he voluntarily and unilaterally relinquished. Accordingly, we will reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

For 20 years, from July 1971 to July 1991, Philip served in the United States Navy, including in the Vietnam War and the Persian Gulf War. For 17 of those years, beginning in August 1974, Philip and Judy were married. In 1991, after Philip retired, he started receiving military retirement benefits.

In 2003, Philip and Judy stipulated to a judgment of dissolution in a marital settlement agreement. The stated intent of the agreement was "to effect a substantially equal division between [Judy] and [Philip] of their community assets" Philip and Judy agreed that Judy "shall take [¶] . . . [¶] [Judy's] community portion of [Philip]'s military retirement pay in the amount of \$475.00 per month." Judy "acknowledge[d] that [certain] property . . . [wa]s the separate property of [Philip] and . . . waive[d] any . . . interest in said property," which included, "social security and disability accounts" and "[a]ny and all work related benefits." In April 2004, the trial court approved the agreement.

After the judgment of dissolution, the Department of Veterans Affairs offered Philip the opportunity to apply for combat-related special compensation benefits in lieu of his military retirement benefits, as he had been diagnosed with posttraumatic stress disorder because of his active combat roles. The dollar amounts of the two benefits were the same, but the difference was that combat-related special compensation benefits were not taxable. Because of the tax advantage, Philip elected to receive combat-related special compensation benefits in lieu of his military retirement benefits. In October 2004, Philip became eligible to receive combat-related special compensation benefits.

Philip continued paying Judy \$475 per month until March 2014. Judy then filed a lawsuit seeking to enforce the terms of the judgment of dissolution to continue her monthly payments of \$475.

The trial court ruled for Judy, reasoning that Philip and Judy "intended for [Judy] to continue to receive her original share of [Philip]'s retirement pay even if he waived all or a portion of that pay to obtain [combat-related

special compensation benefits],” “because there is nothing in the language of the judgment that would make it reasonably susceptible to the interpretation that the parties had agreed that [Philip] would reduce or eliminate the retirement asset by his voluntary waiver sometime in the future.” “Accordingly a constructive trust is imposed on the funds received by [Philip] as [combat-related special compensation] benefits in order to remedy the monthly financial impact on [Judy] of his post-judgment election to receive disability benefits in lieu of military retirement. [Philip] is not required to satisfy this obligation with his [combat-related special compensation] benefits, and is free to use any other assets in order to satisfy this obligation.”

Philip timely appealed from this order.

DISCUSSION

The gravamen of Philip’s appeal is that under federal law, military disability benefits, such as combat-related special compensation, are not considered “retired pay” that is divisible community property under state law. We have no disagreement with this proposition. The problem for Philip, however, is that his unilateral election of combat-related special compensation benefits could not defeat Judy’s community property interest set forth in the marital settlement agreement. We explain these principles and their application below.

■ Retirement benefits generally represent deferred compensation for work performed by an employee. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1104 [32 Cal.Rptr.3d 471, 116 P.3d 1152].) Thus, to the extent the work was performed during the marriage, such benefits are community property. (*Id.* at pp. 1103–1104.) This includes military retirement payments to the extent they derive from military service performed during the marriage. (*Casas v. Thompson* (1986) 42 Cal.3d 131, 139 [228 Cal.Rptr. 33, 720 P.2d 921].) Consistent with this rule, under federal law, “a court may treat disposable retired pay payable to a [military] member” as community property. (10 U.S.C. § 1408(c).)

There is a different rule, however, with respect to veterans’ disability benefits. “The purpose of disability benefits . . . is primarily to compensate the disabled veteran for ‘the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market’ [citation] and secondarily to compensate him for the personal suffering caused by the disability.” (*In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 787 [148 Cal.Rptr. 9, 582 P.2d 96].) Thus, under federal law, a court may not treat those benefits as community property. (See *Mansell v. Mansell* (1989) 490 U.S. 581, 585, 594–596 [104 L.Ed.2d 675, 683,

688–689, 109 S.Ct. 2023] [where a military spouse had been receiving both disability benefits and retired pay at the time of dissolution, the California state court could divide as community property the retired pay but not the disability payments].)¹

■ Sometimes, as happened here, disabled military retirees choose to receive combat-related special compensation benefits, if they are entitled to them. This allows veterans who have a combat-related disability to receive tax-free benefits in exchange for an equal reduction in their retirement pay. (10 U.S.C. § 1413a(b); 26 U.S.C. § 104(a)(4), (b)(2)(C).) Payments made as combat-related special compensation benefits “are not retired pay.” (10 U.S.C. § 1413a(g).) Federal law precludes division of combat-related special compensation benefits as community property. (See 10 U.S.C. § 1408(a)(4)(C); *Mansell v. Mansell*, *supra*, 490 U.S. at pp. 594–596 [104 L.Ed.2d at pp. 688–689].)²

This, however, does not mean that where, after dissolution, Philip unilaterally elected to relinquish his military retirement benefits that were community property in favor of combat-related special compensation benefits that were separate property, he could defeat Judy’s community property interest as set forth in the marital settlement agreement. Instructive here are two cases from the California Supreme Court, *Marriage of Gillmore* and *Marriage of Stenquist*, which we discuss next.

■ In *Marriage of Gillmore*, the husband and wife separated after 14 years of marriage, and the trial court entered a final judgment of dissolution, specifically reserving jurisdiction over the husband’s retirement plan. (*In re Marriage of Gillmore*, *supra*, 29 Cal.3d at p. 421.) After the marriage was dissolved, the husband continued working even when he became eligible to retire. (*Id.* at p. 422.) The wife requested an order directing the husband to pay to her immediately her share of the pension benefits. (*Ibid.*) The trial court denied the request, holding it had discretion to delay distribution of the benefits until the husband actually retired. (*Ibid.*) The California Supreme Court reversed. (*Id.* at p. 429.) The court held that the husband could not “time his retirement to deprive [the wife] of an equal share of the community’s interest in his pension. It is a ‘settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest

¹ In keeping with the rule about disability benefits, “disposable retired pay” is defined as: “‘the total monthly retired pay to which a member is entitled’ less, among other things, amounts deducted as a result of the waiver required to receive disability benefits.” (*In re Marriage of Smith* (2007) 148 Cal.App.4th 1115, 1120–1121 [56 Cal.Rptr.3d 341], quoting 10 U.S.C. § 1408(a)(4).)

² The analysis in the preceding three paragraphs was largely drawn from *Merrill v. Merrill* (2012) 230 Ariz. 369 [284 P.3d 880].

of the other spouse.’” (*Id.* at p. 423, quoting *In re Marriage of Stenquist, supra*, 21 Cal.3d at p. 786.)

■ *In re Marriage of Stenquist* “involved a husband’s election to receive disability benefits (usually separate property), rather than retirement pay (usually community property). [The California Supreme Court in *Stenquist*] held that the husband could not use this election to deprive his wife of her interest in his retirement benefits. ‘[T]o permit the husband, by unilateral election of a “disability” pension, to “transmute community property into his own separate property” [citation], is to negate the protective philosophy of the community property law as set out in previous decisions of this court.’” (*In re Marriage of Gillmore, supra*, 29 Cal.3d at pp. 423–424.) “The result of the husband’s unilateral decision in *Stenquist* would have been to deprive the wife of any interest in his retirement benefits.” (*Marriage of Gillmore*, at p. 424.) “Thus, although the husband in *Stenquist* had every right to choose a disability pension rather than retirement pay, his choice did not prevent the court from ordering him to pay to the wife an amount equivalent to what her interest would have been had he chosen retirement pay.” (*Marriage of Gillmore*, at p. 426.) “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition solely within the employee spouse’s control.” (*Id.* at p. 425.)

■ The same is true here. While Philip had every right to choose combat-related special compensation benefits rather than military retirement benefits, his choice could not defeat Judy’s community property interest in the retirement benefits. Philip made this choice after they separated, after they stipulated to the judgment of dissolution, after they entered into the marital settlement agreement, and after the court approved the agreement. In the agreement, Philip and Judy agreed that Judy “shall take [¶] . . . [¶] [Judy’s] community portion of [Philip’s] military retirement pay in the amount of \$475.00 per month.” There was nothing in the language of the agreement that would make it reasonably susceptible to the interpretation Philip urges, which is that he could unilaterally reduce or eliminate the retirement asset by his voluntary waiver sometime in the future.

■ Our conclusion is also not, as Philip urges, inconsistent with federal law. “*Mansell* held merely that the federal law does not grant state courts the power to divide ‘military retirement pay that *has been* waived to receive veterans’ disability benefits.’” (*In re Marriage of Smith, supra*, 148 Cal.App.4th 1115, 1123–1124.) Here, the trial court did not divide military retirement pay that had been waived; it enforced the preexisting marital settlement agreement by ordering Philip to pay Judy \$475 per month to

compensate her for her community property share of the retirement pay he unilaterally and voluntarily relinquished.³

■ The trial court did err, however, in imposing a constructive trust “on the funds received by [Philip] as [combat-related special compensation] benefits in order to remedy the monthly financial impact on [Judy] of his post-judgment election to receive disability benefits in lieu of military retirement,” because the remedy of a constructive trust is available only for wrongful conduct. A constructive trust requires “the existence of a res (property or some interest in the property); the plaintiff’s right to that res; and the defendant’s acquisition of the res by some wrongful act.” (*Calistoga Civic Club v. City of Calistoga, supra*, 143 Cal.App.3d at p. 116; see also Civ. Code, § 2224 (“One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it”)). “A constructive trust cannot exist unless there is evidence that property has been wrongfully acquired or detained by a person not entitled to its possession.” (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 991 [41 Cal.Rptr.2d 618], italics omitted.)

Here, Philip did nothing wrong in electing to receive combat-related special compensation benefits in lieu of military retirement benefits. He testified he did it for the tax benefits to himself and he did not understand “there was a difference between combat related special compensation and military retirement benefits in terms of what military spouses are entitled to.”

The absence of any wrongful conduct, however, does not leave Judy without a remedy. Philip testified he has “about [a] \$7,000 a month income.” The trial court was entitled to order Philip to pay \$475 per month to ensure Judy receives the benefit of the bargain she made in the marital settlement agreement to receive her community portion of Philip’s military retirement pay in that amount. Whether the trial court may also fashion some further equitable remedy to secure Judy’s right to that payment is a matter we leave to the trial court in the first instance. At this point, all we hold with respect to the remedy is that imposition of a constructive trust is improper.

DISPOSITION

The portion of the postjudgment order imposing a constructive trust on the funds received by Philip as combat-related special compensation benefits is

³ Moreover, contrary to Philip’s assertion, no reservation of jurisdiction clause was necessary here for Judy to raise the issue. Judy was not attempting to modify or change the judgment, but to enforce it based upon Philip’s unilateral attempt to modify its terms. Family courts always have jurisdiction to enforce orders and judgments. (Fam. Code, § 290.)

reversed. The portion of the order directing Philip to pay Judy \$475 per month for her community property interest in the military retirement benefits he relinquished is affirmed.

The matter is remanded to the trial court to exercise its discretion to fashion further equitable relief to secure Judy's right to that payment, if the court determines such relief is lawfully available and appropriate.

Judy is entitled to her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Blease, Acting P. J., and Mauro, J., concurred.

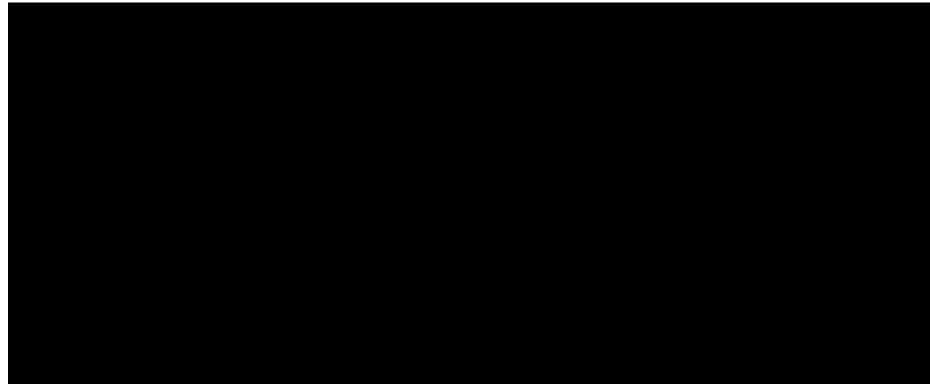
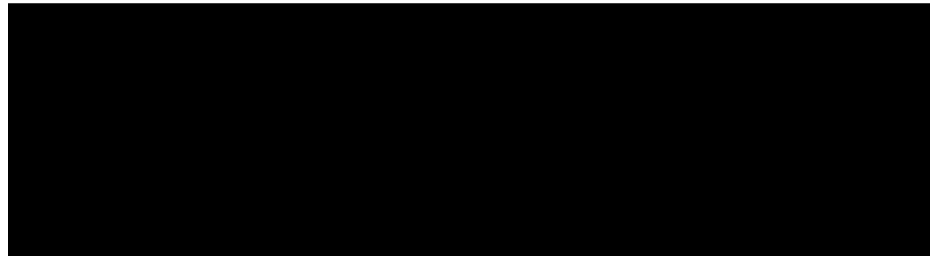
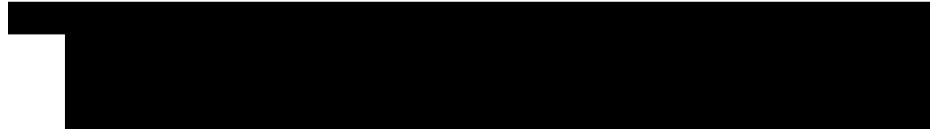
[No. H042385. Sixth Dist. Sept. 27, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JAMES CONNORS, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Katherine Dwight, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Catherine A. Rivlin and Allan Yannow, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MIHARA, J.—Defendant James Connors was on probation for a sex offender registration violation. One of the conditions of his probation barred him from associating with probationers. He associated with a probationer, and the court found him in violation of his probation. It revoked and reinstated his probation with additional conditions, including one barring him from possessing sexually explicit materials.

On appeal, defendant claims that (1) his association with a probationer could not reasonably be found to be a violation of his probation because the probationer was his new girlfriend, and (2) the sexually explicit materials probation condition was unreasonable and unconstitutionally vague and overbroad, and it needed a knowledge requirement. We conclude that defendant forfeited his reasonableness challenge to the association condition by failing to object to that condition on reasonableness grounds when it was imposed. With respect to the sexually explicit materials condition, we modify this condition to require that defendant be made aware of what items fall within its scope.

I. Background

Defendant was convicted of sexual battery (Pen. Code, § 243.4) in 1992 and was thereafter required to register as a sex offender under Penal Code section 290.¹ In August 2013, defendant pleaded no contest to a sex offender registration violation (§ 290.013) in exchange for felony probation. Although he was presumptively ineligible for probation, the court found that there were “unusual circumstances,” suspended imposition of sentence, and granted him probation in September 2013.² Defendant’s probation conditions included these three: “[N]ot traffic in, or associate with persons known to you to use or traffic in controlled substances.” “Permit the search of your person, car, personal effects, or place of residence, night or day, without the necessity of a search warrant at the direction of the probation officer or any peace officer.” “Not associate with any individuals you know, have reason to know, or are told by the probation officer are illegal drug users, or who are on any form of

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

² Defendant’s adult criminal convictions began in 1987. By 1990, he had been convicted of aggravated assault (§ 245, subd. (a)(1)), battery (§ 242), and theft (§§ 484, 488). He was sent to state prison in 1992 for the sexual battery conviction and repeatedly violated his parole. Defendant continued to incur criminal convictions after his release from prison, including convictions for assault (§ 240), a sex offender registration violation (§ 290, former subd. (a)(1)(A)), forgery (§ 476), resisting arrest (§ 148, subd. (a)(1)), and evading an officer (Veh. Code, § 2800.2).

probation, mandatory supervision, post release community supervision, or parole supervision.” Defendant accepted probation with these conditions without objection.

Nine days after he was placed on probation, he and his attorney returned to court requesting a modification of the probation condition forbidding association with probationers. “I was simply asking to modify the condition of probation that he [is] not to have contact with anybody on parole or probation to allow him contact with his wife. His wife is currently on probation, and she’s incarcerated on a DUI and an 11550 under the influence charge. Her name is Jennifer Chapman.” The court granted the request. Defendant’s probation conditions were modified to provide: “Defendant may have contact with his wife, Jennifer Chapman, who is in-custody and on a grant of probation.”

In April 2015, defendant was arrested by his probation officer for violating his probation, and the probation department filed a petition alleging that defendant had violated his probation by “[a]ssociating with drugs users and probationers.” The petition alleged that, on March 26, 2015, defendant’s probation officer had directed defendant not to associate with Sheryl Anne Rhodes, who was a probationer with a lengthy history of drug and alcohol arrests and convictions. It further alleged that on April 8, defendant’s probation officer found defendant associating with Rhodes again. Defendant’s probation was summarily revoked on April 10.

The probation officer testified at the April 17, 2015 probation violation hearing. He had been supervising defendant since June 2014. On March 13, 2015, he made contact with defendant. He asked defendant if he could look at defendant’s cell phone, and defendant gave him the phone. The probation officer looked at the phone and found “some recent internet searches that contained sexually explicit materials or pornography.” Some of these materials “pertained to some time [*sic*] type of sexual assault on women, violent sexual assault on women.” One item was a “news clipping regarding rape.” There were also videos of “full blown sexual intercourse.” The probation officer was concerned about this material. He told defendant that these materials were not “a good thing” and “directed” defendant to “refrain from watching or downloading porn materials”

On March 26, 2015, the probation officer saw defendant with Rhodes. The probation officer determined that Rhodes was on probation, and he “reminded” defendant that his probation conditions required that he was “not to associate” with anyone on probation. “I told him not to associate with Ms. Rhodes any more considering the fact that she’s still on active summary probation.” Defendant told the probation officer that “he’s going to comply.”

On April 8, the probation officer saw defendant again in the company of Rhodes. Defendant and Rhodes “were lying alongside to each other” in a grassy area. The probation officer contacted defendant and told him that he was in violation of his probation condition. Defendant said that Rhodes “just got there just before we pulled up.” He also told the probation officer that Rhodes was his girlfriend. The probation officer arrested defendant for the probation violation.

Defendant testified at the hearing that he met Rhodes on February 26, 2015. Between the March 26 and April 8 incidents, he contacted the public defender’s office about having his probation modified to permit contact with Rhodes, but he was unable to file a “modification form” because “my health started getting worser.” He testified that he and Rhodes “cut our ties loose” between March 26 and April 8, and their contact on April 8 arose from a chance encounter on the street. Defendant admitted that he knew that he was not permitted to associate with Rhodes but despite that chose to do so on April 8.

Defendant’s attorney argued that the court should not find a probation violation. “I’m not challenging the term as written in 2013, but as applied to my client on March 26 and April 8 of this year it would be unconstitutionally overbroad to prohibit him from intimate association with his fiancee.” “[M]y argument is that it is not constitutional to prohibit that type of association.” The court was unpersuaded. “So what you want to carve out is an exception for anybody he wants to date or anybody who may become a fiancee. Because at the time he first met her she wasn’t his fiancee so he was in violation at that time. So you’re suggesting that this Court carve out an exception for any time he wants to date somebody, may date somebody, may enter into a relationship.” The court found defendant had violated his probation. “The defendant at one time sought to modify that probation condition and successfully modify that to exclude a particular individual. He chose to ignore the process when he got involved with someone else and was warned and given a break by the probation officer.”

The prosecution and the defense agreed that defendant should be reinstated on probation. The defense opposed the probation department’s request for the imposition of numerous additional probation conditions. “He doesn’t need a prohibition on possession of sexually explicit materials. These were lawful materials. He’s allowed to have them and he’s allowed to live a normal life with some dignity.” Defendant’s trial counsel also asked the court to “carve out an exemption so that this man can be together with his future wife.” He asked the court to impose “no additional time”: “145 [days] with credited 145 is sufficient.”

The court reinstated probation on the original conditions with several modifications. First, the court modified the association condition to permit defendant to associate with Rhodes and to provide that “[t]here are no other exclusions.” Second, the court imposed 145 days in jail with credit for 145 days served. Third, the court added three new probation conditions. “[Y]ou’re not to possess any sexually explicit materials for the purposes of arousing prurient interest based upon the evidence presented here. [¶] Any computer or electronic storage device in your custody, possession or control shall be subject to a forensic computer search. Any computer, electronic data storage device to which you have shared partial or limited access shall also be subject to a forensic computer search. [¶] You shall provide all encryption keys or passwords to the Probation Department for any computers or electronic data storage devices to which you have shared, partial or limited access or any access to [sic].”³ Defendant timely filed a notice of appeal from the court’s order.⁴

II. Discussion

A. Probation Violation

Defendant contends that the court abused its discretion in finding a probation violation. He claims that the condition he violated “was unreasonable under the circumstances of the case” because it did not allow him “contact with a woman with whom he was in an intimate relationship.” He presents his challenge as one to the reasonableness of the probation condition “as applied.”

Defendant maintains that “a defendant may argue successfully at a violation of probation hearing that a condition is unreasonable.” He cites two cases in support of his claim that he did not forfeit this challenge by failing to raise it when the condition was imposed.

The first of these two cases, *People v. Dominguez* (1967) 256 Cal.App.2d 623 [64 Cal.Rptr. 290] (*Dominguez*), was a challenge to an order revoking probation and a judgment imposing a prison sentence. (*Id.* at p. 624.) The

³ The clerk’s minutes record the new “sexually explicit materials” probation condition differently: “Not possess sexually explicit materials or matter, *which depicts youth* for the purposes of arousing prurient interest.” (Italics added.) The parties do not address this discrepancy, and we presume that the court’s oral pronouncement of the new probation condition prevails over the clerk’s conflicting recordation of it. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471 [121 Cal.Rptr. 473, 535 P.2d 337] [discrepancy between oral pronouncement and clerk’s minutes is presumed to be the result of clerical error; oral pronouncement prevails].)

⁴ After defendant appealed, the probation department filed a petition alleging that he had violated the new “sexually explicit materials” condition.

defendant had been placed on probation with a condition requiring her not to become pregnant if she was not married. (*Id.* at p. 625.) A year and a half later, she became pregnant while unmarried. (*Id.* at p. 626.) The court found her in violation of the no-unmarried-pregnancy probation condition, revoked her probation, and sent her to prison. (*Ibid.*) She challenged the order and judgment. The Second District Court of Appeal evaluated the condition under what later came to be known as the *Lent* standard⁵ and found it to be “void.” (*Dominguez*, at pp. 627–628.) The court summarily concluded that the defendant “did not waive the right to urge the invalidity of the condition of probation by accepting the benefit of probation.” (*Id.* at p. 629.)

The second case that defendant relies on is the Fifth District Court of Appeal’s decision in *People v. Hackler* (1993) 13 Cal.App.4th 1049 [16 Cal.Rptr.2d 681] (*Hackler*). The defendant in *Hackler* was convicted of stealing beer and was placed on probation with a condition requiring him to wear “a court-supplied T-shirt” stating, among other things, that he was on felony probation for theft. (*Id.* at p. 1052.) A petition was subsequently filed alleging that he had violated his probation by committing two burglaries. (*Ibid.*) At the probation violation hearing, the court sua sponte asserted that the defendant had violated the T-shirt condition. (*Id.* at p. 1053.) It thereafter found him in violation of probation both for a burglary offense and for violating the T-shirt condition, and it sentenced him to prison. (*Ibid.*) The defendant appealed from the revocation of his probation and the judgment sending him to prison. (*Ibid.*) He challenged the validity of the T-shirt condition on the grounds that it was vague, overbroad, and unreasonable. (*Ibid.*)

The Attorney General contended that the defendant had forfeited the challenge “by failing to appeal from the order granting probation and by failing to assert the challenge at the probation revocation hearing.” (*Hackler*, *supra*, 13 Cal.App.4th at p. 1053.) The Fifth District held that the issue had been preserved despite the fact that the defendant had accepted probation with this condition and had not objected on these grounds at the revocation hearing. As the trial court had explicitly invited appellate review of the validity of the T-shirt condition, in the Fifth District’s view, the defendant was “relieved of any obligation to expressly preserve the issue himself.” (*Id.* at pp. 1054–1055.) Finally, the Fifth District noted that it was “not aware of any

⁵ In *People v. Lent* (1975) 15 Cal.3d 481 [124 Cal.Rptr. 905, 541 P.2d 545] (*Lent*), the California Supreme Court adopted the reasonableness test that the Court of Appeal had applied in *Dominguez* as the standard for determining whether a condition of probation was a proper exercise of the court’s statutory discretion. (*Lent*, at p. 486.) “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ (*People v. Dominguez*[, *supra*,] 256 Cal.App.2d 623, 627.)” (*Lent*, at p. 486.) *Lent*, unlike *Dominguez*, was an appeal from an order imposing a probation condition. (*Lent*, at p. 487.)

case squarely holding that the validity of probation conditions may be raised only by direct appeal upon the order granting probation.” (*Id.* at p. 1056.) The court cited *Dominguez* and other cases, but it acknowledged: “None of those cases indicates that a claim of waiver was asserted, so they do not stand as direct authority on the waiver issue. Still, the sheer number of cases indicates an appellate court practice to reach the merits of challenges to probation conditions regardless of how the issue comes to the court. In the absence of clear authority to the contrary, we will follow that practice here.” (*Hackler*, at p. 1057.)

■ “[C]lear authority to the contrary” was not long in coming. (*Hackler*, *supra*, 13 Cal.App.4th at p. 1057.) In May 1993, just a few months after the Fifth District’s February 1993 decision in *Hackler*, the California Supreme Court held “that failure to timely challenge a probation condition on ‘*Bushman/Lent*’⁶¹ grounds in the trial court waives the claim on appeal.” (*People v. Welch* (1993) 5 Cal.4th 228, 237 [19 Cal.Rptr.2d 520, 851 P.2d 802] (*Welch*).) In *Welch*, the defendant appealed from the imposition of probation and made a *Lent* challenge to a number of probation conditions that she had not challenged when they were imposed. (*Welch*, at p. 232.) The California Supreme Court held that she had forfeited her *Lent* challenge by not making it when the conditions were imposed. (*Welch*, at pp. 232–233, 235.) “A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case.” (*Id.* at p. 235.) The California Supreme Court acknowledged that “existing law overwhelmingly said no such objection was required,” so it made its decision applicable only prospectively. (*Id.* at p. 238.)

Subsequently, in *In re Sheena K.* (2007) 40 Cal.4th 875 [55 Cal.Rptr.3d 716, 153 P.3d 282] (*Sheena K.*), the California Supreme Court considered whether the *Welch* waiver rule extended not only to *Lent* challenges to probation conditions but also to “facial” constitutional challenges based on vagueness or overbreadth. (*Sheena K.*, at pp. 883, 885.) The court decided to recognize a narrow exception to the *Welch* waiver rule for facial constitutional challenges on vagueness or overbreadth grounds that raise “‘pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.’” (*Sheena K.*, at p. 889.) The *Sheena K.* court characterized *Hackler* as a case involving a “forfeited claim” where the Court of Appeal had “invoked [its] discretion to review an apparent constitutional issue when applicability of the forfeiture rule is uncertain or the defendant

⁶¹ The opinion in *In re Bushman* (1970) 1 Cal.3d 767 [83 Cal.Rptr. 375, 463 P.2d 727] (*Bushman*) purported to adopt the standard stated in *Dominguez*, but it misstated that standard by stating the test in the disjunctive rather than the conjunctive. (*Bushman*, at pp. 776–777.) The opinion in *Lent* disapproved *Bushman* and adopted the correct standard as stated in *Dominguez*. (*Lent*, *supra*, 15 Cal.3d at p. 486, fn. 1.)

did not have a meaningful opportunity to object at trial.” (*Sheena K.*, at p. 887, fn. 7.) The California Supreme Court noted that “‘discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]’ [Citation.]” (*Ibid.*)

■ The challenge that defendant raises in this appeal is expressly asserted as a *Lent* challenge, and is plainly not a facial constitutional challenge, to the association probation condition. Defendant did not object to this probation condition when it was imposed or at any other time before he violated it. His reliance on *Hackler* and *Dominguez* is misplaced as these cases preceded the California Supreme Court’s decisions in *Welch* (adopting a prospective waiver rule) and in *Sheena K.* (explicitly characterizing *Hackler*—which relied on *Dominguez*—as a case in which the contention was forfeited). The *Welch* waiver rule applies here, and we therefore deem forfeited defendant’s challenge to this probation condition.

B. Sexually Explicit Materials Condition

Defendant contends that the trial court abused its discretion by imposing a new condition of probation providing: “[Y]ou’re not to possess any sexually explicit materials for the purposes of arousing prurient interest”

■ “Trial courts have broad discretion to impose such reasonable probation conditions “as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer”’ [Citations.] ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality” [Citation.]’ (*People v. Lent*[, *supra*], 15 Cal.3d 481, 486.)” (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176 [176 Cal.Rptr.3d 413].) A court abuses its discretion under the *Lent* standard only “when its determination is arbitrary or capricious or ‘“exceeds the bounds of reason, all of the circumstances being considered.”’” (*Welch*, *supra*, 5 Cal.4th at p. 234.)

Defendant claims that the sexually explicit materials probation condition was not related to his future criminality. In light of the fact that defendant had previously committed a sexually violent offense, the trial court could have reasonably concluded that permitting him to possess pornography would pose a risk of triggering him to commit another act of sexual violence. The trial court’s determination that there was a potential connection between a convicted sex offender’s possession of pornography and his potential for sexual violence was neither arbitrary nor capricious and was not beyond the bounds of reason.

Defendant also contends on appeal that this probation condition is unconstitutionally vague and overbroad and cannot be upheld without a knowledge requirement. His vagueness challenge is that he could not know what would fall within the condition's prohibition. His overbreadth challenge is that "sexual imagery is so ubiquitous in our culture that one can hardly avoid it." He claims that he would be unable to use the Internet or read a magazine without violating the condition.

This court addressed similar issues in *People v. Pirali* (2013) 217 Cal.App.4th 1341 [159 Cal.Rptr.3d 335] (*Pirali*). In *Pirali*, the trial court had imposed a probation condition requiring the defendant "not to purchase or possess any pornographic or sexually explicit material." (*Id.* at p. 1353.) The defendant contended on appeal that the condition was unconstitutionally vague and needed a knowledge requirement. (*Id.* at p. 1352.) This court concluded that the condition was unconstitutionally vague in the absence of a knowledge requirement but was rendered constitutional by the addition of such a requirement. It modified the condition to apply to only those items that the defendant had "been informed by the probation officer . . . are pornographic or sexually explicit." (*Id.* at p. 1353.)

The Attorney General concedes that the sexually explicit materials condition cannot be upheld without adding a knowledge requirement, and we agree that a modification like the one in *Pirali* is the appropriate remedy. This modification will eliminate any vagueness and overbreadth concerns regarding the condition because it will limit it to only those specific items identified by the probation officer for defendant.

III. Disposition

The sexually explicit materials condition is modified to read: "[Y]ou're not to possess any sexually explicit materials that the probation officer identifies and informs you are sexually explicit for the purposes of arousing prurient interest." As modified, the order is affirmed.

Elia, Acting P. J., and Bamattre-Manoukian, J., concurred.

Appellant's petition for review by the Supreme Court was denied December 21, 2016, S238253.

[No. E055062. Fourth Dist., Div. Two. Sept. 28, 2016.]

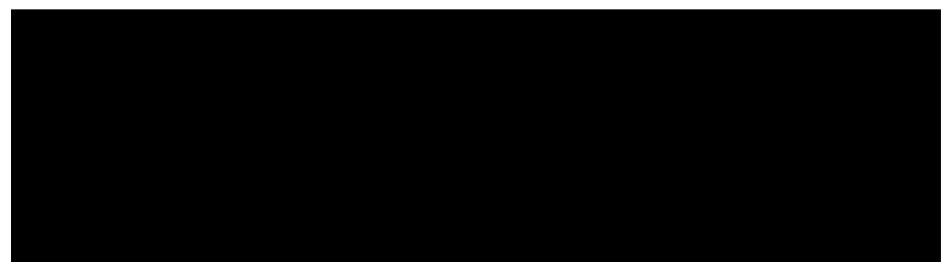
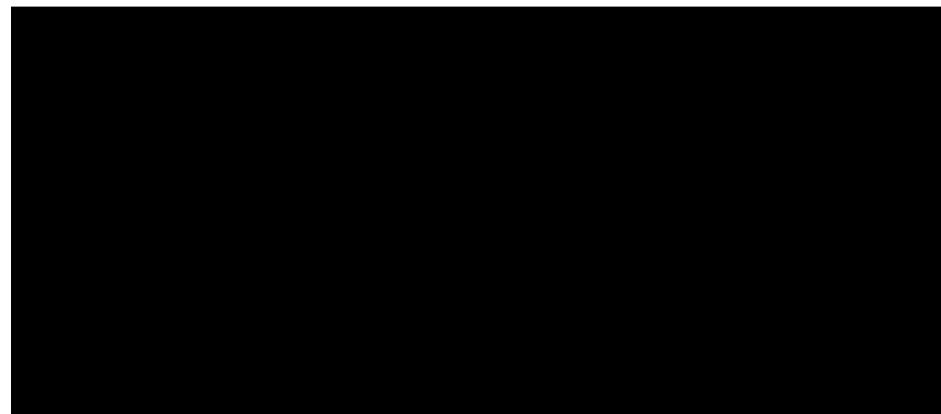
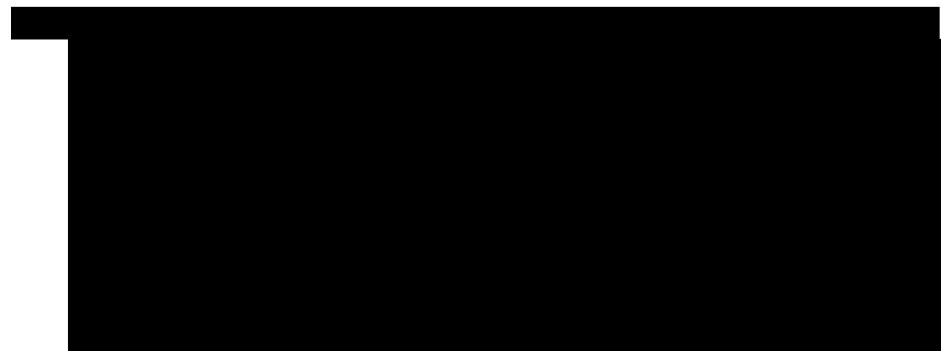
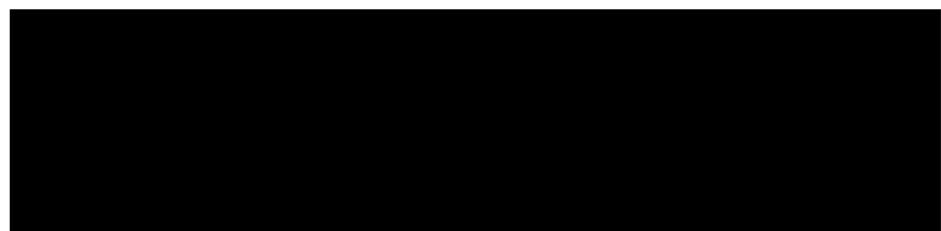
THE PEOPLE, Plaintiff and Respondent, v.
KEANDRE DION WINDFIELD et al., Defendants and Appellants.

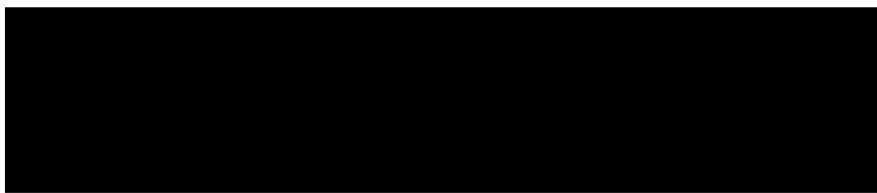
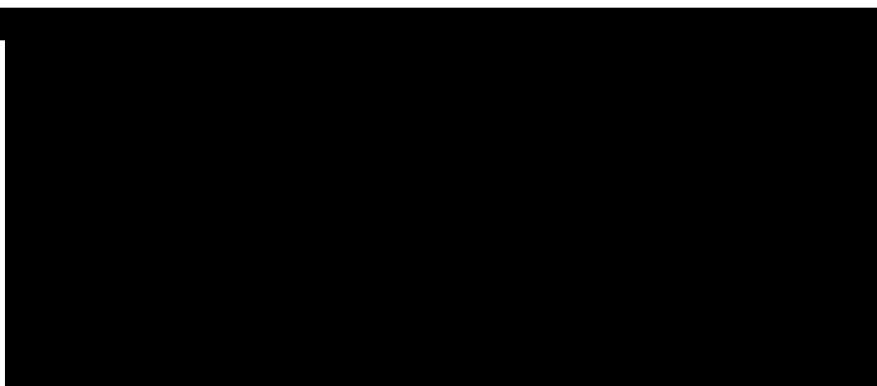
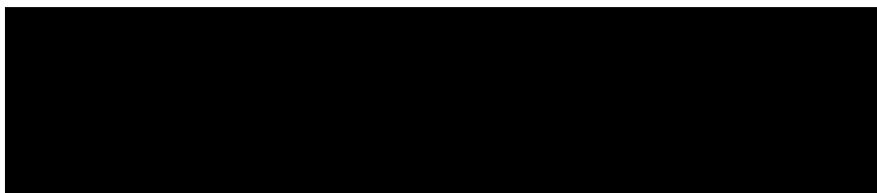
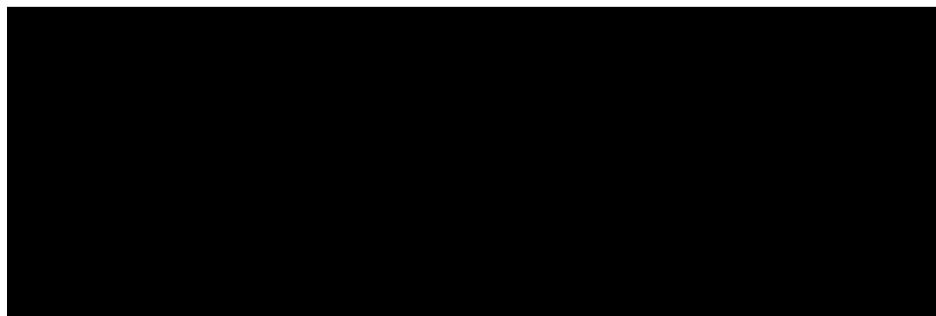
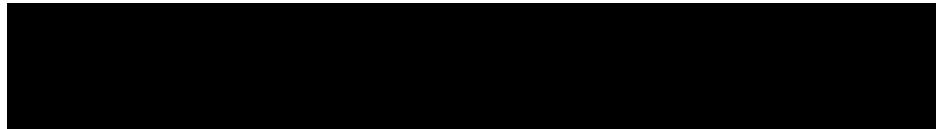
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) January 11, 2017, S238073.

[REDACTED]

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COUNSEL

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant KeAndre Dion Windfield.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Harquan Johnson.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RAMIREZ, P. J.—A jury convicted Harquan Johnson (Johnson) and KeAndre Dion Windfield (Windfield) of first degree murder (Pen. Code, § 187, subd. (a)),¹ during which they personally used and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) and a principal personally discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)). The jury further convicted defendants of attempted premeditated and deliberate murder (§§ 664, 187, subd. (a)), during which they personally used and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and a principal used and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)). As to both offenses, the jury found that defendants committed them for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) The jury also convicted defendants of assault with a semiautomatic firearm (§ 245, subd. (b)), during which they personally used a firearm (§ 12022.5, subd. (a)) and which they committed for the benefit of a criminal street gang. Both were sentenced to prison for 90 years to life. They appealed, claiming the preliminary hearing testimony of a prosecution witness should not have been admitted into evidence at trial, the evidence was insufficient to support their convictions of attempted murder, and the jury was misinstructed. Defendants also claim that the firearm allegation findings as to the attempted murder must be stricken.

In our original opinion, filed August 19, 2014, we agreed in part and directed that the jury's true findings that the defendants personally used a firearm or personally and intentionally discharged a firearm be stricken. Both defendants had asserted that the abstracts of judgment should be corrected and we directed the trial court to correct Windfield's, and, upon the resentencing of Johnson, to ensure that his abstract and the minutes of the hearing correctly reflect the year the crimes were committed and the award of pretrial custody credit. Each defendant claimed that the sentence imposed upon him, without consideration of his individual characteristics, is a violation of the constitutional prohibition on cruel and unusual punishment. We disagreed as to Windfield,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

but agreed as to Johnson. Therefore, we affirmed Windfield's judgment except as to corrections we directed the trial court to make. As to Johnson, we affirmed his convictions and remanded to the sentencing court for consideration of the factors as set forth in *People v. Gutierrez* (2014) 58 Cal.4th 1354 [171 Cal.Rptr.3d 421, 324 P.3d 245] (*Gutierrez*).

On November 12, 2014, the California Supreme Court denied both defendants' petitions for review, but, on its own motion, issued a grant-and-hold of review as to defendant Johnson, for consideration pending review in *In re Alatriste* (Aug. 17, 2016, S214652), *In re Bonilla* (Aug. 17, 2016, S214960), and *People v. Franklin* (May 26, 2016, S217699). On May 26, 2016, the Supreme Court issued its decision in *People v. Franklin* (2016) 63 Cal.4th 261 [202 Cal.Rptr.3d 496, 370 P.3d 1053] (*Franklin*). The Supreme Court then retransferred this case to our court with directions to vacate our opinion and to reconsider the juvenile sentencing issue in light of *Franklin*. Pursuant to that order, we vacate our original opinion, reaffirm those portions of our original opinion pertaining to issues not subject to the grant and hold, modify our holding of Windfield's cruel and unusual punishment issue, and reconsider Johnson's sentencing claim in light of *Franklin*.

FACTS

Johnson and Windfield were members of the Ramona Blocc Hustla gang. Johnson and Windfield were close friends. Johnson was easily influenced by Windfield and Johnson's gang moniker was Little Bam, while Windfield's was Bam.

Months before June 11, 2009, the murder victim's close friend, MM, had taken the murder victim to a Ramona Blocc party at a place in Rialto where people buy and use drugs and hang out, when members of that gang who were cousins of MM beat up and threatened the murder victim with guns and Windfield sucker punched him.

On June 11, 2009, the murder victim was with MM and the attempted murder victim in the same vicinity, which was near an apartment where three females were spending time together. The attempted murder victim had a "friends with benefits" relationship with Windfield's sister at the time. The murder victim was under the influence and he expressed anger at MM for not intervening on his behalf during the prior dustup between him, MM's cousins and Windfield at the party in Rialto. He was also still angry at MM's cousins and Windfield, and he said he wanted to "go over . . . and shoot up Ramona" and "kill those dudes."

MM told the murder victim that the latter was drunk, that he was not going to do the things the murder victim said he wanted to do and MM did not want

[REDACTED]

to fight the murder victim over this. The murder victim, still angry at MM, took off his sweater, pulled out a gun and held it down at his side. A van pulled up and parked across the street. Inside were Windfield's sister, the owner of the van and her minor children, Johnson, Windfield and other members of Ramona Blocc. The owner of the van lived with Windfield and his sister. Windfield, then Johnson, got out of the van and approached the murder victim and MM. The murder victim began chasing Johnson and Windfield with his gun pointed, taunting Johnson and Windfield as they ran away from him and accusing them of having jumped him. Windfield's sister got out of the van and was yelling concerning the murder victim intending to shoot people in the presence of the children that were in the van. The murder victim put his gun in Windfield's sister's face. MM and the attempted murder victim told the murder victim that he was tripping and the murder victim eventually put the gun down at his side. The van took off and the murder victim, attempted murder victim and MM stood outside the apartment talking.

In the van on the way to Windfield's home, Windfield's sister yelled to Johnson and Windfield that the murder victim had put a gun in her face and had to die for it. Windfield said "we" had to handle the murder victim that night. He angrily said that the murder victim had him running like a little bitch and that made him feel like he was a punk. When they arrived at Windfield's home, Johnson and Windfield armed themselves, borrowed the keys to the van from its owner and left, after Windfield said that they were returning to the scene of the chase.

Meanwhile, back at the scene of the chase, the police arrived in response to a call about a fight, and MM told the murder victim to put his gun away. The murder victim went into the alley behind the apartment complex, while MM stood next to a woman named Nikki, who lived nearby, and the attempted murder victim went inside the apartment where the aforementioned three women were. MM told the police that there had been an argument, but everyone had left. The police then left. The murder victim, the attempted murder victim and MM came together again outside the apartment. MM eventually left after hugging the murder victim, leaving the murder victim and the attempted murder victim outside the apartment, talking. The attempted murder victim told the murder victim that they needed to leave because the police were there (he feared the police would double back and return) but the murder victim did not want to leave. The murder victim said he had to get weed "out of the back" and the attempted murder victim accompanied him towards the alley behind the apartment complex.

Nikki was five to six feet away from them and she approached them and said something, but the attempted murder victim did not hear what she said. As the murder victim and the attempted murder victim walked through a

corridor in the apartment complex, each was hit by bullets—the attempted murder victim with one, and the murder victim with 10 to his front and back, including to his head while the gun was being held to it, several of which shots were fatal. As the attempted murder victim limped away, he saw Nikki crying and saying, “They killed him.” He went to a car Windfield’s sister had left nearby earlier for him, and drove it to Windfield’s home so the sister could drive him to the hospital. When he arrived there, he saw MM.

Between the time he left the murder victim and the attempted murder victim outside the apartment and the attempted murder victim arrived at Windfield’s home, MM had driven to a convenience store, purchased a cigar, then had driven to Windfield’s home, which Ramona Blocc members frequented, arriving there 15 to 20 minutes after leaving the apartment. MM intended to apologize to Johnson and Windfield for the murder victim’s actions in chasing them with a gun and to “resolve the matter.” When he arrived at Windfield’s, the latter said to him, “Sorry, Cuzo, he had to go” and “I mean he’s gone.” Windfield said he was sorry but he was not the shooter—Johnson was. When the attempted murder victim subsequently arrived at Windfield’s, MM saw that he had been wounded in the leg. Windfield told the attempted murder victim that “they” did not mean to shoot the attempted murder victim. On the way to the hospital, Windfield’s sister asked him if Windfield, then if Johnson, had shot him and he said he did not know. She then said something about the gun going off once and jamming. She said she could not believe that the murder victim had put a gun in her face and he had to die for doing it. When the attempted murder victim arrived at the hospital for treatment, he lied to the doctors and the police about how he had been injured.

More facts will be disclosed as they are pertinent to the issues discussed.

ISSUES AND DISCUSSION

1. *Admission of Nikki’s Preliminary Hearing Testimony*

The trial court permitted the prosecutor to introduce into evidence an audio/videotape of Nikki’s preliminary hearing testimony after concluding that she was unavailable as a witness, based on its finding that the prosecution had exercised due diligence in unsuccessfully attempting to locate her and produce her for trial. Defendants here contest the trial court’s finding of due diligence. We determine de novo whether due diligence was demonstrated. (*People v. Bunyard* (2009) 45 Cal.4th 836, 851 [89 Cal.Rptr.3d 264, 200 P.3d 879]; *People v. Cromer* (2001) 24 Cal.4th 889, 892, 893 [103 Cal.Rptr.2d 23, 15 P.3d 243] (*Cromer*)).

At the June 2011 due diligence hearing, the prosecution offered the testimony of an investigator from the district attorney’s office and the case

agent. The investigator testified that her office moved Nikki out of state the day Nikki finished her preliminary hearing testimony in October 2009. Nikki had disclosed to the investigator her new address, suggesting that Nikki had chosen it herself, and the investigator had arranged for Nikki to be transported to that address. Three days later, the investigator called and confirmed with Nikki that she had arrived there. However, no one called periodically thereafter to make sure that Nikki was still there.

In October 2010, the investigator was asked to track Nikki down. At that time, the investigator ran Nikki through all the available automated systems in California and in the state where Nikki had been relocated, including the Department of Motor Vehicles, CLETS (California Law Enforcement Telecommunication System) and Accurint. The investigator contacted an investigator for the prosecutor's office where Nikki had relocated and the latter checked all the addresses the former had found and rechecked a couple of them two to three weeks later, in October and November 2010. Nikki had not been living at her last known address for 30 days before contact was made with the manager at the apartment complex where she had lived. The investigator for the local prosecutor's office checked with Nikki's relatives in the area and they had not seen or heard from Nikki for several weeks prior to the contact. The investigator for the local prosecutor's office went to the social service agency that provided money to Nikki while she was living in the place where she had relocated and was informed that she had failed to appear for her last couple of appointments with the agency and to pick up funds it had for her.

In November 2010,² the investigator called Nikki's friend, Jasmine, who said that she had heard from Nikki three weeks before, but had no way to contact Nikki. Jasmine said that if Nikki contacted her, she would tell Nikki to contact the investigator. The investigator called Jasmine a second time a few weeks later, but Jasmine reported that she had not heard from Nikki and had no contact information for her. Jasmine, again, told the investigator that she would have Nikki call the investigator if Nikki contacted her. The investigator also called the case agent in November 2010,³ and asked him to contact her if he heard anything on the street about Nikki's whereabouts. In January, April and May 2011, the investigator reran Nikki through the available automated systems in California and the state to which Nikki had relocated.

The case agent testified that he did not try to stay in contact with Nikki after she relocated following the October 2009 preliminary hearing. The

² In his statement of facts, Windfield reports this hearing occurred in November 2011 and, yet, the hearing occurred in June 2011, according to the record.

³ See footnote 2, *ante*.

prosecutor had asked the case agent to locate Nikki in 2010, possibly in the fall. Starting in September 2010,⁴ and for more than three months, he spoke to 50 or 60 people in Rialto and surrounding communities who may have known Nikki. Information from these people led the case agent to believe that Nikki might be local, so he notified the agencies in the areas surrounding Rialto and he talked to family members, all of whom denied knowing her whereabouts. Some claimed to have seen Nikki locally within “the last six months or so” before the hearing.

Within six or seven months before the hearing, the case agent searched all the places in San Bernardino and Riverside Counties where people said Nikki

⁴ Windfield asserts that the case agent gave conflicting testimony about when his search began. We do not, however, share that view. When asked if he could relate the beginning of his search to a particular month, he said it began during the time of the other trial involving Windfield. In response to a question, he then said he began to talk to the people mentioned after footnote four in the text of this opinion in January or February of 2010. The same judge presided over both of Windfield’s trials, and the other trial began in April 2011. The trial court then expressed confusion about the case agent’s reference to the “other trial” and the agent’s testimony that he began speaking to people about Nikki in 2010, by asking, “What trial in 2010?” The following colloquy occurred between the case agent, the trial court and counsel for Johnson,

“[THE CASE AGENT]: [R]ight after the first trial, when [Nikki] was . . . relocated, there started to be some issues with where she was at. And at that time we had started trying to find out where she was because we did not know.

“[THE COURT]: There was no other trial except for the one that we had a few months ago [(meaning the Apr. 2011 trial of Canizales and Windfield)]. Do you mean some other court proceeding?

“[THE CASE AGENT]: Right . . . after the preliminary [hearing] to the first one.

“[THE COURT]: Okay. So earlier when you spoke about you didn’t start until the . . . other trial, you didn’t mean the trial we just had a month or two ago [(meaning the trial of Canizales and Windfield)].

“[THE CASE AGENT]: No. After the preliminary hearing . . . [¶] . . . [¶]

“[COUNSEL FOR JOHNSON]: After the preliminary hearing in [Windfield’s] prior trial?

“[CASE AGENT]: Yes.”

The preliminary hearing in Windfield’s other trial occurred in September 2010. In her argument to the trial court, the prosecutor said, “As soon as we found out that she moved, . . . things are not good with [her], then all efforts were made to find her after that. [¶] . . . [¶] . . . Up until then, we had no reason to believe that [she] . . . was an unreliable witness.” In its ruling, the trial court found that the case agent “start[ed] looking . . . he said trial, but he meant prelim—back then” We doubt that the trial court was making a finding that the case agent did not begin his search until April 2011. As Windfield, himself, points out, we defer to the trial court’s determination of historical facts.

Windfield also misreads the record by asserting that the case agent testified that he started looking for Nikki “about three months before he visited [her] aunt” citing page 890 of the reporter’s transcript. On that page, the agent testified that he spent at least three months talking to local people, and this three-month period preceded his talk with the aunt, which occurred two weeks before the hearing.

Citing reporter’s transcript page 894, Windfield asserts that the case agent testified that he had been looking for Nikki for six or seven months before he visited the aunt. No such testimony appears on that page.

would reside or frequent on a regular basis. Six months before the hearing, the case agent contacted one of Nikki's aunts, who lived in San Bernardino, but got no information. On and off since January 2011, the case agent had checked the Web site, Accurint, and Nikki's name came up at several locations linked to family members. The case agent and another detective went to those locations and staked them out several times to see if they could determine Nikki's whereabouts. From three months before the hearing, the case agent tried just about every day to contact Nikki by telephone and by contacting law enforcement agencies.

Approximately two months before the hearing, he put Nikki's information into the C.I.I. (California information and identification) database, with a flyer, so that if she were stopped by the police, the officer who stopped her would have the information that the Rialto Police Department should be contacted. The flyer was still active at the time of the hearing. Within the last two weeks before the hearing, the case agent visited another of Nikki's aunts and he contacted several other family members who lived locally. The aunt dialed a phone number for Nikki's mother and sister in another state and the case agent spoke to them in the presence of the aunt, but they reported that they had not been in contact with Nikki for some time. Other information⁵ led to an apartment complex in the city in Colorado⁶ where Nikki's mother and sister lived. Two weeks before the hearing, the case agent contacted the police in that city and they went to the complex and discovered that Nikki had moved out of the complex within the last month. The case agent tracked Nikki to a second other state, because she had been a passenger in a car that had been stopped by law enforcement. Two weeks before the hearing, the case agent had local law enforcement go to the address of the registered owner of the car, but the owner claimed not to know Nikki. The trial court ultimately found the case agent's testimony to be credible.

The prosecutor represented to the trial court at the hearing that when the district attorney's office relocated Nikki in 2009, the district attorney's office believed they were on good terms with her and she had no criminal convictions then or at the time of trial. Because Nikki was in a place where she was surrounded by family members, the prosecutor believed her office would be able to contact Nikki. The prosecutor also said that it was her

⁵ Windfield misreads the record by asserting that the case agent testified first that he obtained information about the apartment complex from talking on the phone to Nikki's mother and sister, then testified that his contact with them was not fruitful. Actually, the detective testified that "after speaking with [the] sister and mother, . . . [he] manage[d] to locate . . . further information on [Nikki's] whereabouts" which led him to the apartment complex. He never testified that speaking with the mother and sister on the phone *led to* his discovery of the apartment complex.

⁶ Although during its remarks while ruling on the motion the trial court said that it had struck the reference to Colorado, the record does not support this.

understanding that while the district attorney's office gave Nikki money so she could relocate, the office did not pay her rent once she did so. Trial counsel for Johnson represented that Nikki was unemployed and was on public assistance.

Defendants correctly point out that due diligence "‘connote[s] persevering application, untiring efforts in good earnest, efforts of a substantial character.’ [Citations.] Relevant considerations include ‘“whether the search was timely began”’ [citation], the importance of the witness’s testimony [citation], and whether leads were competently explored [citation].” (*Cromer, supra*, 24 Cal.4th at p. 904.)

By misconstruing the case agent's testimony, a matter which we have already addressed,⁷ defendants assert that the case agent was aware that Nikki had gone missing as soon as she was relocated in October 2009. In fact, the agent testified that she had gone missing at the time of the preliminary hearing in the other case involving Windfield, which occurred in September 2010⁸ and that was when he began his search for her. Therefore, the record does not support defendant's assertion that the search was not begun in a timely fashion. Although it was a month later that the district attorney's investigator began searching for Nikki, the case agent had already begun his search.

Next, defendants criticize the case agent for searching for Nikki locally when he knew she had been relocated to another state. However, the agent testified that information he gathered led him to believe that Nikki was local and people had told him that they had seen her in the area within six months before the hearing. This was entirely consistent with the agent's testimony that after the preliminary hearing in Windfield's other case in September 2010, law enforcement became concerned that Nikki had disappeared from where she had been relocated. We surmise that if the case agent, upon receipt of such information, had failed to search for her locally, defendants would have criticized him for that.

Defendants also assert that the prosecution is responsible for Nikki's absence at the time of trial "because relocating her to another state was surely a primary cause" of that absence. This is pure speculation. Additionally, defendants cite no authority holding that when the prosecution relocates a witness, it assumes the burden of keeping track of that witness. In fact, absent knowledge of a substantial risk that an important witness will flee, the prosecution has no obligation to take preventative measures to stop that

⁷ See footnote 4, *ante*, page 748.

⁸ See footnote 4, *ante*, page 748.

witness from fleeing. (*People v. Wilson* (2005) 36 Cal.4th 309, 342 [30 Cal.Rptr.3d 513, 114 P.3d 758].) Defendants contend that the prosecution could have obtained a hold and/or bond pursuant to section 1332 before relocating Nikki. However, that section itself requires that the court be satisfied by proof on oath that there is good cause to believe that the material witness will not appear and testify unless security is required, and there is no evidence that the prosecution had any reason in October 2009 to believe that Nikki would not be available for trial in 2011.

Defendants also criticize the prosecution for not contacting hospitals and medical establishments at the place where she was relocated, but we find that checking with the welfare agency that was providing her money was just as good, if not better, than this. Moreover, given the current status of HIPAA (Health Insurance Portability and Accuracy Act of 1996; Pub.L. No. 104-191 (Aug. 21, 1996) 110 Stat. 1936), we doubt that it would have been easy for law enforcement to obtain information about Nikki from medical providers. As to defendants' suggestion that clinics and hospitals should have been contacted to determine if the child she was carrying at the time of the crimes received treatment at any of those facilities, it is clear that defendants failed to read that portion of the record in which trial counsel for Johnson informed the court that that child had been taken from Nikki by the local department of child support services and given to the child's father.

One of the women in the aforementioned apartment testified at trial that Nikki had identified Johnson and Windfield as the shooters to her and this woman had told the case agent the same thing in December 2009. This woman also testified that Nikki had asked her and the other women in the apartment to lie to the police and say that Nikki was inside during the shooting. Another woman at the apartment told the case agent that Nikki did not want to be implicated in the shooting, so this woman lied to the first detective and told him that Nikki was in the apartment at the time of the shooting. A third woman in the apartment testified that she could have told the case agent that Nikki had identified Johnson and Windfield as the gunmen. The case agent testified that this woman told him that Nikki had, indeed, identified Johnson and Windfield as the gunmen and a copy of the recording of this interview was played for the jury. The jury was instructed that Nikki's statements to others were not admitted for the truth of the matters asserted therein, but if the jury believed that she made them, the jury was to use them to determine if her preliminary hearing testimony was believable.

MM provided the motive for Johnson and Windfield to retaliate against the murder victim by testifying that the murder victim had chased them with a gun prior to the shooting and had put his gun in Windfield's sister's face.

Although MM did not tell the first detective who interviewed him this (and he testified to reasons for this), he told the case agent that after the shooting, Windfield had said that the murder victim "had to go" and that Johnson had shot him. Similarly, MM testified that Windfield told him that the murder victim "had to go" and Johnson was the shooter. He also testified that Windfield had told the attempted murder victim that "they" did not mean to shoot him.

The attempted murder victim also testified, and had previously told the case agent, that the murder victim had chased Johnson and Windfield with a gun and put it in Windfield's sister's face before the shootings. He told the case agent that Windfield's sister had asked him if Windfield and Johnson had shot him, but he told her he did not know. He also told the case agent that Windfield's sister was very upset that the murder victim had put his gun in her face and he had to die for it. He also told the agent that he was hurt that Windfield's sister had taken Windfield to the place where the sister insinuated that Windfield had shot him and the murder victim, although he denied actually seeing them do it. He told the agent that Windfield's sister was a proud Ramona Blocc "wanna be" and could be more dangerous than an actual gang member.

The owner of the van testified that Johnson wore a jacket with the cartoon character, Sylvester the cat, on it during the chase and before and after the shooting. She testified that the murder victim chased Johnson and Windfield with a gun and put it in Windfield's sister's face. She also testified that Windfield's sister said, in the presence of Johnson and Windfield, that the murder victim had to be killed, and Windfield said that they had to handle the murder victim that night—that the murder victim had Windfield "running like a little bitch," which made Windfield feel like a punk. The van owner testified that she saw Johnson and Windfield retrieve guns from near Windfield's home. She testified that Windfield said he and Johnson were going to return to the scene of the chase. They got the keys to the van from the owner, got into the van with their guns and took off. They returned 20 to 30 minutes later and Johnson asked the van owner if she would take him to the hood of the rival gang, Hustla Squad, where he could drop off the clothes he had in his hand, so it would seem like that gang killed the murder victim. She testified that Johnson told her that at the scene of the shooting, he had hopped a wall to get to the murder victim, Nikki had seen him and asked him if she wanted him to tell the attempted murder victim to get away from the murder victim, but he just looked at her, and that Johnson and Windfield ran around to where the murder victim was and started shooting him. Windfield told the van owner that he used all his bullets on the murder victim and had shot him more than four times. Johnson showed her how, after the murder victim fell to the ground, he walked over to the murder victim and shot him in the face and chest, using two hands. Windfield said they had shot the murder victim

[REDACTED]

because the latter had Windfield running like Windfield was a bitch. Windfield said more than four times that he shot the murder victim. Windfield asked Johnson if Johnson had shot the murder victim in the face and Johnson said that he had. Johnson told the van owner not to tell on him—that she was his “big sister.” With Johnson standing next to him, Windfield told the attempted murder victim that he was sorry and he did not mean to shoot the latter. Windfield told the van driver that the murder victim had to die and he was running Windfield “like a bitch.” She accused Johnson’s mother of trying to bribe her not to testify and of telling her to tell Nikki not to testify or she would have someone kill Nikki for money.

Nikki’s preliminary hearing testimony corroborated the story about the murder victim chasing Johnson and Windfield with the gun. She identified Johnson and Windfield as the shooters. She testified that Johnson wore a jacket with Sylvester the cat on it. She said that the final shot to the murder victim was delivered as the end of the gun rested against his head. She admitted telling the first detective who interviewed her five or six different stories. She testified that she did not begin making identifications of the shooters until the first detective who interviewed her threatened to arrest her for child endangerment for getting drunk two weekends before and for obstructing or delaying a peace officer. She also admitted being offered relocation and money by the prosecutor’s office in exchange for her help with the investigation.

The detective who first interviewed Nikki testified for Johnson that Nikki told him a number of stories about the shooting. He also testified that Nikki identified Johnson and Windfield as the shooters during the same interview during which she was offered relocation and she repeated her identification of them during subsequent interviews. She also said that the attempted murder victim went into the murder victim’s pockets after the latter had been killed. Although 37 cents was found next to the murder victim’s body, his pockets had not been turned out.

The case agent testified for Johnson that Nikki had told the first detective everything she testified to at the preliminary hearing and more.

The pathologist who performed the autopsy testified that the bullet wound to the murder victim’s head was a contact—or near contact—wound and could have been delivered while the victim was lying on the ground and the barrel of the gun was placed against his head.

The prosecution’s gang expert testified that Johnson and Windfield were members of Ramona Blocc Hustlas, whose primary rival was the Hustla Squad Clicc. The expert opined that the shootings benefitted Ramona Blocc

because they were in retaliation for the murder victim disrespecting Windfield, who was one of the main heads and most active member of Ramona Blocc, by chasing him around with a gun. Graffiti near the crime scene referenced the killing of the murder victim and disrespect to Ramona Blocc.

While no one could dispute that Nikki was an *important* witness, she was not a *crucial* witness, as the foregoing makes clear, and important portions of her testimony were corroborated by other witnesses. There was plenty of evidence aside from her testimony supporting the convictions and she was impeached with the conflicting stories she told, with her effort to get the women in the apartment to lie for her and with the facts that she was compensated and that the prosecutor ultimately discounted her story that it was Windfield, and not Johnson, who fired the shots into the murder victim's body. In fact, trial counsel for Johnson played portions of Nikki's preliminary hearing testimony during his argument to the jury, pointing out how her testimony demonstrated her lack of credibility or conflicted with other evidence presented at trial. Thus, defendants' assertion that an *extraordinary* showing of due diligence was in order because of her value to the prosecution (see *People v. Herrera* (2010) 49 Cal.4th 613, 622 [110 Cal.Rptr.3d 729, 232 P.3d 710]) must be rejected.

2. Insufficiency of the Evidence

Defendants contend that there was insufficient evidence to support a finding by the jury that they created a kill zone by firing their guns and the attempted murder victim was in that zone. During argument to the jury, the prosecutor stated that her theory of defendants' guilt for the attempted murder of the attempted murder victim was kill zone. In connection with this theory, the jury was instructed, "A person may intend to kill a specific victim and/or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of the [attempted murder victim], the People must prove that defendant not only intended to kill [the murder victim] but also either intended to kill [the attempted murder victim], or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill [the attempted murder victim] or intended to kill [the murder victim] by killing everyone in the kill zone, then you must find the defendant not guilty of attempted murder of [the attempted murder victim]."

■ In *People v. Bland* (2002) 28 Cal.4th 313, 328–330, 333 [121 Cal.Rptr.2d 546, 48 P.3d 1107] (*Bland*), the California Supreme Court explained the kill zone theory as follows: "[A defendant] who shoots at a group of people [can be] punished for the actions towards *everyone in the group* even if [the defendant] primarily targeted only one of them [A

[REDACTED]

defendant] might . . . be guilty of attempted murder of *everyone in the group* . . . [¶] . . . [T]he fact [that a defendant] desires to kill a particular target does not preclude finding that the [defendant] also, concurrently, intended to kill others within what it termed the ‘kill zone.’ ‘The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude [that the defendant] intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity. . . . When the defendant escalate[s] his mode of attack from a single bullet aimed at A’s head to a hail of bullets . . . , the defendant concurrently intended to kill everyone in A’s immediate vicinity to ensure A’s death. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. . . .’ [Citation.]” (*Id.* at pp. 329–330, italics added.)⁹

In *People v. Stone* (2009) 46 Cal.4th 131 [92 Cal.Rptr.3d 362, 205 P.3d 272] (*Stone*), the high court said of *Bland*, “The evidence supported a jury finding that the defendant intended to kill the driver [of the car into which he shot] but did not specifically target the two who survived. [Citation.] . . . We summarized the rule that applies when an intended target is killed and unintended targets are injured but not killed. . . . [¶] . . . [I]f a person targets one particular person, . . . a jury could find the person also, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, nontargeted, persons.” (*Stone*, at pp. 136–137, some italics added.) In her dissent in *Smith, supra*, 37 Cal.4th at pages 755 and 756, Justice Werdegar said, “A kill zone . . . analysis . . . focuses on (1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant’s attack on the primary target that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm.” (Italics added.)

■ In *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [86 Cal.Rptr.3d 915] (*Adams*), the Fifth District said, “[T]he . . . [theory] permits a rational jury to infer the required express malice from the facts that (1) the defendant targeted a primary victim by intentionally creating a zone of harm,

⁹ Defendants incorrectly cite *People v. Smith* (2005) 37 Cal.4th 733 [37 Cal.Rptr.3d 163, 124 P.3d 730] (*Smith*) as a kill zone case. It was not. Kill zone instructions were not given in *Smith* and the California Supreme Court stated, “We thus have no occasion here to decide under what factual circumstances, if any, the firing of a single bullet might give rise to multiple convictions of attempted murder under *Bland*’s kill zone rationale.” (*Id.* at p. 746, fn. 3.) Therein, the court held that there was sufficient evidence that the defendant, who fired a single bullet into a car through the rear window at his former girlfriend, knowing that her baby was in his line of fire, from a distance of one car length, intended to kill the child, even though no evidence was presented that he bore any ill will towards the child. (*Id.* at pp. 736, 742–743, 746–747.)

and (2) the attempted murder victims were within that zone of harm. . . . [It] recognizes that the defendant acted with the specific intent to kill anyone in the zone of harm with the objective of killing a specific person [It] imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person . . . despite the recognition, or with acceptance of the fact, that *a natural and probable consequence of that act would be that anyone within that zone could or would die.*" (Italics added.) In *People v. Campos* (2007) 156 Cal.App.4th 1228, 1243 [67 Cal.Rptr.3d 904], the appellate court held, "[The kill zone theory] . . . is simply a reasonable inference the jury may draw in a given case"

Kill zone victims can include those not seen by the defendant or of which the defendant is unaware. (*Adams, supra*, 169 Cal.App.4th at p. 1023; *People v. Vang* (2001) 87 Cal.App.4th 554, 564 [104 Cal.Rptr.2d 704] (*Vang*), cited with approval in *Bland, supra*, 28 Cal.4th at p. 330.)

Defendants assert that there is insufficient evidence to support a kill zone theory because "[Johnson] and . . . Windfield waited for [the murder victim] to appear, and when he did appear they fired at close range a number of well-targeted shots designed to hit and kill only [the murder victim]." That's defendants' interpretation of the evidence—one which does not support the verdict. In examining a record for sufficiency of the evidence, we do not do this if a reasonable jury could have had another interpretation—one that supported a kill zone theory (*People v. Albillar* (2010) 51 Cal.4th 47, 60 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Lindberg* (2008) 45 Cal.4th 1, 27 [82 Cal.Rptr.3d 323, 190 P.3d 664]), and that is the case here.

■ Moreover, there was no evidence that Johnson and Windfield waited specifically for the murder victim. Even if they did, that fact would not detract from the determination whether "'the nature and scope of the attack'" was such that the jury could reasonably conclude that they intended to ensure harm to the murder victim by harming everyone in his vicinity. (*Bland, supra*, 28 Cal.4th at pp. 313, 329.)

We also disagree with defendants' categorization of the shots as "well-targeted shots designed to hit and kill only [the murder victim]" under the circumstances here. The attempted murder victim testified that just before the shots began, he and the murder victim were walking side by side, then he heard the first shot or shots, he told the murder victim to hold up, then both turned and ran into each other, and while turned, facing each other, and probably as he was turning, he got shot. Based on this, and his testimony that when he went down after being shot, he thought the murder victim was still standing and the latter fell on top of him, it is most likely that he got hit

before the murder victim did, while he and the murder victim were very close to each other. He testified that when the shooting began, the muzzle flashes were 15 feet from him, but as the shooting progressed the shooters got within six to eight feet of him. In her preliminary hearing testimony, Nikki said that when Johnson and Windfield approached the murder victim, the attempted murder victim was holding him tightly by having one of his arms over the murder victim's shoulder¹⁰ and after that, while Johnson and Windfield were shooting at the murder victim, the attempted murder victim was trying to cover or shield the murder victim, by standing between him and defendants, and he moved his body as they moved, so they could not shoot the murder victim.

However, "well-targeted" the defendants' bullets might have been, when another person is standing very close to the targeted victim or has placed himself between the shooters and the targeted victim and is acting as a shield for the latter, we cannot imagine a more appropriate application of the kill zone theory where, despite this, the shooters shoot, actually hitting that person. Contrary to defendants' assertion, the fact that the murder victim was hit with nine bullets (aside from the "coup de grace" to the head) and the attempted murder victim with only one does not disprove that the attempted murder victim was in the line of fire.

It is obvious that the attempted murder victim was either hit before the murder victim, or collapsed to the ground before the murder victim did. Moreover, defendants' attack on Nikki's testimony that clearly established that the attempted murder victim was in the line of fire because, according to them, she "never gave a reliable description of precisely where the shooters were positioned when [the murder victim] was shot" is specious. She described, with great precision, where the attempted murder victim was in relation to the murder victim and the attempted murder victim's testimony corroborated at least part of this description (i.e., he testified that he told the murder victim to hold up as the first shot or shots were fired and this was consistent with Nikki's description that he was holding back the murder victim, and he testified that the two ran into each other as he was hit with the bullet, which was not inconsistent with her perception that he was shielding the murder victim during the shooting). Moreover, on a sufficiency of the evidence claim, we do not discount a witness's testimony unless it is so improbable as to be unworthy of belief (*People v. Thornton* (1974) 11 Cal.3d 738, 784 [114 Cal.Rptr. 467, 523 P.2d 267], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), and Nikki's was not.

¹⁰ She said he was trying to stop the murder victim from going any closer to where Nikki had warned him the armed defendants were.

Defendants' assertion that the method used—a hail of bullets from two different guns—was insufficient is absurd. Perhaps if the victims had been inside a house and defendants had used small caliber bullets, they would have an arguable position—but defendants were mere feet from two unarmed people who were very close to each other, if not on top of each other. Under these circumstances, the jury could reasonably infer that defendants “‘used a means to kill the [murder victim] that inevitably would result in the death of other victims within the zone of danger.’” (*Stone, supra*, 46 Cal.4th at p. 138.)

As to the fact that Windfield apologized to the attempted murder victim, saying they did not intend to shoot him, and therefore the jury could not infer the intent to kill, the jury was perfectly free to reject this self-serving statement. If, as defendants assert, they were “being careful not to shoot” the attempted murder victim, they did a lousy job, taking him down before the murder victim.

Moreover, we doubt that the defendants in *Vang* had any particular desire to kill the daughter of their intended target or to injure his wife, or to do either to his other two children who were not injured, but, nonetheless were attempted murder victims when the defendants unleashed a hail of bullets at their house due to gang rivalry. (*Vang, supra*, 87 Cal.App.4th at p. 558.) The same is true of the wounded mother and uninjured siblings of another intended victim at their apartment. (*Ibid.*) In response to the defendants' claim that there was insufficient evidence that they intended to kill anyone except the two targets, the Court of Appeal held, “Defendants' argument might have more force if only a single shot had been fired in the direction of where [the two intended targets] could be seen.” (*Id.* at p. 564.)

In *Bland*, the California Supreme Court approved the language in *Vang* that the fact that the defendants did not see some of their victims “‘who were present and in harm’s way’” somehow negated the intent to kill them. (*Bland, supra*, 28 Cal.4th at p. 330.) In *Adams*, the appellate court similarly upheld convictions of attempted murder against victims who were not seen by the defendant, but who were placed in danger of death by his actions. The court reasoned, “[t]he theory imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant’s primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die.” (*Adams, supra*, 169 Cal.App.4th at p. 1023.)

■ As stated before, the kill zone theory permits a jury to reasonably infer the intent to kill based on the nature and scope of the attack. The

defendant's particular feelings towards the nontarget attempted murder victim—whether good, bad, indifferent or nonexistent, has nothing to do with it, if the defendant created the kill zone and the attempted murder victim was in it. This case involved not only *Bland*'s “‘hail of bullets,’” but at very close range. (*Bland, supra*, 28 Cal.4th at p. 330.)

Although defendants did not mention *People v. McCloud* (2012) 211 Cal.App.4th 788 [149 Cal.Rptr.3d 902] (*McCloud*) until Windfield's reply brief, when the People had no opportunity to address it, we shall do so anyway. *McCloud* begins its discussion of the kill zone theory by citing language in *Smith, supra*, 37 Cal.4th at page 733, about that theory. *Smith*, however, is not a kill zone case, so anything said about the theory therein is dicta. (Accord, *Adams, supra*, 169 Cal.App.4th at pp. 1009, 1022.) Moreover, *Smith* interpreted the reasoning in *Bland*, which we have extensively quoted above, to mean that “a shooter may be convicted of multiple counts of attempted murder on the ‘kill zone’ theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim . . . as the means of accomplishing the killing of a victim.

“Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm.” (*Smith, supra*, 37 Cal.4th at pp. 745–746.) At the same time, the *Smith* court quoted *Bland*'s language that, “[The kill zone theory] is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.’ [Citation.]” (*Smith*, at p. 74, italics added.)

Based on this language, and with no further citation to any precedent, *McCloud* states, “The kill zone theory thus does *not* apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual. Rather, the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*. The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within that area. In effect, the defendant reasons that he cannot miss his intended target if he kills *everyone* in the area in which the target is located. [¶] . . . [T]he defendant specifically intends that *everyone* in the kill zone die. If some of those

individuals manage to survive the attack, then the defendant—having specifically intended to kill every single one of them and having committed a direct but ineffectual act toward accomplishing that result—can be convicted of their attempted murder.” (*McCloud*, *supra*, 211 Cal.App.4th at p. 798.)

In our view, *McCloud* goes too far. The language in *Bland*, cited above, posits that the intent to kill the nontargeted person(s) *can be inferred* from the nature and scope of the attack or from the method employed. If, as *McCloud* asserts, the defendant must in fact intend to kill each attempted murder victim, there is no reason to employ the theory—the intent to kill is established without resort to the theory.

That *McCloud* overstates the theory is proven by language in other California Supreme Court opinions. As we have already stated, in *Stone*, *supra*, 46 Cal.4th at pages 131, 136, and 137, the high court said of *Bland*, “The evidence supported a jury finding that the defendant intended to kill the driver [of the car into which he shot] but *did not specifically target* the two who survived. [Citation.] . . . We summarized the rule that applies when an intended target is killed and *unintended* targets are injured but not killed. . . . [¶] . . . [I]f a person targets one particular person, . . . a jury could find the person *also*, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, *nontargeted* persons.” (Some italics added.) As we have already stated, in her dissent in *Smith*, *supra*, 37 Cal.4th at pages 755 and 756, Justice Werdegar said, “A kill zone . . . analysis . . . focuses on (1) whether the fact finder can rationally *infer from the type and extent of force employed* in the defendant’s attack on the primary target *that the defendant intentionally created a zone of fatal harm*, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm.” (Italics added.)

Language in opinions of the Court of Appeal also suggest that *McCloud* misstates the kill zone theory. As already stated, in *Adams*, *supra*, 169 Cal.App.4th at page 1023, the Fifth District said, “[T]he . . . [theory] permits a rational jury to *infer the required express malice* from the facts that (1) the defendant targeted a primary victim by intentionally creating a zone of harm, and (2) the attempted murder victims were within that zone of harm. [It] recognizes that the defendant acted with the specific intent to kill anyone in the zone of harm with the objective of killing a specific person [It] imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant’s primary objective of killing a specific person . . . despite the recognition, or with the acceptance of the fact, that *a natural and probable consequence of that act would be that anyone within the zone could or would die*.” (Italics added.) In *People v. Campos*, *supra*, 156 Cal.App.4th at page 1243, the appellate court held, “The [kill zone] theory . . . ‘is simply a reasonable inference the jury may draw in a given case . . . ,’”

Moreover, *McCloud's* restrictive view of the kill zone theory cannot possibly be reconciled with the holding of two different appellate courts, and the approval by the California Supreme Court of one of those holdings, that kill zone victims can include those not seen by the defendant or of which the defendant is unaware. (See p. 755, *ante*.)

3. *Jury Instruction Error*

Provocation as to the Attempted Murder

In connection with the charged murder, the jury was instructed, in accordance with CALCRIM No. 522, "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

The jury was also given the standard instruction on the heat of passion/provocation theory of voluntary manslaughter, which imposes an objective standard on the reasonableness of the provocation, while CALCRIM No. 522 does not. (See *People v. Valentine* (1946) 28 Cal.2d 121, 132 [169 P.2d 1], *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295, 1296 [3 Cal.Rptr.2d 808]; *People v. Padilla* (2002) 103 Cal.App.4th 675, 678 [126 Cal.Rptr.2d 889].)

As to the charged attempted murder, the jury was instructed on the requirements of the finding that it was premeditated and deliberate. The jury was also instructed on attempted heat of passion/provocation voluntary manslaughter, which imposes an objective standard on the reasonableness of defendant's reaction to the provocation.

Defendants here claim that the trial court's failure, *sua sponte*, to give an instruction as to the charged attempted murder similar to CALCRIM No. 522 requires reversal of the findings that it was premeditated and deliberate. At the same time, they recognize that two California Supreme Court decisions have held that there is no *sua sponte* duty to give CALCRIM No. 522. (*People v. Rogers* (2006) 39 Cal.4th 826, 877–880 [48 Cal.Rptr.3d 1, 141 P.3d 135]; *People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) Of course, we are bound by Supreme Court decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321, 369 P.2d 937].)

■ As a fallback, defendants claim that their trial counsels' failure to request a CALCRIM No. 522-like instruction as to the charged attempted murder constitutes incompetency of counsel. In order to prevail, they must demonstrate a reasonable probability that, but for the failure to request this instruction, the outcome of this trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 691–694, 697–698 [80 L.Ed.2d 674, 104 S.Ct. 2052].) That probability must be sufficient to undermine confidence in the verdicts. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–218 [233 Cal.Rptr. 404, 729 P.2d 839].)

However, defendants cannot carry their burden. In convicting them of first degree murder, the jury necessarily rejected the possibility that any provocation that existed reduced the first degree murder to second degree murder. This is true for either theory of first degree murder that was available to the jurors, whether premeditated and deliberate or lying in wait, as the latter, the jury was instructed, required "a state of mind equivalent to deliberation or premeditation." Because the murder and the attempted murder were committed simultaneously, by the same acts and under the same circumstances and were interconnected by the use of the kill zone theory as to the latter, there was no basis for the jury to conclude that some provocation reduced the attempted murder to nondeliberate, nonpremeditated attempted murder, but did not reduce the murder to second degree murder.

4. *Gun Allegations as to the Attempted Murder*

The first amended information, filed April 1, 2010, was the first charging document in this case to allege that defendants had attempted to murder the attempted murder victim. It alleged, in connection with the charged attempted murder, that defendants had personally and intentionally discharged a firearm which caused great bodily injury or death to the attempted murder victim within the meaning of section 12022.53, subdivision (d). It also alleged that a principal personally and intentionally discharged a firearm, proximately causing great bodily injury or death to the attempted murder victim, pursuant to section 12022.53, subdivisions (d) and (e)(1). Defendants were arraigned on this charging document while represented by counsel.

On June 1, 2011, during voir dire, the trial court read the information to the prospective jurors, omitting any references to causing death to the attempted murder victim. On June 7, 2011, the seventh day of trial, when voir dire was still occurring, the prosecutor told the trial court that she would be omitting from the charging document the great bodily injury to the attempted murder

[REDACTED]

victim allegation, pursuant to section 12022.7 and count 4,¹¹ and would be adding the allegation that the attempted murder was willful, premeditated and deliberate. She said she would be filing an amended information to reflect these changes. The following day, the prosecutor filed what was entitled the third amended information, although our review of the record before this court and the superior court record shows that no second amended information was ever filed. The so-called third amended information alleged, in connection with the charged attempted murder, that Johnson and Windfield “personally and intentionally discharged a firearm . . . , which caused death to [the murder victim] within the meaning of Penal Code section 12022.53[, subdivision] (d)” It also alleged as to this count that “a principal personally and intentionally discharged a firearm . . . , which proximately caused death to [the murder victim] within the meaning of Penal Code sections 12022.53[, subdivisions] (d) and (e)(1).” It also alleged that the attempted murder had been committed for the benefit of a gang. Finally, it alleged that the victim of this count was the murder victim. The prosecutor’s opening statement is not part of the record before this court.

During arguments to the jury, on July 15, 2011, the prosecutor told the trial court that she wanted to make sure, by interlineations, that count 2 in the so-called third amended information “reflect[ed] the attempted murder victim.” The trial court said it would make that order. Although no such interlineations appear in the record before this court, we will deem the so-called third amended information to have been amended to substitute the attempted murder victim’s name in place of the murder victim’s as to this count and the allegations to read that great bodily injury, not death, was caused to the attempted murder victim. Defendants’ assertion that the amendment affected only the name of the victim and not the enhancement allegations, exalts form over substance, especially in light of the fact that the parties went to trial with a charging document that for almost 15 months before it was incorrectly amended, set forth enhancement allegations under section 12022.53, subdivisions (d) and (e)(1), specifying that the attempted murder was the subject of these allegations. Under the circumstances, defendants can hardly claim that they were unaware that they were going to trial on these allegations. Additionally, neither defendant objected to the verdict forms, which will be described below.

When the jury returned its verdicts, it found, in connection with the attempted murder, that both defendants had personally used a firearm, personally used and intentionally discharged a firearm, and personally used and intentionally discharged a firearm, proximately causing great bodily injury to the attempted murder victim. The jury also found, in connection

¹¹ It had been the substantive crime of associating with a gang. This count had not been read to the jury.

with the attempted murder, as to both defendants, that a principal used a firearm, a principal used and intentionally discharged a firearm and a principal used and intentionally discharged a firearm proximately causing great bodily injury to the attempted murder victim.

■ Section 12022.53, subdivision (d), as is pertinent to this count, provides a 25-year-to-life term for a defendant who personally and intentionally discharges a firearm proximately causing great bodily injury during an attempted murder. Section 12022.53, subdivision (e)(1) applies to the enhancements provided in subdivision (b) (which is a 10-year enhancement when any other principal personally uses a firearm), subdivision (c) (which is a 20-year enhancement when any other principal personally and intentionally discharges a firearm), and subdivision (d), (which is a 25-year-to-life term for any principal when any other principal personally and intentionally discharges a firearm proximately causing great bodily injury) when that person committed the crime for the benefit of a street gang.

In making findings that defendants personally used and another principal personally used a firearm and personally used and intentionally discharged a firearm, the jury was making findings pursuant to section 12022.53, subdivisions (b) and (c). Defendants point out that subdivision (j) of section 12022.53 provides that for the penalties provided in that section to apply, any fact required under subdivision (b), (c) or (d) must be alleged in the accusatory pleading. As to both defendants, the sentencing court imposed a term of 25 years to life, which had to have been pursuant to section 12022.53, subdivision (d). Therefore, the penalty under subdivision (d) did apply because the information alleged the necessary facts, i.e., that defendants personally and intentionally discharged a firearm causing great bodily injury and another principal personally and intentionally discharged a firearm causing great bodily injury where the crime was committed for the benefit of a gang. The jury should not have made findings that defendants and a principal personally used a firearm or personally and intentionally discharged a firearm, but since no penalty was imposed as to those findings, there was no violation of subdivision (j). However, we will direct the trial court to strike from the jury's findings¹² any references to them.

5. *Sentencing*

a. *Windfield's Sentence as Cruel and Unusual*

Windfield was sentenced in this case to three 25-year-to-life terms, plus a life term with a 15-year minimum which was run consecutive with the time

¹² These findings are not reflected in the minutes of the court.

imposed in another case of two 25-year-to-life terms, two 15-year-to-life terms plus 40 years. Windfield contends that this sentence violates *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407, 132 S.Ct. 2455] (*Miller*).

Windfield was 18 years old when he committed the crimes in both cases and 21 when he was sentenced for both. He points out that his minimum parole eligibility extends beyond any life expectancy he could possibly have. In *Miller*, the United States Supreme Court held “that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” (*Miller, supra*, 567 U.S. at p. 463 [132 S.Ct. at p. 2460].) The high court noted, “Because juveniles have diminished culpability and greater prospects for reform, . . . ‘they are less deserving of the most severe punishments.’ [Citation.] . . . [C]hildren have a ‘‘lack of maturity and an underdeveloped sense of responsibility,’’ leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] . . . [They] ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[ll] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] . . . [A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] depravity.’ [Citation.] [¶] . . . [¶] . . . [T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because ‘‘[t]he heart of the retribution rationale’’ relates to an offender’s blameworthiness, ‘‘the case for retribution is not as strong with a minor as with an adult.’’ [Citations.] Nor can deterrence do the work in this context, because ‘‘the same characteristics that render juveniles less culpable than adults’’—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. [Citation.] Similarly, incapacitation could not support the life-without-parole sentence . . . Deciding that a ‘juvenile offender forever will be a danger to society’ would require ‘mak[ing] a judgment that [he] is incorrigible’—but ‘‘incorrigibility is inconsistent with youth.’’ [Citation.] And for the same reason, rehabilitation could not justify that sentence. Life without parole ‘forswears altogether the rehabilitative ideal.’ [Citation.] It reflects ‘an irrevocable judgment about [an offender’s] value and place in society,’ at odds with a child’s capacity for change. [Citation.] [¶] . . . [¶] . . . [T]he characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. [Citation.] . . . ‘[C]riminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.’ [Citation.] . . . [¶] [T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an

adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. . . . [¶] . . . Imprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’ [Citation.]” (*Id.* at pp. 471–476 [132 S.Ct. at pp. 2464–2466].) “Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself It neglects the circumstances of the homicide . . . , including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” (*Id.* at p. 478 [132 S.Ct. at p. 2468].) “Our decision . . . mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” (*Id.* at p. 483 [132 S.Ct. at p. 2471].)

■ Windfield contends that scientific literature shows that the features of juveniles discussed in *Miller* extend to 18 year olds. However, we are bound by precedent and there is no precedent for us to declare that *Miller* applies to 18 year olds. Our Legislature has determined that 18 is the age at which a person is considered an adult. (*People v. Gamache* (2010) 48 Cal.4th 347, 405 [106 Cal.Rptr.3d 771, 227 P.3d 342].)

In *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [149 Cal.Rptr.3d 243] (*Argeta*), the appellate court rejected an identical argument, holding, “while ‘[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules . . . [, it] is the point where society draws the line for many purposes between childhood and adulthood.’ [Citations.] Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude [that the defendant’s] sentence is not cruel and/or unusual under *Graham* [v. Florida (2010) 560 U.S. 48 [176 L.Ed.2d 825, 130 S.Ct. 2011]], *Miller*[, *supra*, 567 U.S. 460 [132 S.Ct. 2455]], or [*People v.*] *Caballero* [(2012) 55 Cal.4th 262 [145 Cal.Rptr.3d 286, 282 P.3d 291]].”

Recently, in *Gutierrez, supra*, 58 Cal.4th at page 1380, the California Supreme Court endorsed the distinction drawn between those under the age of 18 at the time of the crime and those 18 or older. Notwithstanding the stated judicial policy, section 3051, added in 2013 (Stats. 2013, ch. 312, § 4), and amended in 2015 (Stats. 2015, ch. 471, § 1), entitles a prisoner serving a term of 25 years to life to a Youth Offender Parole hearing in the 25th year of his incarceration, if the offender was under the age of 23 at the time of his offense. (§ 3051, subd. (b)(3).) Thus, Windfield's sentencing claim is moot.

b. *Johnson's Sentence as Cruel and Unusual*

Johnson, who was 17 when he committed these crimes, also received a sentence of 90 years to life. As he correctly points out, the California Supreme Court has held that a sentence of 110 years to life is the functional equivalent of a sentence of life without parole. (*People v. Caballero, supra*, 55 Cal.4th at p. 265 (*Caballero*); see also *People v. Mendez* (2010) 188 Cal.App.4th 47, 63 [114 Cal.Rptr.3d 870] [a sentence of 84 years to life is the same]; *Argeta, supra*, 210 Cal.App.4th at p. 1482 [a term of at least 75 years in prison for a defendant who was 15 years old at the time of the crime "likely requires that he be in prison for the rest of his life"].) Johnson also correctly points out that the sentencing court imposed sentence without individualized consideration of him as a person.

In our original opinion, we agreed that Johnson was entitled to resentencing. The Supreme Court granted review on its own motion as to this particular issue, and, following the issuance of its recent opinion in *Franklin, supra*, 63 Cal.4th 261, retransferred the case to our court for reconsideration in light of *Franklin*. We reaffirm our holding that Johnson is entitled to a hearing in the superior court pursuant to *Franklin*.

As we further noted in our original opinion, we commented that there was no sentencing memorandum submitted by counsel for Johnson,¹³ the probation report contained scant information about Johnson personally and neither counsel for Johnson nor the sentencing court addressed this topic during sentencing. While we recognize that Johnson did not object below to the imposition of this sentence, certainly, an argument could be made that the

¹³ At the hearing on Johnson's motion for a new trial, on the day of sentencing, Johnson's trial counsel explained that he had not served the prosecutor with a copy of his motion until earlier that day because he had just finished his last trial of a "non-stop" series of trials that had consumed the entire previous six months, the prior week and he had been "backed up" and had a "heavy calendar" since then, comprised of preliminary hearings.

failure to invoke *Graham v. Florida*, *supra*, 560 U.S. 48 [176 L.Ed.2d 825, 130 S.Ct. 2011] on Johnson's behalf could amount to incompetency of trial counsel.¹⁴

At the same time, the *mandatory* aspect of Johnson's sentence was 50 years to life, and the trial court exercised its discretion, citing the fact that the crimes involved different victims in order to impose consecutive terms for the murder and attempted murder.

By its express terms, a sentence of 50 years to life is not the functional equivalent of a life without parole term because the defendant is now eligible for a youthful parole hearing in his 25th year of incarceration. (*Franklin, supra*, 63 Cal.4th at pp. 279–280.) The enactment of Senate Bill No. 260 (2013–2014 Reg. Sess.) had the effect of superseding the mandated sentences of persons who were under the age of 23 at the time of their offense, “explicitly to bring juvenile sentencing into conformity with *Graham, Miller, and Caballero*.¹⁵” (*Franklin, supra*, 63 Cal.4th at p. 277.)

Miller held that it is a violation of the Eighth Amendment to impose a *mandatory life without parole* sentence upon a juvenile in a homicide case because such a penalty “precludes consideration of [the juvenile’s] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” (*Miller, supra*, 567 U.S. at p. 478 [132 S.Ct. at p. 2468].) Nevertheless, defendant will be eligible for a parole hearing after serving 25 years of his sentence. (§ 3051, subd. (b)(3).) This renders moot defendant’s claim that his sentence violates the Eighth Amendment. (*Franklin, supra*, 63 Cal.4th at pp. 279–280.)

■ Nevertheless, at any parole hearing the Board of Parole Hearings is required to give “great weight to the diminished culpability of juveniles as

¹⁴ To avoid such an argument, we will not rely on the forfeiture rule (*People v. Bradford* (1997) 15 Cal.4th 1229, 1314 [65 Cal.Rptr.2d 145, 939 P.2d 259]) and will address Johnson’s argument on its merits.

Confronted with the same rule in *Gutierrez, supra*, 58 Cal.4th at pages 1354, 1368, the California Supreme Court noted, “[A]lthough at sentencing, Gutierrez did . . . not mention the Eighth Amendment, this is unsurprising because at the time the [United States Supreme Court] had not yet granted review in *Miller* and no court had even held that a *mandatory* sentence of life without parole for juveniles convicted of homicide was unconstitutional. After *Miller* was decided, Gutierrez promptly asserted his Eighth Amendment claim in the Court of Appeal, . . . and he now reasserts that claim in this court. Given these circumstances, and because his Eighth Amendment challenge involves a question of law, we exercise our discretion to consider it here. [Citation.]” We note that, like in *Gutierrez*, *Miller* had not been decided at the time Johnson was sentenced, and Johnson is asserting his Eighth Amendment right in this court. (See also, fn. 13, *ante*, p. 767.)

compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (§ 4801, subd. (c).) As the Supreme Court observed in *Franklin*, the statutes contemplate that information regarding the juvenile offender’s characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the board’s consideration. (*Franklin, supra*, 63 Cal.4th at p. 283.)

In *Franklin*, because it was unclear whether the defendant had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing, the Supreme Court held that he was not entitled to be resentenced, but it remanded the matter to the lower court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing. (*Franklin, supra*, 63 Cal.4th at p. 284.)

The same result is appropriate here. While defendant is not entitled to be resentenced, he is entitled to an opportunity to make a record of matters that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender’s culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. (*Franklin, supra*, 63 Cal.4th at p. 284.)

c. *Correction of the Abstracts of Judgment*

Defendants correctly point out that their abstracts incorrectly state that the dates of the offenses were 2011, when they were 2009. We will direct the trial court to correct Windfield’s and, when Johnson is resentenced, to correctly note the date in his abstract.

d. *Pronouncement of Sentence on Johnson*

Because we are remanding Johnson’s case for a hearing pursuant to *Franklin*, we need not address his assertion that the trial court did not actually sentence him, although it clearly did.

Next, Johnson claims the sentencing court did not specify as to which enhancement it was imposing the 25-year-to-life term. The final charging document stated that the enhancement allegation that Johnson personally discharged a firearm causing death to the murder victim was brought pursuant to section 12022.53, subdivision (d) and the allegation that a principal personally discharged a firearm proximately causing death to the murder

victim was brought pursuant to section 12022.53, subdivisions (d) and (e). The enhancement allegation that Johnson personally discharged a firearm causing great bodily injury to the attempted murder victim, after amendment¹⁵ was brought pursuant to section 12022.53, subdivision (d) and the allegation that a principal personally discharged a firearm which proximately caused great bodily injury to the attempted murder victim, after amendment¹⁶ was brought pursuant to section 12022.53, subdivisions (d) and (e). About two weeks after it had pronounced sentence, the court, without appearances from any of the parties, but apparently upon the request of someone, sought to, what it termed “address” matters not addressed due to “clerical error” and specified that it was imposing the 25-year-to-life enhancement under “12022.53(d)/e(1)” and “strik[ing] the separate . . . 12022.53(d) enhancement.”

Johnson here contends that what the court did was not correct a clerical error, but declare something done which was not done. We disagree. Section 12022.53, subdivision (f) permits the imposition of only one enhancement under section 12022.53, subdivisions (d) or (e)(1) “for each crime.” The court, when it originally imposed sentence, did exactly that. It just failed to state which of the two identical 25-year-to-life terms it was imposing. It did so less than two weeks later. Johnson has nothing about which to complain.

e. *Custody Credits for Johnson*

The parties agree that the sentencing court shorted Johnson by one day in its calculation of his presentence custody credits. When Johnson is resentenced, the court below should take note of this fact and award him an additional day.

DISPOSITION

The convictions for both Johnson and Windfield’s sentence are affirmed, with the exception that the trial court is directed to strike from the jury’s true findings any references to defendants or principals personally using a firearm or personally and intentionally discharging a firearm. The trial court is directed to amend Windfield’s abstract of judgment to show that the crimes were committed in 2009, not 2011, as his abstract currently states. Upon further proceedings relating to Johnson, the trial court is directed to correctly note in his abstract the date of commission of the crimes and the awarding of an additional day of presentence custody credits, the latter of which should also be reflected in the minutes of the court. Johnson’s case is remanded for

¹⁵ See pages 762 through 763, *ante*.

¹⁶ See pages 762 through 763, *ante*.

the limited purpose of determining whether he was afforded an adequate opportunity to make a record of information that will be relevant to the board as it fulfills its statutory obligations under sections 3051 and 4801 as required by *Franklin, supra*, 63 Cal.4th at pages 286–287.

Miller, J., and Codrington, J., concurred.

A petition for a rehearing was denied October 19, 2016, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was granted January 11, 2017, S238073.

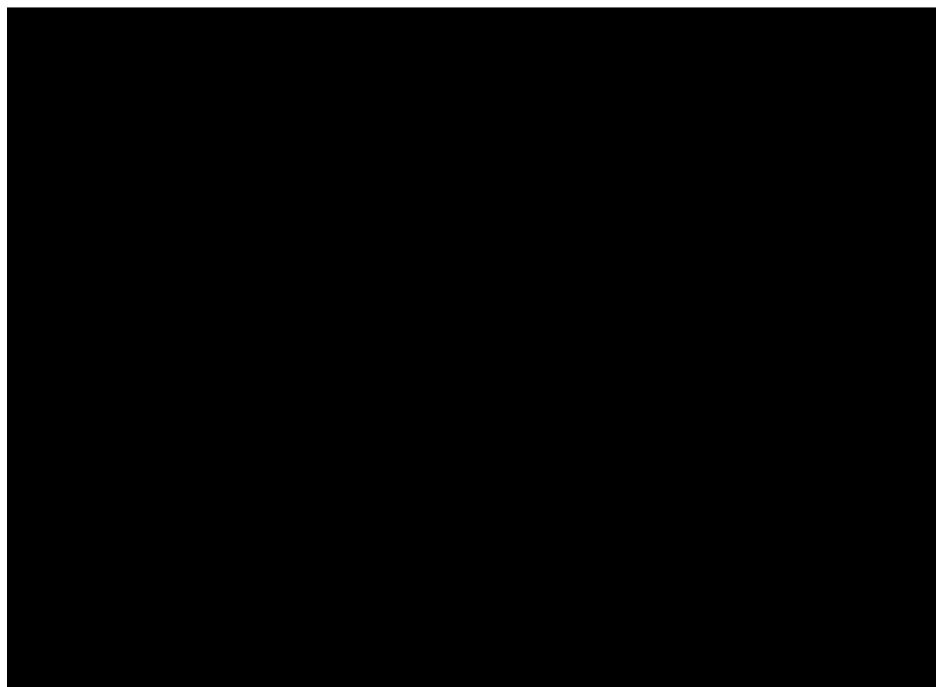
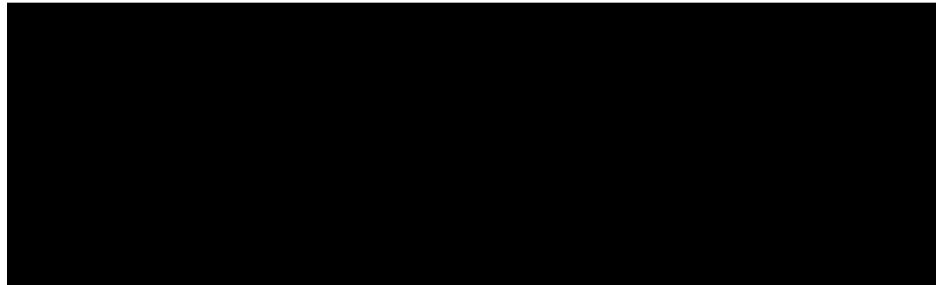
[No. D068814. Fourth Dist., Div. One. Sept. 28, 2016.]

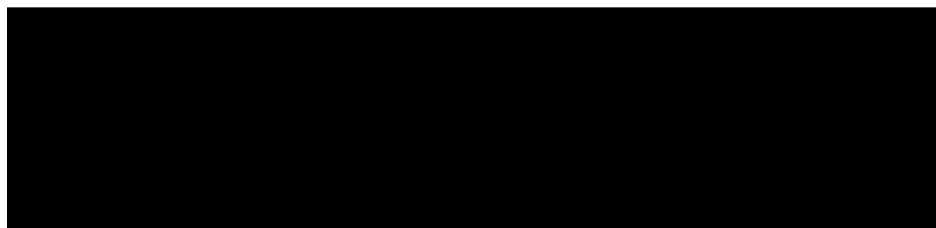
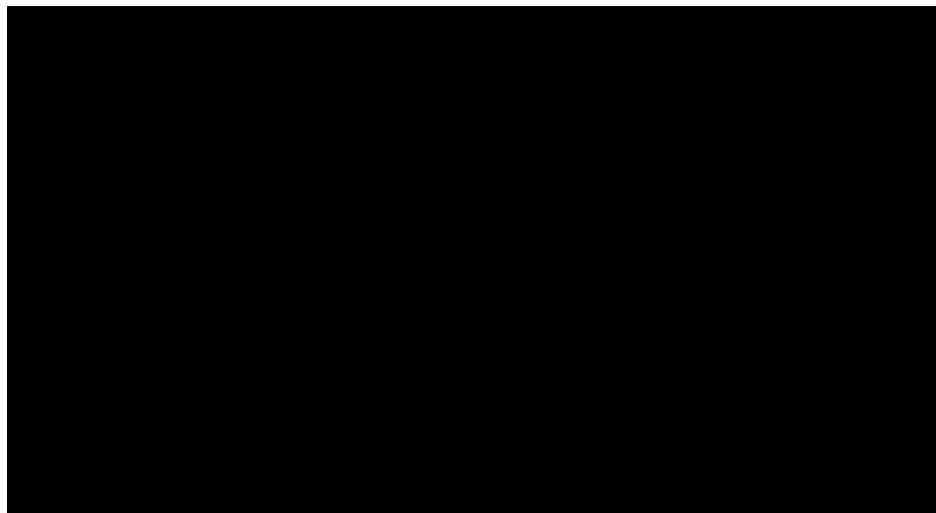
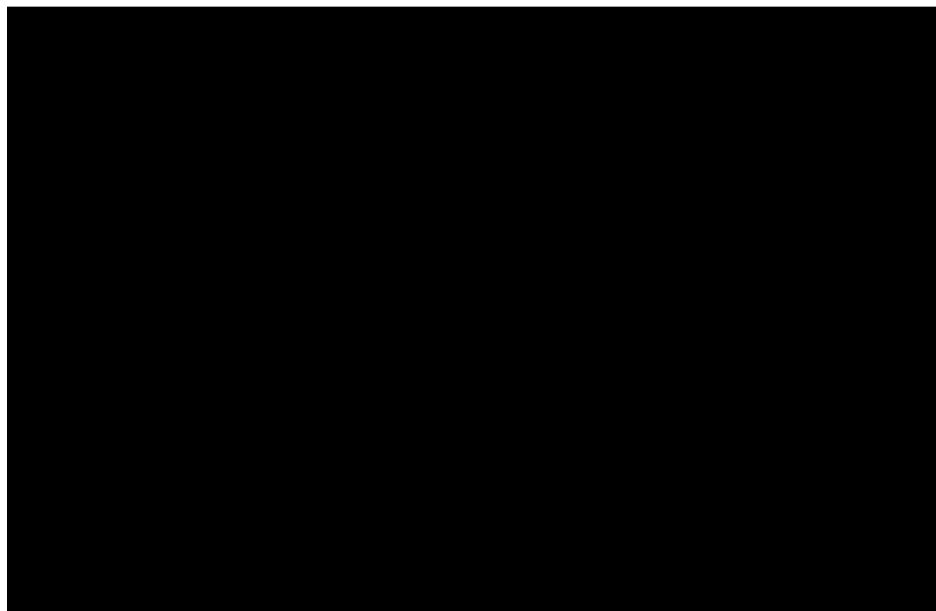
SUZANNE COE, Plaintiff and Appellant, v.
CITY OF SAN DIEGO, Defendant and Respondent.

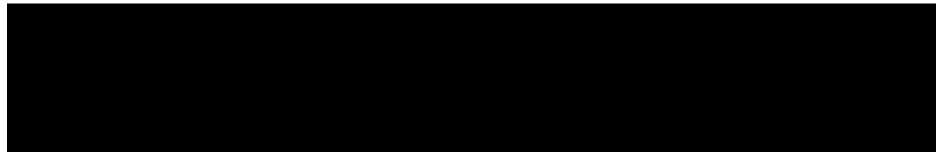
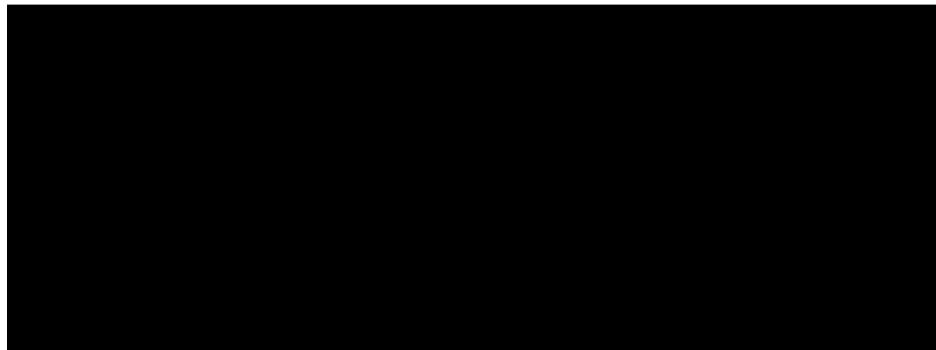
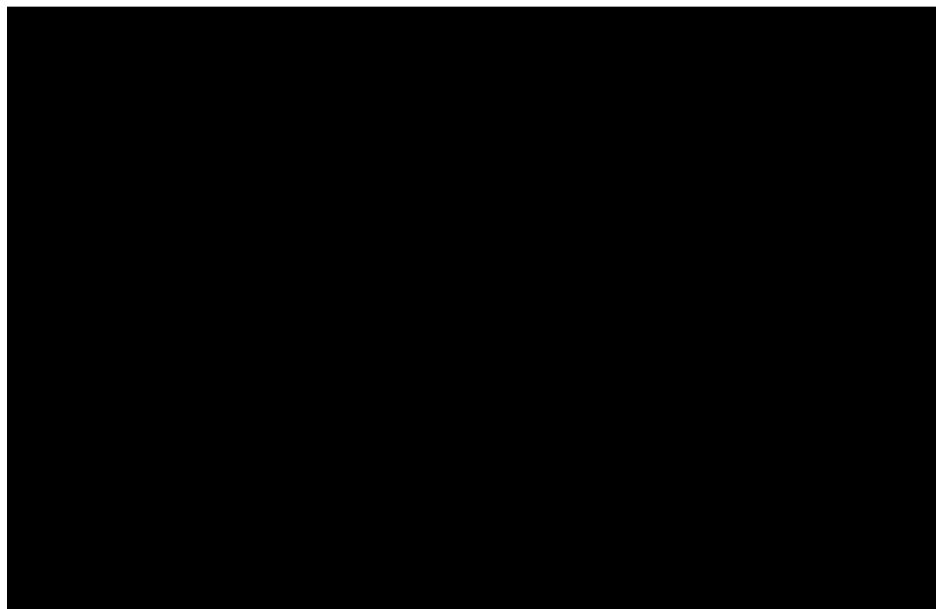
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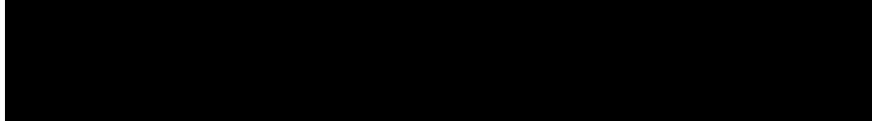
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COUNSEL

The Gilleon Law Firm, Daniel M. Gilleon; Law Office of Steve Hoffman and Steve Hoffman for Plaintiff and Appellant.

Jan I. Goldsmith, City Attorney, Mary T. Nuesca, Assistant City Attorney, and Paige E. Folkman, Deputy City Attorney, for Defendant and Respondent.

OPINION

McCONNELL, P. J.—

I**INTRODUCTION**

Suzanne Coe appeals from a judgment denying her petition for writ of administrative mandate challenging a decision by the City of San Diego (City) to revoke her nude entertainment business permit.¹ She contends certain sections of the San Diego Municipal Code² applicable to nude entertainment businesses are unconstitutionally vague and do not give sufficient guidance to the permit holder or to the enforcement agency. She further contends the City's decision to revoke her permit improperly relied upon inadmissible hearsay evidence and there is otherwise insufficient evidence to support the findings underlying the decision. Finally, she contends the penalty of revocation violated her due process rights because it was arbitrary and capricious. We are not persuaded by these contentions and affirm the judgment.

¹ For purposes of this appeal, “[n]ude entertainment business” means any establishment or business operating at a fixed location where (a) any person engages in or operates nude entertainment, or (b) there are live performances which are distinguished or characterized by an emphasis upon the display of specified anatomical areas or specified sexual activities. It includes nightclubs, bars, lingerie modeling studios, and similar commercial establishments commonly known as ‘topless’ or ‘nude.’ ” (San Diego Mun. Code, § 33.3602, italics omitted.)

² Further statutory references are to the San Diego Municipal Code unless otherwise stated. (<<https://www.sandiego.gov/city-clerk/officialdocs/legisdocs/muni>> [as of Sept. 28, 2016].)

II

BACKGROUND

A

In San Diego, it is unlawful to operate a nude entertainment business without a police permit. (§ 33.3603.) It is also unlawful for a responsible person to allow a nude person within six feet of a patron (six-foot rule); an adult entertainer to intentionally touch a patron or a patron to intentionally touch an adult entertainer during a performance (no-touch rule); or a person to touch, caress, or fondle specified anatomical areas of another person (no-fondling rule).³ (§ 33.3609, subds. (c), (d) & (f).) Parallel prohibitions apply to adult entertainers. (§ 33.3610, subds. (a)–(c).)

Coe has a permit to operate a nude entertainment business in San Diego. The business is open from 12:00 p.m. to 2:00 a.m. daily. It employs approximately 40 people, including managers, bartenders, waitresses, and security guards. As Coe lives in another state, the managers oversee the business's daily operations.⁴

There are two private dance rooms in the back of the business, which are monitored by a security guard positioned between them. One room, the couch room, is bordered with couches where patrons may sit and view a dance for \$10 to \$20 per dance. The other room, referred to by the parties as the VIP room, has stalls with benches inside where patrons may sit to view dances. The stalls are shallow, which allows the adult entertainer to be seen by the security guard, but provides relative privacy to the patron. The VIP room is more expensive than the couch room because the VIP room has a five-dance, or \$100, minimum.

Coe considers the adult entertainers who perform at her business to be independent contractors. Before adult entertainers may perform at the business, they must sign a contract, which recites the six-foot, no-touch, and no-fondling rules. These rules are explained to them and they are shown a dance compliant with the rules. The business does not require the adult entertainers to undergo a reference check or a background check apart from the criminal background check required for an adult entertainer to obtain an adult entertainer permit from the City.

³ A responsible person includes a person “who is otherwise responsible for the operation, management, direction, or policy of a police-regulated business. It also includes an employee who is in apparent charge of the premises.” (§ 33.0201, *italics omitted*.)

⁴ The parties do not dispute Coe and the managers of her business are responsible persons within the meaning of section 33.3609.

The adult entertainers set their own schedules. Between 12 and 15 adult entertainers perform on a day shift and an average of 50 adult entertainers perform on an evening shift. The adult entertainers pay a flat fee to perform and they keep any payment or tips they receive for private dances. At the end of their shift, they "tip out" by giving a percentage of their receipts to the shift manager, the disc jockey, and the doorman, which is then shared with other employees, including the security guards.

B

In 2006, the City issued a 30-day suspension to Coe for multiple violations of the six-foot and no-touch rules occurring during overt and covert inspections between September 2005 and September 2006. Coe appealed the suspension. The parties subsequently settled the matter in January 2007 with Coe admitting to no-touch violations occurring between March and September 2006 and paying a \$10,000 fine.

In July 2012 the City issued a 15-day suspension to Coe for multiple violations of the six-foot, no-touch, and no-fondling rules occurring between March 2011 and April 2012. Coe appealed the suspension. The parties settled the matter in February 2013 with Coe admitting the violations, agreeing to a three-day suspension, and paying a \$20,000 civil penalty. Coe also agreed to mandatory training, which she and the business's managers, security guards, and disc jockeys attended on March 5, 2013.

At the end of April 2013 the City sent Coe a warning letter advising her of multiple violations of the no-touch and no-fondling rules by 14 adult entertainers. The violations occurred during covert inspections in late March and April 2013, after Coe and her staff had completed the mandatory training.

In May 2013 Coe and the business's managers met with police department representatives. The parties discussed the recent violations and what measures Coe might employ to reduce their occurrence. The police representatives warned Coe the next penalty for further violations would be a 15-day suspension.

Coe took a number of steps to prevent further violations. These steps included hiring a security consultant; improving lighting; posting a security guard in the corridor between the private dance rooms; installing monitors in the private dance rooms to allow for remote observation and correction of violating conduct through an intercom system; posting the six-foot, no-touch, and no-fondling rules on the walls, in the bathrooms, and in the dressing rooms; and using secret shoppers to check for rule compliance. She also

began keeping track of adult entertainers and using a progressive discipline policy against adult entertainers found violating the rules.

Nonetheless, violations continued to occur at Coe's business. In August 2013 the City sent Coe a warning letter advising her of multiple violations of the no-touch and no-fondling rules by 10 adult entertainers occurring during covert inspections in May, June and July 2013. In October 2013 the City sent Coe a warning letter advising her of violations of the no-touch and no-fondling rules by one adult entertainer occurring during a covert inspection in September 2013. In February 2014 the City sent a warning letter to Coe advising her of multiple violations of the no-touch and no-fondling rules by nine adult entertainers occurring during overt and covert inspections in January and February 2014. In April 2014 the City sent Coe a warning letter advising her of multiple violations of the no-touch and no-fondling rules by three adult entertainers occurring during covert inspections in February 2014.⁵

Later in April 2014 the parties met to discuss the continuing violations. Coe expressed frustration with the delay between the violations and the receipt of the warning letters, believing the delay prevented her from adequately identifying and disciplining the adult entertainers or the security guards. In May 2014 the City sent Coe a letter recapping the meeting and indicating additional violations, depending on the severity, would most likely result in the revocation of her nude entertainment business permit.

In June 2014 the City notified Coe it was revoking her nude entertainment business permit for repeated violations of the six-foot, no-touch, and no-fondling rules. The notice cited 12 violations of these rules occurring during overt and covert inspections after the parties' April 2014 meeting.⁶

Most of the conduct described in the various warning letters occurred in the private dance rooms. At least fifteen separate officers or detectives observed the conduct. Over 40 separate nude entertainers committed the violations, which included rubbing breasts against faces; grinding breasts and buttocks against groins; and rubbing groins or hands against legs, chests, or groins. Some violations occurred when no security guard was present. Others

⁵ One sentence in one of the reports documenting the violations misnamed an adult entertainer. The report correctly named the adult entertainer in 13 other places. The error occurred because the officer who prepared the report had used another similar report as a template. The officer noted the error and corrected it two months later, before the City sent the warning letter to Coe.

⁶ One of the reports documenting the violations incorrectly stated the report had been approved in March 2014 when it had actually been approved in April 2014 on the same day the reported violation occurred. The error was noted and corrected a week later.

occurred when a security guard was present, but the security guard did not intervene. Still others occurred when a security guard was present and intervened, but then allowed the adult entertainer to continue with the violating conduct. Several adult entertainers said they had been advised to change their stage names often to avoid identification and notices of violation.

C

Coe administratively appealed the revocation.⁷ A hearing officer conducted a four-day evidentiary hearing. At the conclusion of the hearing, the hearing officer upheld the revocation. The hearing officer found based on the above evidence the City had established (1) the business's adult entertainers had committed numerous and continuing violations of the six-foot, no-touch, and no-fondling rules; (2) Coe was aware of these rules; (3) she negligently failed to supervise the business resulting in a pattern of violations; and (4) she demonstrated an inability to perform the duties required of a nude entertainment business permit holder. In particular, the hearing officer found that, despite numerous rules violations, Coe never disciplined any security guards for failing to properly monitor the adult entertainers. The hearing officer also found the business's compensation structure created an incentive for security guards to allow violations because the more touching that occurred, the more compensation adult entertainers were likely to receive, which increased the security guards' share of the adult entertainers' tips.

D

Coe subsequently filed a combined complaint for civil rights violations and a petition for writ of administrative mandate (petition). The petition challenged the hearing officer's decision on the grounds the decision was in excess of jurisdiction, not supported by the evidence, and not based on a fair hearing. The petition also challenged the decision on the grounds certain municipal code sections were unconstitutionally vague and overbroad.

After briefing and oral argument, the superior court denied the petition. As relevant to the issues raised in this appeal, the court found the reports prepared by the police officers and detectives who inspected the business were admissible as official records under Evidence Code section 1280. The court also found this evidence along with the other documentary and testimonial evidence presented at the hearing showed numerous, continuing rules

⁷ At the end of September 2014, while the administrative appeal was pending, the City sent Coe a warning letter advising her of multiple violations of the six-foot, no-touch, and no-fondling rules by 16 adult entertainers occurring during covert inspections in July and August 2014.

violations by the business's adult entertainers resulting from the negligent failure or inability of Coe and her staff to adequately supervise them. The court noted Coe had taken some measures to prevent violations, but these measures were ineffective and the business's staff had a monetary incentive to ignore violations. The court further found the challenged municipal code sections were not unconstitutionally vague and the delay between when the violations occurred and when the City notified Coe of them did not deprive Coe of due process of law.⁸

III

DISCUSSION

A

■ A petition for a writ of administrative mandate presents "the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b); see *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 810 [85 Cal.Rptr.2d 696, 977 P.2d 693] (*Fukuda*).)

All of these questions, except the question of whether the findings are supported by the evidence, are questions of law, which we review de novo. (See, e.g., *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058–1059 [48 Cal.Rptr.3d 563] (*JKH Enterprises*); *Gilliland v. Medical Board* (2001) 89 Cal.App.4th 208, 219 [106 Cal.Rptr.2d 863]; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443 [282 Cal.Rptr. 819].) As to the question of whether the findings are supported by the evidence, the parties agree the superior court was required to exercise its independent judgment on the evidence because a decision to revoke a nude entertainment business permit involves a fundamental vested right. (Code Civ. Proc., § 1094.5, subd. (c); *JKH Enterprises, supra*, at p. 1057.) Under this standard, an agency abuses its discretion if the superior court determines the weight of the evidence does not support the agency's findings. (Code Civ. Proc., § 1094.5, subd. (c); *Fukuda, supra*, 20 Cal.4th at pp. 810–811.) In exercising its independent judgment, the superior court must accord a strong presumption of correctness to the agency's findings and the complaining party has the burden of showing the agency's decision was contrary to the

⁸ The court entered a judgment denying the petition for writ of mandate after Coe dismissed the companion civil rights complaint.

weight of the evidence. (*Fukuda*, at pp. 816–817.) On appeal, we review the superior court’s determination for substantial evidence. (*Id.* at p. 824.)

B

1

a

Section 33.0405, subdivision (a), provides: “Whenever regulatory action against a permittee is based on a violation of law or this Article by an employee that occurs on the premises or during the course of employment, it is sufficient to show that a responsible person caused or condoned the violation, or failed to take reasonable corrective action after timely written notice of the violation.” (Italics omitted.)

Coe contends this section is unconstitutionally vague because the words “caused” and “condoned” are not defined and there are no standards by which to judge whether a responsible person’s conduct meets this requirement. Coe similarly contends the section is unconstitutionally vague because the phrase “reasonable corrective action” is not defined and there are no standards by which to determine whether a responsible person’s corrective actions are adequate.

b

Section 33.0403, subdivision (a), provides: “In addition to any other penalties provided by law, any permittee who does any of the following is subject to regulatory action by the Chief of Police against his or her police permit: [¶] . . . [¶] (5) Negligently fails to supervise the business resulting in a pattern of violations described by patrons, employees, or both; [¶] (6) Manifests an inability to properly perform the duties relating to the police-regulated activity as evidenced by the commission or omission of an act or series of acts.” (Italics omitted.)

Coe contends these provisions are unconstitutionally vague because they do not provide sufficient guidance to police officers or responsible persons. More particularly, she contends section 33.0403, subdivision (a)(5) requires patrons, not police officers, to describe violations, and section 33.0403, subdivision (a)(6) lacks objective standards by which to judge Coe’s conduct, resulting in police officers exercising unbridled discretion.

■ “A law is void for vagueness only if it ‘fails to provide adequate notice to those who must observe its strictures’ and ‘“impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”’” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) “What is constitutionally required is that terms be defined with ‘sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’” (*Tily B., Inc. v. City of Newport Beach* (1998) 69 Cal.App.4th 1, 22 [81 Cal.Rptr.2d 6].)

In evaluating vagueness claims, we consider the context of the challenged language. “A contextual application of otherwise unqualified legal language may supply the clue to a law’s meaning, giving facially standardless language a constitutionally sufficient concreteness.” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116 [60 Cal.Rptr.2d 277, 929 P.2d 596] (Acuna).)

We also consider the notion of reasonable specificity or certainty. (*Acuna, supra*, 14 Cal.4th at p. 1117.) “[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 794 [105 L.Ed.2d 661, 109 S.Ct. 2746, 2755]; see *Acuna, supra*, at p. 1117 [“[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions’ ”].) “All that is required is that the statute be reasonably certain so that persons of common intelligence need not guess at its meaning.” [Citations.] ‘The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.’ [Citation.] ‘So long as the language embodies an objective concept, it is constitutionally concrete.’” (*People v. Linwood* (2003) 105 Cal.App.4th 59, 68–69 [129 Cal.Rptr.2d 73]; see *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295 [60 Cal.Rptr.2d 624] [the terms of a statute need not be defined or have a precise definition; long-established or commonly accepted usage can satisfy the reasonable certainty requirement].)

(3) Regarding the language in section 33.0405, the words “caused” and “condoned” have commonly accepted meanings. “Caused” means “a reason

for an action or condition” or “something that brings about an effect or a result.” (Merriam-Webster’s Collegiate Dict. (11th ed. 2006) p. 196, col. 2.) “Condoned” means “to regard or treat (something bad or blameworthy) as acceptable, forgivable, or harmless.” (*Id.* at p. 259, col. 2.) Likewise, the phrase “reasonable corrective action” is composed of words with commonly accepted meanings. “Reasonable” means “being in accordance with reason,” “not extreme or excessive,” and “possessing sound judgment.” (*Id.* at p. 1037, col. 1.) “Corrective” means “intended to correct.” (*Id.* at p. 280, col. 2.) “Action” means “a thing done.” (*Id.* at p. 12, col. 2.)

“[I]ndividually and collectively these words are understandable by persons of ordinary intelligence.” (*People v. Linwood, supra*, 105 Cal.App.4th at p. 69.) As used in section 33.0405, and considered in the context of the City’s nude entertainment business permitting scheme, these words inform permit holders with the requisite reasonable specificity or certainty that they will be held accountable for violations they personally bring about, accept and allow to continue, or fail to take practical, sensible steps to correct. We, therefore, conclude section 33.0405 is not unconstitutionally vague.

b

■ Subdivision (a)(5) and (6) of section 33.0403 also use ordinary words whose common usage and understanding allow them to be interpreted with reasonable certainty in the context of the City’s nude entertainment business permitting scheme. Subdivision (a)(5) informs permit holders their permits are subject to regulatory action if they negligently supervise their business in a manner that results in a pattern of violations described by employees or patrons, which in this case included undercover police officers paying for private dances. Subdivision (a)(6) similarly informs permit holders their permits are subject to regulatory action if their actions demonstrate an inability to properly perform their duties as permittees. Both subdivisions preclude arbitrary, unbridled enforcement by predicated regulatory action on the occurrence and identification of specific acts establishing either negligent supervision or an inability to perform permittee duties. Accordingly, we conclude section 33.0403 is also not unconstitutionally vague.

C

■ Coe next contends the City’s practice of accumulating violations before notifying her of them denied her due process and a reasonable

opportunity to take corrective action. “Due process requires that when the government seeks to deprive a person of property, it must provide the individual with notice and an opportunity to be heard. [Citation.] When an individual claims governmental delay in imposing sanctions has violated the guarantee of due process, the individual bears the burden of establishing actual prejudice.” (*Krontz v. City of San Diego* (2006) 136 Cal.App.4th 1126, 1141 [39 Cal.Rptr.3d 535] (*Krontz*).)

■ In this case, the City admitted it purposefully delayed in sending Coe warning letters to protect the identity of its undercover officers. However, the City’s decision to revoke Coe’s permit was not based on a discrete violation, but on a persistent pattern of violations over an extended time period. (*Krontz, supra*, 136 Cal.App.4th at p. 1141.) Coe had ample notice of the violations because the City sent her multiple warning letters detailing them. Police detectives also met with Coe, her attorney, and the managers of her business to discuss the violations and provide training to help Coe and the managers recognize and prevent the infringing conduct. Notwithstanding these efforts, additional violations continued to occur—some in close proximity to the meetings, some during overt inspections by police detectives, and some in the midst of the revocation proceedings (see fn. 7, *ante*). As the revocation of Coe’s permit was based on a persistent pattern of violations rather than the existence of any single violation, Coe has not established the delayed warning letters actually prejudiced her and, therefore, has not established the City deprived her of due process of law.

Coe’s reliance on *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1, 529 P.2d 33] (*Walsh*) and its progeny is misplaced. In *Walsh*, the Department of Alcoholic Beverage Control determined a retailer had violated a fair trade statute by selling alcohol at less than the minimum retail price. (*Id.* at pp. 97–98.) The retailer had no record of prior violations. (*Id.* at p. 98.) The penalty for a violation was \$250 for the first offense, and \$1,000 for each subsequent offense. (*Id.* at p. 98, fn. 4.) The purpose of the penalty scheme was to compel compliance with the statute, not to punish or eliminate a defaulting licensee by imposing an insurmountable financial burden. (*Id.* at p. 102.) Rather than notify the retailer of the first violation and allow the retailer an opportunity to comply with the statute, the agency accumulated evidence of recurring violations and, in a single prosecution, assessed cumulative penalties. (*Id.* at pp. 98–99, 103–104.) The California Supreme Court concluded the agency acted arbitrarily and violated the retailer’s due process by proceeding against the retailer in a manner not intended to induce compliance with the statute, but to impose excessive penalties resulting in a de facto revocation of the retailer’s license. (*Id.* at pp. 98, 104–106 & fn. 13.)

Here, the record does not show the City accumulated violations against Coe in order to impose a more stringent penalty. Rather, the record shows the City repeatedly warned Coe of the violations occurring at her business and of her need to take corrective action. It also provided training to her and the managers of her business to help them prevent violations from occurring. The City did not attempt to revoke Coe's permit until it noted continuing violations at the business despite the City's warnings and efforts to assist her. The *Walsh* case expressly did not apply to such situations. (*Walsh, supra*, 13 Cal.3d at p. 105, fn. 14 [“We do not express any view whether departmental conduct similar to that in the instant case would be arbitrary if exercised against a licensee who, the record would show, was [a] habitual offender and unwilling to conform”].)

D

1

Coe additionally contends the decision to revoke her permit was based entirely on hearsay evidence, specifically the reports of the police officers and detectives who overtly and covertly inspected Coe's business. The City counters the reports fall within the official records exception to the hearsay rule in Evidence Code section 1280 and, even if this exception does not apply to the reports, hearsay evidence is admissible in administrative proceedings.

The superior court agreed with the City, ruling the reports were admissible under the official records exception and, regardless, the reports were not the sole evidentiary basis for the City's decision to revoke Coe's permit. We review the court's ruling for abuse of discretion and we may not overturn the ruling except upon a clear showing of abuse. (*People v. Martinez* (2000) 22 Cal.4th 106, 119–120 [91 Cal.Rptr.2d 687, 990 P.2d 563]; *Glatman v. Valverde* (2006) 146 Cal.App.4th 700, 703 & fn. 2 [53 Cal.Rptr.3d 319].)

2

The official records exception to the hearsay rule provides: “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time

of preparation were such as to indicate its trustworthiness.” (Evid. Code, § 1280.)

Coe contends the official records exception does not apply to the reports of the police officers and detectives who inspected her business because the reports were not prepared at or near the time of the observed violations. She also contends the method and timing of the reports’ preparation do not indicate trustworthiness.

a

■ Regarding the timeliness requirement, this “requirement ‘is not to be judged . . . by arbitrary or artificial time limits, measured by hours or days or even weeks.’ [Citation.] Rather, ‘account must be taken of practical considerations,’ including ‘the nature of the information recorded’ and ‘the immutable reliability of the sources from which [the information was] drawn.’ [Citation.] ‘Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the [hearsay] exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory.’” (*People v. Martinez, supra*, 22 Cal.4th at p. 128; see *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1219 [98 Cal.Rptr.3d 459].)

Coe contends the timeliness requirement was not met because some of the reports were not prepared until several days to a week after the incident, which created a danger of inaccuracy from memory lapse. In support of this contention, she points to the reports with admitted inaccuracies, including the report misnaming of an adult entertainer. (See fn. 5, *ante*.)

However, the record includes multiple warning letters supported by over 40 reports. A custodian of records for the police department’s vice unit testified the officers and detectives who inspected Coe’s business normally prepared their reports immediately at the end of the shifts in which they witnessed violations. Sometimes, depending on what other operations were occurring, they prepared their reports the next morning. If an officer or detective had a day off, the preparation of the report might have been delayed by a few days. The timing of the overwhelming majority of the reports appears consistent with the normal practice of preparing reports at the end of a shift or the next morning. Only a small number of reports appear to have actual or possible delays of more than a day in their preparation. Of those reports which were actually or possibly delayed, most are sufficiently detailed to dispel any suggestion of inaccuracy from memory lapse. Thus, the overwhelming majority

of the reports meet the timeliness requirement for application of the official records exception.

b

■ Regarding the trustworthiness requirement, a police report normally satisfies this requirement when, as here, it is based on the reporting officer's firsthand observations. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430 [102 Cal.Rptr.2d 157]; *McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688, 695 [53 Cal.Rptr.2d 55]; *Snelgrove v. Department of Motor Vehicles* (1987) 194 Cal.App.3d 1364, 1375 [240 Cal.Rptr. 281].) Although Coe contends the method of preparation was suspect to the extent the officers and detectives used past reports as templates, she identifies only a few reports containing errors attributable to this method and only one error she characterizes as critical, which the City noted and corrected on its own. (See fn. 5, *ante*.) Given the number of reports in the record, the few errors identified by Coe do not establish the method of preparation rendered the reports inherently untrustworthy. Accordingly, the trial court correctly determined the overwhelming majority of reports were admissible as official records.

c

To the extent a few reports may not have met the requirements for the official records exception to apply to them, their admission was nonetheless proper. San Diego Administrative Regulation No. 10.10, section 4.3, subdivision (a), provides an administrative hearing "need not be conducted according to the technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (Accord, Gov. Code, § 11513, subd. (c).)

The regulation further provides an administrative hearing officer "may consider hearsay evidence as part of [his or her] determination except that no finding may be based solely on such hearsay evidence unless the hearsay evidence is supportive or supplementary to other legally competent evidence. Hearsay may be used if it would be admissible in a civil action." (San Diego Admin. Reg. No. 10.10, § 4.3, subd. (c); accord, Gov. Code, § 11513, subd. (d).)

Here, in addition to the admission of the reports qualifying as official records, seven of the 15 officers and detectives who prepared reports and observed violations at Coe's business testified to their observations at the administrative hearing. Since the few reports that may not have qualified as official records supported or supplemented this evidence, they were properly considered and relied upon. (See, e.g., *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001, 1007 [127 Cal.Rptr.2d 229].)

E

Coe further contends the finding she caused or condoned violations by entertainers was not supported by the evidence and ignored the corrective actions she took to prevent violations. We disagree.

The testimonial and documentary evidence showed a clear pattern of ongoing, blatant violations of the six-foot, no-touch, and no-fondling rules at Coe's business. Although Coe had taken some measures to prevent violations, she did not take other potentially more effective measures, including assigning an additional security guard to monitor the private dance areas and reprimanding security guards, when appropriate, for neglecting their duties. In addition, because Coe's employees received a percentage of the money each adult entertainer earned from private dances, they had a financial incentive to ignore rules violations. Indeed, there was evidence Coe's employees had instructed the adult entertainers to change stage names frequently to hinder the detection of rules violations. As another court in an analogous context aptly observed, when violations "occur with alarming regularity, it is naive to suppose that these conditions of the establishment prevailed without the permission and consent of the licensee." (*Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 119 [28 Cal.Rptr. 74].)

F

Finally, Coe contends the City abused its discretion in deciding to revoke her permit because the decision was based on a vague "totality of the circumstances" standard rather than objective standards. "[W]e review de novo whether the agency's imposition of a particular penalty on the petitioner constituted an abuse of discretion by the agency. [Citations.] But we will not disturb the agency's choice of penalty absent "'an arbitrary, capricious or patently abusive exercise of discretion'" by the administrative agency." (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627–628 [163 Cal.Rptr.3d 346].)

■ The San Diego Municipal Code allows revocation of a nude entertainment business permit as one means of enforcing the rules applicable to nude entertainment businesses. (§ 33.0401, subd. (a) [“Regulatory provisions are enforceable through the issuance, denial, suspension, placing conditions upon, or revocation of the permit, and through the issuance of verbal or written warnings, and notices of violation” (italics omitted)].) A nude entertainment business permit may be constitutionally revoked when the permit holder has violated valid provisions of the permitting scheme. (*Krontz, supra*, 136 Cal.App.4th at p. 1134.)

“ ‘In reviewing the severity of the discipline imposed, we look to the correctness of the agency’s decision rather than that of the trial court.’ [Citation.] ‘The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated. [Citations.] *Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.* [Citation.]’ [¶] “In reviewing the exercise of this discretion we bear in mind the principle ‘courts should let administrative boards and officers work out their problems with as little judicial interference as possible Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.’ ” [Citation.] ‘The policy consideration underlying such allocation of authority is the expertise of the administrative agency in determining penalty questions.’ ” (*Cassidy v. California Bd. of Accountancy, supra*, 220 Cal.App.4th at p. 633.)

Here, the City decided to revoke Coe’s permit, instead of imposing the lesser penalty of a 15-day suspension, based on the totality of the circumstances occurring after the February 2013 settlement agreement and resulting three-day suspension. These circumstances include the warning letters sent to Coe; the number, frequency and severity of the violations occurring at her business; the meetings with Coe and her staff to ameliorate the violations; and the ineffectiveness of the corrective actions taken by her and her staff. These circumstances also necessarily include the evidence indicating Coe’s employees had attempted to hinder the detection of rules violations by advising or requiring adult entertainers to change their stage names frequently. Under these circumstances, the City could have reasonably concluded the lesser penalty of a 15-day suspension would not have ameliorated the pattern of ongoing rules violations. Consequently, we cannot conclude the City abused its discretion by acting arbitrarily and capriciously in choosing revocation, rather than a 15-day suspension as the appropriate penalty for the rules violations at Coe’s business.

IV

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

Irion, J., and Prager, J.,* concurred.

Appellant's petition for review by the Supreme Court was denied December 19, 2016, S238228.

*Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

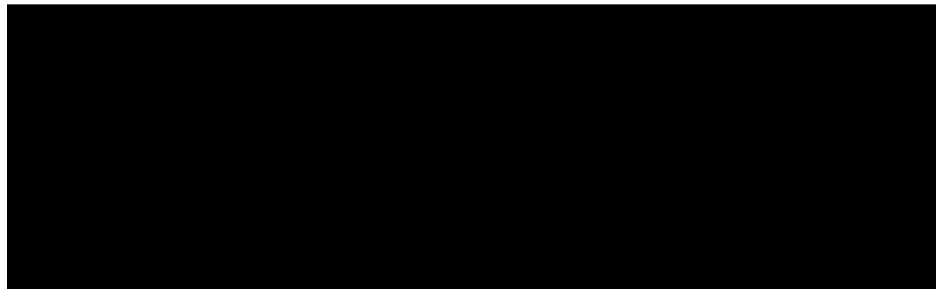
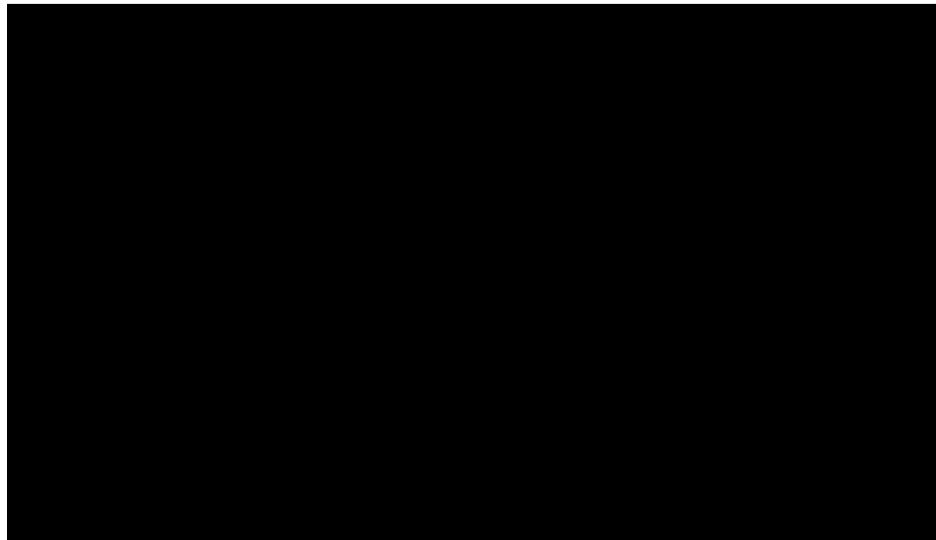
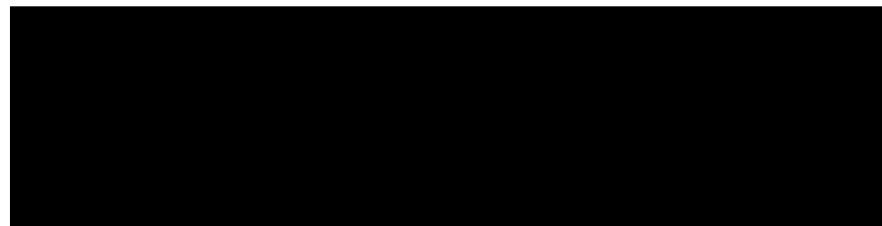
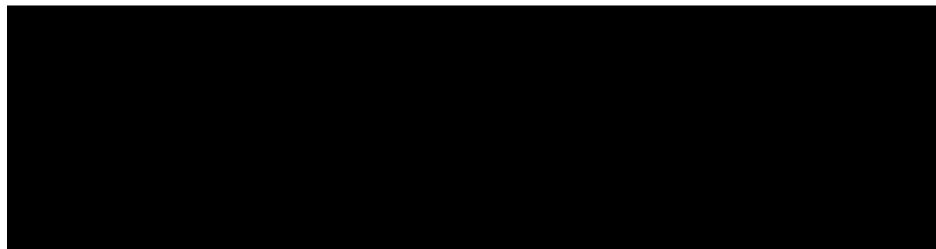
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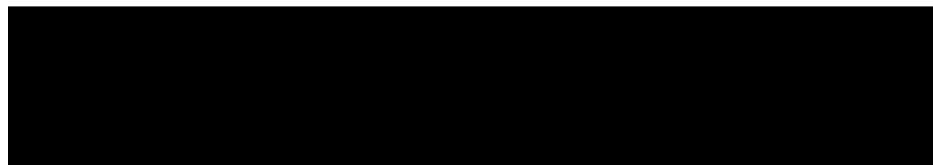
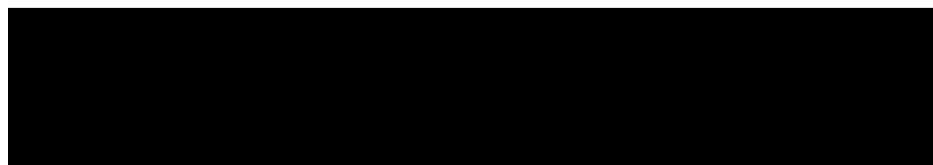
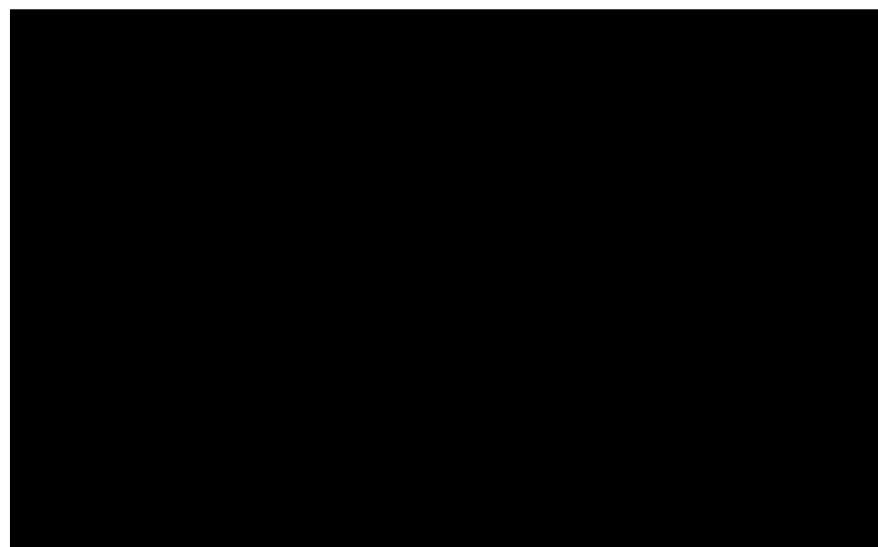
BRANDEN LEE HALL, Petitioner, v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;
DEPARTMENT OF MOTOR VEHICLES et al., Real Parties in Interest.

[REDACTED]

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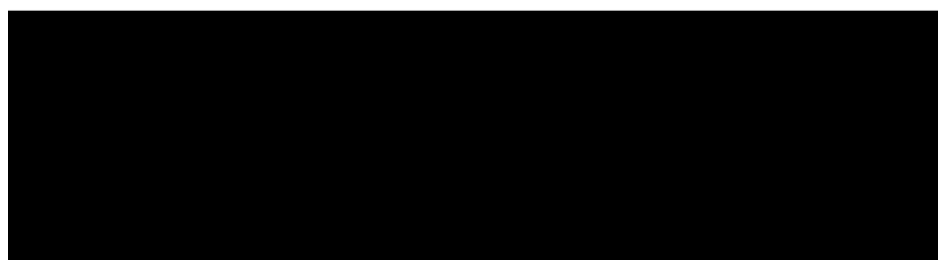
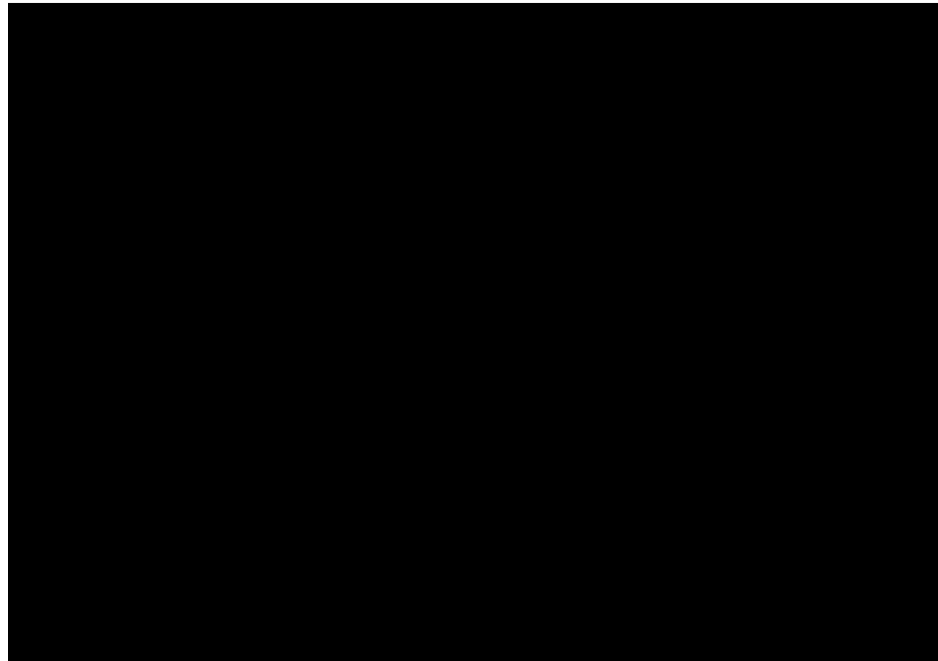
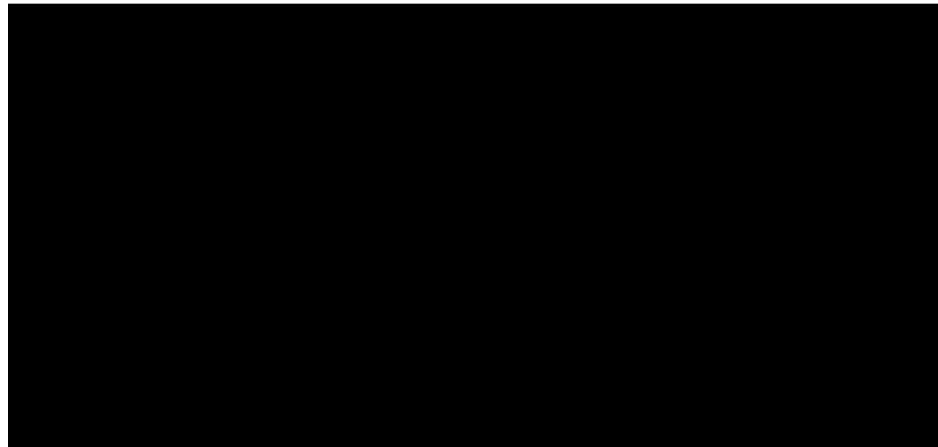
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COUNSEL

Law Office of A.P. Zmurkiewicz and A.P. Zmurkiewicz for Petitioner.

No appearance for Respondent.

Kamala D. Harris, Attorney General, Chris Knudsen, Assistant Attorney General, Celine M. Cooper and Alice Q. Robertson, Deputy Attorneys General, for Real Parties in Interest.

OPINION

NARES, J.—The Department of Motor Vehicles (DMV) revoked Branden Lee Hall’s driver’s license because, after being arrested for driving under the influence, he refused to submit to a chemical test for blood-alcohol content. (Veh. Code,¹ § 13353, subd. (a)(2).) Hall filed a petition for a writ of mandate or review (petition) in the superior court, seeking an order directing the DMV to vacate the revocation on the grounds there was no admissible evidence that police properly admonished him that refusing to submit to a blood-alcohol test would result in his license being revoked.

While Hall’s petition was pending, the DMV hearing officer who upheld the revocation, Alva Garrido Benavidez, pleaded guilty in federal court to taking bribes in exchange for giving favorable treatment to persons arrested for driving under the influence.

¹ All statutory references are to the Vehicle Code unless otherwise specified.

Hall amended the petition to allege Benavidez's corruption deprived him of his due process right to a fair hearing. The DMV filed opposition, asserting there was no evidence Benavidez was actually biased in deciding Hall's case.

In a ruling the Attorney General characterizes as "inherently contradictory," the court "denie[d] the writ"—but granted Hall relief by remanding to the DMV for a new hearing, stating Benavidez's "criminal conduct while acting as a hearing officer for the DMV . . . raises a red flag with respect to all hearings presided by her."

Unsatisfied with a new hearing, Hall appeals, contending section 13559 required the court to order the DMV to reinstate his driver's license. Hall also contends there is no admissible evidence that police properly admonished him that refusing a blood-alcohol test would result in revocation of his driver's license. Additionally, Hall again argues Benavidez's bribe-taking in other cases deprived him of his due process right to a fair DMV hearing.

As explained *post*, we construe the court's order as a remand to the administrative agency to conduct a new hearing—which is not an appealable order. (*Gillis v. Dental Bd. of California* (2012) 206 Cal.App.4th 311, 318 [141 Cal.Rptr.3d 213] (*Gillis*).) However, because the order is unclear on the question of appealability ("den[ying] the writ," but ordering a new hearing), we exercise our discretion to treat Hall's purported appeal as a petition for a writ of mandate. (*Village Trailer Park, Inc. v. Santa Monica Rent Control Bd.* (2002) 101 Cal.App.4th 1133, 1139–1140 [124 Cal.Rptr.2d 857] (*Village Trailer Park*)).

We hold that a DMV hearing officer who admits to taking bribes for nearly a decade does not meet the constitutional standard of impartiality. Accordingly, we conclude the court correctly ordered a new administrative hearing. We reject Hall's contention that section 13559 compelled reinstatement of his driver's license in this case. Additionally, we decline to reach the issue of whether police properly admonished Hall about the consequences of refusing a blood-alcohol test. Because Hall will receive a new DMV hearing, that issue must be decided in the first instance by an impartial DMV hearing officer.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Hall Is Arrested for Driving Under the Influence*

On March 22, 2014, after the car Hall was driving rear-ended another car stopped at a red light, La Mesa police arrested Hall for driving under the influence. Hall had two prior convictions for driving under the influence, in 2006 and 2008.

The arresting officer noticed a strong odor of alcohol on Hall's breath and that Hall had red eyes and slurred speech. Police administered field sobriety tests, which Hall did not successfully complete. One of Hall's minor children, a passenger in the back seat of his car, told police Hall had been drinking and several people tried to stop Hall from driving because he "drank too much."

After his arrest, Hall refused to submit to a blood-alcohol test. A police officer asked him, "Will you take a breath test?" Hall said, "No." The officer asked, "Will you take a blood test?" Hall said, "Nah, nothing." After obtaining a warrant, police obtained a blood sample from Hall anyway.²

B. License Suspension Hearing

Because Hall refused to submit to a blood-alcohol test, the arresting officer seized Hall's driver's license, notified Hall his license would be suspended or revoked by the DMV in 30 days, and advised Hall he had 10 days to request a DMV hearing to show the suspension or revocation was not justified.

Hall requested a hearing, which was conducted on June 13, 2014, by Benavidez, a DMV-appointed hearing officer.

The hearing was limited to four issues: (1) Did the police officer have reasonable cause to believe Hall was driving a motor vehicle under the influence of alcohol in violation of section 23152; (2) was Hall lawfully arrested; (3) was Hall told his driving privilege would be suspended or revoked for one, two, or three years if he refused to submit to or failed to complete a chemical test; and (4) did Hall refuse to submit to or fail to complete a chemical test when requested to do so by a peace officer. (§ 13557, subd. (b)(1).)

No witness testified at the hearing. The DMV offered five exhibits into evidence: (1) An "Officer's Statement" indicating police arrested Hall on March 22, 2014, and there was probable cause based on the odor of alcoholic beverage, Hall's bloodshot and watery eyes, slurred speech, and poor physical coordination. The reverse side of this form is dated "9-27-14" and contains the admonishment: "You are required by state law to submit to a . . . chemical test to determine the alcohol . . . content of your blood. [¶] . . . [¶] . . . Because I believe you are under the influence of alcohol, you have a choice of taking a breath or blood test. [¶] . . . [¶] . . . If you refuse to submit to, or fail to complete a test, your driving privilege will be suspended for one year or revoked for two to three years. . . ." The response to "Will you take a breath test" is "No." The response to "Will you take a blood test" is "Nah,

² The parties do not inform us of the test results.

nothing”; (2) a seven-page traffic collision report; (3) a one-page “Narrative”; (4) a two-page “Intoxication Report”; and (5) Hall’s driving record, showing his prior convictions for driving under the influence and other offenses.

Hall’s attorney objected to exhibit 1, the admonition, as inadmissible hearsay. He noted the document shows “3/22/14” as the arrest date, but also states the police gave the required admonition on “9-27-14.” Because it is impossible to give an admonishment six months after an arrest, counsel asserted this error “renders the document not an official record under Evidence Code section 1280.” Hall’s attorney stated, “[T]hat element of Evidence Code section 1280, that being that the entry must be made at or near the time of the event, is not satisfied. We can’t tell from the document when that entry was made. The source of information—also doesn’t indicate its trustworthiness. The date’s clearly off. The method and time of preparation are also suspect.” Hall’s attorney also argued, “[A]nd any presumption that any official duty has been regularly—performed has been rebutted as well.”

Benavidez overruled these objections and received all five exhibits into evidence. Subsequently, Benavidez issued a “Notification of Findings and Decision,” sustaining the revocation of Hall’s driver’s license through July 3, 2017. Benavidez ruled the discrepancy between the “3/22/14” date of arrest and the “9-27-14” date of admonishment was a “clerical error” that did not affect the document’s trustworthiness or rebut the official duty presumption.

C. *Writ Petition in Superior Court*

On July 15, 2014, Hall filed a petition for a “peremptory writ of mandate and for review” in superior court. Hall asserted the date discrepancy in the chemical test admonition was “substantial and significant,” rendering the document inadmissible under the hearsay exception for official records. Hall argued that without the admonition, there was insufficient evidence to sustain a finding he was properly admonished. The petition was set for a February 18, 2015 hearing.

D. *Benavidez Charged with Taking Bribes; Hall’s Petition Is Continued*

On February 3, 2015, the United States Attorney filed an information in district court alleging that Benavidez, while presiding over DMV hearings, conspired with certain attorneys to accept bribes in violation of title 18 United States Code section 666(a)(1)(B).³ The government alleged that Benavidez

³ Title 18 United States Code section 666 provides in part: “(a) Whoever, if the circumstance described in subsection (b) of this section exists . . . [¶] (1) being an agent of an organization, or of a State . . . or any agency thereof—[¶] . . . [¶] (B) corruptly solicits or demands for the

removed arrest information before it could be entered in the DMV database and unlawfully issued temporary driver's licenses to persons charged with driving under the influence in exchange for approximately \$5,000 cash, plus meals, sunglasses, and luxury items "such as designer purses." The government alleged Benavidez's bribe-taking began in approximately 2005 and continued through August 2014, a period that includes Hall's hearing.

On February 18, 2015, over the DMV's objections, the court granted Hall leave to amend his petition to allege his due process right to a fair administrative hearing was violated because Benavidez was not impartial.⁴

E. Benavidez Pleads Guilty; Hall Files an Amended Petition

Meanwhile, on February 3, 2015, Benavidez pleaded guilty to conspiracy to accept a bribe in violation of title 18 United States Code section 666(a)(1)(B), as alleged in count 1 of the information. On February 20, 2015, the district court accepted her guilty plea.

Thereafter, Hall filed an amended petition, repeating the previous allegations concerning the discrepancy between the date of arrest and admonishment, and also alleging, for the first time, that the DMV violated Hall's due process right to a fair hearing because Benavidez, the hearing officer, took bribes in other cases. In an accompanying memorandum of points and authorities, Hall's attorney asserted that due process requires "that the decision maker . . . not be a person who is actively engaged in taking bribes and whose decisions can be bought." Although Benavidez was not bribed in Hall's case, his attorney argued bribes Benavidez received in other cases "invariably raise[] the concern that, 'If I don't bribe her, she will rule against me'" or cause a person to believe "'[s]he ruled against me because I didn't bribe her.'" Citing section 13559, subdivision (a), Hall's attorney asserted the court was required to order the DMV to reinstate Hall's license.⁵

benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more . . . [¶] . . . [¶] shall be fined under this title, imprisoned not more than 10 years, or both. [¶] (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."

⁴ The record does not contain any papers filed or lodged in support of or in opposition to Hall's motion for leave to amend, nor any reporter's transcript from a hearing on that motion.

⁵ Section 13559, subdivision (a) provides in part: "The review shall be on the record of the hearing and the court shall not consider other evidence. If the court finds that the department

The DMV filed opposition, stating there was no due process violation because Benavidez did not seek a bribe in Hall's case, nor was there evidence she was actually biased in his case.

F. *The Court Denies the Writ, but Remands for a New DMV Hearing*

The court conducted a hearing on April 20, 2015, and approximately one month later issued a 14-page decision.⁶

In its decision, the court first determined there was sufficient evidence, entirely apart from exhibit 1, the document Hall challenged, to find police properly admonished him about the consequences of refusing a blood-alcohol test.

Next, the court addressed Hall's due process argument. That part of the court's ruling is not a model of clarity, and both Hall and the DMV criticize it. The Attorney General characterizes the ruling as "inherently contradictory." Hall's attorney states the remand for a new DMV hearing is "ultra vires."

To begin, the court stated, "The fact Benavidez pled guilty is evidence of her misconduct and that she engaged in criminal conduct while acting as a hearing officer for the DMV, and this fact clearly raises a red flag with respect to all hearings presided by her." However, the court also stated there is "no indication on the facts and the evidence presented that Hall was denied due process." The court explained: "However, with respect to . . . Benavidez and any bias she may have had, Hall does not claim that he was offered to participate in the bribery scheme and he refused, or show that because . . . Benavidez took bribes in other cases, his case was necessarily negatively affected because he did not pay a bribe. Except to state he was denied due process in that the hearing was not presided over by an impartial hearing officer, Hall does not state a *prima facie* case of misconduct in his case, to support the claim he was denied a meaningful opportunity to be heard. As the People [*sic*] point out . . . Benavidez was charged with conduct that benefited the drivers against the DMV. Further, there is no indication on the facts and the evidence presented that Hall was denied due process or that . . . Benavidez' decision in Hall's case was arbitrary and unsupported by the record."

Nevertheless, the court stated she was "greatly disturbed by the fact that a hearing officer assigned to [Hall's] case, who is in the position of authority

exceeded its constitutional or statutory authority . . . , the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person."

⁶ A minute order dated May 18, 2015, indicates the court heard oral argument; however, Hall elected to proceed on appeal without a reporter's transcript or any substitute.

making important decisions that affects people's life [sic], was corrupt and was convicted in Federal Court of bribery." The court added, "The perception of bias in trial proceedings destroys the public's confidence in our justice system and must not be tolerated."

Citing Code of Civil Procedure section 1094.5, subdivisions (e) and (f), together with two published appellate cases involving biased decision makers in administrative hearings (the court in each remanded for a new administrative hearing),⁷ the court concluded, "[B]ased on the law and in fairness to both parties, the court denies the writ with instructions to remand the case for a new administrative hearing. This way, [Hall] is afforded a fresh start with a new fair and impartial hearing officer."

Hall timely filed a notice of appeal from what his attorney characterized as a "final decision on Petition for Writ of Mandate."

DISCUSSION

I. ADMINISTRATIVE LICENSE SUSPENSIONS, IN GENERAL

■ California has enacted an implied consent statute providing noncriminal sanctions for an individual's refusal to submit to a blood-alcohol test when arrested for driving under the influence of alcohol or drugs.⁸ Section 23612, subdivision (a)(1)(A) provides in part: "A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140 [under age 21, 0.05 percent alcohol], 23152 [driving under influence], or 23153 [driving under the influence and causing bodily injury]."

Section 23612, subdivision (a)(1)(D) provides that the person arrested for driving under the influence "shall be told that his or her failure to submit to,

⁷ *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109 [202 Cal.Rptr. 1] (*Nissan Motor Corp.*) and *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 [22 Cal.Rptr.3d 772] (*Nasha*).

⁸ In *Birchfield v. North Dakota* (2016) 579 U.S. ____ [195 L.Ed.2d 560, 136 S.Ct. 2160], the United States Supreme Court considered the constitutionality of state statutes making a refusal to undergo a blood-alcohol test a *criminal* offense. In considering that issue, the *Birchfield* court noted that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply . . . and nothing we say here should be read to cast doubt on them." (*Id.* at p. ____ [136 S.Ct. at p. 2185].)

or the failure to complete, the required chemical testing” will result in a fine, mandatory imprisonment upon conviction of driving under the influence, and suspension or revocation of the person’s driver’s license.⁹

If an individual refuses to submit to such testing, section 13353 provides for suspension or revocation of the person’s driver’s license.¹⁰ However, if police do not properly advise the person that his or her driving privilege will be suspended or revoked if the individual refuses to submit to blood-alcohol testing, then the DMV cannot suspend or revoke the person’s license despite the refusal. (§ 13557, subd. (b)(1)(D); *Daly v. Department of Motor Vehicles* (1986) 187 Cal.App.3d 257, 261 [232 Cal.Rptr. 7] [“Proper warning of the consequence of refusal is an element essential to the suspension of a driver’s license.”].)

■ If the person arrested for driving under the influence refuses to submit to blood-alcohol testing, the police will give the person notice of the administrative suspension, a 30-day temporary permit to drive, and notice of the right to request an administrative hearing. (§§ 13353, 23612, subd. (a).)

⁹ Section 23612, subdivision (a)(1)(D) provides: “The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and (i) the suspension of the person’s privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person’s privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 of this code, or of Section 191.5 or subdivision (a) of Section 192.5 of the Penal Code that resulted in a conviction, or if the person’s privilege to operate a motor vehicle has been suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion, or (iii) the revocation of the person’s privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 of this code, or of Section 191.5 or subdivision (a) of Section 192.5 of the Penal Code, or any combination thereof, that resulted in convictions, or if the person’s privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to Section 13353, 13353.1, or 13353.2 for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations.”

¹⁰ Section 13353, subdivision (a) provides: “If a person refuses the officer’s request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23612, upon receipt of the officer’s sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153, and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer, the department shall do one of the following: [¶] (1) Suspend the person’s privilege to operate a motor vehicle for a period of one year.”

This statute further provides that for a person who has received one or two prior driving under the influence convictions within 10 years, revocations of two and three years are mandated. (See § 13553, subd. (a)(2) & (a)(3).) In this case, as noted *ante*, Hall has two such convictions within 10 years.

In such a case, the arresting officer completes a document entitled, “Officer’s Statement,” which is intended to contain the facts necessary for DMV to suspend the license. (§ 13353, subd. (a)(3)(C).) Upon receipt of this paperwork containing the requisite information, the DMV will suspend or revoke the person’s license. (§ 13353, subd. (d).)

A person who has received a notice of an order of suspension or revocation may request a hearing before the DMV. (§ 13558, subd. (a).) In a case involving the refusal to submit to a blood-alcohol test, the issues to be considered at the hearing are whether (1) the officer had reasonable cause to believe the individual was driving a vehicle in violation of section 23152 or 23153; (2) the person was lawfully arrested; (3) the arrestee was properly advised of the consequences of refusing to submit to or complete a blood-alcohol test; and (4) the person refused to submit to, or failed to complete, the blood-alcohol test. (§ 13557, subd. (b)(1).)

The administrative hearing is held before a DMV hearing officer. (§ 14104.2.) If the hearing officer finds each issue is established by a preponderance of the evidence, the person’s driver’s license will be suspended or revoked. (§ 13557, subd. (b)(1).)

“A determination by the DMV to suspend [or revoke] an individual’s driver’s license is subject to judicial review in the trial court by means of a petition for writ of mandate.” (*Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 862 [79 Cal.Rptr.3d 414].) More specifically, section 13559 provides in part: “(a) [W]ithin 30 days of the issuance of the notice of determination of the department sustaining an order of suspension or revocation of the person’s privilege to operate a motor vehicle . . . the person may file a petition for review of the order in the court of competent jurisdiction in the person’s county of residence. The filing of a petition for judicial review shall not stay the order of suspension or revocation. The review shall be on the record of the hearing and the court shall not consider other evidence. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record, the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.”

II. APPEALABILITY ISSUES

A. The Order Is a Nonappealable Remand Order

■ A trial court’s order denying a petition for a writ of mandate is an appealable order where there are no remaining causes of action between the

parties. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 367, fn. 3 [78 Cal.Rptr.2d 44]; *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1122 [272 Cal.Rptr. 273].) Conversely, “[a] remand order to an administrative body is not appealable.” (*Village Trailer Park, supra*, 101 Cal.App.4th at pp. 1139–1140.)

At the outset, Hall and the DMV disagree whether the court’s order here is appealable. The Attorney General contends the order is a nonappealable remand order. Hall contends the superior court “denied” the amended petition, the court’s remand order is “ultra vires,” and therefore the order is appealable as a final order denying a petition for writ of mandate.

■ To resolve this issue, we must interpret the court’s order. “The substance and effect of the order, not its label or form, determines whether it is appealable” (*Joyce v. Black* (1990) 217 Cal.App.3d 318, 321 [266 Cal.Rptr. 8].) “If a judgment is ambiguous, we may examine the entire record to determine its scope and effect, including the pleadings.” (*Rancho Pauma Mutual Water Co. v. Yuima Municipal Water Dist.* (2015) 239 Cal.App.4th 109, 115 [190 Cal.Rptr.3d 744].)

Considering the order as a whole, the court’s overarching ruling is that Hall is entitled to a new DMV hearing on due process grounds. In two places, the court stated it was deeply troubled by Benavidez’s “criminal conduct while acting as a hearing officer for the DMV” which “raise[d] a red flag with respect to all hearings presided by her.” The court determined there was no evidence Benavidez was actually biased in Hall’s case, stating there is “no indication on the facts and the evidence presented that Hall was denied due process.” Nevertheless, the court stated she “agrees with [Hall] that he has a right to be heard by an impartial decision maker” and therefore ordered a new hearing.

The court cited two cases as authority for its remand for a new DMV hearing—*Nissan Motor Corp., supra*, 153 Cal.App.3d 109 and *Nasha, supra*, 125 Cal.App.4th 470. Examining these cases is therefore helpful in discerning the court’s intent.

In *Nissan Motor Corp.*, the court held that a hearing conducted by the New Motor Vehicle Board violated due process rights to a fair and impartial hearing because four of the nine board members were new car dealers, and none were car manufacturers. Stating “the tribunal is clearly biased and slanted towards the car dealers” (*Nissan Motor Corp., supra*, 153 Cal.App.3d at p. 113), the court remanded for a new hearing “without the participation of the new motor vehicle dealer members.” (*Id.* at p. 116.)

In *Nasha*, while a residential development project was pending before the city’s planning commission, one of its members authored an article attacking

the project. (*Nasha, supra*, 125 Cal.App.4th at p. 473.) The appellate court first held that a superior court may consider evidence not presented at the administrative hearing relating to a claim the petitioner was deprived of due process. (*Id.* at p. 485.) Next, finding an “unacceptable probability of actual bias” (*id.* at p. 483), the appellate court directed the superior court to issue a writ vacating the planning commission’s decision and directing it to conduct a new hearing before an impartial panel. (*Id.* at p. 486.)

In light of the foregoing, we construe the order as granting Hall’s amended petition on due process grounds, directing the DMV to conduct a new hearing with an impartial hearing officer, and denying the amended petition in all other respects. This reconciles the court’s statement that it “denies the writ” with the rest of the order. As such, the order is nonappealable. (*Gillis, supra*, 206 Cal.App.4th at p. 318.)¹¹

B. *The Remand Order Is Not Ultra Vires*

In interpreting the court’s decision, we reject Hall’s assertion that the court had no authority to order a remand or, to use Hall’s words, that the remand is “ultra vires.” Hall’s ultra vires argument is based on section 13559, which provides for judicial review of an adverse DMV hearing determination.

Under section 13559, review is limited to the record of the administrative hearing, and the trial court may not consider any other evidence. (§ 13559, subd. (a).) Section 13559, subdivision (a) also provides, “If the court finds that the department exceeded its constitutional or statutory authority . . . , the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.” Focusing on this last sentence in section 13559, Hall argues the *exclusive* remedy in a proceeding brought under section 13359 is license reinstatement, and the court cannot instead order a new hearing.

Hall’s argument fails because his amended petition was not based solely on section 13359. The due process argument in Hall’s amended petition was based on outside-the-record evidence Benavidez pleaded guilty to bribery. Under section 13559, subdivision (a), the court would have been precluded from considering that evidence. As noted *ante*, that statute provides, “The review shall be on the record of the hearing and the court shall not consider other evidence.” (§ 13559, subd. (a).)

To avoid this limitation and to get Benavidez’s guilty plea before the court, in his amended petition Hall invoked Code of Civil Procedure section 1094.5,

¹¹ Having construed the order as one granting a writ directing the DMV to conduct a new hearing, we reject Hall’s argument the court had no authority to order the DMV to do anything except by issuing a writ.

governing writs of administrative mandate. The caption of Hall's amended petition cites not only section 13559, but also Code of Civil Procedure section 1094.5. Code of Civil Procedure section 1094.5, subdivision (e), which the court treated as applicable here, provides in relevant part: "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence"

Thus, contrary to Hall's contention, ordering a new hearing is not ultra vires. Considering outside-the-record evidence of Benavidez's guilty plea, and remanding to the DMV for a new hearing, was authorized under Code of Civil Procedure section 1094.5, a statute Hall invoked, and upon which the court relied.

C. *We Treat Hall's Attempted Appeal as a Writ Petition*

■ "A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 [107 Cal.Rptr.2d 149, 23 P.3d 43].) Although Hall has attempted to appeal from a nonappealable remand order, the Attorney General urges us to "accept review of the trial court's order of remand as a petition for writ of mandate." Hall, who did not file a reply brief, has not responded to this argument.

■ In *Olson v. Cory* (1983) 35 Cal.3d 390, 400–401 [197 Cal.Rptr. 843, 673 P.2d 720] (*Olson*), the California Supreme Court held it was appropriate to treat an appeal from a nonappealable order as a petition for an extraordinary writ when (1) requiring the parties to wait for a final judgment might lead to unnecessary trial proceedings; (2) the briefs and record included, in substance, the necessary elements for a proceeding for a writ of mandate; (3) there was no indication the trial court would appear as a party in a writ proceeding; (4) the appealability of the order was not clear; and (5) the parties urged the court to decide the issues rather than dismiss the appeal. The Supreme Court cautioned, however, that the power to treat an appeal from a nonappealable order as a petition for a writ of mandate should not be exercised except under unusual circumstances. (*Id.* at p. 401.) In *Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 770, footnote 16 [188 Cal.Rptr.3d 461], this court stated an attempted appeal from a nonappealable order should be treated as a writ petition only in "'extraordinary circumstances.'"

Extraordinary circumstances warrant treating Hall's attempted appeal as a writ petition. In *Olson*, "that the issue of appealability was far from clear in

advance” was an unusual circumstance justifying the Supreme Court’s decision to treat the purported appeal as a petition for a writ of mandate. (*Olson, supra*, 35 Cal.3d at p. 401.) Here too, through no fault of the parties, the appealability of the court’s order was not clear. The court stated it found no evidence of a due process violation, but later agreed with Hall his due process rights were violated, requiring a new hearing before an impartial hearing officer. The court at one point states it “denies the writ” (indicating an appealable order), but then remands for a new hearing. It would be manifestly unfair under these circumstances to preclude Hall from obtaining appellate review because he filed a notice of appeal rather than a writ petition in this court.

Moreover, most of the other *Olson* factors are also present here: The issues have been fully briefed; the existing record includes in substance the elements necessary for a proceeding for a writ of mandate in this court; there is no indication the trial court would be more than a nominal party to the writ proceeding; the DMV urges a decision on the merits; and Hall has not opposed that request. Accordingly, we treat Hall’s purported appeal as a petition for a writ of mandate. (*Board of Dental Examiners v. Superior Court* (1998) 66 Cal.App.4th 1424, 1430–1431 [78 Cal.Rptr.2d 653] [remand order was not appealable but appellate court exercised its discretion to treat appeal as a petition for writ of mandate].)

III. THE COURT CORRECTLY DETERMINED THAT HALL IS ENTITLED TO A NEW HEARING

A. The Standard of Review

“A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law.” (*Nasha, supra*, 125 Cal.App.4th at p. 482.) This due process issue is properly before us because Hall challenges the order remanding for a new hearing, which necessarily encompasses whether his due process right to a fair hearing was violated by having a hearing officer who took bribes in other cases. (See *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1124 & fn. 7 [184 Cal.Rptr.3d 568].)

B. Intolerably High Risk of Actual Bias Standard

■ “‘When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.’” (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 215 [159 Cal.Rptr.3d 358, 303 P.3d 1140]

(*Today's Fresh Start*).) “‘A fair tribunal is one in which the . . . decision maker is free of bias for or against a party.’” (*Ibid.*)

“Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny.” (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 [119 Cal.Rptr.2d 341, 45 P.3d 280].) Thus, even though due process allows more flexibility in administrative process than judicial process, “the rule disqualifying adjudicators with pecuniary interests applies with full force” in administrative proceedings. (*Id.* at p. 1027.) Moreover, although adjudicators challenged for reasons other than financial interest have been afforded a presumption of impartiality, “adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary.” (*Id.* at p. 1025.)

Accordingly, “where the basis for a challenge is an alleged pecuniary interest, the presumption of impartiality that would otherwise apply has no place.” (*Today's Fresh Start, supra*, 57 Cal.4th at p. 216.) Rather, “due process is violated whenever a decision maker has a financial interest that ‘would offer a possible temptation to the average person as judge not to hold the balance nice, clear and true.’” (*Ibid.*) “Conclusive proof of actual bias is not required; an objective, intolerably high risk of actual bias will suffice.” (*Ibid.*)

C. *Hall Is Entitled to a New Hearing*

■ A litigant is entitled to have confidence that the hearing officer before whom he or she appears is not accepting bribes in other cases. A corrupt decision maker who wants to retain office will try to hide bribe-taking. An obvious way to do that is to favor the government in cases where no bribe is tendered. This form of bias, called “compensatory” bias, occurs when a decision maker, who is taking bribes in some cases, is biased against those who do not bribe the decision maker, so he or she avoids being perceived as uniformly and suspiciously soft on the party opposing the government. (See *Bracy v. Gramley* (1997) 520 U.S. 899, 905 [138 L.Ed.2d 97, 117 S.Ct. 1793] [defining compensatory bias].)

Absent a confession from Benavidez about this particular case, which is not in this record, there is no way of knowing for certain whether she was biased in deciding Hall's case. However, the constitutional standard of impartiality is framed in terms of probabilities, not certainties. (*Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021 [183 Cal.Rptr.3d 318].) The law does not require someone in Hall's position to prove actual bias. Rather, “an objective, intolerably high risk of actual bias will suffice.” (*Today's Fresh Start, supra*, 57 Cal.4th at p. 216.)

We know from Benavidez's guilty plea that she accepted bribes *for nearly a decade* and was paid thousands of dollars in cash and took additional bribes in property. Benavidez did not have a momentary ethical lapse or an isolated act of poor judgment. She took bribes over a time period that for some people is an entire career.

The disdain her conviction shows for the duties of her office eliminates any presumption that she was a fair and impartial decision maker when not taking bribes. Benavidez's repudiation of her obligation to impartially decide cases evidences an intolerably high risk of bias in Hall's case and entitles him to a new hearing before a fair and impartial hearing officer. The proper remedy for the denial of a fair administrative hearing is to remand the matter for a new administrative hearing before a different, qualified hearing officer. (See *Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133, 1145 [19 Cal.Rptr.3d 371] ["where the administrative agency fails to provide a fair hearing . . . the court should remand to the administrative agency to consider the evidence and to exercise its discretion following a full and fair hearing on the merits"].)

D. *The Attorney General's Arguments Are Unavailing*

■ The Attorney General contends Hall's due process claim fails because "[e]ven the trial court determined Hall did not present information or evidence showing he was denied due process or that Benavidez' decision was unsupported by the record." This argument fails for two reasons. First, to establish a due process violation, Hall was not required to show Benavidez was actually biased in his case. (*Today's Fresh Start, supra*, 57 Cal.4th at p. 216.) Second, even assuming, without deciding, that Benavidez's evidentiary rulings and decision are justifiable as within the bounds of discretion, this does not demonstrate a lack of bias. A corrupt decision maker may give plausible reasons for rulings, and yet make the decision for dishonest reasons. By their very nature, discretionary rulings are not a reliable indication of bias. The concept of discretion assumes there is more than one reasonably defensible resolution of the particular issue. When bias is present in a corrupt hearing officer's discretionary decisions, it will rarely be visible in the decision maker's rulings. Indeed, a corrupt hearing officer with Benavidez's experience would be expected to mask bias by not making indefensible rulings.

The Attorney General also asserts Hall's claim of bias is not "logical" because Benavidez pleaded guilty to accepting bribes to rule against the DMV—and here, she ruled in the DMV's favor. The Attorney General contends, "[t]here is no indication she has ever . . . exhibited any bias in favor of the DMV." This argument fails because it ignores the probability of

[REDACTED]

compensatory bias. Benavidez's willingness to take bribes for nearly a decade reasonably calls into question her ability to be fair in any case she decided in that time period.

*IV. HAVING REMANDED FOR A NEW HEARING, THE
COURT SHOULD NOT HAVE ADDRESSED THE
MERITS*

In addition to deciding Hall is entitled to a new hearing, the superior court also addressed the merits, determining "there is sufficient admissible evidence . . . to sustain the finding that [the police] properly admonished Hall as required by law."

In light of the order remanding for a new hearing, the court should not have reached this issue. There is no value in affirming a finding based on an administrative record generated in a hearing that violated due process. Moreover, remanding for a new hearing to determine if police properly admonished Hall would be pointless if the superior court already decided that issue.

For the same reasons, it is also inappropriate for this court to address the parties' arguments on whether there is sufficient admissible evidence to establish Hall's license was properly revoked, and therefore we decline to do so. Whether the DMV properly revoked Hall's license must be decided anew, in the first instance, by a fair and impartial hearing officer, without regard to the superior court's discussion, findings, or ruling on that issue in this case.

DISPOSITION

Let a writ issue directing the superior court to vacate its "Decision On Petition for Writ of Mandate" and to issue a writ of mandate directing the DMV to vacate its decision in Hall's case and to conduct a new hearing before a fair and impartial hearing officer.

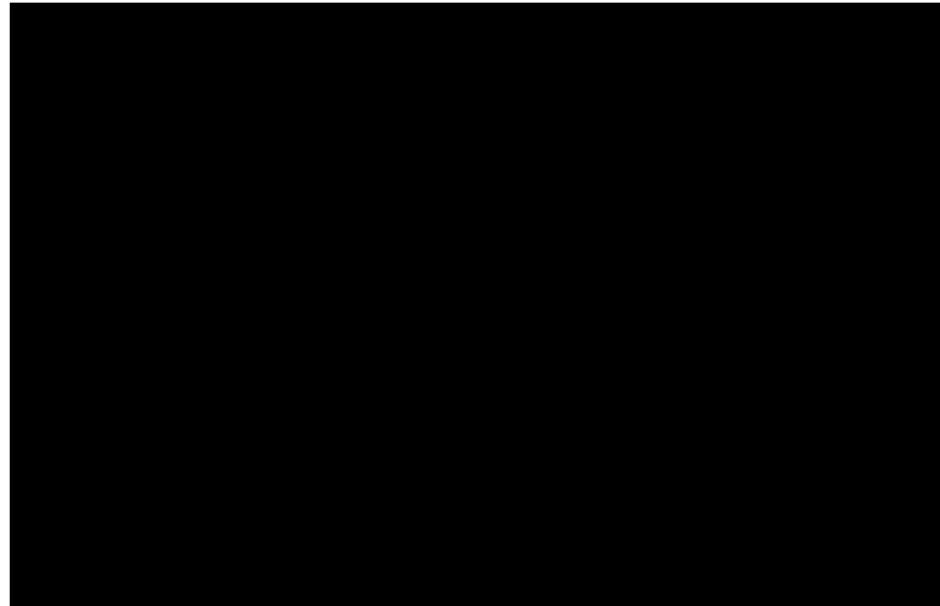
Costs are awarded to Branden Lee Hall.

Huffman, Acting P. J., and Haller, J., concurred.

[No. F069020. Fifth Dist. Sept. 29, 2016.]

THE PEOPLE, Plaintiff and Appellant, v.
ALFREDO PEREZ, JR., Defendant and Respondent.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) January 11, 2017, S238354.



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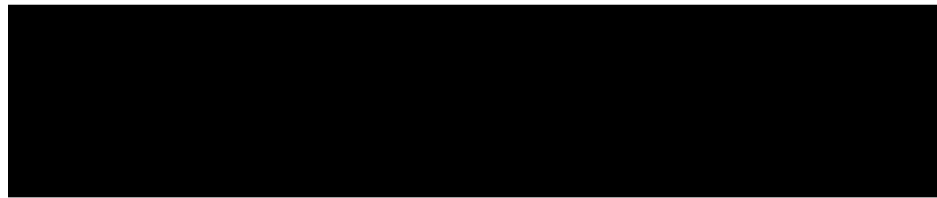
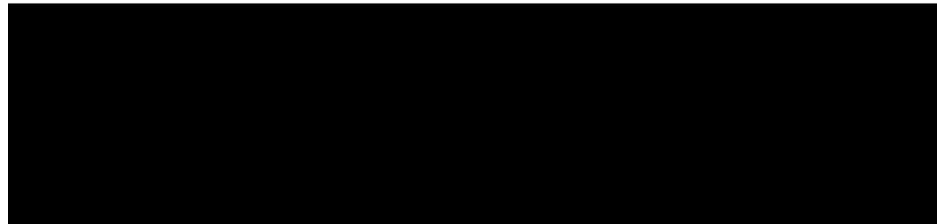
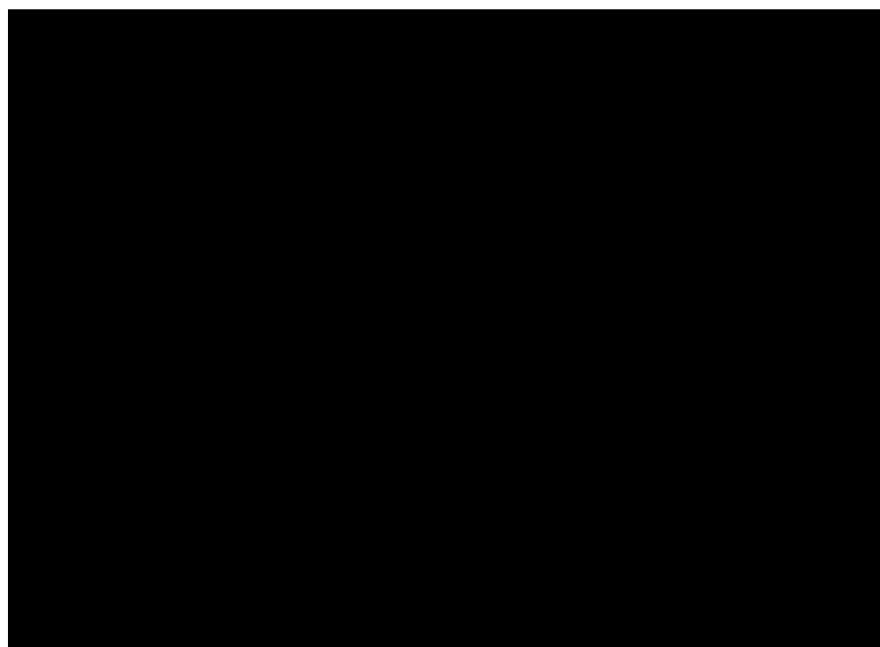
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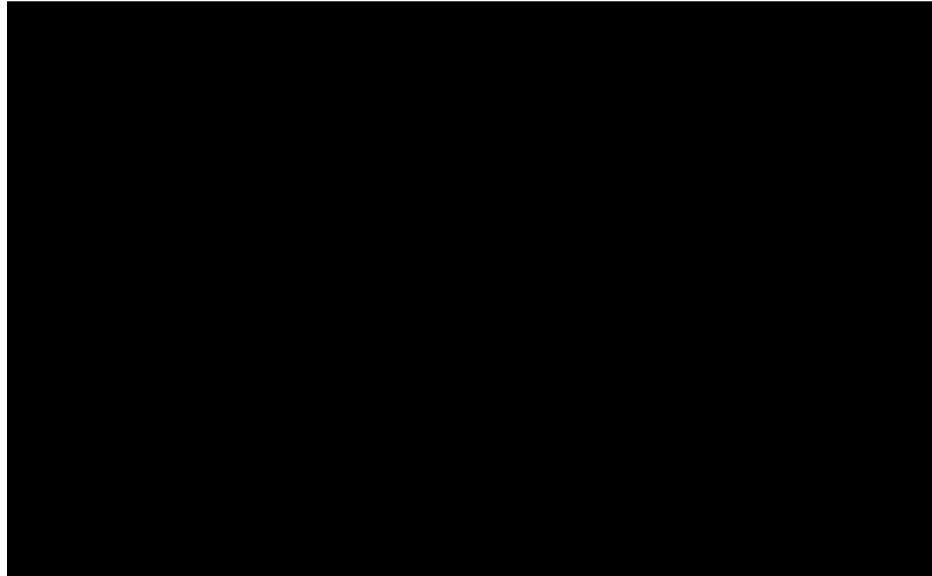
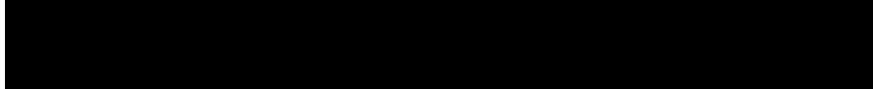
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COUNSEL

Elizabeth A. Egan and Lisa A. Smittcamp, District Attorneys, Rudy Carillo and Traci Fritzler, Chief Deputy District Attorneys, and Douglas O. Treisman, Deputy District Attorney, for Plaintiff and Appellant.

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Respondent.

OPINION

DETJEN, J.—Alfredo Perez, Jr. (defendant), was convicted by jury of assault with force likely to produce great bodily harm, a violation of Penal Code section 245, former subdivision (a)(1).¹ The jury further found he suffered two prior strike convictions (§ 667, subds. (b)–(i)) and served two prior prison terms (§ 667.5, subd. (b)). On May 4, 1995, he was sentenced to a total of two years plus 25 years to life in prison.

¹ All statutory references are to the Penal Code unless otherwise stated.

In 2012, the Three Strikes Reform Act of 2012 (§ 1170.126 et seq.) (hereafter the Act) created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for nonserious and nonviolent felonies. An inmate who meets the criteria enumerated in section 1170.126, subdivision (e), is to be resentenced as a second strike offender unless the court determines such resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168 [151 Cal.Rptr.3d 901].) Defendant's conviction was for a crime that was neither a serious nor a violent felony.

An inmate is ineligible for resentencing under the Act, however, if his or her current sentence is "for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2).) Thus, an inmate is disqualified from resentencing if, inter alia, "[d]uring the commission of the current offense, [he or she] . . . was armed with a . . . deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

After the Act went into effect, defendant filed a petition for recall of sentence and request for resentencing under the Act. The People opposed the petition on the ground, inter alia, defendant was armed with (and actually used) a deadly weapon during the commission of his offense. Following a hearing, the trial court found defendant eligible for resentencing, and that resentencing defendant would not pose an unreasonable risk of danger to public safety. The court granted the petition and resentenced defendant as a second strike offender.

The People appeal, challenging the trial court's eligibility determination.

We hold an inmate is armed with a deadly weapon within the meaning of clause (iii) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 and clause (iii) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12 (hereafter referred to collectively as clause (iii)) when he or she personally and intentionally uses a vehicle in a manner likely to produce great bodily injury. On the evidence found in the record of conviction, defendant used a vehicle as a deadly weapon. He is, therefore, ineligible for resentencing pursuant to section 1170.126, subdivision (e)(2). Accordingly, we reverse the trial court's order granting defendant's petition.

FACTS AND PROCEDURAL HISTORY²

"On March 17, 1994, at approximately 2 p.m., Fred Sanchez was working as a sales clerk at Grand Auto in Fresno. He observed [defendant] and a man, who hereinafter will be referred to as the 'passenger,' enter the store. The passenger raised a Club, an auto anti-car theft device, a couple of feet above the aisle and then lowered it. The passenger was wearing a Pendleton wool-type jacket and had his back to Sanchez. [Defendant] spoke briefly to the passenger and then went up to Sanchez and spoke to him about some tires. While this conversation was taking place, the passenger left the store. Sanchez could see the passenger go out into the parking lot of the store and wait at the passenger side of a Blazer-type truck. [Defendant] went to the driver's side and drove away. Sanchez suspected that the passenger had stolen the Club from the store and [defendant] had attempted to divert his attention away from the theft. However, he did not call the police over the incident nor did he check the store inventory to determine if any items were missing.

"The next day, March 18, 1994, around noon, Sanchez saw the same passenger from the day before enter the store. He was wearing the same jacket, even though the day was 'incredibly' hot. He appeared nervous and kept turning his back toward Sanchez. Sanchez asked the passenger if he needed assistance and then followed the passenger out of the rear of the store after alerting the other store employee that he needed assistance. He heard rustling in the passenger's clothing. The passenger had not paid for any item from the store.

"The passenger entered the passenger side of the same Blazer as the day before. The passenger side window was rolled down. Sanchez was wearing a red smock shirt with the insignia of Grand Auto and his name tag. The passenger was in the Blazer less than a minute when Sanchez came up to its window. [Defendant] was the driver. Sanchez observed a bulge protruding from the passenger's clothing. Sanchez told the passenger to please give the merchandise back and he could leave. Sanchez then reached into the vehicle and grabbed at the package in the passenger's jacket. Sanchez identified the package as an Ultra Club which had a retail value of \$59.55. Sanchez said, 'Give it up.' [Defendant] then looked toward Sanchez and said, 'Give it up.'

"[Defendant] then drove the vehicle in reverse. The passenger grabbed Sanchez's left arm and pushed it down, which prevented Sanchez from pulling his arm out of the vehicle. Sanchez yelled, 'Stop the vehicle' three

² We quote the facts of defendant's commitment offense as they are stated in our nonpublished opinion in *People v. Perez* (Nov. 5, 1996, F023703), which was submitted by the People in their initial response to defendant's petition, and is contained in the clerk's transcript of the present appeal.

times as the vehicle was moving in reverse. He was dragged when the vehicle went into reverse. He had to run to keep his balance. [Defendant] then drove the vehicle forward. Sanchez was able to pull his arm free once the vehicle moved forward, but he was afraid if he fell he could be run over.

"Sanchez estimated the speed of the Blazer to be 20 miles per hour, but admitted that at the preliminary hearing he had testified that the vehicle started at 10 miles per hour and was doing 15 when he pulled his arm free. He estimated the entire incident took a minute, his arm was in the vehicle after it was put in drive for 15 seconds, and that the vehicle traveled approximately 50 feet forward.

"After he broke free, Sanchez saw the vehicle leave the scene. Sanchez never recovered the merchandise from the passenger. The police arrived and Sanchez provided them with a description of the vehicle and the license plate number. The vehicle was registered to [defendant] and his wife. Sanchez's co-worker, Don Tatum, testified to seeing Sanchez run alongside the truck. He characterized the incident as Sanchez being dragged and 'running for his life.'^[3] Both Sanchez and Tatum picked out [defendant] from various photographs.

"[Defendant] testified that he was not in the store on March 17. On that day he had gone with his father to the Sanger cemetery to visit the grave of his grandmother and then went to the father's house until 3:30 p.m. His father testified similarly. [Defendant] testified that on March 18, he was looking for a Universal Tire store when he met a woman friend, Elizabeth Ornelas. Ornelas offered [defendant] \$5 to give her male acquaintance, Dan, a ride to an auto parts store to get a part to fix her vehicle which had broken down. [Defendant] testified he drove to the Grand Auto store but stayed in his vehicle and the passenger Dan went into the store. When Dan returned to the vehicle he was angry with another man. [Defendant] was not aware the man was a store employee. When [defendant] said, 'Give it up,' he was talking to his passenger and meant quit fighting.

"[Defendant] stated he was afraid and admitted driving one mile an hour in reverse and two-to-three miles an hour in drive. He stated at no time did Sanchez have to run. He admitted that Sanchez had his arm in the passenger side of his vehicle when he put his vehicle in reverse and forward. After he left the parking lot, he told his passenger to get out and returned the gas money to him.

³ In our discussion of one of defendant's claims on appeal, we expounded that Tatum testified "he saw Sanchez running for his life and was surprised that Sanchez was able to run that fast."

[Redacted]
[Redacted]

"[Defendant] admitted telling the investigating officer that the man outside the vehicle was dressed 'like you and me.' [Defendant] just wanted to leave. He admitted not telling the investigating officer about Ornelas and never mentioned to the officer he had a witness that the police could contact. [Defendant] admitted he told the investigating officer that his passenger had told him to leave since the man outside the vehicle was trying to rob him.

"Elizabeth Ornelas testified that she asked [defendant] to give a man she had recently met a ride to an auto parts store to help buy a part for the disabled vehicle they had been driving. Her trial testimony, that she made this request of [defendant] as he was stopped at a red light, differed from her pretrial statement that this conversation took place in a parking lot."

The jury was instructed pursuant to CALJIC No. 9.00 (1994 rev.), in pertinent part, that an assault required proof "1. A person willfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and [¶] 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another." Pursuant to CALJIC No. 9.02, they were told assault by means of force required proof of an assault committed by means of force likely to produce great bodily injury. They were further told great bodily injury referred to significant or substantial bodily injury or damage and not to trivial or insignificant injury or moderate harm, and that while actual bodily injury was not a necessary element of the crime, if such bodily injury was inflicted, its nature and extent were to be considered in connection with all the evidence in determining whether the means used and the manner in which it was used were such that they were likely to produce great bodily injury.⁴ The jury convicted defendant of assault by means of force likely to produce great bodily injury (§ 245, former subd. (a)(1)).

On August 16, 2013, defendant petitioned the trial court for a recall of sentence pursuant to section 1170.126. Defendant represented he was eligible for such relief, in that neither his current conviction nor his prior serious or violent felony convictions (both of which were for first degree burglary) disqualified him. As previously stated, the People opposed the petition on the ground, *inter alia*, defendant was armed with (and actually used) a deadly weapon during the commission of his current offense and was, therefore, ineligible for resentencing. Defendant countered that the People's position was supported by neither the law nor the facts of the case. In pertinent part,

⁴ On December 2, 2014, by separate order and in compliance with Evidence Code section 459, this court granted the People's request for judicial notice of these selected jury instructions given by the trial court to the jury in the trial of defendant's commitment offense. We do not take judicial notice beyond that order. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2 [112 Cal.Rptr.3d 853, 235 P.3d 152].)

he argued the fact that because virtually any object could be used in a harmful way did not mean possession constituted arming or qualified the item as a deadly weapon.

On February 5, 2014, a hearing was held on defendant's petition.⁵ The trial court characterized defendant's use of the vehicle during the offense as "incidental," and found defendant "not ineligible to be resentenced, due to the method in which the motor vehicle was used" It continued the hearing on the question whether defendant posed an unreasonable risk to public safety if resentenced and likely released.

On February 21, 2014, the People filed further opposition to defendant's resentencing, again claiming defendant was ineligible therefor, and arguing he posed an unreasonable danger if released. Specifically, on the eligibility question, the People asserted defendant necessarily was armed with a deadly weapon during the commission of the aggravated assault of which he was convicted, having employed an automobile as the instrumentality of the assault. Defendant filed a response in which he focused on the dangerousness issue. At the March 7, 2014, hearing, the trial court reiterated its finding of eligibility. It further found defendant did not pose an unreasonable risk to public safety, recalled the previously imposed sentence, and resentenced defendant to the upper term of four years, doubled to eight years due to the prior strike offenses, plus two years for the prior prison term enhancements. Defendant was awarded custody credits and ordered to report to parole for placement on postrelease community supervision.

DISCUSSION

The People contend the trial court erred in finding defendant eligible for resentencing, because defendant was "armed with a . . . deadly weapon"—to wit, a vehicle—in the commission of the current offense within the meaning of clause (iii).⁶ While we depart somewhat from the People's line of reasoning, we reach the same conclusion. The record of conviction reflects defendant committed assault by means of force likely to produce great bodily injury. The facts show defendant personally and intentionally used a vehicle in the commission of that assault. When a vehicle is used as a means of force likely to produce great bodily injury, it is a deadly weapon. Defendant was,

⁵ As the judge who originally sentenced defendant was no longer on the bench, the matter was heard by a different judge. (See § 1170.126, subd. (j).)

⁶ Although the People's notice of appeal stated they were appealing the finding of eligibility as well as the "orders, judgment and resentencing," on appeal they contest only the eligibility finding. The People have the right to appeal such a finding pursuant to section 1238, subdivision (a)(5). (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 987–988 [170 Cal.Rptr.3d 763].)

therefore, “armed with a . . . deadly weapon” within the meaning of clause (iii). Accordingly, defendant is ineligible for resentencing pursuant to section 1170.126, subdivision (e)(2).⁷

I. Because the trial court made both factual and legal determinations, multiple standards of review apply.

The standard of review applicable to an eligibility determination depends on the nature of the finding or findings a trial court is called upon to make in a given resentencing proceeding. In the present case, the trial court necessarily made both factual and legal determinations.

■ The eligibility criteria contained in clause (iii) refer to the “facts attendant to commission of the actual offense . . .” (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332 [174 Cal.Rptr.3d 499].) In deciding whether a defendant’s current offense falls within those criteria, a trial court “make[s] a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which [the] petitioner was convicted.” (*Ibid.*)⁸ The trial court makes this factual determination based on the evidence found in the record of conviction. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 285–286 [179 Cal.Rptr.3d 703]; *People v. Bradford*, *supra*, at p. 1331; *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678].)⁹ It is subject to review for substantial evidence under the familiar sufficiency of the

⁷ In light of our conclusion, we need not reach the People’s claim defendant also “personally used a dangerous or deadly weapon” within the meaning of section 1192.7, subdivision (c)(23), so as to render him ineligible pursuant to section 1170.126, subdivision (e)(1). (See generally *People v. Banuelos* (2005) 130 Cal.App.4th 601, 604–605 [30 Cal.Rptr.3d 315].)

⁸ In its discussion of whether a defendant is entitled to an evidentiary hearing on the issue of eligibility for resentencing, the appellate court in *People v. Oehmigen* (2014) 232 Cal.App.4th 1 [181 Cal.Rptr.3d 569] states eligibility is not a question of fact requiring the resolution of disputed issues; rather, “[w]hat the trial court decides is a question of law: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility.” (*Id.* at p. 7.) Whatever the validity of this statement with respect to a petitioner’s right to an *evidentiary* hearing, we believe it overstates the legal nature of our review.

⁹ The term “record of conviction” has been “used technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted.” (*People v. Reed* (1996) 13 Cal.4th 217, 223 [52 Cal.Rptr.2d 106, 914 P.2d 184]; see *People v. Houck* (1998) 66 Cal.App.4th 350, 356 [77 Cal.Rptr.2d 837].) Police reports are not part of the record of conviction (see *Shepard v. United States* (2005) 544 U.S. 13, 16 [161 L.Ed.2d 205, 125 S.Ct. 1254]; *Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1521 [82 Cal.Rptr.2d 378]), nor are a defendant’s statements made after conviction and recounted in a postconviction report of the probation officer (*People v. Trujillo* (2006) 40 Cal.4th 165, 179 [51 Cal.Rptr.3d 718, 146 P.3d 1259]). The record of conviction does include, however, the preliminary hearing transcript (*People v. Reed*, *supra*, 13 Cal.4th at p. 223), transcript of the jury trial (*People v. Bartow* (1996) 46 Cal.App.4th 1573, 1579–1580 [54 Cal.Rptr.2d 482]), and the appellate record, including the appellate opinion (*People v. Woodell* (1998) 17 Cal.4th 448, 456 [71 Cal.Rptr.2d 241, 950 P.2d

evidence standard. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 661 [175 Cal.Rptr.3d 640]; see, e.g., *People v. Maciel* (2013) 57 Cal.4th 482, 514–515 [160 Cal.Rptr.3d 305, 304 P.3d 983].)¹⁰

When the issue is one of the interpretation of a statute and its applicability to a given situation, however, it is a question of law we review independently. (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1013 [171 Cal.Rptr.3d 86]; accord, *People v. Tran* (2015) 61 Cal.4th

85]). Portions of the probation officer’s report may or may not be part of the record of conviction. (See *People v. Reed, supra*, 13 Cal.4th at p. 230; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1459 [195 Cal.Rptr.3d 903].)

Even when an item is part of the record of conviction, it is not automatically relevant or admissible for a particular purpose. (See *People v. Trujillo, supra*, 40 Cal.4th at pp. 179–181; *People v. Woodell, supra*, 17 Cal.4th at p. 457; *People v. Guerrero* (1988) 44 Cal.3d 343, 356, fn. 1 [243 Cal.Rptr. 688, 748 P.2d 1150].) Its admission must comport with the rules of evidence, particularly the hearsay rule and exceptions thereto. (See *People v. Woodell, supra*, 17 Cal.4th at pp. 457–460; *People v. Reed, supra*, 13 Cal.4th at pp. 220, 224–228, 230–231; *People v. Bartow, supra*, 46 Cal.App.4th at pp. 1579–1580.) Thus, although part of the record of conviction, the appellate opinion will not necessarily be relevant or admissible in its entirety. This may be especially true where the facts recited therein have their source in the probation officer’s report rather than the trial evidence. (See *People v. Trujillo, supra*, 40 Cal.4th at pp. 180–181; *People v. Reed, supra*, 13 Cal.4th at pp. 220, 230–231.) In the present case, the facts in the appellate opinion were derived from the evidence presented at trial.

¹⁰ Defendant contends allowing a trial court to find a petitioner ineligible for resentencing based on facts not found true by a jury deprives the petitioner of his or her right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution. In *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059–1062 [171 Cal.Rptr.3d 70] (*Blakely*), we rejected the claim an inmate seeking resentencing pursuant to section 1170.126 had a Sixth Amendment right to have disqualifying factors pled or proven to a trier of fact beyond a reasonable doubt. We found *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] and its progeny (e.g., *Alleyne v. United States* (2013) 570 U.S. ___ [186 L.Ed.2d 314, 133 S.Ct. 2151]; *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856]; *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531]) “do not apply to a determination of eligibility for resentencing under the Act.” (*Blakely, supra*, 225 Cal.App.4th at p. 1060.) We and other courts have adhered to this conclusion, since “[a] finding an inmate is not eligible for resentencing under section 1170.126 does not increase or aggravate that individual’s sentence; rather, it leaves him or her subject to the sentence originally imposed. The trial court’s determination . . . [does] not increase the penalty to which defendant [is] already subject, but instead disqualifie[s] defendant from an act of lenity on the part of the electorate to which defendant [is] not constitutionally entitled.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [171 Cal.Rptr.3d 55]; accord, *People v. Chubbuck* (2014) 231 Cal.App.4th 737, 748 [180 Cal.Rptr.3d 127]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 805 [178 Cal.Rptr.3d 857]; *People v. Guilford, supra*, 228 Cal.App.4th at pp. 662–663; *People v. Bradford, supra*, 227 Cal.App.4th at pp. 1334–1336; but see *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852–853 [198 Cal.Rptr.3d 343].) Whatever implications recent pronouncements may have with respect to the determination whether, for purposes of imposing an *initial* sentence, a prior conviction constitutes a strike (see, e.g., *Descamps v. United States* (2013) 570 U.S. ___, ___–___, ___ [186 L.Ed.2d 438, 133 S.Ct. 2276, 2281–2286, 2293]; *People v. Saez* (2015) 237 Cal.App.4th 1177, 1198–1208 [189 Cal.Rptr.3d 72]), defendant fails to convince us his constitutional rights are violated by judicial factfinding on the question of eligibility for resentencing under the Act. (See *Blakely, supra*, 225 Cal.App.4th at p. 1063.)

1160, 1166 [191 Cal.Rptr.3d 251, 354 P.3d 148]; *People v. Christman* (2014) 229 Cal.App.4th 810, 815 [176 Cal.Rptr.3d 884]; see *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 549 [103 Cal.Rptr.2d 447].) “‘In interpreting a voter initiative’ . . . , ‘we apply the same principles that govern statutory construction. [Citation.] Thus, [1] ‘we turn first to the language of the statute, giving the words their ordinary meaning.’ [Citation.] [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate’s intent]. [Citation.] [3] When the language is ambiguous, ‘we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ ” [Citation.] ‘In other words, our “task is simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent.”’ [Citation.]” (*People v. Arroyo* (2016) 62 Cal.4th 589, 593 [197 Cal.Rptr.3d 122, 364 P.3d 168].)

II. *Defendant used his vehicle as a deadly weapon in commission of the assault.*

■ At the time defendant committed his current offense, section 245, subdivision (a)(1) prescribed the punishment for “[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury”¹¹

¹¹ “[S]ection 245, [former] subdivision (a)(1) . . . ‘defines only one offense, to wit, “assault upon the person of another with a deadly weapon or instrument [other than a firearm] or by any means of force likely to produce great bodily injury” The offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon.’ [Citation.]” (*People v. McGee* (1993) 15 Cal.App.4th 107, 114–115 [19 Cal.Rptr.2d 12] (*McGee*)).

At issue in *McGee* was whether a deadly weapon use enhancement had to be stricken given that section 12022, former subdivision (b) by its terms precluded imposition of such an enhancement where use of a deadly weapon was an element of the underlying offense. (*McGee*, *supra*, 15 Cal.App.4th at p. 110.) In concluding the enhancement was improper, the appellate court reasoned: “[I]n determining whether use of a deadly weapon other than a firearm is an element of a section 245, [former] subdivision (a)(1) conviction, the question is not simply whether, in the abstract, the section can be violated without using such a weapon. Rather, the conduct of the accused, i.e., the means by which he or she violated the statute, must be considered. [¶] . . . [¶] Here, defendant’s use of a deadly weapon other than a firearm was the sole means by which he violated section 245, [former] subdivision (a)(1). The assault by means of force likely to produce great bodily injury was defendant’s stabbing of the victim with a knife. Hence, his use of this deadly weapon was an element of the offense, within the meaning of section 12022, [former] subdivision (b), even though the crime was pleaded as an assault by means of force likely to produce great bodily injury rather than as an assault with a deadly weapon other than a firearm.” (*Id.* at p. 115.)

Under section 245 as it currently reads, assault with a deadly weapon is addressed in subdivision (a)(1), while assault by means of force is addressed in subdivision (a)(4).

It is apparent assault by means of force can be committed without the involvement of any sort of weapon or the intent to cause great bodily injury. Accordingly, it does not automatically disqualify an inmate from resentencing under clause (iii).

Nevertheless, the use of a deadly weapon does not preclude a conviction for assault by means of force. (*McGee, supra*, 15 Cal.App.4th at p. 109 [the defendant convicted of assault by means of force after he stabbed the victim with a knife].)

“As used in section 245, subdivision (a)(1), a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.] Some few objects, such as dirks and blackjack, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204] (*Aguilar*).)¹²

Although a vehicle is not a deadly weapon per se, it can become one, depending on how it is used. (See, e.g., *People v. Oehmigen, supra*, 232 Cal.App.4th at pp. 5, 11 [the defendant purposefully drove his car at police vehicle]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [148 Cal.Rptr.3d 901] [the defendant deliberately raced vehicle through red light at busy intersection and collided with another vehicle, causing injury to another]; *People v. Golde* (2008) 163 Cal.App.4th 101, 109 [77 Cal.Rptr.3d 120] [the defendant accelerated toward victim at about 15 miles per hour three or four times as victim ran back and forth to avoid vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 779, 781–782 [28 Cal.Rptr.3d 862] [the defendant knowingly and intentionally pushed victim into path of oncoming vehicle]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707–709 [123

¹² At issue in *Aguilar* was whether hands and feet could constitute deadly weapons, or whether a deadly weapon within the meaning of the statute had to be an object extrinsic to the human body. (*Aguilar, supra*, 16 Cal.4th at pp. 1026–1027, 1034.) Within that context, *Aguilar* found “sound” the inference, based on inclusion of both the deadly weapon and the assault by means of force clauses in former subdivision (a)(1) of section 245, that the Legislature intended a meaningful difference to exist between the two clauses. (*Aguilar, supra*, 16 Cal.4th at p. 1030.) We do not read *Aguilar* as undermining *McGee* or *In re Mosley* (1970) 1 Cal.3d 913, 919, footnote 5 [83 Cal.Rptr. 809, 464 P.2d 473], on which *McGee* relied. (*McGee, supra*, 15 Cal.App.4th at pp. 110, 114.)

Cal.Rptr.2d 494] [the defendant intentionally drove pickup truck close to persons with whom he had contentious relations].)¹³

■ In the present case, the jury was instructed that assault by means of force required proof of an assault committed by means of force likely to produce great bodily injury. They were told great bodily injury referred to significant or substantial bodily injury or damage, not trivial or insignificant injury or moderate harm. “Jurors are presumed to understand and follow the court’s instructions. [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 662 [63 Cal.Rptr.2d 782, 937 P.2d 213].) That is “[t]he crucial assumption underlying our constitutional system of trial by jury.” [Citations.]” (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 [2 Cal.Rptr.3d 186, 72 P.3d 1166]; see, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9 [85 L.Ed.2d 344, 105 S.Ct. 1965].) When the jury convicted defendant of assault by means of force likely to produce great bodily injury, they necessarily found the force used by defendant in assaulting Sanchez, the victim, was likely to produce great bodily injury. (See *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065–1066 [10 Cal.Rptr.2d 839].) The sole means by which defendant applied this force was the vehicle he was driving. Thus, the record of conviction establishes defendant used the vehicle in a manner capable of producing, and likely to produce, at a minimum great bodily injury—i.e., as a deadly weapon. (See *McGee, supra*, 15 Cal.App.4th at pp. 110, 115; cf. *People v. Bradford, supra*, 227 Cal.App.4th at pp. 1342–1343.) Even under the deferential substantial evidence standard of review, the record of conviction does not support the trial court’s contrary findings that defendant’s use of the vehicle during the offense was merely “incidental,” or that Sanchez was “dragged slightly, though the dragging wasn’t anything more than keeping pace with the car.” The vehicle was the instrumentality by which defendant committed the offense, and whatever speed defendant was driving, Sanchez was dragged and had to run to keep his balance to such an extent that a witness characterized Sanchez as “‘running for his life’” and expressed surprise Sanchez was able to run that fast.¹⁴

¹³ Other objects that, while not deadly weapons as a matter of law, have been found to have been used as such for purposes of convictions of assault with a deadly weapon, include a “‘sharp’ and ‘pointy’” knife (*In re D.T.* (2015) 237 Cal.App.4th 693, 697, 699 [188 Cal.Rptr.3d 273] (*D.T.*)); a sharp pencil (*People v. Page* (2004) 123 Cal.App.4th 1466, 1468, 1472 [20 Cal.Rptr.3d 857]); an apple with a straight pin embedded in it (*In re Jose R.* (1982) 137 Cal.App.3d 269, 276 [186 Cal.Rptr. 898]); a fingernail file (*People v. Russell* (1943) 59 Cal.App.2d 660, 665 [139 P.2d 661]); and even a pillow (*People v. Helms* (1966) 242 Cal.App.2d 476, 486–487 [51 Cal.Rptr. 484]).

¹⁴ The dissent quotes the statement in *People v. Newman* (2016) 2 Cal.App.5th 718, 721 [206 Cal.Rptr.3d 427] (*Newman*), that “[i]n determining eligibility for Proposition 36 relief, a court is empowered to consider the record of conviction and to make factual findings by a preponderance of the evidence, even if those findings were not made by the jury or the trial court in convicting a defendant of the current offense.” We agree the resentencing court may

Defendant argues the record of conviction must establish he intended to use the vehicle as a deadly weapon. In part, he relies on *People v. Graham* (1969) 71 Cal.2d 303 [78 Cal.Rptr. 217, 455 P.2d 153], disapproved on another ground in *People v. Ray* (1975) 14 Cal.3d 20, 32 [120 Cal.Rptr. 377, 533 P.2d 1017], wherein the California Supreme Court stated: “Although the manner of the use of an object does not automatically determine whether a defendant was ‘armed with a dangerous or deadly weapon,’ the method of use may be evidence of the intent of its possessor. In *People v. Raleigh* (1932) 128 Cal.App. 105 [16 P.2d 752], the District Court of Appeal . . . adopted a position appropriate to the present case, ‘that a distinction should be made between two classes of “dangerous or deadly weapons”. There are, first, those instrumentalities which are weapons in the strict sense of the word, and, second, those instrumentalities which are not weapons in the strict sense of the word, but which may be used as such. . . . The instrumentalities falling into the second class, . . . which are not weapons in the strict sense of the word and are not “dangerous or deadly” to others in the ordinary use for which they are designed, may not be said as a matter of law to be “dangerous or deadly weapons.” When it appears, however, that an instrumentality . . . falling within the [second] class is capable of being used in a “dangerous or deadly” manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a “dangerous or deadly weapon” may be thus established, at least for the purposes of that occasion.’ (128 Cal.App. at pp. 108–109.)” (*People v. Graham*, *supra*, 71 Cal.2d at pp. 327–328; see *People v. McCoy* (1944) 25 Cal.2d 177, 188–189 [153 P.2d 315]; *People v. Page*, *supra*, 123 Cal.App.4th at p. 1471; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287].)

do so, at least where eligibility under clause (iii) is concerned. Thus, for example, a resentencing court could properly find a defendant disqualified from resentencing based on the defendant’s intent to cause great bodily injury to another person, even though the jury in the defendant’s case was never asked to make such a finding or found the defendant did not actually inflict great bodily injury—the situation in *Newman*. To hold otherwise would be to render nugatory a portion of clause (iii).

Contrary to the apparent positions of the resentencing court and dissent in this case, however, this does not mean the jury’s verdict can be disregarded altogether, or that the resentencing court can decline to find, by the applicable standard of preponderance of the evidence, a fact the jury necessarily found beyond a reasonable doubt. We do not read *Newman* as countenancing such a result; despite its occasionally sweeping statements, “we must remember ‘ ‘ ‘the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.’ ’ ’ [Citations.]’ [Citation.]” (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1532 [36 Cal.Rptr.3d 854], quoting *Trope v. Katz* (1995) 11 Cal.4th 274, 284 [45 Cal.Rptr.2d 241, 902 P.2d 259].) *Newman* deals only with a situation in which the resentencing court made factual findings that went beyond those made by the jury, not that contradicted the jury’s verdict.

■ In *D.T.*, *supra*, 237 Cal.App.4th at page 702, the Court of Appeal explained the foregoing “does no more than establish that intent to use an item as a weapon can be sufficient, in some circumstances, to qualify the item as a deadly weapon. It in no way states that proof of such intent is necessary to this inquiry.” The appellate court pointed to *People v. Colantuono* (1994) 7 Cal.4th 206, 214 [26 Cal.Rptr.2d 908, 865 P.2d 704], in which the California Supreme Court held that “‘the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being “any willful and unlawful use of force or violence upon the person of another.”’ [Citation.]”

We tend to agree with *D.T.* (See *People v. Aznavoleh*, *supra*, 210 Cal.App.4th at pp. 1183, 1186–1187 [setting out elements of assault and assault with a deadly weapon in case involving use of vehicle].) Even assuming such an intent must be shown, however, it is established by the record of conviction in the present case. Sanchez yelled “Stop the vehicle” three times as the vehicle was moving in reverse, yet defendant then drove the vehicle forward “at a great speed.” Sanchez only managed to pull his arm free shortly before defendant drove out of the store parking lot onto Blackstone without even stopping at the stop sign.

III. *Because defendant personally used the vehicle as a deadly weapon in commission of the assault, he was armed with a deadly weapon during the commission of his current offense and so was ineligible for resentencing under section 1170.126.*

■ It has long been the law that “[a] person is ‘armed’ with a deadly weapon when he simply carries a weapon or has it available for use in either offense or defense. [Citation.]” (*People v. Stiltner* (1982) 132 Cal.App.3d 216, 230 [182 Cal.Rptr. 790]; see *Blakely*, *supra*, 225 Cal.App.4th at p. 1051.) Here, because defendant personally used the vehicle as a deadly weapon, he necessarily had it available for use and so was armed with it during the commission of his current offense, since “use” subsumes “arming.” (See, e.g., *People v. Strickland* (1974) 11 Cal.3d 946, 961 [114 Cal.Rptr. 632, 523 P.2d 672]; *People v. Schaefer* (1993) 18 Cal.App.4th 950, 951 [22 Cal.Rptr.2d 536]; *People v. Turner* (1983) 145 Cal.App.3d 658, 684 [193 Cal.Rptr. 614], disapproved on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415, 422–423, fn. 6 [87 Cal.Rptr.2d 474, 981 P.2d 98] & *People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].)

The question, then, is whether voters intended clause (iii) to encompass arming based on personal use as a deadly weapon of an object that is not a deadly weapon per se. The trial court found defendant’s use of the motor vehicle in the present case was “not the anticipated use of a deadly weapon contemplated by [section] 1170.126.” Reviewing this question of law independently, we disagree.

■ “The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted’ [citation], ‘and to have enacted or amended a statute in light thereof’ [citation]. ‘This principle applies to legislation enacted by initiative. [Citation.]’ [Citation.]

“Where, as here, ‘the language of a statute uses terms that have been judicially construed, “‘the presumption is almost irresistible’” that the terms have been used “‘in the precise and technical sense which had been placed upon them by the courts.’” [Citations.] This principle . . . applies to legislation adopted through the initiative process. [Citation.]’ [Citation.]” (*Blakely, supra*, 225 Cal.App.4th at p. 1052.)

■ In light of the foregoing, we conclude the electorate intended “armed with a . . . deadly weapon,” as that phrase is used in clause (iii), to mean carrying a deadly weapon or having it available for offensive or defensive use. (See *Blakely, supra*, 225 Cal.App.4th at p. 1052.) When the object at issue is a deadly weapon per se, simply carrying the object or having it available for use is sufficient to render a defendant ineligible for resentencing under the Act. By contrast, where, as here, the object is *not* a deadly weapon per se, merely carrying the object or having it available for use will not, without more, be enough to bring a defendant within the scope of clause (iii).¹⁵ Here, however, defendant actually and personally *used* the object *as a deadly weapon*. Because enhancing public safety was a key purpose of the Act, despite the fact the Act “‘diluted’” the three strikes law somewhat (*Blakely, supra*, 225 Cal.App.4th at p. 1054), we conclude the electorate did not intend to distinguish, under such circumstances, between objects that are deadly weapons per se and those whose characterization as such depends upon the use to which they are put. (See generally *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1034–1038 [discussing Act’s purpose and voters’ intent].)

DISPOSITION

The order granting the petition for recall of sentence, recalling the previously imposed sentence pursuant to Penal Code section 1170.126, and resentencing defendant is reversed. The matter is remanded to the trial court

¹⁵ For example, the driver of a getaway vehicle in a robbery who merely puts the vehicle to the ordinary use for which it was designed—transportation—technically has the vehicle available for offensive or defensive use as a weapon. Yet we have no doubt the electorate did not intend clause (iii) to reach that type of conduct, at least when unaccompanied by some sort of nefarious intent. (See *People v. Graham, supra*, 71 Cal.2d at pp. 327–328.) We are not presented with the question, and express no opinion, whether not actually using an object as a deadly weapon, but intending to do so should the need arise, falls within clause (iii).

with directions to find defendant ineligible for resentencing, deny the petition, and reinstate defendant's original sentence.

Poochigian, Acting P. J., concurred.

POOCHIGIAN, Acting P. J., Concurring.—I concur to express my view concerning the significance of certain facts underlying the conviction below.

The majority opinion cites several cases whereby motor vehicles were deemed dangerous weapons as a result of demonstrably intentional and threatening conduct calculated to place others at risk of injury or with reckless disregard for such peril. Clearly, assault requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will likely and directly result in the application of physical force. In this case, the purpose of the use of the vehicle was arguably not to inflict injury but to provide a means of escape. Indeed, the court's conclusion at the hearing on the petition for resentencing that the use of the vehicle was "incidental" was presumably based on that understanding. It seems clear that any determination regarding whether the vehicle was employed as a deadly weapon under such circumstances should take into account the element of speed.

The evidence indicated that the path of the vehicle's movement involved a distance of roughly 50 feet. The passenger grabbed victim Sanchez's left arm and pushed it down, which prevented him from pulling his arm out of the vehicle as it was in motion. As the vehicle was moving in reverse, Sanchez yelled, "Stop the vehicle" three times. While the defendant contended that the vehicle moved at the rate of one to three miles per hour during the episode, the victim stated that the vehicle was traveling about 20 miles per hour as he ran alongside. During the preliminary hearing, he had stated that at the time he pulled his arm free, the vehicle was moving at a speed of about 15 miles per hour and that the ordeal lasted one minute. Under the circumstances in which the victim's arm was apparently held as he ran alongside the moving vehicle, the speed suggested by the victim's testimony seems questionable.¹ Indeed, that fact may have affected the trial court's conclusion that the victim was "dragged slightly"—in contrast to a coworker's observation that Sanchez was "running for his life."

Despite any misgivings about the accuracy of lay testimony regarding the speed of the vehicle, the coworker's observation about the peril presented is certainly relevant in assessing whether the vehicle was operated as a deadly

¹ It is noteworthy that the winner of the 100-meter sprint in the 2016 Olympic Games won with a time of 9.81 seconds—a rate of 22.8 miles per hour.

weapon. It is also instructive that the jury found appellant guilty of assault with force likely to produce great bodily injury. When coupled with testimony that the passenger held onto Sanchez's extended arm while the vehicle was in motion, that Sanchez yelled for the driver to stop, that he presumably struggled to be released from the passenger's hold, and that he was finally able to free himself when Perez put the vehicle in drive after moving in reverse, I am satisfied with the conclusion that the vehicle was employed as a deadly weapon—thus rendering the defendant ineligible for resentencing.

FRANSON, J., Dissenting.—The People appeal the trial court's order granting defendant Alfredo Perez, Jr.'s petition to recall his sentence, contending Perez was armed with and used a deadly weapon during the commission of an assault. The majority agrees and reverses the trial court's order granting defendant's petition. Based on the trial court's underlying factual findings and determination, I respectfully dissent and would affirm.

Factual and Procedural Background

The following summary of facts pertinent to this appeal come from the appellate opinion affirming Perez's current conviction, which is repeated verbatim in the majority opinion. At trial, Fred Sanchez testified he was working as a sales clerk at Grand Auto in Fresno on March 17, 1994, when Perez and another man (the passenger) entered the store midafternoon. The passenger, with his back to Sanchez, was seen holding a Club, an automobile anti-theft device. Perez spoke briefly to the passenger and then went up to Sanchez and spoke to him about tires. During this conversation, the passenger left the store and went to stand by the passenger side of a Blazer-type vehicle. Perez left the store, went to the driver's side of the vehicle, and the two drove away. Sanchez suspected the passenger had stolen the Club from the store and that Perez had tried to divert his attention away from the theft.

The following day, Sanchez saw the passenger again enter the store. Sanchez approached the passenger, asked if he needed assistance, and, after alerting other store employees that he needed assistance, followed him out of the rear of the store. While following the passenger, Sanchez heard rustling in the passenger's clothing, although he had not paid for any items from the store.

Once out of the store, the passenger entered the passenger side of the same Blazer as the day before. Perez was again driving. Sanchez approached the open passenger window and observed a bulge protruding from the passenger's clothing. Sanchez told the passenger to give the merchandise back and he could leave. Sanchez then reached into the vehicle and grabbed the package under the passenger's jacket, which turned out to be an "Ultra Club." Sanchez said, "Give it up." Perez looked toward Sanchez and said the same.

Perez then drove the vehicle in reverse while the passenger held onto Sanchez's arm. Sanchez implored Perez to stop the vehicle as it continued to move in reverse. Sanchez was dragged by the movement of the vehicle and had to run to keep his balance. Perez then put the vehicle in drive and the vehicle moved forward approximately 50 feet, when Sanchez was able to pull his arm free.¹ Sanchez estimated the Blazer was going about 20 miles per hour, although he admitted that at the preliminary hearing he estimated the vehicle started at 10 miles per hour and was going about 15 miles per hour when he pulled his arm free. Sanchez estimated that the entire incident took about a minute, 15 seconds of that with his arm in the vehicle as it was moving forward.

After he broke free, Sanchez saw the vehicle leave. A coworker of Sanchez described Sanchez as "running for his life" alongside the Blazer.

A jury convicted Perez of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, former subd. (a)(1))² and found true the allegations that Perez had sustained two prior strike convictions and suffered two prior prison terms. The trial court sentenced Perez to an indeterminate term of 25 years to life, plus two one-year enhancements for the prison priors.

Resentencing Under Proposition 36

The trial court's consideration of a petition for resentencing under Proposition 36 is a two-step process. First, the court determines whether the petitioner is eligible for resentencing. If the petitioner is eligible, the court proceeds to the second step, and resentence the petitioner under Proposition 36 unless it determines that doing so would pose "an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

At issue here is the first step of the process—the initial eligibility determination. Section 1170.126 grants the trial court the power to ultimately determine whether a third strike offender is eligible for resentencing *only if*, as an initial matter, the inmate satisfies the criteria set out in subdivision (e) of section 1170.126. Generally, for purposes here, those criteria are: (1) the inmate is serving a life term under the three strikes law for a conviction of a felony or felonies not defined as serious and/or violent under section 1170.126; (2) the inmate's current sentence was not imposed for an offense in which the defendant used or was armed with a firearm or deadly weapon; and

¹ There is no indication Perez was injured as a result. At the subsequent hearing on the petition for resentencing, the parties described the injury as "not major" and "a few scrapes." The injury required no hospitalization or medical treatment.

² All further statutory references are to the Penal Code unless otherwise stated.

(3) the inmate has no prior convictions for certain specified offenses. If the inmate does not satisfy each of the criteria, the trial court must deny the request for resentencing. Perez satisfies the first and third requirements. This appeal relates to the second criteria.

DISCUSSION

Eligibility Determination

The eligibility determination required by section 1170.126, subdivision (e) is not a discretionary determination by the trial court. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336 [174 Cal.Rptr.3d 499].) The Three Strikes Reform Act of 2012 (§ 1170.126 et seq.) (the Act) provides that “the court shall determine whether the petitioner satisfies the criteria in subdivision (e). . . .” (§ 1170.126, subd. (f).) And because the Act fixes ineligibility not on statutory violations or enhancements, but on “facts attendant to commission of the actual offense, the express statutory language requires the trial court to make a *factual determination* that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted.” (*People v. Bradford, supra*, at p. 1332, italics added.)

Instead, “the trial court must make this *factual determination* based solely on evidence found in the record of conviction” (*People v. Bradford, supra*, 227 Cal.App.4th at p. 1331, italics added.) As stated in *People v. Oehmigen* (2014) 232 Cal.App.4th 1 [181 Cal.Rptr.3d 569], “[E]ligibility is not a question of fact that requires the resolution of disputed issues. The *facts* are limited to the record of conviction underlying a defendant’s commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction. [Citation.] What the trial court decides is a question of law: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility.” (*Id.* at p. 7, original italics.) As stated recently in *People v. Newman* (2016) 2 Cal.App.5th 718, 721 [206 Cal.Rptr.3d 427], “In determining eligibility for Proposition 36 relief, a court is empowered to consider the record of conviction and to *make factual findings* by a preponderance of the evidence, even if those findings were not made by the jury or the trial court in convicting a defendant of the current offense.”³ (Italics added.) Simply put, the trial court takes the facts from the

³ In *People v. Newman* the defendant was convicted of assault by means of force likely to produce great bodily injury (§ 245, former subd. (a)(1)) but found not true the allegation that he inflicted great bodily injury on the victim during the assault (§ 12022.7). Defendant subsequently filed a Proposition 36 petition for recall and resentencing. In denying the petition, the court found the defendant, based on the facts of the case, intended to cause great bodily

record of conviction and determines, from its interpretation of those facts, whether a petitioner is eligible for resentencing.

“[D]isqualifying factors need not be pled and proved to a trier of fact beyond a reasonable doubt; hence, a trial court determining whether an inmate is eligible for resentencing under section 1170.126 may examine relevant, reliable, admissible portions of the record of conviction to determine the existence of a disqualifying factor.” (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048–1049 [171 Cal.Rptr.3d 70].) For this purpose, the record of conviction includes pleadings, trial transcripts, pretrial motions, and any appellate opinion. (See, e.g., *People v. Manning* (2014) 226 Cal.App.4th 1133, 1140–1141 [172 Cal.Rptr.3d 560]; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1027, 1030 [171 Cal.Rptr.3d 55]; *People v. White* (2014) 223 Cal.App.4th 512 [167 Cal.Rptr.3d 328].) “[A] trial court need only find the existence of a disqualifying factor by a preponderance of the evidence. (Evid. Code, § 115; [citation].)” (*People v. Osuna, supra*, at p. 1040.)

Standard of Review

The trial court’s underlying factual determination that Perez was eligible for resentencing is reviewed on appeal for substantial evidence. (*People v. Bradford, supra*, 227 Cal.App.4th at p. 1331; 3 Witkin & Epstein, *Cal. Criminal Law* (4th ed. 2016 supp.) *Punishment*, § 421C, p. 128.) Furthermore, “the task of an appellate court is to ‘review the correctness of the challenged ruling, not of the analysis used to reach it.’ [Citation.] ‘ ‘If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.’ [Citation.]’ ” (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1481 [136 Cal.Rptr.3d 538].)

Trial Court Hearing and Order

At the hearing on the petition, the trial court reviewed the facts and circumstances of the prior conviction and made the preliminary determination that they did not support a finding of ineligibility. The court was provided with a copy of this court’s 1996 opinion affirming Perez’s conviction and the People’s summary of the facts from that opinion. The court described its interpretation of the facts of the conviction, as the victim being “dragged slightly, though the dragging wasn’t anything more than keeping pace with the car.” It further described the use of the vehicle as “incidental.”

injury in the commission of the assault, disqualifying him from resentencing. (*People v. Newman, supra*, 2 Cal.App.5th at pp. 722–723.)

The People argued that Perez became armed with the vehicle for purposes of the statute, “[t]he moment that Mr. Perez chose to use the vehicle as a weapon as a means of his assault.” The trial court stated, in reviewing Perez’s file, that he was never charged with assault with a deadly weapon.⁴ The People explained that, at the time Perez committed his crime, “it would have had very little meaning to file an assault with a deadly weapon.” The trial court acknowledged that it had previously ruled in earlier cases that, “if there are facts that support use of a deadly weapon, even though they are not charged, and there is not a conviction, the person is still excluded from [resentencing] reconsideration.”

The court then focused on the difference between a defendant who “used” a firearm or deadly weapon and a defendant who “was armed” with a firearm or deadly weapon. The People agreed with the trial court that, when Perez was sitting in his vehicle and the vehicle was not moving, the vehicle was not a weapon. The trial court explained that, had Perez had a knife in a sheath under his shirt at the time, the court would find him ineligible.

The People continued, arguing that when Sanchez put his arm into the vehicle, Perez had an “election” to make: (1) to leave the vehicle as a vehicle by asking Sanchez to remove his arm from the vehicle, turn off the vehicle and resolve the issue; or (2) to use the vehicle as the mechanism of the assault, which would convert the vehicle into a weapon. According to the People, Perez chose the second option. As argued by the People, Perez was armed with a deadly weapon because “use” encompasses “armed,” whereas “armed” does not encompass “use.”

In response, the trial court read from an order it had issued in earlier resentencing hearings, explaining its understanding of the rationale behind Proposition 36, which stated that it did not think the voters of Proposition 36 “in any way were being told at that point, ‘if an individual uses something that is not in and of itself a . . . deadly weapon, that they would not be eligible.’ ” Following that line of reasoning, the trial court posed a hypothetical, asking the People what their argument would be if the passenger had gotten into the vehicle with the anti-theft device, Sanchez approached the vehicle and said “[d]on’t leave,” Perez grabbed the anti-theft device, threw it at Sanchez and drove away. Under the People’s argument, the trial court reasoned Perez would have converted the anti-theft device, which is not

⁴ I note the jury was instructed only on the theory of “by means of force likely to produce great bodily injury.” (CALJIC No. 9.02) I take judicial notice of the record in the appeal of the underlying offense (*People v. Perez, supra*, F023703) and also note that the prosecutor did not argue at trial that the use of the vehicle constituted use of a deadly weapon during the assault.

inherently a deadly weapon, into the use of a deadly weapon, making him ineligible for resentencing.

The People made the distinction between someone releasing a stolen item and giving it back, and throwing the item and hitting the victim in the skull or attempting to hit the victim with the item. The latter example, argued by the People, “convert[s] the Club into exactly that, a club, and it was being used then as an instrument for the assault and was a dangerous or deadly weapon.”

With that, the trial court then issued its ruling, stating: “Okay. I understand your position. I understand your argument. . . . [I]t is . . . very well-reasoned. . . . I think your argument is clear, if you want to take this further, the fact [is] that the Court is going to deny it. I am going to finalize the order. For that purpose, . . . *I am finding that the defendant is not ineligible to be resentenced, due to the method in which the motor vehicle was used in this offense.* So I have tried to give you as clear language as I can.” (Italics added.)

Analysis

The trial court reviewed and weighed the facts, including the credibility of the estimated speeds and length of time for the incident⁵ and determined, based on *its review and interpretation* of the facts, that the method used by Perez in maneuvering his car to depart the scene did not convert an object otherwise not inherently a deadly weapon, into one. Utilizing this factual determination, Judge Conklin reached the legal conclusion that Perez was not armed with, or used, a deadly weapon and was therefore eligible for resentencing. This determination was not made because of any misunderstanding of Proposition 36. Based on the record, and the trial court’s comments, he clearly understood the mandates of Proposition 36 and properly applied them to the facts, as he interpreted them, to reach his decision. The record supports the trial court’s determination of eligibility, based on the method in which the vehicle was used in the offense Perez was convicted of. The trial court did not, contrary to the majority’s assertion (maj. opn. *ante*, at pp. 825–826, fn. 14), contradict the jury’s verdict. It simply made factual findings that went beyond those made by the jury.

⁵ As an aside, I take judicial notice of the fact that the world record for the 100-meter sprint is 9.58 seconds, a rate of 23.35 miles per hour. As such, the speed suggested by the victim’s testimony seems implausible and provides additional support for the trial court’s implied credibility findings. (Evid. Code, § 452, subd. (h); *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1043 [113 Cal.Rptr.2d 597] [“A trier of fact is free to disbelieve a witness, even one uncontradicted, if there is any rational ground for doing so.”].)

While I agree that an object not inherently deadly may be made deadly by its use and all other factors relevant to the issue, the factual determinations made by the trial court in this case fail to support this legal conclusion. Examples of vehicles used as deadly weapons are cited by the majority in part II. of the Discussion, but are clearly much more egregious than the facts of this case, especially as interpreted by the trial court.

As a further example, in *People v. Claborn* (1964) 224 Cal.App.2d 38 [36 Cal.Rptr. 132], a vehicle was found to be a deadly weapon within the meaning of a section 245 assault when the defendant, upset by a family dispute, got into his vehicle and, upon seeing an approaching police car, swerved and aimed his vehicle directly at the officer's car, causing a head-on collision. The defendant then got out of his vehicle and shouted, "'You son-of-a bitch, I didn't kill you this way, but I will kill you now,' " and physically attacked the officer. (*People v. Claborn, supra*, at p. 41.)

In determining whether a defendant is ineligible for resentencing under the Act, a trial court examines the "conduct that occurs during the commission of an offense." (*People v. Bradford, supra*, 227 Cal.App.4th at p. 1333.) Here, the record does not show Perez sped away with Sanchez's arm trapped in the car; he did not ram him with his vehicle, nor did he aim for him while driving. Instead, the facts contained in the record, as interpreted and cited by the trial court, were that Perez assaulted Sanchez when, while he was in the driver's seat of the vehicle, Sanchez reached into the passenger window in an attempt to retrieve the anti-theft device, the passenger grabbed Sanchez's arm and Perez then drove the vehicle slowly in reverse, to effect a getaway, while the passenger held onto Sanchez. Sanchez implored Perez to stop the vehicle as it continued to move in reverse. Sanchez was dragged by the movement of the vehicle and had to run to keep his balance. Perez then put the vehicle in drive and the vehicle moved forward. Sanchez was able to pull his arm free. Sanchez received no injuries other than a few scrapes. While Sanchez estimated the Blazer was going between 10 and 20 miles per hour and that the entire incident took about a minute, common sense dictates otherwise.

Perez's section 245, former subdivision (a)(1) conviction was based on an assault by any means of force likely to produce great bodily injury, and does not come within section 1192.7, subdivision (c)(23) use of a deadly weapon exclusion making him ineligible for resentencing. (*People v. Williams* (1990) 222 Cal.App.3d 911, 914 [272 Cal.Rptr. 212].) Nor does it come within the "armed with a . . . deadly weapon" exclusions pursuant to section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii), as referenced in section 1170.126, subdivision (e)(2).

Substantial evidence supports the trial court's determination that Perez's use of the vehicle was not a deadly weapon within the meaning of the use of a deadly weapon exclusions and, thus, he was eligible for a recall of his life sentence and for resentencing under the Act.

Respondent's petition for review by the Supreme Court was granted January 11, 2017, S238354.

[No. A148627. First Dist., Div. One. Sept. 29, 2016.]

M.C., Petitioner, v.

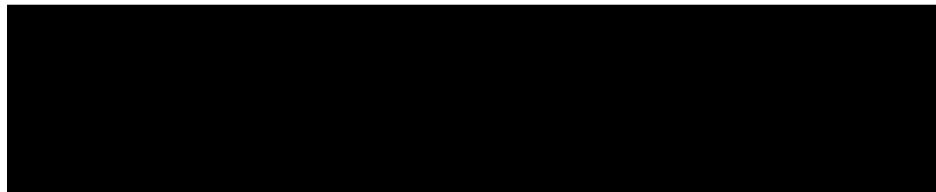
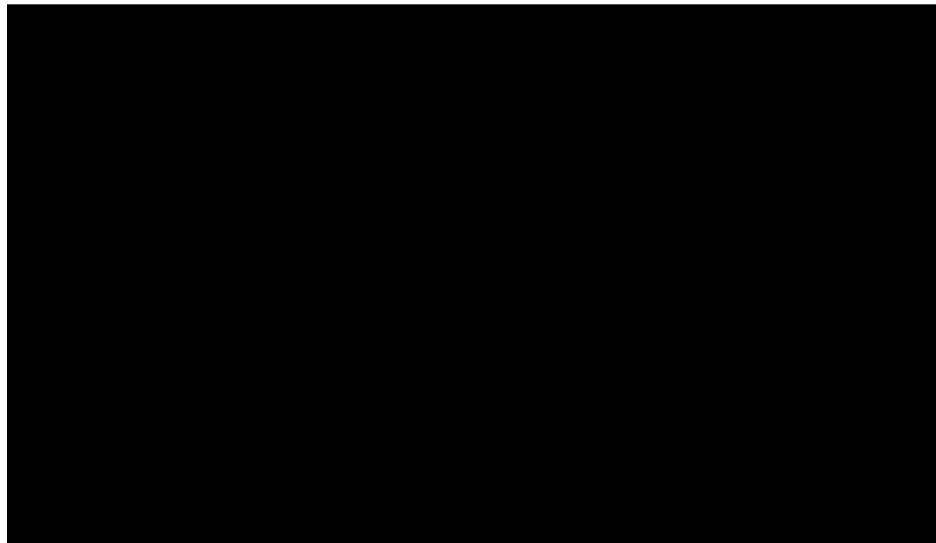
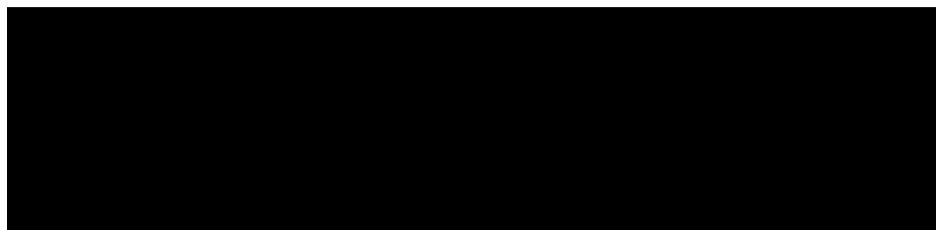
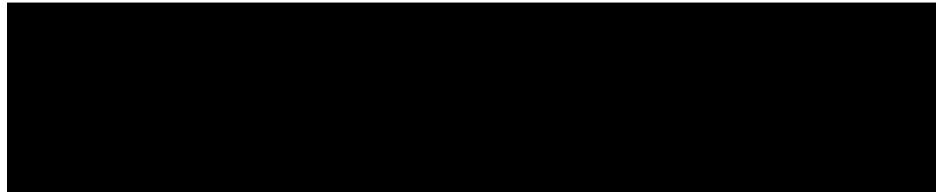
THE SUPERIOR COURT OF DEL NORTE COUNTY, Respondent;
DEL NORTE COUNTY DEPARTMENT OF HEALTH AND HUMAN
SERVICES, Real Party in Interest.

[REDACTED]

[REDACTED]

[REDACTED]





[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Law Offices of Jennifer Savoy and Jennifer Savoy for Petitioner.

No appearance for Respondent.

Elizabeth Cable, County Counsel, and Sean Collins, Deputy County Counsel, for Real Party in Interest.

OPINION

BANKE, J.—M.C. (Mother) seeks writ relief from orders terminating her reunification services at the six-month review hearing and setting the matter for a Welfare and Institutions Code section 366.26 hearing.¹ C.C. and K.C. were removed from Mother when the children were five and 11 years old, respectively, based on Mother’s substance abuse issues, criminal activity, and

¹ All further statutory references are to the Welfare and Institutions Code.

the condition of her home. Mother contends she was statutorily entitled to 12 months of services and that period could be shortened only on the filing of a section 388 petition. We conclude Mother was entitled to 12 months of services except under the circumstances specified in section 361.5, subdivision (a)(2). The juvenile court did not terminate services in accordance with these statutory provisions. We therefore grant Mother's writ petition.

BACKGROUND

The Del Norte County Department of Health and Human Services (Department) received a referral from law enforcement after officers searched Mother's residence and found mushrooms, methamphetamine pipes, marijuana paraphernalia, concentrated cannabis, brass knuckles and butterfly knives. It also appeared the occupants were hoarders, as there were large piles of items. Some of the piles were over seven feet tall, presenting a hazard to the children. Mother was arrested for possession of a controlled substance, possession of drug paraphernalia, possession of marijuana over 28.5 grams, possession for sale, receiving stolen property, and carrying a dirk or dagger. Two days later, Mother tested positive for methamphetamine, benzodiazepines, and marijuana. K.C. and C.C. were immediately removed from her custody.

The Department filed a juvenile dependency petition alleging failure to protect the children, leaving them without support, and abuse of a sibling under section 300. The petition further alleged Mother has a substance abuse problem that impairs her ability to adequately supervise and care for the children, and she engages in criminal activity that places the children at substantial risk of physical and/or emotional harm. The court ordered K.C. and C.C. detained, and ordered that Mother receive parenting education, random drug screening, substance abuse assessment and any recommended treatment. The court also ordered supervised visitation.

In subsequent reports, the Department noted Mother's substance abuse was "causing clouded judgment as to what is an appropriate environment and care for her children." Despite her admitted daily marijuana and occasional methamphetamine use, Mother continued to deny she had a substance abuse problem stating she "only uses meth to do yard work."

Prior to the six-month review hearing, the Department filed a report stating Mother had not "involved herself in any of the services" offered, apparently because she was a "medical" marijuana user and thus was not eligible for substance abuse treatment. Nor did Mother apparently think these programs would help her address a methamphetamine habit. The report further advised Mother had just accepted a plea deal to resolve charges based on her "keeping a drug house," whereby she would be sentenced to eight months in

state prison and thereafter be on probation, subject to drug testing. The Department expressed hope that, having been required to participate in drug treatment in prison, she would comply with testing and program requirements on probation. Mother also had agreed to complete a mental health assessment and to attend parenting classes. The Department therefore recommended that services be continued.

About two weeks later, the Department filed an addendum. The Department newly recommended services be terminated because Mother had, in fact, been sentenced to 18 months in state prison and it was “unknown what services would be available or offered” while she is incarcerated. The Department “cannot recommend an additional six months of services” if Mother “is to be unable to comply with her case plan requirements.”

At the contested six-month review hearing, Mother’s counsel advised the court Mother had actually been sentenced to 16 months in state prison. The Department, in turn, explained it would have recommended continued services if Mother was going to be released prior to the end of the “review period,” but that was no longer the case. At that point, the juvenile court stated it was obvious the Department’s “witness is incorrect.” On a 16-month sentence, said the court, Mother would “do eight months,” plus she had credits for time already served. It was apparent none of the participants at the hearing knew exactly how long Mother would be incarcerated, or what programs would be available to her in prison. The court commented, “I think [state prisons] have services. But what I’ve seen, generally, have not been particularly good services and don’t—frankly, aren’t as good as what’s available here.”

Ultimately, the juvenile court made numerous findings, including: adequate services were provided, mother had “simply not engaged in services,” there was an “extremely low” likelihood of reunification prior to the 12-month dependency hearing, Mother had not provided a safe and secure home, the services that would be available to her in prison would be inadequate to overcome her many serious problems, and the minors’ need for permanency. The court ordered services terminated and set the matter for a permanency hearing under section 366.26.

DISCUSSION

Applicable Welfare and Institutions Code Provisions

■ Section 361.5, subdivision (a)(1), provides that where a detained child is three years of age or older, 12 months of reunification services “shall be provided” to the parent. (§ 361.5, subd. (a)(1)(A).) Subdivision (a)(2) provides the framework for terminating services prior to the end of the 12-month

period. It states in relevant part: “Any motion to terminate court-ordered reunification services prior to the hearing set pursuant to subdivision (f) of Section 366.21 [the permanency hearing, which is to be held no later than 12 months after the child enters foster care] for a child described by subparagraph (A) of paragraph (1) [a child three years of age or older] . . . shall be made pursuant to the requirements set forth in subdivision (c) of Section 388.” (§ 361.5, subd. (a)(2).) It further states that such a motion “shall not be required” for the court to terminate services prior to the permanency hearing if, at the six-month review hearing, the court “finds by clear and convincing evidence one of the following: [¶] (A) That the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown. [¶] (B) That the parent has failed to contact and visit the child. [¶] (C) That the parent has been convicted of a felony indicating parental unfitness.” (§ 361.5, subd. (a)(2)(A), (B), (C); see generally *In re J.P.* (2014) 229 Cal.App.4th 108, 121–122 [176 Cal.Rptr.3d 792] (*J.P.*).)

Subdivision (c) of section 388, in turn, provides, in relevant part: “Any party, including a child who is a dependent of the juvenile court, may petition the court, prior to the [dependency] hearing . . . to terminate court-ordered reunification services provided under subdivision (a) of Section 361.5 only if one of the following conditions exists: [¶] (A) It appears that a change of circumstance or new evidence exists that satisfies a condition set forth in subdivision (b) or (e) of Section 361.5 justifying termination of court-ordered reunification services. [¶] (B) The action or inaction of the parent or guardian creates a substantial likelihood that reunification will not occur, including, but not limited to, the parent’s or guardian’s failure to visit the child, or the failure of the parent or guardian to participate regularly and make substantive progress in a court-ordered treatment plan.” (§ 388, subd. (c)(1)(A), (B).) The court can terminate services only if it finds, by clear and convincing evidence, that reasonable services have been offered and one of these two conditions exist. (§ 388, subd. (c)(3); see *J.P.*, *supra*, 229 Cal.App.4th at p. 122.)

Disentitlement Doctrine

■ The Department advances three arguments in support of the juvenile court’s orders. It first maintains Mother is foreclosed from seeking writ relief under the “disentitlement” doctrine. While it is true, “[a] reviewing court has inherent power to dismiss an appeal when the appealing party has refused to comply with the orders of the trial court[,] [citation] . . . [i]n dependency cases, the doctrine has been applied only in cases of the most egregious conduct by the appellant that frustrates the purpose of dependency law and makes it impossible for the court to protect the child or act in the child’s best interests. (See *In re Kamelia S.* (2000) 82 Cal.App.4th 1224 [98 Cal.Rptr.2d

816] [father absconded with minor]; *Guardianship of Melissa W.* (2002) 96 Cal.App.4th 1293 [118 Cal.Rptr.2d 42] [grandparents absconded with minor]; *Adoption of Jacob C.* (1994) 25 Cal.App.4th 617 [30 Cal.Rptr.2d 591] [mother abducted child].)” (*In re Z.K.* (2011) 201 Cal.App.4th 51, 63 [133 Cal.Rptr.3d 597].)

This is not such a case. Mother made some, albeit minimal, attempt to comply with her case plan. She contacted mental health services and made some effort to visit the children. The Department, itself, observed Mother seemingly loved her children and exhibited some motivation in progressing with her plan, and it initially recommended that services be continued. It subsequently recommended termination because Mother faced a prison sentence. In short, Mother’s conduct does not rise to the level of “flagrant disobedience and contempt” that would justify disentitlement to pursue her appellate remedies. (*In re Z.K., supra*, 201 Cal.App.4th at p. 64.)

Discretion to Terminate Services

The Department secondly maintains juvenile courts have inherent discretion to terminate services at any time, whether or not a section 388 petition has been filed. The Department relies on *In re Aryanna C.* (2005) 132 Cal.App.4th 1234 [34 Cal.Rptr.3d 288] (*Aryanna C.*) and *In re Derrick S.* (2007) 156 Cal.App.4th 436 [67 Cal.Rptr.3d 367] (*Derrick S.*).

In *Aryanna C.*, the father appealed from an order terminating his parental rights to an infant. At the three-month review hearing, the juvenile court terminated reunification services and set the matter for a section 366.26 hearing. (*Aryanna C., supra*, 132 Cal.App.4th at p. 1238.) Since the child was under three, a six-month, rather than a 12-month, period of reunification services applied. (*Id.* at pp. 1239–1240.) On appeal, the father maintained he was entitled to a full six months of services and the only way that period could be shortened was by way of a section 388 petition. (*Aryanna C.*, at p. 1239.) The Court of Appeal affirmed the early termination of services. It declined to read section 361.5 as setting forth mandatory time periods, stating the statutes governing reunification services must be considered “in light of the juvenile dependency system as a whole” and the “overall objective of that system is the protection of abused or neglected children.” (*Aryanna C.*, at p. 1241.) Thus, “[r]eading sections 361.5, subdivision (a), and 366.21, subdivision (e), together,” the court concluded “the juvenile court has the discretion to terminate the reunification services of a parent at any time after it has ordered them, depending on the circumstances.” (*Id.* at p. 1242.)

This conclusion was supported, said the *Aryanna C.* court, by the language of section 361.5, subdivision (a)(2), which at that time stated, with respect to

a child under three, that “services ‘may not exceed’ ” six months. (*Aryanna C.*, *supra*, 132 Cal.App.4th at p. 1242.) This established a maximum time period, not a minimum entitlement. (*Ibid.*) The court also pointed to section 366.21, subdivision (e), which provides if the child is not returned to the parent at the six-month review hearing, the juvenile court “shall” order that services “be initiated, continued or terminated.” (§ 366.21, subd. (e)(8).) The court observed a six-month review hearing may, in fact, be held earlier than six months after the initial dispositional hearing. (*Aryanna C.*, *supra*, 132 Cal.App.4th at pp. 1240–1241.)

The *Aryanna C.* court recognized the importance of reunification services “cannot be gainsaid” and the “law favors reunification whenever possible.” (*Aryanna C.*, *supra*, 132 Cal.App.4th at p. 1242) However, “reunification services constitute a benefit; there is no constitutional “‘entitlement’ to those services.” (*Ibid.*) It, therefore, “remains within the discretion of the juvenile court to determine whether continued services are in the best interests of the minor, or whether those services should be ended at some point” before the statutory period has elapsed. (*Id.* at p. 1243.)

In *Derrick S.*, a child over the age of three appealed from a six-month review hearing order denying his request to terminate services for his mother and to set a section 366.26 hearing. Following the reasoning of *Aryanna C.*, the Court of Appeal concluded juvenile courts also have discretion in cases involving children over the age of three to terminate services prior to the 12-month hearing. (*Derrick S.*, *supra*, 156 Cal.App.4th at p. 439.) The court called the periods set forth in section 361.5, “default” periods. “This statutory language establishes a dual-track approach based on the dependent minor’s age. If the child is under three, the default position is six months of reunification services. If the child is over three, the default position is 12 months. For both categories, the outer limit is 18 months.” (*Derrick S.*, at pp. 444–445.) “But none of these time periods,” said the court, “is immutable.” (*Id.* at p. 445.) There is “no absolute right to receive the maximum amount of statutorily fixed services in any and all circumstances”—made clear by the “no fewer than 15 situations in which the juvenile court is not required to order *any* reunification services.” (*Ibid.*) “‘Nowhere,’ ” observed the court, “‘is it provided that a *minimum* of 12 months of services is required.’ ” (*Ibid.*, quoting *In re David H.* (1995) 33 Cal.App.4th 368, 388 [39 Cal.Rptr.2d 313].) And since 2000, “it has been established that a motion pursuant to section 388” may be used to ask the juvenile court to terminate services earlier. (*Derrick S.*, at p. 445.)

The *Derrick S.* court pointed out the language of section 361.5 provided, in connection with a child three or over, that reunification services “shall not exceed” 12 months, and section 366.21, subdivision (e) provided if a child

was not returned to a parent at the six-month hearing, the court was to determine whether reasonable services had been provided, and either commence, continue or terminate services. (*Derrick S., supra*, 156 Cal.App.4th at p. 448.) “These seemingly conflicting directives are harmonized by the *Aryanna C.* formula: 12 months of services will ordinarily be provided for a parent of a dependent child over the age of three, but services may be discontinued in the rare case when ‘the likelihood of reunification is,’ for whatever reason, ‘extremely low.’ ” (*Ibid.*)

The *Derrick S.* court was also of the opinion the Legislature could not have intended, “much less commanded,” that services be provided where, by all indicators, it would be futile, as in the case before it, where the parent was on the run from law enforcement. (*Derrick S., supra*, 156 Cal.App.4th at p. 448.) “[I]t would ill serve the needs of the dependent child to be hostage to a fugitive parent, particularly one with an ‘abysmal record of failure at reunification.’ ” (*Id.* at p. 449, quoting *Aryanna C., supra*, 132 Cal.App.4th at p. 1241.)

However, the year after *Derrick S.* was decided, the Legislature amended sections 361.5 and 388. The Assembly Committee on Human Services report explained the author’s intent was to afford parents “a *minimum* (emphasis added) of 6 months of reunification services for children under three and 12 months of reunification services for children over the age of three.” (Assem. Com. on Human Services, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Mar. 28, 2008, p. 2 [italics and parenthetical in original].) It further explained, “recent appellate cases allowing termination of reunification services prior to the end of these timeframes (see analysis of cases below) circumvent due process requirements and are inappropriate.” (*Ibid.*) The report went on to specifically identify *Aryanna C.* and *Derrick S.* as holding the statutory time periods were not minimum periods, but rather set an “outside limit” on services and the court “could terminate those services any time after it ordered them.” (Assem. Com. on Human Services, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Mar. 28, 2008, p. 3.) “By contrast, prior appellate court decisions had characterized the 6 and 12-month timeframes as ‘minimum’ periods of time during which parents were ‘entitled’ to reunification services.” (*Ibid.*) The report also observed that another court, prior to *Aryanna C.* and *Derrick S.*, had held the statutory time periods could properly be cut short by way of a section 388 petition. (Assem. Com. on Human Services, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Mar. 28, 2008, p. 3; see *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 877–879 [101 Cal.Rptr.2d 187].)

The report stated that, “[a]s amended, this bill would continue to allow courts to change, modify or set aside initial orders for reunification services,

but would narrow the instances in which the court could use this discretion to those in which changed circumstances or new evidence, if available at the time of the disposition hearing, could have lead the court to bypass reunification services." (Assem. Com. on Human Services, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Mar. 28, 2008, p. 4.)

The report also noted that the argument in opposition to the legislation was that services would have to be provided "'whether or not the parent has shown any progress in reunification,'" and the "'practical ramification of having *mandatory* times for reunification'" would be a delay in permanency for children. (Assem. Com. on Human Services, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Mar. 28, 2008, p. 4.) In other words, the opposition voiced the same policy reasons that drove the courts in *Aryanna C.* and *Derrick S.* to conclude the then-existing statutory language did not establish mandatory reunification time periods and juvenile courts retained inherent discretion to terminate services prior to the statutorily designated periods.

There can be no question, then, that the 2008 amendments reined in *Aryanna C.* and *Derrick S.* and eliminated the broad discretion to terminate services at any time those cases had recognized. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Apr. 16, 2008, pp. 3–6; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.) as amended Aug. 18, 2008, pp. 4–5; Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2016) § 2.129[1], p. 2-454 [2008 amendments making reunification periods mandatory and limiting judicial discretion to terminate earlier "resulted in a major policy change for California"].)²

The language of section 361.5 was, thus, changed from providing that reunification services are "not to exceed" either six or 12 months, to

² In *In re Katelynn Y.* (2012) 209 Cal.App.4th 871 [147 Cal.Rptr.3d 423], the court stated: "By amending sections 361.5 and 388, subdivision (c), the Legislature codified existing case law that had allowed the court to terminate reunification services before the prescribed time period expired (*In re Aryanna C.*, *supra*, 132 Cal.App.4th 1234; *In re Derrick S.*, *supra*, 156 Cal.App.4th 436, 448–449; *Sheila S. v. Superior Court*[, *supra*], 84 Cal.App.4th 872), and provided the vehicle by which a party could seek to have services terminated early. (See §§ 361.5, subd. (a)(2), 388, subd. (c); Stats. 2008, ch. 457, §§ 1.5, 2.)" (*Id.* at pp. 878–879.) The court then added: "At the same time, the amended statute limited the court's discretion to terminate services early by requiring a hearing and a finding by clear and convincing evidence that certain circumstances exist, including the substantial likelihood reunification will not occur with a parent. (§ 388, subd. (c)(1)(B), (3).)" (*Id.* at p. 879.) While we do not agree the Legislature "codified" *Aryanna C.* and *Derrick S.*, we do agree the Legislature limited the courts' discretion to terminate services early. We also agree with *Katelynn Y.*'s holding that a juvenile court, in ruling on a section 388 petition, may terminate services as to one parent without immediately setting a section 366.26 hearing, thus allowing the other parent to continue receiving services.

specifying that services “shall be provided” for either a six- or 12-month period. (§ 361.5, subd. (a)(1)(A), (B).)

Section 361.5 also now specifies that “[a]ny motion to terminate court-ordered reunification services prior to” the six-month hearing for a child under three or the twelve-month hearing for a child over three “shall be made pursuant to the requirements set forth in subdivision (c) of Section 388.” (§ 361.5, subd. (a)(2).) However, such a motion “shall not be required” for the court to terminate services at the six-month review hearing if the court “finds by clear and convincing evidence one of the following: [¶] (A) That the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown. [¶] (B) That the parent has failed to contact and visit the child. [¶] (C) That the parent has been convicted of a felony indicating parental unfitness.” (§ 361.5, subd. (a)(2) (A), (B), (C); see § 366.21, subd. (e)(5).)³

■ We recognize that while the Legislature amended sections 361.5, subdivision (a) and 388 in response to *Aryanna C.* and *Derrick S.*, it did not also amend section 366.21, subdivision (e)(8), which provides that if a child is not returned to the parent at the six-month review hearing, the juvenile court shall determine whether reasonable services have been provided and the court “shall order that those services be initiated, continued, or terminated.” (§ 366.21, subd. (e)(8).) As we have discussed, in *Aryanna C.* and *Derrick S.* the appellate courts pointed to this statutory provision as additional support for their conclusion that juvenile courts had discretion to terminate services

³ The latter provision largely (but not precisely) correlates with section 366.21, subdivision (e)(5), which provides that the juvenile court can, at the six-month review hearing, schedule a 366.26 hearing within 120 days if (a) the child was removed under section 300, subdivision (g), and the court finds by clear and convincing evidence that the parent’s whereabouts are “still unknown” or the parent has “failed to contact and visit the child”; or (b) if the court finds by clear and convincing evidence that “the parent has been convicted of a felony indicating parental unfitness.” (§ 366.21, subd. (e)(5).)

Subdivision (e)(3) of section 366.21 also allows a juvenile court at the six-month review hearing to set a 366.26 hearing within 120 days if the child is *under* the age of three or is under the age of three and part of a sibling group and if the court finds by clear and convincing evidence that the parent “failed to participate regularly and make substantive progress in a court-ordered treatment plan.” (§ 366.21, subd. (e)(3).) This provision, allowing for the setting of a 366.26 hearing on a finding of failure to participate in and make progress in a treatment plan, is not inconsistent with the Legislature’s intent in amending section 361.5 or, specifically, with the language of subdivision (a)(2). Section 361.5 provides for only six months of services if the child is under three or for an entire sibling group if one of the group is under three. (§ 361.5, subd. (a)(1)(B) [child under three], (C) [entire sibling group].) Accordingly, under the statutory scheme, the specified six-month period of services will not be “terminated” at the six-month hearing on the setting of a 366.26 hearing; rather, the specified period of time for services will simply have ended. Thus, the six-month hearing termination provisions set forth in section 361.5, subdivision (a)(2), can be harmonized with the provisions of section 366.26, subdivision (e), allowing for the setting of a section 366.26 hearing at the six-month hearing.

before the end of the statutory periods prescribed by the then language of section 361.5, subdivision (a).

■ However, section 366.21, subdivision (e)(8), must be read in light of the Legislature's subsequent amendments to 361.5, subdivision (a), and section 388, subdivision (a)(2). These newer provisions implement the Legislature's explicit intent to overrule *Aryanna C.* and *Derrick S.*, in part, and to make the time periods in section 361.5, subdivision (a)(1) mandatory, subject to early termination only through a section 388 petition or at the six-month review hearing as expressly provided for in section 361.5, subdivision (a)(2)(A), (B) and (C). (§ 361.5, subd. (a)(2); see generally *J.P., supra*, 229 Cal.App.4th at pp. 121–122, 123–124.) Our principal task in reading statutory provisions is to heed the Legislature's intent, and we have no doubt as to its intent in enacting the 2008 amendments to sections 361.5 and 388. (See *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 [45 Cal.Rptr.3d 394, 137 P.3d 218]; *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1543 [89 Cal.Rptr.3d 166].) These later enacted and more specific statutory provisions are controlling. (See *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960–961 [184 Cal.Rptr.3d 60, 342 P.3d 1217].)

We therefore do not agree with the Department that the juvenile court had the broad discretion to terminate services recognized in *Aryanna C.* and *Derrick S.* The 2008 amendments vitiated the most significant holdings of these two cases and make it clear the six- and 12-month reunification periods in section 361.5, subdivision (a)(1), are mandatory and can only be cut short through the procedure set forth in section 388 or at the six-month review hearing if the court finds by clear and convincing evidence one of three circumstances exists.⁴ (§ 361.5, subd. (a)(1), (2).)

Harmless Error

■ The Department lastly maintains any error by the juvenile court in terminating reunification services in the absence of a section 388 petition was harmless. While it may be that in some cases failure to comply with section 361.5, subdivision (a)(1) and (2), may be harmless, that is not the case here. The juvenile court was laboring under a misapprehension as to the proper legal standard and neither acted pursuant to a section 388 petition nor made

⁴ Indeed, the intent of the Legislature is so clear we must express concern that, some eight years after these statutes were amended, the Department continues to rely on *Aryanna C.* and *Derrick S.* for the proposition that juvenile courts have inherent discretion to terminate reunification services at any time. We are equally concerned that, in the trial court, Mother's counsel never took issue with the Department's erroneous view of the law.

any finding, let alone by clear and convincing evidence, required to terminate services at a six-month review hearing under section 361.5, subdivision (a)(2).

We have already summarized the report and addendum prepared by the Department for the six-month review hearing. After the Department's witness and Mother testified, the deputy county counsel representing the Department told the juvenile court the applicable standard to terminate services at the six-month hearing was whether there was a "substantial probability that the children could be returned to their parent in the next six months." The court then observed that points and authorities it had received "indicated that the Court at any time can terminate services previously ordered upon a finding that the likelihood of reunification is extremely low" and that was "the standard that the department" was asking the court "to look at."

■ However, as we have discussed, that view of the juvenile court's discretion is simply not the law. The 2008 amendments to sections 361.5 and 388 significantly narrowed the court's discretion to terminate reunification services prior to the end of the six- and 12-month periods specified by section 361.5, subdivision (a)(1)(A) and (B). Subdivision (a)(2) of section 361.5 allows for the early termination of services in two ways, by way of a section 388 petition, or at the six-month review hearing, without a section 388 petition, if the court "finds by clear and convincing evidence one of the following: [¶] (A) That the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown. [¶] (B) That the parent has failed to contact and visit the child. [¶] (C) That the parent has been convicted of a felony indicating parental unfitness." (§ 361.5, subd. (a)(2) (A), (B), (C).)

Here, the juvenile court denied services, ultimately, because it was of the view it had the discretion to do so and, specifically, because, as of the six-month hearing, Mother had done next to nothing towards meeting her case plan. When the court and Mother's counsel discussed the fact Mother was now looking at a prison sentence, counsel directed the court's attention to section 361.5, subdivision (e)(1), which provides that reasonable services must be offered to an incarcerated parent unless the court determines, by clear and convincing evidence, the services would be detrimental to the minor. (§ 361.5, subd. (e)(1); see generally Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure, *supra*, § 2.129[5] at pp. 2-481 to 2-484.) The court responded: "Do you think that section trumps all the other sections? So if somebody—I was going to cut out—. . . and then she commits a crime, goes to prison, then I have to offer services that I wasn't going to offer anyway?" It seems apparent that Mother's incarceration was not pivotal to the juvenile court's termination of services. Rather, what was most important was that

Mother had done precious little for the first six months of services and the court believed it had the inherent discretion, in such circumstances, to immediately terminate services.

As we have recounted, the court made numerous findings in connection with terminating services and setting a section 366.26 hearing. However, the court made no finding that any of the three situations set forth in section 361.5, subdivision (a)(2)(A), applied—i.e., “[t]hat the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown” or “[t]hat the parent has failed to contact and visit the child” or “[t]hat the parent has been convicted of a felony indicating parental unfitness.” (§ 361.5, subd. (a)(2)(A), (B), (C).) It is possible the last of these situations may apply here. But that is not a finding we can or should make in the first instance, particularly given the heightened clear and convincing standard.

DISPOSITION

The petition is granted. Let a writ of mandate issue directing the juvenile court to vacate its orders terminating reunification services and setting the case for a 366.26 hearing. This opinion is final in this court on filing. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

Humes, P. J., and Dondero, J., concurred.

[No. C077440. Third Dist. Sept. 29, 2016.]

CITY OF TRACY, as Successor Agency, etc., et al., Plaintiffs and Appellants, v.
MICHAEL COHEN, as Director, etc., et al., Defendants and Respondents.¹

[REDACTED]

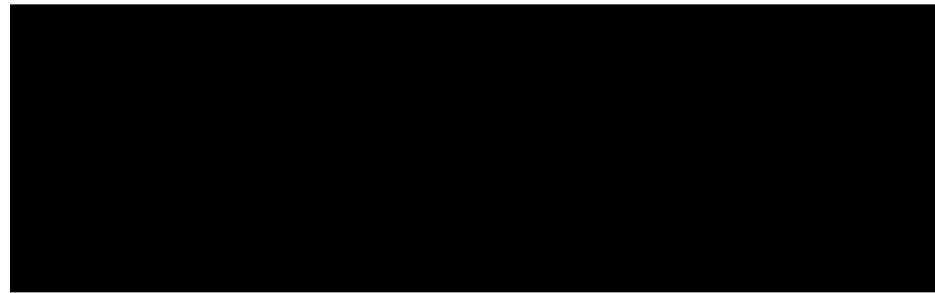
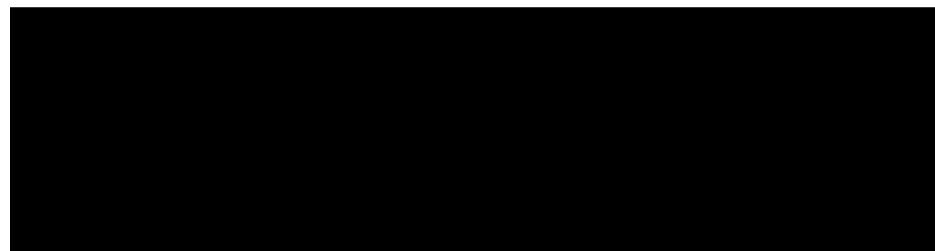
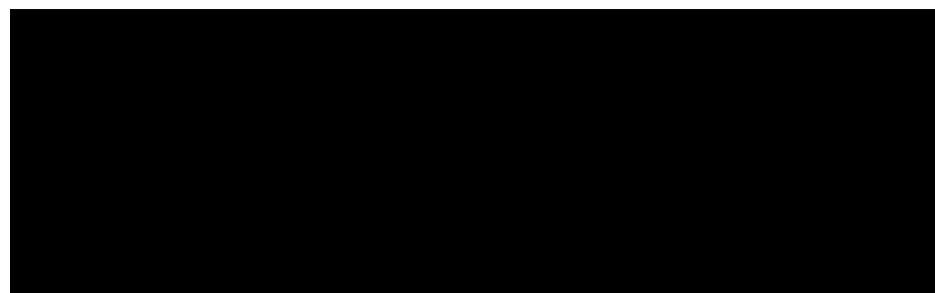
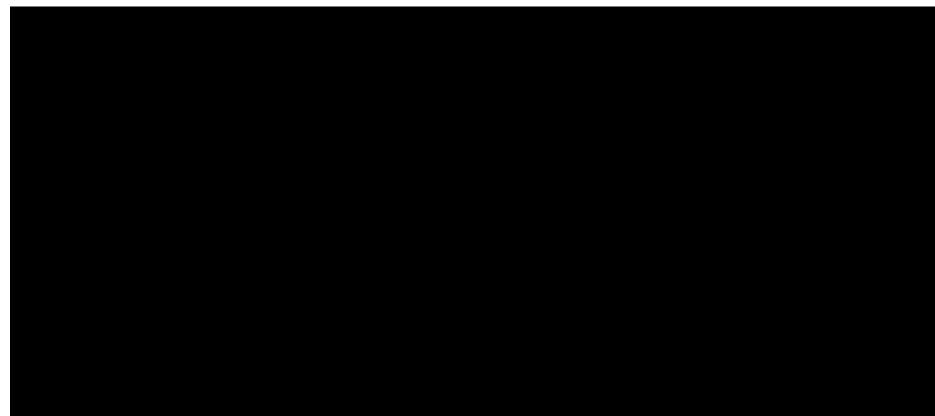
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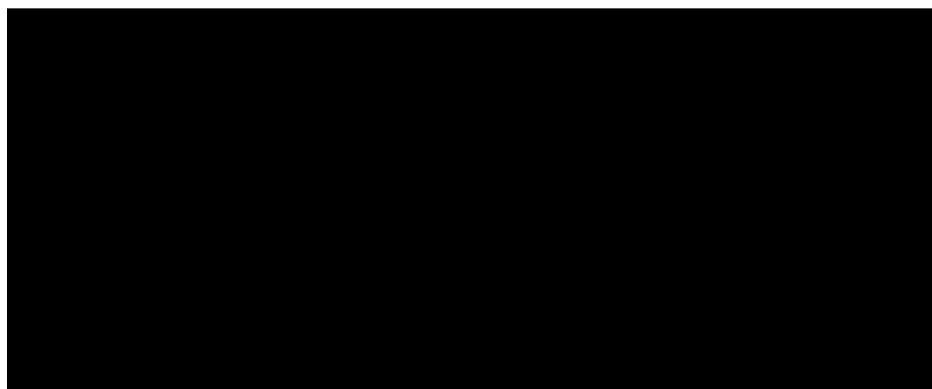
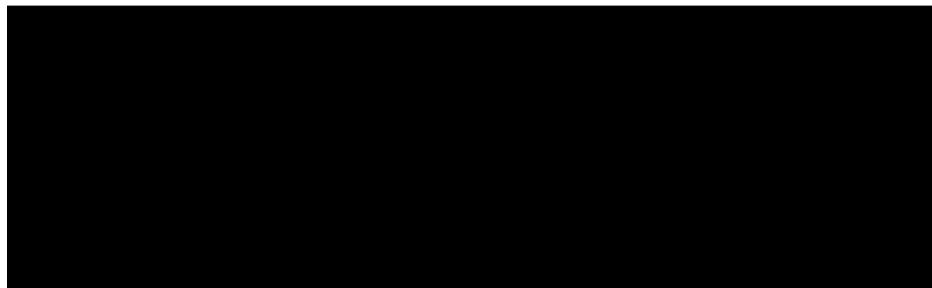
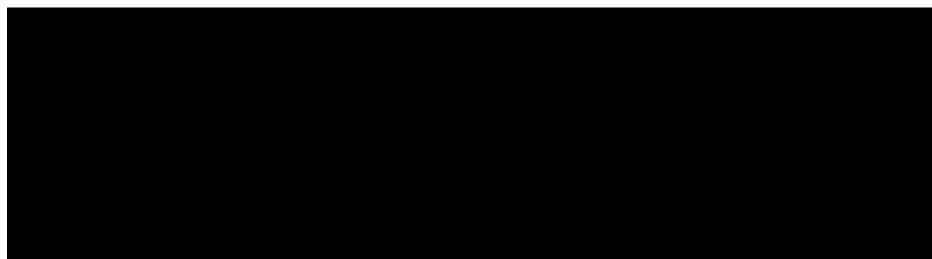
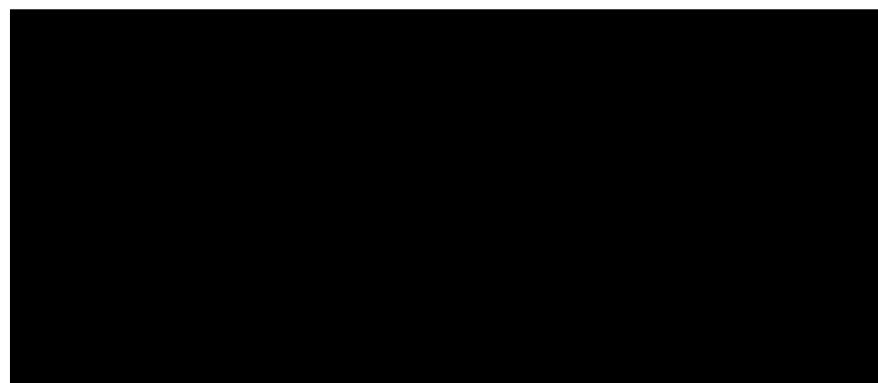
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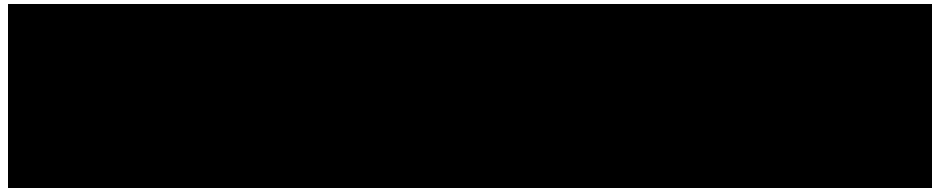
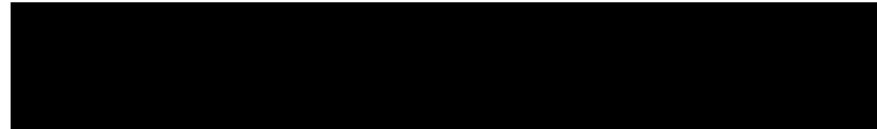
¹ We again adjust the appellate title in one of these appeals, putting the official capacity cart (“Successor Agency, etc.”) back behind the party name horse (“City of Tracy”), and deleting the Department of Finance as a party, a redundant defendant. (*City of Brentwood v. Campbell* (2015) 237 Cal.App.4th 488, 492, fn. 3 [188 Cal.Rptr.3d 88] (*Brentwood*).)

[REDACTED]

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COUNSEL

Bill Sarton, City Attorney; Goldfarb & Lipman, Dolores Bastian Dalton, James T. Diamond, Jr., and Karen M. Tiedemann for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Douglas J. Woods, Assistant Attorney General, Marc A. LeForestier and John W. Killeen, Deputy Attorneys General, for Defendants and Respondents.

OPINION

BUTZ, J.—In 2011, the political branches of our state government decided as a matter of public policy that abuses of the redevelopment law, which constituted an ever-growing drain on state finances, required the dissolution of nearly 400 redevelopment agencies and the winding down of outstanding redevelopment obligations; this resulted in a frantic scurry on the part of “sponsoring entities”² (usually cities) and their conjoined former redevelopment agencies to lock up “tax increment” revenues—the share of property taxes to which redevelopment agencies had been entitled before the enactment of this “‘Great Dissolution.’” (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 243–248 [135 Cal.Rptr.3d 683, 267 P.3d 580]; *Brentwood*, *supra*, 237 Cal.App.4th at pp. 491, 492, fn. 4, 499 & fns.

² “‘Sponsoring entit[ies]’” are the local entities that created the former redevelopment agencies, the officials of the local entities usually constituting the redevelopment agency boards. (Health & Saf. Code, § 34171, subd. (n); undesignated statutory references are to the Health and Safety Code.)

13, 14.) It has also resulted in scores of actions in the Sacramento County Superior Court (§ 34168, subd. (a)) that primarily involve the sponsoring entities and their equally conjoined “successor agencies”³ seeking to evade this legislative determination.

We confront a recurring issue in this appeal. In 2012, the Legislature decided to apply the *postdissolution* exclusion of any agreements between a sponsor and a former redevelopment agency (hereafter, sponsor agreements) from the definition of “enforceable obligations” (see fn. 3, *ante*, at p. 856) to any sponsor agreements that *antedated* dissolution (which previously had still been included in the definition), for the purpose of retransferring to “taxing entities”⁴ any redevelopment agency transfers to sponsors pursuant to a sponsor agreement; the Legislature also created an audit process to identify these sponsor transfers. (*Brentwood, supra*, 237 Cal.App.4th at p. 494; §§ 34167, 34171, subd. (d)(2), 34179.5, 34179.6.)

The City of Tracy (City) brought this action as the successor agency to its former redevelopment agency (and also in its own right) against Michael Cohen as director of the Department of Finance (the Department) to challenge administrative determinations that invalidated the transfer of funds from the former redevelopment agency—before its dissolution—to the City because this action was pursuant to a sponsor agreement, and that directed return of a portion of the funds (constituting bond proceeds) to the successor agency and another portion (constituting former tax increment) to the Auditor-Controller of San Joaquin County (Auditor-Controller),⁵ the administrator of the trust fund for former tax increment (§ 34182, subd. (c)), to distribute to the taxing entities. (*Brentwood, supra*, 237 Cal.App.4th at p. 492 & fn. 3.) The trial court granted judgment in favor of defendants.

Without any analysis of *Brentwood*, which antedates its briefing, the City makes a lengthy argument in its opening brief (to which it does not return in its reply brief) that, as a matter of statutory analysis, the 2012 audit procedure and its incorporation of the postdissolution definition of enforceable obligations was not intended to apply to any predissolution sponsor agreements. It

³ “‘Successor agenc[ies]’ ” are essentially caretakers, the boards of which usually are also the officials of the former sponsoring entities, empowered only to complete ongoing “[e]nforceable obligations” (those which are still entitled to tax increment) of the former redevelopment agency. (§ 34171, subds. (j), (d); see *Brentwood, supra*, 237 Cal.App.4th at p. 491, fn. 2.)

⁴ “‘Taxing entities’ ” are the entities now entitled to tax increment after the abolition of redevelopment agencies. (§ 34171, subd. (k); see *Brentwood, supra*, 237 Cal.App.4th at p. 492.)

⁵ The Auditor-Controller is the nominal other defendant. Although he filed an answer contesting the petition, neither party points to any further participation on his part in the litigation in the trial court and he has not filed a brief on appeal.

also contends there are constitutional obstacles to retroactive exclusion of sponsor agreements from the definition of enforceable obligations.⁶ Alternatively, it argues that the transfers it received come within the “goods or services” exception to the exclusion of sponsor agreements. (§ 34179.5, subd. (b)(3).)⁷ Finally, the City contends that it was entitled to a declaration that the Department may not constitutionally avail itself of an administrative remedy that allows the Department to order diversion of future local tax revenues (sales, use, and property) to recover wrongfully transferred tax increment from a sponsoring entity. (§§ 34179.6, subd. (h), 34179.8, subd. (a).)

We agree that *a portion* of the payments made to the City reflect goods or services that the City provided to the redevelopment project that the successor agency was overseeing. Our decision in *City of Bellflower v. Cohen* (2016) 245 Cal.App.4th 438 [199 Cal.Rptr.3d 383], remittitur issued May 3, 2016 (*Bellflower*), renders moot any need for a declaration in the present action that the administrative diversion of future local tax revenues violates a provision of our state charter (Cal. Const., art. XIII, § 24, subd. (b)).⁸ We otherwise reject the City’s claims and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

As is typically the case with the statutory interpretation involved in these redevelopment agency dissolution cases, the particular facts are largely irrelevant. We include them primarily for context.

The City created its former redevelopment agency in 1970, designating its city council as the administrating body. The former redevelopment agency adopted a community redevelopment plan in 1990 for the project area. In

⁶ In this context, the City mentions a violation of due process in a *heading*, and adverts in passing to interference with a vested interest in the body of its analysis, but does not develop either argument. This forfeits any further consideration of these suggestions (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 593 [59 Cal.Rptr.3d 18] (*Imagistics*)), which are also unavailing in any event. (*Brentwood, supra*, 237 Cal.App.4th at p. 498, fn. 12; see *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6 [227 Cal.Rptr. 391, 719 P.2d 987].)

⁷ Improperly admixed under the due process heading is an unrelated lurking argument that the trial court improperly ordered return of the bond proceeds because these may now properly be expended on the redevelopment expenses for which the bonds were sold. (§ 34191.4.) This manner of raising the issue forfeits our plenary consideration. (*Imagistics, supra*, 150 Cal.App.4th at p. 593, fn. 10.) We simply observe that, while it does seem pointless to order the return of bond proceeds that the successor agency can then expend on the same project, it is also difficult to find ultimate prejudice to the City, thus requiring modification of the judgment.

⁸ Further references to articles are to the California Constitution.

2008, the former redevelopment agency developed a five-year implementation plan, which included the development of a downtown shopping plaza. To this end, the City and its former redevelopment agency issued bonds in 2008, from which the former redevelopment agency received \$2.13 million in proceeds (rounded to the nearest ten thousand, as will be all dollar figures in this opinion). However, the former redevelopment agency did not enter into any contractual obligation to carry out the planned downtown improvements before 2011.

In January 2011, the Governor announced his intention to seek the abolition of redevelopment agencies, leading to the resultant frenzy on the part of former redevelopment agencies and their sponsoring agencies throughout the state to lock up unencumbered tax increment. (*Brentwood, supra*, 237 Cal.App.4th at pp. 493, 499.) The City and its former redevelopment agency were among these. At a January 2011 special meeting of the city council in its joint capacities, the City and its former redevelopment agency entered into a “cooperation agreement” for the former redevelopment agency to fund identified improvements from the five-year plan, for which the City would acquire land and provide design and construction services. The sources of the revenue were all “funds currently held by the [redevelopment agency] . . . not previously budgeted or appropriated for other . . . projects” The agreement specified four projects: the downtown shopping plaza, downtown infrastructure, acquisition of properties for joint public-private improvements, and a signage program. In response to an inquiry whether there was any binding commitment to these four projects, the City’s finance director stated at the meeting that the agreement “does not mean the projects are being funded. The plan is simply moving forward.” The agreement “will allow the City Council to proceed and to award contracts for these projects.” The purpose of entering into the cooperation agreement was to “directly address some of the issues presented by the Governor’s proposed budget”; rather than return redevelopment agency reserves to the “state” (actually, to the taxing entities), “the action . . . transfers the funds to the City.” The City and the redevelopment agency thus enacted resolutions approving the agreement. The redevelopment agency on the same date transferred \$4.18 million in tax increment funds and \$2.13 million in bond funds to the City pursuant to the agreement.

In declaring that it was not subject to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), the cooperation agreement recited that it was a funding mechanism that did not commit any funds to any specific public improvement. The agreement provided that the funds the City received from the redevelopment agency could be used to pay for “land acquisition, relocation, demolition, site preparation and remediation, design, and construction” of the listed projects, and reimbursement of the City’s

“staff, consultant and other administrative costs in connection therewith.” The City and the redevelopment agency retained the power to modify the plan to add or delete projects.

The City estimates the construction costs for the plaza project on its February 2014 completion to have been \$3.81 million. The City had entered into contracts in May 2011 with third parties to provide landscaping and engineering services for the plaza for a total cost of \$141,000. The City incurred an additional \$911,000 in “design, construction management, staff and inspections costs” for the work of City employees in connection with the plaza project. In June 2011, the City entered into a \$2.30 million contract with Knife River Construction to build the shopping plaza. An additional \$460,000 in funds were attributed to a 20 percent contingency fee. The City also entered into a contract in June 2011 with a third party to buy land near the plaza for \$650,000. This brought the total amount of expenditures at issue to \$4.46 million, which reflected the \$2.13 million in bond proceeds and \$2.34 million in tax increment from the former redevelopment agency (our rounding of the components resulting in a larger sum than the total).

On June 28, 2011, the Legislature enacted the Great Dissolution as an urgency measure, immediately freezing the authority of the former redevelopment agencies to incur further obligations and providing a process for the dissolution of the former redevelopment agencies on February 1, 2012 (as judicially reformed). (*Brentwood, supra*, 237 Cal.App.4th at p. 494.) After that date, the successor agencies were responsible for winding down the outstanding enforceable obligations of the former redevelopment agencies, which did not include “sponsor agreements” between the former redevelopment agency and its sponsoring agency. (*Ibid.*; §§ 34171, subd. (d)(2), 34177, subd. (a).) Pursuant to section 34179.5, enacted in 2012, a successor agency had to undertake audits of the former redevelopment agency’s accounts, subject to the Department’s review. Upon the Department’s determination that transferred funds were not the subject of any enforceable obligation, a successor agency had the obligation to transmit such funds in its possession to the county’s auditor-controller for distribution to taxing entities and make a diligent effort to recover funds already transferred to the sponsor agency. (*Brentwood*, at p. 495.) As noted at the outset, for the purposes of this audit, the Legislature applied the postdissolution definition of enforceable obligations that specifically excluded transfers pursuant to predissolution sponsor agreements, which previously had been considered enforceable under section 34167. Section 34179.6, as noted, provided an administrative remedy in the form of diverting future local tax revenues to recoup funds wrongfully transferred to a sponsor agency.

In reviewing the result of such an audit, the Department concluded the cooperation agreement was an invalid sponsor agreement, and consequently

the \$6.31 million transfer was not an enforceable obligation. The City returned \$1.84 million to the successor agency under protest. The Department directed that the remaining bond proceeds be returned to the successor agency, and the tax increment to the Auditor-Controller.

The City then brought the instant action in July 2013. The Department thereafter issued a demand that the City comply with its administrative findings, or else it would direct the diversion of the City's future local tax revenues to reclaim the \$4.46 million. However, it never took action to direct the diversions. Under protest, noting that it had already expended all the funds at issue on the redevelopment project, the City remitted the contested amounts from its general fund in December 2015 in order to meet an impending deadline for obtaining a "finding of completion" (§ 34179.7).

DISCUSSION

1.0 *The Legislature Intended Retroactively to Invalidate Transfers Pursuant to Sponsor Agreements*

In interpreting the Great Dissolution legislation, we do not owe any deference to the Department; we decide the issue *de novo*. (*Brentwood, supra*, 237 Cal.App.4th at p. 500.)

The City contends the incorporation in section 34179.5 of the postdissolution definition of enforceable obligation for the audit and retransfer process should not be interpreted as intending to include sponsor agreements predating dissolution. To this end, it gives a strained reading of section 34179.5, and concocts "conflicts" with sections 33445 (the statute previously authorizing sponsor agreements), 34164 (which froze any new predissolution redevelopment activities), 34167.5 (which allowed asset transfers to *third parties* pursuant to enforceable contracts), 34177 (a provision of which directs distribution of *unencumbered* funds designated for subsidized housing to auditor-controllers), and 34167 itself (the predissolution definition of enforceable obligations), without explaining why the Legislature could not conclude "in retrospect [that] the facts on the ground demonstrated . . . the need to have abrogated the authority to enter into sponsor agreements from the moment that ERAWKI [end of redevelopment as we knew it] was foretold . . ." (*Brentwood, supra*, 237 Cal.App.4th at p. 499.).

■ In *Brentwood*, we rejected this tactic of hunting indirectly through legislative mouseholes for an elephant of legislative intent. "[I]f this were in fact the intent in enacting section 34179.5[,] it would have been so much more straightforward simply to define 'enforceable obligation' by reference to section 34167 rather than section 34171." (*Brentwood, supra*, 237 Cal.App.4th

at p. 501.) In short, the Legislature *intended* to layer upon the existing statutory dissolution framework a *new* procedure and definition to recapture diverted tax increment that the sponsors and former redevelopment agencies siphoned away through new sponsor agreements beginning in January 2011 in response to the imminence of ERAWKI before the judicially delayed dissolution date of February 2012, as detailed in the February 2012 report of the Legislative Analyst (*Brentwood*, at p. 499, fns. 13 & 14), as well as any payments pursuant to sponsor agreements antedating 2011. We accordingly reject without further elaboration the City's arguments to the contrary.

2.0 *The Legislature Did Not Violate the Constitution in Retroactively Invalidating Transfers Pursuant to Sponsor Agreements*

2.1 *Section 34179.5 Does Not Result in a Gift of Public Funds*

The City argues that the redirection of funds transferred under sponsor agreements is a gift of public funds in violation of article XVI, section 6. The claim, which is not renewed in its reply brief, ignores this court's decision in *California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457 [152 Cal.Rptr.3d 269] (*Matosantos*).

■ We rejected this claim in *Matosantos*. Relying on authority that a redirection of local tax revenues (derived only for general purposes from residents of the county) from specific local agencies to the county's general fund is not a gift of public funds (*Matosantos*, *supra*, 212 Cal.App.4th at p. 1499), we concluded that tax increment is similarly derived only for general purposes, and could thus permissibly be reallocated from redevelopment agencies to taxing entities for the general benefit of county residents (*id.* at pp. 1499–1500). We accordingly reject this argument again.

2.2 *Section 34179.5 Does Not Violate Article XIII, Section 25.5, Subdivision (a)(7)*

The City contends the electorate, through a 2010 initiative adding article XIII, section 25.5, subdivision (a)(7) to the state charter, prohibited the Legislature from reallocating tax increment from the former redevelopment agencies to taxing entities. The contention, which is not renewed in its reply brief, ignores this court's decision in *Brentwood*.

■ We determined that this constitutional protection of *former* redevelopment agencies no longer applies after the point at which the Legislature decided that the redevelopment agencies did not have any further authority to exercise redevelopment powers, and thus the withdrawal in 2012 of the

authority to enter into sponsor agreements in 2011 was constitutional. (*Brentwood, supra*, 237 Cal.App.4th at pp. 499–500.) We thus reject this argument again.

2.3 Section 34179.5 Does Not Violate Article XIII, Section 24, Subdivision (b)

■ The City (mistakenly referencing a different initiative) makes an abbreviated claim that the same 2010 initiative, in also adding article XIII, section 24, subdivision (b), prohibited the Legislature from reallocating its general fund to the taxing entities to repay wrongfully diverted and already expended tax increment. As we will explain, while this provision precludes the Legislature from seizing incoming local tax revenues via an administrative process and reallocating them to taxing entities, it is not an obstacle to the pursuit of *judicial* remedies against sponsors wrongfully appropriating redevelopment agency funds.

“[T]he *Legislature* ‘may not reallocate, transfer, borrow, appropriate, restrict the use of, or otherwise use the proceeds of any tax imposed or levied by a local government solely for the local government’s purposes.’” (*Bellflower, supra*, 245 Cal.App.4th at p. 451, quoting art. XIII, § 24, subd. (b), italics added.) Accordingly, the authorization in section 34179.6 from the *Legislature* for the Department to order diversion of future local tax revenues from sponsors to taxing entities was unconstitutional; the constitutional provision is “a prohibition on transferring away from the local government any tax revenue to which the local government is entitled.” (*Bellflower, supra*, at p. 453.)

However, we were careful to note that “[w]ithholding the tax revenue to which the sponsoring agency is entitled is not the only means by which the State can acquire from the sponsoring agency the funds that should [have been] distributed to other taxing entities, if such a result is justified. For example, the State is authorized to obtain *judicial* relief for violation of the dissolution law. (§ 34177, subd. (a)(2).)” (*Bellflower, supra*, 245 Cal.App.4th at p. 453, italics added.)

■ The import of *Bellflower* is that the Legislature cannot withhold local tax revenues from sponsors through administrative fiat as a remedy for violation of the directives in the Great Dissolution. However, the sponsors are not rendered judgment-proof by virtue of the constitutional provision, such that their general funds are immune from answering for a violation of state law in court. A judgment is not a *legislative* action to “reallocate, transfer, borrow, appropriate, restrict the use of, or otherwise use” local tax revenues in the coffers of a sponsor. (Art. XIII, § 24, subd. (b).) The City does not

direct us to any indicia in the November 2010 initiative materials that would compel us to infer such a drastic restriction on *judicial* authority in the postdissolution landscape. We decline to do so.

3.0 To the Extent the City Itself Provided Redevelopment Services (as Opposed to Third Parties with Whom It Contracted), It Comes Within the Exception to Section 34179.5 for Goods or Services

■ In *Brentwood*, we concluded section 34179.5 unambiguously “exempts only a transfer of money in exchange for a type of good or service from its ambit. As a result, Brentwood must demonstrate that the payment from its former redevelopment agency comes within this definition.” (*Brentwood, supra*, 237 Cal.App.4th at p. 502.) Because the payments were solely to reimburse the city for its payments for goods or services to third parties, we concluded these did not come within the exception in section 34179.5. (*Brentwood*, at pp. 502–503.)

■ The City contends payments from the former redevelopment agency for the costs of redevelopment services that City staff provided, as well as for the costs to the City for services that third parties provided, come within the exception. *Brentwood* forecloses the City from receiving payments for the latter; we do not see anything in the cooperation agreement to indicate that the former redevelopment agency was engaging the City’s services as a manager for the specific projects involving the third party contracts, or engaging it to execute any redevelopment contracts with third parties in general. The cooperation agreement described itself as simply a “funding mechanism” for future redevelopment work—i.e., a reimbursement agreement for these third party arrangements. However, the City is correct that it was entitled to be paid for the redevelopment work that its *own* staff directly provided; this was not the case in *Brentwood*, a distinction that the Department overlooks.⁹ We also decline to accept the Department’s suggestion that we should “interpret” the unambiguous section 34179.5 as including a requirement for payments from a former redevelopment agency to be contemporaneous with redevelopment services that a sponsor provided. We therefore will modify the judgment to grant a writ of mandate directing the Department to reduce its determination of the total required reimbursement by \$911,495 (the exact figure at issue).

⁹ In a petition for rehearing, the Department argues that a sponsor’s provision of services for redevelopment projects must be pursuant to a written services agreement authorizing them, lest the sponsor unilaterally obligate the former redevelopment agency. While reimbursement agreements such as the one at bar cannot sanction payments for third party services, they are sufficient authorization for a sponsor to provide services in furtherance of the redevelopment projects identified in the agreement.

4.0 Bellflower Has Established That Section 34179.6 Is Unconstitutional, so the Erroneous Denial of a Declaration in the Present Case Is Moot

■ *Bellflower* determined that the remedy provided in section 34179.6, subdivision (h) violates article XIII, section 24, subdivision (b) because it purports to allow the Department to order the reallocation of local tax revenues. (*Bellflower*, *supra*, 245 Cal.App.4th at p. 451.) That decision is now final.

The trial court thus erred in finding to the contrary in denying the requested declaratory relief. However, we cannot assume that the Department will act in disregard of this declaration (indeed, it never acted upon its threats to employ the remedy in the present case), so the issue of a declaration to the same effect in the present case is moot. (*Burke v. City etc. of San Francisco* (1968) 258 Cal.App.2d 32, 34–35 [65 Cal.Rptr. 539].) We therefore decline to modify the judgment to include a declaration of unconstitutionality.

DISPOSITION

The judgment is modified to grant a writ of mandate directing the Department to reduce its determination of the total required reimbursement by \$911,495. As thus modified, the judgment is affirmed. Neither party shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

Hull, Acting P. J., and Robie, J., concurred.

A petition for a rehearing was denied October 12, 2016, and the opinion was modified to read as printed above.

[No. B263022. Second Dist., Div. Eight. Sept. 29, 2016.]

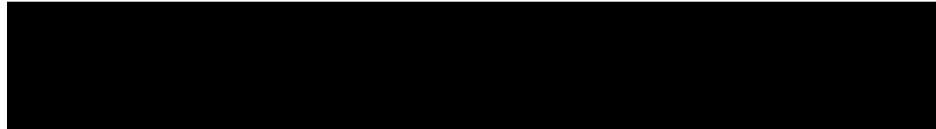
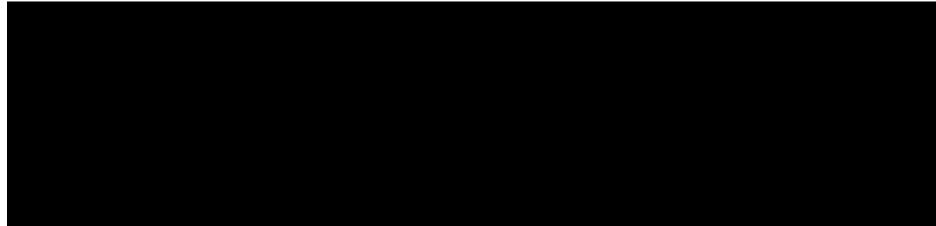
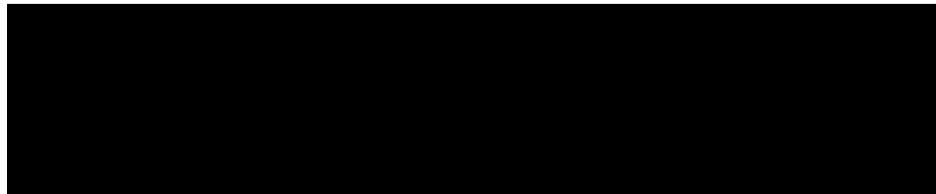
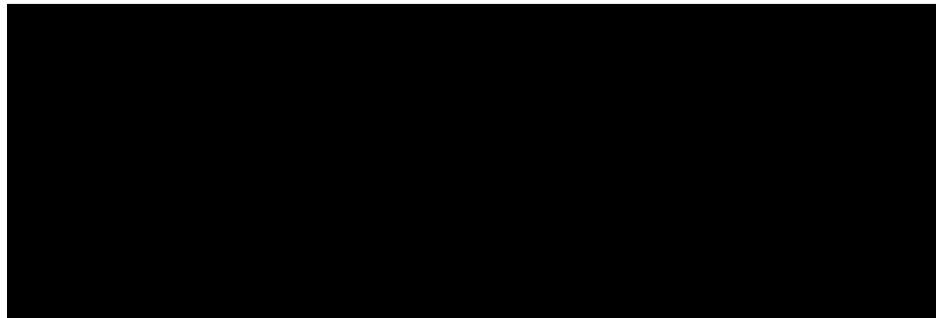
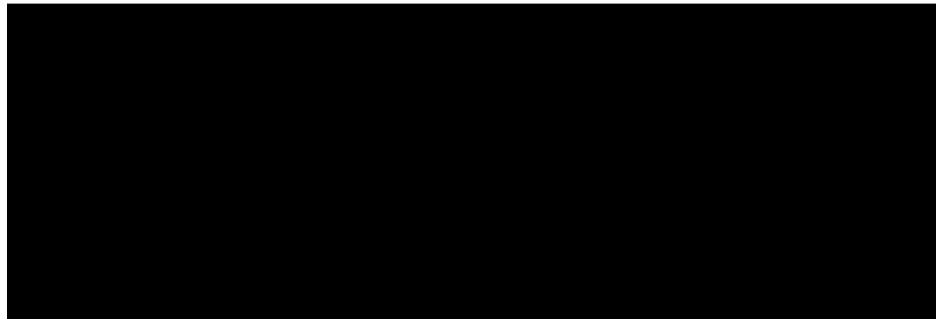
THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL XAVIER BELL, Defendant and Appellant.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) January 11, 2017, S238339.

[REDACTED]

[REDACTED]

[REDACTED]



Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RUBIN, J.—Michael Xavier Bell appeals from the judgment imposed after he was resentenced to a combined state prison term of 43 years to life for multiple violent acts, including robbery, rape, and assault with a firearm that occurred when he was 14, contending that his parole eligibility date at age 55 violates the equal protection and cruel and unusual punishment provisions of the state and federal Constitutions. We disagree and affirm the judgment.

FACTS

The lengthy, quoted portion of our statement of facts, including the first five footnotes, is taken verbatim from this court's first decision in this matter. (*People v. Bell* (July 31, 2003, B158891) [nonpub. opn.] (*Bell I*).) “Appellant's offenses occurred on the evening of December 10, 2000, nine days before his fifteenth birthday, at two homes on a block in Torrance where he had previously resided. Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23, 864 P.2d 103]), the evidence showed that shortly after 6:00 p.m., appellant knocked on the door at the home of Locke Lane, Jr., a former neighbor and friend. Lane opened the door and found appellant standing with another young male.^[1] They asked if they could use the phone, and Lane admitted them, explaining that his father was using it. The three went into the living room, where Lane resumed playing games on a PlayStation that was attached to the television.

“Appellant's accomplice left to use the bathroom. When he returned, he held an automatic handgun to Lane's head, and told him to put the video gear on the bed. Lane put the game controller there, and the accomplice told appellant to throw a Nintendo system on the bed too, which he did. When Lane's 15-year-old brother appeared, appellant's accomplice placed the gun inside his jacket. The brother departed, and appellant and his accomplice unhooked the PlayStation. Appellant asked Lane where he could put it. Lane indicated a pillowcase, and appellant placed the two video game systems into it, together with some games.

¹ The identity of appellant's accomplice, whom we refer to as such, was not shown at trial.

“Lane’s mother entered the living room from the kitchen, and asked Lane where the PlayStation was. Lane said he didn’t know. His brother reappeared and dumped out the contents of the pillowcase. Although appellant then claimed that Lane had offered to lend him and his accomplice the systems, Mrs. Lane told them to leave, and they did. Lane, nervous and upset, told his mother not to go outside, because the visitors had a gun.

“About an hour later, appellant and his accomplice rang the doorbell at the home of E.M. and her son, a few houses down the block. Appellant had previously lived in the house in back of Ms. M.’s, and she recognized him. When Ms. M. answered the door, appellant and his accomplice asked if they could use her phone. She declined and closed the door, but it remained partly open. When she moved to shut it fully, Ms. M. saw appellant and his accomplice inside the house, the accomplice holding an automatic handgun. She demanded to know what they were doing, and they told her to shut up, one of them saying, ‘I’m going to kill you.’ Appellant’s accomplice pointed the gun at Ms. M.’s eight-year-old son and told him not to scream. The accomplice demanded to know where Ms. M.’s money was, and she informed him and told him to take it.

“Appellant then took the gun from his companion. He asked where the clip was, and the accomplice told him it was loaded. Appellant put the gun to Ms. M.’s head, and told her that she was going to give him ‘head.’ He forced her into the kitchen, ripped open her sweater, and ordered her to remove her pants, which she did, along with her underwear. Appellant sat on a chair and made her unbuckle his pants and open them. Holding the gun to her head, he forced her mouth onto his penis. Ms. M. saw her son pressing his head into a pillow on a couch, as appellant had commanded. Appellant then made her lie on the floor, saying, ‘You’re going to like this.’ He proceeded to rape her, then dismounted her and recommenced, the gun still at her head.

“During the acts, appellant’s accomplice reappeared, stepped over appellant and Ms. M., and inquired if there were any ‘brewskies.’ Referring to Ms. M., appellant asked the accomplice if he wanted ‘some of this.’ The accomplice declined. Appellant eventually got up and went into Ms. M.’s son’s room. At that point, Ms. M. ran to the door in an attempt to escape, but the intruders caught up with her and pushed her onto the couch, where her son was sitting. Appellant’s accomplice then took Ms. M. into the kitchen, saying ‘You’re going to give me some head.’ He sat on the chair, opened his pants, and told her to put her mouth on his penis. She complied. He then told her to stand up and bend over the counter, and tried without success to penetrate her. After failing to do so with her seated on him, he ordered her to lie on the floor, got on top of her, and raped her, holding the gun to her head.

“When the accomplice stopped and went to Ms. M.’s bedroom, she sat down with her son, who tried to cover her with a blanket. Appellant appeared, pointed the gun at her, and ordered her to remove her gold jewelry and give it to him, which she did. Appellant’s accomplice told her to wash herself, and she did so with a sponge in the kitchen sink. The accomplice told Ms. M. to understand that they were looking for Christmas gifts. He said he was just 15 and had three children.^[2] He also told Ms. M.’s son to stay in school, ‘so this doesn’t happen to him.’

“Appellant’s accomplice then asked to use Ms. M.’s car, which was in her driveway, and she gave him the keys, telling him he could take it. Handing appellant the gun, he went out to the car. Appellant then took Ms. M., who was still naked, back into the kitchen, and raped her again. Ms. M. heard the car’s horn honking, but appellant did not get off of her until his accomplice returned and told him, ‘C’mon.’

“Appellant stated that they had to tie up Ms. M. and her son, and the accomplice said he would take her with him. He repeated this when appellant displayed a telephone with a cord that had been ripped from the wall. Ms. M. put on some clothes, as the accomplice directed. Appellant then told him not to forget the television in the son’s room. The accomplice handed appellant the gun and got the TV.

“Appellant’s accomplice walked outside, followed by Ms. M., who was ‘sandwiched’ close between him and appellant. They walked toward her car, which was now on the street with the engine running, at least 36 feet from the door they had exited. When the accomplice bent down to put the TV in the car, Ms. M. ran screaming down the street.^[3] A neighbor let her phone the police. When she returned home, the intruders were gone with her car, having left the television in the street.

“Ms. M. flagged down a police car that had responded to her call. Officers took her and her son to San Pedro Peninsula Hospital, where a sexual assault nurse examined her and took swab samples from her genital area, breasts, and mouth area. The examination disclosed vaginal lacerations, consistent with forcible intercourse. While at the hospital, Ms. M. identified appellant from a photographic display. She also identified him at trial.^[4] The next day, Ms. M. returned to her house and found that the bedrooms had been ransacked and numerous additional items of jewelry were missing.

² “At trial, Ms. M. estimated that both of the intruders were in their ‘Late teens, early twenties.’ ”

³ “Ms. M. testified, ‘We were walking towards the car. And I knew if I got in the car with them, I would be dead’”

⁴ “Locke Lane, Jr., and his mother also did so.”

“On December 14, 2000, Los Angeles police officers went to the home of appellant’s girlfriend, and found appellant, dressed in his underwear, hiding in her closet. After being arrested and handcuffed, appellant broke away and fled outside. He was apprehended more than an hour later, hiding in a trash bin. The officers recovered items of Ms. M.’s jewelry that appellant’s girlfriend was wearing, having been given them by appellant the day before. Subsequently, the girlfriend’s mother found a loaded semi-automatic handgun in a neighbor’s car in her apartment building’s carport.

“A Los Angeles police detective obtained oral swab samples from appellant, for DNA comparison with Ms. M.’s samples. The forensic laboratory director at Cellmark Diagnostics testified that, upon analysis, the vaginal sample contained DNA consistent with appellant’s, with a one-in-21-billion frequency, and that he was a possible donor to the breast sample.

“Appellant did not offer an affirmative defense. In closing argument, his attorney contested the sufficiency of the proof of kidnapping, which the information alleged both as a substantive offense and as an aggravating circumstance of the sexual offenses ([Pen. Code,] § 667.61, subd. (e)(1)). Counsel suggested that there might have been only an attempted kidnapping, and an attempted rather than completed robbery of Locke Lane, Jr. After the jury retired to deliberate, the court granted appellant’s motion under section 1118.1 with respect to the kidnapping charge under section 667.61.^[5]”

Bell was convicted of three counts of robbery (Pen. Code, § 211);⁶ three counts of forcible rape (§ 261, subd. (a)(2)); two counts of forcible oral copulation (§ 288a, subd. (c)); one count of kidnapping to commit rape or robbery (§ 209, subd. (b)(1)); and one count of assault with a firearm (§ 245, subd. (a)(2)). The jury also found true allegations that he committed those crimes during the commission of a residential burglary for purpose of the one strike law (§ 667.61, subd. (e)(2), (3)) and that a principal was armed with a firearm during the commission of these crimes (§ 12022, subd. (a)(1)). He was given a determinate term of 28 years eight months, along with an indeterminate term of 25 years to life for the one strike sentence.

PROCEDURAL HISTORY

This case has a long and complicated procedural history. In 2003, this court affirmed the judgment after modifying it in two respects: (1) by

⁵ “The prosecutor had argued that this kidnapping occurred when Ms. M. tried to escape from the house and appellant and his accomplice brought her back from the door. The alleged aggravated kidnapping involved the movement of Ms. M. out the door to the driveway and the car.”

⁶ All further undesignated section references are to the Penal Code.

reducing the kidnap for robbery/rape count to attempted kidnapping for that purpose based on insufficiency of the evidence and (2) by striking the armed principal enhancement as to the assault count while directing that the assault count sentence be stayed. (*Bell I, supra*, B158891.)

On remand, Bell was resentenced to 54 years to life. He appealed and we reversed and remanded for resentencing because the trial court, and not the jury, determined the facts that supported a finding concerning certain aggravating factors that led to imposition of the upper term sentence as to one of the robbery counts, in violation of *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531]. (*People v. Bell* (Feb. 10, 2005, B171066) [nonpub. opn.].)

The California Supreme Court granted review and transferred the matter back to us to reconsider our decision in light of *People v. Black* (2005) 35 Cal.4th 1238 [29 Cal.Rptr.3d 740, 113 P.3d 534], which affirmed the validity of California's sentencing scheme and its delegation to the trial court of factfinding power concerning sentence-related aggravating factors. We then affirmed the judgment. (*People v. Bell* (Jan. 30, 2006, B171066) [nonpub. opn.].)

In *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856], the United States Supreme Court overruled *People v. Black, supra*, 35 Cal.4th 1238, and held that California's sentencing scheme was unconstitutional because it permitted judges, not juries, to make factual findings concerning aggravating sentencing factors. Bell's case eventually made its way back to this court for reconsideration in light of *Cunningham*. We affirmed, concluding that even though the trial court erred, the error was harmless because no reasonable jury would have found that the robbery in count 2 had not involved great violence. (*People v. Bell* (Feb. 27, 2008, B171066) [nonpub. opn.].)

Following a series of decisions by the United States and California Supreme Courts that forbade life without parole sentences for juvenile non-homicide offenders, including sentences that did not offer the opportunity for parole within a meaningful portion of the offender's life span, Bell filed a habeas corpus petition with the trial court contending that his sentence of 54 years to life amounted to cruel and unusual punishment because it was a de facto sentence of life without parole. In response to that petition, the trial court resentenced Bell to a combined state prison term of 43 years to life, as follows: 25 years to life on one of the rape counts, and a determinate term of 18 years on the other counts. The trial court also ordered that Bell would become eligible for parole in December 2040, when he would be 55.

Bell makes the following contentions on appeal: (1) his age 55 parole eligibility date is a de facto life without parole sentence and is therefore cruel and unusual under *Graham v. Florida* (2010) 560 U.S. 48, 63–64 [176 L.Ed.2d 825, 130 S.Ct. 2011] (*Graham*); (2) his sentence is unconstitutionally cruel and unusual because it is grossly disproportionate when compared to the parole eligibility date available to most juvenile homicide offenders; and (3) the exclusion of one strike offenders from section 3051 violates equal protection principles.

DISCUSSION

1. *Principles Applicable to Determining Whether Punishment Is Cruel and Unusual*

We begin our discussion with a review of the law of cruel and unusual punishment and recent decisional and statutory law regarding sentencing of juvenile defendants. We then turn to the points raised on appeal.

■ When considering a proportionality challenge to the length of a sentence under the Eighth Amendment to the United States Constitution, we consider all the circumstances of the case. We begin by comparing the gravity of the offense and the severity of the sentence. In the rare case where this threshold comparison leads to an inference of gross disproportionality, we then compare the defendant's sentence to the sentences received by offenders both in California and other jurisdictions. If this comparison bears out the initial assessment that the sentence is grossly disproportionate, then the sentence is cruel and unusual. (*People v. Christensen* (2014) 229 Cal.App.4th 781, 805–806 [177 Cal.Rptr.3d 712].)

■ Determining whether a sentence is cruel or unusual under article I, section 17 of the California Constitution employs a three-part analysis: (1) we examine the nature of the offense and the offender; (2) we compare the punishment in this case with the punishment imposed for more serious crimes in California; and (3) we compare the punishment with that imposed for the same crime by other jurisdictions. (*People v. Em* (2009) 171 Cal.App.4th 964, 972 [90 Cal.Rptr.3d 264].) A defendant must overcome a considerable burden to show his sentence is disproportionate to his level of culpability, and findings of disproportionality are exquisitely rare in case law. (*Ibid.*)

2. *The Evolving Law Concerning Sentencing of Juvenile Offenders*

In *Graham, supra*, 560 U.S. 48, the United States Supreme Court announced a categorical rule prohibiting life without parole (LWOP) sentences for minors who were convicted of non-homicide offenses. *Graham*'s holding

was based on the following: (1) scientific studies showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows that his crimes are less likely the result of an inalterably depraved character; (3) the notion that it is morally misguided to equate a minor's failings with those of an adult; and (4) the fact that even though non-homicide crimes may have devastating effects, they cannot be compared to murder in terms of severity and irrevocability. (*Id.* at pp. 67–70.)

In *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407, 132 S.Ct. 2455] (*Miller*), the Supreme Court held that sentencing schemes that made LWOP sentences mandatory for juveniles who commit homicide offenses violated the Eighth Amendment's ban on cruel and unusual punishment. Under *Miller*, LWOP sentences are still permissible, but may be imposed on only the “‘rare juvenile offender whose crime reflects irreparable corruption.’ [Citations.]” (*Miller*, at p. 478 [132 S.Ct. at p. 2469].) This determination must be made as part of a sentencing scheme that requires trial courts to take into account the “distinctive (and transitory) mental traits and environmental vulnerabilities” of children. (*Id.* at p. 473 [132 S.Ct. at p. 2465].)

Mandatory LWOP sentences for juveniles “preclude[] consideration of [their] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds [them]—and from which [they] cannot usually extricate [themselves]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of [their] participation in the conduct and the way familial and peer pressures may have affected [them]. Indeed, it ignores that [they] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, [their] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist [their] own attorneys.” (*Miller, supra*, 567 U.S. at p. 478 [132 S.Ct. at p. 2468].) Accordingly, trial court sentencing of juvenile homicide offenders must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Id.* at p. 480 [132 S.Ct. at p. 2469].)

■ In *People v. Caballero* (2012) 55 Cal.4th 262 [145 Cal.Rptr.3d 286, 282 P.3d 291] (*Caballero*), the California Supreme Court applied *Graham* to non-homicide juvenile offenders who receive a sentence which, although subject to the possibility of parole, is so long that it amounts to a de facto LWOP sentence. Under *Caballero*, the sentence for a juvenile non-homicide offender must provide a “meaningful opportunity to demonstrate [his] rehabilitation and fitness to reenter society in the future” and must take into

account all the mitigating circumstances, including the juvenile's age, role in the crime, and physical and mental development. (*Id.* at pp. 268–269.)

■ In response to *Caballero*, the Legislature enacted section 3051, which sets mandatory parole eligibility dates for most persons convicted of crimes committed before they turned 23: (1) at the 15th year of incarceration if the sentence is a determinate term; (2) at the 20th year of incarceration if the sentence is a life term of less than 25 years to life; and (3) at the 25th year of incarceration if the sentence is a life term of 25 years to life. (§ 3051, subd. (b)(1)–(3).) These provisions do not apply if the juvenile was sentenced (1) under the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (b)–(g)); (2) under the one strike law for committing certain felony sex offenses (§ 667.61); or (3) to life without possibility of parole (§ 3051, subd. (h)). Bell's sentence included a term of 25 years to life because he committed a burglary in order to carry out a rape and did so with a firearm, thus falling into the one strike sentencing scheme. (§ 667.61, subd. (e)(2), (3).) As a result, the mandatory minimum parole eligibility requirements do not apply to him.

3. *Bell's Parole Eligibility Date Does Not Amount to Cruel and Unusual Punishment*

Bell contends that his age 55 parole eligibility date is unconstitutionally cruel and unusual for three reasons: (1) it amounts to a de facto LWOP sentence because the possibility of parole comes too late to leave him with a meaningful life expectancy; (2) it is grossly disproportionate to the punishment for more serious crimes such as special circumstances murder because section 3051 requires a parole eligibility date at 25 years after incarceration for that offense, while he is not eligible for parole for 41 years; and (3) it did not adequately account for his horrific childhood, which was marked by abuse, neglect, and mental illness.⁷

■ Although a parole eligibility date must occur while a defendant has some meaningful life expectancy remaining, how much life expectancy that entails is somewhat of an open issue. (*People v. Perez* (2013) 214 Cal.App.4th 49, 57–58 [154 Cal.Rptr.3d 114] (*Perez*.)) The *Perez* court held that an age 47 parole eligibility date could “by no stretch of the imagination” be considered a de facto LWOP sentence. (*Id.* at p. 58.) We believe that rationale applies to

⁷ In *People v. Franklin* (2016) 63 Cal.4th 261 [202 Cal.Rptr.3d 496, 370 P.3d 1053], our Supreme Court held that section 3051's mandatory parole eligibility requirements mooted a juvenile defendant's claim that his prison sentence was cruel and unusual. *Franklin* is inapplicable here for two reasons: (1) the defendant in that case was eligible for a 25-year parole hearing under section 3051, while Bell's one strike conviction made him an exception to that requirement and (2) *Franklin* did not address the equal protection issue raised by Bell.

Bell's age 55 parole eligibility date and that, standing alone, the eligibility date is not a de facto LWOP sentence. The record does not suggest that Bell would not have a meaningful life expectancy.

As for Bell's disproportionality argument, he relies on *In re Nuñez* (2009) 173 Cal.App.4th 709 [93 Cal.Rptr.3d 242], where a 14 year old convicted of kidnapping for ransom received an LWOP sentence.⁸ Noting that the defendant could have received no more than 25 years to life had he committed murder instead, the *Nuñez* court held that the LWOP sentence was "among the rarest of the rare" because he was the only known offender under age 15 to receive an LWOP sentence throughout the nation. (*Id.* at p. 25.) The *Nuñez* court therefore reversed the LWOP sentence. (*Id.* at pp. 715, 726.)

Nuñez is inapplicable here. Bell did not receive an LWOP sentence: he was sentenced to 43 years to life with parole eligibility after 41 years at age 55. Bell committed multiple violent crimes of a horrific and devastating nature. He broke into the victim's home in order to commit rape, raped and robbed her at gunpoint in front of her eight-year-old son, and tried to kidnap her in order to facilitate his crimes. Even taking into account the admittedly unfortunate circumstances of Bell's childhood, we cannot say that his age 55 parole eligibility date makes this the "rarest of the rare" cases where the punishment is grossly disproportionate to the crimes he committed. We therefore conclude that Bell's sentence was not cruel and unusual under either the federal or California Constitutions.

4. *Excluding One Strike Offenders from Section 3051 Was Not an Equal Protection Violation*

■ Both the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution guarantee to all persons the equal protection of the laws. In order to succeed on his equal protection claim, Bell must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836 [16 Cal.Rptr.3d 420, 94 P.3d 551] (*Wilkinson*)).

Although respondent contends that Bell has failed to meet this hurdle because violent rapists and special circumstances murderers are not similarly situated, we will assume for purposes of our analysis that the two groups are similar, consisting of violent juvenile offenders. We apply different levels of scrutiny to different types of classifications. (*Wilkinson, supra*, 33 Cal.4th at p. 836.) Relying on *People v. Olivas* (1976) 17 Cal.3d 236 [131 Cal.Rptr. 55,

⁸ The sentence in *Nuñez* was imposed before *Graham* was decided.

551 P.2d 375] (*Olivas*), Bell contends that we must apply the highest level of scrutiny—strict scrutiny—which requires a showing that the classification bears a close relationship to a compelling state interest, is necessary to achieve the state’s goal, and is narrowly drawn to reach that goal by the least restrictive means possible. (*People v. Cole* (2007) 152 Cal.App.4th 230, 238 [61 Cal.Rptr.3d 238].)

Noting that personal liberty was a fundamental right, the *Olivas* court applied the strict scrutiny test to strike down a sentencing scheme that allowed juvenile wards to be held in custody beyond the maximum term of imprisonment for the crime they committed. (*Olivas, supra*, 17 Cal.3d at p. 238.) We believe *Olivas* is not applicable here. As the Supreme Court has noted, *Olivas* concerned only the maximum term for which a juvenile offender could be held, and was inapplicable where the issue was “the method by which he may obtain release prior to expiration of the full term imposed.” (*People v. Austin* (1981) 30 Cal.3d 155, 162 [178 Cal.Rptr. 312, 636 P.2d 1] [juvenile wards not entitled to sentence reduction by way of conduct credits applicable to state prison inmates].)

The court in *Wilkinson, supra*, 33 Cal.4th 821, clarified *Olivas*’s limited reach. The defendant in *Wilkinson* was convicted of battery on a custodial officer (§ 243.1), which was a felony. He argued on appeal that the felony classification violated equal protection principles because battery that resulted in injury under a different code section (§ 243) was a “wobbler” offense that could be treated as a misdemeanor. The *Wilkinson* court rejected that contention by applying the rational basis test. In doing so, the Supreme Court held that *Olivas* was limited to the principle that the boundaries between the adult and juvenile criminal systems be maintained. (*Wilkinson*, at pp. 837–838.) Otherwise, a defendant does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives. (*Id.* at p. 838.) Application of strict scrutiny in other cases would “be incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment.” (*Ibid.*)

Therefore, because the purported statutory disparity does not implicate a suspect class or fundamental right, we apply the deferential rational basis test when examining the Legislature’s sentencing choice. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 [183 Cal.Rptr.3d 96, 341 P.3d 1075] (*Johnson*); *Wilkinson, supra*, 33 Cal.4th at p. 838.) This standard does not depend on whether the Legislature ever actually articulated its purpose, and the underlying rationale need not be empirically substantiated. While the realities of the subject matter cannot be completely ignored, we may engage in “‘rational speculation’” as to the justifications for the Legislature’s decision, even if our assumption has no foundation in the

record. (*Johnson*, at p. 881.) Under this test, Bell must negate every conceivable basis that might support the legislative distinction. If a plausible basis exists for the provision, we may not second-guess its wisdom, fairness, or logic. (*Ibid.*)

When applying the rational basis test, “‘we must accept any gross generalizations and rough accommodations that the Legislature seems to have made.’ [Citation.] ‘A classification is not arbitrary or irrational simply because there is an “imperfect fit between means and ends,”’ [citation], or ‘because it may be “to some extent both underinclusive and overinclusive.”’ [Citation.]” (*Johnson, supra*, 60 Cal.4th at p. 887.) “At bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses.” (*Ibid.*)

The *Johnson* court employed this test to overrule its earlier decision in *People v. Hofsheier* (2006) 37 Cal.4th 1185 [39 Cal.Rptr.3d 821, 129 P.3d 29] (*Hofsheier*), which held that a mandatory sex offender registration requirement applicable to those who orally copulate minors (§ 290) had no rational basis and therefore violated the equal protection clause in light of a companion requirement for discretionary sex offender registration for those who engaged in unlawful intercourse with a minor.

The *Johnson* court disagreed with *Hofsheier* that there could be no plausible explanation for having discretionary sex offender registration for the crime of intercourse with a minor and mandatory sex offender registration for those who orally copulated minors. First, it cited studies showing that sex offenders could more easily manipulate minors into having oral sex instead of intercourse. As a result, the Legislature could have plausibly assumed that those sexual predators had more opportunities to reoffend. (*Johnson, supra*, 60 Cal.4th at pp. 883–884.) Second, legislative concerns over the costs of supporting children born to underage mothers might also have motivated the Legislature to permit discretionary registration of intercourse sex offenders to prevent interference with the father’s “employment opportunities and the support of children conceived as a result of unlawful intercourse” (*Id.* at pp. 885–886.)

Bell contends there can be no rational basis for treating him more severely than a juvenile who commits the far more serious crime of special circumstances murder, especially in light of the Department of Corrections and Rehabilitation, 2010 Juvenile Justice Outcome Report (the Department of Corrections report), showing that juvenile sex offenders recidivate far less often than those who commit other crimes. Respondent contends a rational basis exists for the Legislature’s decision to exclude one strike rapists from the mandatory minimum parole eligibility requirements of section 3051

because Bell's one strike sentence was based on his commission of multiple offenses, including rape, burglary with the intent to commit rape, and assault with a firearm. Respondent adds that even if juvenile sex offenders recidivate less frequently than others, they still recidivate, justifying their exclusion from section 3051.

■ We believe the threat of recidivism gives rise to a rational basis for the Legislature's decision to exclude one strike offenders from section 3051. We begin by noting that three strikes offenders were also excluded from section 3051. Because the three strikes law is geared toward repeat offenders, we believe the statutory scheme suggests that the Legislature had recidivism in mind when it excluded one strike offenders.

We also find persuasive that the Legislature has enacted several comprehensive statutory schemes that all seem to focus on the Legislature's concerns over recidivism by those who commit violent sex offenses. The Sexually Violent Predators Act (Welf. & Inst. Code, § 660 et seq.) provides for the indefinite civil commitment of certain offenders who are found to suffer from a qualifying mental disorder after the completion of their prison terms. The Mentally Disordered Offenders Act (Pen. Code, § 2690 et seq.) permits the continued detention of certain other sex offenders until they receive appropriate mental health treatment that results in remission of their disorder. Each has the same purpose: to protect the public from a select group of sexual offenders who are extremely dangerous and to provide treatment for them. (*People v. Landau* (2013) 214 Cal.App.4th 1, 46 [154 Cal.Rptr.3d 1]; *People v. Ward* (2002) 97 Cal.App.4th 631, 636 [118 Cal.Rptr.2d 599].)

Section 290 requires the lifetime registration of a large class of sex offenders, including those commit assault or kidnapping with the intent to commit rape. (§ 290, subd. (c).) The purpose of section 290's lifetime registration requirement is to ensure that persons convicted of the enumerated crimes be readily available for police surveillance at all times because the Legislature has deemed them likely to commit similar offenses in the future. (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1080 [114 Cal.Rptr.3d 711].)

As we see it, the Legislature believes that most sex offenders pose a recidivism risk. We believe the Legislature had that concern in mind when it excluded one strike offenders such as Bell from the reach of section 3051, and that the risk of recidivism provides a rational basis for doing so.

Bell relies on the Department of Corrections report to show that juvenile rapists have a low recidivism rate. That report examined recidivism among juvenile offenders, including those who committed violent non-sex offenses, violent sex offenses, and other less serious crimes. Although the Department

of Corrections report concluded that juvenile violent sex offenders had a lower recidivism rate than most other types of offenders, there were no statistics available for juvenile homicide offenders, perhaps because such offenders tend to be denied parole even when eligible.⁹ In any event, one report that reaches contrary conclusions does not mean that the Legislature's classification of crimes is unreasonable.

Based on this, and given the deferential standard we must apply, we cannot say that the Legislature lacked a rational basis for its sentencing choice.

DISPOSITION

The judgment is affirmed.

Bigelow, P. J., and Grimes, J., concurred

Appellant's petition for review by the Supreme Court was granted January 11, 2017, S238339.

⁹ We also note that even though the Department of Corrections report showed that juvenile rapists had a lower recidivism rate than many other types of offenders, that rate was still high. For instance, as measured by arrests, the recidivism rate was 78.7 percent for serious/violent crimes, 64.7 percent for non-violent sex offenders, and 67.7 percent for violent sex offenders. (Department of Corrections report, p. 28.) As measured by the rate of commitment or other forms of custody, the recidivism rate was 56.9 percent for serious/violent crimes, 28.1 percent for non-violent sex offenders, and 46.9 percent for violent sex offenders. (Department of Corrections report, p. 28.) By another measure, the three-year return rate to state incarceration for violent rapists was 37.8 percent. (Department of Corrections report, p. 30.)

[No. B268130. Second Dist., Div. Two. Sept. 29, 2016.]

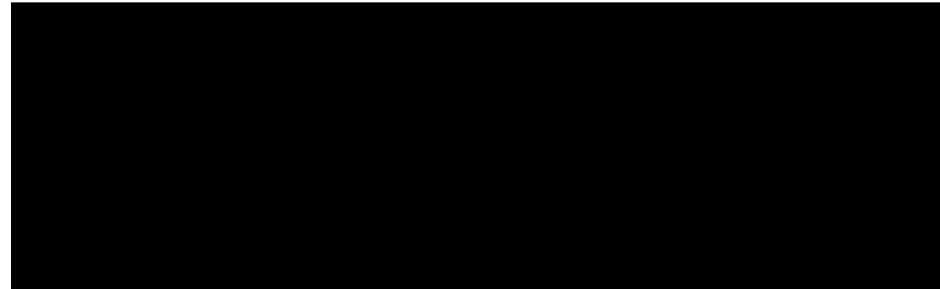
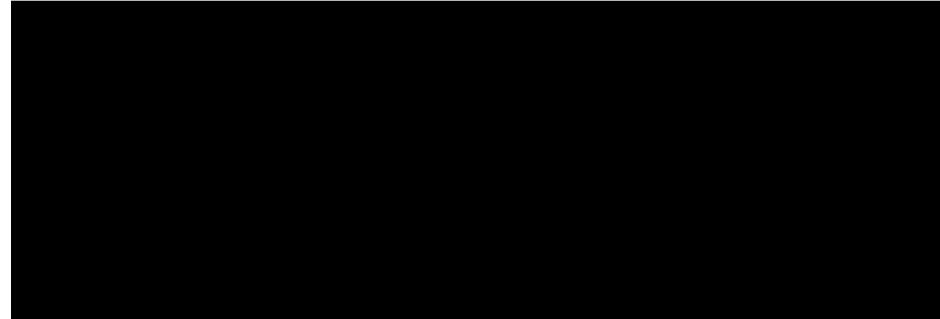
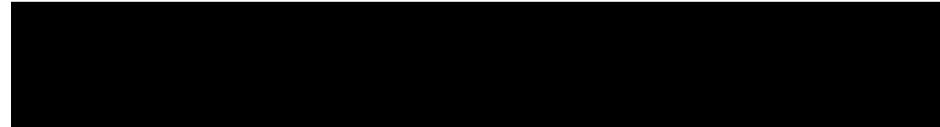
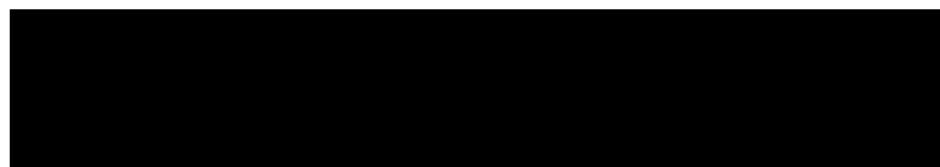
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CEDARS-SINAI MEDICAL CENTER et al., Defendants and Appellants.

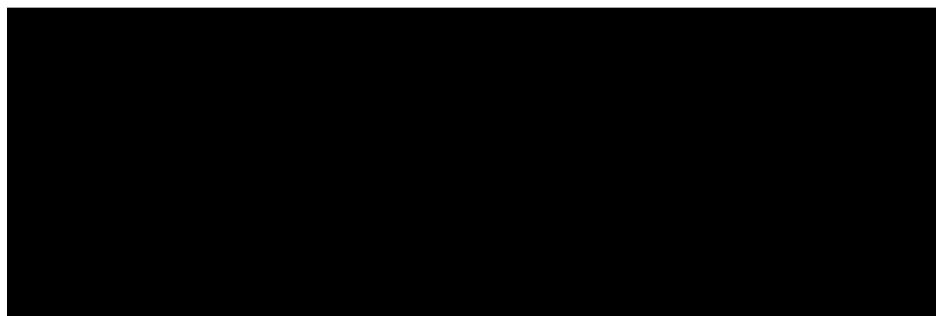
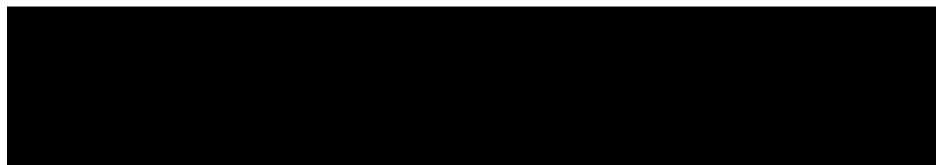
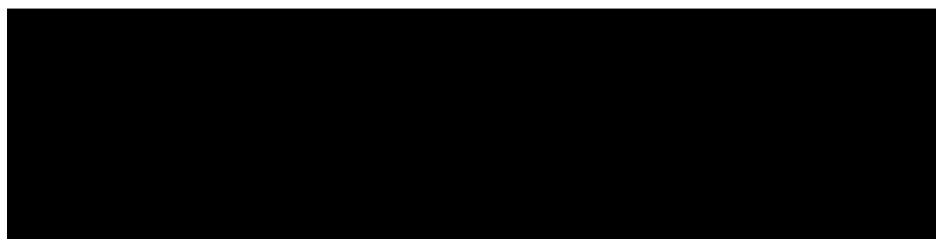
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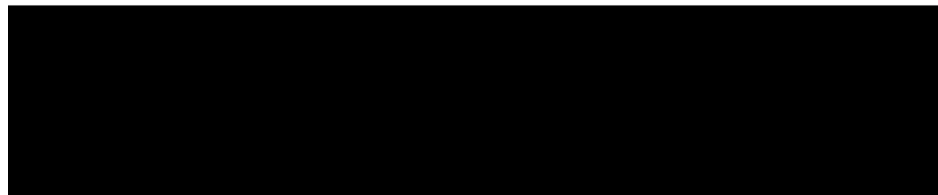
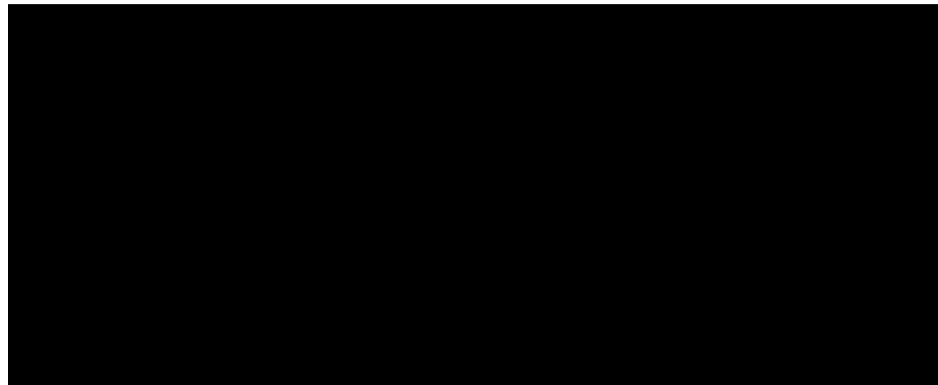
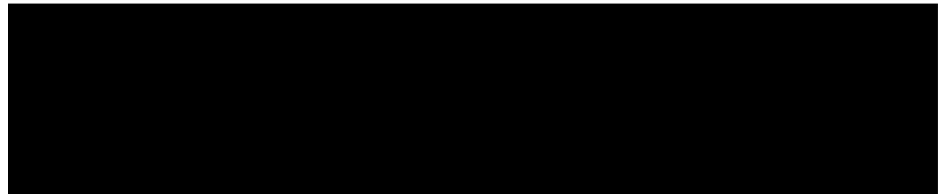
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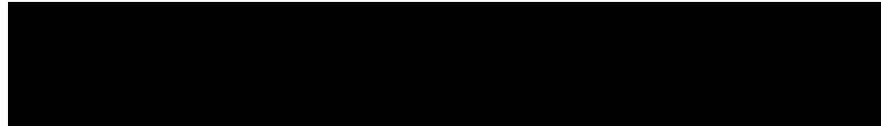
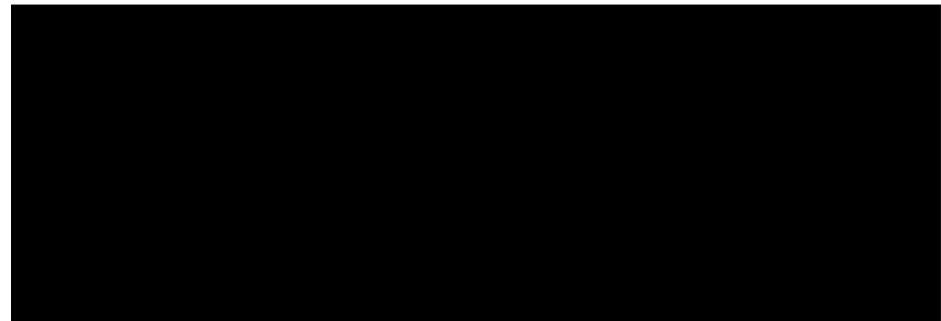
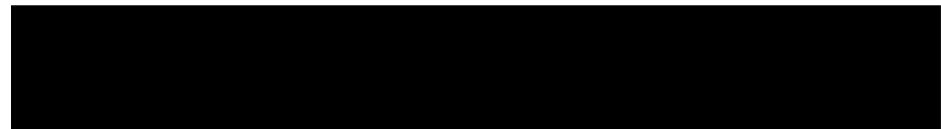
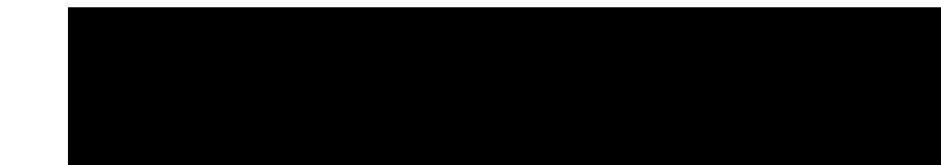
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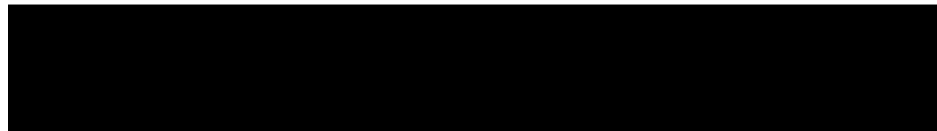
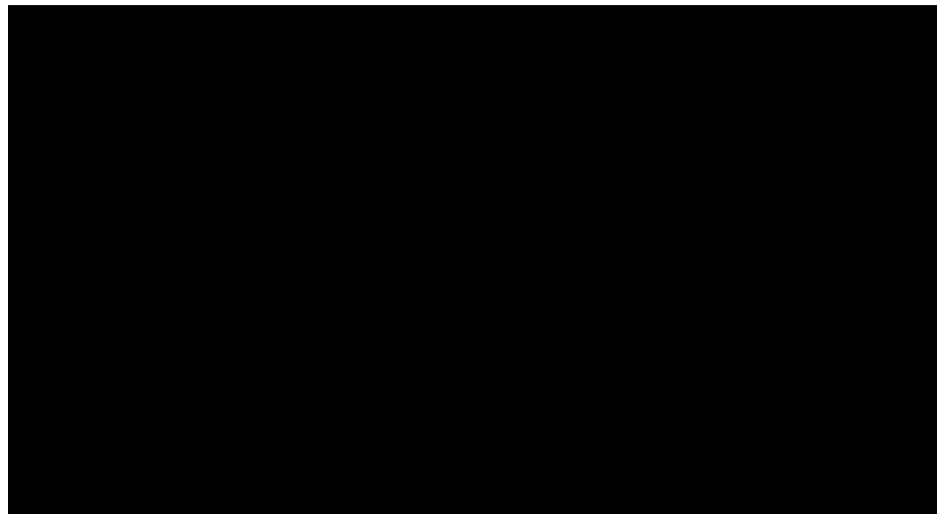
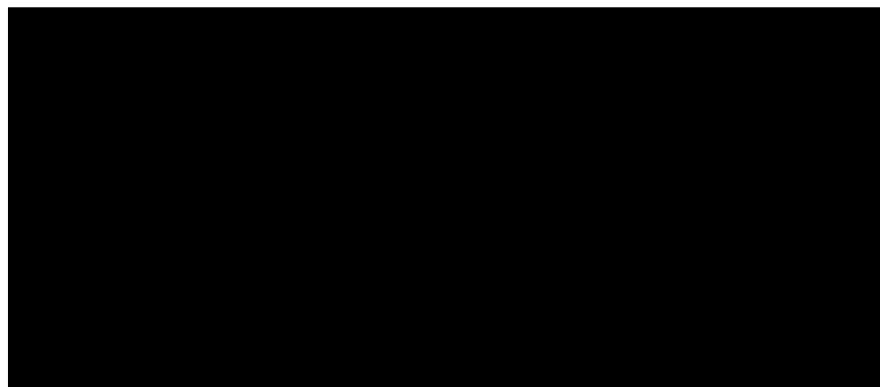
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COUNSEL

Horvitz & Levy, David M. Axelrad, Emily V. Cuatto, Moore McLennan,
Raymond R. Moore and Drew N. Evans for Defendants and Appellants.

Howard A. Kapp for Plaintiff and Respondent.

OPINION

HOFFSTADT, J.—During her senior year of college, plaintiff Dionne Licudine (plaintiff) suffered injury during a gallbladder surgery that will have lifelong repercussions. She sued for malpractice, and sought damages for the resulting diminution in her earning capacity. Before such damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury. (See *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665] (*Fein*); *Storrs v. Los Angeles Traction Co.* (1901) 134 Cal. 91, 93 [66 P. 72] (*Storrs*).) The first threshold requirement is met only if the plaintiff is “reasonably certain to suffer a loss of future earnings.” (*Robison v. Atchison, T. & S. F. R. Co.* (1962) 211 Cal.App.2d 280, 287–288 [27 Cal.Rptr. 260] (*Robison*)). But how certain must the jury be in fixing what the plaintiff could have earned without the injury? We know that a jury may not award speculative damages (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048 [135 Cal.Rptr.2d 46, 69 P.3d 965] (*Ferguson*)), and the cases reviewing lost earning capacity awards seem to apply a consistent, yet unstated standard. No case has yet articulated what that standard is. Today, we hold that the jury must fix a plaintiff’s future earning capacity based on what it is “reasonably probable” she could have earned. Because the plaintiff in this case did not adduce any evidence to establish that it was reasonably probable she could have obtained employment as an attorney or any evidence on the earnings of lawyers, the trial court did not abuse its discretion in determining that the jury’s \$730,000 award for lost earning capacity was not supported by substantial evidence. What is more, given the unusual facts of this case, the court acted within its discretion in granting a new trial on damages rather than entering a judgment notwithstanding the verdict for the defendants. We consequently affirm the grant of a new trial on damages, and provide additional guidance as to a handful of evidentiary issues likely to arise during the retrial.

FACTS AND PROCEDURAL BACKGROUND**I. Facts**

In January 2012, plaintiff was a senior at the University of Southern California (USC) with a double major in political science and international relations. She was also the coxswain and captain of USC’s women’s rowing team, and stood a legitimate chance of being named to the national rowing team. She was planning to apply to law school to fulfill her “passion” to be a human rights lawyer.

On February 6, 2012, plaintiff underwent surgery at defendant Cedars-Sinai Medical Center (Cedars). She had been experiencing sharp abdominal pains over the prior few years, and the doctors at Cedars recommended the removal of her gallbladder. The surgery was supposed to be minimally invasive: The surgeons were to make a small incision in her abdomen, place a hollow tube into the incision, introduce a small camera and the necessary surgical instruments into her abdomen through the tube, and then conduct the surgery.

When inserting the tube, however, defendant Ankur Gupta (Dr. Gupta) nicked a vein and caused substantial internal bleeding. This necessitated a change in plans. In order to repair the vein, extract the blood, and remove plaintiff's gallbladder, the attending physicians cut a six-inch opening in her abdomen. Although her gallbladder was successfully removed, the more invasive surgery necessitated an additional four weeks in the hospital, including a week in the intensive care unit. What is more, the saturation of plaintiff's digestive organs in her blood caused fibrous tissue called adhesions to form on and around those organs, which has resulted in pain, bloating and dysfunction in her digestive tract.

II. *Procedural History*

A. *Lawsuit*

Plaintiff sued Cedars and Dr. Gupta for malpractice.¹

B. *Evidence at trial*

The matter proceeded to trial in May 2015.

At trial, plaintiff testified that she was able to return to school and graduate from USC in the spring of 2012, albeit with help from her mother, dispensation from her teachers, and use of an electronic wheelchair. Plaintiff also applied to, and was accepted by, four law schools to start in the fall of 2013. Two of the law schools—Suffolk Law School and New England School of Law—were in Boston, which plaintiff preferred so she could participate in the Boston rowing community. She explained that she did not apply to Harvard Law School because she did not have “straight As.” Plaintiff also applied to, and was accepted into, the Masters of Public Administration program at Pennsylvania State University. Plaintiff accepted the offers from Suffolk Law School and Penn State, and thereafter requested and was granted

¹ Plaintiff also sued the Regents of the University of California and another doctor who supervised Dr. Gupta during the surgery. Plaintiff voluntarily dismissed the Regents, and dismissed the other doctor by stipulation.

medical deferments of her start date. In the meantime, plaintiff worked for two years as an assistant rowing coach, earning \$1,200 a month.

Plaintiff's former rowing coach testified that more than half of the women who have served as coxswains have gone on to graduate school.

Plaintiff also called an expert witness in internal medicine. The expert opined that plaintiff's ongoing gastrointestinal problems would likely be with her for the rest of her life and that she will "continue to suffer pain, require medical evaluations, require medication, and may at some point require an emergent surgical operation for a[n] acute abdominal event." The expert further opined that these consequences "would certainly impact [her] lifestyle decisions[,] including career choice [and] education."

Plaintiff asked the trial court to take judicial notice of a printout from the website of the United States Bureau of Labor Statistics (Bureau). The printout indicated that the "median" annual salary for attorneys in 2012 was \$113,530, but noted that "competition" for attorney positions was "strong[]" because more students are graduating from law school each year than there are jobs available." Although plaintiff filed her request prior to trial, the court entertained argument on the issue intermittently throughout the trial, and did not deny the request until all parties had rested. The court ultimately denied plaintiff's request on the ground that the power to judicially notice official government documents did not reach "the truth of the matter[s]" stated in those documents and that, as a result, the printout's probative value was substantially outweighed by the danger of confusing the issues and misleading the jury.

C. *Jury verdict*

The jury returned a special verdict form finding Cedars and Dr. Gupta negligent, and awarded plaintiff a total of \$1,045,000 in damages. More specifically, the jury awarded plaintiff \$285,000 in past economic loss, \$730,000 in future economic loss, \$15,000 for past noneconomic loss, and \$15,000 for future noneconomic loss.

D. *Posttrial motions*

Cedars and Dr. Gupta (collectively, defendants) moved for a new trial and for judgment notwithstanding the verdict on several grounds, including the insufficiency of the evidence to support the jury's award of economic damages. Plaintiff moved for a new trial due to the inadequacy of the jury's award of noneconomic damages.

The trial court granted both motions for a new trial on damages and denied defendants' motion for judgment notwithstanding the verdict. With respect to the jury's award of economic damages, the court stated that "there was virtually no evidence" to support the jury's \$285,000 award of lost earnings "prior to verdict" and that the jury's award of \$730,000 for plaintiff's loss of earning capacity was "speculative and excessive" because "there was no evidence whatsoever of the compensation earned by graduates of any law school, much less the law school plaintiff chose to attend, or compensation of any attorneys, no matter how experienced." With respect to the jury's award of noneconomic damages, the court concluded that the jury's meager award of \$30,000 *total* for past and future pain and suffering was "grossly inadequate" in light of evidence of the "excruciating pain" she would have to endure "on a daily basis for the rest of her life."

Defendants filed a timely notice of appeal.

DISCUSSION

■ Defendants appeal the trial court's order denying their motion for judgment notwithstanding the verdict, arguing that (1) there was insufficient evidence to support plaintiff's claim for loss of earning capacity, and (2) the remedy for this lack of evidence is the entry of judgment awarding no such damages, not a new trial on damages. Plaintiff disputes both arguments. A party is entitled to judgment notwithstanding the verdict only if there is "no substantial evidence [to] support" that verdict. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [104 Cal.Rptr.2d 602, 18 P.3d 29] (*Sweatman*); see Code Civ. Proc., § 629.) In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, we ask: Does the record, viewed in the light most favorable to the jury's verdict, contain evidence that is reasonable, credible and of solid value sufficient to support the jury's verdict? (*King v. State of California* (2015) 242 Cal.App.4th 265, 288 [195 Cal.Rptr.3d 286]; *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 787 [185 Cal.Rptr.3d 684].) If we must resolve any legal issues in answering this question, our review of such issues is *de novo*. (*King*, at p. 288.)

I. *Forfeiture*

■ As a threshold matter, plaintiff argues that defendants have forfeited their right to challenge the trial court's denial of their motion for judgment notwithstanding the verdict because they only generally attacked the sufficiency of the evidence, and did not specifically argue that plaintiff failed to introduce evidence quantifying her lost earning capacity. To be sure, a party attacking a jury's award of damages as excessive must first give the trial

court the opportunity to consider the argument before raising that argument on appeal. (E.g., *Franck v. Polaris E-Z Go Div. of Textron, Inc.* (1984) 157 Cal.App.3d 1107, 1115–1116 [204 Cal.Rptr. 321].) However, defendants did just that. Not only did defendants attack the jury’s award of \$730,000 for the future loss of earning capacity as speculative (and hence excessive), they specifically asserted that plaintiff never introduced evidence that she was “reasonably certain to earn some definable amount of income.” In other words, defendants argued that plaintiff never quantified her lost earning capacity. There was no forfeiture.

II. *Substantial Evidence*

■ To assess whether the jury’s award of damages for loss of earning capacity was supported by substantial evidence, we must (1) know what standard the jury must apply in awarding such damages, and (2) evaluate whether the evidence meets that standard.

A. *Standard for assessing loss of earning capacity*

1. *Compensatory damages in general*

■ A person who “suffers” a “loss or harm” to her person or property due to another’s “unlawful act or omission” may sue for “damages” that “compensate” for all of the loss or harm proximately caused by that act or omission. (Civ. Code, §§ 3281–3283, 3333; accord, *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396 [178 Cal.Rptr.3d 604] [“‘Damages’ are the monetary compensation awarded to parties who suffer detriment for the unlawful act or omission of another”].) Damages encompass losses or harms that occurred prior to trial as well as losses or harms “certain to result in the future.” (Civ. Code, § 3283.) Once a jury determines that an injured party is entitled to damages, the “focus of an award of damages [turns to] the quantification of detriment suffered by a party.” (*Meister*, at p. 396.) “Damages must, in all cases, be reasonable” (Civ. Code, § 3359; see *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

■ Compensable damages are categorized as either “general” or “special.” General damages are those damages that “ ‘necessarily result from the act complained of.’ ” (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1599 [265 Cal.Rptr. 719].) Put differently, general damages “ ‘flow from the injuries received.’ ” (*Treadwell v. Whittier* (1889) 80 Cal. 574, 581 [22 P. 266].) Consequently, general damages are “ ‘implied by law’ ” (*Beeman*, at p. 1599), and may be “inferred from the nature of the injury” itself (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d

343] (*Connolly*); *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117] (*Hilliard*)). General damages include damages for “‘pain [and] suffering, emotional distress, and other forms of detriment that are sometimes characterized as “subjective” or not directly quantifiable.’ [Citation.]” (*Beeman*, at p. 1599; see *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 156 [143 Cal.Rptr.3d 17].) By contrast, special damages do not necessarily arise from the typical infliction of the injury and are instead the “out-of-pocket losses” “‘peculiar to the infliction of each respective injury.’” (*Beeman*, at pp. 1600, 1599.) Special damages include medical and related expenses as well as lost income. (*Id.* at p. 1599; Rest.2d Torts, § 924.)

■ When a plaintiff’s injury interferes with her professional earnings, she can potentially recover general damages, special damages, or both. Retrospectively, she can seek the “loss of wages between the occurrence of the injury and the trial”; these are special damages. (*Swanson v. Bogatin* (1957) 149 Cal.App.2d 755, 758 [308 P.2d 918].) Prospectively, she can seek to recover for her loss of earning capacity; these are general damages. (*Connolly, supra*, 49 Cal.2d at p. 489 [“Loss of earning power is” “awarded for the loss of ability thereafter to earn money” and “is an element of general damages”]; *Zibbell v. Southern Pacific Co.* (1911) 160 Cal. 237, 251–252 [116 P. 513] (*Zibbell*)).

2. *Damages for loss of earning capacity*

■ A jury tasked with evaluating a plaintiff’s prayer for prospective loss of earning capacity must answer two questions: (1) Did the plaintiff suffer a loss in her earning capacity as a result of her injury, and if so, (2) How is that loss to be valued?

a. *Entitlement to damages for loss of earning capacity*

■ The first question assesses whether the plaintiff’s earning capacity was, in fact, damaged at all. It is a threshold question of entitlement. Consistent with the statutory requirement that a plaintiff is eligible only to recover damages for losses “certain to result in the future” (Civ. Code, § 3283), a jury may award damages for a plaintiff’s loss of earning capacity only if the plaintiff is “reasonably certain to suffer a loss of future earnings.” (*Robison, supra*, 211 Cal.App.2d at pp. 287–288; see *Khan v. Southern Pacific Co.* (1955) 132 Cal.App.2d 410, 417–418 [282 P.2d 78] (*Khan*); accord, *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97 [67 Cal.Rptr.3d 100] [“Courts have interpreted [Civil Code section 3283] to mean that a plaintiff may recover if the detriment is ‘reasonably certain’ to occur”].) Consistent with the classification of loss of earning capacity as general

damages, the jury may infer the reasonable certainty of such a loss from the nature of the injury. (E.g., *Storrs, supra*, 134 Cal. at p. 94 [“It needs no evidence to show that a plaintiff in full health and vigor, who has lost an arm or a hand by reason of the negligence of the defendant, has had his earning power greatly impaired”]; *Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 Cal.2d 480, 494 [55 P.2d 870] (*Lindemann*) [same].) But a jury is not required to draw this inference, and damages for the loss of earning capacity may not be awarded where the evidence demonstrates there was no such loss. (E.g., *Handelman v. Victor Equipment Co.* (1971) 21 Cal.App.3d 902, 905–909 [99 Cal.Rptr. 90] [no loss of earning capacity for deep sea diver who has undertaken his deepest dives *after* his injury]; *Hallinan v. Prindle* (1936) 17 Cal.App.2d 656, 673 [62 P.2d 1075] [no loss of earning capacity for “acute, but brief” pain at the time of an injection].)

b. *Extent of damages for loss of earning capacity*

■ The second question is a question of valuation. As its name suggests, a loss of earning capacity is the difference between what the plaintiff’s earning capacity was *before* her injury and what it is *after* the injury. (Rest.2d Torts, § 924, com. d, p. 525 [“the difference, viewed as of the time of trial, between the value of the plaintiff’s services as they will be in view of the harm and as they would have been had there been no harm”]; *Fein, supra*, 38 Cal.3d at p. 153, fn. 10 [adopting Restatement].) Because these damages turn on the plaintiff’s earning *capacity*, the focus is “not [on] what the plaintiff *would* have earned in the future[,] but [on] what she *could* have earned.” (*Hilliard, supra*, 148 Cal.App.3d at p. 412, italics added; *Gargir v. B’Nei Akiva* (1998) 66 Cal.App.4th 1269, 1281 [78 Cal.Rptr.2d 557] (*Gargir*) [same]; see *Storrs, supra*, 134 Cal. at p. 93 [“it is what [the plaintiff] was capable of earning, rather than what he was actually earning, that was to be considered by the jury”]; *Strosk v. Howard Terminal Co.* (1954) 129 Cal.App.2d 797, 799–800 [277 P.2d 828] [same]; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399] (*Rodriguez*) [“[one’s] earning capacity is not a matter of actual earnings”], disapproved on other grounds in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499 [142 Cal.Rptr.3d 607, 278 P.3d 860].) Consequently, proof of the plaintiff’s prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages (e.g., *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 462 [130 Cal.Rptr. 786] (*Neumann*) [no “‘proof of actual earnings or income either before or after the injury’ ” required]; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854] (*Heiner*) [same]), nor a cap on the amount of those damages (e.g., *Robison, supra*, 211 Cal.App.2d at p. 287 [fact that plaintiff’s actual earnings had not decreased prior to trial not a bar to loss of earning capacity damages]; *Paxton v. County of Alameda* (1953) 119 Cal.App.2d 393, 414–415 [259 P.2d 934] (*Paxton*)

[same]). Indeed, proof that the plaintiff had *any* prior earnings is not required because the “vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,” even if she had not done so previously. (*Gotsch v. Market S. Railway* (1928) 89 Cal.App. 477, 483 [265 P. 268].) Thus, damages for loss of earning capacity may be awarded to persons who, at the time of the injury, were homemakers (*Ibid.*; *Wilcox v. Sway* (1945) 69 Cal.App.2d 560 [160 P.2d 154], superseded on other grounds in Code Civ. Proc., § 634; *Davis v. Renton* (1931) 113 Cal.App. 561, 563–564 [298 P. 834]), as well as persons who were retired or otherwise not working (*Storrs*, at pp. 94–95 [75-year-old plaintiff serving in “positions of trust” in financial and other corporations]; *McCormack v. San Francisco* (1961) 193 Cal.App.2d 96, 98, 101–102 [14 Cal.Rptr. 79] [71-year-old widow not working]; *Bencich v. Market S. R. Co.* (1938) 29 Cal.App.2d 641, 647–648 [85 P.2d 556] [retired plaintiff]).

■ A plaintiff’s earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s).

■ How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff’s earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving.

We select this standard for five reasons.

■ First and foremost, the reasonable probability standard effectuates the standard our Supreme Court has long articulated. In *Zibbell*, the court held that a plaintiff’s pre-injury earning capacity was properly pegged to the “business, vocation, trade or profession” for which the “plaintiff had shown himself fitted and qualified” to undertake based on “the nature of his skill and experience.” (*Zibbell, supra*, 160 Cal. at pp. 248–249; accord, *Neumann, supra*, 59 Cal.App.3d at p. 462; *Osterode v. Almquist* (1948) 89 Cal.App.2d 15, 19–20 [200 P.2d 169].) More generally, the court in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774–775 [149 Cal.Rptr.3d 614, 288 P.3d 1237] (*Sargon*) held that “[t]he law requires . . . that some reasonable basis of computation of damages be used.” Where a plaintiff is not already “fitted and qualified” for the career she seeks to use to define her earning capacity, *Zibbell* and *Sargon* implicitly suggest that the

plaintiff must demonstrate a reasonable probability that she would have become fit and qualified for that career. If she does, the jury will have a “reasonable basis of comput[ing]” what the plaintiff could have earned by looking to what persons in that career can earn.

■ Second, looking to the careers a plaintiff has a reasonable probability of achieving is consistent with the standard used to assess a business’s prospective lost profits, which also looks to what profits are “reasonably probable.” (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 171–172 [331 P.2d 17]; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 470 [120 Cal.Rptr.3d 797]; *Wholesale Electricity Antitrust Cases I & II* (2007) 147 Cal.App.4th 1293, 1309–1310 [55 Cal.Rptr.3d 253]; see also *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679, 701 P.2d 826] [looking to “‘reasonable certainty’” as to extent of damages for lost profits]; accord, 29 Am.Jur.3d (2016) *Proof of Facts*, § 259 [“In a personal injury action, an injured plaintiff is entitled to claim damages for lost earning capacity, proximately caused by the injury, where such damages are established to a reasonable degree of probability and are not speculative”].) Although lost profits are awarded for breach of a contract while loss of earning capacity damages are awarded for a tort, both types of damages require the trier of fact to estimate the future earning capacity of a person or business; both exercises in estimation should turn on the same degree of certainty.

■ Third, using the reasonable certainty standard for assessing a plaintiff’s *entitlement* to loss of earning capacity damages while using the less onerous reasonable probability standard for assessing the *extent* of those damages dovetails neatly with the venerable principle that “[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.” (*Sargon, supra*, 55 Cal.4th at pp. 774–775, quoting *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168]; see *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 191 [132 Cal.Rptr.2d 490, 65 P.3d 1255]; *JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 585 [198 Cal.Rptr.3d 47]; accord, *Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 813 [97 Cal.Rptr. 164] [“Once certainty as to the fact of damage is established, less certainty is required as to the amount of damage”].)

■ Fourth, requiring the plaintiff to prove that it is reasonably probable that she could have earned the salary she now claims is foreclosed by virtue of her injury ensures that the jury’s fixing of damages is not wholly, and thus impermissibly, speculative. (*Ferguson, supra*, 30 Cal.4th at p. 1048 [noting “public policy against speculative damages”]; *Piscitelli v. Friedenberg* (2001)

87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88] (“it is fundamental that ‘damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery’ ”).) Use of this standard also ensures that the jurors, faced with a vacuum of evidence, do not commit misconduct by impermissibly resorting to their own extra-record knowledge in attempting to agree upon the likelihood that the plaintiff would become fit and qualified for a particular career. (E.g., *People v. Holloway* (1990) 50 Cal.3d 1098, 1108 [269 Cal.Rptr. 530, 790 P.2d 1327] [jurors may not rely on extra-record knowledge], overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 [38 Cal.Rptr.2d 394, 889 P.2d 588].)

Lastly, the reasonable probability standard harmonizes nearly all of the patchwork of cases that specify which careers a jury may look to in assessing a plaintiff’s earning capacity. In cases where the plaintiff is already part of the work force, courts have looked to the plaintiff’s earning capacity in his or her chosen career. (*Hicks v. Ocean Shore Railroad, Inc.* (1941) 18 Cal.2d 773, 784–785 [117 P.2d 850] (*Hicks*) [steam shovel operator]; *Torr v. United Railroads of San Francisco* (1921) 187 Cal. 505, 508–509 [202 P. 671] [teacher]; *Bonneau v. North S. R. Co.* (1907) 152 Cal. 406, 413–414 [93 P. 106] (*Bonneau*) [insurance solicitor]; *Neumann, supra*, 59 Cal.App.3d at p. 461 [employment with same employer]; *Khan, supra*, 132 Cal.App.2d at p. 418 [common laborer]; *Kraft v. Acme Stevedore Co.* (1931) 112 Cal.App. 653, 657–658 [297 P. 585] [stevedore]; *Washington v. Pacific E. R. Co.* (1910) 14 Cal.App. 685, 687–688 [112 P. 904] [physician].) In such instances, the fact that the plaintiff was fit and qualified for that career more than sufficed to show a reasonable probability that he could have been fit for that very same career in the future. Of course, the task of determining a plaintiff’s available career options is more difficult when the plaintiff is not yet in the work force. Where a very young plaintiff’s catastrophic injury precludes any work, courts have fixed the lost earning capacity as the average salary of all workers in the workforce. (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 241–242 [116 Cal.Rptr. 733].) In that instance, it was reasonably probable that the plaintiff was fit and qualified to do something in the workforce, so the average salary of any and all workers was a reasonable measure. However, where a young plaintiff’s injury prevents him or her from pursuing a specific career, courts have generally required some proof that the plaintiff is far along in his or her training or experience. Where she adduces such proof, courts have looked to that career’s earnings to fix lost earning capacity. (E.g., *Connolly, supra*, 49 Cal.2d at pp. 488–489 [plaintiff was a “champion tennis player” who had won the National Singles Title three times, won the “four major championships of the world” and been offered a professional tennis tour; permissible to look to salary for professional tennis players]; *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 Cal.App.2d 795, 803–805 [151 P.2d 647] [apprentice electrician; permissible to look to salary for electricians];

Rodriguez, supra, 87 Cal.App.3d at pp. 656–659 [same, as to apprentice sprinkler fitter].) Where the plaintiff has not established her likely fitness for a particular career, courts have refused to look to that career in fixing earning capacity. (E.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 419 [185 Cal.Rptr. 654, 650 P.2d 1171] [plaintiff had less than “B” average in college and “unspectacular” test scores; impermissible to look to future earnings for doctors]; *Martinides v. Mayer* (1989) 208 Cal.App.3d 1185, 1205–1206 [256 Cal.Rptr. 679] [plaintiff had “C” grades in high school, never attended college or any nursing classes; impermissible to look to future earnings for nurses].)

To be sure, a handful of cases suggest that a plaintiff’s earning capacity is within a jury’s common knowledge and thus may be left to the jury’s judgment without the requirement of any evidence as to plaintiff’s fitness for a particular career. (*Girard v. Irvine* (1929) 97 Cal.App. 377, 386 [275 P. 840]; *Evarts v. Santa Barbara C. R. Co.* (1906) 3 Cal.App. 712, 715 [86 P. 830].) *Gargir* also seems to suggest that enrollment in college with a special education major with the intention to attend graduate school is enough by itself to establish an earning capacity based upon a career in special education. (*Gargir, supra*, 66 Cal.App.4th at pp. 1280–1282.) Because *Girard*, *Evarts*, and *Gargir* are inconsistent with the weight of later Supreme Court precedent on this point and with the standard we derive from that precedent, we respectfully disagree with those decisions.

Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness (e.g., *Markley v. Beagle* (1967) 66 Cal.2d 951, 956 [59 Cal.Rptr. 809, 429 P.2d 129]; *Neumann, supra*, 59 Cal.App.3d at p. 461); (2) by the testimony of lay witnesses, including the plaintiff (e.g., *Storrs, supra*, 134 Cal. at pp. 94–95); or (3) by proof of the plaintiff’s prior earnings in that same career (e.g., *Perry v. McLaughlin* (1931) 212 Cal. 1, 12 [297 P. 554]; *Bonneau, supra*, 152 Cal. at pp. 413–414; *Ridley v. Grifall Trucking Co.* (1955) 136 Cal.App.2d 682, 688 [289 P.2d 31]; *Tornell v. Munson* (1947) 80 Cal.App.2d 123, 125 [181 P.2d 112]). As these options suggest, expert testimony is not always required. (E.g., *Paxton, supra*, 119 Cal.App.2d at p. 414; *Gargir, supra*, 66 Cal.App.4th at pp. 1280–1281; Evid. Code, § 801, subd. (a) [expert testimony must “[r]elate[] to a subject that is sufficiently beyond common experience”].) If an expert does testify, however, his or her testimony about the plaintiff’s earning capacity must still be grounded in reasonable assumptions. (*Rodriguez, supra*, 87 Cal.App.3d at p. 659.) Some older Supreme Court decisions seem to suggest that the earning capacity of certain careers is within the jury’s common knowledge without the need for further proof. (*Lindemann, supra*, 5 Cal.2d at pp. 494–495; *Storrs*, at p. 94.) In light of the vast array of diverse and disparate careers available today as well as the extensive case law setting forth the multiplicity of ways

in which plaintiffs can and should prove the earnings associated with certain careers, we question whether these older cases are still viable. We have no occasion to reach this question because, as discussed below, plaintiff did not prove she was likely to become fit and qualified to be a lawyer.

Plaintiff offers three arguments in support of her position that the evidence she produced at trial—namely, her interest in a legal career and her letters of acceptance to law school—supported the jury's \$730,000 award for lost earning capacity and that no greater showing is required.

First, she contends that a loss of earning capacity may be inferred from the nature of the injury. As explained above, a jury may infer the *fact* of a loss of earning capacity. (See *Storrs, supra*, 134 Cal. at p. 94.) But the jury may not infer the *amount* or *extent* of that loss from the injury alone.

Second, plaintiff asserts that once she shows the fact of a loss of earning capacity, the burden shifts to the defendant to set an upper limit on her earning capacity and that the upper limit is not confined to the career plaintiff has chosen to pursue. As noted above, courts have drawn a distinction between the fact of an injury to a plaintiff's earning capacity on the one hand, and the extent of that injury on the other. (E.g., *Sargon, supra*, 55 Cal.4th at pp. 774–775.) That distinction lessens a plaintiff's burden to show the extent of damages once the fact of injury has been established, but it does not shift the burden to the defendant. Further, whether the inquiry into a plaintiff's earning capacity encompasses all careers for which a plaintiff shows her fitness to be reasonably probable or is instead limited to the subset of those careers that plaintiff desires to pursue is a difficult question. It is also one we need not resolve today in light of plaintiff's failure, discussed below, to adduce evidence on her fitness for *any* career.

Lastly, plaintiff argues that the case law does not require a plaintiff to adduce evidence quantifying any loss of earning capacity. For support, she cites *Connolly, supra*, 49 Cal.2d 483, *Hicks, supra*, 18 Cal.2d 773, *Heiner, supra*, 84 Cal.App.4th 335, and *Gargir, supra*, 66 Cal.App.4th 1269. *Connolly, Hicks*, and *Heiner* do not support plaintiff's argument because in each case the plaintiff introduced evidence of what persons in the plaintiff's chosen career earned. (*Connolly*, at pp. 488–489; *Hicks*, at p. 784; *Heiner*, at pp. 346–348.) And, as we explained above, *Gargir* is an outlier decision we decline to follow.

B. *Sufficiency of the evidence under this standard*

The trial court did not err in concluding that substantial evidence did not support the jury's award of \$285,000 in past lost earnings and \$730,000 in loss of earning capacity.

With respect to the loss of earnings prior to trial, the evidence indicated that, absent her injury, plaintiff would have started law school in the fall of 2013 and would still have been a law student by the time of trial in May 2015. Thus, there was no evidence of lost earnings prior to trial.

With respect to the prospective loss of earning capacity, plaintiff presented sufficient evidence that she was “reasonably certain” to suffer some loss of earning capacity due to the perpetual pain, bloating and dysfunction of her digestive tract caused by the negligently performed surgery. However, she did not introduce evidence establishing a reasonable probability that she could have become qualified and fitted to earn a lawyer’s salary. Absent from the record is any evidence of her likelihood of graduating from Suffolk Law School, her likelihood of passing the Bar, or her likelihood of obtaining a job as a lawyer. Plaintiff also adduced no evidence as to what lawyers earn.

III. *Remedy*

Defendants argue that the trial court’s finding that the jury’s award of economic damages was unsupported by the evidence obligated the court to grant their motion for judgment notwithstanding the verdict and deny their new trial motion. Although we review the denial of a motion for judgment notwithstanding the verdict for substantial evidence (*Sweatman, supra*, 25 Cal.4th at p. 68) and the grant of a new trial for an abuse of discretion (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636 [61 Cal.Rptr.3d 634, 161 P.3d 151]), a trial court’s selection of the appropriate remedy in this case turns on a question of statutory construction; as such, it is a question of law we review de novo. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95–96 [201 Cal.Rptr.3d 459, 369 P.3d 238].)

■ A party faced with an adverse result may move for judgment notwithstanding the verdict when, among other things, the “verdict” is “not supported by the facts.” (Code Civ. Proc., § 663; see *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919 [52 Cal.Rptr.3d 126].) What is more, when the facts are insufficient and “[w]hen the [nonmoving party] has had full and fair opportunity to present [her] case, . . . a judgment for [the moving party] is required and no new trial is ordinarily allowed.” (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661 [278 Cal.Rptr. 596] (*McCoy*); see *Kelly*, at p. 919; *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 289 [133 Cal.Rptr.3d 774] (*Kim*); *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1232 [12 Cal.Rptr.3d 533].)

This general rule is grounded in two rationales. The first is judicial economy and, in particular, the recognition that a trial “is not a practice run to be scrapped in favor of a more complete proceeding in the event of an

adverse judgment.” (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 575 [121 Cal.Rptr.2d 317].) If the plaintiff did not adduce sufficient evidence in the first trial, the logic goes, why should she be given a second bite at the apple? The second rationale is procedural symmetry: If a trial court grants a nonsuit or directed verdict due to insufficient evidence, the remedy is entry of judgment for the moving party, not a new trial; why should the remedy be any different when the finding of insufficient evidence is made in a posttrial motion for judgment notwithstanding the verdict? (See *McCoy, supra*, 227 Cal.App.3d at p. 1661.)

■ We reject defendants’ suggestion that this general rule is without exception, and we do so for several reasons. To begin, the statute that confers upon trial courts the power to grant a new trial specifically authorizes—and thus specifically contemplates—a new trial due to “[i]nsufficiency of the evidence to justify the verdict” or due to “[e]xcessive . . . damages.” (Code Civ. Proc., § 657.) A trial court evaluating a new trial motion on these grounds sits “as a thirteenth juror,” asking whether “‘the weight of the evidence appears to be contrary to the jury’s determination’”; in so doing, the court is free to “‘disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact.’” (*Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503 [129 Cal.Rptr.3d 490], quoting *Mercer v. Perez* (1968) 68 Cal.2d 104, 112 [65 Cal.Rptr. 315, 436 P.2d 315].) Because, as noted above, a trial court evaluating a motion for judgment notwithstanding the verdict may not independently assess the evidence, trial courts have greater latitude to grant a new trial than to grant judgment notwithstanding the verdict. However, a verdict that is “against the weight of the evidence” necessarily includes a verdict not supported by any evidence; consequently, defendants’ proposed rule that a new trial may not be granted whenever a judgment notwithstanding the verdict could be granted would curtail to some extent a trial court’s freedom to grant a new trial. To avoid this result, courts have recognized that the general rule favoring entry of judgment will give way to a court’s discretion to grant a new trial in cases (1) where newly discovered evidence may be introduced at the new trial (*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 153 [87 Cal.Rptr.3d 5]; *Kim, supra*, 201 Cal.App.4th 267 at p. 289), or, more generally, (2) where a retrial would serve some further purpose beyond giving the nonmoving party a second opportunity to try her case (*Cardinal Health*, at p. 153).

We conclude that the trial court did not err in ruling that this case is excepted from the general rule mandating entry of judgment, and that the trial court did not abuse its discretion in granting a new trial. Two reasons support this conclusion. First, as the trial court remarked, the jury’s woefully inadequate award for pain and suffering damages and its wholly unsupported

award for economic damages suggest the possibility that the jury may have incorrectly filled in the blanks for damages on the special verdict form. If that is the case, allowing plaintiff the opportunity to fix one half of the prior jury's mistake (by obtaining a larger damages award for pain and suffering in a retrial) while denying her the opportunity to fix the other half (by obtaining any damages for economic loss) would be unfair. Second, the trial court did not rule on plaintiff's request for judicial notice of the Bureau's median salary for lawyers until the close of evidence. Although the court gave the issue thoughtful consideration, the end result is that plaintiff did not have a definitive ruling until it was too late to marshal other evidence on this point (and too late to allow defendants to marshal contrary evidence). Although plaintiff certainly could have taken the "belt and suspenders" approach and introduced other evidence at the outset, we think the lateness of the court's ruling along with the jury's possible confusion in awarding damages make it fair for the court to have granted plaintiff a second opportunity to prove all of her damages. This interest in fairness takes the unusual circumstances of this case outside of the general rule mandating entry of judgment and places the trial court's grant of a new trial within its discretion.

IV. Evidentiary Issues on Retrial

Plaintiff raises two evidentiary issues sure to arise during the damages retrial.² In the interest of judicial economy, we address them now.

A. Judicial notice

Plaintiff argues that the trial court is obligated as a matter of law to take judicial notice of the Bureau's report indicating that the median salary for lawyers in 2012 was \$113,530, and that the trial court has no discretion to exclude that evidence.

■ A court may take judicial notice of, among other things, the "[o]fficial acts of the legislative, executive, and judicial departments of the United States . . ." and "[f]acts and propositions that are not reasonably

² Plaintiff also invites us to direct the trial court on retrial to instruct the jury that her loss of earning capacity can be inferred from the nature of her injury, that earning capacity turns on what a plaintiff "could" have earned, and that she need not present expert testimony on earning capacity. We decline plaintiff's invitation. Our opinion sets forth the guiding legal principles, and we will not hamstring the trial court by telling it in advance which instructions to give, particularly when those instructions may depend upon the evidence introduced during the retrial, which we cannot anticipate at this time.

subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subds. (c) & (h).) What is more, the court’s discretion to take judicial notice of these matters disappears—and the court becomes *obligated* to judicially notice these matters—if the moving party gives adequate advance notice. (Evid. Code, § 453.) Because judicially noticed matters are a “‘substitute for proof,’ ” the trial court retains its usual discretion not to take judicial notice of matters that are irrelevant or, under Evidence Code section 352, have a probative value that is substantially outweighed by the probability that their admission will create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [31 Cal.Rptr.2d 358, 875 P.2d 73] (*Mangini*), overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276 [63 Cal.Rptr.3d 418, 163 P.3d 106].)

■ We conclude that the trial court is not obligated to take judicial notice of the fact that the average median salary of lawyers in 2012 was \$113,530 for several reasons. This fact is not necessarily subject to judicial notice as an “[o]fficial act.” (Evid. Code, § 452, subd. (c).) Although the Bureau’s report is an official act of a federal executive agency, this ground for taking judicial notice extends to the official act itself (that is, the fact that the Bureau has published a report on attorney salaries), but not the truth of the facts relayed through that official act (that is, the fact that median salary was \$113,530). (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 541–542 [188 Cal.Rptr.3d 171] (“[w]e can take judicial notice of official acts and public records, but we cannot take judicial notice of the truth of the matters stated therein”); *Horne v. District Council 16 Internat. Union of Painters & Allied Trades* (2015) 234 Cal.App.4th 524, 535 [183 Cal.Rptr.3d 879]; *Mangini, supra*, 7 Cal.4th at pp. 1063–1064.) This fact is also not necessarily subject to judicial notice as a fact “not reasonably subject to dispute” because the attorney salary figure set forth in the report is not “capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).) The report does not cite any further source for the salary figure, and the report cannot verify its own accuracy. Nor is the median salary subject to judicial notice, as plaintiff argued below, just because she gave notice to defendants of her request. The plain language of Evidence Code section 453 makes clear that judicial notice becomes mandatory only if the matter to be noticed fits within one of the categories set forth in section 452. (Evid. Code, § 453 [“The trial court shall take notice of any matter *specified in Section 452*” (italics added)].) This is not to say that an expert could not rely upon the Bureau’s report in forming an opinion (Evid. Code, § 801, subd. (b)), but the report’s factual findings are not themselves subject to mandatory judicial notice.

Plaintiff resists this conclusion, citing several cases she insists allow for judicial notice of facts contained in reports of government agencies. Plaintiff cites *Kilker v. Stillman* (2015) 233 Cal.App.4th 320, 328 [182 Cal.Rptr.3d 712], but the court in that case refused to take judicial notice of material irrelevant to the case before it. Plaintiff also cites *Lorraine v. Markel American Ins. Co.* (D.Md. 2007) 241 F.R.D. 534, 551, but that case did not involve judicial notice at all. Plaintiff points us to *Rizo v. Yovino* (E.D.Cal., Dec. 4, 2015, No. 1:14-cv-0423-MJS) 2015 U.S.Dist. Lexis 163849, where the court took judicial notice of a Bureau report, but that court did so in part on the basis of rule 902 of the Federal Rules of Evidence, which does not apply here. (*Rizo*, at pp. *12-*13.) Plaintiff is correct that the court in *In re Israel O.* (2015) 233 Cal.App.4th 279, 289, footnote 8 [182 Cal.Rptr.3d 548], took judicial notice of the content of official documents setting forth how federal agencies were interpreting a federal statute, and *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 666, footnote 1 [51 Cal.Rptr.3d 821], took judicial notice of the racial composition of California residents found in a federal Census Bureau website. But *In re Israel O.* judicially noticed the actions of the federal agencies as reflected by their opinions rather than the facts contained in those opinions, and *Sanchez* cited the Census Bureau statistics as an aside and without any analysis of whether doing so was appropriate under our judicial notice statutes. These cases do not dictate a different analysis from the one we have set forth above.

B. *Information specific to plaintiff's chosen law school*

Plaintiff also argues that the trial court must exclude evidence regarding the graduation rates, Bar passage rates and employment statistics of students of the Suffolk Law School. She claims that school-specific information is per se inadmissible under *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110 [267 Cal.Rptr. 503], superseded on other grounds in Evidence Code section 1157. *Hinson* held that the poor reputation of a medical school was inadmissible, as improper character evidence, when admitted to show that the defendant—a graduate of that school—committed malpractice against the plaintiff. (*Hinson*, at p. 1122.) *Hinson* does not speak to the admissibility of school-specific information when it is introduced for other purposes, such as to show whether there is a reasonable probability that a plaintiff attending that school will graduate, pass the Bar or become gainfully employed as a lawyer. If the evidence introduced during the retrial supports a link between a law school and the earning capacity of its graduates, then it is up to the trial court to assess whether the evidence should be admitted. The limitations on character evidence set forth in *Hinson*, however, do not erect an absolute bar to admissibility.

DISPOSITION

The judgment is affirmed. Each party is to bear its own costs.

Boren, P. J., and Chavez, J., concurred.

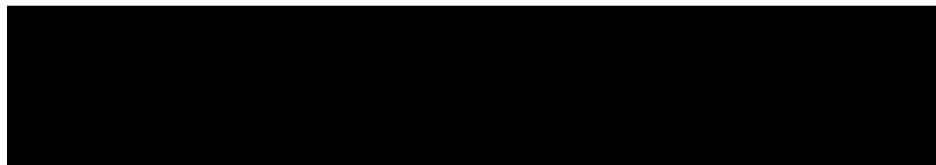
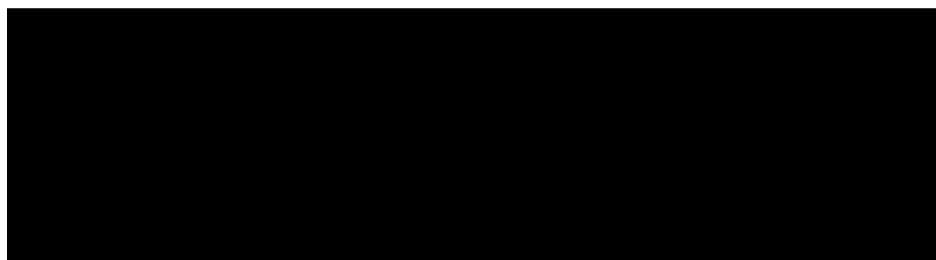
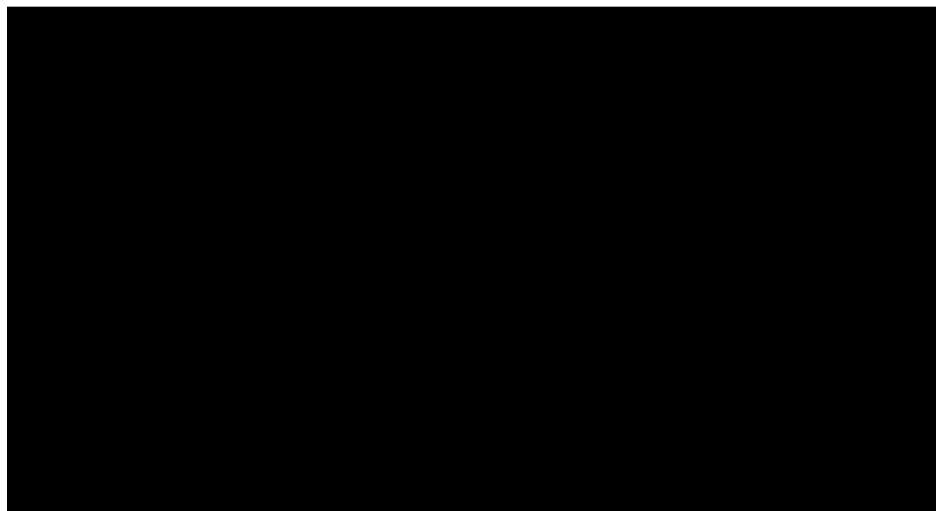
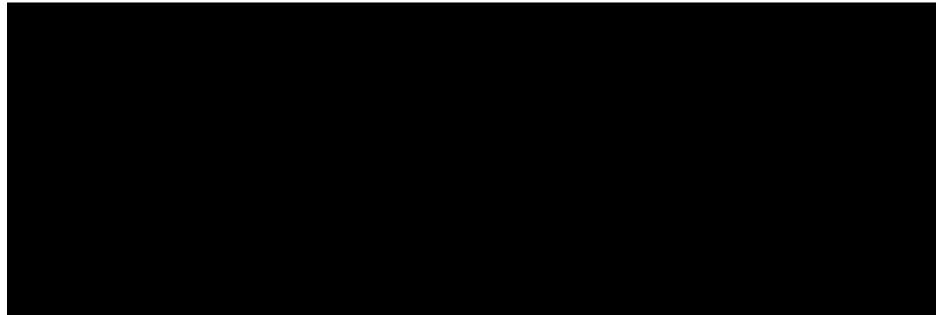
[No. B266185. Second Dist., Div. One. Sept. 29, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
NICHOLAS HALLAM, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

LUI, J.—In this appeal we consider whether the entry during business hours into a commercial establishment’s employee restroom to commit larceny qualifies as “shoplifting” under Penal Code¹ section 459.5 as enacted by the voters in Proposition 47. We conclude that it does.

Nicholas Hallam appeals an order denying his petition for resentencing/application to redesignate his felony conviction for second degree burglary as misdemeanor shoplifting pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47 or the Act). (§§ 1170.18, subds. (a)–(e), (f)–(i), 459.5.) The trial court reasoned that because appellant entered a store through the back entrance and committed the theft in an “employee area” of the store, the offense did not meet the definition of “shoplifting” under section 459.5, and his felony conviction thus did not qualify for resentencing or redesignation as a misdemeanor under section 1170.18, subdivisions (a) through (e) or (f) through (i).² Appellant contends the trial court erred in denying his application because his crime satisfied the elements of shoplifting under section 459.5 and the factors cited by the court did not disqualify him from relief under section 1170.18, subdivisions (b) or (i). We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2011, appellant entered a Computers NLA store during business hours and used the employee restroom with the store’s permission. When he left the store, he proceeded to the back of the building. There he climbed over a fence and reentered the store through the back door. He returned to the restroom and took an air compressor valued at \$350.

On May 24, 2011, appellant entered a plea of no contest to one count of second degree burglary. The court sentenced him to two years in state prison.

¹ Undesignated statutory references are to the Penal Code.

² Appellant’s application/petition for resentencing indicated he had completed his sentence but was still on probation or parole. He requested that his felony sentence be recalled and that he be resentenced to a misdemeanor sentence pursuant to section 1170.18, subdivisions (a) through (e). He also sought relief pursuant to section 1170.18, subdivisions (f) through (i), requesting that the felony conviction be designated a misdemeanor conviction. The trial court treated appellant’s request as an application to designate a felony conviction as a misdemeanor conviction.

On April 21, 2015, appellant filed a petition for resentencing/application for redesignation of a conviction pursuant to section 1170.18, subdivisions (a) through (e) and (f) through (i), seeking to designate his felony burglary conviction as a misdemeanor shoplifting conviction. The district attorney opposed the application on the grounds that the employee restroom was not an area to which the public generally had access, and appellant intended to steal an item that belonged to the store but was not store merchandise.

The trial court concluded Proposition 47 would not apply to reduce appellant's felony conviction to a misdemeanor, reasoning that, to qualify as shoplifting, the statute "anticipates" entry into an area of a commercial establishment to which the public has access and where merchandise is sold. Because appellant did not enter the store through the front door and he took an item from the employee area, the court ruled that appellant's offense did not meet the criteria for shoplifting under section 459.5.

DISCUSSION

California voters approved Proposition 47 on November 4, 2014. The stated intent of the initiative was to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70; see *People v. Stylz* (2016) 2 Cal.App.5th 530, 533 [206 Cal.Rptr. 3d 301]; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 [183 Cal.Rptr.3d 362].)

■ To fulfill its purpose of "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession" (Voter Information Guide, Gen. Elec., *supra*, § 3, p. 70), Proposition 47 added section 459.5 to the Penal Code, creating "a new crime of 'shoplifting,' a misdemeanor offense that punishes certain conduct that previously would have qualified as a burglary"³ (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1112 [195 Cal.Rptr.3d 482] (*J.L.*)). Section 459.5, subdivision (a) defines shoplifting as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950)."

³ While shoplifting is generally to be treated as a misdemeanor, a person who has a prior "super-strike" conviction (§ 667, subd. (e)(2)(C)(iv)) or is required to register as a sex offender (§ 290, subd. (c)) is excluded from the misdemeanor designation for the crime under section 459.5, and "may be punished pursuant to subdivision (h) of section 1170" (§ 459.5, subd. (a)).

■ “Proposition 47 allows a person . . . who is currently serving a felony sentence for an offense that is now a misdemeanor . . . to petition for recall of sentence and resentencing in accordance with its provisions.” (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1308–1309 [194 Cal.Rptr.3d 658]; see § 1170.18, subd. (a).) *Hoffman* noted that if the petitioner meets the statutory criteria, the trial court has no discretion to deny the petition, unless the court determines that resentencing “‘would pose an unreasonable risk of danger to public safety.’” (*Hoffman, supra*, at p. 1309; see § 1170.18, subd. (b).) The initiative also includes a procedure whereby a person who has completed the sentence on a felony conviction for an offense that is now a misdemeanor under the Act may file an application in the trial court to have the felony conviction designated as a misdemeanor. (§ 1170.18, subd. (f); *People v. Tidwell* (2016) 246 Cal.App.4th 212, 218 [200 Cal.Rptr.3d 567].)

■ Unlike the petition for recall and resentencing, the trial court undertakes no assessment of any risk to public safety in ruling on an application for designation of a felony as a misdemeanor under Proposition 47: If the application satisfies the statutory criteria in subdivision (f), the court *shall* designate the felony offense as a misdemeanor. (§ 1170.18, subd. (g).) Thus, the court has no discretion to deny the application of a person who has completed his felony sentence and “who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense.” (§ 1170.18, subd. (f).)

Appellant contends that because he satisfies the statutory criteria for reclassifying his burglary conviction as shoplifting under the plain language of section 459.5, the trial court erred in denying his application. We agree.

■ Our interpretation of Proposition 47 “is governed by the same rules that apply in construing a statute enacted by the Legislature.” (*People v. Park* (2013) 56 Cal.4th 782, 796 [156 Cal.Rptr.3d 307, 299 P.3d 1263]; see *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 [107 Cal.Rptr.3d 265, 227 P.3d 858].) “‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.’” (*Horwitz v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927].) “We begin with the language of the statute, to which we give its ordinary meaning and construe in the context of the statutory scheme.” (*People v. Johnson* (2015) 61 Cal.4th 674, 682 [189 Cal.Rptr.3d 794, 352 P.3d 366].) “A statute ‘“must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.”’” (*People v. Zambia* (2011) 51 Cal.4th 965, 972 [127 Cal.Rptr.3d 662, 254 P.3d 965].) “Once the electorate’s intent has been ascertained, the provisions must be construed to conform to that intent. [Citation.] ‘[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the

voters should get what they enacted, not more and not less.’ ” (*People v. Park, supra*, 56 Cal.4th at p. 796.)

■ “The crime of shoplifting has three elements: (1) entry into a commercial establishment, (2) while the establishment is open during regular business hours, and (3) with intent to commit larceny of property valued at \$950 or less.” (*J.L., supra*, 242 Cal.App.4th at p. 1114; see § 459.5, subd. (a).) “Any other entry into a commercial establishment with intent to commit larceny is burglary.” (§ 459.5, subd. (a).)

The parties do not dispute that the Computers NLA store is a “commercial establishment,” or that appellant intended to and did commit larceny of property valued at less than \$950. The Attorney General, however, contends that appellant “failed to satisfy his initial burden to show that the store he entered was ‘open during regular business hours’ within the meaning of the shoplifting statute.” We disagree.

When appellant pleaded no contest to the charge of second degree burglary, the parties stipulated to a factual basis as set forth in the police reports.⁴ At the hearing on the application for redesignation of the felony, defense counsel stated specifically during his summary of the arrest reports that the store “was open during business hours.” In addition, the probation report before the court when appellant entered his plea states that appellant was detained and arrested on the scene on May 13, 2011, at 11:40 a.m.

In ruling on the application, the trial court accepted the representation that the crime occurred during regular business hours, expressly acknowledging that the front of the store through which appellant initially walked to reach the restroom was open for business. Moreover, the prosecutor failed to dispute the defense representation that the theft occurred during regular business hours, agreeing with the trial court’s statement that the store was a commercial establishment that was open for business, while the employee restroom was not.

“The trial court’s decision on a section 1170.18 petition is inherently factual, requiring the trial court to determine whether the defendant meets the statutory criteria for relief” (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892 [188 Cal.Rptr.3d 698]), and we review the trial court’s factual findings for substantial evidence (*People v. Trinh* (2014) 59 Cal.4th 216, 236 [173 Cal.Rptr.3d 1, 326 P.3d 939]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136 [197 Cal.Rptr.3d 743]). Here, the trial court’s characterization of the Computers NLA store as a commercial establishment that was open for

⁴ The record on appeal contains no police reports.

business when appellant entered is not reasonably open to question. We therefore reject the Attorney General's assertion that appellant failed to carry his burden of establishing that the entry occurred during the store's regular business hours.

■ On the other hand, we review de novo the trial court's legal conclusion that the store's employee restroom was not part of a "commercial establishment" within the meaning of section 459.5, subdivision (a). (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 [45 Cal.Rptr.3d 394, 137 P.3d 218]; *People v. Perkins*, *supra*, 244 Cal.App.4th at p. 136.) " "[I]n construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language." " (In re Hoddinott (1996) 12 Cal.4th 992, 1002 [50 Cal.Rptr.2d 706, 911 P.2d 1381]; see also *People v. Rizo* (2000) 22 Cal.4th 681, 685–686 [94 Cal.Rptr.2d 375, 996 P.2d 27].)

■ Turning to the words of the statute here, we find no indication that shoplifting can occur only in specific areas of a commercial establishment. Nor does there appear any requirement that the business's commercial activity must be taking place in the area from which the theft occurs in order to qualify the offense as shoplifting. The trial court thus added an element to the offense that is absent from the plain language of the statute itself when it determined that appellant's theft would qualify as shoplifting only if it occurred in an area of the commercial establishment open to the public where merchandise is sold. Based on its impermissible revision of the definition of shoplifting, the court concluded that the crime was burglary rather than shoplifting because appellant entered the store through the back and stole an item from the employee restroom rather than an area of the store that was "open for business."

Relying on *J.L.*, *supra*, 242 Cal.App.4th at pages 1114–1115, the Attorney General urges that we adopt a "commonsense meaning" of "commercial establishment" to hold that the term excludes any room within the business where the buying and selling of goods or services does not occur. According to the Attorney General, because "[a] person is guilty of burglary who enters a room with the intention to commit a theft" (*People v. Edwards* (1971) 22 Cal.App.3d 598, 602 [99 Cal.Rptr. 516]), when appellant returned to the employee restroom to steal the air compressor, he did not enter a commercial establishment within the meaning of section 459.5. In *J.L.*, however, the court applied its commonsense interpretation of "commercial establishment" not to a single room or area within a commercial venue, but to an entire school facility, and concluded that "[a] public high school is not an establishment

primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students.” (*J.L.*, *supra*, 242 Cal.App.4th at p. 1114.)

In contrast to the public high school in *J.L.*, Computers NLA unquestionably qualifies as a “commercial establishment” within the meaning of section 459.5, subdivision (a). We find nothing in *J.L.*’s discussion of schools to inform our decision as to whether shoplifting includes the entry into any area of a commercial establishment during business hours, whether open to the public or not, as long as the establishment as a whole is open for business.

We do, however, find guidance on the question in our Supreme Court’s recent holding in *People v. Garcia* (2016) 62 Cal.4th 1116 [199 Cal.Rptr.3d 164, 365 P.3d 928] (*Garcia*). There, the defendant challenged two burglary convictions that resulted from his entry into a store to commit robbery followed by his entry into the store’s bathroom to commit rape. Reversing the dual burglary convictions, our Supreme Court found insufficient evidence that the bathroom afforded “its occupants a separate and reasonable expectation of protection from intrusion and danger, beyond that provided by the shop itself.” (*Id.* at p. 1120.) The court explained: “Where a burglar enters a structure enumerated under section 459 with the requisite felonious intent, and then subsequently enters a room within that structure with such intent, the burglar may be charged with multiple burglaries only if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure. Such a separate expectation of privacy and safety may exist where there is proof that the internal space is owned, leased, occupied, or otherwise possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to the stand-alone structures enumerated in section 459.” (*Id.* at pp. 1119–1120.) The court identified several characteristics that might indicate an interior room shares the enhanced expectation of privacy and security of a stand-alone structure, including a locked door and signs to prevent unauthorized access. (*Id.* at p. 1129.) Such features demonstrate “a separate and objectively reasonable expectation of protection from intrusion, distinct from that provided by the security of the overarching structure.” (*Id.* at p. 1127.)

Here, like the store bathroom in *Garcia*, the restroom in the Computers NLA store was separate from the main part of the business and was not generally open to the public. But as in *Garcia*, there is no evidence the restroom in this case was kept locked or provided any more than “a limited transitory source of privacy.” (*Garcia*, *supra*, 62 Cal.4th at p. 1132.) As demonstrated by appellant’s use of the restroom before returning to steal the air compressor, there appeared to be no obstacles to gaining entry to this

“employee area.” The area thus lacked any objective indications of a heightened expectation of privacy and security beyond what the store itself provided such that the offense should be deemed burglary rather than shoplifting.

■ Because appellant’s crime qualified under section 459.5 as shoplifting, the trial court erred in denying relief under Proposition 47.

DISPOSITION

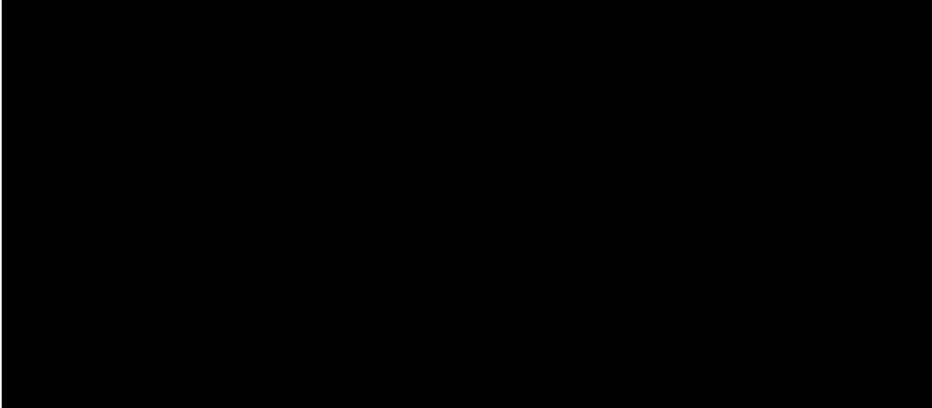
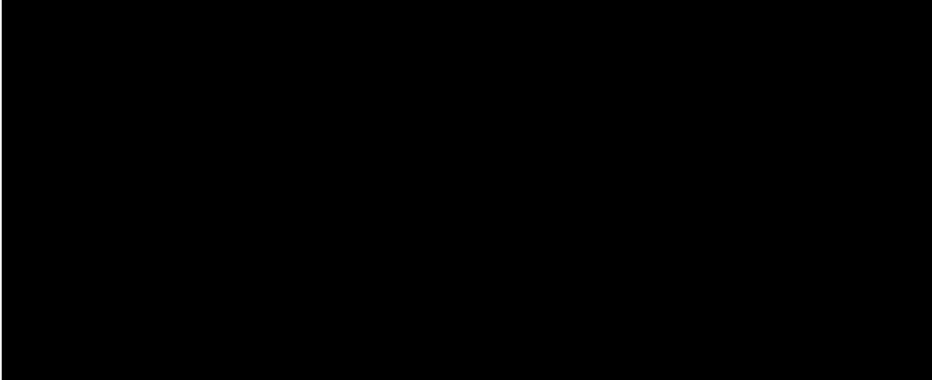
The order is reversed.

Chaney, Acting P. J., and Johnson, J., concurred.

[No. B271508. Second Dist., Div. One. Sept. 29, 2016.]

JOHN DOE, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
POULET NIKOLAY, Real Party in Interest.

[REDACTED]



COUNSEL

The Ryan Law Firm, Kelly F. Ryan and Nathaniel P. Loakes for Petitioner.
No appearance for Respondent.

[REDACTED]

No appearance for Real Party in Interest.

OPINION

CHANEY, J.—Petitioner John Doe seeks a writ of mandate vacating an order of the superior court directing that all future proceedings in the underlying action, brought pursuant to Civil Code section 1708.85,¹ be filed with his true name. We grant the petition, vacate the superior court’s April 8, 2016 order compelling the parties to file all future documents utilizing Doe’s true name, and direct the superior court to treat Judicial Council Confidential Information form MC-125 as confidential and not available for public inspection.

BACKGROUND

Section 1708.85, which became operative on July 1, 2015, provides for a private cause of action “against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other’s consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages as described in Section 48a.” (§ 1708.85, subd. (a).)

On January 20, 2016, Doe filed a complaint against Poulet Nikolay, alleging that Nikolay violated section 1708.85 by distributing, and threatening to distribute to Doe’s employer, electronic and/or physical copies of photographs, film, videotape and recordings, depicting Doe’s exposed intimate body parts or showing Doe engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration. The complaint was filed utilizing the pseudonym, John Doe.

Section 1708.85, subdivision (f), permits a party to file such an action under a pseudonym. As required by section 1708.85, subdivision (f)(1), Doe filed and served a confidential information form, Judicial Council form MC-125, which included Doe’s true name and informed the court that he would be using a pseudonym throughout the course of the action. The statute requires that the “court shall keep the plaintiff’s name and excluded or

¹ Future references are to the Civil Code unless otherwise specified.

redacted characteristics confidential.” (§ 1708.85, subd. (f)(1).) Form MC-125 included Doe’s true name in the body of the form.

The superior court, at some point after Doe filed form MC-125, posted the form on its Web site, consequently making the confidential information available to the public during the time that it was posted.

The petition alleges that during a status conference on April 8, 2016, the superior court inquired of both parties as to whether they were in compliance with section 1708.85 and California Rules of Court, rule 2.551, relating to records filed under seal. Doe and Nikolay responded to the superior court that they were in compliance with section 1708.85 and California Rules of Court, rule 2.551, and directed the court’s attention to form MC-125 filed by Doe. The superior court requested that the court clerk determine whether the form was posted on the court’s Web site. Upon the clerk’s confirmation that it was posted, the superior court ordered that “all future pleadings are to be filed with the true name of the parties.”

This petition followed on April 13, 2016. We issued a temporary stay of the superior court’s order and ordered that pending resolution of this petition, documents and information posted on the superior court’s Web site should refer to petitioner only as John Doe. We issued an alternative writ on May 19, 2016, and invited briefing. Neither respondent court nor Nikolay filed an opposition to the petition or a return to our order to show cause.

Doe seeks a writ of mandate ordering respondent court to vacate the April 8, 2016 order requiring disclosure of his true name in all future pleadings.

DISCUSSION

Section 1708.85, which became operative on July 1, 2015, provides that a “private cause of action lies against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other’s consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages . . .” (§ 1708.85, subd. (a).)

■ Section 1708.85, subdivision (f)(1) specifically authorizes a plaintiff in such a civil proceeding to “proceed using a pseudonym, either John Doe, Jane Doe, or Doe, for the true name of the plaintiff and may exclude or redact

from all pleadings and documents filed in the action other identifying characteristics of the plaintiff. A plaintiff . . . shall file with the court and serve upon the defendant a confidential information form for this purpose that includes the plaintiff's name and other identifying characteristics excluded or redacted. The court shall keep the plaintiff's name and excluded or redacted characteristics confidential." (§ 1708.85, subd. (f)(1).)

Form MC-125 is marked "confidential" a total of four times. The form is marked "CONFIDENTIAL" at the top and bottom; in a text block there is a notice that the form is a "CONFIDENTIAL INFORMATION FORM UNDER CIVIL CODE SECTION 1708.85"; and the form specifically directs "TO COURT CLERK: THIS FORM IS CONFIDENTIAL."

■ Code of Civil Procedure section 367 requires that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc., § 367.) Here, the California Legislature has expressly provided for such an exception. This is not unique, and California courts have affirmed the ability to proceed as a pseudonymous plaintiff under circumstances in which privacy rights are implicated. "The judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web." (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1452, fn. 7 [86 Cal.Rptr.3d 482].) Section 1708.85 holds the court responsible for "keep[ing] the plaintiff's name and excluded or redacted characteristics confidential." (§ 1708.85, subd. (f)(1).) A confidential record is required to be closed to inspection by the public or a party. (Cal. Rules of Court, rules 2.254(c) ["electronically filed document is a public document at the time it is filed unless it is . . . made confidential by law"], 8.45.)

■ The superior court, after receiving form MC-125 from Doe, stated that because the form was posted online to the court's publicly accessible Web site, it obviated the need to refer to Doe by the pseudonym, and ordered the parties to thereafter refer to Doe by his real name. This, however, is not a circumstance in which a party waived a right to keep information confidential or sealed by inadvertently disclosing it. (See, e.g., Evid. Code, § 912.) The superior court, rather than a party, caused the temporary disclosure of Doe's confidential information by mistakenly posting it on the court's Web site. Further, the superior court's April 8 order would compound the harm to Doe by taking the erroneous disclosure of form MC-125, in which some confidential information appears solely in the body of the document, and using the court's mistaken disclosure to justify an order that all future filings, including

documents that will result in Doe's name becoming searchable online, include Doe's true name. This would defeat the objective of the Legislature in adopting section 1708.85.

Accordingly, we grant the petition and order respondent court to vacate its April 8, 2016 minute order. Respondent court is ordered to treat information filed on form MC-125 as confidential.

DISPOSITION

The petition is granted. The superior court's April 8, 2016 minute order is vacated. Respondent court is directed to comply with section 1708.85, subdivision (f)(1) to keep Doe's name and excluded or redacted characteristics confidential, as provided on form MC-125. The parties are to bear their own costs on appeal.

Rothschild, P. J., and Lui, J., concurred.

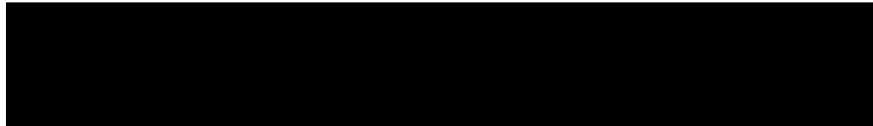
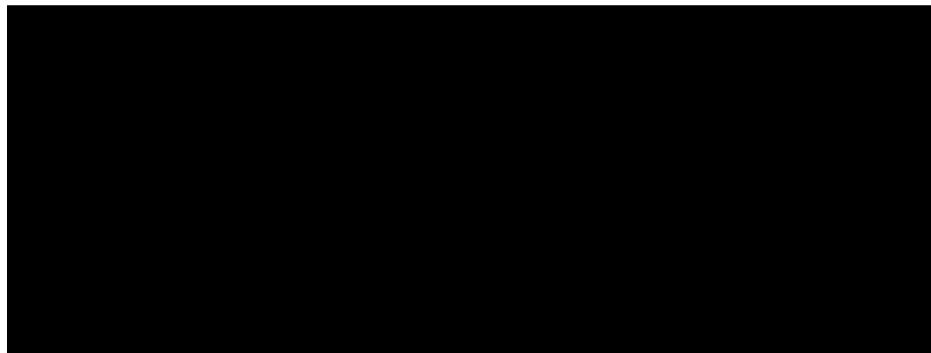
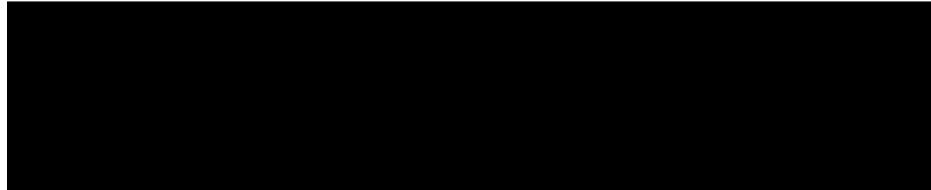
[No. B262485. Second Dist., Div. One. Sept. 29, 2016.]

WERTHEIM, LLC, Plaintiff and Respondent, v.
PARVIZ OMIDVAR et al., Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Diem Law and Robin L. Diem for Defendants and Appellants.

The Newell Law Firm, Felton T. Newell, Jr.; Broedlow Lewis, Jeffrey Lewis, Kelly B. Dunagan; Klapach & Klapach, Joseph S. Klapach; Law Offices of Jay F. Rahimi and Jay F. Rahimi for Plaintiff and Respondent.

OPINION

CHANAY, Acting P. J.—When the superior court entered judgment confirming a \$672,122 arbitration award against a lender in favor of a borrower's assignee, the lender appealed the judgment while the assignee attempted to enforce it by levying the lender's debtors. As a result of the enforcement efforts, the debtors interpleaded several million dollars and were discharged by the court and awarded \$238,615.45 in attorney fees paid out of the deposited funds.

We ultimately reversed the underlying judgment, after which the superior court released all deposited funds to the lender. The lender then moved to recoup the already-paid attorney fees from the borrower's assignee. In support of and in opposition to the lender's motion, each party contended the other's litigation tactics drove up the debtors' attorney fees. The trial court entered an order denying the lender's motion, which the lender now appeals.

We conclude the record supports the order.

BACKGROUND

This is the latest of many appeals involving these parties. Parviz Omidvar and his relatives and companies, including Currency Corporation (collectively Currency), loaned money at high interest rates to elderly artists who owned rights to receive royalty payments from music rights management companies such as Broadcast Music Inc. and the American Society of Composers, Authors and Publishers (the royalty payors). The artists assigned their royalty rights to Currency in exchange for the loans. Currency made dozens of such loans to Maibell Page, the widow of Eugene Page, a successful songwriter, who in exchange assigned her royalty rights to Currency.

In 2006, David Pullman, the owner of Wertheim, LLC, and founder and CEO of Structured Asset Sales, LLC (collectively Wertheim), persuaded Page and many other artists to assign to him their royalty rights and any causes of action they might have against Currency. Wertheim and Currency then began a multifront legal feud over the assigned royalty streams, each contending the other preys on the gullible elderly. (E.g., *Currency Corp. v. Wertheim* (May 20, 2011, B222851) [nonpub. opn.].)

As pertinent here, in one of the many proceedings Wertheim obtained a \$672,122 arbitration award against Currency, which the superior court confirmed. Currency appealed the resulting judgment while Wertheim attempted to enforce it by diverting to itself the royalty payments that the royalty payors were making to Currency. These entities filed interpleader actions and deposited disputed funds with the superior court, after which they were discharged and awarded \$238,615.45 in attorney fees, which was paid out of the deposited funds.

In 2013, we reversed the judgment confirming Wertheim's arbitration award on the ground that the arbitrators had exceeded their authority. (*Currency Corp. v. Wertheim* (Sept. 30, 2013, B240444) [nonpub. opn.].) In that ruling, we observed that both Currency and Wertheim "admitted to conduct that amounts to breach of fiduciary duty and financial elder abuse. Indeed, this entire litigation surrounds a three-sided effort to separate Maibell

Page, an ill, incompetent senior, from her main source of income. Currency admitted during the arbitration hearing that it extended loans to Maibell after she suffered a stroke and became unable to understand the loan terms, failed and was unable to account for the money it took from her, and retained her money without just cause. (It offered to return the money at the hearing.) . . . And Wertheim admitted it extracted financial agreements from ‘an unsuspecting elderly widow with short term memory loss, who had been institutionalized for mental illness.’ And all of the agreements were unconscionable. All were written in visually dense, incomprehensible language, heavily favored their authors, and were obtained under conditions of undue influence. Currency made purportedly commercial ‘loans’ to Maibell—some for under \$100—at 107 percent annual interest—charged at its own undisclosed discretion—while keeping no records. Wertheim bought a royalty stream from her, worth approximately \$50,000 per year, for \$1,000.” (*Ibid.*, fn. omitted.)

Wertheim’s judgment against Currency now having been vacated, the superior court in the interpleader proceedings released all deposited funds to Currency. Currency then moved to recoup from Wertheim the \$238,615.45 in attorney fees that had been paid to the royalty payors, contending all or most of those entities’ fees were incurred as a result of Wertheim’s litigation tactics. In opposition to the motion, Wertheim contended the fees were incurred as a result of Currency’s litigation tactics.

Before hearing the matter, the superior court issued a tentative ruling in which it found no merit to either side’s argument. After the hearing, the court issued an order denying Currency’s motion without explanation. Three weeks later, the court issued a clarification in which it stated, among other things, that it had considered and understood Currency’s position.

Currency appeals the order denying its motion for attorney fees.

DISCUSSION

Currency contends the trial court erred as a matter of law in declining to allocate some or all of the interpleading parties’ attorney fees to Wertheim, as the record establishes Wertheim caused those parties to incur the fees. We disagree.

■ Any person or entity against whom incompatible claims are made by two or more persons may bring an action in interpleader against the claimants to compel them to litigate their claims. (Code Civ. Proc., § 386.) That person or entity may in the court’s discretion be awarded costs and reasonable

attorney fees incurred in bringing the interpleader action and obtaining discharge. Then, “[a]t the time of final judgment in the action the court may make such further provision for assumption of such costs and attorney fees by one or more of the adverse claimants as may appear proper.” (Code Civ. Proc., § 386.6, subd. (a).) Our review is for abuse of discretion. (*Fritschi v. Teed* (1963) 213 Cal.App.2d 718, 728 [29 Cal.Rptr. 114].)

■ Here, by denying Currency’s motion to allocate the interpleading parties’ fees, the trial court impliedly found it proper that Currency assume those fees. We perceive no abuse of discretion. At the time the interpleader action was initiated and funds deposited, Wertheim had a colorable claim on the funds in the form of a judgment confirming a \$672,122 arbitration award. Had Currency paid the judgment or posted a bond during the pendency of its appeal there would have been no interpleader action. When it prevailed in the end and was awarded all deposited funds, the trial court could reasonably find it proper that the party that necessitated the interpleader action pay for it.

Currency argues the trial court abused its discretion by misunderstanding and failing to exercise it. The argument is without merit because nothing in the trial court’s order, which simply denied Currency’s fees motion without explanation, suggests the court misunderstood or failed to exercise its discretion. On appeal a trial court’s order “is presumed correct. Error must be affirmatively shown.” (*People v. Beardslee* (1991) 53 Cal.3d 68, 100 [279 Cal.Rptr. 276, 806 P.2d 1311].) The record’s silence here reveals no error.

Currency argues the trial court’s order “strongly suggests” the court was convinced by an erroneous argument Wertheim’s counsel pressed at the fees hearing. Currency proceeds at some length to discuss the erroneous argument but we need not do so here because we reject the premise: nothing about a facially proper order implies the court relied on an erroneous argument to reach the order.

Currency argues equity requires that Wertheim pay at least some of the interpleading parties’ attorney fees because it drove up the costs of litigation. The argument is without merit. Although equity certainly would have countenanced Wertheim paying at least some of the fees, equity does not demand that it do so. As stated, Wertheim had a colorable claim on the interpleaded funds in the form of a judgment, and Currency could have avoided the interpleader action by paying the judgment. The trial court therefore acted within its discretion in finding it “proper” for Currency to pay the attorney fees.

DISPOSITION

The order denying Currency's motion for fees is affirmed. Each side is to bear its own costs on appeal.

Johnson, J., and Lui, J., concurred.

A petition for a rehearing was denied October 19, 2016, and appellants' petitions for review by the Supreme Court were denied December 21, 2016, S238289.

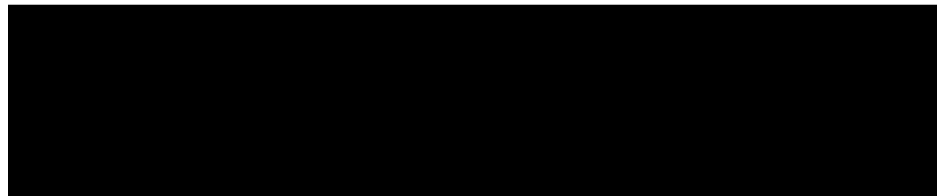
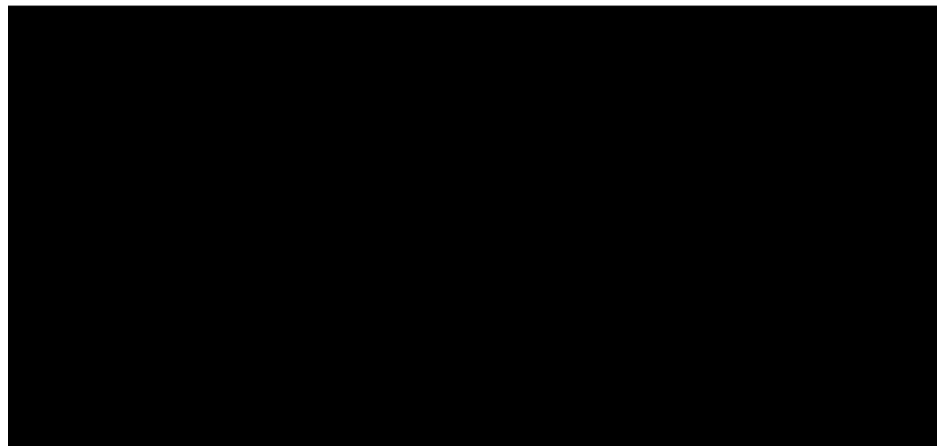
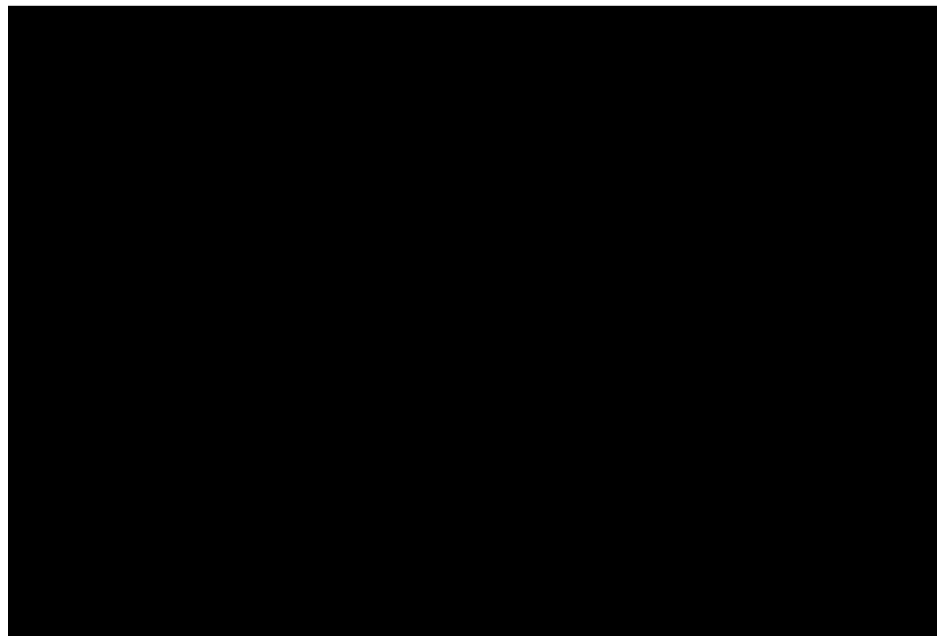
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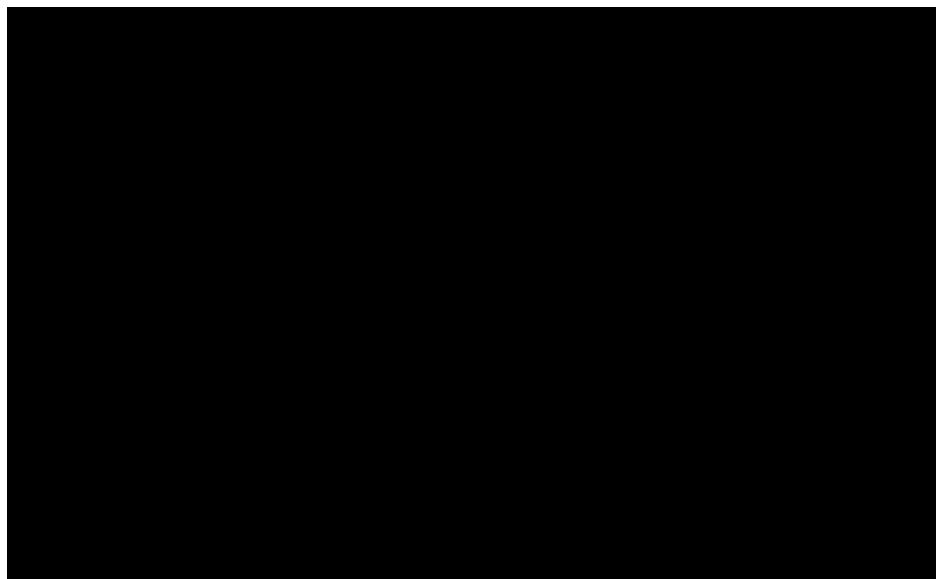
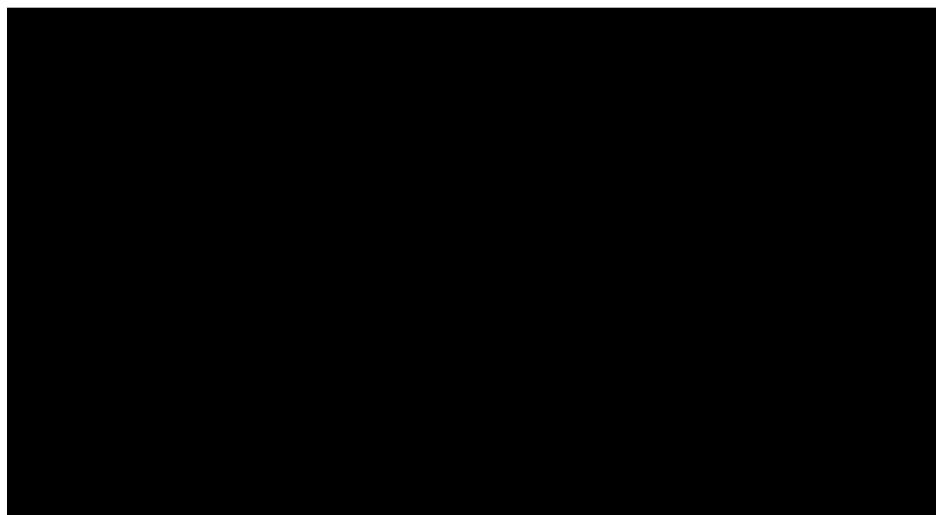
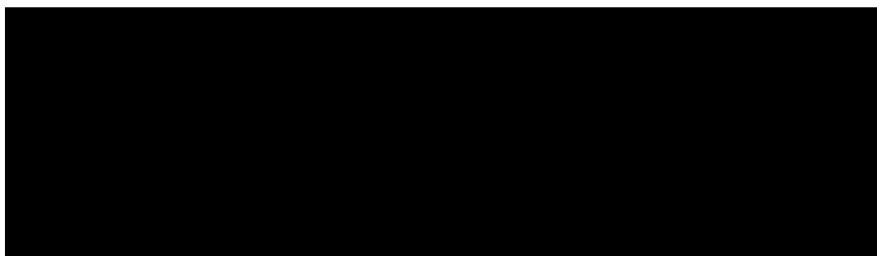
KALNEL GARDENS, LLC, Plaintiff and Appellant, v.
CITY OF LOS ANGELES et al., Defendants and Respondents.

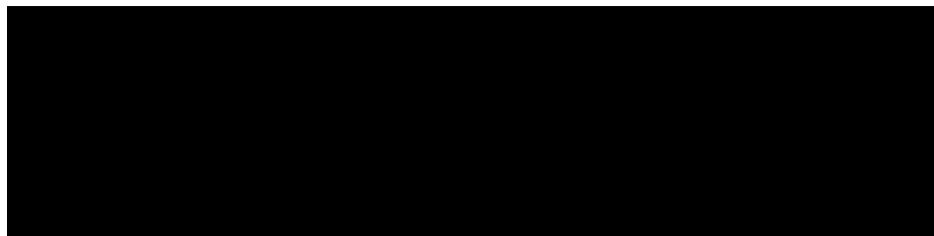
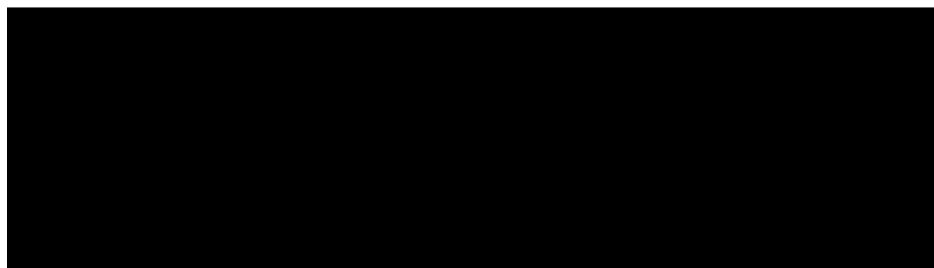
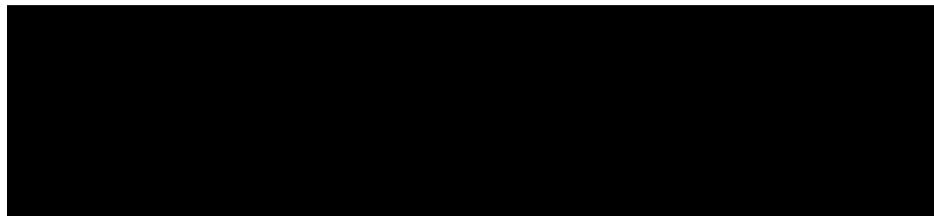
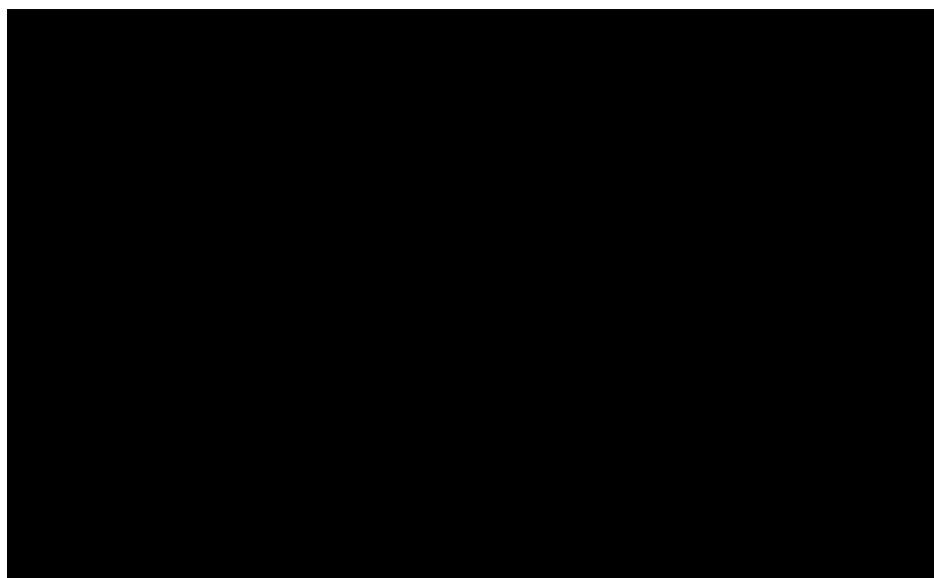
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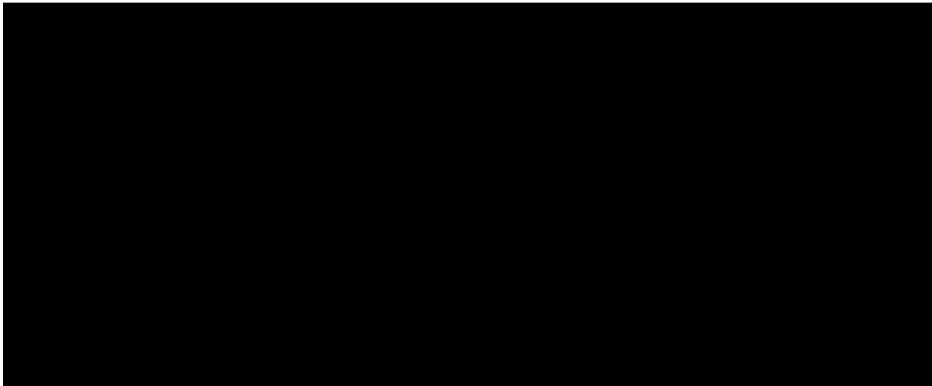
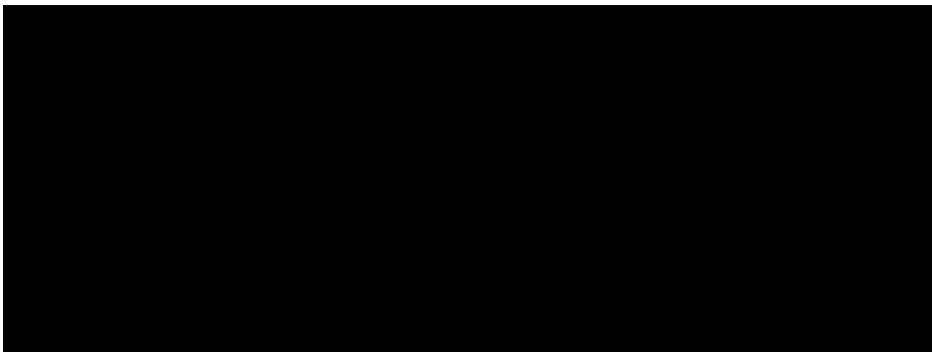
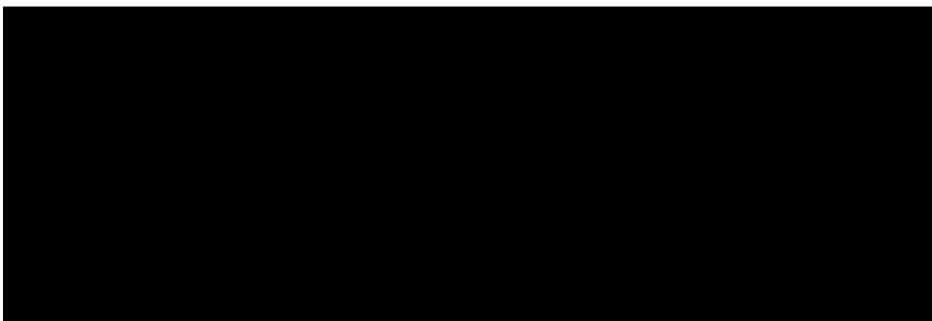
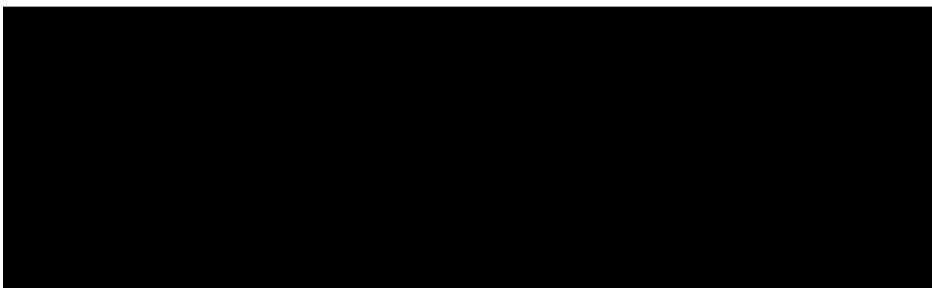
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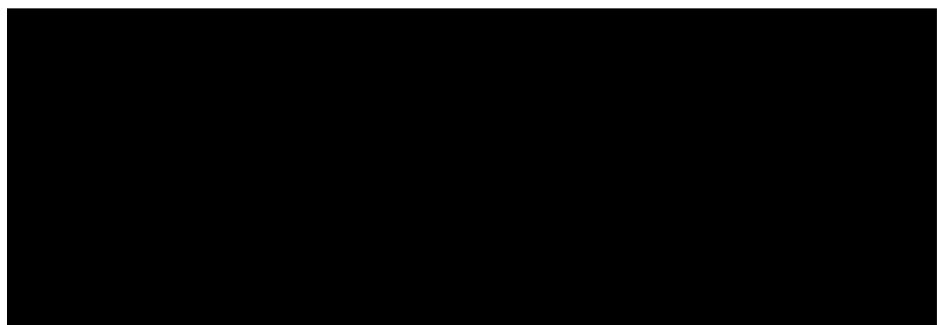
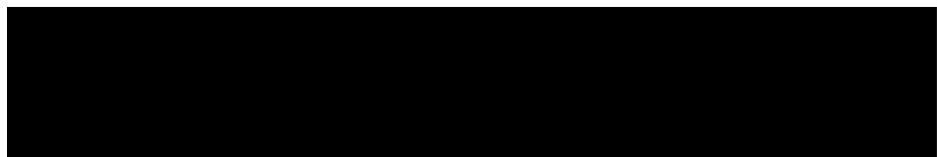
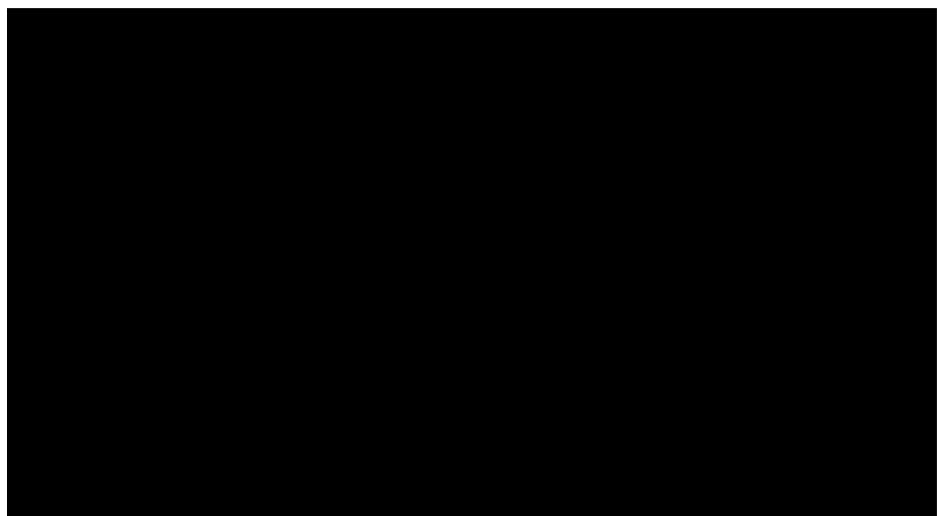
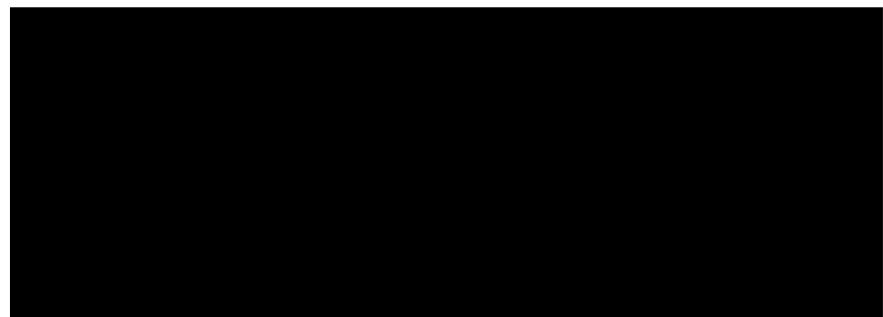
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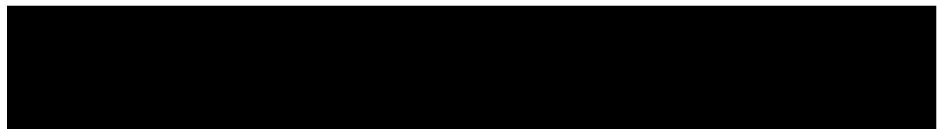
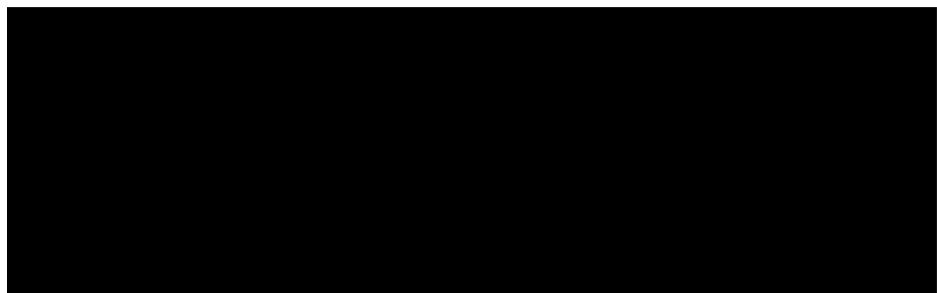
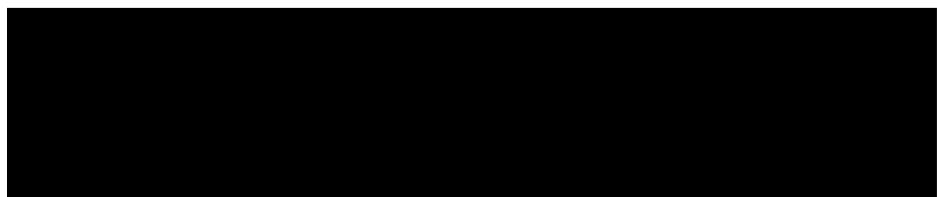
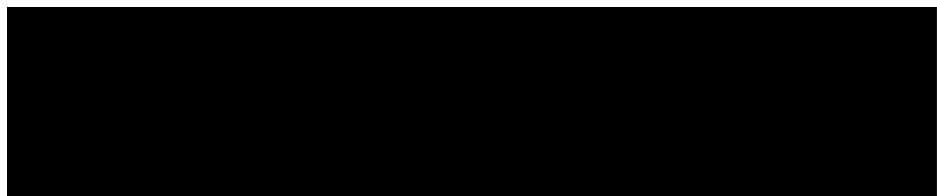
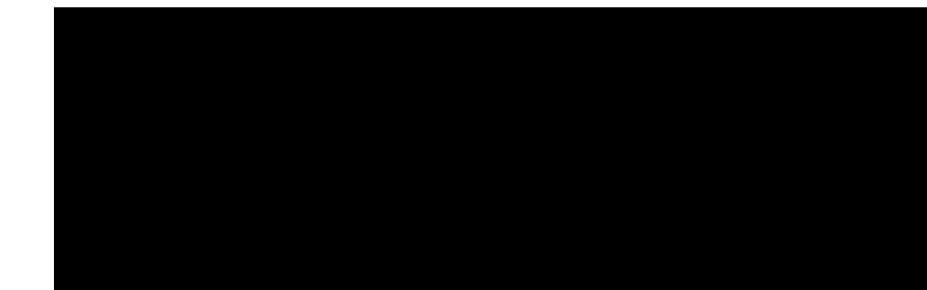


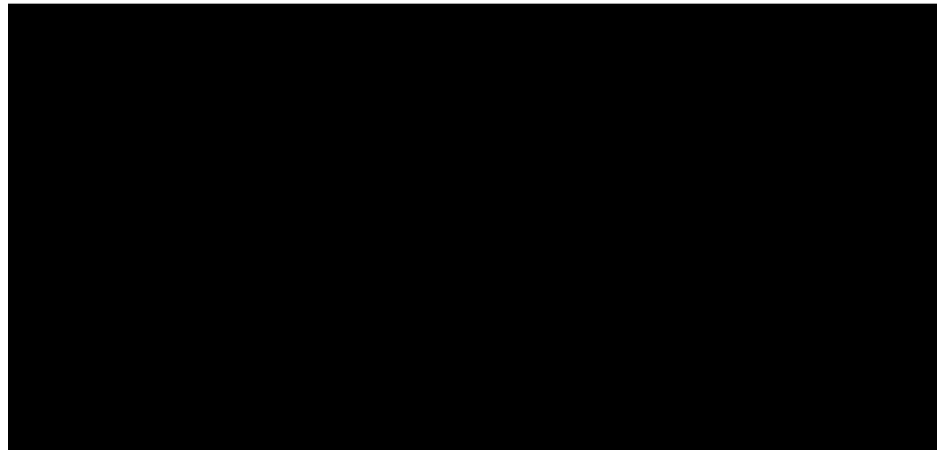
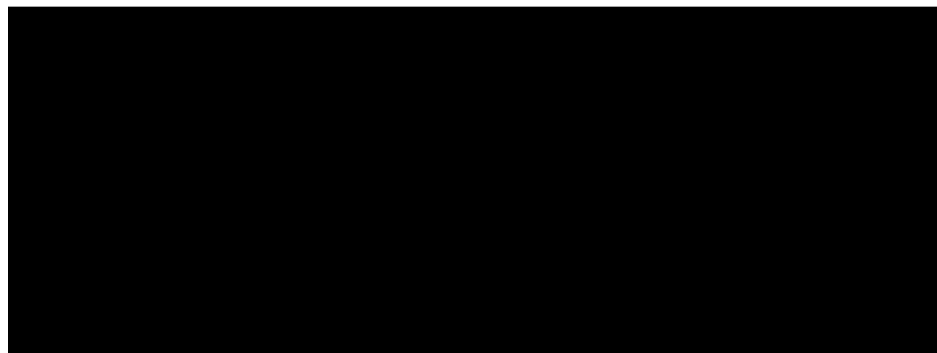












COUNSEL

Loeb & Loeb, Allan J. Abshez and Elizabeth A. Camacho for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Terry Kaufmann Macias, Assistant City Attorney, and Michael J. Bostrom, Deputy City Attorney, for Defendants and Respondents.

OPINION

RUBIN, J.—Developer Kalnel Gardens, LLC, appeals from the judgment denying its petition for a writ of administrative mandate seeking to overturn the City of Los Angeles’s (City) decision to halt a previously approved 15-unit housing project in Venice. We dismiss the appeal in part as to the developer’s cause of action based on the Housing Accountability Act (Gov. Code, § 65589.5 et seq.) because the developer did not seek appellate review by way of a writ petition as required by that statute. We affirm as to the remaining causes of action because there is substantial evidence that the proposed project violated the visual and scenic elements requirement of the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act), and because the Coastal Act takes precedence over statutes awarding density and height increase bonuses for proposed residential developments that include affordable housing units.

FACTS AND PROCEDURAL HISTORY

In 2013, City of Los Angeles planning officials approved Kalnel Gardens, LLC’s (Kalnel) proposed project to tear down a two-story, three-unit apartment building at the triangular intersection of Mildred and Ocean Avenues and Venice Boulevard in the Venice area. The project would include a total of 15 housing units: five duplexes and five single-family homes. Kalnel was allowed to exceed the normal density restrictions for that location because two of the units would be designated for very-low-income households. These “density bonuses” were authorized by the Housing Accountability Act (Gov. Code, § 65589.5; HAA), the Density Bonus Act (Gov. Code, § 65915) and the Mello Act (Gov. Code, § 65590).¹ The low-income housing units also entitled Kalnel to certain other zoning concessions, including a height variance above the usual 25-foot limit. As a result, the project included a flat roofline height of 33.75 feet and a varied roofline height of 40.5 feet.

In addition to approving the density bonuses and height variances, city planning officials adopted a mitigated negative declaration under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA). Soon after, the City’s advisory agency approved the project’s vesting tentative tract map, including findings that the project complied with the City’s general plan as well as the Venice specific plan. The City’s zoning administrator also approved a coastal development permit under the Coastal Act (Pub. Resources Code, § 30000 et seq.).

¹ All further undesignated section references are to the Government Code. We will sometimes refer to these three acts collectively as the housing density statutes, and we will discuss them in more detail in part 1. of our discussion.

In September 2013, a group of neighboring residents appealed the planning department's various approvals concerning Kalnel's project, including the coastal development permit. The residents contended the project violated the Coastal Act because its height, density, setbacks, and other visual and physical characteristics were out of step with the existing neighborhood.²

At the December 2013 appeal hearing before the West Los Angeles Area Planning Commission (the Commission), numerous area residents spoke about how the proposed project was out of step with the unique character of the Venice neighborhood, which was described as artistic and charming. According to the residents, one- and two-story structures outnumbered taller structures in the area by a ratio of nine to one. The visual impact of the few taller structures that existed was mitigated by setbacks of as much as 200 feet, while the Kalnel project had the same 25-foot setback as did one-story homes. Many of the homes were 1920's era one-story bungalows. The project's three-story height, which included rooflines of up to 40 feet, would tower over and shadow nearby properties. The design as a whole was described as having solid stucco brown walls with no windows, articulation, or character of any kind.

These concerns were echoed in a statement by Tricia Keane, the planning director for City Councilmember Mike Bonin. Keane agreed that the surrounding neighborhood consisted primarily of one- and two-story single and multi-family homes. Few, if any, "reach the height, story, scale and mass proposed by this project." The proposed project was not consistent with the character of the neighborhood, which she called the "gateway to Venice." A Commission staff member confirmed that there were only a few three-story buildings near the site of the proposed project, with everything else being one story.

Alan Abshez, counsel for Kalnel, said that there was a three-story library across the street from the project site, and that similar size structures could be found along nearby stretches of Venice Boulevard and Mildred Avenue. At bottom, however, Abshez said this was "all a case about affordable housing and density bonus." Abshez contended that the density and height of Kalnel's project were all the result of its compliance with the statutory requirement that the project include affordable housing.

Commission vice-president Donovan said that issues related to the density bonus were "outside the purview" of the appeal hearing, which instead focused on the Commission's discretionary power concerning the issuance of

² The residents raised several other challenges to the project, including its effect on traffic, vehicular and pedestrian safety, parking, and coastal access. The trial court's judgment, and our analysis, is limited to the issue of visual and scenic compatibility under the Coastal Act.

coastal development permits under the Coastal Act. At Donovan's suggestion the Commission found that the development did not conform to the Coastal Act because its size, height, bulk, mass, and scale were incompatible with and harmful to the surrounding neighborhood and because the setbacks were too small.³

Kalnel appealed the Commission's decision to the City Council, which denied the appeal and adopted the Commission's findings. Kalnel then brought an administrative mandate action against the City, alleging that it had violated the HAA, the Density Bonus Act, and the Mello Act.⁴

Distilled, the trial court found that the City had not complied with the HAA and that the density bonus, height and setback variations initially approved for the project were proper under the housing density statutes and other City zoning plans and regulations, including the California Coastal Commission-approved Venice Land Use Plan. Even so, the trial court found that the three housing density statutes were subordinate to the Coastal Act and that substantial evidence supported the City's findings that the project violated that act because it was visually out of step with the surrounding coastal community.⁵ Kalnel does not contend that there was insufficient evidence to support the finding that the project violated the Coastal Act. Therefore, the primary issue on appeal is whether the Coastal Act in fact takes precedence over the various housing density provisions.

STANDARD OF REVIEW

At issue in administrative mandate proceedings is whether the agency acted without or in excess of jurisdiction, whether there was a fair hearing, and whether there was a prejudicial abuse of discretion. An abuse of discretion occurs when the agency did not proceed in the manner required by law, its order or decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc., § 1094.5, subd. (b).)

Our role is the same as the trial court's: we review the administrative record to determine whether the City's findings are supported by substantial

³ The Commission also adopted findings concerning traffic issues and other concerns.

⁴ Kalnel also stated two causes of action under federal civil rights law alleging that the City's actions violated Kalnel's constitutional due process and equal protection rights. (42 U.S.C. § 1983.) The trial court did not address that issue and neither do the parties on appeal. As a result, neither do we.

⁵ The trial court also found that the City's original issuance of a mitigated negative declaration for the project under CEQA had been proper, and rejected two new issues raised by the City at trial: that the project violated the Venice Land Use Plan by calling for the consolidation of more than two lots, and that it hinged on the City ceding a certain portion of public right of way to the developer. Because we affirm the trial court's judgment under the Coastal Act, we need not reach those issues.

evidence. (*Reddell v. California Coastal Com.* (2009) 180 Cal.App.4th 956, 962 [103 Cal.Rptr.3d 383].) To the extent interpretation of a statute is involved, we exercise independent review and apply the well-settled rules of statutory construction. (*Automotive Funding Group, Inc. v. Garamendi* (2003) 114 Cal.App.4th 846, 851 [7 Cal.Rptr.3d 912].)

■ The fundamental rule of statutory construction is to ascertain the Legislature's intent in order to give effect to the purpose of the law. (*Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone Co.* (2006) 140 Cal.App.4th 658, 663–664 [44 Cal.Rptr.3d 556] (*Pasadena Metro Blue Line*).) We first examine the words of the statute and try to give effect to the usual, ordinary import of the language while not rendering any language surplusage. The words must be construed in context and in light of the statute's obvious nature and purpose. The terms of the statute must be given a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention. (*Id.* at p. 664.) Our interpretation should be practical, not technical, and should also result in wise policy, not mischief or absurdity. (*Ibid.*) We do not interpret statutes in isolation. Instead, we read every statute with reference to the entire scheme of law of which it is a part in order to harmonize the whole. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1275 [109 Cal.Rptr.2d 611].)

If the statutory language is clear, we should not change it to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Pasadena Metro Blue Line*, *supra*, 140 Cal.App.4th at p. 664.) If there is more than one reasonable interpretation of a statute, then it is ambiguous. (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 752 [162 Cal.Rptr.3d 158] (*Joannou*).) If so, we turn to secondary rules of construction, including maxims of construction, the legislative history, and the wider historical circumstances of a statute's enactment. (*Ibid.*)

DISCUSSION

1. Summary of the Three Housing Density Statutes

1.1 The Housing Accountability Act (HAA)

■ The HAA (§ 65589.5), known as the “anti-NIMBY law,”⁶ was designed to limit the ability of local governments to reject or render infeasible housing developments based on their density without a thorough analysis of the “economic, social, and environmental effects of the action.” (§ 65589.5, subd. (b).) When a proposed development complies with objective general plan and zoning standards, including design review standards, a

⁶ “NIMBY” is the acronym for Not In My Backyard.

local agency that intends to disapprove the project, or approve it on the condition that it be developed at a lower density, must make written findings based on substantial evidence that the project would have a specific, adverse impact on the public health or safety and that there are no feasible methods to mitigate or avoid those impacts other than disapproval of the project. (§ 65589.5, subd. (j)(1) & (2).)⁷

1.2 The Density Bonus Act

■ The Density Bonus Act (§ 65915) is designed to address the shortage of affordable housing in California. (*Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1164 [159 Cal.Rptr.3d 284].) When a developer agrees to set aside a certain percentage of the units in a housing development for low- or very-low-income residents, the local agency with approval power over that development must award the developer both certain itemized concessions and a density bonus that allows an increase in density above what the zoning ordinances would ordinarily allow. (*Ibid.*)

Local governments are required to enact ordinances that implement the density bonus law (§ 65915, subd. (a)), which the City did through Los Angeles Municipal Code section 12.22.A.25. The Density Bonus Act also provides for judicial remedies if the local agency refuses to grant the required density bonus. (§ 65915, subd. (d)(3).)

1.3 The Mello Act

■ The Mello Act (§§ 65590–65590.1) establishes minimum requirements for affordable housing within the coastal zone. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 798 [149 Cal.Rptr.3d 383, 288 P.3d 717] (*Pacific Palisades*).) It does this in two ways: first, by requiring the construction of replacement low-income housing when existing affordable housing is demolished (§ 65590, subd. (b)); second, as applicable here, by requiring new affordable housing units as part of new developments, either at the site of the new development or somewhere else (§ 65590, subd. (d)). While a local agency must require replacement affordable housing when existing affordable housing is demolished within the coastal zone, the agency may reject the addition of affordable housing units in a proposed new development if those units are found to be not feasible. (§ 65590, subd. (d)). Feasibility “means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technical factors.” (§ 65590, subd. (g)(3).)

⁷ The trial court found, and the City does not dispute, that it failed to make the required findings under the HAA.

2. *The Coastal Act*

The court in *Pacific Palisades, supra*, 55 Cal.4th at pages 793–794, gave a detailed description of the Coastal Act, which we paraphrase below.

■ The Coastal Act (Pub. Resources Code, § 30000 et seq.) is a comprehensive scheme to govern land use planning for the state's entire coastal zone. As part of its enactment the Legislature made several findings: that the coastal zone “is a distinct and valuable natural resource of vital and enduring interest to all the people”; that permanent protection of the state’s natural and scenic resources is of paramount concern; that “it is necessary to protect the ecological balance of the coastal zone”; and that “existing developed uses, and future developments that are carefully planned and developed consistent with the policies of [the Coastal Act], are essential to the economic and social well-being of the people of this state” (Pub. Resources Code, § 30001, subds. (a), (c) & (d).)

The Coastal Act is to be “liberally construed to accomplish its purposes and objectives.” (Pub. Resources Code, § 30009.) In almost all cases, any development within the coastal zone requires a coastal development permit in addition to any other permits required by law from state or local governments or state and local agencies. (Pub. Resources Code, § 30600, subd. (a).)

■ The Coastal Act relies heavily on local government “[t]o achieve maximum responsiveness to local conditions, accountability, and public accessibility” (Pub. Resources Code, § 30004, subd. (a).) It requires local governments to develop local coastal programs, comprised of a land use plan and implementing ordinances to promote the Coastal Act’s objectives. (Pub. Resources Code, §§ 30004, subd. (a), 30001.5, 30500–30526.) In 2001 the California Coastal Commission certified the City’s Venice Land Use Plan as the local coastal program governing the City’s issuance of coastal development permits.

Once the California Coastal Commission certifies a local government’s program, the California Coastal Commission delegates authority over coastal development permits to the local government. (Pub. Resources Code, §§ 30519, subd. (a), 30600.5, subds. (a), (b) & (c).) Under the Coastal Act, the local coastal program and development permits issued by local agencies are not just matters of local law. Instead, they embody state policy. A fundamental purpose of the Coastal Act is to ensure that state policies prevail over local government concerns.

3. *The Appeal Must Be Dismissed in Part Because Kalnel Did Not File a Writ Petition as Required by the Housing Accountability Act*

Kalnel's first cause of action was for violation of the HAA. Even though the trial court concluded the City had violated the HAA, it denied relief under the Coastal Act. Nevertheless, Kalnel purports to appeal the denial of its HAA claim. The City contends that we must dismiss that portion of the appeal because Kalnel was required to obtain appellate review of its HAA claim by way of a writ petition.

■ Subdivision (m) of section 65589.5 provides that actions brought to enforce the HAA shall be brought as administrative mandate actions. Subdivision (m) also provides the mechanism for appellate review in such cases: "Upon entry of the trial court's order, a party shall, *in order to obtain appellate review of the order*, file a petition within 20 days after service upon it of a written notice of the entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant." (§ 65589.5, subd. (m), *italics added.*)

Kalnel did not ask for an additional 20 days in which to file a writ petition, and did not file a writ petition at all. Instead, within 60 days after service of notice that judgment had been entered, it filed a notice of appeal as to the entire judgment. The City contends that we have no jurisdiction to consider Kalnel's challenge to the judgment insofar as the HAA cause of action is concerned. We agree.

Because the statute mentions appellate review of a trial court *order*, but goes on to require a bond when a local agency appeals a *judgment*, Kalnel contends that the statute requires a writ petition only when interlocutory relief is sought from a trial court order in an action under the HAA. The legislative history of the HAA leads us to reject this contention.

As originally introduced, and as first amended, section 65589.5 did not mention the procedure for seeking appellate review in HAA actions. (Legis. Counsel's Dig., Sen. Bill No. 575 (2005–2006 Reg. Sess.) 4 Stats. 2005, Summary Dig., p. 298.) Subdivision (m) was added as part of a June 7, 2005, amendment, and provided that, after a trial ended, "[u]pon entry of the trial court's order [*denying relief*], a party shall, in order to obtain appellate review of the order," file a writ petition within 20 days, with the trial court permitted to extend that period by up to 20 more days. If the local agency appealed the judgment, then the agency would have to post a bond. (§ 65589.5, subd. (m),

italics added; see Legis. Counsel's Dig., Sen. Bill No. 575 (2005–2006 Reg. Sess.) 4 Stats. 2005, Summary Dig., p. 298.)

■ The only parties who can be denied relief in an HAA action are developers such as Kalnel who are challenging a local agency's disapproval of a proposed development. Appellate review of an order denying relief in such an action must therefore refer to a trial court judgment in favor of the local agency whose decision has been challenged, not to some unspecified interlocutory order.

■ Senate Bill No. 575 (2005–2006 Reg. Sess.) amended section 65589.5, subdivision (m) to its current form on June 16, 2005, by deleting the limiting phrase "denying relief" from the mandatory writ procedure. Just as amendments to existing legislation are indicative of legislative intent to broaden or restrict the scope of a statute (*Lockheed Martin Corp. v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1237, 1245 [117 Cal.Rptr.2d 865]), so too is the evolution of proposed legislation from its introduction to its final form (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1373 [64 Cal.Rptr.2d 741]). Instead of requiring a writ petition by only a party denied relief in an HAA action—which must mean developers—the Legislature must have intended to expand the writ requirement to all parties in HAA actions.

■ Our conclusion is bolstered by the Legislative Counsel's Digest, which is the official summary of the legal effect of a bill and is relied upon by the Legislature throughout the legislative process. (*Joannou, supra*, 219 Cal.App.4th at p. 759.) Although it is not binding, the digest is entitled to great weight. (*Ibid.*) In describing every version of Senate Bill No. 575 (2005–2006 Reg. Sess.) from the time section 65589.5, subdivision (m) was first added and then amended to delete the "denying relief" language, the digest stated that the bill would "specify procedures for appeal of the court's order." (Legis. Counsel's Dig., Sen. Bill No. 575 (2005–2006 Reg. Sess.) 4 Stats. 2005, Summary Dig., p. 298, italics added.) It appears to us that the Legislature (1) loosely interchanged the term "appeal" as an alternative for appellate review by way of writ proceedings and (2) intended "order" to mean the final judgment in an HAA action. In other words, the final order in an HAA action was not an appealable judgment or order under Code of Civil Procedure section 904.1.

The City also contends that the HAA writ review provision is substantially similar to the California Public Records Act. (§ 6250 et seq.) The losing party in a California Public Records Act case must also file a writ petition within 20 days of the trial court's order (§ 6259, subd. (c).) Under that provision, the failure to do so divests the appellate court of jurisdiction, a defect that cannot be remedied by treating a notice of appeal as a writ petition if the notice of

appeal was filed after the 20-day writ petition deadline. (*MinCal Consumer Law Group v. Carlsbad Police Dept.* (2013) 214 Cal.App.4th 259, 265 [153 Cal.Rptr.3d 577].)

As Kalnel points out, however, section 6259, subdivision (c) expressly states that an order of the court in a California Public Records Act case “is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ” within 20 days after notice of entry of order is served. Because the HAA contains no such express limitation on the right to appeal, Kalnel contends that judgments in HAA actions are as appealable as any other final judgment.

■ We agree that the requirement to seek writ relief as the only avenue of appellate review in HAA actions would have been clearer if the Legislature had chosen the same express limiting language found in the California Public Records Act. Even so, in light of the legislative history of section 65589.5, subdivision (m), we see no other reasonable construction of the statement that a party to an HAA action must file a writ petition within 20 days of service of notice of entry of the adverse order “in order to obtain appellate review.” We therefore dismiss Kalnel’s appeal of the HAA order even though it is part of a final judgment.⁸

4. *The Density Bonus Act Is Subordinate to the Coastal Act*

The Density Bonus Act (§ 65915) states: “This section does not supersede or in any way alter or lessen the effect or application of the [Coastal Act].” (§ 65915, subd. (m).) As the City observes, this language is a clear expression of legislative intent that the Density Bonus Act is subordinate to the Coastal Act.

Kalnel disagrees, relying on a provision of the Density Bonus Act stating that the grant of a density bonus or concession “shall not require or be interpreted, in and of itself, to require a . . . local coastal plan amendment.” (§ 65915, subds. (f)(5), (j)(1).)

■ The language of section 65915, subdivision (m) could not be clearer: the Density Bonus Act does not supersede the Coastal Act or in any way alter

⁸ We note that in *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066 [132 Cal.Rptr.3d 874], which the parties cite for other purposes, the Court of Appeal reviewed the judgment in an HAA action by way of appeal. However, the issue of appealability versus writ review was not mentioned in that decision, and it is therefore not authority for the proposition that HAA final orders are appealable.

or lessen its effect. The plain language of the provision therefore governs. (*Drouet v. Superior Court* (2003) 31 Cal.4th 583, 593 [3 Cal.Rptr.3d 205, 73 P.3d 1185].) That the mere grant of a density bonus or concession does not require a coastal plan amendment does not raise a conflict with, or create an ambiguity in, the plain meaning of subdivision (m) or otherwise suggest that the Coastal Act takes a backseat to the Density Bonus Act.

Kalnel also contends that other legislative provisions declaring the vital importance of encouraging affordable housing somehow alter the plain meaning of section 65915, subdivision (m). (§§ 65580, subd. (a) [housing availability to persons of all economic means is priority of highest order], 65589.5, subd. (g) [lack of affordable housing is a critical statewide problem].) We disagree.

■ First, we are construing the Density Bonus Act (§ 65915), not those other provisions, and, as just discussed, under that law the Coastal Act takes precedence. Second, the Coastal Act seems to strike a balanced pose between the policies of affordable housing and coastal protection, stating only that it is “important . . . to encourage the protection of existing and the provision of new affordable housing” within the coastal zone. (Pub. Resources Code, § 30604, subd. (g).) As a result, under that provision, density bonuses granted under the HAA (Gov. Code, § 65589.5) or the Density Bonus Act (§ 65915) may be denied if the local agency issuing a coastal development permit finds that the project “cannot feasibly be accommodated on the site in a manner that is in conformity with” the Coastal Act (Pub. Resources Code, § 30604, subd. (f)). We find this consistent with the Coastal Act’s statement that protecting coastal resources is a “paramount concern” because those resources are of “vital and enduring interest.” (Pub. Resources Code, § 30001, subds. (a), (b).)

In short, the Legislature appears to have struck a balance between the Coastal Act and the Density Bonus Act by requiring local agencies to grant density bonuses unless doing so would violate the Coastal Act. We therefore hold that section 65915 is subordinate to the Coastal Act and that a project that violates the Coastal Act as the result of a density bonus may be denied on that basis.⁹

5. The Mello Act Is Also Subordinate to the Coastal Act

■ Determining the relationship between the Mello Act and the Coastal Act is not as clear cut a task. Unlike the Density Bonus Act (§ 65915), the

⁹ Because the HAA similarly provides that it shall not be construed to relieve local agencies from complying with the Coastal Act (§ 65589.5, subd. (e)), if we were to reach that issue we would likely conclude that it too was subordinate to the Coastal Act.

Mello Act does not state that the Coastal Act supersedes it. Instead, the Mello Act states that it “shall apply within the coastal zone as defined [by the Coastal Act].” (§ 65590, subd. (a).) The Coastal Act also provides that “[n]othing in this division shall exempt local governments from meeting the requirements of state and federal law with respect to providing low- and moderate-income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by existing law or any law hereafter enacted.” (Pub. Resources Code, § 30007.)

Standing alone, these two provisions might be construed as giving the Mello Act primacy over the Coastal Act. However, the Coastal Act also requires that the design of new developments protect scenic views and be “visually compatible with the character of surrounding areas.” (Pub. Resources Code, § 30251.) That was the basis of the City’s decision to reject the Kalnel project, and on appeal Kalnel does not contend there was insufficient evidence to support that finding.

In the face of an undisputed Coastal Act violation, does Public Resources Code section 30007 require that the City stand down from enforcing the Coastal Act in order to comply with the Mello Act?

■ We begin with the Mello Act itself, which states only that it “shall apply” in the coastal zone. (§ 65590, subd. (a).) Under Kalnel’s interpretation, the Mello Act supersedes the Coastal Act, requiring approval of increased density affordable housing developments even if they violate Coastal Act provisions. However, the Legislature knows how to expressly state that one statute supersedes another, but did not do so here. In the absence of such an express declaration of legislative intent, we will not presume that the Legislature intended to do so if we can harmonize the Mello Act with the Coastal Act. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 18 [92 Cal.Rptr.3d 441]; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 54–55 [69 Cal.Rptr. 480].) As set forth below, we conclude they can be harmonized.

We next turn to Public Resources Code section 30007.5, where the Legislature has provided interpretive guidance in reconciling conflicting Coastal Act provisions: “The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be

more protective, overall, than specific wildlife habitat and other similar resource policies.” (Pub. Resources Code, § 30007.5.) The Coastal Act must “be liberally construed to accomplish its purposes and objectives.” (Pub. Resources Code, § 30009.)

■ As discussed above, the Coastal Act states that although affordable housing is encouraged within the coastal zone, density bonuses may be reduced if the increased density is incompatible with the Coastal Act. (Pub. Resources Code, § 30604, subd. (f).) As we read it, this provision subordinates affordable housing density bonuses to the Coastal Act, in apparent contradiction to Public Resources Code section 30007. We must resolve that conflict in the manner that is most protective of coastal resources, and do so through a liberal construction that will accomplish the Coastal Act’s purpose and objectives. (Pub. Resources Code, §§ 30007.5, 30009.)

As also noted above, this case involves an undisputed violation of Public Resources Code section 30251, which requires development design that protects scenic views and is “visually compatible with the character of surrounding areas.” The Coastal Act contains several other directives that could also clash with the Mello Act: preventing intrusion into environmentally sensitive areas (Pub. Resources Code, § 30240); maintaining public access to the coast (Pub. Resources Code, § 30252); and in the case of new development, protecting special communities and neighborhoods with unique characteristics that are popular visitor destination points for recreational uses (Pub. Resources Code, § 30253, subd. (e)).¹⁰

■ Which interpretation is most protective of coastal resources? One that requires Mello Act housing even if it blocks coastal access, intrudes into environmentally sensitive areas, or is visually incompatible with existing uses, or one that requires application of the Mello Act’s affordable housing requirements within the coastal zone so long as those housing projects abide by the Coastal Act’s overall protective provisions? Remembering the Legislature’s statements that protecting coastal resources is a paramount concern because those resources are of vital and enduring interest, it seems clear that the latter interpretation must prevail. We therefore conclude that Kalnel’s project was still subject to the Coastal Act despite its compliance with the Mello Act. Accordingly, the City properly rejected the project pursuant to Public Resources Code section 30251.¹¹

¹⁰ Although the City did not rely on the latter provision, it seems applicable here.

¹¹ At oral argument, counsel for Kalnel contended that our decision would mean that the housing density statutes do not apply in the coastal zone. We disagree. While those statutes do apply in the coastal zone, we hold only that they may still be superseded by the Coastal Act. While we recognize the importance of encouraging affordable housing, it is for the Legislature to strike the balance between that policy and the Coastal Act.

6. *The City Was Not Required to Make Findings That the Project Could Not Be Feasibly Accommodated Under the Coastal Act*

Kalnel contends that, even if the Coastal Act takes precedence and its project was incompatible with the surrounding community, the City violated the Coastal Act by not finding that the project could not be accommodated on the site in conformity with that act. (Pub. Resources Code, § 30604, subd. (f).)

■ The trial court rejected that contention, concluding that Public Resources Code section 30604, subdivision (f) applied only where the density of a development had been reduced, not where, as here, an entire project was rejected based on subjective aesthetic considerations that violated the Coastal Act. We agree.

Subdivision (f) of Public Resources Code section 30604 states that the agency in charge of issuing a coastal development permit “may not require measures that reduce residential densities below the density sought by [the] applicant if the density sought is within the permitted density or range of density established by local zoning plus the additional density permitted under [Government Code section 65915], unless the issuing agency . . . makes a finding, based on substantial evidence in the record, that the density sought by the applicant cannot feasibly be accommodated on the site in a manner that is in conformity with [the Coastal Act] or the certified local coastal program.”

■ Kalnel contends this provision applies because the City’s conduct was the ultimate density reduction of disapproving the entire project. As City Planning Commissioner Donovan stated during the appeal hearing before that agency, the issue was visual compatibility under the Coastal Act, not density. We do not believe the City would have had to make the feasibility findings had it rejected the project because it cut off coastal access or intruded into an environmentally sensitive area. In such a case density would not have been the issue and no density reduction would have been ordered. The same reasoning applies here where the City denied the project because it was visually incompatible and otherwise out of step with the surrounding community. Accordingly, the City was not required to make the feasibility findings required by Public Resources Code section 30604, subdivision (f).

7. *The City Did Not Violate the Venice Land Use Plan*

In 2001 the California Coastal Commission certified the City’s Venice Land Use Plan (VLUP), which is the local coastal program governing the City’s issuance of coastal development permits. (Pub. Resources Code,

§ 30600.5, subd. (c.) Under that provision, the City shall issue a permit if it finds that the proposed development conforms to the VLUP. (*Ibid.*) The trial court found that the Kalnel project met the standards of the VLUP, leading Kalnel to contend that the City violated both the VLUP and the Coastal Act.

Kalnel supports this contention by pointing to provisions of the VLUP that (1) grant additional density and height bonuses for housing projects located in multiple housing areas near Venice Boulevard, which would include the area around the proposed Kalnel project (VLUP policies I.A.13.b & e, V.A.2) and (2) require the City to identify all feasible means of accommodating a density increase, implement the means most protective of coastal resources, and, if it finds that all feasible incentives would have an adverse impact, to grant the incentive that is most protective of coastal resources (VLUP policies 1.A.13.c & e).

■ The City contends that Public Resources Code section 30600.5 is not applicable because the City did not find that Kalnel's project was compatible with the VLUP. We agree. A predicate to the applicability of that section is a finding by the local agency that the proposed development conforms to its local coastal plan. The City overturned the earlier decisions of its planning officials concerning compliance and was therefore not compelled to issue the coastal development permit under Public Resources Code section 30600.5.

As for the trial court's apparent finding that the Kalnel project complied with the VLUP, we make two observations. First, the finding is ambiguous to the extent the trial court also found that the project violated the Coastal Act. Second, because we exercise independent review, we are not bound by the trial court's findings, and will instead determine for ourselves whether the City acted properly. As set forth below, we conclude that the City's actions were consistent with the VLUP.

The City contends that its decision was consistent with the VLUP, pointing to provisions (1) stating that building heights and bulks shall be controlled to preserve the nature and character of existing neighborhoods (VLUP policy I.A.1.a); (2) call for the preservation of "stable single-family residential neighborhoods" and promote new developments that are compatible with those neighborhoods (VLUP policy I.A.2, capitalization omitted); and (3) require yards in the Kalnel project area to accommodate the need for fire safety, open space, stormwater percolation, and on-site recreation consistent with the existing scale and character of the neighborhood¹² (VLUP policy I.A.7).

¹² The City also contends that this issue was waived because Kalnel did not raise VLUP compliance at trial. We disagree. The project's compliance with VLUP was mentioned in the petition and argued in Kalnel's trial court points and authorities.

While those VLUP policies tend to support the City's position, they are not conclusive. More persuasive to us are the following portions of the VLUP: (1) a summary of Venice coastal issues under the heading, "**Preservation of Venice as a Special Coastal Community**," listing the goals of "Preservation of community character, scale and architectural diversity[,] [¶] . . . Development of appropriate height, density, buffer and setback standards"; and (2) a policy statement that the VLUP was intended to address various Coastal Act policies, including Public Resources Code section 30251, which calls for development that is visually compatible with the character of surrounding areas.

As we see it, the VLUP was expressly designed to protect the visual and scenic compatibility requirements of the Coastal Act that were the basis for the City's rejection of Kalnel's project. At best, the handful of height and density policies cited by Kalnel set up a conflict with those policies. However, a closer examination of the height and density policies upon which Kalnel relies shows that they are inapplicable here.

Although VLUP policies I.A.13.b, c and e do call for the application of density bonuses in accordance with the Density Bonus Act (§ 65915), those policies fall within the subject heading "**Replacement of Affordable Housing**." The first policy in that section is also captioned "**Replacement of Affordable Housing**," and states that it applies "[p]er the provisions of . . . the 'Mello Act' [in regard to] the conversion or demolition of existing residential units occupied by [low-income residents]." (VLUP policy I.A.p.) It prohibits the conversion or demolition of such existing units unless they are replaced in accordance with the Mello Act. The section goes on to address issues such as the location of replacement housing (VLUP policy I.A.10), the ratio of replacement units (VLUP policy I.A.11), and the right of displaced low-income residents to priority for the replacement units (VLUP policy I.A.13). The density and height bonus requirements that Kalnel relies upon follow as part of the same section.

■ As discussed earlier, the Mello Act applies in two situations: (1) when existing low-income units are demolished, they must be replaced with new ones; and (2) when new developments include low-income housing, density bonuses apply unless the increased density conflicts with the Coastal Act. The density and height bonus policies that Kalnel relies on are expressly geared toward the former circumstance, where existing low-income units are demolished. This case involves a new development, however, and is not covered by those policies.

Even if those policies do apply to proposed new developments that include affordable housing, they do not assist Kalnel. According to Kalnel, under

VLUP policy I.A.13.c, the City was obligated to not only permit the increased density and accompanying height incentives, but to identify all feasible means of accommodating the increased density if the City found that the project would have an adverse effect on coastal resources. Based on this, Kalnel contends the City violated the VLUP by failing to approve the project and by failing to identify ways in which Kalnel's project might be feasibly accommodated.

Read in its entirety, this provision states that any housing development approved under the density bonus law "shall be consistent, to the maximum extent feasible and in a manner most protective of coastal resources, with all otherwise applicable certified local coastal program policies and development standards." (VLUP policy I.A.13.c.) After describing what steps the City must take if a proposed project is consistent with the local coastal policies, the provision addresses the City's obligations if it finds "that the means for accommodating the density increase . . . will have an adverse effect on coastal resources . . ." (*Ibid.*) In such a case, "the City shall identify all feasible means of accommodating the 25 percent density increase and consider the effects of such means on coastal resources. The City shall require implementation of the means that are most protective of significant coastal resources." (*Ibid.*) "[C]oastal resources" is defined to mean "public access, marine and other aquatic resources, environmentally sensitive habitat, and the visual quality of coastal areas." (VLUP policy I.A.13.f, *italics added.*)

■ As we read it, this policy affirms the significance of Coastal Act compliance when approving projects with affordable housing density bonuses, including the provision concerning visual conformity with the surrounding area. Most important, however, is the policy's limited applicability to decisions based on the effect of a density bonus on Coastal Act compliance. In other words, the City's accommodation obligation applies only when it determines that a project's increased density causes a conflict with the Coastal Act. As mentioned previously, that is not what occurred here. Instead, the project was disapproved for purely aesthetic reasons unrelated to its density, making VLUP policy I.A.13.c inapplicable.¹³ As the City points out, under Kalnel's reasoning the City was obligated to propose architectural design changes to the proposed project, a task beyond the reach of planning commissioners or City Council members.

■ Finally, as the City points out, Kalnel's reliance on VLUP policy V.A.2 has no apparent application here because that policy addresses

¹³ As counsel for the City conceded at oral argument, Kalnel is free to seek approval of a redesigned project at the same density so long as its visual qualities are compatible with the surrounding neighborhood.

street improvements, including taking into account additional density considerations for affordable housing. That policy has no effect on whether or not a project should be approved in the first instance or otherwise complies with the Coastal Act. We therefore conclude that the City complied with the VLUP.

DISPOSITION

The judgment is affirmed. The City of Los Angeles shall recover its costs on appeal.

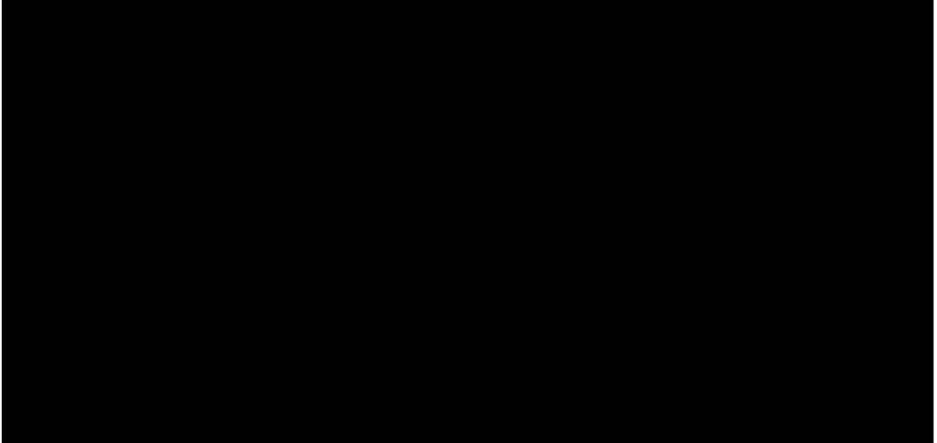
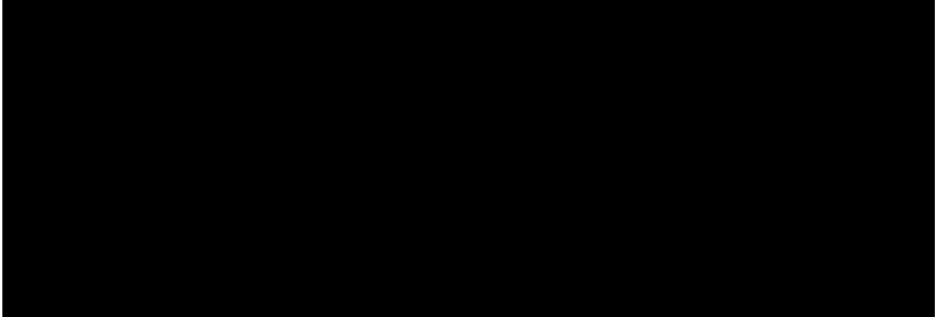
Bigelow, P. J., and Grimes, J., concurred.

Appellant's petition for review by the Supreme Court was denied December 14, 2016, S238288.

[No. F073030. Fifth Dist. Sept. 30, 2016.]

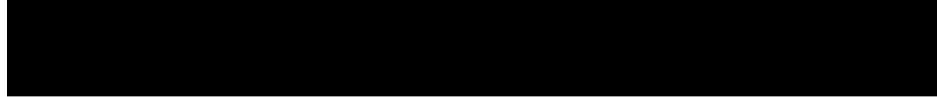
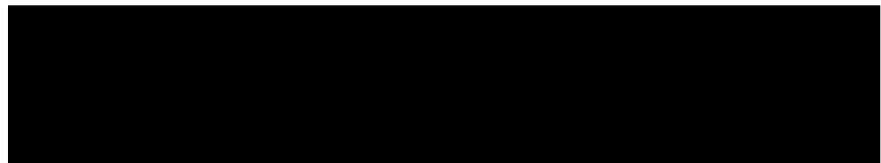
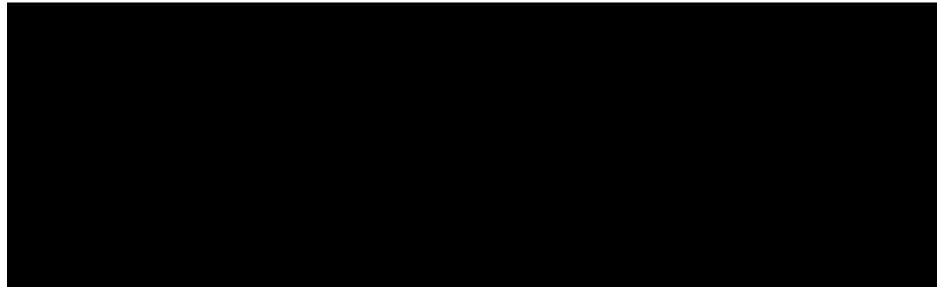
In re GABRIEL T., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
GABRIEL T., Defendant and Appellant.

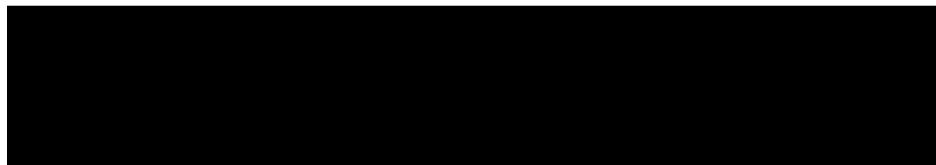
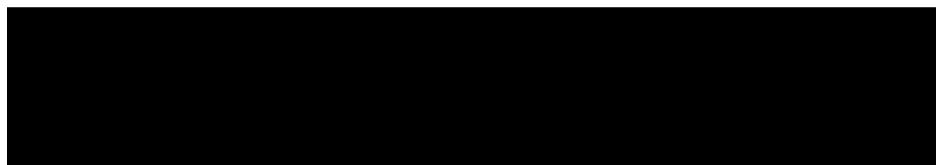
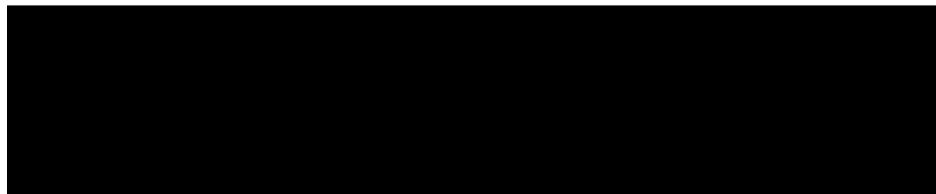
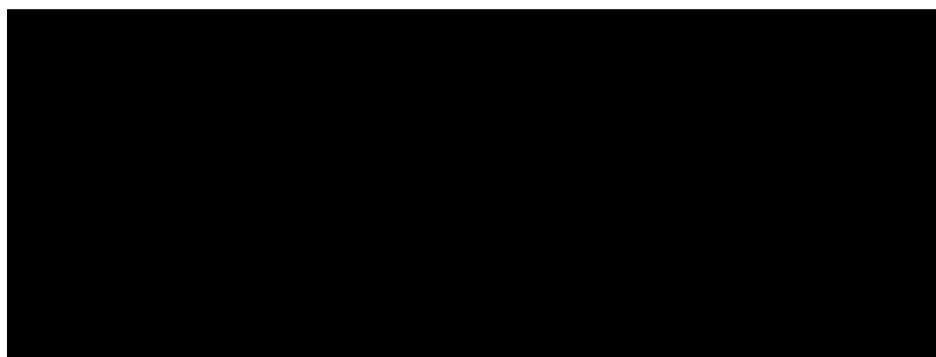
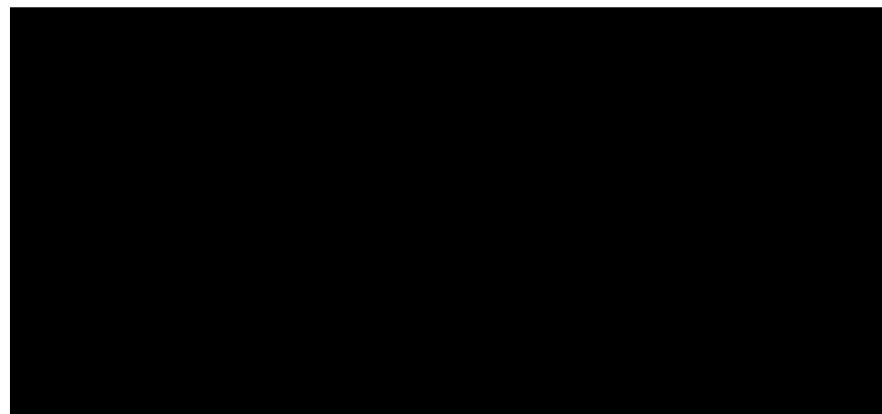












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COUNSEL

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Michael A. Canzoneri, Deputy Attorney General, for Plaintiff and Respondent.

OPINION

McCABE, J.*—

INTRODUCTION

This opinion involves a troubled minor, appellant Gabriel T., who was placed on informal probation in July 2015 in Madera County Superior Court case No. MJL018293. In August 2015, he admitted a misdemeanor violation of brandishing a deadly weapon (Pen. Code, § 417, subd. (a)(1)), and he was released into his grandmother's custody under certain terms and conditions. In September 2015, he was placed on probation pursuant to Welfare and Institutions Code section 602 after failing to comply with the terms.

In November 2015, the present wardship petition was filed in case No. MJL018293-A, and appellant subsequently admitted a violation of grand theft from the person of another (Pen. Code, § 487, subd. (c)), with a stipulated restitution of \$20. The court ordered appellant to the correctional academy for 12 months, consisting of six months of confinement and six months of aftercare under the supervision of probation. It was ordered appellant could be returned to the correctional academy for a one-time remediation of 30 days at any time during the aftercare component due to a violation of probation or program rules.

■ On appeal the parties agree, as do we, that multiple errors occurred at sentencing. In the published portion, we hold that the 30-day remediation

*Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

violated the statutory protections afforded in the Welfare and Institutions Code as it permitted the probation officer to determine a violation of probation without notice to appellant and an opportunity to be heard. In addition, we hold that it was impermissible for the juvenile court to impose a \$50 “Facilities Assessment” pursuant to Government Code section 70372, subdivision (a).

In the unpublished portion, we agree with the parties that the violation of Penal Code section 487, subdivision (c), was a misdemeanor pursuant to Penal Code section 490.2; the court inappropriately ordered the collection of appellant’s biological samples pursuant to Penal Code section 296; and the juvenile court erroneously calculated appellant’s sentence. The parties’ sole disputed issue on appeal is whether a firearm prohibition was properly imposed pursuant to Penal Code sections 29800 and 29805. Based on this sentencing record, however, we are unable to determine whether a firearm prohibition was appropriate or not in this case.

We vacate the sentence and remand for resentencing.

FACTUAL BACKGROUND

I. *The Prior Juvenile Record.*

On July 7, 2015, the juvenile court granted appellant informal probation pursuant to Welfare and Institutions Code section 654.2 for misdemeanor violations of brandishing a deadly weapon (Pen. Code, § 417, subd. (a)(1)) and assault (Pen. Code, § 240) in case No. MJL018293. Appellant was ordered, in part, to enroll into and complete substance abuse and anger management counseling, not to possess weapons, and to obey his grandmother.

On August 12, 2015, a modification request was filed with the court alleging appellant failed to obey his grandmother, he left his reported residence without permission, he violated curfew, and he refused to enroll into anger management and substance abuse counseling. On August 20, he was remanded into custody for violation of informal probation, and on August 31, he admitted a misdemeanor violation of Penal Code section 417, subdivision (a)(1). He was released to the custody of his grandmother pending disposition with certain conditions imposed, including not to possess weapons.

On September 28, 2015, appellant was taken into custody after being suspended from school for assaulting another student. Two days later he was

placed on probation pursuant to Welfare and Institutions Code section 602 and ordered to serve a 20-day juvenile hall commitment with credit of 20 days for time served.

II. *The Current Juvenile Petition.*

On November 5, 2015, a juvenile wardship petition was filed pursuant to Welfare and Institutions Code section 602, subdivision (a), in case No. MJL018293-A. It was alleged appellant committed one felony count of dissuading a witness (Pen. Code, § 136.1, subd. (c)(1); count 1) and one felony count of robbery (Pen. Code, § 211; count 2). The petition stated the maximum aggregate term of confinement would be sought based on the previously sustained petition pursuant to Penal Code section 417, subdivision (a)(1). The maximum time for the previously sustained petition was listed as "1 year." The petition sought a total aggregate time of six years four months. A violation of probation was also filed on November 5, 2015, alleging appellant failed to obey all laws by violating Penal Code sections 136.1, subdivision (c)(1), and 211.

The petition was subsequently amended to allege in count 1 a violation of Penal Code section 136.1, subdivision (c)(1), and to add a count of grand theft from the person of another (Pen. Code, § 487, subd. (c); count 3). The amended petition did not specify whether the grand theft was charged as a misdemeanor or a felony. According to the police report, the victim and the victim's mother indicated the theft resulted in a loss of \$20 to \$35.

On December 9, 2015, appellant admitted violation of Penal Code section 487, subdivision (c), and the remaining two counts and violation of probation were dismissed. The maximum confinement time was set at three years four months. On January 4, 2016, appellant was continued as a ward of the court, and he was ordered to the correctional academy for 12 months with six months of boot camp and six months of aftercare program. Restitution was ordered at the stipulated amount of \$20. Appellant was ordered to serve 65 days in juvenile hall with 65 days of credit for time served. Various other terms and conditions were imposed.

DISCUSSION

I.-III.*

*See footnote, *ante*, page 952.

IV. *The 30-day Remedial Incarceration Violated Statutory Protections.*

The court's January 4, 2016, recommended findings and orders states: "At any time during the aftercare component the minor may be returned to the Correctional Academy for a one time remediation of 30 days due to a violation of probation or program rules." Respondent concedes Welfare and Institutions Code section 777 precludes appellant's removal from his home during the "aftercare" portion of the program without complying with statutory notice and hearing requirements. We agree.

A. *Background.*

At the January 4, 2016, disposition hearing, appellant's defense counsel objected to this provision, contending it violated the notice requirements under the Welfare and Institutions Code, it violated due process, and it permitted the probation officer to put appellant into custody without any further review. The juvenile court disagreed, seeing the provision as "a limit on the number of times that they can bring him back into the aftercare program. Because the program is in [sic] this case would be a year program. And six months are in and then six months are out in the aftercare program. And if [appellant] violates during the aftercare program, they bring him back in for a portion of that. In the past there was an unlimited amount of that and they just put a limitation on it by a one-time remediation." The court said it would follow this recommendation from probation and invited appellant's counsel to raise this issue on appeal.

The prosecutor suggested the procedure "was limited" and "an agreement entered into ahead of time." The court disagreed and stated: "They are not treating it as a new violation of probation where they would file a new petition. They are just treating it as a violation after Correctional Academy program which this Court has ordered for that violation. Instead of completing the aftercare program at home, they have to do—they have to serve a minimum amount of 30 days."

Following argument from counsel, the court ordered appellant to the correctional academy for 12 months, consisting of six months of confinement and six months of aftercare under the supervision of the probation officer. The court informed appellant: "At any time during the aftercare component you may be returned to the Correctional Camp for a one-time remediation of 30 days due to a violation of probation or program rules."

B. *This issue is appropriate to review on appeal.*

Appellant notes this issue is moot as he will not have any confinement time left for this condition to be exercised. However, he asserts this court should

address this issue as it is important to the fair and effective administration of justice in the field of juvenile delinquency law. Respondent offers no objection.

We agree that this issue involves a justifiable controversy stemming from an important procedural issue with court-wide impact. There is a likelihood of recurring litigation involving this same issue. We agree that review of this issue is appropriate under these circumstances to provide guidance to juvenile courts. (*In re Jorge Q.* (1997) 54 Cal.App.4th 223, 229 [62 Cal.Rptr.2d 535] (*Jorge Q.*) [unripe issue reviewable on appeal because a justifiable controversy existed with a likelihood of recurring litigation].) We will address the merits of this claim.

C. *Appellant may not be removed from his home for an alleged violation of probation absent a hearing.*

It is the stated purpose of the juvenile court laws to provide protection and safety to the public and to each minor under the juvenile court's jurisdiction. (Welf. & Inst. Code, § 202, subd. (a).) It is the goal "to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public." (*Ibid.*)

When a minor is adjudged a ward of the court, the court is authorized to impose and require any and all reasonable conditions it determines fitting and proper to obtain justice, and enhance the minor's reformation and rehabilitation. (Welf. & Inst. Code, § 730, subds. (a) & (b).) "A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile. [Citation.]" (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5 [63 Cal.Rptr.2d 701].) "That discretion will not be disturbed in the absence of manifest abuse. [Citation.]" (*Ibid.*)

If the probation officer determines a minor should be retained in custody, the officer is required to proceed in accordance with Welfare and Institutions Code, article 16 (commencing with § 650) to cause the filing of a petition pursuant to Welfare and Institutions Code section 656. (Welf. & Inst. Code, § 630, subd. (a).) If the minor is alleged to be a person described in Welfare and Institutions Code section 601 or 602, the minor must be served with a copy of the petition, receive notice of the time and place of the detention hearing, and the minor's parents or guardians must also receive notice if their whereabouts can be determined by due diligence. (Welf. & Inst. Code, § 630,

subd. (a.) At the hearing, the minor has a privilege against self-incrimination, and the right to confront and cross-examine any person examined by the court. (*Id.*, subd. (b).)

■ When a minor is detained pursuant to a probation violation, a detention hearing must be conducted in accordance with Welfare and Institutions Code, article 15, commencing with section 625. (Welf. & Inst. Code, § 777, subd. (d).) The minor must be released unless the court finds both that the continuance in the home of the parent or legal guardian is contrary to the child's welfare and at least one of the following exists: (1) the child violated a court order; (2) the child escaped from a court commitment; (3) the child is likely to flee the court's jurisdiction; (4) immediate and urgent necessity exists for the child's protection; or (5) it is reasonably necessary for the protection of the person or another's property. (Cal. Rules of Court, rule 5.760(c)(1)(A)–(E).) The supplemental petition procedure is designed for situations where the minor is moved to a more restrictive placement because the original disposition has not been effective. (*Jorge Q.*, *supra*, 54 Cal.App.4th at p. 231.)

■ A juvenile court cannot lift an imposed, stayed or suspended term of confinement without meeting the requirements of Welfare and Institutions Code section 777. (*In re Jose T.* (2010) 191 Cal.App.4th 1142, 1147 [120 Cal.Rptr.3d 562].) When evaluating the minor following the filing of a petition pursuant to Welfare and Institutions Code section 777, the court must make required findings that the previous disposition has not been effective regarding the minor's rehabilitation or protection. (*In re Jose T.*, at p. 1147.) In order to commit the minor to the Division of Juvenile Justice, the court must be fully satisfied that the minor's mental and physical condition and qualifications render it probable the minor will benefit from the commitment. (*Ibid.*; Welf. & Inst. Code, § 734.)

Here, the condition imposed upon appellant vested absolute discretion in the probation officer to determine if and when a violation of probation occurred during the aftercare program. This condition was not tailored to meet appellant's specific needs at the time of any future alleged violation. Moreover, because an alleged violation of probation would have been at issue, the officer was required to proceed in accordance with the notice and hearing requirements under Welfare and Institutions Code, article 16 (commencing with § 650). (Welf. & Inst. Code, § 630, subd. (a).) If and when appellant was detained pursuant to a probation violation, a detention hearing was required pursuant to Welfare and Institutions Code, article 15, commencing with section 625. (Welf. & Inst. Code, § 777, subd. (d).)

The condition which the juvenile court imposed did not require a judicial finding that appellant violated a condition of probation or that his continuance

in the home was contrary to his welfare. Appellant was not entitled to notice or an opportunity to be heard. Such a condition does not comply with the statutory requirements of the Welfare and Institutions Code. (Welf. & Inst. Code, §§ 630, subd. (a), 777, subd. (d).) It was impermissible. Accordingly, this condition shall not be imposed upon resentencing.

V. *Appellant's Sentence Was Erroneously Calculated.**

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VI. *The Penalty Under Government Code Section 70372 Is Stricken.*

According to the recommended findings and orders, the juvenile court imposed a \$150 “restitution fine” pursuant to Welfare and Institutions Code section 730.6, which included a \$50 “Facilities Assessment” pursuant to Government Code section 70372, subdivision (a). We agree with the parties that the \$50 Facilities Assessment should be stricken.

■ Government Code section 70372 imposes a “state court construction penalty” that is levied “upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses” (Gov. Code, § 70372, subd. (a)(1).) The statute expressly states that this penalty does not apply to any restitution fine. (*Id.*, subd. (a)(2)(A).)

Here, based upon the wording of the recommended findings and orders, it appears the calculation of the \$50 Facilities Assessment was based upon the restitution fine. This was error because a construction penalty does not apply to any restitution fine. (Gov. Code, § 70372, subd. (a)(2)(A).) Moreover, we hold this penalty may not be imposed against a juvenile ward.

“Although confinement, fines, and fees imposed upon a ward of the juvenile court may be penal in nature and premised upon a finding of criminal misconduct, juvenile adjudications of wardship are not criminal convictions. [Citations.]” (*Egar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1308 [16 Cal.Rptr.3d 613].) Pursuant to Welfare and Institutions Code section 203, “[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.”

■ “‘Our fundamental task in interpreting a statute is to determine the Legislature’s intent so as to effectuate the law’s purpose.’” (*People v. Simmons* (2012) 210 Cal.App.4th 778, 790 [148 Cal.Rptr.3d 554].) We give a

*See footnote, *ante*, page 952.

plain and commonsense meaning to the statutory language, and we are to follow the plain meaning if it is clear. (*Ibid.*)

■ Here, the state court construction penalty under Government Code section 70372, subdivision (a)(1), is collected for criminal offenses. Under Welfare and Institutions Code section 203, however, juvenile adjudications of wardship are deemed neither criminal convictions nor criminal proceedings. (*In re Derrick B.* (2006) 39 Cal.4th 535, 540 [47 Cal.Rptr.3d 13, 139 P.3d 485]; *People v. Dotson* (1956) 46 Cal.2d 891, 895 [299 P.2d 875] [juvenile proceedings are similar to guardianship proceedings]; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 164 [74 Cal.Rptr.2d 464] [juvenile proceeding is a civil action].) Under the plain language of these statutes, the penalty pursuant to Government Code section 70372, subdivision (a)(1), is inapplicable in an adjudication of wardship. At resentencing, the juvenile court shall not impose this penalty.

DISPOSITION

The sentence is vacated. This matter is remanded to the juvenile court for resentencing consistent with this opinion.

Hill, P. J., and Franson, J., concurred.

[No. A145238. First Dist., Div. One. Sept. 30, 2016.]

In re JONATHAN R., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
JONATHAN R., Defendant and Appellant.

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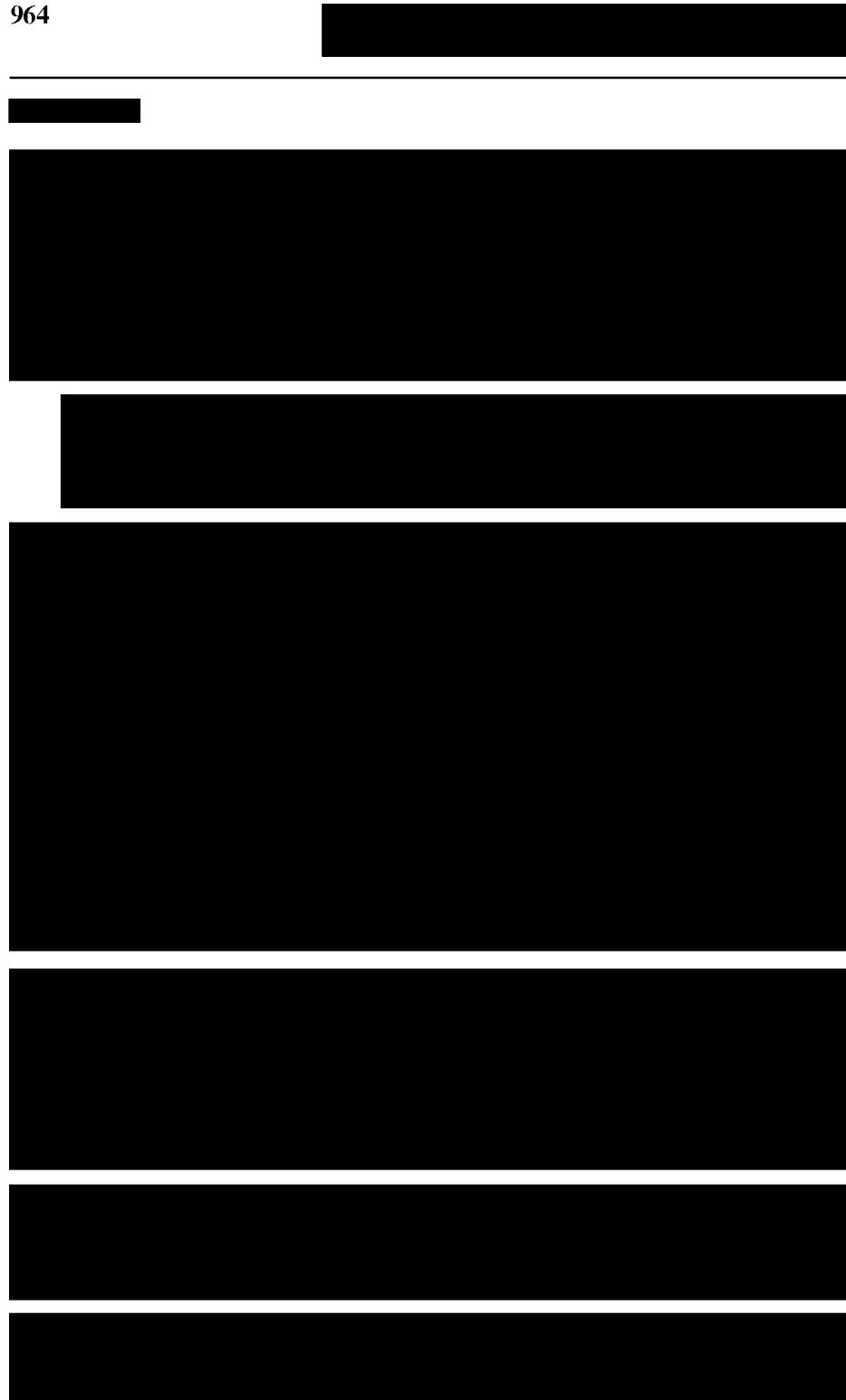
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COUNSEL

Gail E. Chesney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Jeffrey M. Laurence, Assistant Attorneys General, Ronald E. Niver and Joan Killeen, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MARGULIES, J.—After Jonathan R. (minor) stabbed another young man during a brawl, he was alleged in a juvenile wardship petition to have violated Penal Code section 245, subdivision (a)(1), assault with a deadly weapon other than a firearm, and subdivision (a)(4), assault by force likely to produce great bodily injury. The juvenile court found true both violations, as well as enhancement allegations under both violations of personal use of a deadly weapon and infliction of great bodily injury. Defendant contends he cannot be found to have committed violations of both subdivisions of section 245 because the two subdivisions merely specify different ways of committing a single offense. He also argues the deadly weapon enhancement under subdivision (a)(1) is improper because use of such a weapon is an element of the crime and objects to the imposition of an electronic search probation condition.

■ We conclude the minor's argument that the crimes specified in subdivision (a)(1) and (4) of Penal Code section 245 are not separate offenses is untenable in light of the Supreme Court's decision in *People v. Gonzalez* (2014) 60 Cal.4th 533 [179 Cal.Rptr.3d 1, 335 P.3d 1083] (*Gonzalez*). Nonetheless, we agree with the minor that he cannot be found to have violated both offenses because we find the offense specified in subdivision (a)(4), assault by force likely to produce great bodily injury, is necessarily included within the offense specified in subdivision (a)(1), assault with a deadly weapon or instrument other than a firearm. We also find merit in the minor's other arguments. We therefore vacate the juvenile court's findings with respect to section 245, subdivision (a)(4) and strike the deadly weapon use enhancement under the violation of subdivision (a)(1). In addition, we direct the entry of a narrower electronic search condition and remand for recalculation of the minor's maximum term of confinement and restitution fine.

I. BACKGROUND

In an amended juvenile wardship petition under Welfare and Institutions Code section 602, subdivision (a), the minor was alleged to have violated Penal Code¹ section 245, subdivision (a)(1), assault with a deadly weapon other than a firearm (count one), and section 245, subdivision (a)(4), assault by force likely to produce great bodily injury (count two). Both counts also alleged the minor used a deadly weapon, a knife, and inflicted great bodily injury on the victim. (§§ 12022, subd. (b)(1), 12022.7, subd. (a).)

Testimony at the contested jurisdictional hearing established that the minor stabbed another young man in the abdomen during a brawl, using a folding pocketknife with a blade approximately three to four inches long. The resulting injury required a five-day hospital stay.

The juvenile court found true both counts of the petition, as well as all enhancement allegations. The minor was adjudged a ward of the court and committed to the county's Youthful Offender Treatment Program for a maximum period of nine years or until age 21. Among the probation conditions imposed was one requiring the minor to submit his property to a warrantless search at any time, "including any electronic device & cell phone & access codes."

II. DISCUSSION

The minor contends the juvenile court erred in convicting him of both subdivision (a)(1) and (4) of section 245 and argues the enhancement alleging use of a knife under count one should be stricken because use of a deadly weapon is an element of the crime of assault with a deadly weapon. He also challenges the imposition of the probation condition permitting warrantless search of his electronic devices.

A. *Multiple Violations of Section 245*

1. *Governing Law*

The statute governing the crime of aggravated assault, section 245, has undergone a gradual expansion over its history. For much of the first half of the last century, the section read, "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison . . . , or in a county jail . . . , or by fine . . . ,

¹ All further statutory references are to the Penal Code.

or by both such fine and imprisonment.’” (*In re Mosley* (1970) 1 Cal.3d 913, 918, fn. 4 [83 Cal.Rptr. 809, 464 P.2d 473]; see Stats. 1933, ch. 847, § 1, p. 2216.) In 1961, this provision was designated subdivision (a), and a subdivision (b) was added separately criminalizing aggravated assault against a peace officer. (Stats. 1961, ch. 802, § 1, p. 2067.) In addition to other statutory changes to section 245 not pertinent here, subdivision (a) was later split into two parts, dividing the crime into (1) assault with a deadly weapon other than a firearm or by force likely to produce great bodily injury, and (2) assault with a firearm. The latter imposed the new requirement of a minimum six-month jail term. (Stats. 1982, ch. 136, § 1, p. 437; see *People v. Milward* (2011) 52 Cal.4th 580, 585 [129 Cal.Rptr.3d 145, 257 P.3d 748].) In 1989, subdivision (a)(3) was added to section 245, specifying the crime of assault with a machinegun or assault weapon, which carried a mandatory prison term, unlike the other provisions of subdivision (a). (Stats. 1989, ch. 18, § 1, p. 52.) Finally, in 2011, subdivision (a)(1) was split into the crimes of assault with a deadly weapon other than a firearm, which remained subdivision (a)(1), and assault by force likely to produce great bodily injury, which became subdivision (a)(4). Although stated in separate subdivisions, the two crimes continued to carry the same range of punishments, which were separately specified in each subdivision. (Stats. 2011, ch. 183, § 1.) As a result of these changes, subdivision (a) of section 245 now specifies four different crimes, each with its own elements and range of punishments.²

■ It has long been accepted that, in general terms, “a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. ‘In California, a single act or course of conduct by a defendant can lead to convictions “of *any number* of the offenses charged.”’ [Citations.]’ [Citation.] Section 954 generally permits multiple conviction. Section 654 is its counterpart concerning punishment. It

² Section 245, subdivision (a) now reads:

“(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

“(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

“(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

“(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.”

prohibits multiple punishment for the same ‘act or omission.’” (*People v. Reed* (2006) 38 Cal.4th 1224, 1226–1227 [45 Cal.Rptr.3d 353, 137 P.3d 184] (*Reed*).) This general rule is subject to “[a] judicially created exception,” which “‘prohibits multiple convictions based on necessarily included offenses.’ [Citation.] ‘[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’” (*Id.* at p. 1227.) Many cases have found that only a single offense can arise from a single statute, but that has never been a hard-and-fast rule.³

The Supreme Court’s latest word on the issue of multiple convictions is *Gonzalez, supra*, 60 Cal.4th 533. The *Gonzalez* defendant sexually assaulted a woman who had been rendered unconscious by intoxication. He was convicted separately under two subdivisions of section 288a, which prohibit oral copulation of an unconscious person (*id.*, subd. (f)) and oral copulation of a person rendered defenseless by intoxication (*id.*, subd. (i)). The defendant contended he could not be convicted of both offenses because he had committed a single act of oral copulation. (*Gonzalez*, at p. 536.) His appeal was premised on *Craig, supra*, 17 Cal.2d 453, 455, in which the defendant was convicted of two counts of rape based on a single act of forcible intercourse with an underage girl. This conduct violated two subdivisions of section 261, which separately criminalized sex with a minor and forcible intercourse. In requiring consolidation of the convictions, the *Craig* court reasoned: “Under [section 261], but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the [statutory] subdivisions. These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act. . . . The victim was not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age. There was but a single outrage and offense.” (*Id.* at p. 455.) The court expressly distinguished conduct that violated more than one statute, noting different statutes are “based upon an independent public policy.” (*Id.* at p. 458.)

Although the circumstances of *Craig* would appear to be materially indistinguishable from those in *Gonzalez*, the *Gonzalez* court permitted both convictions for oral copulation to stand, basing its conclusion on an analysis of the statutory structure. (*Gonzalez, supra*, 60 Cal.4th at pp. 537–538.)

³ Compare *People v. Craig* (1941) 17 Cal.2d 453, 455 [110 P.2d 403] (*Craig*) (one offense of rape results from a single act of unlawful intercourse, despite violating more than one statutory subdivision); *People v. Muhammad* (2007) 157 Cal.App.4th 484, 493–494 [68 Cal.Rptr.3d 695] (same for stalking); *People v. Ryan* (2006) 138 Cal.App.4th 360, 366–367 [41 Cal.Rptr.3d 277] (same for forgery), with *People v. Toure* (2015) 232 Cal.App.4th 1096, 1106 [181 Cal.Rptr.3d 857] (defendant can suffer convictions under more than one subdivision of statute proscribing driving under the influence and causing bodily injury).

Within the statute, section 288a, subdivision (a) defines oral copulation in general terms. The subsequent subdivisions of the statute describe the various circumstances under which oral copulation, as so defined, is illegal. Each subdivision describes a distinct circumstance and contains a specific punishment, applicable solely to the circumstances described in the subdivision. In inferring a legislative intent to permit convictions for violations of both subdivisions (f) and (i), the *Gonzalez* court concluded: “These offenses differ in their necessary elements—an act of oral copulation may be committed with a person who is unconscious but not intoxicated, and also with a person who is intoxicated but not unconscious—and neither offense is included within the other. [Citation.] ¶ . . . Each subdivision sets forth all the elements of a crime, and each prescribes a specific punishment. Not all of these punishments are the same. That each subdivision of section 288a was drafted to be self-contained supports the view that each describes an independent offense, and therefore section 954 is no impediment to a defendant’s conviction under more than one such subdivision for a single act.” (*Id.* at p. 539.)

Gonzalez distinguished *Craig* on the basis of the different structure of the two statutes involved. At the time *Craig* was decided, former section 261 stated, “[r]ape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances,” and thereafter listed a variety of circumstances in separately numbered subparagraphs. No individual punishments were specified for the different circumstances. (*Gonzalez, supra*, 60 Cal.4th at p. 539, fn. 2.) According to *Gonzalez*, *Craig* “simply concluded, based on the wording and structure of the statute, that former section 261 set forth only one offense that could be committed under several different circumstances, as described in its several subdivisions. This conclusion flowed naturally from the wording and structure of former section 261. . . . ¶ . . . ¶ Section 288a is textually and structurally different from former section 261.” (*Gonzalez*, at p. 539, fn. omitted.)

2. *Violations of Section 245, Subdivision (a)(1) and (4)*

a. *The Statutory Structure of Section 245*

■ The statutory structure of section 245 is indistinguishable from that of section 288a. Each subdivision of section 245 sets out different circumstances under which a person can commit aggravated assault, and each subdivision specifies the punishment applicable to those circumstances. The reasoning of *Gonzalez* would therefore classify each subdivision as a separate offense and permit more than one conviction based upon the violation of more than one subdivision of section 245.

The minor encourages us to find subdivision (a)(1) and (4) of section 245 do not constitute separate offenses on the basis of the legislative history of the amendment creating subdivision (a)(4), which described the legislation as a “technical, nonsubstantive” change. (Legis. Counsel’s Dig., Assem. Bill No. 1026 (2011–2012 Reg. Sess.).) According to the bill’s author, the purpose of the amendment was to make it easier for prosecutors and defense attorneys to determine whether a defendant’s past aggravated assault conviction involved the use of a weapon when examining a defendant’s criminal history, since past aggravated assault convictions involving the use of a weapon are treated differently for certain purposes than those not involving a weapon. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) Apr. 26, 2011, pp. 1–2.) Because criminal histories typically list prior crimes according to the statute violated, a citation to section 245, subdivision (a)(1) was ambiguous in this respect prior to the amendment. (See Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) Apr. 26, 2011, p. 2.) The minor argues no separate offense was created by the amendment because the two clauses specified different methods of committing a single offense before the amendment and the Legislature expressed no intent to change that situation in enacting the amendment.

■ The rationale of *Gonzalez* precludes such an analysis. The court held, in effect, that the Legislature is deemed to have intended to create separate offenses whenever a statute isolates violations with separate elements and punishments in separate subdivisions. Under *Gonzalez*, this statutory structure was held to be an element of the plain language of the statute, and that language was held to be unambiguous in creating separately convictable offenses. ■ Given the absence of ambiguity, expressions of intent in a statute’s legislative history are irrelevant to its interpretation. (*Gonzalez, supra*, 60 Cal.4th at pp. 537–538.)

b. *Necessarily Included Offenses*

■ While we do not accept the minor’s reasoning, we find merit in his general point. *Gonzalez* acknowledges an exception to its general rule. As the court noted in discussing the subdivisions violated by the defendant: “These offenses differ in their necessary elements . . . and neither offense is included within the other.” (*Gonzalez, supra*, 60 Cal.4th at p. 539.) In other words, the court recognized that the general rule prohibiting multiple convictions for necessarily included offenses (*Reed, supra*, 38 Cal.4th at p. 1227) operates with respect to separate subdivisions within a single statute.⁴ Because, as

⁴ The language of *Gonzalez* echoes the “elements test” for determining whether one offense is a lesser included offense of another. “The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words,

discussed below, we conclude assault with a deadly weapon other than a firearm includes the elements of assault by force likely to produce great bodily injury, such that a person cannot commit the former without at the same time committing the latter, a person cannot be convicted of both offenses on the basis of a single act, notwithstanding their inclusion in separate, self-contained subdivisions of section 245.

The separate aspects of aggravated assault found in subdivision (a)(1) and (4) of section 245 have not previously been considered in the terms associated with lesser included offenses because, until 2011, the subdivisions were alternative provisions within a single statutory subdivision. As section 245 was constructed prior to 2011, a person could commit aggravated assault by committing assault either “with a deadly weapon or instrument other than a firearm *or* by any means of force likely to produce great bodily injury.” (Former § 245, subd. (a)(1), italics added.) Use of a deadly weapon other than a firearm or force likely to produce great bodily injury were therefore two means to commit the same offense, rather than different offenses. When the two aspects are considered separately, however, it becomes clear the latter is necessarily committed when the former occurs.

■ The crime of assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240; see *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1344 [152 Cal.Rptr.3d 109].) It is unnecessary for any actual injury to occur. (*People v. White* (2015) 241 Cal.App.4th 881, 884 [194 Cal.Rptr.3d 323].)

The distinction between assault with a deadly weapon other than a firearm and assault by force likely to produce great bodily injury was explored in *People v. Aguilar* (1997) 16 Cal.4th 1023 [68 Cal.Rptr.2d 655, 945 P.2d 1204] (*Aguilar*), in which the court considered “whether hands or feet can constitute ‘deadly weapons’ within the meaning of the statute.” (*Id.* at p. 1026.) In *Aguilar*, the defendant had severely beaten and kicked the victim, and the prosecutor argued to the jury a conviction for aggravated assault was appropriate because hands and feet may be deadly weapons within the meaning of former section 245, subdivision (a)(1). (*Aguilar*, at p. 1029.) In disapproving the prosecutor’s argument, the court noted weapons not inherently deadly “are defined by their use in a manner capable of producing great bodily injury.” (*Id.* at p. 1030.) For that reason, the clause “force likely to produce great bodily injury” would be rendered redundant if hands and feet could be considered “weapons” or “instruments.” (*Ibid.*) Rather, the separate

“ ‘[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ ” ” (*People v. Robinson* (2016) 63 Cal.4th 200, 207 [202 Cal.Rptr.3d 485, 370 P.3d 1043].)

clause “force likely to produce great bodily injury” was included in the statute to cover the application of such force without the use of an instrument. (*Ibid.*)

While the court found the prosecutor’s argument to be improper, it concluded the prosecutor’s argument was harmless, using reasoning directly pertinent to the issue before us. “Ultimately . . . , the jury’s decisionmaking process in an aggravated assault case under [former] section 245, subdivision (a)(1), is functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used.” (*Aguilar, supra*, 16 Cal.4th at p. 1035.) That is, if the defendant acted by means of a weapon other than a firearm, it was necessary for the jury to find the defendant applied force likely to produce great bodily injury, regardless of whether the force was applied by means of an instrument or by hands and feet. As the court concluded, there is a “fundamental identity of the concepts of assault with a deadly weapon and assault by means of force likely to produce great bodily injury.” (*Id.* at p. 1036.) Both aspects of former section 245, subdivision (a)(1) required the attempted or actual use of force likely to produce great bodily injury; they differed only in that subdivision (a)(1) required force to be applied through use of a weapon or other instrument.

■ *Aguilar* is conclusive here. When a defendant commits an assault using an instrument other than a firearm, the instrument is considered to be a “deadly weapon,” and therefore to qualify under section 245, subdivision (a)(1), only if the instrument is used in a manner likely to produce death or great bodily injury. For that reason, when assault with a deadly weapon other than a firearm is found to have occurred, the trier of fact necessarily must have concluded the defendant used or attempted to use force likely to produce great bodily injury, since that likelihood is what makes a weapon or instrument “deadly.” If the use of the instrument was not likely to produce great bodily injury, the defendant’s conduct could not satisfy subdivision (a)(1). Because both subdivisions require the use or attempted use of force likely to produce great bodily injury, subdivision (a)(4) does not “differ in [its] necessary elements” from subdivision (a)(1), and subdivision (a)(4) is “included within” subdivision (a)(1).⁵ (*Gonzalez, supra*, 60 Cal.4th at p. 539.)

⁵ This is true as well when a defendant is convicted of using a “deadly weapons as a matter of law,” such as a dirk or blackjack. (*Aguilar, supra*, 16 Cal.4th at pp. 1029, 1037, fn. 10.) While no jury finding of force likely to produce great bodily injury is required in these circumstances, those instruments are declared “deadly” weapons as a matter of law precisely because they “are weapons in the strict sense of the word and are ‘dangerous or deadly’ to others in the ordinary use for which they are designed.” (*People v. Raleigh* (1932) 128 Cal.App. 105, 108 [16 P.2d 752].) Use of these weapons necessarily involves the use of force likely to

A defendant who has been convicted of a violation of subdivision (a)(1) therefore cannot also suffer a conviction under subdivision (a)(4) based on the same assault.⁶

The Attorney General, citing *Aguilar*, argues subdivision (a)(4) of section 245 is not included within subdivision (a)(1) because a violation of subdivision (a)(1) requires the use of a weapon, while subdivision (a)(4) is addressed to an assault using only hands or feet. The argument reflects the Legislature's original motivation in adding the phrase "force likely to produce great bodily injury" to section 245, which was to include violent assaults committed without the use of a weapon or other instrument within the aggravated assault statute. (*Aguilar, supra*, 16 Cal.4th at pp. 1030–1031.) We would agree with the Attorney General if the Legislature had expressly included this limitation in subdivision (a)(4) by excluding assaults carried out by means of an instrument. In that case, the two offenses would be mutually exclusive, rather than overlapping. That is not, however, the language of subdivision (a)(4). As written, the subdivision encompasses *any* use of force likely to produce great bodily injury, which necessarily includes the application of that force by use of a weapon or other instrument. The juvenile court recognized as much when it found the minor to have violated both provisions on the basis of an assault using a knife. Were subdivision (a)(4) restricted in the manner argued by the Attorney General, the minor's conviction under subdivision (a)(4) would have been unsupported by the evidence.

■ The Attorney General also argues that subdivision (a)(4) of section 245 requires the *application* of force, while subdivision (a)(1) does not. The argument ignores the definition of assault, which is incorporated into section 245. An assault includes an attempt to apply force as well as the actual application of force. It is commonly held that a defendant need not make any physical contact with the victim to commit aggravated assault. (E.g., *People v. White, supra*, 241 Cal.App.4th at p. 886; *People v. Brown* (2012) 210 Cal.App.4th 1, 7 [147 Cal.Rptr.3d 848] ["Because the statute speaks to the capability of inflicting significant injury, neither physical contact nor actual injury is required to support a conviction."].) Under subdivision (a)(4), a powerful punch that misses is an aggravated assault to the same degree as the same punch that lands, at least in theory. (E.g., *People v. Leonard* (2014) 228 Cal.App.4th 465, 488 [175 Cal.Rptr.3d 300] [evidence that person swung fist toward the victim with force sufficient to smash a car window supports conviction for aggravated assault].)

produce death or serious injury. (See *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 541 [91 Cal.Rptr.2d 778] [to be deadly weapon as a matter of law, weapon must be "capable of inflicting great bodily injury"].)

⁶ Because the issue is not before us, we offer no opinion whether a defendant who attacks or attempts to attack another both with a deadly weapon and with hands or feet, the latter in a manner likely to produce great bodily, can be convicted of both offenses.

We are aware *In re Mosley, supra*, 1 Cal.3d 913, states that assault by means of force likely to produce great bodily injury is not a lesser included offense of assault with a deadly weapon under former section 245. (*Mosley*, at p. 919, fn. 5.) At the time *Mosley* was decided, however, the two were not separate offenses. As discussed above, all aspects of the crime of aggravated assault were encompassed within a single statutory paragraph that included both provisions. (*Id.* at p. 918, fn. 4.) As the court explained its reasoning: “Section 245 . . . defines only one offense, to wit, ‘assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury. . . .’ The offense of assault by means of force likely to produce great bodily injury is not an offense separate from—and certainly not an offense lesser than and included within—the offense of assault with a deadly weapon.” (*Id.* at p. 919, fn. 5.) The explanation makes clear that the court’s conclusion was based on the structure of the statute, which specified use of a deadly weapon and use of force likely to produce great bodily injury as alternative means to commit the same offense, aggravated assault. (See *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1043 [23 Cal.Rptr.3d 508] [“As is readily apparent, [former section 245, subdivision (a)(1)] describes two different ways of committing a prohibited assault: (1) by use of a deadly weapon or instrument other than a firearm *or* (2) by means of force likely to produce great bodily injury.”].)

Once the Legislature separated these provisions into different subdivisions, the logic of *Mosley* no longer holds. Under the reasoning of *Gonzalez*, the separation of the two aspects of aggravated assault into separate, self-contained subdivisions created two offenses where formerly there was one. Considered as separate offenses, for the reasons discussed above, assault by means of force likely to produce great bodily injury is necessarily included within assault with a deadly weapon.

For this reason, the court’s true findings with respect to count two, which alleged a violation of subdivision (a)(4) of section 245, must be vacated, and the enhancements alleged in count two must be stricken. Given these modifications, we also must vacate the juvenile court’s calculation of the minor’s maximum term of confinement and restitution fine.⁷

B., C.*

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⁷ We are persuaded by the minor that there is uncertainty over the court’s restitution fine. At the hearing, the court set the total fine at \$200, but the dispositional order specifies \$200 *per felony*. We therefore vacate the fine and direct its recalculation on remand. We do not mean to imply that either fine is unavailable or improper under section 245, subdivision (a)(1).

*See footnote, *ante*, page 963.

III. DISPOSITION

The juvenile court's findings with respect to the minor's violation of section 245, subdivision (a)(4), alleged in count two, and the juvenile court's calculation of the minor's maximum term of confinement and restitution fine are vacated. The enhancements alleged under count two and the enhancement allegation under section 12022, subdivision (b)(1) in count one are stricken. The matter is remanded to the juvenile court for entry of a new detention hearing order reflecting these modifications, recalculation of the minor's maximum term of confinement and restitution fine in light of the modifications, and entry of a new dispositional order reflecting the recalculated maximum term of confinement and fine.

In addition, the search condition of the dispositional order, which currently reads, "Submit person, property, any vehicle under minor's control, and residence to search and seizure by any peace officer any time of the day or night with or without a warrant[,] including any electronic device & cell phone & access codes," is modified to read: "Submit your person and any vehicle, room, or property under your control to a search by the probation officer or a peace officer, with or without a search warrant, at any time of the day or night. Submit all electronic devices under your control to a search of any medium of communication reasonably likely to reveal whether you are involved with drugs or are otherwise in violation of the remaining probation conditions, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified. Such media of communication includes text messages, voicemail messages, photographs, e-mail accounts, and social media accounts."

Humes, P. J., and Dondero, J., concurred.

A petition for a rehearing was denied October 27, 2016.

[No. B269598. Second Dist., Div. One. Sept. 30, 2016.]

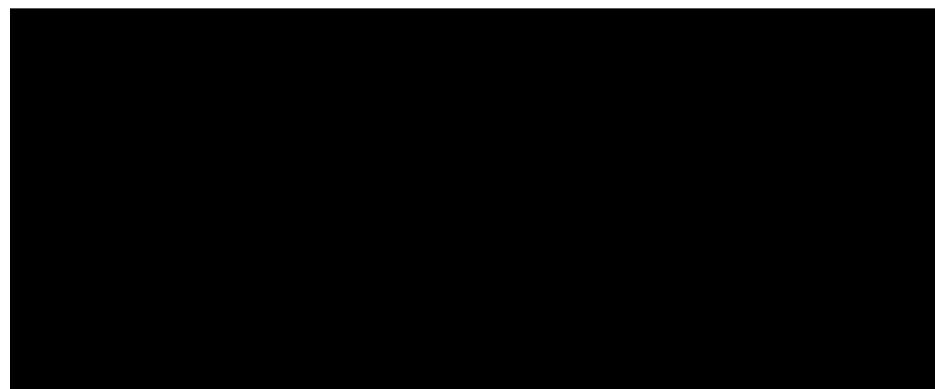
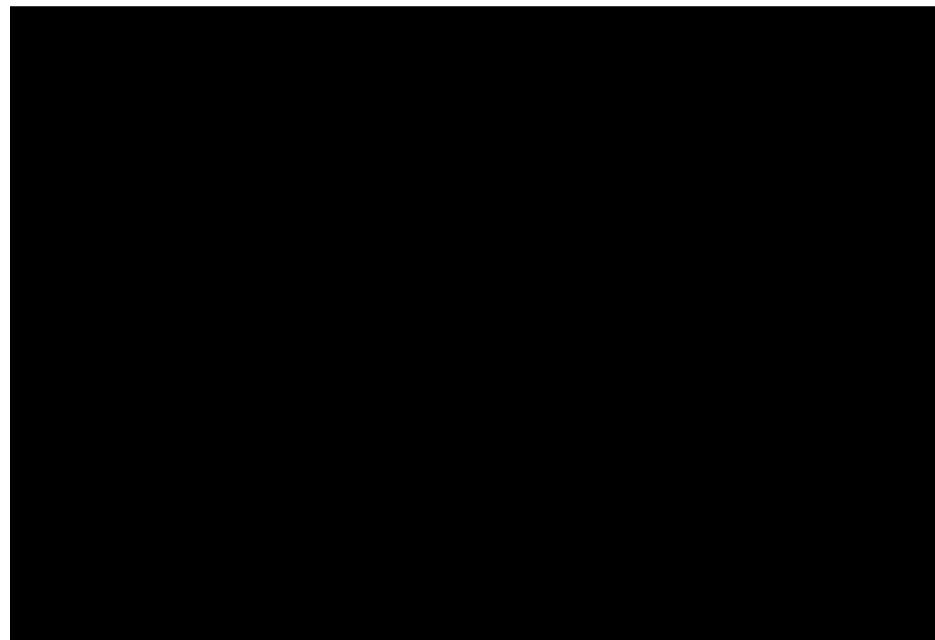
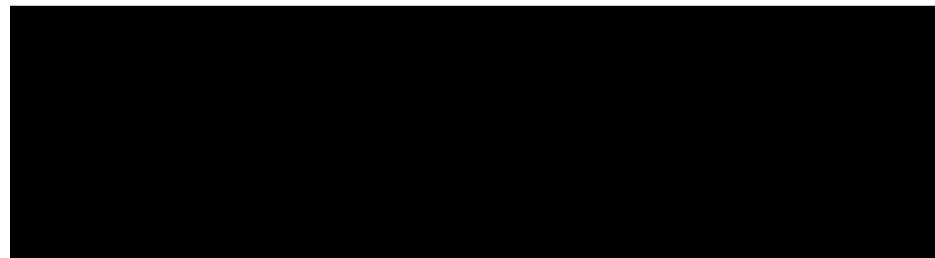
In re MICHAEL S., a Person Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
MIGUEL S., Defendant and Appellant.

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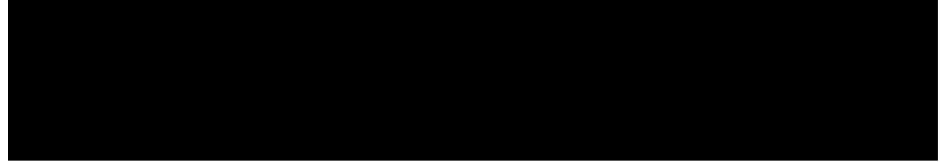
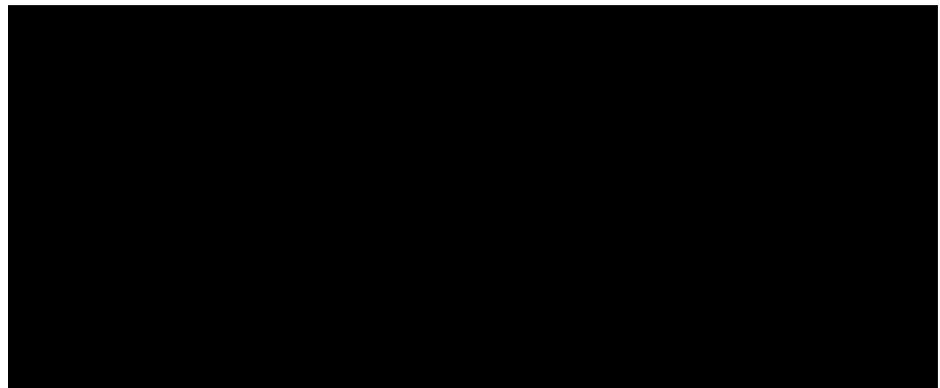
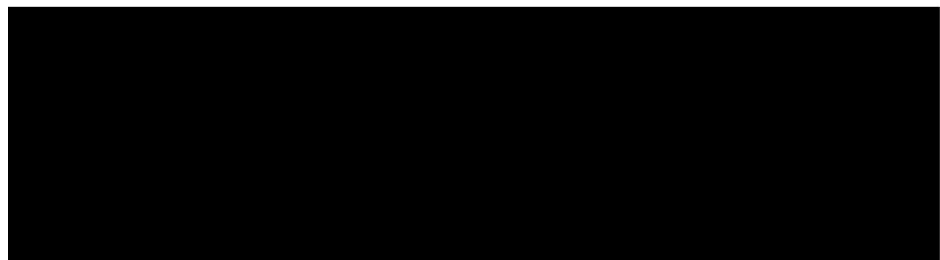
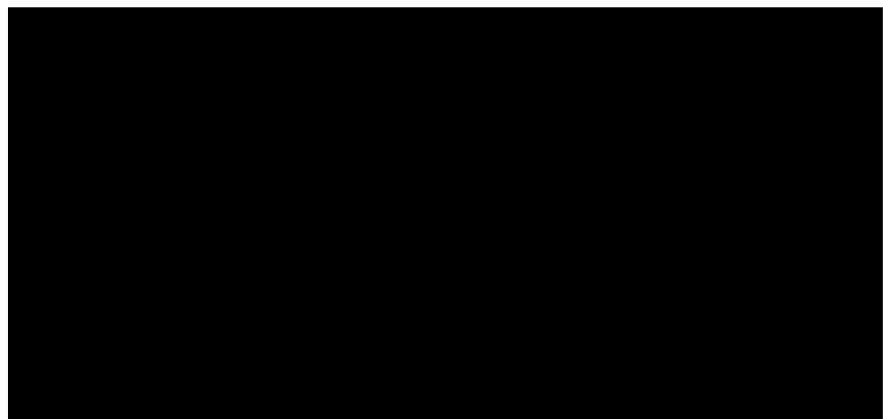
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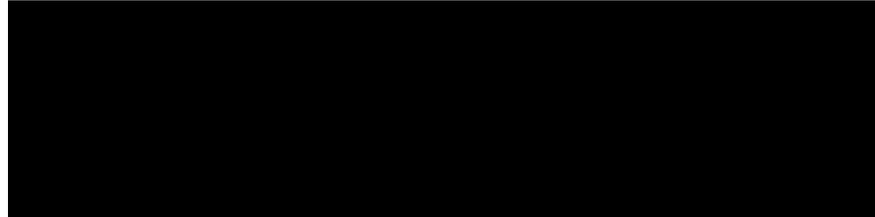
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COUNSEL

Michelle Ben-Hur, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Jessica Paulson-Duffy, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

LUI, J.—Miguel S. (Father) appeals from the juvenile court’s order removing his son, Michael, from his custody. At the time the juvenile proceedings began, Michael lived with his mother, Maria O. (Mother), and Father. Father now lives elsewhere and is prohibited by a restraining order from any contact with Michael other than in supervised visits.

Father does not challenge the juvenile court’s jurisdictional findings and does not argue for any practical change in his access to Michael. Rather, Father argues that the governing statute, Welfare and Institutions Code section 361, subdivision (c)(1), does not permit removal from just one “custodial” parent.¹ Because the court ordered Michael to remain in Mother’s custody with restrictions on Father’s contacts, Father claims that there was necessarily a reasonable alternative to removal and that the removal order therefore exceeded the juvenile court’s jurisdiction.

We disagree with Father’s statutory interpretation and therefore affirm.

BACKGROUND

Michael was born in 2011 and was four years old at the time of the juvenile court proceedings. He lived with Mother and Father and three children from Mother’s previous marriage to Nicolas P. (Nicolas).

¹ Subsequent undesignated statutory references are to the Welfare and Institutions Code.

[REDACTED]

On October 16, 2015, the Los Angeles County Department of Children and Family Services (Department) received a referral from the child abuse hotline concerning possible sexual abuse of Michael's older half sister, M.P. Social workers and the police went to the family's home that day to investigate. When interviewed, M.P. (who was 15 years old at the time) admitted that Father had touched her inappropriately on a number of occasions. The most recent inappropriate touching had occurred just a few days earlier when Mother was in the hospital.

When questioned, Mother admitted that she was in the hospital because Father had pushed her into the bathtub while they were having an argument. She fell backward and hit the faucet. She suffered broken ribs and a broken vertebrae. Mother also disclosed a previous incident in which Father had thrown a lamp in her face. M.P. and her sister separately told a social worker that Father had thrown a metal tool at Mother about four to six months previously.

Following the interviews, Nicolas picked up Michael's three half siblings to stay with him. Mother and Michael left their apartment to stay in an emergency shelter. When Father learned from Mother that law enforcement officers were at the apartment speaking with M.P., he refused to return home. The police officers gave Mother an emergency protective order against Father that was effective for seven days.

The Department filed a petition concerning the four children on October 21, 2015. An initial detention hearing occurred the same day. The juvenile court released Michael to Mother and released the other three children to Mother and to their father, Nicolas. The court also extended the temporary restraining order against Father until November 9, 2015. On November 9, the court again extended the restraining order until November 18, 2015, the date set for the adjudication hearing, because Mother had been unable to serve Father.

The Department's jurisdiction/disposition report filed before the November 18 hearing stated that Michael's three half siblings continued to live with Nicolas, and Michael and Mother lived at a friend's house at an undisclosed address. The Department had not been able to interview Father, and he had not arranged any supervised visits with Michael. Mother had expressed interest in moving back to their original residence, and the Department was "exploring the possibility of mother doing so once it is verified that all of [Father's] belongings are out of the home and the locks have been changed." Mother had recanted her statements about domestic violence, but she told the Department that she had no intention of resuming a relationship with Father. The Department observed that Mother's prior statements were very detailed

and concluded that it was “likely that [Mother] is now recanting the domestic violence out of fear due to [Father’s] gang ties as previously reported by [Mother].”

The Department’s jurisdiction/disposition report recommended various findings for the court, including that “[c]ontinuance in the home of [Father] would be contrary to the child’s welfare.” The Department also recommended that the court find that “[c]lear and convincing evidence shows that the child Michael should be removed from the physical custody of [Father] in that there is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child or would be if the child was returned home, and there are no reasonable means by which the child’s physical health can be protected without removing the child from the physical custody of the child’s father.”

The Department’s jurisdiction/disposition report attached the Department’s prior detention report filed before the October 21, 2015 detention hearing, which included a section on “reasonable efforts.” That section summarized the steps the Department took to “prevent or eliminate the need for the child(ren)’s removal from the home” prior to the detention hearing. Those steps consisted of the Department’s interviews of the children and parents, unsuccessful attempts to contact Father, investigation of the parents’ criminal histories, placement of Mother and Michael in an emergency shelter, and obtaining an emergency protective order. The detention report also recommended a permanent restraining order.

Father made his first appearance at the November 18 hearing and provided an address in Apple Valley.² The court continued the jurisdiction/disposition hearing to December 15, 2015.

M.P. testified at the jurisdiction/disposition hearing on December 15, 2015, and confirmed that Father had touched her inappropriately in a sexual manner on multiple occasions. With respect to the alleged domestic violence, she testified that Mother had told her at the first juvenile court appearance that Father had “pushed her into the tub. And because of that, she had her—she hurt her spine.” She also testified that she had seen Father throw a tool at Mother about three months earlier. The tool was “like a wrench.” It appeared to her that Father “wanted to purposely hit my mom with the tool, but my mom got to close the door on time.”

At the conclusion of the hearing, the juvenile court stated that Michael would be “removed from his father.” Father’s counsel asked to be heard on

² M.P. had previously told the social worker and police officers about an incident that occurred when Mother and the children were spending the night in Father’s Apple Valley home.

that issue and requested “either that Michael not be removed from his care or we’re asking for unmonitored visits.” The court denied the request.

Following the hearing, the juvenile court ordered Michael removed from Father’s custody. The court found that “[s]ubstantial danger exists to the physical or emotional health of minor(s) and there is no reasonable means to protect the minors without removal.” The court also found that “[r]easonable efforts have been made to prevent or eliminate need for minor’s removal from home.” The court did not state the basis for that determination.

The court issued a permanent restraining order against Father that precludes him from any contact with Mother or Michael (or Mother’s other children) except for scheduled supervised visits with Michael. The restraining order also states that Father “must move immediately” from the family’s prior home. The restraining order expires on December 15, 2018.

DISCUSSION

■ Father’s statutory interpretation argument is an issue of law that we review independently. (*In re Marquis H.* (2013) 212 Cal.App.4th 718, 725 [151 Cal.Rptr.3d 284].) Our objective is to ascertain legislative intent, based in the first instance on the statutory language itself. (*Ibid.*) However, we also keep in mind the context of the particular statute within the statutory scheme as a whole. “Given the complexity of the statutory scheme governing dependency, a single provision ‘cannot properly be understood except in the context of the entire dependency process of which it is a part.’” (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235 [91 Cal.Rptr.3d 140, 203 P.3d 454].)

1. *The Governing Statutes*

■ Section 361, subdivision (a)(1) provides that, when a minor is adjudged a dependent of the court, the court “may limit the control to be exercised over the dependent child by any parent or guardian.” However, a child may not be removed from the physical custody of his or her parents unless there is “clear and convincing evidence” of one of the circumstances specifically enumerated in the statute. (§ 361, subd. (c).)

The circumstance that the juvenile court found here is that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” (§ 361, subd. (c)(1).) Subdivision (c)(1) specifically identifies two alternatives for the juvenile court to consider

as “a reasonable means to protect the minor.” One is “[t]he option of removing an offending parent or guardian from the home.” (§ 361, subd. (c)(1)(A).) The other is “[a]llowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.” (§ 361, subd. (c)(1)(B).)

Father argues that the juvenile court’s order removing Michael from his custody was not authorized by section 361, subdivision (c), and that leaving Michael in Mother’s custody was, as a matter of law, an *alternative* to Michael’s removal from Father. Thus, Father claims that the juvenile court could not both order Father to stay away from Michael and also order Michael removed from Father’s custody.

■ We disagree that the juvenile court was precluded as a matter of law from considering the alternative of removal in this situation. By its language, section 361 appears to contemplate removal from one parent only. While that section is somewhat inconsistent in its use of the singular and plural, it does refer in places to the possibility of removal from only one parent. For example, subdivision (c)(1) uses the singular possessive in stating that the court must determine that there are no reasonable means to protect the minor “without removing the minor from the minor’s *parent’s* or *guardian’s* physical custody.” (§ 361, subd. (c)(1), italics added.) That same subdivision states that a prior adjudication that the minor is a dependent child of the court pursuant to section 300, subdivision (e) “shall constitute *prima facie* evidence that the minor cannot be safely left in the physical custody of the *parent* or *guardian* with whom the minor resided at the time of injury.” (§ 361, subd. (c)(1), italics added.) Other subdivisions also use the singular in describing conduct that would warrant removal from the “parent.” (See § 361, subd. (c)(2)–(5).)

Section 361, subdivision (c)(1)(A) clearly requires the court to consider the “option” of removing an offending parent from the home as a possible alternative to removal of the child from the parent. However, that subdivision does not state that the option of removing a parent from the home will *necessarily* be sufficient to protect the child in all cases even if ordered. It does not, by its terms, preclude the possibility of ordering both removal of the parent from the home and removal of the child from the parent.

Flexibility in ordering removal from only one custodial parent makes sense in light of the many different custody arrangements that a juvenile court might need to address. For example, two parents might live apart and share custody of a child. Or the parents might live together with a child most of the time, but one of the parents maintains a separate residence that the child

sometimes visits. In such situations, if only one parent engages in the conduct underlying a dependency petition, the juvenile court might conclude that it is appropriate to remove the child only from the offending parent and allow the child to remain in the other parent's custody.

■ Indeed, the facts here illustrate the different living arrangements that a juvenile court can confront. While Mother and Father lived with Michael in an apartment in Los Angeles at the time the relevant events occurred, they were not married and Father apparently had a separate residence in Apple Valley that the children had previously visited. Father left his family, initially on his own volition, after learning that law enforcement and social workers had made a visit. By the time the initial petition was filed, he was no longer at the home. While the juvenile court ordered Father to stay away from the family's residence and from the children, under the circumstances the juvenile court could also reasonably consider the option of removing Michael from Father's custody to confirm that, absent a further court order, Father was not permitted physical custody of Michael at any location.³

In other cases, dependency courts have removed a child from only one parent's custody when the parents did not live together. (See *In re D.G.* (2012) 208 Cal.App.4th 1562 [146 Cal.Rptr.3d 576] (*D.G.*) [removing child from the custody of the father who was also ordered out of the home]; *In re E.B.* (2010) 184 Cal.App.4th 568, 574, 578 [109 Cal.Rptr.3d 1] [removing children from the father's custody based upon sexual and other abuse and allowing them to remain with the mother]; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1209–1210, 1217 [272 Cal.Rptr. 316] [child removed from divorced father's custody and placed with the mother who shared legal custody].)

In *D.G.*, *supra*, 208 Cal.App.4th 1562, this court approved an order removing an offending father from the home and also removing the father's children from his custody under section 361 (albeit without addressing the statutory argument that Father makes here). The juvenile court in that case had ordered the father removed from the home because of the father's sexual abuse of D.G. while the children remained in the mother's custody. After reviewing the requirements of section 361, subdivision (c), this court found substantial evidence to support the juvenile court's findings that "allowing Father to remain in the family home posed a substantial danger to the health and safety of [the children] and there were no reasonable means of protecting the children without removal from Father's custody." (*D.G.*, at p. 1574.)

The cases on which Father relies do not hold that a child may never be removed from only one custodial parent. Rather, those cases held that the

³ Although the juvenile court did not identify this as a reason for ordering removal, we note that the restraining order expired after three years.

statutory scheme does not permit removing a child from a parent and then immediately returning that child to the *same* parent. (See *In re Damonte A.* (1997) 57 Cal.App.4th 894 [67 Cal.Rptr.2d 369]; *In re Andres G.* (1998) 64 Cal.App.4th 476 [75 Cal.Rptr.2d 285]; *In re N.S.* (2002) 97 Cal.App.4th 167 [118 Cal.Rptr.2d 259].) That is not what occurred here. The juvenile court did not order Michael removed from Mother, and therefore did not create the “unseemly inconsistency” of a finding that it was necessary to remove a child from a parent to protect the child while simultaneously returning the child to the same parent. (*Andres G.*, at p. 481.)

■ Father also argues that section 361.2 supports the conclusion that the statutory scheme does not permit removing a child from one custodial parent only. Section 361.2, subdivision (e) specifies the procedure for placement of a child who has been removed pursuant to section 361. Once a child has been ordered removed, “the court shall order the care, custody, control, and conduct of the child to be under the supervision of the social worker.” The social worker’s first option for placement is with another parent “with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300.” (§ 361.2, subd. (a); see *id.*, subd. (e).) Other options include a “relative,” a “nonrelative extended family member,” a “resource family,” a foster home, community care facility, or a group home. (§ 361.2, subd. (e)(1)–(11).) The listed alternatives do not include placement with a parent with whom the child was living at the time the relevant events occurred. Father argues that this is because the Legislature contemplated that leaving a child with a custodial parent while placing limits on the other custodial parent would be an alternative to removal under section 361.

■ While this argument has some force, we do not believe that section 361.2 should be read to preclude removal from only one custodial parent in all situations. The section addresses placement when a child is removed from his or her previous home. Such placement is necessary only when the child has no home in which to stay. If a child remains with a custodial parent, there would be no need to consider other placement options. Although section 361.2 does not expressly identify the possibility of keeping a child in one custodial parent’s home and removing custody from the other parent, we do not read it to foreclose that possibility as a matter of law, particularly in light of the different living situations that a juvenile court might confront.

2. *The Juvenile Court’s Order*

The juvenile court ordered Michael removed from Father’s custody with a finding that “substantial danger exists to the physical or emotional health” of Michael and there was “no reasonable means to protect” Michael without

removal. The court did not state the facts on which this conclusion was based. (See § 361, subd. (c)(1).) However, on appeal Father does not challenge the sufficiency of the evidence underlying the court's removal order, but argues only that the court was precluded from considering the option of removal as a matter of law. Because we reject that legal argument, we affirm.

DISPOSITION

The juvenile court's order removing Michael from Father's physical custody is affirmed.

Rothschild, P. J., and Johnson, J., concurred.

[No. A142424. First Dist., Div. Four. Sept. 30, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
LATANYA A. STAMPS, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

989

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Alfons Wagner and J. Bradley O'Connell, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Catherine A. Rivlin and Ann P. Wathen, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

STREETER, J.—Appellant Latanya A. Stamps was convicted of multiple drug possession offenses after drugs in both pill and crystalline form were discovered in her car, purse or clothing on four different dates from October through December 2012. She appeals, arguing the court improperly admitted the testimony of an expert criminalist who identified the drugs in pill form as controlled substances solely by comparing their appearance to pills pictured on a Web site called “Ident-A-Drug.” Stamps attacks her convictions for possession of oxycodone and dihydrocodeinone on grounds that (1) the expert’s testimony was based on unreliable and inadmissible hearsay from the Web site and did not involve the use of the witness’s expertise and (2) there was insufficient evidence to convict on the counts involving those drugs because the expert relied exclusively on the Web site in rendering her

opinion. Because we agree that the expert testimony was improperly admitted, and because the testimony was central to Stamps's pill-based convictions, we reverse Stamps's convictions on counts one, five, seven and eight.¹ We conclude, however, that a retrial on those counts is not barred by double jeopardy principles.

I. BACKGROUND

On four occasions in October through December 2012, Stamps was pulled over by the Pittsburg police because her car did not display a license plate. On each occasion she and her car were searched, and on each occasion drugs were discovered. On October 30, 2012, the police discovered two yellow oval tablets with a capital "V" on one side and a white oval tablet with the word "Watson" on its side. The next night, the police again stopped Stamps's car, conducted a search, and discovered a methamphetamine pipe and 1.19 grams of a white crystalline substance believed to be methamphetamine. Yet again, on November 1, 2012, they found a bindle of white crystalline substance believed to be methamphetamine, weighing 0.25 gram, six white oblong pills, one with the words "Watson" and "853" printed on it, and 0.28 gram of some white chunky substance believed to be cocaine base. On December 16, they found 0.03 gram of suspected methamphetamine in a plastic baggie in Stamps's bra and two pills in her car. One of the pills was yellow with "853" written on it, and the other was a white tablet bearing the words "Watson 932."

Stamps was charged with eight counts of drug possession: three counts of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), one count of possession of cocaine (Health & Saf. Code, §§ 11350, subd. (a), 11379, subd. (a)), one count of possession of oxycodone (Health & Saf. Code, § 11350, subd. (a)), and three counts of possession of dihydrocodeinone (Health & Saf. Code, § 11350, subd. (a)). At trial, the People proved the chemical composition of the crystalline and chunky substances through the testimony of criminalist Shana Meldrum, an employee of the Contra Costa County Sheriff's crime lab. Meldrum performed a detailed chemical analysis on the suspected methamphetamine and cocaine, and her tests confirmed the drugs were as suspected. With respect to the drugs in pill form, however, Meldrum identified the pills as oxycodone and dihydrocodeinone based solely on a visual comparison of the seized pills to those displayed on the Ident-A-Drug Web site. Based on the shape and color of the pills, their markings and their condition, Meldrum concluded they contained the alleged substances. This visual comparison was considered a "presumptive test" of

¹ Stamps's briefs identify the challenged counts as one, three, seven and eight, but it appears the correct counts are one, five, seven and eight.

each pill's chemical composition. Meldrum did no confirming chemical analysis of the pills. In addition to the expert's testimony, Stamps had given statements to the police on the dates of her arrests indicating the pills found on October 30, 2012, were Norco and Phexoreal, and the pills found on November 1, 2012, were "Norcos."

The jury found Stamps guilty on all eight counts, and she was placed on probation for two years. On appeal she challenges her convictions only on the four counts stemming from her possession of the various pills described above.

II. DISCUSSION

A. *Admissibility of the Ident-A-Drug Evidence*

Stamps contends Meldrum should not have been allowed to testify to the contents of the Ident-A-Drug Web site because the testimony brought before the jury inadmissible and unreliable hearsay which the jurors may have used as direct evidence of the charged offenses. She further argues the expert's testimony should have been excluded because matching the pills to a photograph on a Web site did not involve the use of the witness's expertise.² (See *State v. Ward* (2010) 364 N.C. 133 [694 S.E.2d 738, 746, fn. 5] (*Ward*).) On the admissibility question, we review the trial court's evidentiary ruling admitting the expert's testimony for abuse of discretion. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193 [94 Cal.Rptr.3d 478] (*Dean*); *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1083 [112 Cal.Rptr.2d 479].) On any question of law, however, such as the meaning to be ascribed to the language in an appellate court's opinion, we exercise independent review. (See, e.g., *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 837 [189 Cal.Rptr.3d 824, 352 P.3d 391] [statutory

² Nor did Meldrum testify that any special expertise was required to use the Ident-A-Drug Web site. She testified she "entered the markings on the pill into the website and obtained a match result to the markings, to the shape and to the color of the pills, and presumptively identified those" as oxycodone and dihydrocodeinone. Her testimony did not reveal any special expertise required to interpret the results provided by Ident-A-Drug beyond ordinary visual acuity, and she added nothing of her expertise to the Ident-A-Drug information so as to make it an integral part of some larger opinion. By admitting Meldrum's testimony that the contents of the Ident-A-Drug Web site "match[ed]" the pill found in Stamps's possession, the court allowed her to place case-specific non-expert opinion before the jury, with the near certainty that the jury would rely on the underlying hearsay as direct proof of the chemical composition of the pills. The conclusion is unavoidable that Meldrum was a "mere conduit" for the Ident-A-Drug hearsay. (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 286 [185 Cal.Rptr.3d 24]; see *People v. Coleman* (1985) 38 Cal.3d 69, 92 [211 Cal.Rptr. 102, 695 P.2d 189].)

interpretation]; *Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313 [183 Cal.Rptr.3d 548] [language in a court disposition].)

1. *The Issue Was Not Forfeited*

Preliminarily, we reject the People's contention that Stamps's argument was forfeited by failure to object in the trial court on the specific ground that too much detail was provided by the expert about the Web site or that reliability of the Web site had not been established. Stamps's counsel did object repeatedly on grounds of hearsay and lack of foundation, which adequately alerted the court to the basis of objection and were sufficient to preserve the issue for review. (See *People v. Carillo* (2004) 119 Cal.App.4th 94, 101 [13 Cal.Rptr.3d 878] [issue is whether the objection "fairly apprises the trial court of the issue it is being called upon to decide"].)

2. *Expert Reliance on Hearsay Under California Law*

Until very recently, the law governing expert witnesses' reliance on hearsay—and the latitude given them to testify about such hearsay—seemed fairly well settled. For instance, in *People v. Gardeley* (1996) 14 Cal.4th 605 [59 Cal.Rptr.2d 356, 927 P.2d 713] (*Gardeley*), our Supreme Court held a gang expert could testify to out-of-court statements he had heard from fellow officers and gang members, including a coparticipant in the crimes with which the defendants were charged, relating to the gang's activities (*id.* at pp. 611–613, 619), and upon that basis could opine that the crime with which the defendants were charged was a "classic" example of gang-related activity" (*id.* at p. 619). The court relied upon the following rule: "[B]ecause Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Id.* at p. 618.) In such a case, so the theory goes, the gang members' statements are not admitted for their truth, but only as basis evidence for the expert's opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209–1210 [30 Cal.Rptr.3d 582].) This was not a new development in *Gardeley*; California had long followed this not-admitted-for-its-truth rule. (E.g., *People v. Montiel* (1993) 5 Cal.4th 877, 918 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *Dean, supra*, 174 Cal.App.4th at pp. 196–197; *Board of Trustees v. Porini* (1968) 263 Cal.App.2d 784, 792–794 & fns. 4 & 6 [70 Cal.Rptr. 73].)

But even in holding such hearsay admissible, *Gardeley* and similar cases placed some limits on its admissibility by cautioning that "any material that

forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' " (*Gardeley, supra*, 14 Cal.4th at p. 618.) *Gardeley* further reminded the trial courts of their power to limit "'the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' " (*Id.* at p. 619.) Thus, trial courts were left with broad discretion to determine whether particular facts to which an expert was prepared to testify were sufficiently "reliable" to come before the jury. Concurrently, trial courts were and are charged with an important gatekeeping "duty" to exclude expert testimony when necessary to prevent unreliable evidence and insupportable reasoning from coming before the jury. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753 [149 Cal.Rptr.3d 614, 288 P.3d 1237] (*Sargon*);³ see *People v. Brown* (2016) 245 Cal.App.4th 140, 156 [199 Cal.Rptr.3d 303].) Because appellate review is for abuse of discretion, this broad discretion went largely uncorrected except in cases of manifest abuse.

■ Recently, however, the not-admitted-for-its-truth rationale was jettisoned altogether—at least with respect to “case-specific hearsay”—when a unanimous Supreme Court announced: “[T]his paradigm is no longer tenable because an expert’s testimony regarding the basis for an opinion *must* be considered for its truth by the jury.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 678, 679 [204 Cal.Rptr.3d 102, 374 P.3d 320] (*Sanchez*).) In so holding, *Sanchez* followed the reasoning of a number of jurists who have criticized the logic of the not-admitted-for-its-truth rationale, including a majority of justices of the United States Supreme Court. (*Id.* at pp. 680–686; see also *Williams v. Illinois* (2012) 567 U.S. 50, 104–105, 108 & fn. 3 [183 L.Ed.2d 89, 132 S.Ct. 2221, 2256, 2258 & fn. 3] (conc. opn. of Thomas, J.); *Williams*, at pp. 118–128 [132 S.Ct. at pp. 2264–2269] (dis. opn. of Kagan, J.); *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127–1129 [120 Cal.Rptr.3d 251]; *People v. Mercado* (2013) 216 Cal.App.4th 67, 89 [156 Cal.Rptr.3d 804].) In vigorously rejecting the not-admitted-for-its-truth rationale, the Supreme Court also dealt a deathblow to the notion that juries can make any sense of the

³ Specifically, *Sargon* requires trial courts to probe expert testimony under Evidence Code sections 801, subdivision (b), and 802 and exclude any portion of it “that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony.” (*Sargon, supra*, 55 Cal.4th at pp. 771–772.)

distinction traditionally espoused in cases such as *Gardeley*.⁴ The court expressly ruled that a limiting instruction intended to restrict jurors' consideration of such evidence to the purpose of serving as the basis for the expert's opinion was ineffective in eradicating the evidentiary error or rendering it harmless. (*Sanchez, supra*, at p. 686, fn. 13.) The paradigm shift occasioned by *Sanchez* no doubt affects the outcome of the present appeal. Indeed, as we shall discuss, we find *Sanchez* dispositive.

■ *Sanchez* dealt with a gang expert's testimony subject to a challenge under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354] (*Crawford*), but in the course of analyzing the confrontation clause issue the Supreme Court found occasion to revisit, and essentially to revamp, state law hearsay rules relating to expert testimony generally. (*Sanchez, supra*, 63 Cal.4th at pp. 674–686.) It is this non-*Crawford* aspect of *Sanchez* that comes into play here.⁵ Insofar as pertinent to this case, the significance of *Sanchez* was not left open to doubt. The court specifically "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Sanchez*, at p. 686.) Because we conclude the Ident-A-Drug evidence was admitted for its truth under the foregoing test, while not coming within any hearsay exception, we also conclude it was improperly admitted.

Incorporated within the *Sanchez* rule is what appears to be a new litmus test for admissibility of expert testimony incorporating hearsay as the basis for the expert's opinion: it depends on whether the matter the prosecution seeks to elicit is "case-specific hearsay" or, instead, part of the "general background information" acquired by the expert through out-of-court statements as part of the development of his or her expertise. (*Sanchez, supra*, 63 Cal.4th at p. 678.) Though most jurists may find this a novel approach, the Supreme Court took pains to explain that the rule announced in *Sanchez* in fact "restores the traditional distinction between an expert's testimony regarding background information and case-specific facts" that had existed at common law and in the early California cases. (*Id.* at p. 685.) *Sanchez* itself acknowledged that the line between "case-specific facts" and "general background information" had "become blurred" due to decades of statutory and case law that paid no heed to such a distinction. (*Id.* at p. 678.)

⁴ *Sanchez* specifically disapproved several of the Supreme Court's earlier cases to the extent they conflicted with its holding, including *Gardeley, supra*, 14 Cal.4th 605, and *Montiel, supra*, 5 Cal.4th 877. (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13.)

⁵ The *Crawford* line of cases has no direct application here because the challenged hearsay was not testimonial. (See *Crawford, supra*, 541 U.S. at pp. 50–53.)

■ After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. Admissibility—at least where “case-specific hearsay” is concerned—is now more cut-and-dried: If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it. (*Sanchez, supra*, 63 Cal.4th at pp. 684–686.) The underlying fact also may not be included in a hypothetical question posed to the expert unless it has been proven by independent admissible evidence. (*Id.* at pp. 684, 686.) If the hearsay relied upon by the expert is not case specific, as we read *Sanchez*, the evidence still is admitted for its truth (*id.* at pp. 685–686), and is therefore hearsay, but we tolerate its admission due to the latitude we accord experts, as a matter of practicality, in explaining the basis for their opinions (*id.* at p. 676). Where general background hearsay is concerned, the expert may testify about it so long as it is reliable and of a type generally relied upon by experts in the field, again subject to the court’s gatekeeping duty under *Sargon*. (*Sanchez, supra*, at pp. 676–679, 685; Evid. Code, §§ 801, 802.)

3. *The Ident-A-Drug Testimony Was Inadmissible Because It Was Case Specific*

■ Stamps argues, and the People do not contest, that the content of the Ident-A-Drug Web site would not be independently admissible to prove its truth because it was hearsay.⁶ (Evid. Code, § 1200, subd. (a); *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1203–1215 [148 Cal.Rptr.3d 863] [police use of Web site containing cell phone data did not make information retrieved from the Web site admissible over a hearsay objection]; *People v. Hard* (Colo.Ct.App. 2014) 342 P.3d 572, 575–579 [information found on “Drugs.com” was not sufficiently reliable to be admissible as hearsay exception when trooper identified hydrocodone pills only by visual comparison].) Indeed, the cases reflect a common judicial skepticism of evidence found on the Internet: “While some look to the Internet as an innovative vehicle for communication,” the courts continue to view it “warily and warily” as a catalyst for “rumor, innuendo, and misinformation.” (*St. Clair v. Johnny’s Oyster & Shrimp, Inc.* (S.D.Tex. 1999) 76 F.Supp.2d 773, 774.) The Internet “provides no way of verifying the authenticity” of its contents and “is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation.” (*Id.* at pp. 774–775.) Moreover, “hackers can adulterate the content

⁶ Based on Meldrum’s testimony, it appears the Web site provided photographs of pills, together with sufficient text to communicate that the photograph depicted a specified pharmaceutical. This combined content would constitute an out-of-court “statement” of a “person” (the person who entered the information on the Web site) so as to bring it within the definition of hearsay. (Evid. Code, §§ 225, 1200, subd. (a).)

on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules" (*Id.* at p. 775; see generally *Crispin v. Christian Audigier, Inc.* (C.D.Cal. 2010) 717 F.Supp.2d 965, 976, fn. 19 [discussing why Wikipedia content generally is considered inadmissible hearsay]; *Southco, Inc. v. Fivetech Tech. Inc.* (E.D.Pa. 2013) 982 F.Supp.2d 507, 515 [Web sites are "typically inadmissible as hearsay," and "even website evidence admissible under a hearsay exception requires authentication"]); *Hernandez v. Smith* (E.D.Cal., July 13, 2015, No. 1:09-cv-00828-AWI-SAB (PC)) 2015 U.S.Dist. Lexis 90740, p. *12 [striking "printouts of Internet websites as inadmissible hearsay and as unauthenticated"].)

■ The Attorney General has proposed no hearsay exception that would render the Ident-A-Drug Web site contents admissible.⁷ Because the Ident-A-Drug content was itself inadmissible hearsay, and because that content was case specific, Meldrum's testimony about the Web site was inadmissible under the new paradigm. *Sanchez* defined "case specific" facts as those "relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) We think it undeniable that the chemical composition of the pills Stamps possessed must be considered case specific. Indeed, the Ident-A-Drug hearsay was admitted as proof of the very gravamen of the crime with which she was charged. There is no credible argument that the testimony concerned "general background" supporting Meldrum's opinion. That being true, our hearsay analysis is at an end. We need not address the out-of-state cases and other authorities cited by the parties, nor need we get bogged down in considering the reliability of the Ident-A-Drug Web site.

4. Harmless Error Analysis

We review the erroneous admission of expert testimony under the state standard of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; *Dean, supra*, 174 Cal.App.4th at p. 202 [*Watson* standard applies].) Under that standard the error was not harmless.

First, *Sanchez* specifically held a limiting instruction was not effective in preventing the jury from considering the hearsay as direct evidence of the

⁷ Throughout the appellate process, both parties have referred to the Ident-A-Drug content as hearsay. In a petition for rehearing, the Attorney General suggests the Web site material is "not hearsay" because it falls within the exception for commercial lists and the like in Evidence Code section 1340. The point has been forfeited by failure to assert it earlier. (*Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1308 [71 Cal.Rptr.2d 122] [issues cannot be raised for first time on petition for rehearing].) Although we take no position on this issue, we note that a similar argument was rejected in *People v. Hard, supra*, 342 P.3d at pages 575–579 because the information was deemed insufficiently reliable.

facts asserted. (*Sanchez, supra*, 63 Cal.4th at p. 684.) And cycling hearsay through the mouth of an expert does not *reduce* the weight the jury places on it, but rather tends to *amplify* its effect. We cannot dismiss the evidence in this case as carrying little weight with the jury or being duplicative of other evidence.

Because the Ident-A-Drug testimony was the only evidence that the pills actually contained the controlled substances alleged in the information, the convictions on counts one, five, seven and eight must be reversed. In this case, unlike some others, there was no chemical analysis to supplement the expert's testimony based on visual similarities she noted on Ident-A-Drug (cf. *State v. Stank* (2005) 288 Wis. 2d 414 [708 N.W.2d 43, 54–55]), and no identification of the drug on sight based on experience, as with a pharmacist witness (cf. *Sterling v. State* (Tex.App. 1990) 791 S.W.2d 274, 277). Nor was there any testimony to the uniqueness of the trade dress of pharmaceuticals. (Cf. *Jones v. Commonwealth* (Ky. 2011) 331 S.W.3d 249, 255.) Meldrum's testimony also took no account of the possibility that the pills were counterfeit. (See *Ward, supra*, 694 S.E.2d at p. 745.)

There were, of course, admissions by Stamps that some of the pills were Norco and Phexoreal, but there was no testimony that these brand names are equivalent to oxycodone and dihydrocodeinone. And though this evidence may prove Stamps *believed* she was in possession of controlled substances, Meldrum's testimony was the only evidence that the pills actually contained dihydrocodeinone and oxycodone, as charged. We conclude it is reasonably probable the jury would have acquitted Stamps of the charges based on pill possession in the absence of the Ident-A-Drug testimony.

■ The evidence in question, consisting solely of Meldrum's unfiltered and unvarnished recapitulation of what she saw on the Ident-A-Drug Web site, was case specific, did not come within any hearsay exception, was not personally known to the witness as a fact, was treated as true by Meldrum, and was inadmissible under *Sanchez*. Because it was central to conviction on the counts involving pills, we must reverse as to those counts.

B. *Sufficiency of the Evidence*

Although reversal is required based on inadmissibility of the evidence alone, we consider Stamps's insufficiency of the evidence argument as well, in order to determine whether retrial is barred by double jeopardy principles, as announced in *Burks v. United States* (1978) 437 U.S. 1, 16–17 [57 L.Ed.2d 1, 98 S.Ct. 2141]. (See *People v. Smith* (1998) 62 Cal.App.4th 1233, 1235, fn. 1 [72 Cal.Rptr.2d 918].) Though we agree with Stamps that without the Ident-A-Drug testimony there was insufficient evidence to convict Stamps

on the pill-based counts, we do not find the evidence as introduced by the prosecution was, apart from the evidentiary error, insufficient to support those convictions. The evidence was not, as presented, “so lacking that the trial court should have entered a judgment of acquittal.” (*Lockhart v. Nelson* (1988) 488 U.S. 33, 39 [102 L.Ed.2d 265, 109 S.Ct. 285].) Acceptance by the jurors of the veracity of the Ident-A-Drug results was not so misguided as to render the guilty verdicts among those that no “rational factfinder” could render. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313 [61 L.Ed.2d 560, 99 S.Ct. 2781].) And in addition to Meldrum’s testimony, there were admissions by Stamps regarding the forbidden nature of the pills she possessed. The prosecution did not fail altogether “to muster” sufficient evidence to support the charges (*Burks, supra*, at p. 11); rather, our analysis discloses only that “evidence was erroneously admitted against” Stamps, which was an “error in the proceedings leading to conviction” such that a retrial is not barred (*Lockhart v. Nelson, supra*, 488 U.S. at pp. 38, 40; see *People v. Bryant* (1992) 10 Cal.App.4th 1584, 1596–1598 [13 Cal.Rptr.2d 601]; *People v. Reynolds* (1989) 211 Cal.App.3d 382, 390 [259 Cal.Rptr. 352]).

III. DISPOSITION

The judgment is reversed as to counts one, five, seven and eight. In all other respects it is affirmed. The cause is remanded to the superior court for further proceedings not inconsistent with this opinion.

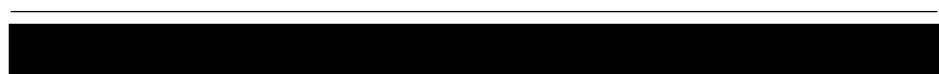
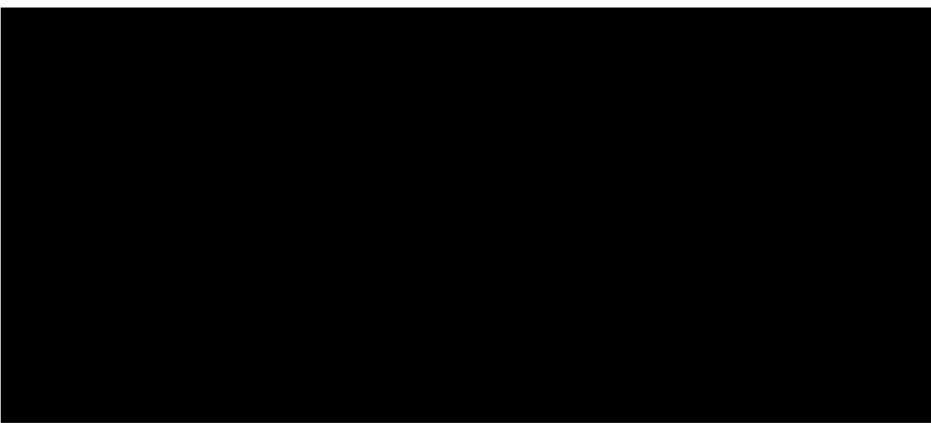
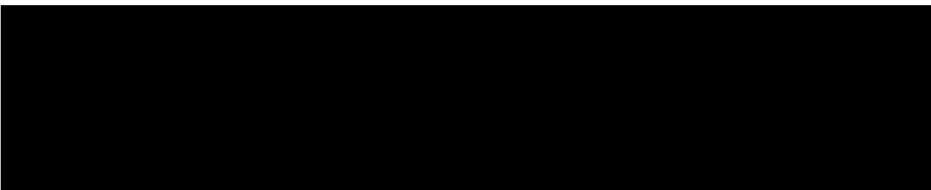
Reardon, Acting P. J., and Rivera, J., concurred.

A petition for a rehearing was denied October 28, 2016, and the opinion was modified to read as printed above. Respondent’s petition for review by the Supreme Court was denied January 25, 2017, S238236. Werdegar, J., and Chin, J., were of the opinion that the petition should be granted.

[No. B270252. Second Dist., Div. One. Oct. 3, 2016.]

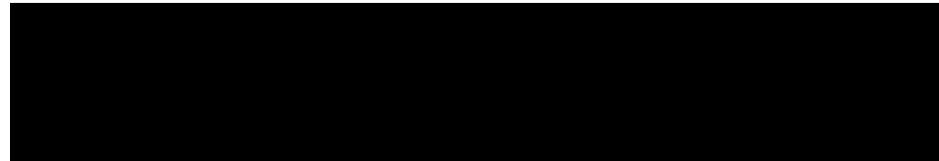
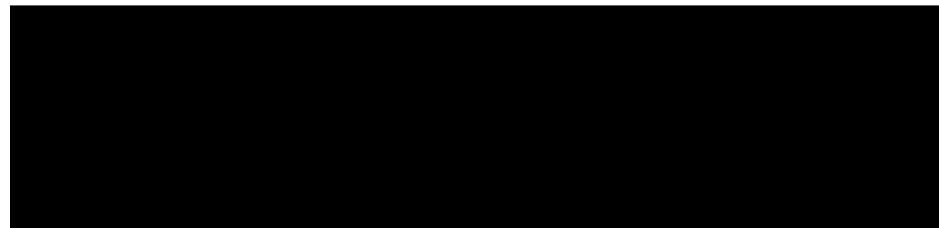
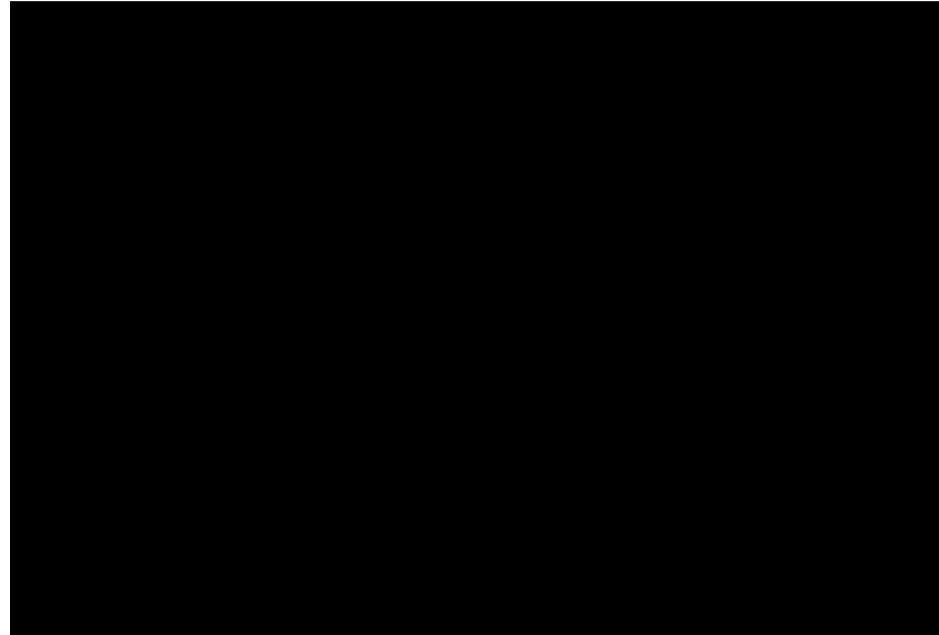
In re LOGAN B., a Person Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
O.K. et al., Defendants and Appellants.





[REDACTED]

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COUNSEL

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant O.K.

Andre F. F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant Cary B.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

OPINION

LUI, J.—O.K. (Mother) and Cary B. (Father) appeal from an order terminating parental rights under Welfare and Institutions Code section 366.26.¹ Mother claims that the trial court erred in rejecting her argument that her son Logan would benefit sufficiently from continuing his relationship with her to satisfy the requirements of the parental relationship exception in section 366.26, subdivision (c)(1)(B)(i).² She argues that the trial court improperly required her to prove a “compelling” reason why termination of her parental rights would be detrimental to Logan. She also argues that she proved such a compelling reason despite Logan’s testimony that he preferred adoption by his maternal cousin, who had been caring for him for nearly four years. We reject both arguments and affirm.

BACKGROUND**1. *The Juvenile Court Proceedings and Mother’s Relationship with Logan*****a. *The basis for juvenile court jurisdiction***

The Los Angeles County Department of Children and Family Services (Department) filed a juvenile dependency petition on September 16, 2011, after receiving a report that Logan’s parents were seen smoking methamphetamine in Logan’s presence. The caller also reported that Father was a member of a “Skin Head” gang and had been in and out of prison over the last 15 to 20 years. Logan was eight years old at the time.

The petition alleged that Logan’s parents had engaged in domestic violence in his presence. The petition also referred to a prior dependency proceeding in 2007 resulting from alleged domestic violence, drug use, and sexual abuse by an acquaintance of the parents. Juvenile court jurisdiction was terminated in that earlier proceeding in 2009 following an order from the family law court granting Mother sole physical and legal custody of Logan.

The Department filed its jurisdiction and disposition report on October 27, 2011. The report summarized an interview with Logan during which he confirmed that he had witnessed domestic violence, including seeing Father injuring Mother by pushing her onto a bed and turning over a table that hit Logan. Logan reported that his parents got into fights and argued a lot. The

¹ Subsequent undesignated statutory references are to the Welfare and Institutions Code.

² Father does not present any separate arguments on appeal, but joins in Mother’s arguments and on that basis seeks reinstatement of his parental rights in the event that Mother’s appeal is successful. Because we affirm the trial court’s orders with respect to Mother, it is unnecessary to address Father’s appeal.

report stated that Mother had a prior conviction for possession of a controlled substance and Father had prior convictions for burglary, possession of a controlled substance, and resisting an officer.

On November 23, 2011, Mother and Father pleaded no contest to an amended petition. The court ordered Logan placed with Mother under the Department's supervision and permitted monitored visits by Father. The court also ordered Father to complete a domestic violence program and ordered Mother to participate in counseling, including conjoint counseling with Logan.

b. *Events leading to termination of Mother's reunification services and limited visitation rights*

On February 22, 2012, the Department reported to the court that Father had not provided any proof of participating in the court-ordered programs, but Mother was complying with the case plan and Logan was doing well. However, on May 21, 2012, the Department filed a supplemental petition pursuant to section 387 alleging that Mother had become homeless while Logan was hospitalized for mental health issues (diagnosed as a mood disorder) and Mother had been unreachable since May 14, 2012. Mother had placed Logan with Logan's maternal cousin, Andre. The petition also alleged that Mother had been repeatedly late and occasionally had not shown up at Andre's house to take Logan to school as she had agreed to do. In addition, Mother had permitted Logan to have unmonitored contact with Father on Mother's Day. There was apparently an incident that day that led to Father's arrest.

On May 21, 2012, the court ordered Logan detained with Andre and permitted Mother unmonitored day visitation. At a continued hearing on the Department's section 387 petition on August 21, 2012, the court ordered Logan removed from Mother's custody and ordered the Department to assist Mother in finding housing.

Although the Department provided Mother with various housing assistance referrals, by February 4, 2013, Mother was still homeless and unemployed. She was not enrolled in any of the court-ordered individual counseling programs. Logan was still living with Andre. The court found that Mother was not in compliance with the case plan, and on March 8 appointed Andre as Logan's educational representative.

By August 20, 2013, Mother was still not enrolled in any of the court-ordered individual counseling programs and only occasionally participated in conjoint counseling with Logan. She was visiting Logan weekly. Andre

reported that the visits appeared to go well. A Department social worker observed that Mother and Logan appeared to have a strong bond. Father had been in prison and his whereabouts were unknown.³ The court terminated Father's reunification services and permitted Mother's unmonitored visits to continue.

In December 2013 Mother failed to return Logan to Andre after a church event. Logan remained with Mother from Sunday, December 15, 2013, until she returned him to school the next Tuesday, December 17. The visit violated the court's order permitting overnight visits only with prior confirmation that Mother's roommates had been "livescanned."⁴

Mother visited Logan in mid-January, but then did not visit again until April 18, 2014. At a review hearing on March 20, 2014, the Department reported that Mother had provided no proof of participation in individual counseling and had not engaged in conjoint counseling with Logan. Mother's participation in family preservation services had been erratic. The court found that Mother was not in compliance with the case plan and terminated her reunification services. The court continued the case for a permanency hearing under section 366.26.

Mother had several more visits with Logan over the next few months that went well and that Logan seemed to enjoy. Mother then failed to appear for a visit on June 4, 2014. On July 2, 2014, Mother had another scheduled visit. Andre and Logan arrived on time. When Mother failed to appear 45 minutes after the starting time, Logan had an emotional breakdown. Mother told the social worker that she had car problems and then did not get a cab because she thought the visit was to be canceled.

In October 2014 both Mother and Father filed petitions under section 388, seeking custody or reinstatement of reunification services based on alleged changed circumstances. The court denied both petitions without a hearing. Mother then filed a second section 388 petition on November 12, 2014, claiming that she had been participating in a domestic violence program and had been visiting Logan more frequently. The court set that petition for a hearing on January 14, 2015, along with a section 366.26 hearing.

In its report prior to the hearing, the Department stated that Mother had made only minimal efforts to address the issues that had led to the intervention of the Department and her involvement in the juvenile system. Despite

³ Father had apparently been incarcerated in Nevada following conviction on a charge of transporting a controlled substance.

⁴ "LiveScans" are the method that the Department uses to obtain criminal background checks. (*In re Darlene T.* (2008) 163 Cal.App.4th 929, 933, fn. 2 [78 Cal.Rptr.3d 119].)

the services that she had received, Mother had not gained any significant insight into how her behavior had harmed Logan and had put him at risk of further abuse and neglect. She remained in contact with Father despite their history of drug use and domestic violence. The Department recommended that her section 388 petition be denied. The court accepted that recommendation and continued the section 366.26 hearing.⁵

In March 2015 Logan's court-appointed special advocate (CASA) reported to the court that Logan had come to a full understanding that it was in his best interest to live with Andre. He realized his behavior deteriorated drastically after visits with Mother. Logan said that Mother pressured him constantly to come home and told him she was sad without him. Logan was exhausted after visits and did not want to see Mother frequently.

Prior to a hearing on June 5, 2015, the Department reported that Logan had said he had become "‘fed up’" with Mother's failure to "‘do what she was supposed to do after three years.’" He thought that Mother was "‘putting lies into my head,’" which made him feel uncomfortable. He did not want Mother calling him every night, and he said he was okay with just two visits a month. He thought Mother was "‘selfish’" to want more visits.

Logan's CASA also filed a report on June 5, 2015. The report reiterated that Logan's behavior deteriorated after his visits with Mother and stated that Logan wanted to see Mother only once or twice a month. At the request of Logan's counsel, following the June 5th hearing the court ordered that Mother's visits be reduced to every other week with two telephone calls per week. The court again continued the section 366.26 hearing.

c. *Logan's decision to request adoption*

In July 2014 Andre told the Department that she wanted to be Logan's legal guardian but was open to the possibility of adoption as an alternative plan. The Department requested time to arrange a home adoption study for Andre. That study was approved in October 2014.

Various reports filed by the Department and by Logan's CASA over the next year indicated that Logan wanted legal guardianship rather than adoption. Prior to the January 15, 2015 hearing, the Department reported that Logan and Mother had a strong bond and that Logan wanted his parents to "‘legally’" remain his. He wanted to continue his visits with Mother. Later that month, Logan told a social worker that he was concerned about Mother's feelings and did not want to upset her by being adopted.

⁵ Mother later filed a third section 388 petition, which the court denied without a hearing on May 22, 2015.

At the hearing on January 14, 2015, Mother's and Logan's counsel requested a legal guardianship by Andre. They pointed out that Logan would be 12 years old by the time the adoption could be completed and at that time could legally object to the adoption.⁶

Prior to the June 5, 2015 hearing, the Department reported that Logan wanted to live with Andre under a legal guardianship. The report from Logan's CASA stated that Logan wanted "long term guardianship at this time with option for adoption open in the future." However, Logan wanted his "case to be closed to [the Department]," and if this cannot happen, Logan "is willing to be adopted."

However, by July 2015, Logan had changed his mind and wanted adoption. The Department submitted a report on July 21, 2015, stating that Andre informed a social worker on June 5 that Logan had told his attorney he wanted to proceed with adoption rather than legal guardianship. The social worker interviewed Logan on July 8, 2015, and Logan confirmed that he wanted to be adopted. He said that he understood that would mean his mother's parental rights would be terminated and Andre would be his parent. He indicated that he "is no longer worried about what his mother wants and wants to move forward with an adoption." Logan's CASA also filed a report dated July 21, 2015, confirming that Logan now wanted adoption and stating that the CASA had "no doubt" that adoption by Andre was in Logan's best interests.

2. *The Section 366.26 Hearing*

The contested section 366.26 hearing took place on February 3 and 4, 2016. Logan testified in chambers.

On examination by Mother's counsel, Logan testified that, although he previously wanted to go back to live with Mother, "I live in a stable home now, and I would like to be adopted." He also recalled previously wanting Andre to be his legal guardian. However, he said that such an arrangement would "involve court in my life, and I don't want that." He wanted adoption "[s]o that I can live with Andre and just be in a stable home."

Logan testified that he understood there could be a type of legal guardianship that would not require court intervention. Nevertheless, he "just want[s] to be adopted." He also understood that adoption would terminate Mother's parental rights and that if that occurred there would be nothing he could do to

⁶ Section 366.26, subdivision (c)(1)(B)(ii) creates an exception to termination of parental rights based upon the objection of a child aged 12 or older.

see Mother until he was 18 if Andre said that he could not. But his “mind is set.” “For the past few years I have been saying legal guardianship, adoption, or living with my mom, and now I am set on adoption.” He testified that he would feel that way even if there were an option to live with Andre and still have a relationship with Mother and not have to deal with the courts.

Logan recalled the time when he was very upset after Mother did not show up for a visit, and then on the telephone Mother was able to calm him down. He acknowledged that Mother makes him “feel calmer sometimes,” although Andre can calm him down also.

Logan testified that he would be disappointed and sad if he could not see Mother until he was 18. He said that he likes to see Mother and feels close to her. He enjoys their visits. They sculpt with clay, talk about school, eat snacks and draw. On a scale of one to 10 for how upset he would be if he could not see Mother until he was 18, he would feel about “7.5.”

On examination by his counsel, Logan testified that Andre and Chris (her fiancé) are the ones who go to parent-teacher conferences, take care of him when he is sick, take him to the doctor and dentist, and arrange his extracurricular activities. Logan confirmed that, despite all the questions he had been asked, he had not changed his mind and “still want[s] adoption.”

Mother also testified. She talked about what she did with Logan when they had unsupervised visits. She testified about the affection that Logan shows, the love that they express to one another, the nicknames and special language that they use, and the interests that they share.

At the conclusion of the hearing, the Department argued for termination of parental rights and adoption by Andre. Logan’s counsel joined in the Department’s request, arguing that the record is clear that Logan loves his mother but it is equally clear that he wants to be adopted and wants a stable home.

3. The Trial Court’s Findings

The court observed that it was “obvious Logan loves his parents” and that “the parents love Logan.” However, the court concluded that parental rights should be terminated.

The court found that Father failed to satisfy the first element of section 366.26, subdivision (c)(1)(B)(i) by failing to be consistent in his visits. Father made himself “unavailable through his incarcerations to be a part of Logan’s life during periods of time.”

With respect to Mother, the trial court noted that section 366.26, subdivision (c)(1)(B) “talks about finding a compelling reason for determining that termination would be detrimental.” The court stated that it “can’t get past the first sentence” in finding a compelling reason why termination would be detrimental to Logan.

The court observed that Logan is very articulate and seemed like a young man who had “weighed his options.” Logan had considered adoption and legal guardianship and “now is set on adoption.” The court found that Logan wanted stability and that a legal guardianship “does not foreclose possible future court involvement.”

The court also found that Mother was not “fulfilling a parental role” with the two hours of monitored visitation that she had every other week. The court concluded that “she does the best she can with what she’s been given,” but noted that “her time has been restricted by her own actions.” “One time or a few times” that Logan asked to be “soothed by her” during her visits was not sufficient to show a parental role.

The court found by clear and convincing evidence that Logan was adoptable and that no exceptions applied. The court therefore terminated parental rights and transferred Logan’s care, custody, and control to the Department for adoptive planning.

DISCUSSION

1. *The Trial Court Correctly Decided That Mother Was Required to Prove a Compelling Reason Why Termination of Parental Rights Would Be Detrimental to Logan*

■ Section 366.26 establishes a detailed procedure for terminating parental rights. Subdivision (c)(1) states that a prior order under section 361.5 terminating reunification services “shall constitute a sufficient basis for termination of parental rights.” If the court determines under a “clear and convincing standard” that it is “likely the child will be adopted,” the court “shall terminate parental rights and order the child placed for adoption.” (§ 366.26, subd. (c)(1).) The goal is to provide “stable, permanent homes” for children who are dependents of the juvenile court, and the first choice to achieve that goal is adoption. (§ 366.26, subd. (b); *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 [93 Cal.Rptr.2d 644] (*Jasmine D.*)).

This procedure recognizes that “[b]y the time of a section 366.26 hearing, the parent’s interest in reunification is no longer an issue and the child’s interest in a stable and permanent placement is paramount.” (*Jasmine D.*,

supra, 78 Cal.App.4th at p. 1348.) Thus, to terminate parental rights under section 366.26, the court “need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated.” (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249–250 [19 Cal.Rptr.2d 698, 851 P.2d 1307].) Under these circumstances, “the court shall terminate parental rights” unless certain exceptions apply. (§ 366.26, subd. (c)(1).)

■ Mother relies on the exception set forth in section 366.26, subdivision (c)(1)(B)(i). Together with the introductory language in subdivision (c)(1)(B), that subdivision states that an exception to termination of parental rights applies when: “(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

Mother argues that this exception requires a showing of only two factors: (1) regular visitation, and (2) that the child would benefit from continuing the relationship. She claims that the trial court impermissibly added a third factor by requiring her to prove that there was a “compelling reason” to find that termination of her parental rights would be detrimental to Logan. Because this argument raises an issue of statutory interpretation, we review it de novo. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal.Rptr.2d 531, 828 P.2d 672] (*Snowden*)).

■ The objective of statutory interpretation is “to ascertain and effectuate legislative intent.” (*Snowden*, *supra*, 2 Cal.4th at p. 562.) Mother correctly points out that the plain meaning of a statute is the best guide to determining legislative intent, and that the court may not vary the plain meaning to accomplish some other purpose. (*Ibid.*) (4) However, Mother is wrong in claiming that proof of a “compelling reason” why termination of parental rights would be detrimental to the child is not within the plain meaning of the statute. To the contrary: That express statement appears in section 366.26, subdivision (c)(1)(B).

Mother argues that the Legislature’s explanation that the “compelling reason” must be “due to” one of the circumstances identified in the specific subdivisions means that the presence of one of those circumstances automatically qualifies as a “compelling reason.” But the statute does not say that, and her suggested interpretation is itself a gloss on the statutory language that is inconsistent with its plain meaning.

Mother's interpretation would make the phrase "compelling reason" superfluous. If the Legislature had intended that the presence of any of the enumerated circumstances would automatically be sufficient to preclude termination of parental rights, it had no reason to include the requirement of a "compelling reason" in the subdivision. It could have written section 366.26, subdivision (c)(1)(B) more simply to say that an exception precludes termination of parental rights when "[t]he court finds . . . one or more of the following circumstances." A statutory construction that makes some words superfluous is to be avoided. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387, 1397 [241 Cal.Rptr. 67, 743 P.2d 1323] (*Dyna-Med*).)

■ Mother's interpretation also would be inconsistent with section 366.26, subdivision (c)(1)(D), which requires that "[i]f the court finds that termination of parental rights would be *detrimental to the child*" pursuant to the exceptions identified in subdivision (c)(1)(B), "it shall state its reasons in writing or on the record." (§ 366.26, subd. (c)(1)(D), *italics added*.) If the presence of any of the specific circumstances identified in section 366.26, subdivision (c)(1)(B) were alone sufficient to preclude terminating parental rights, that subdivision could simply require the trial court to state in writing why it found the existence of the circumstance, not to explain the reasons why termination would be "detrimental to the child." Inconsistency with subdivision (c)(1)(D) is another reason to reject Mother's interpretation. (See *Dyna-Med, supra*, 43 Cal.3d at p. 1387 ["statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible"].)⁷

In addition to its inconsistency with the plain language of section 366.26, subdivision (c)(1)(B), Mother's interpretation would frustrate the purpose of the legislative scheme. Under Mother's interpretation of section 366.26, subdivision (c)(1)(B)(i), a parent's showing of regular visits and some benefit to the child from continuing the parental relationship would be sufficient to preclude terminating parental rights, even if a court concludes that the statutory goal of providing the child with a "stable, permanent home" outweighs that benefit. (§ 366.26, subd. (b).) That would be inconsistent with the focus on the child's interest in a permanent placement at the section 366.26 hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [19 Cal.Rptr.2d 544, 851 P.2d 826]

⁷ Mother also argues that if section 366.26, subdivision (c)(1)(B) requires that a parent prove a "compelling reason" to continue the parental relationship in addition to establishing the specific circumstances identified in the listed exceptions, then the objection to adoption of a child who is 12 or older would not necessarily be sufficient to preclude termination of parental rights under subdivision (c)(1)(B)(ii). That subdivision is not before us, so we do not reach Mother's argument. However, we note that the objection of a child older than 12 might create a barrier to a finding of adoptability under subdivision (c)(1). (See Fam. Code, § 8602 ["The consent of a child, if over the age of 12 years, is necessary to the child's adoption"]; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650 [28 Cal.Rptr.2d 82].)

[§ 366.26 “must be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect”].)

The court in *Jasmine D.* reached the same conclusion. (*Jasmine D., supra*, 78 Cal.App.4th 1339.) In that case, the court held that a parent must do more to establish the parental relationship exception than just show the existence of some benefit to continuing the parental relationship. The court rejected the appellant’s argument that section 366.26 did not require any weighing of the benefit of a continuing relationship against the benefits of adoption.⁸ (*Jasmine D.*, at pp. 1347–1349.) The court concluded that, when viewed in light of the “legislative preference for adoption when reunification efforts have failed,” the parental relationship exception does not permit a parent to “derail” adoption simply by showing that the child would derive some benefit from continuing the parental relationship through visits. (*Id.* at p. 1348.) Rather, to establish the exception a parent must prove that the benefit of continuing a parental relationship outweighs the child’s interest in the stability and permanence of adoption.

■ In analysis that directly contradicts Mother’s statutory interpretation argument here, the court in *Jasmine D.* reasoned that the balancing test it endorsed was confirmed by the Legislature’s decision to amend section 366.26 in 1998 to add the language requiring the court to find “‘a compelling reason for determining that termination would be detrimental to the child.’” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1349, citing Stats. 1998, ch. 1054, § 36.6, p. 8171.) The court concluded that this language “makes it plain that a parent may not claim entitlement to the [parental relationship exception] simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*Jasmine D.*, at p. 1349) We agree with that conclusion and reject Mother’s argument that establishing the circumstances identified in section 366.26, subdivision (c)(1)(B)(i) alone is sufficient to preclude termination of parental rights even when no compelling reason to continue those rights is shown.

The court in *Jasmine D.* also explained that its interpretation of the parental relationship exception was consistent with a long line of cases construing that exception, beginning with *In re Autumn H.* (1994) 27 Cal.App.4th 567 [32 Cal.Rptr.2d 535] (*Autumn H.*). (See *Jasmine D., supra*, 78 Cal.App.4th at pp. 1348–1349.) Those cases all require the benefit from continuing a parental relationship to be weighed against the child’s interest in adoption. (*Ibid.*) The court in *Jasmine D.* recognized that this standard “‘reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being

⁸ At the time, the parental relationship exception was codified at former section 366.26, subdivision (c)(1)(A). (*Jasmine D., supra*, 78 Cal.App.4th at p. 1343.)

the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child's need for a stable and permanent home that would come with adoption.' " (*Id.* at pp. 1348–1349, quoting *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [82 Cal.Rptr.2d 426].)⁹

The plain language of section 366.26, the purpose and the history of the statute, and prior case law all contradict Mother's statutory interpretation. We therefore reject it.

2. *Mother Failed to Prove That the Benefit of Continuing Her Relationship with Logan Outweighed the Benefit of Adoption**

.....

DISPOSITION

The juvenile court's order terminating parental rights pursuant to Welfare and Institutions Code section 366.26 is affirmed.

Rothschild, P. J., and Johnson, J., concurred.

Appellants' petition for review by the Supreme Court was denied December 21, 2016, S238409.

⁹ Mother claims that she does not rely on a standard that would require only a showing of some benefit to continuing the parental relationship no matter how insignificant. Citing *Autumn H.*, *supra*, 27 Cal.App.4th at page 575, Mother argues that "some" benefit to the child would not suffice, and that the parent "must show the bond is a significant one." Mother's reliance on the *Autumn H.* standard for this argument actually undermines her statutory interpretation. As discussed above, the balancing of the benefit of the parental relationship against the benefit of adoption required under *Autumn H.* is essentially the same as the requirement in section 366.26, subdivision (c)(1)(B) that a parent must show a "compelling reason" to continue the parental relationship. (See *Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1348–1349.) Mother's argument that the "plain language" of section 366.26, subdivision (c)(1)(B)(i) requires *only* a showing that the "child would benefit" from continuing the parental relationship is inconsistent with the *Autumn H.* holding that the benefit of the relationship must be evaluated against the benefit the child would obtain through adoption.

*See footnote, *ante*, page 1000.

[No. G052058. Fourth Dist., Div. Three. Sept. 7, 2016.]

In re Marriage of LAURALIN ANDERSON COHEN and RICHARD COHEN.

LAURALIN ANDERSON COHEN, Respondent, v.
RICHARD COHEN, Appellant;
ORANGE COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES,
Intervener.

[REDACTED]

[REDACTED]

[REDACTED]

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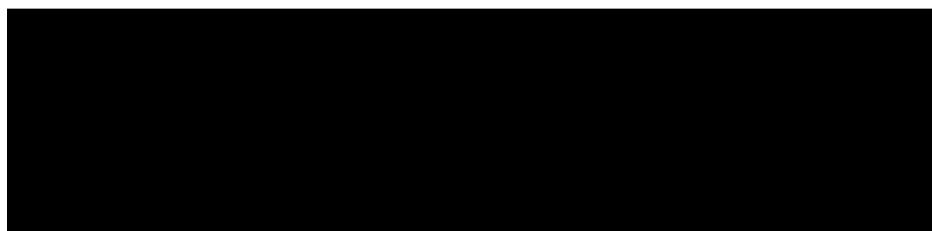
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COUNSEL

John R. Schilling for Appellant.

The Law Offices of Saylin & Swisher, Brian G. Saylin, Lindsay L. Swisher and Daniela A. Laakso for Respondent.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Linda M. Gonzalez and Jennevee H. de Guzman, Deputy Attorneys General, for Intervener.

OPINION

BEDSWORTH, J.—

I. INTRODUCTION

The marriage underlying this case was sadly overburdened and failed. Unfortunately, the divorce is also problematic. Essentially, a very high earner making \$1.9 million during the marriage agreed to a stipulated divorce judgment providing for above-guideline child and spousal support. In this appeal from what was (mostly) the denial of the high earner's postjudgment request for a reduction of his child support obligations to guideline, and his request to terminate spousal support in the wake of the wife's remarriage, he presents two issues of law.

■ There was a clause in the stipulated judgment to the effect that any future modification proceeding would be reviewed *de novo*. Did that clause

eliminate the usual change of circumstances rule that applies to postjudgment modifications? We answer no. The law does not allow litigants to agree to what are in effect “temporary” judgments, revisable at will.

■ There was a clause in the stipulated judgment that said if the high earner’s ex-wife remarried a person making less than \$400,000 a year, the high earner would still keep paying her spousal support—but at a reduced rate. Did the ex-wife’s remarriage terminate spousal support *anyway*, given that the clause did not expressly mention Family Code section 4337,¹ the statute that makes spousal support terminable at remarriage? Again we answer no. The lack of an express reference to section 4337 did not function as a kind of “king’s X” to contradict the plain intent of the clause—particularly since the parties modified the stipulated judgment in October 2012 to provide for continued spousal support after the wife’s imminent remarriage.

We thus conclude there is no error in the orders challenged here. The trial court correctly denied the high earner’s requests to modify the child support amounts down to a guideline amount,² and also correctly denied his request to terminate spousal support in the wake of the ex-wife’s subsequent remarriage.

II. FACTS

Lauralin Anderson Cohen and Richard Cohen were married in 1990 and separated in 2006. They had four children. Lauralin³ then petitioned for dissolution of the marriage. A little less than five years later, the couple entered into a stipulated judgment for dissolution.

Richard is a highly paid executive in the clothing industry who had earned about \$1.9 million a year during the marriage. But his income had gone down by 2011. The stipulated judgment recites that Richard’s income in March 2011 was \$70,166 per month, which works out to \$841,992 annually.

The stipulated judgment provides for total monthly child support payments in excess of \$17,366 a month.⁴ In computing that amount, Richard is given

¹ All further statutory references are to the Family Code.

² The trial court did reduce support for a four-month period in 2014, a temporary reduction which the husband does not challenge in this appeal, and which we explain in more detail below.

³ We use first names for convenience.

⁴ The judgment does not spell out such a handy single number in one place. The trial judge, however, canvassed the various provisions of the judgment dealing with child support and put them into a helpful encapsulation in his minute order explaining his ruling:

credit for having a 90 percent time share with one of the children, Dean, and a 10 percent time share with two of the other children, Jason and Skylar. The fourth child, Daniel, is quadriplegic as a result of cerebral palsy, and requires continual nursing care.⁵ There is no dispute that the child support order is *higher* than statutory legal guidelines (see § 4055 et seq.) require.

The judgment also has a provision stating that any future requests to modify support should be reviewed “*de novo* by the court.” The exact text of this provision is: “The allocations of support as set forth above are without prejudice to either party. In the event that either party seeks a modification of child support or dependant adult support in the future, said support amounts and the allocation of said support shall be reviewed *de novo* by the court.”

It further provides for spousal support in the amount of about \$19,166 a month.⁶ The judgment had this provision in regard to remarriage by Lauralin: “In the event Petitioner [Lauralin] becomes remarried and Petitioner’s new spouse income is less than \$400,000.00, Respondent’s [Richard’s] total annual spousal support obligation shall be reduced by an amount equal to 45% of Petitioner’s new spouse income. If [Lauralin’s] new spouse income is greater than \$400,000.00 per year, [Richard’s] spousal support obligation shall be reduced to zero. This provision shall not apply if [Lauralin] remarries within 24 months of entry of this Judgment. In the event that [Lauralin] remarries within 24 months of entry of this Judgment, spousal support payable to [Lauralin] shall terminate.”

In January 2014, Richard filed a request for order (RFO) seeking, among other things, a reduction in his child support obligation based on significant

- “a. Jason, \$2750 per month
- “b. Dean, \$1800 per month
- “c. Skylar, \$6650 per month
- “d. Daniel, \$2000 per month (into a trust)
- “e. Plus \$12,500 annually for each child (Daniel’s into a trust)
- “f. Plus 100% of the children’s health care costs (though employer-provided funds and insurance)
- “g. Plus 100% of the children’s school tuition costs through high school.”

According to Lauralin, the reason for some of the disparities in the payments to the children was to facilitate some publicly assisted nursing care for two of the children, Daniel and Jason. That public assistance is the reason the Attorney General’s office has filed a brief here on behalf of Orange County Department of Child Support Services.

⁵ All four children face some sort of significant disability. According to Lauralin’s declaration, in addition to Daniel, who has cerebral palsy, Jason is autistic and given to seizures, and Dean and Skylar (who are adopted siblings) each have attention deficit hyperactivity disorder; Dean also has reactive attachment disorder while his sister Skylar is bipolar.

Daniel is now an adult but incapacitated under section 3910 and thus still receiving support.

⁶ Fifteen thousand dollars a month plus an annual payment of \$50,000, which works out to the \$19,166.66 figure on a monthly basis.

declines in his income incurred in the years 2012 and 2013. Clearly his income *had* declined in those two years.⁷ However, by the time Richard's request was finally heard on February 3, 2015, the parties had achieved a stipulation which took care of all issues prior to January 1, 2014. Thus Richard's RFO was based only on his income in 2014 going forward.

And by February 2015, things had significantly turned around for Richard. In May 2014, Richard had begun working for a Hong Kong based company, Trinity Limited. That month Trinity began paying him a salary of \$500,000 a year (\$41,666 a month). *Plus*, it paid him a \$500,000 signing bonus, predicated on meeting certain "targets" over the course of the next two years.

Three requests were presented to the court on Richard's motion: (1) reduction of child support to guideline level, particularly in light of the de novo clause in the stipulated judgment; (2) termination of Lauralyn's spousal support based on a remarriage that occurred in October 2012, and (3) an increase of Richard's time share percentage regarding Skylar to 100 percent based on his payment of 100 percent of the costs of Skylar's being in a school for mentally ill children. Richard challenges the trial court's decision as to issues (1) and (2), which he lost except for a four-month reduction for the first four months of 2014. Issue (3) has been abandoned on appeal.

In regard to issue (1), the child support reduction, the trial judge noted that, considering Richard's new employment with Trinity at \$41,666 a month plus proration of his \$500,000 bonus over the 24 months from May 2014 (another \$20,833 a month), and an "ex pat" benefit paid by Trinity (\$10,833 a month), Richard was now making *more* money than he was making at the time of the May 2011 judgment—at least \$73,932 a month against the earlier \$70,166.⁸ On the other hand, if one were to take into account the first four lean months of 2014—in which Richard had made \$27,830 per month—the total average for the year 2014 would be \$62,695, which, if our math is correct, would represent a roughly 11 percent drop in income from the level provided for in the 2011 stipulated judgment.

The trial judge resolved these disparities by amortizing the two-year \$500,000 bonus prospectively from May 2014 forward. In practical terms,

⁷ Just as the May 2011 judgment was being entered, Richard lost his job with Robert Talbott Inc., so his income for May and June of 2011 was zero. From July 2011 to July 2012, he made \$30,000 a month at Saks Fifth Avenue, and in 2012 about \$44,000 a month from Saks, which continued to September 2013. He lost his position at Saks that month, but soon found employment with the WDiamond Group at about \$20,000 a month, which is where his income stood in January 2014. But as we shall soon see, his employment fortunes were about to change for the better.

⁸ The figures were conveniently presented to the court in a spreadsheet labeled exhibit 1 and agreed to by both parties. Nice work.

that meant the court granted Richard's request to reduce child support for the first four months of 2014 (prior to the Trinity employment), but from May 2014 forward, there were no adverse changes of circumstance to justify modification.

As to issue (2), it turned out that Louraline had remarried on October 19, 2012, which was just a little more than *18 months* since the date of the March 3, 2011 stipulated judgment. Had nothing been done, her 2012 remarriage, by the terms of the March 2011 judgment, would have terminated all spousal support.

However, on October 15, 2012, four days before her remarriage, she and Richard, each now in *propria persona*,⁹ entered into a stipulation which retroactively changed the 24-month period that began on March 3, 2011, to an 18-month period. The net effect of the stipulation allowed Louraline to remarry within the next few days and still continue receiving spousal support.

The stipulation of October 15, 2012, looks like a repeat of language already quoted on page 1018 *ante*, but the 18-month change is significant. The way the stipulation was structured, it was as if the March 2011 stipulated judgment was being modified *nunc pro tunc*. It said: "Spousal Support paragraph number 3.3 shall be modified so the 18 months is substituted for 24 months at page 11, lines 5 and 6. Said paragraph shall now read as follows: [¶] 3.3 In the event [Louraline] becomes remarried and [her] new spouse income is less than \$400,000, [Richard's] total annual spousal support obligation shall be reduced by an amount equal to 45% of [Louraline's] new spouse income. If [Louraline's] new spouse income is greater than \$400,000 per year, [Richard's] spousal support obligation shall be reduced to zero. This provision shall not apply if [Louraline] remarries within 18 months of this judgment. In the event that [Louraline] remarries within 18 months of entry of this judgment, spousal support payable to [Louraline] shall terminate."

In an income and expense declaration filed May 2014, Louraline's new spouse's income is listed as \$5,416 a month (or less than \$65,000 a year). Forty-five percent of that amount is \$2,337.20, which reduced Richard's \$19,166 obligation to \$16,828.80.

As to Richard's request in regard to spousal support, the trial court ruled the stipulated judgment, particularly as modified on October 15, 2012, waived

⁹ The paperwork was prepared by Louraline, and recites that both she and Richard are in *propria persona*.

what would otherwise be the effect of section 4337, which normally terminates spousal support on remarriage.¹⁰ The court also ruled that the stipulated judgment waived what otherwise would be the rebuttable presumption set out in section 4323 of the decreased need for spousal support that occurs on a supported spouse's cohabitation with a nonmarital partner.¹¹ The court further rejected Richard's request to reduce spousal support for the first four (lean) months of 2014, ruling that Richard had not shown a material change in the (numerous) factors that govern spousal support under section 4320. The court reasoned his four-month decline in income was "only one such factor."

The court's orders and reasoning were formally set out in a signed order filed April 17, 2015. Richard timely filed a notice of appeal from the orders of April 17, 2015, on June 4, 2015.

III. DISCUSSION

A. *The Amortization Issue*

We first deal with a relatively minor issue in Richard's appeal, which is his argument that if the trial court had used a 12-month *January-to-December* 2014 calendar year average, the court would have recognized that Richard had indeed shown a change of circumstances. That is, *if one isolates the 12 months of calendar 2014 and takes an average based on those particular 12 months, exhibit 1 showed an 11 percent reduction in monthly income in comparison to March 2011 (\$62,695 versus \$70,166).*

■ The issue implicates the body of law governing how fluctuating income is treated for child support. (See generally §§ 4058 [definition of income includes bonuses], 4064 ["court may adjust the child support order as appropriate to accommodate seasonal or fluctuating income of either parent"]; *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375 [82 Cal.Rptr.3d 497] (*Mosley*); *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075 [23 Cal.Rptr.3d 273] (*Riddle*); *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808 [130 Cal.Rptr.2d 1] (*Rosen*); and Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 6:181, pp. 6-118 to 6-119.)

¹⁰ Section 4337 provides in its entirety: "*Except as otherwise agreed by the parties in writing*, the obligation of a party under an order for the support of the other party terminates upon the death of either party or the remarriage of the other party." (Italics added.)

¹¹ The statute provides in pertinent part: "(a)(1) Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a nonmarital partner. Upon a determination that circumstances have changed, the court may modify or terminate the spousal support as provided for in Chapter 6 (commencing with Section 3650) of Part 1." (§ 4323, subd. (a)(1).)

If we were to attempt to boil down the law involving how bonuses affect income calculations for purposes of child support determination, it would be, simply: the treatment must be “fair and representative.” (See *Riddle, supra*, 125 Cal.App.4th at p. 1081.) Thus, for example, in *Mosley*, it was an abuse of discretion for the trial court to predicate a support order on the assumption the payor parent would receive a huge bonus when in fact such a large bonus “might never materialize.” (*Mosley, supra*, 165 Cal.App.4th at p. 1379.) In *Riddle*, the trial judge abused her discretion by taking just the two best months of the payor spouse’s most recent year of earnings to figure monthly income. That was, as the appellate court said, “an embarrassingly short period on which to predict the annual income of a commissioned salesperson who works in the financial markets.” (*Riddle, supra*, 125 Cal.App.4th at p. 1083.) And in *Rosen* this court held it was error for the trial court to base a goodwill valuation on an abnormally good year which was not “‘reasonably illustrative.’” (*Rosen, supra*, 105 Cal.App.4th at p. 820.)

But in this case, the trial court’s decision to average out Richard’s bonus over the two years prospectively May 2014 to May 2016 makes sense. This is the period the bonus was *intended* to cover. The trial court’s decision corresponds to the economic substance of that bonus, which was essentially paying Richard for anticipated good results for the next *two years* going forward, and, more to the point, locked him into proverbial golden handcuffs to keep him so working for those years. Conversely, the bonus was certainly not given in payment for any work done in the first four months of 2014.

It is true that, generally speaking, as the court said in *Riddle*, there is “heavy emphasis” in the law on the income tax calendar year as the basic unit on which to calculate income. (*Riddle, supra*, 125 Cal.App.4th at p. 1083, citing § 4059.)¹² But the court was also careful in *Riddle* to point out that the relevant time period might be longer, or perhaps sometimes even somewhat shorter, than a year, depending on the nature of the payor parent’s income: “Since section[s] 4060 and 4064 are framed in discretionary terms, it would be outside the proper province of an appellate court to prescribe a bright-line rule for the precise parameters of a proper sample; after all, the whole point of discretion is a recognition that there are times when there shouldn’t be a bright-line rule.” (*Id.* at p. 1083; see *id.* at pp. 1083–1084 [contrasting various professions].) In the present case, amortization over two years was the most reasonable way of treating Richard’s May 2014 signing bonus.

¹² The *Riddle* court’s point was that *statutes*, including the Internal Revenue Code and Family Code section 4059, are framed in “whole years” as distinct from “artificially truncated and therefore unrepresentative slices of time,” so it is unfair to try to take just a few months of abnormal income (whether high or low) as representative of a payor parent’s true income. (*Riddle, supra*, 125 Cal.App.4th at p. 1084.)

B. *The De Novo Issue*

This brings us to the main argument Richard makes regarding his child support reduction request, namely that the court should have honored the “de novo” language in the modification paragraph of the stipulated judgment and looked at circumstances anew. The subtext of this argument is that the trial court, had it done so, would have reduced his above-guideline current order down to guideline.¹³

We dare say no family lawyer is unaware of the rule requiring a change of circumstances before a support order may be modified. The reason the rule is so ubiquitous in family practice has been explained in *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801 [81 Cal.Rptr.2d 797]: “Because family law cases typically entail issues concerning an ongoing relationship rather than a distinct event—child support, custody and visitation, for example—the law builds in the necessary flexibility to accommodate changing circumstances by postjudgment orders to show cause hearings where the judgment has provided jurisdiction to do so. Unlike an auto accident case which might end with a tidy final judgment for money damages, the successive modifications possible in a family law proceeding can make the case resemble an unruly desert caravan strung out upon the sands.” (*Id.* at pp. 807–808; see, e.g., *In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1475 [143 Cal.Rptr.3d 81] [overview of basic rule].)

The precise issue thus becomes whether the parties could *contract around* the change of circumstances rule. In support of his theory Richard points to a couple of cases, *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543 [251 Cal.Rptr. 370] (*Catalano*) and *In re Marriage of Thomas* (1981) 120 Cal.App.3d 33 [173 Cal.Rptr. 844] (*Thomas*) from which one might extract the possibility of modification *without* a change of circumstances.¹⁴

■ But reliance on *Catalano* is misplaced. The only support for Richard’s position in *Catalano* is dicta,¹⁵ because in *Catalano* there was a change of

¹³ The point of the Attorney General’s brief in this case is to underscore the fact that parents cannot contract around certain levels of child support, since the state has an interest in the well-being of children independent of the parents. The Attorney General, however, makes no argument that simply reducing Richard’s child support levels to *guideline* amounts would somehow contravene public policy.

¹⁴ For purposes of this opinion, there is no need, as there was in *In re Marriage of Bodo* (2011) 198 Cal.App.4th 373 [129 Cal.Rptr.3d 298] (*Bodo*), to contemplate the difference between a “material” change of circumstances as distinct from a “substantial” change of circumstances.

¹⁵ Here is the passage. Readers should pay attention to the two authorities cited at the end: “Despite the general rule requiring a showing of changed circumstances since the last prior order, a court may base its modification on a showing of *current* needs alone where, as here, the prior order called for modification based on a stipulation unaccompanied by findings about

circumstances justifying the modification (in that case, upwards). (See *Catalano, supra*, 204 Cal.App.3d at p. 549 [noting increase in payor parent's earnings].) Indeed, *Catalano* is regularly cited for the proposition that a change of circumstances is *required* before a modification. (E.g., *Bodo, supra*, 198 Cal.App.4th at p. 388; *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1015 [112 Cal.Rptr.2d 378].)

■ Moreover, the *Catalano* dicta is merely a variant of the well-established family law rule that child support obligations are law imposed as distinct from contractual, so the court *always* retains authority to ensure a minimum level of adequate child support. Indeed, from the very earliest days, California courts overrode stipulated support orders (or the total lack of provision for them in the first place) to impose or increase child support. (See *Wilson v. Wilson* (1873) 45 Cal. 399 (*Wilson*) [imposing child support where there was none in original divorce decree].) As a late 19th-century case summarized the rule: "The authority of the court to modify the decree in a proper case, and to provide when necessary that the plaintiff shall discharge his paramount duty in caring for and defraying the expense of educating his children, is not doubted. The *stipulation of the parents cannot divest them, as against the children*, of this duty." (*Parkhurst v. Parkhurst* (1897) 118 Cal. 18, 22 [50 P. 9], italics added (*Parkhurst*)).¹⁶

But the other authority *Catalano* cited—and one which Richard also relies on directly—*Thomas*, cannot be so readily distinguished. *Thomas*, in fact, provides some real support for Richard's position. In *Thomas*, a former husband sought and obtained a \$25-a-month reduction in child support per child without proof or even allegation of change of circumstances. (See *Thomas, supra*, 120 Cal.App.3d at p. 34.) We now explain why we decline to follow the *Thomas* decision.

Thomas was a bagatelle of a decision consisting of but four paragraphs, and dealing with unusual circumstances that could no longer occur. In *Thomas*, a former husband sought a downward modification of his support obligation from \$125 to \$100 a month per child, but could not provide a

any change of circumstances existing then. ([*Thomas, supra*], 120 Cal.App.3d [at pp.] 34–35; *Singer v. Singer* (1970) 7 Cal.App.3d 807, 812–813 [87 Cal.Rptr. 42].)" (*Catalano, supra*, 204 Cal.App.3d at p. 549.)

¹⁶ *Singer* itself illustrates that rule nicely. The divorce happened in 1960, and in April 1968, the ex-wife and custodial parent agreed to a stipulated modification that only slightly increased the ex-husband's support obligation for the couple's two boys. Then the payee parent got new counsel and, in October 1968, a mere six months later, sought again to increase support. The boys were now "strapping teenagers." (*Singer, supra*, 7 Cal.App.3d at p. 810.) The trial court restricted the evidence at the October hearing to change of circumstances since the April hearing. That was error, said the *Singer* court. And in fact the passage which the *Catalano* court cited (pp. 812–813 in the official reporter) itself cited the rule from *Wilson* and *Parkhurst*. (See particularly *Singer, supra*, 7 Cal.App.3d at p. 812.)

“court record” of the parties’ circumstances at the time the original judgment was made. (*Thomas, supra*, 120 Cal.App.3d at p. 35.) He got his downward modification in the trial court and the appellate court affirmed. The appellate court reasoned that, given the absence of any findings of financial circumstances, the modification proceeding itself was the “first time” the “proper amount” of child support was litigated, hence the court acted within its discretion in modifying the previous order based on the current evidence, and so affirmed the order. (*Thomas, supra*, 120 Cal.App.3d at p. 35.) In the process, the *Thomas* court articulated a rule allowing modification without changed circumstances in more open-ended terms than just a rule that allows courts to increase support upwards to ensure that children are adequately supported: “The court may modify a child support order where the parties have stipulated to the amount of support; modification does not always require a showing of changed circumstances and in certain cases may be justified by current circumstances. (See *Moore v. Moore* (1969) 274 Cal.App.2d 698, 703 [79 Cal.Rptr. 293].)” (*Id.* at pp. 34–35.)

Moore, however, does not stand for the open-ended proposition that *Thomas* cited it for. *Moore* was simply one of the numerous California cases we have already mentioned allowing courts to modify stipulated judgments to assure adequate child support. Modifications are needed in such cases, as the *Moore* court put it, if only to prevent children becoming “public charges.” (See *Moore v. Moore, supra*, 274 Cal.App.2d at p. 703.) The *Moore* case arose because of a change of custody of one child, and the parent with the new custody of that child simply did not have the “‘income and resources’” to adequately provide for that child’s expenses. (*Id.* at pp. 702–703, quoting *Levy v. Levy* (1966) 245 Cal.App.2d 341, 358–359 [53 Cal.Rptr. 790].)

Thomas was thus different from the situation in *Moore*. Had the *Thomas* court followed the basic California rule, it would have analyzed the wife’s appeal in terms of whether the payor parent had met the burden *he had* to show a change of circumstances since the previous order. (E.g., *In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 77 [46 Cal.Rptr.2d 8] [burden on party seeking modification, citing cases].) Under the facts as stated in *Thomas*, the result would have been different. We need merely add such a burden on the payor father in *Thomas* would have hardly been unreasonable: Surely he could have offered a declaration as to what he was making just four years earlier when he agreed to the \$125 per child support order. (See *Thomas, supra*, 120 Cal.App.3d at p. 34.) The *Thomas* court, faced with unusual facts that made their result just, had no reason to conduct this analysis.

■ The reason for the change of circumstances rule is the doctrine of res judicata. The first Supreme Court case to announce the change of circumstances rule in regard to modification requests was *Snyder v. Snyder*

(1933) 219 Cal. 80 [25 P.2d 403] (*Snyder*). There, in February 1932, a trial court reduced the total support owing an ex-wife and child when, just the previous October, the ex-husband had made an identical application and it had been turned down. The February attempt, in fact, contained not “a single new fact” since the October effort. (*Id.* at p. 81.) Our Supreme Court flatly said the court in February had “[no] authority” to alter the judgment, and relied on a now long-out-of-print treatise dating back to World War I, McKinney’s Ruling Case Law (1914).¹⁷ (*Snyder*, at p. 81.) After laying down the rule, the *Snyder* court in fact quoted from page 948 of the first volume of the Ruling Case Law hornbook, in terms that make it clear res judicata is the animating principle behind the change of circumstances rule: “‘Authority to modify the allowance, however, does not include the right to alter the award upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. *The parties had their day in court, with the right of appeal if the decree was deemed erroneous,* and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter or modify a decree for alimony upon the facts existing at the time of its entry.’” (*Snyder, supra*, 219 Cal. at p. 81, italics added.)

■ As *Snyder* makes clear, Richard’s reliance on the “de novo” clause is untenable. His position would reduce family law orders and judgments to mere temporary placeholders in contravention of res judicata.

C., D.*

.

IV. DISPOSITION

The orders appealed from are affirmed. Lauralin shall recover her costs on appeal.

O’Leary, P. J., and Thompson, J., concurred.

On October 3, 2016, the opinion was modified to read as printed above. Appellant’s petition for review by the Supreme Court was denied December 14, 2016, S238023.

¹⁷ The book was a hornbook-style treatise based on various selected cases from both American and British courts. We are indebted to the California Supreme Court library for supplying us with the passage and surrounding text on which the *Snyder* court relied.

*See footnote, *ante*, page 1014.

[Nos. B260715, B262530. Second Dist., Div. One. Oct. 4, 2016.]

MICHAEL MARKOW et al., Plaintiffs and Respondents, v.
HOWARD L. ROSNER et al., Defendants and Appellants.

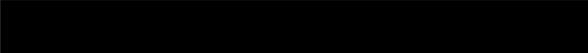
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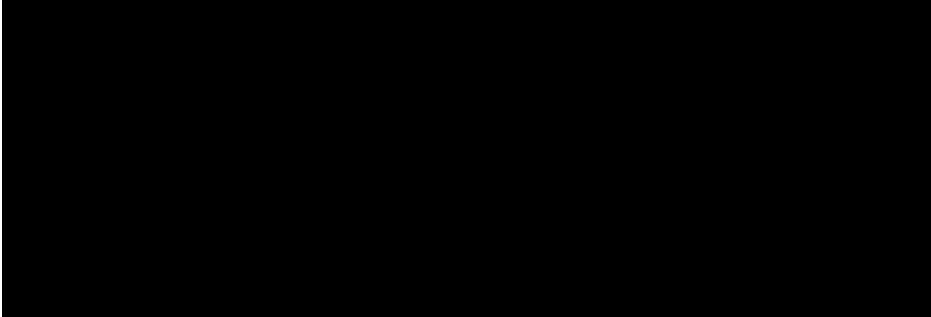
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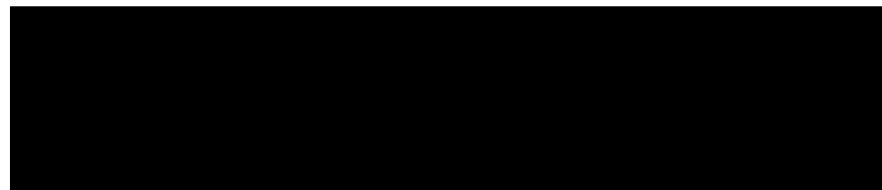
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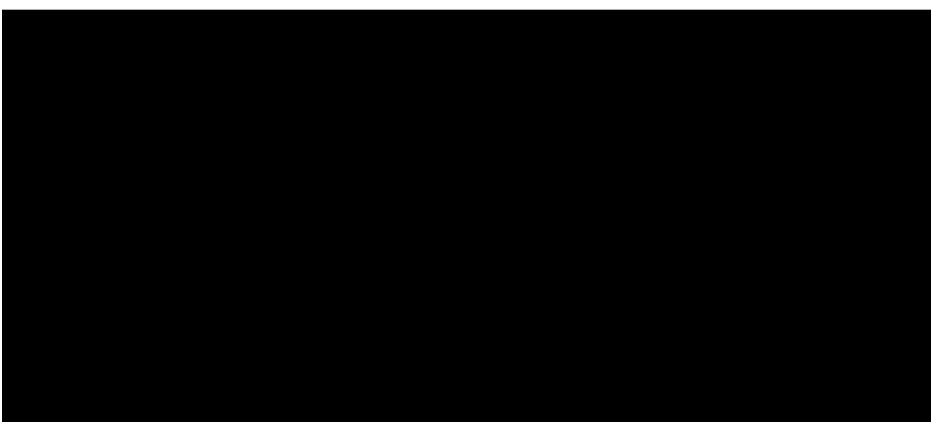
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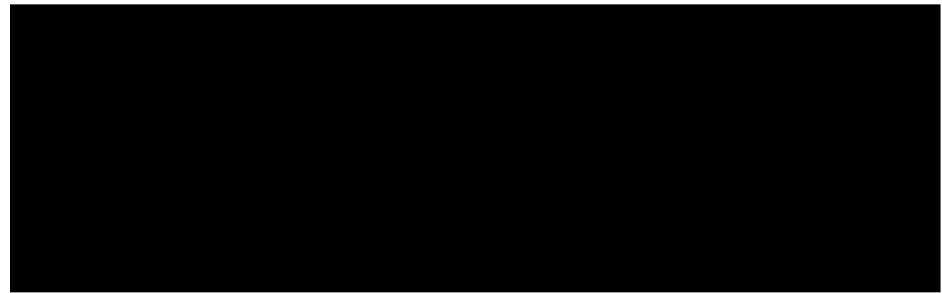
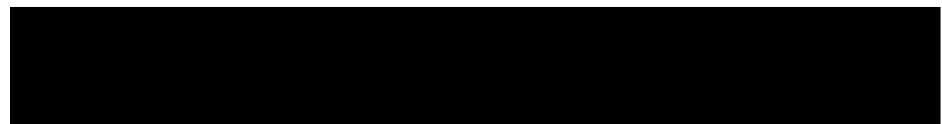
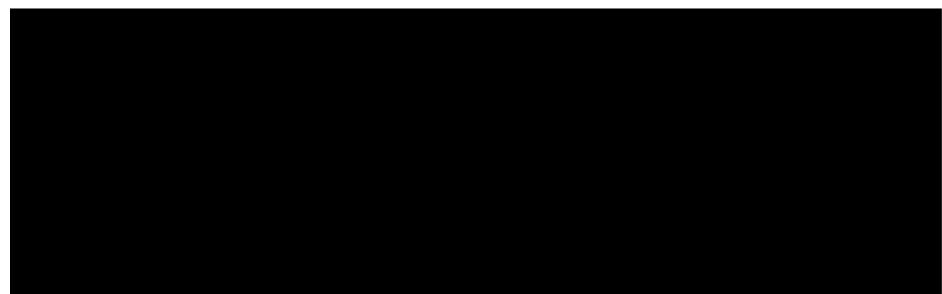
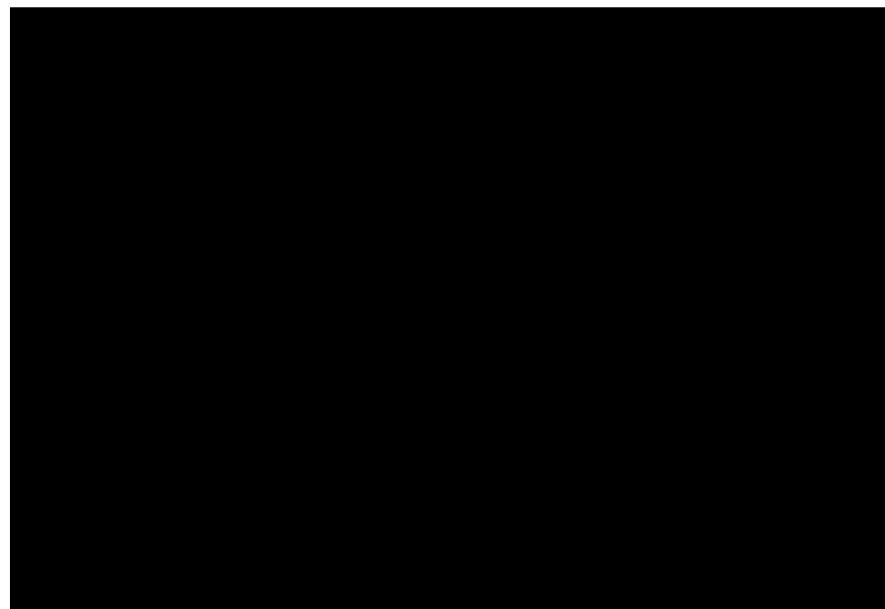




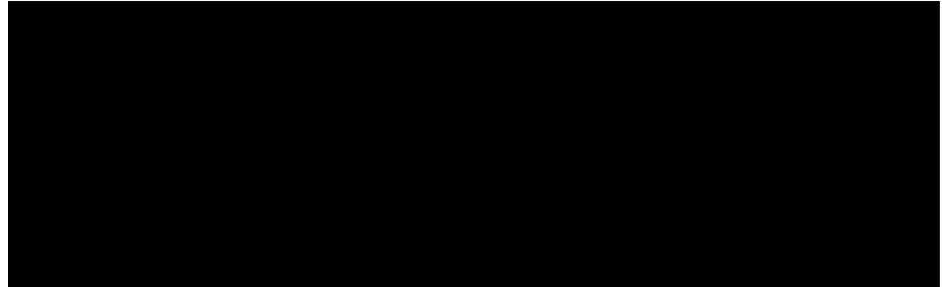
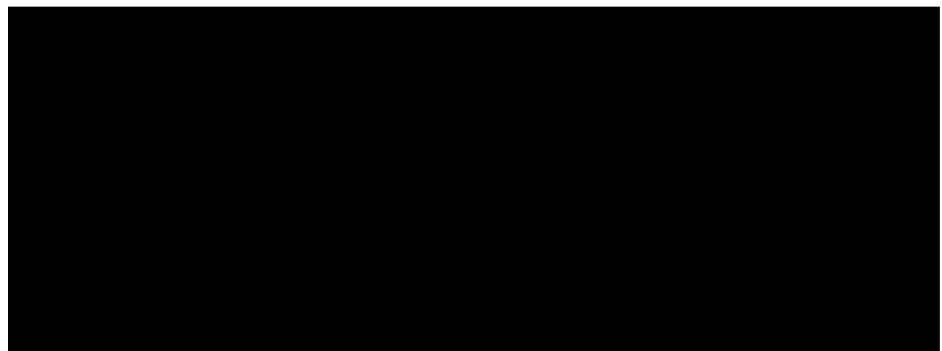




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OPINION

LUI, J.—Plaintiffs Michael Markow (Markow) and his wife, Francine Markow, sued Markow's pain management physician, Howard L. Rosner, M.D., and Cedars-Sinai Medical Center (Cedars) for professional negligence and loss of consortium after Rosner's treatment rendered Markow quadriplegic. A jury found that both Rosner and Cedars had been negligent, but that only Rosner's negligence had been a substantial factor in causing Markow's severe injuries. The jury nonetheless apportioned 40 percent of fault to Cedars, apparently on the basis of its finding that Rosner was Cedars's ostensible agent. Both Rosner and Cedars appealed.

Cedars contends that, as a matter of law, Rosner could not be found to be its ostensible agent because in conditions of admissions forms (Conditions of Admissions forms) Markow initialed and signed on 25 separate occasions Cedars unambiguously informed Markow that all physicians furnishing services to patients were independent contractors, not agents or employees of Cedars. We agree and reverse the judgment as to Cedars. Under the circumstances, Markow knew or should have known that Rosner was not Cedars's agent. Markow's belief to the contrary was not objectively reasonable, and Cedars's motion for judgment notwithstanding the verdict should have been granted.

Rosner contends that the evidence was insufficient to support the jury's finding he was negligent, the special verdict was hopelessly inconsistent and warranted a new trial, the award of future economic damages was excessive, and plaintiffs were not entitled to costs under Code of Civil Procedure section 998.¹ We find no merit in Rosner's claims and therefore affirm the judgment against him.

BACKGROUND*1. Markow's decision to seek treatment from Rosner*

Markow began to experience serious and chronic pain in 2003, following an automobile accident. By 2006, Markow suffered from "continuous" and "severe" pain in his neck, back, arm, and shoulder. To help Markow manage his pain, one of his doctors referred him to Rosner.

Markow researched Rosner on the Internet before going to see him. Markow visited Cedars's Web page and was impressed to discover that Rosner was the medical director of the pain center at Cedars. The Web page

¹ Undesignated statutory references are to the Code of Civil Procedure.

stated that the center was the largest pain management program in the western United States, with 14 to 15 practitioners, “from psychologists through interventional pain physicians [and] two full-time committed procedure rooms.” The center treats approximately 27,000 patients per year and performs approximately 600 procedures per month. Although Cedars was 30 to 40 miles from his home, Markow elected to become one of Rosner’s patients. Markow testified he did so because Rosner was the medical director of a pain center at a major medical center that was also a teaching hospital. Markow explained that he went to Rosner because he “worked for the best hospital, one of the best hospitals in the country.”

Markow’s first appointment with Rosner was on May 15, 2006.

2. The actual and apparent relationship between Cedars and Rosner

Cedars’s pain center was located down the street from the actual hospital in a building owned by Cedars. Cedars owns or supplies the pain center’s equipment and consumables, and the nurses and other nonphysician staff members are employees of Cedars. In keeping with California’s ban on the corporate practice of medicine (Bus. & Prof. Code, § 2400), Rosner was not an employee of Cedars, but was instead a partner in the General Anesthesia Specialists Partnership Medical Group (GASP). GASP billed patients, including Markow, for Rosner’s professional services, and the evidence at trial demonstrated that Markow paid GASP for Rosner’s services.

Nonetheless, Rosner did not usually give patients his GASP business cards, but instead gave them business cards imprinted with Cedars’s name, without any reference to GASP. Cedars’s Web site identified Rosner as the medical director of its pain center, also without reference to GASP. The Web page for the pain center further directed potential patients to phone “1-800-CEDARS-1” to make an appointment. However, Rosner’s “Cedars” business card and his correspondence (to the extent reflected in the record) listed a different number in the 310 area code. In addition, with Cedars’s authorization, Rosner used a Cedars logo in his letterhead when corresponding with referring physicians. There were no signs in the pain center offices informing patients that Rosner worked for GASP.

3. Cedars’s disclosures regarding physicians’ status as independent contractors

Over the four-and-one-half-year period that Rosner treated Markow, Markow signed and initialed 25 Conditions of Admissions forms bearing Cedars’s name and logo. In May 2006, when Markow began his treatment with Rosner, the Conditions of Admissions form (Oct. 2003 rev.) was three

pages long and single-spaced. The second paragraph on the first page of this form was printed in boldface and in a larger pitch than any of the other paragraphs. It stated as follows:

“2. Legal Relationship Between Hospital and Physicians

“In accordance with California law which prohibits the Corporate practice of Medicine, physicians are independent contractors and are neither employed by nor agents of this facility. Patient recognizes that Physicians furnishing services to the Patient, including without limitation Emergency Room physicians, radiologists, pathologists and anesthesiologists, are all independent contractors with Patient for the purposes of the provision of professional services and are not employees or agents of Cedars-Sinai Medical Center for such purposes. _____ (Initial here).”

In the smaller pitch used in the rest of the document and without boldface, the disclaimer continued and stated: “The physician groups include, but are not limited to: . . . General Anesthesia Specialists Partnership Medical Group.” The disclaimer paragraph was the only portion of the entire three-page document that a patient was asked to separately initial.

On July 15, 2006, the Conditions of Admissions form was amended. The third paragraph on the first page of the amended form was printed in a larger pitch than any of the other paragraphs. It stated as follows:

“3. PHYSICIANS ARE INDEPENDENT CONTRACTORS

“All physicians and surgeons furnishing services to the Patient, such as radiologists, pathologists, anesthesiologists and the like, are independent contractors and are not employees or agents of the Hospital. These physicians may bill separately for their services.”

Following this paragraph was either a boldfaced “**Patient initials: _____**” or a large rectangle above the descriptor, “Patient initials: _____.” Beneath the space for initialing, the disclaimer continued: “The patient is under the care and supervision of his / her attending physician and it is the responsibility of the Hospital and its nursing staff to carry out the instructions of such physician. It is the responsibility of the Patient’s physician or surgeon to obtain the Patient’s informed consent, when required, to medical or surgical treatment, special diagnostic or therapeutic procedures, or Hospital services rendered to the Patient under the general and special instructions of the physician.”

Markow testified that when he was first presented with a Conditions of Admissions in May 2006, he read it and, for some time thereafter, he

continued to read each subsequent Conditions of Admissions before signing and initialing. Ultimately, however, he stopped reading them because “they all appeared to be the same.” Markow believed that the independent contractor disclaimer did not apply to Rosner because “he was director of pain management for the hospital” and, as a result, he “can’t be an independent contractor.” Markow thought Rosner must be a “full-time employee” of Cedars. Markow further testified that he believed, but was not certain, that his neurologist—who was also the director of a department at Cedars and also had an office in the same building as Rosner’s—was an employee of Cedars.

In addition to the 25 Conditions of Admissions documents, Markow signed at least eight documents entitled, “Authorization for & Consent to Surgery or Special Diagnostic or Therapeutic Procedures or Blood Transfusions,” prior to and on the date of the injurious procedure. Each of these contained the following paragraph on the first page: “3. I understand that the person or persons in attendance at such operation or procedures, as indicated above, for the purpose of administering anesthesia, and the person or persons performing other specialized professional services, such a radiology, pathology, and the like, are not the agents, servants or employees of Cedars-Sinai Medical Center, but are independent contractors performing specialized services on my behalf and, as such, are the agents of myself.”

4. Markow’s injuries during treatment

On November 11, 2010, Rosner performed a nerve root block procedure on Markow. This procedure was similar to other procedures that Rosner had performed on Markow, but was much higher on the spine, at the base of the skull near the brain stem. Rosner conceded at trial that the procedure was both “very rare” and quite “risky.”² Immediately after the procedure, Markow was in “tremendous pain, terrible pain,” as if “a thousand tiny hot lancets” were penetrating his face. It was a pain that Markow had never experienced before. Markow continued to experience this lancing pain in his face on an intermittent basis over the course of the next week.

On November 19, 2010, eight days after the procedure, Markow began to develop neurological problems in his upper and lower extremities. On November 20, 2010, due to “substantial sensory deficit” on one side of his body and “weakness” on the other, Markow was rushed to Cedars’s emergency room. Over the course of the next several weeks, Markow’s condition deteriorated, eventually leaving him quadriplegic. Markow remained hospitalized for approximately the next two years.

² Rosner testified that of the approximately 1,500 nerve block procedures that he performs per year, only six are done at the C1–C2 levels in the cervical spine.

In the weeks and months immediately following the paralysis, physicians at Cedars conducted a “very exhaust[ive] and thorough workup” to determine the cause of Markow’s condition. The physicians believed that Markow’s condition was “ultimately” due to a “cervical cord infarct,” i.e., a stroke in the cervical spine, but they were unable to find evidence of any such stroke.

At the time of trial, Markow continued to suffer from the lancing facial pain, which is known as trigeminal neuralgia or trigeminal pain.

At trial, plaintiffs and their experts advanced two different causes for Markow’s paralysis: Either Rosner used an iodine-based contrast (Omnipaque) to which Markow was allergic or Rosner caused mechanical trauma to Markow’s cervical cord during the procedure.

With regard to their Omnipaque theory, plaintiffs presented evidence that although hospital records documented that Markow was allergic to iodine contrast and that Rosner had been aware of this allergy ever since he began treating Markow on May 15, 2006, Rosner, acting “in haste,” filled out an “intra-procedure” order requesting Omnipaque for the November 11, 2010 procedure. Plaintiffs further established that no change in the contrast was ever documented for the November 11, 2010 procedure, that plaintiffs were billed by Cedars for Omnipaque, and that the billing form is completed by nurses during the procedure.

As for their mechanical trauma theory, plaintiffs established that immediately following the procedure, Rosner told Markow that the reason he was experiencing intense pain in his face was because Rosner “may have hit something he shouldn’t have hit, touched something he shouldn’t have touched.” Plaintiffs’ expert neurologist testified that the slow onset of Markow’s quadriplegia was consistent with a vasospasm caused by a misplaced needle nicking the radicular artery that supplied the nerve root. The expert also testified that there was “objective evidence of trauma” because immediately following the procedure Markow suffered from trigeminal pain, and an MRI scan taken days after the procedure showed edema or swelling at the source of such pain, the trigeminal apparatus.

Rosner presented evidence that Markow’s quadriplegia resulted from a cervical stroke induced by a purely coincidental blood clot, as shown by the slow deterioration that Markow suffered following the procedure. Plaintiffs’ expert neurologist testified that the odds of such a stroke are one in 10,000.

5. *Litigation and trial*

Plaintiffs sued defendants for professional negligence and loss of consortium.³ The trial court denied Cedars's motion for summary judgment based upon lack of ostensible agency, finding that plaintiffs had submitted evidence from which "a jury could find . . . that Dr. Rosner is an agent of Cedars-Sinai."

Using a special verdict form, the jury found Rosner "negligent in the diagnosis or treatment" of Markow and that his negligence was a substantial factor in causing Markow's quadriplegia. The jury also found that Cedars was negligent in its treatment of Markow, but found its negligence was not a substantial factor in causing harm to Markow. The jury found Cedars vicariously liable for plaintiffs' damages because it "intentionally or carelessly" created the impression that Rosner was its agent and Markow was harmed as a result of his reasonable belief that Rosner was Cedars's agent. Although Rosner was the only defendant found to have caused Markow's injuries, the jury, in direct contradiction of the special verdict's instructions, allocated 60 percent of the fault to Rosner and 40 percent to Cedars. After reducing damages for noneconomic losses to \$250,000 pursuant to Civil Code section 3333.2, plaintiffs' damages award totaled \$5.2 million.

6. *Posttrial motions*

Cedars requested the trial court to strike the apportionment of fault, while Rosner moved for a new trial on grounds including the inconsistency of the jury's findings. The trial court denied Rosner's motion and granted Cedars's. It found that the jury erroneously answered the allocation question and struck the allocation of fault.

Cedars subsequently moved for judgment notwithstanding the verdict and for a new trial on several grounds, including that the verdict was contrary to law because the Conditions of Admissions conclusively established that Rosner was not Cedars's ostensible agent. The trial court denied these motions.

Rosner and Cedars timely appealed, and we consolidated their separate appeals.

³ Plaintiffs also sued anesthesiologist Nirmala Thejomurthy, M.D., but the jury found that she was not negligent.

DISCUSSION

1. *Cedars's liability on basis of ostensible agency*

a. *Ostensible agency principles*

■ “An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.” (Civ. Code, § 2300.) “A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.” (Civ. Code, § 2334.) “Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: The person dealing with an agent must do so with a reasonable belief in the agent’s authority, such belief must be generated by some act or neglect by the principal sought to be charged[,] and the person relying on the agent’s apparent authority must not be negligent in holding that belief.” (*J.L. v. Children’s Institute, Inc.* (2009) 177 Cal.App.4th 388, 403–404 [99 Cal.Rptr.3d 5].)

■ Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: “(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.” (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453 [122 Cal.Rptr.2d 233] (*Mejia*.)) Generally, the first element is satisfied “when the hospital ‘holds itself out’ to the public as a provider of care,” “unless it gave the patient contrary notice.” (*Id.* at pp. 1453–1454.) Nonetheless, a hospital’s “contrary notice” may be insufficient “to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.” (*Id.* at p. 1454.) Reliance upon an apparent agency is demonstrated “when the plaintiff ‘looks to’ the hospital for services, rather than to an individual physician.” (*Ibid.*) Ultimately, “there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.” (*Id.* at pp. 1454–1455.)

■ Although the existence of an agency relationship is usually a question of fact, it “becomes a question of law when the facts can be viewed in only one way.” (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 658 [186 Cal.Rptr. 578, 652 P.2d 426].) In the physician-hospital-patient context, ostensible agency is a factual issue “[u]nless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital’s agent, such as when the patient is treated by his or her personal physician” or received actual notice of the absence of any agency relationship. (*Mejia, supra*, 99 Cal.App.4th at pp. 1454, 1458.)

- b. *Because Markow received actual notice and was treated in a nonemergency context, there was no ostensible agency and Cedars was entitled to judgment as a matter of law.*

It was undisputed that on 25 occasions over the course of four and one-half years Markow received, read (until he realized that he recognized the language as the same used in forms he had previously read), signed, and initialed Conditions of Admissions forms that informed him that **“physicians are independent contractors and are neither employed by nor agents of this facility. Patient recognizes that Physicians furnishing services to the Patient, including without limitation . . . anesthesiologists, are all independent contractors with Patient for the purposes of the provision of professional services and are not employees or agents of Cedars-Sinai Medical Center for such purposes”** (Oct. 2003 Conditions of Admissions form); “physician groups include, but are not limited to: . . . General Anesthesia Specialists Partnership Medical Group” (July 15, 2006 Conditions of Admissions form); and “All physicians and surgeons furnishing services to the Patient, such as radiologists, pathologists, anesthesiologists and the like, are independent contractors and are not employees or agents of the Hospital” (July 15, 2006 Conditions of Admissions form). Although the Conditions of Admissions forms also address a number of other topics, the disclaimer section stood out prominently on the first page of both versions of the form, in part because it was printed in a larger pitch than the other paragraphs in the form. Moreover, the disclaimer section was the only portion of either form requiring the patient to initial it. On the October 2003 Conditions of Admissions form, the disclaimer also stood out because it was in boldface print. On the July 2006 version of the Conditions of Admissions form in use for most of the period of 2007 through 2010, the disclaimer paragraph was even more prominent and distinctive because it was followed by a large rectangle in which the patient was to place his or her initials.

The wording of the disclaimer in each form, particularly in the version of the form in use from 2007 through 2010, was simple and unambiguous, not obtuse “legalese.” Although plaintiffs and the dissent argue that the form

failed to specify whether physicians who were also directors of practice areas such as the pain center were independent contractors, the language in each version of the form clearly included *all* physicians. The 2006 version initially stated, “**In accordance with California law which prohibits the Corporate practice of Medicine, physicians are independent contractors and are neither employed by nor agents of this facility.**” It then continued to specify, “**Patient recognizes that Physicians furnishing services to the Patient, including without limitation . . . anesthesiologists, are all independent contractors with Patient for the purposes of the provision of professional services and are not employees or agents of Cedars-Sinai Medical Center for such purposes.**” This language did not limit the category of independent contractor physicians to any subgroup, such as those who were not directors of practice areas, but expressly included *all physicians* furnishing services to patients, including anesthesiologists, which is Rosner’s field of specialization. The form then went on to specify Rosner’s practice group, GASP, as one of the “physician groups.” Although Markow may not initially have known that GASP was Rosner’s practice group, he had reason to know this upon receiving a bill from GASP for Rosner’s services. The Conditions of Admissions form as amended in July 2006 was also all-inclusive: “*All physicians and surgeons furnishing services to the Patient, such as . . . anesthesiologists and the like, are independent contractors and are not employees or agents of the Hospital.*” (Italics added.) This language is simply not susceptible to an interpretation that would exclude Rosner, an anesthesiologist, because he was the director of the pain center.

In addition, Markow signed at least eight “Authorization for & Consent to Surgery or Special Diagnostic or Therapeutic Procedures or Blood Transfusions” forms prior to and on the date of the injurious procedure, and in each of these he again acknowledged that “persons in attendance at such operation or procedures as indicated above, for the purpose of administering anesthesia, and the person or persons performing other specialized professional services, such as radiology, pathology, and the like, are not the agents, servants or employees of Cedars-Sinai Medical Center, but are independent contractors performing specialized services on my behalf and, as such, are the agents of myself.” When Rosner performed procedures on Markow to alleviate his pain, Rosner was a person in attendance for the purpose of performing specialized professional services. Thus, for every procedure, Markow signed at least one, and sometimes two forms acknowledging his receipt of actual notice that Rosner was an independent contractor, not an agent or employee of Cedars.

Furthermore, although Rosner’s affiliation with Cedars, in conjunction with the allure of Cedars’s reputation, played a significant role in Markow’s decision to be treated by Rosner, it was undisputed that Markow chose Rosner to be his physician. Markow did not go to Cedars seeking care from

its emergency room, as in many of the reported decisions upholding a finding of ostensible agency or concluding that ostensible agency was a factual issue for the jury. (See, e.g., *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631 [188 Cal.Rptr.3d 246] (*Whitlow*) [reversing summary judgment for hospital]; *Mejia, supra*, 99 Cal.App.4th 1448 [reversing judgment after nonsuit].) Nor was Rosner a physician on call who attended to Markow after he was admitted to the hospital, without Markow having a choice or say in the matter. Instead, once treatment commenced and on the date of the injurious procedure, Rosner was one of Markow's *personal* physicians, i.e., Cedars did not *assign* Rosner to treat Markow; Markow *chose* Rosner. GASP billed Markow for Rosner's services and Markow paid for Rosner's services by paying GASP, not Cedars.⁴ GASP was also specifically mentioned in the disclaimer section of the original Conditions of Admissions form prior to amendment in July 2006.

Accordingly, Markow indisputably either knew or should have known, based upon the Conditions of Admissions forms that he initialed and signed on multiple occasions, the "Authorization for & Consent to Surgery or Special Diagnostic or Therapeutic Procedures or Blood Transfusions" forms that he also signed on at least eight occasions, and Rosner's status as Markow's personal physician, that Rosner was not Cedars's agent or employee, but was instead an independent contractor.⁵ Because the evidence conclusively indicates that Markow knew or at least should have known that Rosner was not Cedars's agent, this is an issue of law, not fact. (*Mejia, supra*, 99 Cal.App.4th at pp. 1454, 1458.)

Plaintiffs cite a variety of factors to support their ostensible agency theory, such as the contents of Cedars's Web site identifying Rosner as the director of its pain clinic and inviting would-be patients to phone 1-800-CEDARS-1; the location of the pain clinic in a building owned by Cedars and displaying Cedars's name and logo; Rosner's use, with Cedars's authorization, of Cedars's name and logo on his business cards and correspondence with physicians;⁶ Cedars's ownership of the pain clinic's equipment and supplies

⁴ The record reflects Markow's payment of GASP's bills prior to the date of the injurious procedure. Billing by and payment of GASP was consistent with the contents of the disclaimer, i.e., Rosner was an independent contractor with respect to Cedars. In contrast, there was no evidence that Cedars billed Markow for Rosner's services.

⁵ We do not intend to suggest that a patient must be advised of physicians' independent contractor status more than once to receive adequate notice. Nonetheless, in this case Markow received and acknowledged receipt of 25 such advisements that consistently informed him that physicians were independent contractors.

⁶ We note, however, that nothing indicated Markow saw Rosner's correspondence with other physicians, which would be necessary to show reliance. Moreover, Markow did not testify that he relied upon the business cards or correspondence.

and employment of nurses and other pain clinic staff;⁷ Rosner's Cedars badge; and that Cedars recruited Rosner from the East Coast to be the director of the pain clinic. Assuming, for the sake of argument, that Markow had knowledge of and relied upon each of these factors, they are nonetheless negated by the actual notice Cedars provided Markow that Rosner was an independent contractor, not Cedars's agent or employee and Markow's express acknowledgement of receipt of such notice on the multiple Conditions of Admissions forms, not to mention the Authorization for & Consent to Surgery or Special Diagnostic or Therapeutic Procedures or Blood Transfusions forms and Rosner's status as Markow's personal physician.

Plaintiffs rely upon a number of distinguishable cases. In most of these cases, the defendant did not give the plaintiff notice of the lack of agency or employment. (*Stanhope v. L. A. Coll. of Chiropractic* (1942) 54 Cal.App.2d 141 [128 P.2d 705]; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475 [61 Cal.Rptr.3d 754]; *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154 [41 Cal.Rptr. 577, 397 P.2d 161]; *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88 [11 Cal.Rptr.2d 468] (*Jacoves*).) Others (*Stanhope, supra*, 54 Cal.App.2d 141; *Whitlow, supra*, 237 Cal.App.4th 631) involve patients seeking care in an emergency room context where, as noted in *Mejia, supra*, 99 Cal.App.4th at page 1454, "an injured patient in need of immediate medical care cannot be expected to understand or act upon that information." In *Mejia* itself, the injured patient sought treatment in an emergency room and the hospital did not provide her any notice that the physicians were not its agents or employees. The appellate court concluded that "absent evidence that plaintiff should have known that the [allegedly negligent physician] was not an agent of respondent hospital, plaintiff has alleged sufficient evidence to get to the jury merely by claiming that she sought treatment at the hospital." (*Id.* at p. 1460.)

Although notice that physicians were independent contractors was given in *Whitlow, supra*, 237 Cal.App.4th 631, both in a Conditions of Admissions form and on a sign on the wall of the emergency room registration area, the patient was suffering excruciating pain from a brain hemorrhage and was unable to read the Conditions of Admissions form. Moreover, no one read it to her. (*Id.* at pp. 633–634.) Under those circumstances, the appellate court rejected "the notion that a signature on an admissions form conclusively constitutes notice to a patient *seeking care in an emergency room* that the treating physician, *whom she did not choose* and did not know, is not an agent of the hospital." (*Id.* at p. 641, italics added.)

Finally, in *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741 [69 Cal.Rptr.2d 640], an experienced real estate investor

⁷ Nothing indicated Markow knew who owned the equipment or provided the supplies.

who was also a superior court judge sued Coldwell Banker, as well as his broker (a Coldwell Banker franchisee) and others when he discovered misrepresentations regarding a property he had purchased. (*Id.* at p. 744.) Coldwell Banker required every franchisee to hold himself or herself out to the public as “‘independently owned and operated member[s] of Coldwell Banker Residential Affiliates, Inc.’” (*Ibid.*) The broker in question had printed this disclaimer language on his advertising, but in much smaller print than the name “Coldwell Banker.” (*Ibid.*) This appears to have been in accordance with the requirements of the Coldwell Banker Identity Manual, a page from which was attached as an appendix to the appellate opinion. This page depicted sample “Exterior Signage” with “Coldwell Banker” in very large letters, the name of the franchisee in somewhat smaller letters, and the independent contractor disclaimer in very tiny letters at the bottom. (*Id.* at pp. 744, fn. 1, 749.) The plaintiff “testified that he ‘went for the sign,’ [and] did not notice the disclaimer language.” (*Id.* at p. 744.) Here, however, the disclaimer was not hidden in fine print amidst other, more prominent language. It was in larger print and either in boldface print or right above a large rectangle in which the patient was to place his or her initials. It was also the only portion of the Conditions of Admissions form that required the patient to initial it. Unlike Kaplan, who did not see the fine-print disclaimer, Markow saw Cedars’s disclaimer, read it a number of times, and initialed it each time he was presented with a Conditions of Admissions form.

The dissent relies upon a federal trial court case,⁸ *Romar v. Fresno Community Hosp. and Medical Center* (E.D.Cal., Mar. 23, 2007, No. CIV F 03-6668 AWI SMS) 2007 WL 911882, in support of its position that the Conditions of Admissions forms were ambiguous regarding whether physicians who were directors of practice areas or administrative units were also independent contractors. (Dis. & conc. opn. at p. 1059, *post.*) However, the only potentially negligent personnel in *Romar* were physician assistants and nurse practitioners. The “Conditions Form” stated that “[a]ll physicians and surgeons” were independent contractors, but was silent regarding physician assistants and nurse practitioners. (*Romar*, at p. *2.) Neither a physician’s assistant nor a nurse practitioner falls within the scope of “[a]ll physicians and surgeons” because neither is a physician, let alone a surgeon. However, a physician who is the director of a practice area or administrative unit clearly falls within the scope of the phrases used in the Conditions of Admissions forms presented to Markow, i.e., “physicians,” “Physicians providing services,” and “all physicians and surgeons furnishing services to the Patient.”

⁸ While such cases are citable, they do not constitute binding authority. (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 375, 171 Cal.Rptr.3d 881.)

In a related argument, the dissent also relies upon *Jacoves, supra*, 9 Cal.App.4th 88, for the proposition that “dual status physicians” such as Markow may be agents of the hospital. (Dis. & conc. opn. pp. 1058–1059, *post.*) However, unlike this case, the hospital in *Jacoves* did not provide the plaintiff with any notice that the physicians were independent contractors, not agents or employees. Here, in contrast, any inference of agency or employment arising from Rosner’s status as director of the pain clinic was negated by the unambiguous and prominent disclaimer Markow repeatedly initialed.

The dissent also cites a second federal trial court case, *Van Horn v. Hornbeck* (E.D.Cal., Feb. 18, 2010, No. CIV F 08-1622 LJO DLB) 2010 WL 599885, in support of its view that the Conditions of Admissions forms did not provide Markow with notice as a matter of law. (Dis. & conc. opn. at pp. 1061–1062, *post.*) Van Horn, a pregnant state prison inmate, was taken to a hospital four times: The first three visits were to the emergency room and on the fourth visit she was in labor. On each occasion she signed a Conditions of Admissions form stating that all physicians and surgeons furnishing services to patients were independent contractors. (*Van Horn*, at p. *2.) The trial court denied the hospital’s summary judgment motion, stating: “[P]laintiff made a sufficient showing on the question of ostensible agency to avoid summary judgment. Plaintiff declared that she had no reason to believe that [the physicians] were not hospital employees, that she believed they were, ‘and was never told otherwise.’ She was shackled, in pain, and ‘forced’ to sign the forms.” (*Id.* at p. *10.) *Van Horn* thus represents an aggravated form of an emergency room case. Not only was the plaintiff seeking care in an emergency room on her first three visits, she was literally a prisoner in shackles. She had no choice in where to seek treatment, but was instead at the mercy of prison authorities and was “forced” to sign the form or, presumably, forgo medical care. Markow, however, was not a prisoner and chose Rosner to treat him. If Markow found Rosner’s independent contractor status unacceptable, he was free to leave and seek treatment elsewhere—a course of action not available to inmate Van Horn.

None of the cases relied upon by the plaintiffs and the dissent addressed treatment of a patient by his own physician in a nonemergency context where the patient repeatedly read and initialed a prominent notice that his physician was an independent contractor, not an agent or employee of the hospital. Accordingly, none of these cases supports the proposition that ostensible agency remains a factual issue where the patient knew or should have known that his physician was not the hospital’s agent. We conclude the jury’s ostensible agency finding is contrary to law.

■ A trial court may grant a motion for judgment notwithstanding the verdict only if the evidence, viewed most favorably to the prevailing party, is

insufficient to support the verdict. (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388 [132 Cal.Rptr.3d 617].) Generally, an appellate court reviews a trial court's ruling on such a motion for sufficiency of the evidence supporting the verdict. (*Ibid.*) However, review is de novo “[i]f the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions.” (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138 [76 Cal.Rptr.3d 585].) Here, all of the facts essential to the issue of ostensible agency were undisputed. The only issue was whether Markow's purported conclusion that Rosner was Cedars's agent was reasonable, which is a question of law. (*Mejia, supra*, 99 Cal.App.4th at pp. 1454, 1458.) Accordingly, after de novo review, we conclude that the jury's finding of ostensible agency was contrary to the law, and the trial court should have granted Cedars's motion for judgment notwithstanding the verdict. We therefore reverse the judgment as to Cedars.

2. *Sufficiency of the evidence*

Rosner contends the verdict was not supported by substantial evidence.

a. *Standard of review*

In reviewing the sufficiency of evidence to support the jury's finding, we review the record in the light most favorable to the prevailing party, resolving in favor of the prevailing party all conflicts in either the evidence or the reasonable inferences to be drawn therefrom, to determine whether the record contains substantial evidence, contradicted or uncontradicted, supporting the finding. (*State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1625–1626 [29 Cal.Rptr.2d 840]; *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544 [138 Cal.Rptr. 705, 564 P.2d 857], overruled on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].) “‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [51 Cal.Rptr.2d 907].) “The focus is on the quality, rather than the quantity, of the evidence.” (*Ibid.*) “Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence.” (*Ibid.*) “The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.” (*Id.* at p. 652.) The testimony of a single witness may be sufficient. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1075 [124 Cal.Rptr.2d 142, 52 P.3d 79].)

b. *The jury's negligence finding was supported by substantial evidence.*

Plaintiffs presented undisputed evidence that Rosner erred by ordering an iodine-containing contrast, Omnipaque, for the November 11, 2010 procedure. In addition, plaintiffs presented evidence which strongly suggested that this initial error was not corrected. There was no documentation showing that an iodine-free contrast was substituted for the Omnipaque before the procedure. Moreover, there was undisputed evidence that plaintiffs were billed for Omnipaque and only Omnipaque—that is, plaintiffs were not inadvertently billed for two contrasts, one containing iodine and one iodine-free contrast. In addition, plaintiffs' pain management expert testified that delayed hypersensitivity reactions to iodine agents, such as Omnipaque, are quite common and typically occur six to 10 days later. Such a delay in this case would be consistent with the nine-day interval between November 11, 2010, the day of the procedure, and November 20, 2010, the day when Markow was rushed back to Cedars.

With respect to the alternate theory that Markow was injured by means of negligent mechanical trauma, it was undisputed that Markow suffered from trigeminal nerve pain immediately upon awakening from the procedure. It was further undisputed that such pain was unprecedented for Markow. Although he had received many similar treatments lower on his cervical spine, he had never previously experienced thousands of "hot lancets" in his face. In addition, an MRI scan taken upon Markow's return to Cedars on November 20, 2010, revealed that there was swelling at the trigeminal apparatus. Plaintiffs' expert neurologist testified that the swelling was "objective evidence of trauma," and that the chances of Markow suffering a purely coincidental stroke in his cervical spine at or around the same time he underwent the November 11, 2010 procedure were one in 10,000.

Rosner contends that the jury's verdict was not supported by substantial evidence because plaintiffs' experts could not definitively state whether an allergic reaction to the iodine contrast or mechanical trauma caused Markow's paralysis and conceded that a coincidental stroke was a possibility. Plaintiffs and their experts, however, were not required to rule out all causes but one. "Under the applicable substantial factor test, it is not necessary for a plaintiff to establish the negligence of the defendant as the proximate cause of injury with absolute certainty *so as to exclude every other possible cause of a plaintiff's illness . . .*" (*Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 578 [191 Cal.Rptr.3d 67].) Instead, plaintiffs were only required to "offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* the

negligent act was a cause-in-fact of the plaintiff's injury.' " (*Ibid.*) Plaintiffs met this burden. Their experts offered reasoned explanations for how Rosner's negligence caused Markow's quadriplegia: Either Rosner used Omnipaque or he inflicted some form of mechanical trauma on Markow during the November 11, 2010 procedure.

In short, we find that the jury's verdict was supported by evidence that was reasonable, credible, and of solid value.

3. *Failure to require findings on plaintiffs' alternate theories of negligence*

Rosner also contends the special verdict form should have included questions that would have addressed plaintiffs' different negligence theories.

■ "[A] special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (§ 624.) "Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that "nothing shall remain to the court but to draw from them conclusions of law."'" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959–960 [17 Cal.Rptr.2d 242].)

The special verdict form used in this case properly required the jury to make findings only as to ultimate facts for plaintiffs' sole cause of action. Including questions that separately addressed each of plaintiffs' theories of negligence would have required the jury to decide evidentiary facts, in contravention of section 624.

Rosner's reliance on *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467 [81 Cal.Rptr.2d 252] is misplaced. In *Valentine*, the Court of Appeal held that it was proper to pinpoint the plaintiffs' distinct negligence theories even though there was only a single cause of action, but it did so only because of exceptional circumstances—there had already been two trials and two verdicts: "This was a case calling for special verdicts that would pinpoint the jury's fact finding and enable judgment to be entered rather than prolonging litigation with a possible third trial." (*Id.* at p. 1488.)

4. *Inconsistent findings in special verdict*

Rosner contends he was entitled to a new trial because the special verdict was hopelessly ambiguous, in that the jury concluded both that Cedars's

negligence was not a cause of Markow's injuries and that it was a cause of 40 percent of his injuries. Rosner argues the trial court erred by choosing one of these findings over the other.

a. *Standard of review*

■ “A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.] If a verdict appears inconsistent, a party adversely affected should request clarification, and the court should send the jury out again to resolve the inconsistency. [Citations.] If no party requests clarification or an inconsistency remains after the jury returns, the trial court must interpret the verdict in light of the jury instructions and the evidence and attempt to resolve any inconsistency.” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357–358 [112 Cal.Rptr.3d 455], fn. omitted.) “On appeal, we review a special verdict de novo to determine whether its findings are inconsistent. [Citation.] With a special verdict, . . . a reviewing court will not infer findings to support the verdict. [Citations.] ‘‘Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.’ ’ ’’ (*Id.* at p. 358.)

b. *The special verdict was not hopelessly ambiguous.*

The trial judge instructed the jury: “I will give you a verdict form with questions you must answer. I’ve already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. [¶] Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form in the order they appear. After you answer a question, the form tells [you what] to do next.”

Question 6 on the verdict form asked: “Was Howard Rosner, M.D.’s negligence a substantial factor in causing harm to Michael Markow?” The jury answered yes. Question 8 on the verdict form asked: “Was Nirmala Thejomurthy, M.D.’s negligence a substantial factor in causing harm to Michael Markow?” The jury did not answer this question, having found that Dr. Thejomurthy was not negligent in the first place. Question 10 on the verdict form asked: “Was Cedars-Sinai Medical Center’s negligence a substantial factor in causing harm to Michael Markow?” The jury answered no.

Question 16 on the verdict form was preceded by the following direction: “If the jury found more than one defendant liable for Plaintiffs’ injuries, i.e. the jury previously answered yes to more than one of these questions: 6, 8, and 10, answer the following, for each defendant(s) that the jury found to be

negligent. [¶] The names of all three defendants are provided in this question. If you did not find that a particular defendant was liable for Plaintiffs' injuries (i.e. the particular defendant was not negligent and/or the defendant's negligence was not a substantial factor in causing harm), then please do not assign a percentage of fault to that defendant." Although the jury had not "previously answered yes to more than one of these questions: 6, 8, and 10," the jury answered question 16, apportioning fault 60 percent to Rosner and 40 percent to Cedars.

■ Question 16 was included on the special verdict form because Civil Code section 1431.2, subdivision (a), enacted in 1986 as part of Proposition 51, provides as follows: "In any action for personal injury, property damage, or wrongful death, based upon principles of *comparative fault*, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault . . ." (Italics added.) However, such an allocation does not apply to defendants whose liability is vicarious. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1156–1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

Cedars's liability (as found by the jury) was based on ostensible agency, not comparative fault. The jury's allocation of any percentage of fault to Cedars was therefore improper, as well as contrary to the court's directions on the special verdict form. This does not mean, however, that the verdict was hopelessly ambiguous and a new trial was required. A similar claim was made and rejected on very similar facts in *Miller v. Stouffer* (1992) 9 Cal.App.4th 70 [11 Cal.Rptr.2d 454], in which a jury acted on its own initiative to allocate fault between the driver of a vehicle that struck a pedestrian and the driver's employer, who also owned the car. The jury had found that the driver acted negligently and was acting within the course and scope of her employment when she struck the plaintiff. (*Id.* at pp. 75–76.) On appeal the employer contended that the verdict was "‘hopelessly ambiguous’" because even though "there was no claim of fault or direct liability against" her, "the jury allocated 40 percent of the negligence to her and also found her vicariously liable for the accident." (*Id.* at p. 86.) The court rejected her contention, explaining that because the trial court granted the plaintiff's "motion for JNOV and allocated 100 percent of the liability for negligence to [the employee], making [the employer's] liability purely vicarious," there was no ambiguity warranting retrial. (*Ibid.*) Here, too, the trial court eliminated the ambiguity by giving effect to the jury's ostensible agency finding and striking the jury's improper allocation of fault.

Rosner principally relies on *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763 [180 Cal.Rptr.3d 479] and *Mendoza v. Club Car, Inc.* (2000) 81

Cal.App.4th 287 [96 Cal.Rptr.2d 605], both of which addressed a comparative fault allocation among directly liable tortfeasors. These cases are therefore inapposite to a jury's improper attempt to allocate fault between a directly liable defendant and a vicariously liable defendant.

Accordingly, we hold that the trial court was not required to grant a new trial, but instead acted properly to eliminate the ambiguity or inconsistency by striking the jury's apportionment of fault.

5. Excessiveness of future economic damages

The jury awarded Markow \$4.5 million for future economic loss, which included \$1.3 million for the cost of future hospitalizations. Rosner contends he is entitled to a new trial on plaintiffs' future economic damages because the jury's award for future hospitalizations is excessive, in that "plaintiffs' expert did not consider amounts actually paid for hospitalization."

a. Standard of review

"Whether a plaintiff "is entitled to a particular measure of damages is a question of law subject to de novo review. [Citations.] The amount of damages, on the other hand, is a fact question . . . [and] an award of damages will not be disturbed if it is supported by substantial evidence."'" (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1324 [188 Cal.Rptr.3d 820] (*Bermudez*).)

b. Substantial evidence supported the award for the cost of future hospitalizations.

The jury in this case was properly instructed with CACI No. 3903A, which directs the jury to determine "the reasonable cost of reasonably necessary medical care that [Markow] is reasonably certain to need in the future." (See Civ. Code, §§ 3283 [damages may be awarded for "detiment . . . certain to result in the future"], 3359 "[d]amages must, in all cases, be reasonable"]; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330 [156 Cal.Rptr.3d 347].)

Our Supreme Court has endorsed a market or exchange value as the proper way to think about the reasonable value of medical services. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 556 [129 Cal.Rptr.3d 325, 257 P.3d 1130].) This applies to the calculation of future medical expenses. (*Corenbaum v. Lampkin, supra*, 215 Cal.App.4th at pp. 1330–1331.) For insured plaintiffs, the reasonable market or exchange value of medical services will not be the amount *billed* by a medical provider

or hospital, but the “amount *paid* pursuant to the reduced rate negotiated by the plaintiff’s insurance company.” (*Bermudez, supra*, 237 Cal.App.4th at p. 1332, italics added.)

Plaintiffs’ life-care planning expert,⁹ Tricia West, R.N., estimated that the amount billed for Markow’s future hospitalizations would be approximately \$2 million. Based on her research, knowledge, and experience, West testified that the amount actually paid is usually 50 to 75 percent of the total amount billed.¹⁰ West also testified that with respect to one particular hospitalization, the cost was reimbursed at a much lower rate of 12.9 percent. The jury’s award of \$1.3 million is approximately 65 percent of the estimated future billing amount of \$2 million, or roughly halfway between the 50 to 75 percent reimbursement testified to by West.

In his motion for a new trial and on appeal, Rosner argues that the jury’s award of \$1.3 million is excessive, that the jury should have applied the 12.9 percent reimbursement rate from that one hospital stay, not the 50 to 75 percent offered by West. If the jury had utilized the 12.9 percent rate, the award for future hospitalizations would have been reduced to \$260,000.

Substantial evidence supports the jury’s award. While West acknowledged that in one instance a hospital accepted a reimbursement rate much lower than 50 to 75 percent, she also testified that reimbursement rates vary and that there is no one “across-the-board, set percentage.” West testified that she has been doing life care planning for almost seven years. In addition to her experience as a life-care planner, she has a bachelor’s degree in critical care nursing, and a master’s degree in business administration with a specialty in health care management; she is also a certified hemodialysis nurse and is licensed as both an R.N. and a public health nurse. The jury could reasonably find West’s testimony on the reimbursement rate to be credible. Accordingly, we find that substantial evidence supports the jury’s award of future economic damages.¹¹

⁹ Plaintiffs also had two other damages experts testify at trial: an economist and a physical therapy/rehabilitation expert. Defendants offered no expert testimony on plaintiffs’ damages.

¹⁰ Between September 2011 and March 2014, Markow spent 245 days in the hospital, averaging 98 days per year. West estimated that due to professional in-home nursing care, Markow would average far fewer days in the hospital than before, only 28 days per year.

¹¹ Citing *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753 [149 Cal.Rptr.3d 614, 288 P.3d 1237], Rosner also contends that West’s testimony was speculative. To the extent that Rosner’s argument on future hospital costs challenges the bases for West’s opinions, we hold that he waived this contention by, *inter alia*, not filing a motion in limine seeking to exclude West’s testimony. “We leave the question of how courts should fulfill their gatekeeper role in a case like the instant one for an appeal in which the parties have *actually litigated the issue at trial.*” (*Bermudez, supra*, 237 Cal.App.4th at p. 1340, italics added.)

6. *Section 998 costs*

More than six months before trial, plaintiffs jointly served Rosner with a single offer to compromise their claims for \$999,999.99 pursuant to section 998. The offer did not allocate the settlement funds between Markow and his wife. Moreover, the offer was conditioned on the accuracy of Rosner's representation that he had only \$1 million in insurance coverage for plaintiffs' claims. Because Rosner rejected this offer and plaintiffs were awarded more than \$1 million, they sought to recover section 998 costs from Rosner. Rosner moved to strike plaintiffs' costs claim on the ground the settlement offer was invalid because it was joint and conditional. The trial court denied the motion. Rosner contends that the trial court erred by denying his motion.

a. *Standard of review*

The interpretation and applicability of a statute is a question of law, which we review de novo. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797 [101 Cal.Rptr.2d 167] (*Barella*).) "In interpreting section 998, this court has placed squarely on the offering party the burden of demonstrating that the offer is a valid one under section 998." (*Barella*, at p. 799.)

b. *Plaintiffs' joint section 998 offer to Rosner was valid.*

Rosner's argument that plaintiffs' joint section 998 offer is invalid is based on the language of section 998, subdivision (d): "If an offer made by a plaintiff is not accepted . . ." (Italics added.)

■ "The first rule of statutory construction is, of course, that a statute should be construed to effectuate the intention of the Legislature in enacting it." (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 262 [259 Cal.Rptr. 311] (*Fortman*).) "As recognized in numerous Court of Appeal decisions, the clear purpose of section 998 and its predecessor, former section 997, is to encourage the settlement of lawsuits prior to trial." (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 [204 Cal.Rptr. 143, 682 P.2d 338].) ■ "The purpose of section 998 is to encourage the settlement of lawsuits before trial by penalizing a party who fails to accept a reasonable offer from the other party." (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 583 [11 Cal.Rptr.2d 820].)

■ Joint settlement offers are not necessarily invalid. (*Fortman, supra*, 211 Cal.App.3d at p. 263.) "An offer of settlement must be certain, and when an offer is made jointly, the offeree must be able to evaluate the likelihood of each offeror receiving a more favorable verdict at trial." (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1170 [23 Cal.Rptr.3d 335].)

Deocampo v. Ahn (2002) 101 Cal.App.4th 758 [125 Cal.Rptr.2d 79] (*Deocampo*) upheld the validity of a joint offer to compromise made by two plaintiffs: a man rendered a paraplegic by the defendant's medical malpractice and his wife (asserting a loss of consortium claim). The court stated: “[P]laintiff's wife could only have recovered a maximum of \$250,000 on her cause of action. Thus, the bulk of plaintiffs' section 998 offer was obviously meant for plaintiff himself. Moreover, the trial court could not have been confused about whether plaintiff obtained a more favorable judgment than that for which he offered to settle. Since the jury did not award plaintiff's wife any damages, it is clear that the damages the jury *did* award are far greater than the amount requested in the section 998 offer, less the maximum \$250,000 that plaintiff's wife could have recovered.” (*Id.* at p. 777.)

Similarly, joint section 998 offers by multiple plaintiffs were held to be valid in *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 630 [34 Cal.Rptr.2d 26]; *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747 [286 Cal.Rptr. 755]; and *Fortman, supra*, 211 Cal.App.3d at page 263.

The joint offer in this case did not preclude a determination of whether plaintiffs received a more favorable judgment. Plaintiffs offered to settle the case for just under \$1 million, yet the jury awarded them \$5.2 million. Thus, it is clear that plaintiffs were awarded far more than they would have received from their joint settlement offer. Moreover, as held in *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1394 [273 Cal.Rptr. 231], and noted in *Deocampo, supra*, 101 Cal.App.4th at page 777, the spouse could recover a maximum of \$250,000 on her loss of consortium claim pursuant to Civil Code section 3333.2. This statutory limit provided a further guideline for assessing the certainty and validity of plaintiffs' offer to compromise. Accordingly, we hold that their section 998 offer was not invalid because it was jointly made.

c. *Plaintiffs' conditional section 998 offer to Rosner was valid.*

Rosner also argues that the section 998 offer was invalid because it was conditioned on the accuracy of Rosner's disclosures regarding his insurance coverage for plaintiffs' claims.

■ “An offer to compromise under Code of Civil Procedure section 998 must be sufficiently specific to allow the recipient to evaluate the worth of the offer and make a reasoned decision whether to accept the offer. [Citations.] Any nonmonetary terms or conditions must be sufficiently certain and capable of valuation to allow the court to determine whether the judgment is more favorable than the offer.” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764 [60 Cal.Rptr.3d 375] (*Fassberg*)).

■ As Rosner acknowledges, *Deocampo, supra*, 101 Cal.App.4th 758, upheld the validity of a settlement offer conditioned on the accuracy of the offeree's discovery responses regarding the amount of insurance coverage for the plaintiffs' claims. The *Deocampo* court explained: "The provision simply sought to hold [the doctor] to his discovery representation that he only had \$1 million in insurance coverage for plaintiffs' claims. Certainly litigants have a right to condition an offer to compromise on the accuracy of the information supplied by the offeree in discovery." (*Id.* at p. 778.) We agree. Plaintiffs' section 998 offer was not invalid merely because it was conditioned on the accuracy of Rosner's disclosures regarding his insurance coverage for plaintiffs' claims. This nonmonetary condition was sufficiently certain and capable of valuation to allow the court to accurately assess the offer.

The cases Rosner relies upon are distinguishable in that none of them involved an offer to compromise conditioned on the accuracy of the offeree's discovery responses. (See *Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1543–1546 [19 Cal.Rptr.3d 664] [defense offer conditioned on acceptance by all plaintiffs invalid]; *Fassberg, supra*, 152 Cal.App.4th at pp. 765–767 [offer conditioned on releases by, and releases of claims against "a long list of other possible, ill-defined third parties" not overbroad or incapable of valuation absent indication such parties possessed valid claim]; *Barella, supra*, 84 Cal.App.4th at p. 801 [offer conditioned on confidentiality invalid in defamation action].)

Accordingly, the trial court properly awarded plaintiffs section 998 costs.

DISPOSITION

The judgment is affirmed with respect to Rosner and reversed with respect to Cedars-Sinai. Plaintiffs are awarded costs with respect to Rosner's appeal. Cedars-Sinai is awarded costs with respect to its appeal.

Rothschild, P. J., concurred.

JOHNSON, J., Dissenting and Concurring.—With regard to the ostensible agency issue, I respectfully dissent. As to all other issues, I join the majority.

The majority's discussion of the ostensible agency issue is remarkable less for what it says, than for how it cobbles together its justification for the remarkable conclusion it reaches.

1. *The majority misstates the applicable standard of review*

In the very last paragraph of its discussion of the ostensible agency issue, the majority comes finally to the applicable standard of review, treating this

critical issue almost as a given. (Maj. opn. *ante*, at p. 1045.) But the applicable standard of review is not a given, but “the threshold issue” for every appeal. (*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611 [236 Cal.Rptr. 605].) The standard of review “is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination. Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness.” (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018 [27 Cal.Rptr.3d 596].) In choosing an incorrect standard of review, the majority has strayed beyond the bounds of its authority and arrived at a necessarily flawed conclusion.

a. *De novo is not the correct standard*

According to the majority, de novo review is required because “all of the facts essential to the issue of ostensible agency were undisputed” and, as a result, the appeal by Cedars-Sinai Medical Center (Cedars) “raises purely legal questions.” (Maj. opn. *ante*, at p. 1045.) The majority bases its conclusion on *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448 [122 Cal.Rptr.2d 233] (*Mejia*). I believe that the majority is mistaken and its reliance on *Mejia* misplaced.

It is not correct that all of the facts essential to a determination of the ostensible agency issue were undisputed. While it was undisputed, for example, that Michael Markow (Markow) signed various conditions of admission and that Markow relied on the Cedars website and the location of Howard Rosner’s (Rosner) office in a Cedars building to conclude that the disclaimer in the conditions of admission did not apply to Rosner, the reasonableness of Markow’s belief in an agency relationship between Rosner and Cedars was hotly contested. Indeed, that very issue loomed as one of the core factual disputes that the jury had to resolve. Moreover, the trial court asked the jury to resolve the reasonableness of Markow’s belief, not on an objective “reasonable person” standard, but on a subjective standard—that is, the jury had to determine whether, given Markow’s own knowledge and experience, his belief was reasonable.¹

Here, as discussed more below, the jury, by an 11-to-one vote, found that Markow’s belief about Rosner being Cedars’s agent was neither irrational nor unreasonable—but in fact, reasonable. Consequently, the majority’s claim that “all of the facts essential to the issue of ostensible agency were undisputed”

¹ While the jury was asked to determine some issues, such as informed consent, on an objective reasonable person basis—for example, the jury was asked to determine whether a “reasonable person in . . . Markow’s position [would] have refused the pain management procedure”—on the issue of ostensible agency the jury was asked whether Markow, not some objective, reasonable person, reasonably believed that Rosner was Cedars’s agent.

(maj. opn. *ante*, at p. 1045) appears to be more an artifice to circumvent the required deference to the trier of fact than a realistic assessment of the facts of this case. Moreover, the majority's reasoning is tautological. The only way that the majority can conclude that the issue of ostensible agency is a question of law subject to *de novo* review is to pre-judge the evidence and determine that it conclusively indicates that the patient should have known that the treating physician was not the hospital's agent. In other words, the majority has assumed what it wants to prove.

Mejia, supra, 99 Cal.App.4th 1448, on which the majority relies (maj. opn. *ante*, p. 1045), does not hold that the reasonableness of a patient's belief about an alleged ostensible agency relationship is always determined as a question of law. *Mejia* simply held that "[u]nless the evidence *conclusively* indicates that the patient should have known that the treating physician was not the hospital's agent, . . . , the issue of ostensible agency must be left to the trier of fact."² (*Mejia*, at p. 1458, italics added.)

In short, facts are "‘undisputed’" for purposes of *de novo* review if they are "‘settled’" or "‘not open to dispute or question.’" (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717 [57 Cal.Rptr.3d 259].) Here, a critical fact for resolution of the ostensible agency issue—the reasonableness of Markow's belief in an agency relationship between Rosner and Cedars—was not settled, but disputed, questioned and resolved by the trier of fact in Markow's favor. Because Cedars's appeal concerns a disputed issue of fact, it does not raise a pure question of law that would allow the majority to disregard the jury's factual findings and determine the issue independently. Instead, the ostensible agency issue must be reviewed under a different standard.

b. Substantial evidence is the correct standard

Cedars appeals from the denial of its motion for judgment notwithstanding the verdict (JNOV). "[W]hen reviewing a ruling on a motion for JNOV, ‘an appellate court will use the same standard the trial court uses in ruling on the

² The holding in *Mejia, supra*, 99 Cal.App.4th 1448, is consistent with other types of legal disputes where the reasonableness of a plaintiff's belief is at issue. For example, "the question of whether a [fraud] plaintiff's reliance is reasonable is a question of fact." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [44 Cal.Rptr.2d 352, 900 P.2d 601].) "The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience." (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864 [68 Cal.Rptr.3d 828].) "Generally, '[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information.' " (*Id.* at p. 865.) The issue of reasonable reliance is a question of law only in the "rare case where the undisputed facts leave no room for a reasonable difference of opinion." (*Alliance Mortgage*, at p. 1239.)

motion, by determining whether it appears from the record, *viewed most favorably to the party securing the verdict*, that *any* substantial evidence supports the verdict. “ ‘If there is *any* substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied.’ ’’’ (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309 [181 Cal.Rptr.3d 399], italics added.)

Under the substantial evidence standard, our appellate review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the jury’s factual determinations. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874 [197 Cal.Rptr. 925]; *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489 [21 Cal.Rptr.3d 36].) “Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence *this court is without power to substitute its own inferences or deductions for those of the trier of fact . . .*’” (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24 [42 Cal.Rptr.3d 399], italics added.) “The term ‘substantial evidence’ means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value.” (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433 [95 Cal.Rptr.3d 235].)

2. *The majority ignores the fact that notice is inherently a fact issue*

Although the majority correctly observes that the issue of ostensible agency, at its most elemental level, is an issue about notice (maj. opn. *ante*, p. 1038), they fail to acknowledge that whether notice is sufficient to inform a party about a fact is not a question of law for this court to decide, but a question of fact for the jury to decide. As our Supreme Court noted long ago, “whether notice was given or not, and if given, whether defendant understood it, and it was sufficient to put him on his guard, or, in the language of the code, to put a prudent man upon inquiry [citation], [are] questions of fact for the jury . . .” (*Renton, Holmes, & Co. v. Monnier* (1888) 77 Cal. 449, 456 [19 P. 820].)

3. *The majority ignores the decisive nature of the jury’s ostensible agency findings*

While the majority acknowledges that the jury ruled in favor of Markow and his wife, Francine Markow (collectively the Markows) on the issue of ostensible agency, they fail to note just how lopsided the votes were against Cedars. This lopsidedness is noteworthy because it demonstrates the jury’s own view that substantial evidence supported its findings. On the issue of ostensible agency, the jury found as follows: (a) Cedars intentionally or

carelessly created the impression that Rosner was its agent (12 to zero); (b) Markow reasonably believed that Rosner was the hospital's agent (11 to one); and (c) Markow was harmed as a result of his belief that Rosner was the hospital's agent (10 to two). Unfortunately, the majority has decided that they, not the jury, are better situated to evaluate the credibility of the Markows on such issues as (a) the Markows' reasons for choosing Rosner and Cedars in 2006 and continuing with Rosner and Cedars up to and beyond the surgery in 2010 and (b) the Markows' understanding and interpretation of the conditions of admissions as it applied to Rosner and his relationship with Cedars.

By choosing to ignore these touchstone principles and facts, the majority has become a second and self-appointed trier of fact—a role which appellate judges should shun. For example, the majority states that “any inference of agency or employment arising from Rosner’s status as director of the pain clinic was negated by the unambiguous and prominent disclaimer Markow repeatedly initialed.” (Maj. opn. *ante*, at p. 1044.) This statement begs the question of who decided that the disclosure “negated” Rosner’s status. Not the jury. They sat and listened to all of the evidence and decided in a decisive manner that the disclosures did not negate Rosner’s status. Instead of focusing on facts that support the verdict and then determining whether they are “substantial,” the majority highlights facts supporting the verdict that Cedars sought but the jury decisively rejected.

4. *The majority analyzes the conditions of admission form in isolation, not in context*

The majority, quite properly, looks at the language of the various conditions of admission forms regarding the independent contractor status of physicians. (Maj. opn. *ante*, pp. 1039–1040.) But that is both the beginning and the end of the majority’s analysis. The majority decision does not consider what the forms do *not* say, and, perhaps more critically, what was the trial testimony about these forms.

a. *The majority ignores what the forms fail to address*

The majority ignores the fact that none of the conditions of admissions says anything about dual status physicians—that is, physicians who not only practice at Cedars, but also run administrative units of the hospital, such as the pain management clinic. Importantly, California courts have held that the director of a hospital’s administrative unit “may be an agent of the hospital.” (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 104 [11 Cal.Rptr.2d 468] (*Jacoves*).) In *Jacoves*, the parents of a young man who had committed suicide sued the hospital; the decedent had received treatment at

the hospital from a staff psychiatrist, who was also the director of the hospital's adolescent psychiatric unit. (*Id.* at pp. 99–100.) The hospital won summary judgment based on evidence that the psychiatrist billed for his services separately from the hospital and had no office at the hospital. (*Id.* at p. 100.) The Court of Appeal reversed, holding that such facts were not dispositive on the issue of ostensible agency: “*reasonable inferences may be drawn from the fact that the Hospital designated [the physician] as director of its adolescent psychiatric unit . . . It is also reasonable to infer that the Jacoveses based their decision to admit Jonathan to the Hospital at least in part on [the physician]'s position with the Hospital.*” (*Id.* at p. 104, italics added.)

Here, the jury, after hearing all of the evidence, not only found that Markow reasonably believed that Rosner was Cedars's agent but it did so, not by a narrowly divided vote, but by a nearly unanimous vote of 11 to one.

In addition, courts applying California law have held that, where a conditions of admission form, such as the ones at issue in this case, is arguably ambiguous over who is and is not an independent contractor, the issue of ostensible agency cannot be determined as a matter of law. (*Romar v. Fresno Community Hosp. and Medical Center* (E.D.Cal., Mar. 21, 2007, No. CIV F 03-6668 AWI SMS) 2007 U.S.Dist. Lexis 25927, *6, *44 (*Romar*).) In *Romar*, when her minor daughter fell ill due to a bacterial infection, the minor's mother sought repeated treatment at a hospital's emergency room. On each occasion, the mother signed conditions of admission forms that, *inter alia*, provided that “[a]ll physicians and surgeons . . . are independent contractors with the patient and are not employees or agents of the hospital.” (*Id.* at p. *6.) After the minor suffered permanent injury due to the inability of the hospital's medical staff to stem the spread of the infection, the minor, through her mother, sued for malpractice. The court granted the treating doctor summary judgment because there was insufficient evidence that he had breached the standard of care. (*Id.* at p. *47.) With regard to the physician assistants and nurse practitioners who treated the minor, the hospital, relying on the conditions of admission form, moved for summary judgment. The court denied the hospital's motion, reasoning that “there is an ambiguity whether the Conditions Form reasonably informs patients that nurse practitioners and physician assistants are not employees or agents of [the hospital]. Given the language of the notice in the Conditions Form, the Court cannot say as a matter of law that [plaintiffs] knew or should have known that the nurse practitioners and physician assistants were not agents or employees of [the hospital].” (*Id.* at p. *54.)

As established by *Jacoves, supra*, 9 Cal.App.4th 88, and *Romar, supra*, 2007 U.S.Dist. Lexis 25927, Cedars created an issue of fact when it drafted

its conditions of admission forms. By failing to address whether directors of its administrative units are also independent contractors, Cedars allowed this ambiguity to remain in its forms and, in fact, benefited from this ambiguity by permitting the impression that Rosner was one of Cedars's own doctors. In other words, by its conduct and omissions, Cedars, created an issue of fact for the jury to resolve. This ambiguity is not overcome by the fact that the conditions of admission forms indicated that General Anesthesia Specialists (GASP), Rosner's actual employer, was one of the subgroups that were independent contractors. There was no testimony at trial by Rosner, the Markows or anyone else that the Markows knew at any time between 2006 and 2010 that Rosner was employed by GASP *and only GASP*. In other words, the GASP disclosure on the conditions of admission form is of no value to the ostensible agency determination in the absence of evidence that the Markows knew about GASP and that Rosner was employed by GASP *and only GASP*. Indeed, the testimony at trial was to the contrary—that is, both the Markows and others, including longtime Cedars employees, testified that they believed that Rosner was an employee or agent of Cedars. After listening to this testimony and all of the other evidence presented at trial, the jury found, by an 11-to-one vote, that Markow's belief about Rosner being an agent of Cedars was reasonable.

b. *The majority inexplicably disregards trial testimony about the conditions of admission forms*

The majority ignores the testimony at trial about the conditions of admissions. Tellingly, Cedars offered no testimony about its own forms. The *only* testimony at trial about these forms came from Markow. With regard to the independent contractor disclosure, Markow believed that it did not apply to Rosner because "he was director of pain management for the hospital" and, as a result, he "can't be an independent contractor." In other words, Markow thought that because Rosner had an office at Cedars and oversaw a department at Cedars, he was a "full-time employee" of the hospital. Other testimony at trial corroborated the reasonableness of Markow's interpretation of the forms. At trial, Vera Dae Borce, who had worked at Cedars's pain center for approximately 14 years, testified that she herself believed that Rosner worked for Cedars and she had never heard of Rosner's actual employer, GASP. From the jury's nearly unanimous vote on the issue of the reasonableness of Markow's interpretation, we know that the jury found such testimony to be not just credible, but compelling.

Two other sets of undisputed facts undeniably bolstered Markow's credibility on the issue of Rosner's ostensible agency. First, Rosner held himself out to the public as being affiliated with Cedars, not GASP. For example, although Rosner had been issued with GASP business cards, he did not use

those cards; instead, he gave his patients business cards with Cedars's name on them. Second, Cedars itself held out Rosner as one of its doctors, not a GASP physician. For example, the Cedars's website identified Rosner as the medical director of Cedars's pain center with no mention of or reference to GASP. On Rosner's business cards from the Hospital, there is no mention of GASP. Moreover, if a patient or potential patient wanted to make an appointment with Rosner, he or she would not call GASP; instead, he or she would dial 1-800-CEDARS-1. In addition, when Rosner sent correspondence to other doctors, he would put the letter on stationery with Cedars's letter-head—a privilege that Cedars granted to him.³ Finally, there were no signs in Rosner's office at Cedars that mentioned or referenced the fact that he worked for GASP. It is clear that the jurors regarded such evidence as credible and persuasive, for they found by a unanimous 12-to-zero vote that Cedars intentionally or carelessly created the impression that Rosner was its agent. It is of no moment that the Markows may not have noted all of these factors; the importance of this evidence is Cedars's creation of an apparent agency relationship with Rosner.

Van Horn v. Hornbeak (E.D.Cal., Feb. 17, 2010, No. CV F 08-1622 LJO DLB) 2010 U.S.Dist. Lexis 14321, illustrates how written disclosures, such as the conditions of admission, do not establish notice conclusively or as a

³ The majority, in part, bases its conclusion that Cedars was entitled to judgment as a matter of law on the fact that Markow did not testify that he relied on Rosner's business cards and stationery supplied by Cedars. (Maj. opn. *ante*, at p. 1041, fn. 6.) The majority misses the point in three ways.

First, the business cards and stationery that Cedars provided to Rosner, and which Rosner used, go to the threshold issue of whether Cedars held Rosner out to the world, including the Markows, as one of its agents—in other words, this evidence goes to Cedars's conduct, not the reasonableness of Markow's beliefs. That the jury found by a unanimous vote that Cedars intentionally or carelessly created the impression that Rosner was its agent suggests that the jury regarded the business cards and stationery as probative on the issue of Cedars's conduct.

Second, whether Markow saw the business cards or the stationery is irrelevant, because he did see and he did rely upon Cedars's website, which described Rosner as the director of its pain management clinic and which said nothing whatsoever about Rosner's employment by GASP and GASP alone, and he did rely on the fact that Rosner was officed in a building plainly and prominently marked as a Cedars building. By finding (11 to one) that Markow reasonably believed Rosner was Cedars's agent, the jury implicitly but necessarily and decisively found that Markow's reliance on the website's disclosures and the location of Rosner's office was sufficient for ostensible agency purposes—that is, Markow did not need to testify that he saw or relied upon the Cedars-supplied business cards or stationery.

Third, by focusing on the fact that Markow did not see or rely on the Cedars-supplied business cards and stationery, the majority is doing precisely what it should not do: combing the record for evidence that does not support the verdict. As discussed above, what the majority should be doing instead is reviewing the record in a way that is “‘most favorabl[e]’” to the Markows and then determining whether ““‘any substantial evidence, or reasonable inferences to be drawn therefrom’” supports the jury's factual determination that Rosner was the ostensible agent of Cedars. (*Pacific Corporate Group Holdings, LLC v. Keck, supra*, 232 Cal.App.4th at p. 309, italics added.)

matter of law. In that case, the plaintiff, a state prisoner, received obstetrical treatment from a community hospital. Each time she sought services at the hospital, the plaintiff “signed documents ‘Conditions of Admissions’ and ‘Authorization and Consent’ which gave notice that the physicians were not employees of [the hospital].” (*Id.* at p. *28.) After her baby died one day after a cesarean section birth, plaintiff sued the hospital and two doctors for negligence in connection with the prenatal care that they had provided her. The hospital moved for summary judgment on the ground that its disclosures “foreclosed” the issue of ostensible agency as a matter of law, because those forms stated that the physicians were not the hospital’s agents, but rather independent contractors. (*Id.* at p. *31.) The *Van Horn* plaintiff declared that she had “no reason to believe that [the physicians] were not hospital employees, that she believed they were, ‘and was never told otherwise.’ ” (*Ibid.*) The *Van Horn* court denied the hospital’s motion for summary judgment, stating that “[i]n the face of these affirmations, the presence of the Conditions of Admission does not establish ‘conclusively’ that plaintiff should have known there was no agency.” (*Ibid.*) The court explained that, “under California’s lenient standard of ostensible authority, plaintiff made a sufficient showing on the question of ostensible agency to avoid summary judgment.” (*Ibid.*)

Here, the Markows’ statements of belief regarding Rosner’s status as an agent of Cedars are credible, with arguably more basis than the ones at issue in *Van Horn v. Hornbeak, supra*, 2010 U.S.Dist. Lexis 14321. The Markows’ belief was rooted in tangible indicators of Rosner’s status as an agent of Cedars, such as the location of his office in a Cedars building, and the description of Rosner on the Cedars website as the medical director of its pain center with no mention whatsoever of Rosner’s actual employer, GASP. As noted above, the Markows’ belief was shared by longtime Cedars employees.

The majority, relying on language in *Mejia, supra*, 99 Cal.App.4th 1448, concludes that the ostensible agency doctrine is inapplicable to the Markows because once Rosner began treating Markow he became one of Markow’s personal physicians. (Maj. opn. *ante*, at p. 1041.) Such a contention lacks merit because it is a plausible, but unproven, construct only—that is, it is not rooted in any evidence, just logical inferences. The majority, in other words, ignores the undisputed testimony at trial and instead attempts to generate its own evidence to support its disregard for the jury’s factual findings. For example, the majority stresses that “Cedars did not assign Rosner to treat Markow; Markow chose Rosner.” (Maj. opn. *ante*, at p. 1041, italics omitted.) While that is partially true (although Cedars did not assign Markow to

Rosner, it recruited Rosner from across the country and made him the director of its pain management program, and in so doing effectively assigned all pain management patients to Rosner), it is only half the story. Markow testified he and his wife chose Rosner, not because of who Rosner was independent of Cedars, but precisely because Rosner was affiliated with Cedars. Specifically, Markow testified that he elected to become one of Rosner's patients, even though Rosner's office was 30 to 40 miles away (or an hour to an hour and a half drive one way) from his home, because Rosner was the medical director of a pain center at Cedars, a major medical center that was also a teaching hospital; in other words, Markow went to Rosner because he "worked for the best hospital, one of the best hospitals in the country." Moreover, there is no testimony—either explicit or implicit—that Markow would have agreed to be seen by Rosner in 2006 if he had not been at Cedars. Nor is there any testimony that Markow would have continued to be seen by Rosner after 2006 if Rosner had left Cedars for another hospital.⁴

The value that the Markows put on Cedars is also captured by Francine Markow's testimony. She was in favor of her husband being treated by Rosner because Rosner was at Cedars, a place where they would get the "best possible care, the best possible staff, the best possible doctors, equipment, etc.; we always felt that way." As she explained to the jury, using Cedars was important to her husband because "he always wanted to see someone who was affiliated with a major medical hospital, preferably even a teaching hospital because we have been told years ago that those are the best." Francine Markow's faith in Cedars proved almost unshakeable—even as her husband was developing the paralysis that would lead to his quadriplegia, she did not, despite the obvious medical emergency and the possibility of a 90-minute drive, consider going to another, closer hospital.

5. The majority's position is bereft of legal support

The majority concludes that "the jury's ostensible agency finding is contrary to law." (Maj. opn. *ante*, at p. 1044.) The majority's conclusion, however, is unsupported by any case law. The majority does not rely upon a single case decided in a nonemergency setting which holds that boilerplate conditions of admission forms "conclusively" establish as a matter of law that an ostensible agency relationship does not exist between a hospital and one of its doctors, let alone when the doctor at issue is also the director of a large

⁴ The majority also places great stock in the fact that the Markows paid GASP bills. (Maj. opn. *ante*, at p. 1041 & fn. 4.) However, there is no testimony by the Markows that when they were paying those bills they knew that Rosner was employed by GASP and GASP alone—that is, that they knew Rosner was not also employed by Cedars. Cedars could have asked such questions at trial but apparently elected not to do so.

and nationally prominent administrative unit at that same hospital. In fact, the two California cases upon which the majority most directly relies—*Mejia, supra*, 99 Cal.App.4th 1448; and *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631 [188 Cal.Rptr.3d 246]—were both decided in the context of plaintiff-patients signing disclaimer forms in emergency room settings and both ruled in favor of the plaintiff-patient, not the hospital, on the issue of ostensible agency.

Although *Mejia, supra*, 99 Cal.App.4th 1448 was decided under different facts than those at issue here, the court explained in significant detail its thought process to insure that California law on the issue of ostensible agency “should be interpreted consistent[] with the national trend.” (*Id.* at p. 1457.) As *Mejia* explained, the national trend is squarely in favor of factual findings in favor of an ostensible agency relationship: “ ‘The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes [*sic*], as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of “hospital facilities” expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.’ ” (*Id.* at p. 1453.) In view of this modern reality, the *Mejia* court observed that “the overwhelming majority of jurisdictions employ[] ostensible or apparent agency to impose liability on hospitals for the negligence of independent contractor physicians.” (*Ibid.*)

Given the absence of any supporting authority, and given that the cases upon which it does rely are contrary to its position, it is the majority who finds itself in a position that is contrary to the law.

6. Conclusion

In sum, our role as a reviewing court in this instance is quite limited. We are to determine merely if the jury’s ostensible agency findings were supported by substantial evidence. Our job is not to ignore or supplant the jury and decide the case as we believe it should have been decided. Yet that is exactly what the majority has done.

To establish ostensible agency liability against Cedars for the alleged malpractice of Rosner, the Markows needed to establish just two things: “(1)

conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff.” (*Mejia, supra*, 99 Cal.App.4th at pp. 1456–1457.)

After hearing 12 days of evidence and argument, and after deliberating over the course of four additional days, the jury found, and decisively so, that there was conduct by Cedars (either intentional or negligent) that created the impression that Rosner was its agent (12 to zero) and that Markow reasonably relied on that apparent agency relationship between Rosner and Cedars (11 to one). Evidence, in the principal form of uncontested trial testimony by the Markows, Rosner, and others, supported the jury’s unanimous and near-unanimous findings. Instead of looking to that evidence to see if it was truly substantial (as it is required to do by the applicable standard of review), the majority simply ignores it. Instead, the majority has reweighed the evidence, and has supplanted the jury’s decision about what was credible and what was not, what was important and what was not, and what was clear and what was ambiguous, with its own findings. That decision contradicts the applicable law as well as facts established at trial.

Because a patient is “generally presumed to have looked to the *hospital* for care,” and because “ostensible agency *is readily inferred*” (*Mejia, supra*, 99 Cal.App.4th at pp. 1454–1455, italics added), a hospital’s written disclaimer of agency, such as Cedars’s conditions of admission, simply negates the inference of agency and compels the plaintiff-patient to present facts establishing that he or she had reason not to understand the disclaimer and/or appreciate its significance and/or that the hospital, by other actions or inactions, gave the patient grounds to believe reasonably that the physician was an agent of the hospital. “[T]he mere existence of a boilerplate admissions form is *not* sufficient to ‘conclusively indicate[] that [the patient] should have known that the treating physician was not the hospital’s agent’” (*Whitlow v. Rideout Memorial Hospital, supra*, 237 Cal.App.4th at p. 640, italics added.) In other words, the existence of a written disclaimer, such as Cedars’s conditions of admission, does not end the factual inquiry into ostensible agency; it begins it.

Here, the Markows did what they needed to do—they presented evidence that Cedars held Rosner out as its agent and that they reasonably believed Rosner was Cedars’s agent—and the jury found that evidence compellingly persuasive. Because substantial evidence supported the jury’s factual determinations on the issue of ostensible agency, the trial court properly denied Cedars’s motions for judgment notwithstanding the verdict and for a new trial.

I, therefore, respectfully dissent with regard to the ostensible agency issue. In all other respects, I would affirm the judgment.

A petition for a rehearing was denied October 21, 2016. Johnson, J., was of the opinion that the petition should be granted. Appellants' petition for review by the Supreme Court was denied January 11, 2017, S238388.

[No. B259937. Second Dist., Div. Two. Oct. 4, 2016.]

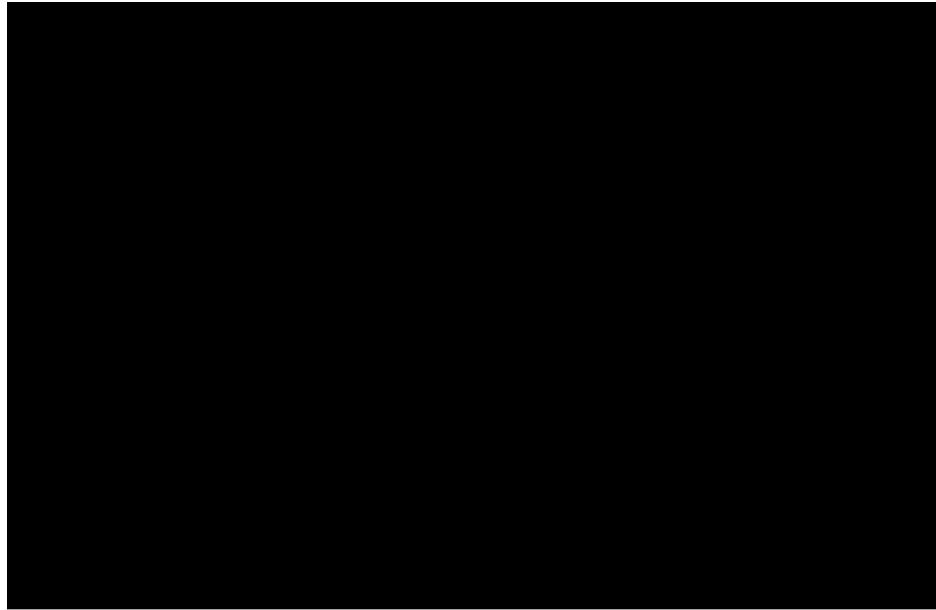
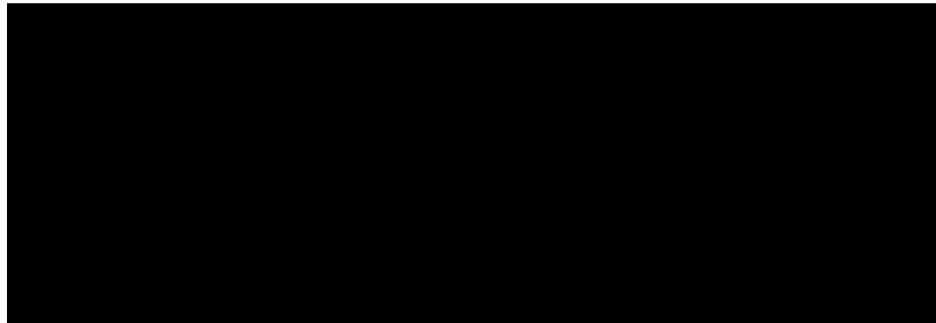
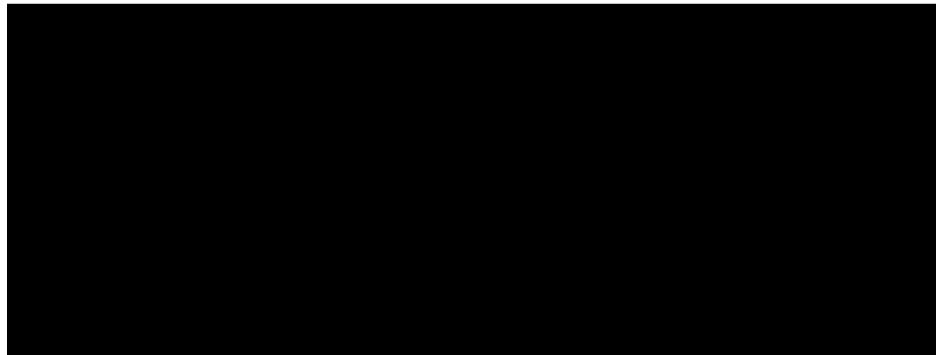
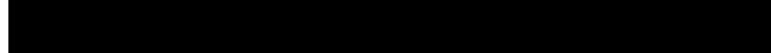
LSREF2 CLOVER PROPERTY 4, LLC, Plaintiff and Appellant, v.
FESTIVAL RETAIL FUND 1, LP, Defendant and Respondent.

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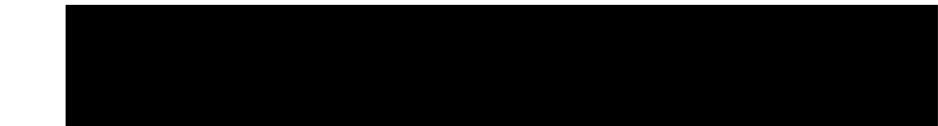
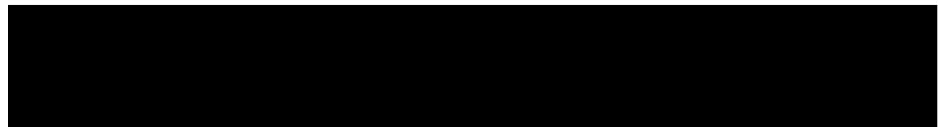
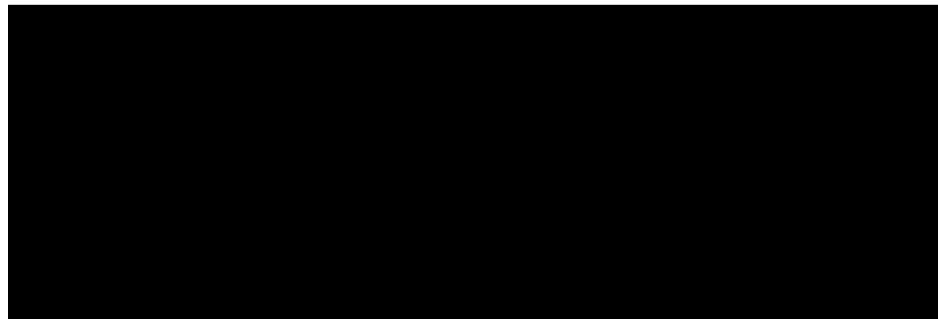
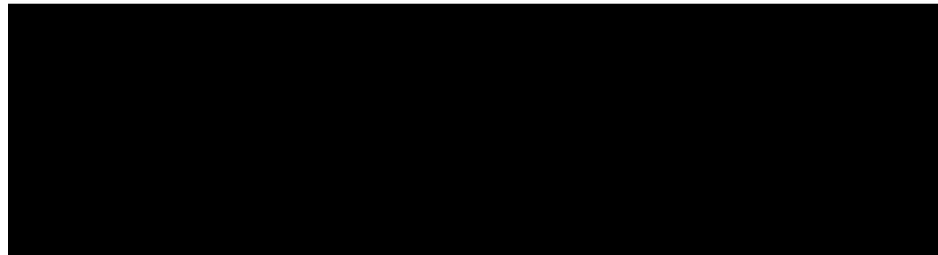
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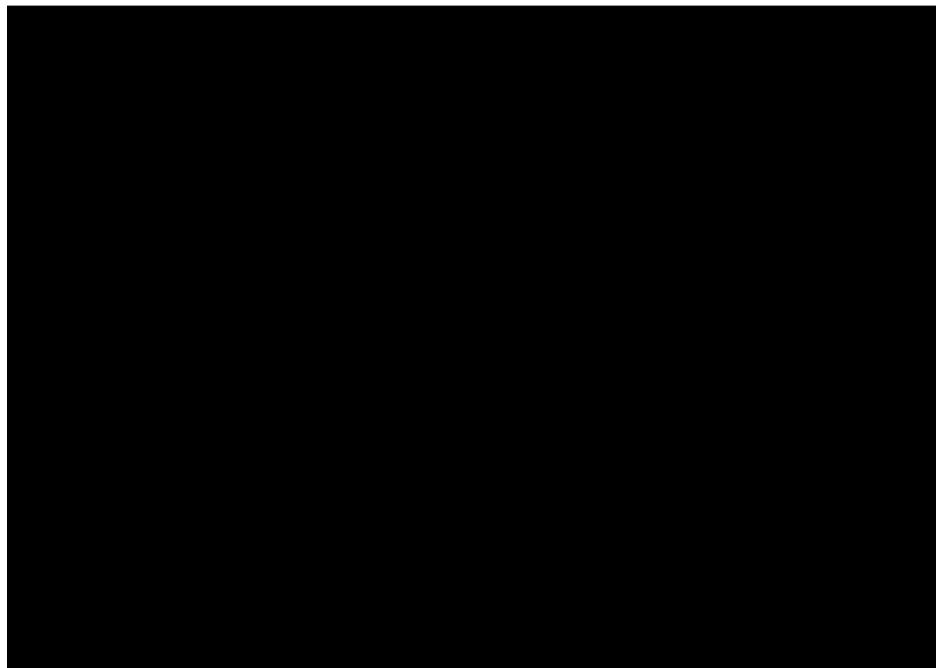
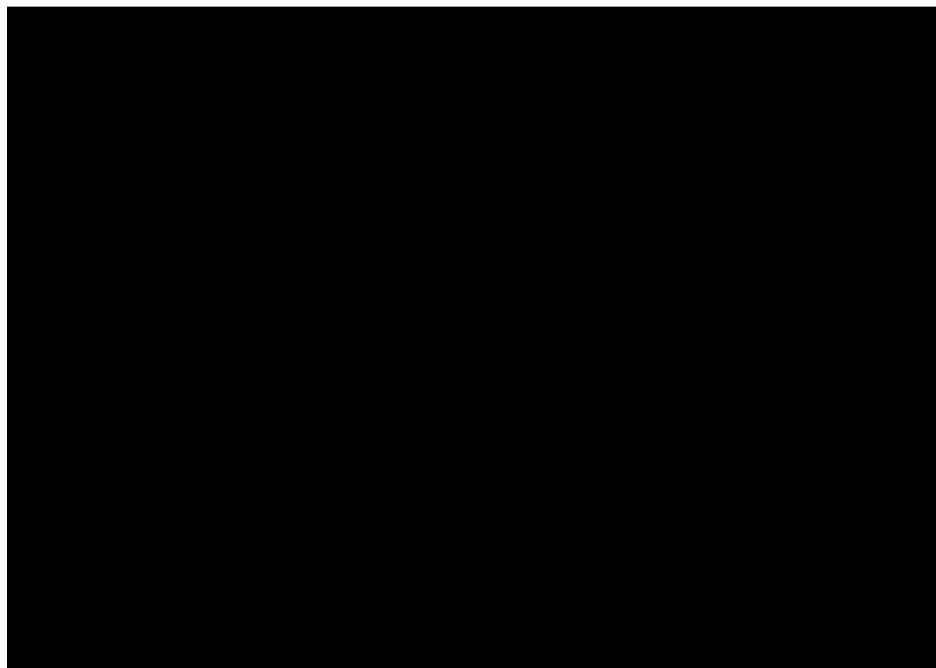
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OPINION

BOREN, P. J.—Defendant and respondent Festival Retail Fund 1, LP (Festival Fund), guaranteed a loan made to an affiliate in connection with the purchase of a retail property. Following default on the loan and a nonjudicial foreclosure, plaintiff and appellant LSREF2 Clover Property 4, LLC (Clover), sought to enforce the guaranty. At a bench trial, the trial court determined the guaranty was unenforceable. The court found that Festival Fund was protected by antideficiency laws because it was, in reality, the primary obligor on the loan and the loan guaranty was effectively a sham.

We reverse. Substantial evidence does not support a conclusion that Festival Fund was a principal obligor on the loan. Rather, Festival Fund itself structured the transaction and determined that its affiliate—a separate legal entity—would take out the loan and take title to the property. The trial court therefore erred in applying a sham guaranty defense and entering judgment in favor of Festival Fund.

BACKGROUND*Facts*

Festival Fund is a limited partnership formed in September 2006 for the purpose of investing in retail properties. Goldman Sachs Investments Ltd. (Goldman Sachs) was the lead investor, a limited partner, and the primary funder of Festival Fund. Mark Schurgin, the president of the general partner of Festival Fund, indirectly held an ownership interest in Festival Fund, and negotiated loans on behalf of Festival Fund and its affiliates. Festival Fund's limited partnership agreement provided that, absent approval from the lead investor and the general partner, Festival Fund would not purchase property except through a "single-purpose" company.

In April 2007, Festival Fund entered into an agreement to purchase property at 357 North Beverly Drive in Beverly Hills (the property). In the purchase agreement, Festival Fund reserved the option to assign its rights and take title to the property under “a limited liability company or other single purpose entity (SPE),” if the SPE was owned and controlled by Festival Fund or an affiliate.

In May 2007, Schurigin caused the SPE that would take title to the property—Festival Retail Fund 1 357 N. Beverly Drive, LP (Festival 357)—to be formed by the filing of a certificate of limited partnership. The same day, he also filed a certificate of formation for a limited liability company named FRF1 357 N. Beverly Drive, LLC (FRF1). FRF1, which was owned entirely by Festival Fund, was made the general partner of and owned 0.01 percent of Festival 357, while Festival Fund was a limited partner in Festival 357 and owned the remaining 99.99 percent of it.

Festival Fund had structured other real estate transactions in a similar manner, using SPE’s to take title. Schurigin testified that one of his objectives in setting up such a real estate transaction was to limit Festival Fund’s liability. Edmund Byrne, the former head of lending at Anglo Irish Bank (the eventual lender here; the Bank), testified that both lenders and borrowers saw advantages from the use of SPE’s. The borrowing side potentially could keep equity in the project separate from claims against the parent developer’s other projects, while the bank’s security in the project likewise was potentially insulated from claims asserted against the developer.

In the summer of 2007, after execution of the purchase agreement for the property, and after formation of Festival 357 and its general partner FRF1, Schurigin approached the Bank for the purpose of obtaining a loan on behalf of Festival 357 to finance the purchase of the property. The Bank provided “term sheets” of a proposed loan, first with a “TBD entity” as the proposed borrower, and then with Festival 357 as the proposed borrower. In both sets of term sheets, Festival Fund was listed as the proposed guarantor.

On October 1, 2007, Festival Fund assigned its rights to purchase the property to Festival 357.

On October 2, 2007, the Bank requested the organizational documents of Festival 357, FRF1, and Festival Fund. The same day, Schurigin executed Festival 357’s limited partnership agreement and FRF1’s limited liability company agreement, and forwarded these and other organizational documents to the Bank. Festival 357’s limited partnership agreement stated, in part, that its purposes were to obtain a loan from the Bank and acquire, operate, and manage the property.

On October 23, 2007, Festival 357, as sole borrower, entered into a loan agreement, promissory note, and deed of trust with lender Bank, and took title to the property. The loan totaled \$25,025,000. It was secured by the property and contained an assignment of leases and rents from the property (which was an income-producing retail property) to the Bank. In connection with the closing, Festival Fund made a \$9 million equity contribution to Festival 357.

Further, as a condition of the loan, “to induce [the Bank] to extend credit to [Festival 357],” Festival Fund entered into a guaranty with the Bank, whereby Festival Fund guaranteed \$1.5 million of the \$25,025,000 loan. Pursuant to Civil Code section 2856, the guaranty contained an express waiver of any antideficiency protections Festival Fund might have otherwise had under California law.

Prior to making the loan, the Bank required that it receive and approve the limited partnership agreements of Festival Fund and Festival 357, as well as the limited liability company agreement of FRF1. In addition, the Bank obtained financial information of Festival Fund to ensure that it could pay the guaranty, if necessary. Other than requiring that Festival 357 had received equity, the Bank was not concerned with its financial condition, or with the financial condition of FRF1. The Bank did appraise the property, however, because, according to Byrne, the value of the property, and its cash flow from rent, was the most important factor in determining whether the loan could be satisfied.

In July 2011, Festival 357 defaulted on the loan. In October 2011, the Bank assigned all of its rights in the loan to LSREF2 Clover, LLC, which then assigned its rights to Wells Fargo Bank, N.A. (Wells Fargo). Wells Fargo issued a default notice to Festival 357 and Festival Fund in November 2011, reflecting a principal balance of nearly \$23 million and interest and other charges of approximately \$600,000. Wells Fargo demanded that these amounts be paid immediately by Festival 357. It also demanded that Festival Fund pay the guaranty. Festival 357 did not make any of the demanded payments on the loan, and Festival Fund did not pay the guaranty.

Procedural history

In May 2012, Wells Fargo filed an action for judicial foreclosure and breach of guaranty against Festival 357 and Festival Fund. In July 2012, Wells Fargo assigned the loan and guaranty to Clover, and the property was subsequently purchased by Clover at a nonjudicial foreclosure sale for approximately \$17.5 million. Clover thereafter substituted in as plaintiff for Wells Fargo, dismissed the causes of action against Festival 357, and pursued the claim against Festival Fund for breach of guaranty.

Clover filed a motion for summary judgment on the guaranty claim, which the trial court denied, finding that there were triable issues of fact whether the guaranty was a sham. Subsequently, the parties agreed to a bifurcated trial so that the court first could determine whether Festival Fund had a valid defense based on a purported single business enterprise defense. In briefing the issue, Festival Fund argued it was an alter ego of FRF1, which was liable for the debts on the loan as a general partner of Festival 357. Festival Fund itself was therefore a principal obligor on the loan, Festival Fund contended, and was protected by unwaivable antideficiency protections. At the bifurcated trial, in addition to addressing the “single business enterprise” defense, the parties also presented testimony, evidence, and argument relevant to whether Festival Fund had a valid sham guaranty defense.

Following the trial on Festival Fund’s claimed defenses, the trial court found that Festival Fund was entitled to judgment in its favor on Clover’s sole remaining claim for breach of guaranty. In orally making its ruling, the court noted that the Bank required that Festival Fund enter into the guaranty. The court also emphasized that the Bank drafted the loan documents, and found that several provisions in the documents demonstrated that Festival Fund was an obligor on the loan, and not just a guarantor. In addition, the court found there was a “unity of interest” between FRF1 and Festival Fund based on: FRF1’s lack of assets, its absence of day-to-day business dealings, its identical directors and mailing address as Festival Fund, and its lack of employees. In an ensuing written order, the court concluded that Festival Fund and FRF1 “formed a single business enterprise, making [Festival Fund] a primary obligor and entitled to the unwaivable protections of California’s anti-deficiency laws.”¹

Clover appealed from the judgment in Festival Fund’s favor on the breach of guaranty action.

DISCUSSION

I. *Antideficiency statutes and the sham guaranty defense*

■ California’s antideficiency laws are codified at Code of Civil Procedure sections 580a through 580e and 726.² As relevant here, these statutes prohibit a lender from obtaining a deficiency judgment from a borrower following a nonjudicial foreclosure of real property. (§ 580d, subd. (a); *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 631 [166 Cal.Rptr.3d 38] (*Lawlor*)).

¹ A jury trial was subsequently held on cross-claims brought by Festival Fund and Festival 357 against Wells Fargo and Clover. The jury found in favor of the cross-defendants.

² Unless otherwise stated, further statutory references are to the Code of Civil Procedure.

The antideficiency statutes' protections generally do not extend to guarantors. (§ 580d, subd. (b); *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 784 [185 Cal.Rptr.3d 684] (*Bradley*).) “[A] lender may recover a deficiency judgment from a guarantor who waives his or her antideficiency protections, even though the antideficiency statutes would bar the lender from recovering that same deficiency from the primary borrower.” (*Bradley*, at p. 784.) Civil Code section 2856, subdivisions (a)(3) and (c) expressly allow a guarantor to waive antideficiency defenses. Such a waiver was expressly incorporated into the guaranty at issue here.

■ Even when a guarantor waives antideficiency protections, however, the protections may still apply if the named guarantor is in actuality a principal borrower. (*Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927, 932 [100 Cal.Rptr.2d 150].) “To be subject to a deficiency judgment, . . . a guarantor must be a true guarantor, not merely the principal obligor under a different name. [Citations.] Indeed, Civil Code section 2787 defines a guarantor as ‘one who promises to answer for the debt, default, or miscarriage of another’” (*Lawlor, supra*, 222 Cal.App.4th 625, 632, italics omitted.) When a principal borrower provides a guaranty on a debt, the guaranty—which effectively adds nothing to the primary obligation—is a sham, and therefore antideficiency defenses apply. (*Ibid.*)

■ A lender may not obtain a deficiency judgment on a guaranty that is shown to be a sham. In determining whether a guaranty is a sham, the court examines whether the guarantor is actually the principal obligor, which occurs when “(1) the guarantor personally executes underlying loan agreements or a deed of trust or (2) the guarantor is, in reality, the principal obligor under a different name by operation of trust or corporate law or some other applicable legal principle.” (*Bradley, supra*, 235 Cal.App.4th 775, 786–787.) When there is “adequate legal separation between the borrower and the guarantor, e.g., through the appropriate use of the corporate form,” the sham guaranty defense generally will not apply. (*Id.* at p. 787.) The court also determines whether the lender itself structured the loan transaction to avoid the antideficiency laws. (*Ibid.*) The object of this analysis is to determine whether the lender designed the transaction so that the primary source for repayment of the loan was placed in the role of guarantor rather than named borrower. (*Lawlor, supra*, 222 Cal.App.4th 625, 638.) The court’s overall focus when examining whether guaranties are shams is to “look to the purpose and effect of the parties’ agreement to determine whether the guaranties constitute an attempt to circumvent the antideficiency law and recover deficiency judgments when those judgments otherwise would be prohibited.” (*Id.* at p. 638.)

II. *Substantial evidence does not support the trial court's ruling*

A. *Standard of review*

■ In discussing the standard of review on appeal, both parties fail to focus on the absence of a statement of decision. Although the bench trial on Festival Fund's defenses was bifurcated, a statement of decision could have been requested and rendered. (Cal. Rules of Court, rule 3.1591(a).) The record reveals no request for a statement of decision, and, although the court ruled orally and issued a subsequent written order in Festival Fund's favor, it did not issue a statement of decision. (See § 632 [trial court shall issue statement of decision upon request]; Cal. Rules of Court, rule 3.1590 [discussing steps for announcement of tentative decision, request for statement of decision, proposed statement of decision, and statement of decision]; see also *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 526, fn. 7 [35 Cal.Rptr.2d 291] [trial court's "Opinion and Ruling" did not constitute a statement of decision, but could be used on appeal to discover grounds for judgment and show absence of prejudice in any error].)

The lack of a statement of decision affects the tenor of appellate review. When a statement of decision is not issued, the appellate court applies the doctrine of implied findings, meaning that we presume the trial court "made all factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267 [88 Cal.Rptr.3d 186].)

The impact of the doctrine of implied findings in this matter, however, is somewhat mitigated by the relative absence at trial of disputed issues of fact. The relevant evidence consisted primarily of documents pertaining to the Festival companies' formation and the loan agreements. We review legal conclusions arising from an established set of facts independently. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385 [112 Cal.Rptr.3d 853, 235 P.3d 152]; *F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 794 [30 Cal.Rptr.3d 407]). Likewise, unless interpretation of a written document "depends on the credibility of conflicting extrinsic evidence, the interpretation of a writing involves a question of law for de novo review by the appellate court." (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57 [120 Cal.Rptr.2d 535].)

B. *The evidence demonstrated the guaranty was not a sham*

Festival Fund only executed the guaranty, not the underlying loan agreements. Therefore, in order for the sham guaranty defense to apply, substantial

evidence must support a finding that Festival Fund was the true principal obligor,³ and that the Bank structured the loan transaction to circumvent the antideficiency law by casting Festival Fund as the guarantor instead of the borrower. (*Bradley, supra*, 235 Cal.App.4th 775, 786–787; *Lawlor, supra*, 222 Cal.App.4th 625, 638.)

We find that the evidence allows for no such conclusion. Instead, the evidence shows that Festival Fund itself structured the transaction, including the ownership structure under which it obtained the loan. Festival Fund's limited partnership agreement—which was executed well before Festival Fund approached the Bank—stipulated that it would purchase property through SPE's. Consistent with this provision, Festival Fund employed SPE's to take title in numerous real estate transactions, and Schurigin testified that one of his objectives in doing so was to limit Festival Fund's liability. When purchasing the property at issue here, Festival Fund expressly reserved the option to take title under an SPE. Festival 357, the SPE that would take title (and which included the address of the property in its name), was formed in May 2007, well prior to the time a loan was sought from the Bank. Festival 357's general partner, FRF1, was also formed in May 2007, and also without involvement by the Bank. Thus, by the time Festival Fund approached the Bank, it had already created the structure under which Festival 357 would hold title and would be owned by FRF1 and Festival Fund, where FRF1 would be the general partner of Festival 357, and where Festival Fund would be a limited partner of Festival 357 and would own FRF1. The loan transaction simply corresponded with this already-determined structure.

Bradley, where the appellate court reversed a jury verdict applying a sham guaranty defense, involved a similar factual scenario. The defendants in *Bradley* were two individuals who each owned 50 percent of a corporation, which in turn owned a limited liability company that held title to a parcel of real property. (*Bradley, supra*, 235 Cal.App.4th 775, 780–782.) In connection with the purchase of property, a bank provided a loan to the limited liability company. The loan was secured by a deed of trust, and both defendants executed guaranties for the entirety of the loan. (*Ibid.*) The loan went into default, and, after the bank's successor foreclosed on the property, it sought to obtain the deficiency from the defendant guarantors, eventually filing an

³ As noted in *Bradley*, a guarantor may be treated as a primary obligor by operation of trust or company law. (*Bradley, supra*, 235 Cal.App.4th 775, 786–787.) This could occur, for example, in the case of a general partner guaranteeing a loan taken by its limited partnership, where the general partner does not otherwise limit its liability by agreement. (See Corp. Code, § 15904.04, subd. (a) [“all general partners are liable jointly and severally for all obligations of the limited partnership unless otherwise agreed by the claimant or provided by law”].) Here, Festival Fund was not the general partner of Festival 357, so further evidence supporting a conclusion that it was the true principal obligor was required to apply the antideficiency statutes.

action for breach of guaranties. (*Id.* at pp. 782–783.) In finding that the bank did not structure the loan transaction to subvert the antideficiency laws, the appellate court emphasized how the defendants, not the bank, created the ownership structure, including the entity that took title to the property. (*Id.* at pp. 790–791.) There was no indication the lender “forced defendants to borrow through a shell entity or that it dictated the form that shell entity should take.” (*Id.* at p. 790.) The court also noted that the defendants themselves chose to use a corporate borrower, in their case so they could take advantage of tax breaks. (*Id.* at pp. 790–791.) Although the bank requested corporate records and financial information and required that guaranties be given, the defendants were primarily responsible for designing the ownership and borrowing structure, so imposition of the sham guaranty defense was not warranted. (*Id.* at pp. 790–792.)

Lawlor, supra, 222 Cal.App.4th 625, like *Bradley*, examined the effectiveness of guaranties given by individual defendants on a loan taken by an affiliated company. In finding that the sham guaranty defense did not apply, the appellate court noted that the defendants, not the lender, selected the entities and the forms of the entities that were the borrowers. (*Lawlor*, at p. 639.) The defendants themselves formed separate entities to “protect themselves from those entities’ liabilities.” (*Id.* at p. 640.) The court found that without evidence the lender had a role in the formation of the borrowers, there was “no basis for the conclusion those entities were designed to conceal Defendants’ status as the primary obligors.” (*Ibid.*)

Likewise, in this action, there was no basis to find that the Bank had a role in the formation of Festival Fund or its affiliated entities, and no evidence to support a conclusion that the entities were designed by the lender to conceal the identity of the primary obligor. In this fundamental respect, the instant matter differs from *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400 [45 Cal.Rptr.2d 790] (*River Bank*), a case relied on by Festival Fund. In *River Bank*, the lender (River Bank) initially contemplated entering into a joint venture with the developer of a project. (*Id.* at p. 1407.) However, after engaging in negotiations, River Bank informed the developer “it had decided unilaterally to change the entire structure of the proposed agreement.” (*Id.* at p. 1421.) Further, during the course of drafting the final documentation, “‘counsel for River Bank insisted that in order to render “enforceable” the “guaranty” being given by [the developer], a new “borrower” should be brought into existence.’” (*Ibid.*) River Bank required that this new borrower be a limited partnership, and prohibited the developer from acting as its general partner. (*Id.* at pp. 1421–1422.) In affirming an order denying a motion for summary adjudication to enforce guaranties, the appellate court found the guarantors “raised a triable issue of fact whether, by structuring the loan transaction as it did, River Bank subverted the purpose of the antideficiency laws ‘by making a related entity the debtor while relegating the

principal obligors to the position of guarantors.’ ” (*Id.* at p. 1423.) In contrast, the evidence here shows that the overall makeup of the transaction was determined prior to the time that Festival Fund approached the Bank, which had no role in determining the Festival companies’ structure.

■ Festival Fund argues that, by requiring a guaranty from Festival Fund, the Bank demonstrated that it primarily looked to Festival Fund to fulfill the debt obligations. Requiring a guaranty from a person or entity affiliated with the borrower, however, does not, in itself, indicate a likelihood that the guaranty is a sham. (See *Bradley, supra*, 235 Cal.App.4th 775, 781 [lender required guaranties from individuals owning more than 20 percent of borrowing entity]; *Lawlor, supra*, 222 Cal.App.4th 625, 629 [requiring guaranties from individuals and entity affiliated with borrower].) If it did, any guaranty given by an affiliate of a borrower would be considered suspicious, defeating the purposes of Civil Code sections 2787 (which allows a guarantor to “answer for the debt, default, or miscarriage of another”) and 2856 (allowing a guarantor to waive antideficiency defenses). In basically all instances, a guarantor will have some relationship to the borrower; people do not often agree to answer for the debts of total strangers.

The amount of the guaranty here also supports the conclusion that the Bank did not view Festival Fund as the primary obligor. The guaranty was for \$1.5 million of a \$25,025,000 loan. If the Bank *had* considered Festival Fund the primary obligor, its agreement to cap the guaranty at approximately 6 percent of the total amount loaned would be stunningly irrational, since the Bank would expose itself to the vast bulk of any likely deficiency.

■ Festival Fund further contends that the guaranty was a sham because the Bank required the Festival companies to submit their organizational documents for its approval. An identical argument was rejected in *Bradley*. As the court noted, “there is a significant difference between requesting information about a borrowing entity and insisting upon the use of one and the form that it should take.” (*Bradley, supra*, 235 Cal.App.4th 775, 790.)

Festival Fund’s related assertion that the Bank required financial information of Festival Fund and not the borrower, Festival 357, also does not compel a conclusion that the guaranty was a sham. As stated in *Lawlor*, “There is nothing unusual about a bank asking for financial information from a person or entity that is guaranteeing a loan.” (*Lawlor, supra*, 222 Cal.App.4th 625, 640.) The court in *Bradley* noted that a lender’s consideration of only the financial strength of the guarantor could be indicative in certain circumstances of an attempt to skirt the antideficiency laws. (*Bradley, supra*, 235 Cal.App.4th 775, 791, citing *River Bank, supra*, 38 Cal.App.4th 1400, 1423.) The *Bradley* court found no basis to accord such evidence any weight in that

matter, however, since the defendant itself chose to borrow through a corporation for tax purposes. (235 Cal.App.4th at p. 791.) Similarly, in this case, Festival Fund sought to limit its own liability by having Festival 357 enter into the loan agreement and take title to the property. Moreover, the evidence here shows that the Bank did examine the ability of Festival 357 to repay the loan. The Bank appraised the property—an income-producing, retail property—and the loan agreement contained an assignment of lease and rents. According to Byrne, the most important factor to the Bank in determining whether the loan could be satisfied was the value of the property and its cash flow from rent. Thus, the evidence demonstrates the Bank understood the borrower would be responsible for satisfying the loan, based on the property's value and income potential.

■ Festival Fund next argues that contractual provisions demonstrate it was a primary obligor. Festival Fund points to language in the guaranty referring to the guarantor as “a primary party and not merely as a surety.” Festival Fund contends that this provision shows it was a “primary party” to the loan. The phrase at issue, however, has no object—it does not state what the guarantor was a “primary party” to. The most obvious and correct conclusion is that Festival Fund was a “primary party” to the guaranty. Such a conclusion is consistent with the terms of the guaranty, which define Festival Fund as the guarantor, and the loan agreement, which expressly states the agreement is between Festival 357 (not Festival Fund) and the Bank. (See Civ. Code, §§ 1641 [giving effect to entire contract], 1642 [several instruments covering one transaction are taken together].)

Festival Fund also argues the loan agreement’s statement “the Obligations of Borrower and the obligations of Guarantor under the Loan Documents shall be joint and several” demonstrates Festival Fund was the principal obligor. Festival Fund was not a party to the loan agreement, however, so it is unclear how this statement could obligate it to fulfill the terms of the agreement. Furthermore, such an interpretation would be inconsistent with the loan agreement’s “Limitation on Liability” provision, stating: “Anything herein . . . to the contrary notwithstanding, Lender agrees that, for repayment of the Loan and the payment and performance of any and all of Borrower’s obligations . . . [Lender] will look solely to the Borrower, the Property and the other assets of Borrower . . . and no other property or assets of Borrower’s direct or indirect constituent partners . . . shall be subject to levy, execution or other enforcement procedure for the satisfaction of remedies of Lender” The clear effect of this provision is that, irrespective of any other language in the loan agreement, in the event of default, the Bank would seek recompense from only Festival 357 and the property itself to fulfill the obligations of the loan agreement. There is no basis to conclude Festival Fund was contractually obligated to satisfy the loan agreement.

■ In sum, substantial evidence does not support a finding that Festival Fund was the true principal obligor and that the Bank structured the transaction to circumvent antideficiency laws.

C. *The claimed “single business enterprise” defense did not apply*

■ Festival Fund argues that judgment in its favor on the breach of guaranty claim was also proper because there was a “unity of interest” between Festival Fund and FRF1, making Festival Fund the de facto general partner of Festival 357 and responsible for its debts. (See Corp. Code, § 15904.04 [ordinarily, general partners are liable for obligations of limited partnership].)

■ The “single business enterprise” theory asserted by Festival Fund is a variant of the alter ego doctrine. “Generally, alter ego liability is reserved for the parent-subsidiary relationship. However, under the single enterprise rule, liability can be found between sister companies. The theory has been described as follows: ‘ ‘In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it.’’’ (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249–1250 [1 Cal.Rptr.2d 301].)

There are two standard requirements for finding alter ego (and single business enterprise) liability: “‘(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.’’ (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300 [216 Cal.Rptr. 443, 702 P.2d 601] (*Mesler*).) The doctrine generally applies when upholding the defendant’s corporate form will work an injustice to an innocent plaintiff. (*Ibid.*; *Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 900–901 [88 Cal.Rptr.2d 594].) “[A]lter ego is used to prevent a corporation from using its statutory separate corporate form as a shield from liability only where to recognize its corporate status would defeat the rights and equities of third parties; it is not a doctrine that allows the persons who actually control the corporation to disregard the corporate form.” (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 994 [41 Cal.Rptr.2d 618].)

■ Alter ego is normally a basis for liability, not a defense. However, alter ego principles have been considered in sham guaranty cases examining whether a guarantor is actually the principal obligor. (See *Bradley, supra*, 235 Cal.App.4th 775, 789 [declining to pierce veil of corporate owner of borrower, finding that it observed corporate formalities]; *Valinda Builders, Inc. v.*

Bissner (1964) 230 Cal.App.2d 106, 110 [40 Cal.Rptr. 735] [in applying sham defense guaranty, finding that undercapitalized purported borrower was a “mere shell of a corporation”].) Nevertheless, the overriding concern when deciding whether the sham guaranty defense applies is whether the guaranty is an attempt to circumvent the antideficiency laws. (See *Lawlor, supra*, 222 Cal.App.4th 625, 638.) Thus, the presence of a potential alter ego relationship is just one factor to consider when analyzing a sham guaranty defense. In a situation like the one here, where the lender neither structures the transaction nor knows, at the time of making the loan, of a borrower’s (or an affiliate’s) failure to follow corporate formalities, there generally will be no basis to apply the sham guaranty defense.

Festival Fund, in arguing that it is properly considered a single enterprise with its affiliate FRF1, states that FRF1 never had a bank account, never owned assets or made investments other than a 0.01 percent interest in Festival 357, never had income, never had employees or paid for services, held no regular meetings, did not conduct day-to-day business, and was undercapitalized. The evidence, though, does not show that the Bank was aware of most if any of these failures to follow corporate formalities. To allow a guarantor to avoid its obligations simply because the debtor’s general partner—which is owned entirely by the guarantor—avoided complying with corporate necessities would work an absurdity. Guarantors could choose to avoid liability by instructing their affiliated companies to disregard corporate formalities. If an alter ego (or single business enterprise) defense applied in these situations, it would promote an inequitable result, exactly what the doctrine is designed to avoid. (See *Mesler, supra*, 39 Cal.3d 290, 300.)

Lawlor reasoned: “Individuals may structure their own business dealings to limit their personal liability, but they must accept the risks that accompany the benefits of incorporation.” (*Lawlor, supra*, 222 Cal.App.4th 625, 639.) Schurgin testified that the structure used here was chosen by Festival Fund to limit its liability. Festival Fund may have insulated itself from potential claims on the property by legally separating itself from Festival 357, the borrower and the owner of the property, but by doing so, Festival Fund could not also claim the benefit of antideficiency protections.

In conclusion, viewing the trial evidence in the light most favorable to the judgment, the sham guaranty defense, and the asserted, related single business enterprise defense, did not apply.

DISPOSITION

The judgment in favor of Festival Fund on Clover's action for breach of guaranty is reversed. On remand, the trial court shall determine to what extent, if any, aspects of Clover's claim, including any defenses thereto, remain to be tried.

Clover shall recover costs on appeal.

Ashmann-Gerst, J., and Hoffstadt, J., concurred.

A petition for a rehearing was denied October 25, 2016, and on October 6, 2016, the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied January 18, 2017, S238394.

[No. B267953. Second Dist., Div. One. Oct. 4, 2016.]

In re JULIEN H., a Person Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
JACOB M., Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

1085

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Matthew J. Hardy, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

ROTHSCHILD, P. J.—Jacob M., father (Father) of Julien H., appeals from a dispositional order relating to Father made pursuant to Welfare and Institutions Code section 361, subdivision (c)(1).¹ Father contends that section 361, subdivision (c)(1) applies only to a parent with whom a child resides, and because Julien did not reside with Father, the court had no authority under that section to make the orders restricting his rights to Julien. Father also contends that the error was prejudicial because no other authority supports the court’s order. We agree with Father that section 361, subdivision (c) does not apply but we conclude that Father has failed to demonstrate prejudice. Consequently, we affirm but remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Julien (born in 2010) lived with his mother, Janelle H.,² and had weekend visits with Father. The parents were never married, and the family never lived together.

In February 2015, the Los Angeles County Department of Children and Family Services (DCFS) received an anonymous referral indicating that the mother regularly left Julien for several days a week with his grandmother who smoked cigarettes in the child’s presence, left prescription medicine accessible to him and allowed him to eat candy. The report also indicated that Julien’s mother did not provide him with proper dental or medical care.

When the social worker responded to the mother’s home, she denied the allegations, and she reported problems with Father’s violent and angry behavior, including that he abused drugs and alcohol and suffered from mental health problems. The mother also told the social worker that Father had a pending child abuse referral involving Julien’s half sibling (M.) based

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Janelle H. is not a party to this appeal.

on Father's arrest for felony driving under the influence while M. was a passenger in his car and that Father caused an automobile accident in which M. was injured. The mother also indicated that police had responded to her home several times because of Father's actions, including once when Father blocked the grandmother's car and another time when he tried to take Julien without a car seat.

The social worker unsuccessfully attempted to contact Father. In late March 2015, Father called the social worker, stating that he had not returned her phone calls because he had been incarcerated. Father said he was bipolar and had been taking medication for the condition, but was considering discontinuing the medication after consulting with his doctor. Father conceded that he used marijuana, and agreed to drug test.³ Father indicated that he wanted to remain involved in Julien's life and to continue visits with his son; he did not, however, seek custody of the child.

DCFS discovered that the parents had a family law order that did not contain any express legal or physical custody determination, but nonetheless awarded Father unmonitored visitation with Julien every Saturday from 2:00 p.m. to 7:00 p.m. The mother also reported that she had agreed to allow Father to have unmonitored visits with Julien for the entire weekend every other week.

The social worker expressed concerns about Father's ongoing unmonitored visits with Julien and requested that the mother obtain an order in the family law court for sole custody of the child and a modification of the visitation order to require monitored visits for Father. Although the mother agreed to seek a modification of the family law order, she failed to do so.

On June 22, 2015, DCFS obtained an order to remove Julien from Father pending the detention hearing. Thereafter, DCFS filed a section 300 petition under subdivisions (b) and (j) alleging Julien was at risk based on Father's conduct. Among other allegations, the petition alleged that Father abused marijuana, alcohol, and prescription medication and that he had mental and emotional problems that rendered him incapable of providing regular care for the child. It also alleged that the mother knew or should have known of Father's substance abuse but failed to protect the child.⁴

³ On March 30, 2015, Father tested positive for marijuana.

⁴ In allegations b-1 and j-1, the petition alleged Father drove under the influence and collided with a parked vehicle, causing M. to sustain injuries that required emergency medical treatment. The petition further alleged in b-3 that Father had mental and emotional problems and failed to take his prescribed medication and that as a result he was unable to provide care to the minor.

At the detention hearing, DCFS asked the court to order monitored visitation for Father and to order that Father participate in random drug and alcohol testing. Father agreed to the drug testing and stated that he is “submitting to detention today.” The court found a *prima facie* case for detention based on substantial danger to the physical or emotional health of the child and no reasonable means to protect him without removal from Father. The court vested temporary custody of Julien with DCFS and ordered the child released to his mother.

In its jurisdiction/disposition report, DCFS reported Father’s monitored visits were inconsistent, and the report described the parents as “aggressive” towards each other. Father was participating in a substance abuse program; however, he was not required to test as part of the program unless he appeared to be under the influence. Father was also participating in an individual drug counseling program and domestic violence counseling and had enrolled in alcohol and drug testing, but he had missed all seven drug/alcohol tests.

On September 30, 2015, the juvenile court conducted the combined jurisdiction/disposition hearing. Although the parents requested that the court terminate jurisdiction, the court found by a preponderance of the evidence, that allegations j-1, b-2 and b-3 were true,⁵ and proceeded to the disposition. The court declared Julien a dependent of the court, released the child to his mother and ordered family maintenance services for her. The court ordered enhancement services, monitored visits, and substance abuse treatment for Father. The court continued the case for a section 364 hearing.⁶

Father appealed.

DISCUSSION

On appeal, Father does not challenge the order declaring Julien a dependent of the juvenile court. Rather, Father’s only contention is that the order limiting his access to Julien must be reversed because the court had no authority to “impose restrictions on his parental rights.”⁷ We disagree.

⁵ The court dismissed allegation b-1.

⁶ The dependency court conducted additional review hearings in January, April and July 2016 but did not change the orders relating to Julien and set the matter for another hearing for September 30, 2016.

⁷ To the extent Father challenges the court’s predetention removal and detention orders that challenge is moot because those orders were superseded by the disposition orders and there is no effectual relief that may be provided by this court. (See *In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1420 [57 Cal.Rptr.3d 863] [a detention order is by its nature temporary; it lasts only until the court decides placement at the disposition hearing].)

■ Preliminarily, we address DCFS's argument that Father forfeited any argument that the juvenile court erred when it removed Julien from him because he did not raise the issue in the dependency court. Although in general, a party who does not raise an argument below forfeits the argument on appeal, where as here, an appellant poses a question of law, the appellate court can exercise its discretion to address the issue. (See *In re V.F.* (2007) 157 Cal.App.4th 962, 967–968 [69 Cal.Rptr.3d 159] [holding that father did not forfeit his arguments that he was entitled to retain custody of his children under § 361, subd. (c)], superseded on other grounds as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57–58 [81 Cal.Rptr.3d 918].) Because the arguments Father raises are primarily issues of law, we decline to hold that he forfeited his arguments regarding the disposition order.

■ Section 361, subdivision (c) authorizes a child's removal "from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated." (§ 361, subd. (c).) At the disposition hearing, the court declared Julien a dependent of the court and ordered him removed from Father pursuant to section 361, subdivision (c).

Although Julien and Father have had unmonitored weekend visits, Julien did not reside with Father. Consequently, the court could not remove Julien from Father's physical custody under section 361, subdivision (c)(1) because Julien was not residing with him when the petition was initiated. (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 628 [195 Cal.Rptr.3d 200] (*Dakota J.*) [holding that "the statute does not contemplate that a child could be removed from a parent who is not living with the child at the relevant time"]; *In re V.F.*, *supra*, 157 Cal.App.4th at p. 969 [§ 361, subd. (c) " 'does not, by its terms, encompass the situation of the noncustodial parent' "]). Thus, as a matter of law, section 361, subdivision (c) did not apply.

Notwithstanding this conclusion, reversal is unwarranted unless the error resulted in prejudice, i.e., it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (See, e.g., *Dakota J.*, *supra*, 242 Cal.App.4th at pp. 630–632.)⁸

Father contends that he suffered prejudice because the order denied his fundamental right to parent his child and the order would disadvantage him in future matters. The underlying premise of this argument is that he suffered prejudice because no other authority grants the court the power to limit his

⁸ To the extent Father suggests that *Dakota J.* holds that an error in removing a child from a noncustodial parent based on section 361, subdivision (c) is prejudicial per se, Father misreads *Dakota J.* The appellate court in *Dakota J.* did not conclude that the error was per se prejudicial. Instead the court found prejudice based on the parent's showing of actual prejudice in that case—the removal order jeopardized arrangements the mother had made for the children to live with a relative who had provided a stable home for five years. (*Dakota J., supra*, 242 Cal.App.4th at pp. 630–632.)

access to his child in a manner analogous to a removal order under section 361, subdivision (c). Father is mistaken.

■ As the court in *Dakota J.* implicitly acknowledged,⁹ the dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent. (See *Dakota J., supra*, 242 Cal.App.4th at pp. 632–633.) Specifically, section 361, subdivision (a)(1), grants the court authority to “limit the control to be exercised over the dependent child by any parent or guardian.” (§ 361, subd. (a)(1).) And unlike subdivision (c) of section 361, subdivision (a)(1) applies to “any parent,” not solely to parents with whom the child resides. Similarly, section 362, subdivision (a) further authorizes the court to “make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child.” (§ 362, subd. (a).) (See *Dakota J., supra*, 242 Cal.App.4th at pp. 632–633.)

Father does not argue that in order to justify exercise of its power under section 361, subdivision (a) and section 362, subdivision (a), the dependency court must make a different factual finding or apply a higher standard of proof than would be required under section 361, subdivision (c). Nor does he argue that the factual findings made by the dependency court are not supported by substantial evidence. Accordingly, Father has failed to show that the court’s reliance on section 361, subdivision (c) was prejudicial. Therefore, we order the juvenile court to amend the order to reflect that it is made pursuant to section 361, subdivision (a) and section 362, subdivision (a).

DISPOSITION

The order is affirmed, and the matter is remanded for the juvenile court to amend its order to reflect that it is made pursuant to section 361, subdivision (a) and section 362, subdivision (a).

Chaney, J., and Lui, J., concurred.

⁹ This matter has also generated commentary from legal analysts. (See Menetrez, *Protect Kids from Abusive Noncustodial Parents*, S.F. Daily J. (Sept. 1, 2016) p. 7 [recognizing the dearth of legal guidance on this issue, and urging the Legislature to amend the Welf. & Inst. Code to expressly provide for removal from noncustodial parents and to identify the findings required to support the order].)

[No. A144450. First Dist., Div. One. Oct. 4, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL DAVID FORNEY, Defendant and Appellant.

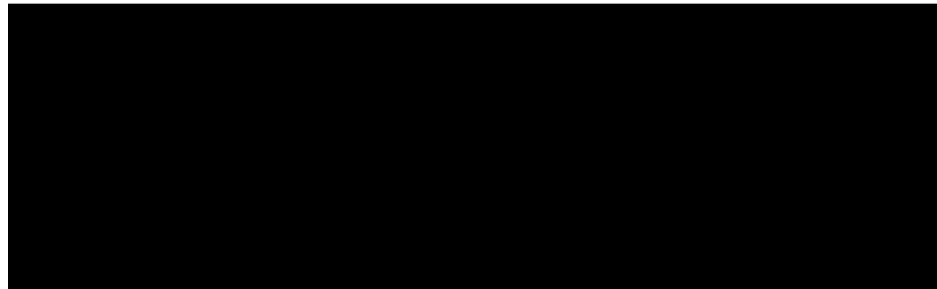
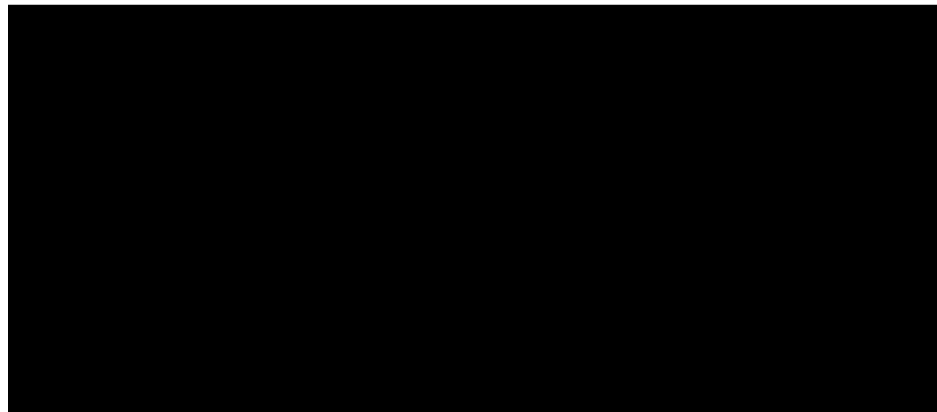
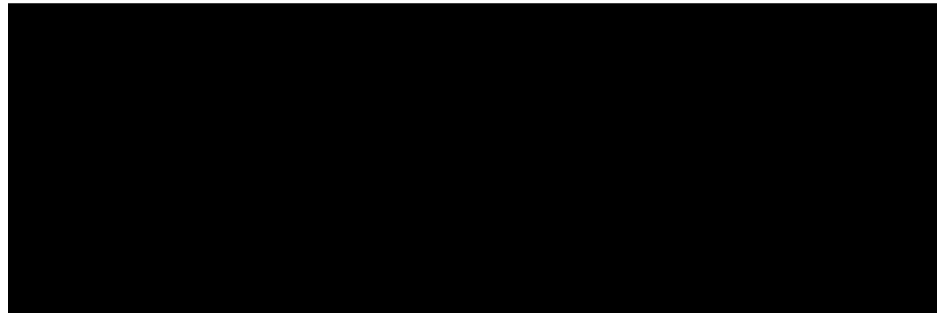
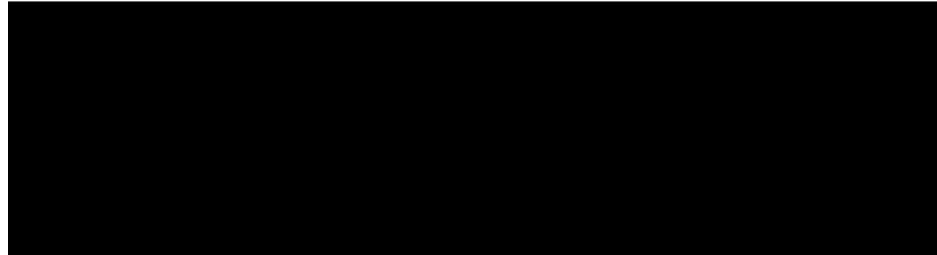
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) December 14, 2016, S238013.

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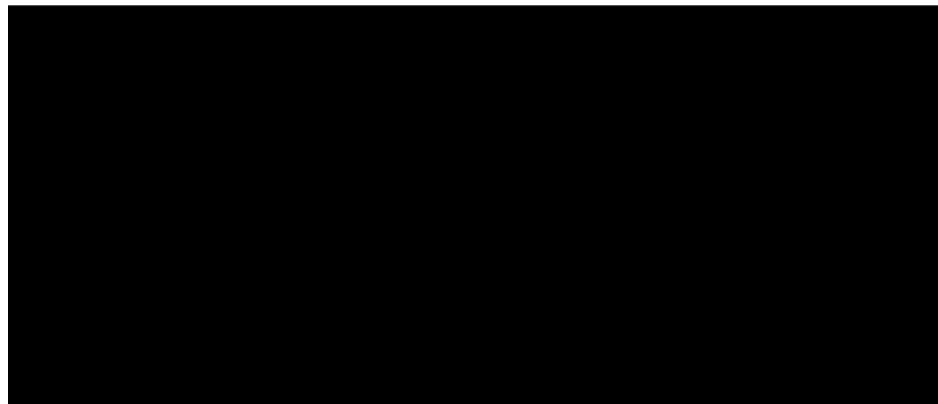
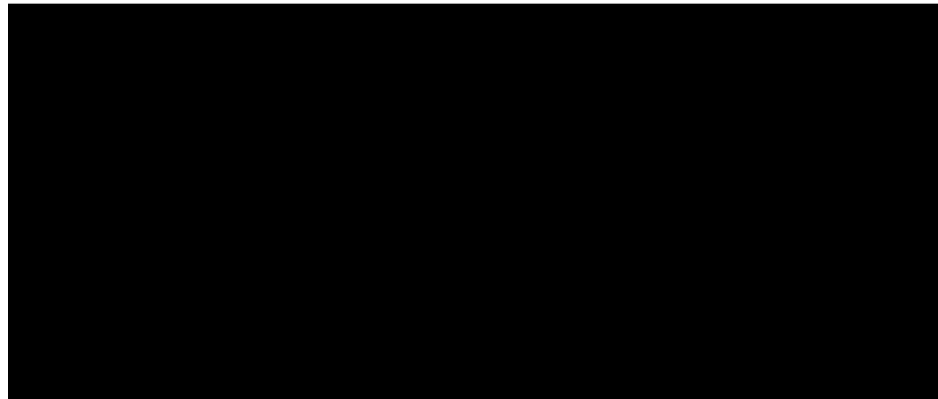
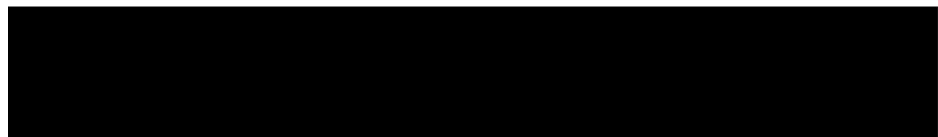
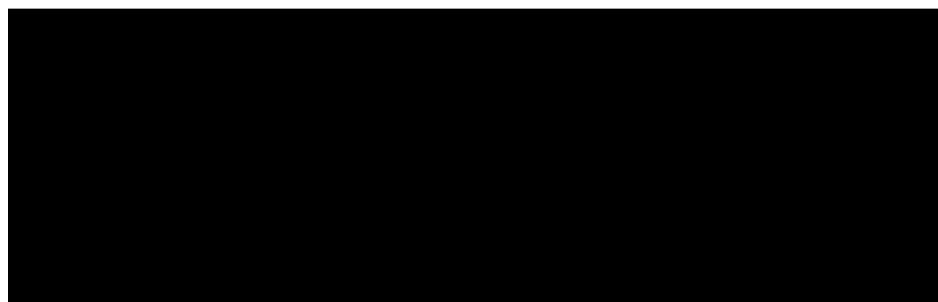
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COUNSEL

Michael David Forney, in pro. per.; and Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Catherine A. Rivlin and Ann Wathen, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION**BANKE, J.—**

I.

INTRODUCTION

Defendant Michael David Forney appeals from a judgment entered pursuant to a no contest plea to unlawful oral copulation (Pen. Code, § 288a, subd. (b)(2))¹ and unlawful sexual intercourse (§ 261.5, subd. (d)). In accordance with the terms of a negotiated disposition, the trial court suspended imposition of sentence and placed defendant on three years' formal probation. Defendant challenges three conditions of his probation: (1) that he waive his Fifth Amendment right against self-incrimination and submit to polygraph examinations as part of a sex offender management program; (2) that he not contact any minor without prior approval of his probation officer; and (3) that he not reside near or be any place where minors congregate.

The validity of the sex offender management program Fifth Amendment waiver and polygraph requirement—a probation condition statutorily required under section 1203.067, subdivision (b)(3)—is currently on review by our Supreme Court. (*People v. Rebolloza*, review granted June 10, 2015, S225503; *People v. Klatt*, review granted July 16, 2014, S218755; *People v. Friday*, review granted July 16, 2014, S218288; *People v. Garcia*, review granted July 16, 2014, S218197.)

■ Binding United States Supreme Court precedent holds that a probationer cannot be compelled to relinquish his Fifth Amendment right against self-incrimination, and in our view, this authority also makes clear the choice between agreeing to the mandatory Fifth Amendment waiver as a condition

¹ All further statutory references are to the Penal Code unless otherwise indicated.

of probation or facing immediate incarceration is an impermissibly coercive one. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435–437 & fn. 7 [79 L.Ed.2d 409, 104 S.Ct. 1136] (*Murphy*); see also *McKune v. Lile* (2002) 536 U.S. 24, 35 [153 L.Ed.2d 47, 122 S.Ct. 2017] (*McKune*) [holding consequences of prison inmate’s refusal to waive 5th Amend. and participate in sexual abuse treatment program did not rise to impermissible “compulsion” to incriminate himself; however, if consequences did “combine to create a compulsion that encumber[ed] the constitutional right,” the state could not “continue the program in its present form”].) We therefore order the Fifth Amendment waiver struck from the first of the challenged probation conditions. However, under this same high court authority, as well as California precedent, the polygraph requirement, shorn of the compelled Fifth Amendment waiver, is valid.

As for the no contact with minors, residency, and location probation conditions, the Attorney General largely agrees they should be modified. We also agree and order appropriate modifications of these conditions.

II.

DISCUSSION²

The Fifth Amendment Waiver and Polygraph Testing Requirement

1. *The Fifth Amendment Waiver Is Unconstitutionally Coercive*

As required by section 1203.067, subdivision (b)(3), defendant was ordered, as a condition of probation, to “[w]aive[] . . . any privilege against self-incrimination and participat[e] in polygraph examinations, which shall be part of the sex offender management program.” He contends this condition violates his Fifth Amendment right against self-incrimination and is overbroad in any event. In our view, the United States Supreme Court’s decisions in *Murphy*, *supra*, 465 U.S. 420 and *McKune*, *supra*, 536 U.S. 24 are controlling on the Fifth Amendment issue and compel the conclusion that the statutorily required waiver cannot stand.

In *Murphy*, the defendant was subject to a probation condition that he participate in a sex offender treatment program, report to his probation officer as directed, and be truthful with the probation officer “in all matters.” (*Murphy*, *supra*, 465 U.S. at p. 422.) In his treatment program, the defendant admitted a prior rape and murder. (*Id.* at p. 423.) These admissions were

² Given the issues on appeal, we need not separately set forth either the facts of the crimes to which defendant pleaded no contest or the procedural background of the case.

communicated to his probation officer, who then asked the defendant to meet with her; she told him she intended to convey any incriminating information he provided to the police. (*Id.* at p. 424.) The defendant admitted the crimes to the probation officer, which resulted in the filing of new criminal charges. In the new case, he sought to suppress the admissions. (*Id.* at pp. 424–425.)

■ The specific issue before the Supreme Court was whether the defendant's failure to actually invoke his Fifth Amendment privilege against self-incrimination could be excused on the ground that his admissions to the probation officer had been "compelled." (*Murphy, supra*, 465 U.S. at p. 434.) Generally, the Fifth Amendment is not "self-executing" and must be invoked in order to obtain its protection. (*Murphy*, at p. 431.) There are, however, several exceptions, one of which is when the consequences of invoking the right are so severe the individual is effectively compelled to incriminate himself. (*Id.* at pp. 434–435.) This exception, developed in a line of cases referred to as the "'penalty' cases," applies where "the State not only [has] compelled an individual to appear and testify, but also [has] sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.' [Citation.]" (*Id.* at p. 434.)

■ The high court explained "[t]he threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony. A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." (*Murphy, supra*, 465 U.S. at p. 435.)

■ "The situation would be different," observed the court, "if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. If, for example, a residential restriction were imposed as a condition of probation, it would appear unlikely that a violation of that condition would be a criminal act. Hence, a claim of the Fifth Amendment privilege in response to questions relating to a residential condition could not validly rest on the ground that the answer might be used to incriminate if the probationer was tried for another

crime. Neither, in our view, would the privilege be available on the ground that answering such questions might reveal a violation of the residential requirement and result in the termination of probation. Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. [Citations.] Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. It follows that whether or not the answer to a question about a residential requirement is compelled by the threat of revocation, there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings.” (*Murphy, supra*, 465 U.S. at p. 435, fn. 7.)

■ And, added the high court, “[o]ur cases indicate . . . that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, *as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances*, a probationer’s ‘right to immunity as a result of his compelled testimony would not be at stake,’ [citations], and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer’s silence as ‘one of a number of factors to be considered by the finder of fact’ in deciding whether other conditions of probation have been violated. [Citations.]” (*Murphy, supra*, 465 U.S. at p. 436, fn. 7, italics added.)

The court then turned to the question of “whether Murphy’s probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.” (*Murphy, supra*, 465 U.S. at p. 436.) The court concluded that the state had not taken that “extra, impermissible step.” (*Ibid.*)

The court explained, “[t]he state court did not attempt to define the precise contours of Murphy’s obligation to respond to questions. On its face, Murphy’s probation condition proscribed only false statements; *it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution. . . .* Without the benefit of an authoritative state-court construction of the condition, we are hesitant to read into the truthfulness requirement an additional obligation that Murphy refrain from raising legitimate objections to furnishing information that might lead to his conviction for another crime.” (*Murphy, supra*, 465 U.S. at p. 437, italics added.) “Whether we employ a subjective or

an objective test, there is no reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination. There is no direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent.” (*Ibid.*)

Further, said the court, even “[i]f Murphy did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable. Our decisions have made clear that *the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege*. It is not surprising, then, that neither the state court nor any state officer has suggested otherwise. Indeed, in its brief in this Court, the State submits that it would not, and legally could not, revoke probation for refusing to answer questions calling for information that would incriminate in separate criminal proceedings.” (*Murphy, supra*, 465 U.S. at p. 438, italics added.)

The high court further explained probation revocation under Minnesota law is not “automatic.” (*Murphy, supra*, 465 U.S. at p. 438.) There must be a hearing, and a court must find that the alleged violation was intentional or inexcusable, and that the need for confinement outweighs the policies favoring probation. (*Ibid.*) In short, the court had “not been advised of any case in which Minnesota ha[d] attempted to revoke probation *merely* because a probationer refused to make *nonimmunized* disclosures concerning his own criminal conduct.” (*Id.* at p. 439, italics added.) And given the court’s cases, “Murphy could not reasonably have feared that the assertion of the privilege would have led to revocation.” (*Ibid.*)

The Supreme Court accordingly concluded Murphy’s Fifth Amendment right was not self-executing, and he therefore had to actually invoke the privilege in order to claim its protection in the new criminal case. (*Murphy, supra*, 465 U.S. at pp. 439–440.)

■ *Murphy* thus makes clear (a) probationers retain their Fifth Amendment privilege against self-incrimination, which embraces the right to remain silent and not answer questions that would elicit incriminating information; (b) a state may compel a probationer to answer potentially incriminating questions, but only if he is assured incriminating answers will not be used in a pending or new criminal proceeding (i.e., only if the state guarantees the *preservation* of his 5th Amend. right not to be called as a witness against himself); and (c) probation cannot be revoked solely because a probationer exercises his Fifth Amendment right to remain silent. (*Murphy, supra*, 465 U.S. at pp. 439–440.)

In *McKune*, the high court addressed the constitutionality of a prison sexual abuse treatment program, which was mandatory for inmates convicted of sex crimes. The program required inmates to, among other things, accept responsibility for the crime for which they had been sentenced, provide a complete sexual history regardless of whether it included uncharged crimes, and take a polygraph to confirm the accuracy and completeness of the history. It also required prison authorities to report uncharged sexual offenses involving minors, and the state reserved the right to initiate criminal proceedings. (*McKune, supra*, 536 U.S. at p. 30.) The consequences of refusing to participate in the program included reduction of visiting rights, earnings, work opportunities, canteen expenditures, and access to television, as well as transfer to a maximum security unit. (*Id.* at p. 31.) *McKune* refused to participate on Fifth Amendment grounds and brought a civil rights action under title 42 United States Code section 1983 for injunctive relief. (*McKune*, at p. 31.) The court produced a fractured opinion.

Given that the state reserved the right to use information disclosed during the program as the basis for new criminal charges, the plurality stated the issue was “whether the State’s program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form” (*McKune, supra*, 536 U.S. at p. 35.) The court then undertook a lengthy defense of the merits of the program, stating “[t]herapists and correctional officers widely agree that clinical rehabilitation programs can enable sex offenders to manage their impulses and in this way reduce recidivism” and deeming the elements of the challenged program (that it was mandatory, required acceptance of responsibility for the crime of conviction, required a complete sexual history, required truthfulness, and allowed for prosecution of other sex crimes) as essential to its efficacy. (*Id.* at pp. 32–34, 47–48.)

The plurality next examined the consequences of *McKune*’s refusal to participate in the program and concluded they did not rise to the level of “compulsion” necessary to implicate the Fifth Amendment. (*McKune, supra*, 536 U.S. at pp. 35–47.) The plurality commenced its discussion by stating that while an inmate retains his Fifth Amendment privilege, the “compulsion” inquiry must take into account the fact of confinement and that rehabilitation “is a legitimate penological interest that must be weighed against the exercise of an inmate’s liberty.” (*McKune*, at p. 36.) Notably, the plurality observed *McKune*’s refusal to participate did “not extend his term of incarceration,” nor did it adversely “affect his eligibility for good-time credits or parole.” (*Id.* at p. 38.) His transfer to the maximum security unit was also not “intended to punish” him for exercising his Fifth Amendment right, said the plurality, but was due to the practical necessity of removing him from the housing unit dedicated to the rehabilitation program. (*McKune*, at pp. 38–39.) As for the

other consequences, McKune could not “cite a single case from this Court holding that the denial of discrete prison privileges for refusal to participate in a rehabilitation program amounts to unconstitutional compulsion.” (*Id.* at p. 40.)

In the plurality’s view, “what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate’s choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.” (*McKune, supra*, 536 U.S. at p. 41.) The plurality concluded the consequences McKune faced—“denial of certain perquisites that make his life in prison more tolerable”—did not add up to compulsion to waive his Fifth Amendment right. (*McKune*, at p. 42; see *id.* at pp. 43–45.)

Justice O’Conner, while not entirely agreeing with the plurality’s articulation of the “compulsion” standard, agreed the alterations in McKune’s prison conditions “were [not] so great as to constitute compulsion for the purposes of the Fifth Amendment.” (*McKune, supra*, 536 U.S. at p. 49 (conc. opn. of O’Connor, J.).) She thus concurred in the judgment rejecting McKune’s constitutional challenge to the program. (*McKune, supra*, 536 U.S. at pp. 48–49 (conc. opn. of O’Connor, J.).) She observed “[t]he Court today is divided on the question of what standard to apply when evaluating compulsion for the purposes of the Fifth Amendment privilege against self-incrimination in a prison setting.” (*Id.* at p. 48 (conc. opn. of O’Connor, J.).) She posited, however, similar to the plurality, that Fifth Amendment analysis in the criminal setting should be different from that in other contexts. “Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony” (*McKune*, at p. 53 (conc. opn. of O’Connor, J.).) In any case, in her view, none of the privileges McKune stood to lose was “compulsive on any reasonable test.” (*Id.* at p. 54 (conc. opn. of O’Connor, J.).)

In the dissent’s view, putting McKune to the choice of exercising his Fifth Amendment rights or being transferred to maximum security amounted to unconstitutional compulsion—no matter how laudable the goals of the state’s sex abuse treatment program. (*McKune, supra*, 536 U.S. at pp. 55, 71 (dis. opn. of Stevens, J.).)

In light of *Murphy* and *McKune*, we do not see how the Fifth Amendment waiver required by section 1203.067, subdivision (b)(3) can survive. Both cases make clear a convicted sex offender retains his Fifth Amendment privilege not to provide incriminating answers that could be used in a

pending or subsequent criminal proceeding, and the pivotal question is whether the consequences of a defendant's refusal to waive his Fifth Amendment right rise to the level of unconstitutional compulsion to waive it. Here, the consequences of a defendant's refusal to waive the Fifth Amendment is denial of probation and immediate incarceration. While neither *Murphy* nor *McKune* addressed this precise question, commentary in both cases inevitably leads, we think, to the conclusion this amounts to unconstitutional compulsion to forgo the Fifth Amendment.

In *Murphy*, for example, the Supreme Court specifically pointed out the state's sex offender program did not require the probationer to waive his Fifth Amendment privilege and had it done so, on pain of revocation, the state would have attached "an impermissible penalty to the exercise of the privilege." (*Murphy, supra*, 465 U.S. at p. 437; see also *id.* at p. 435 [there is "a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation"]; *id.* at p. 437 ["Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution"]); *id.* at p. 438 [revocation of probation was not "automatic" on a probationer's invocation of his 5th Amend. rights].) In *McKune*, the plurality specifically pointed out an inmate's refusal to participate in the sex abuse treatment program did not extend his term of incarceration or affect his eligibility for good time credits or parole. (*McKune, supra*, 536 U.S. at p. 38.)

If, as the high court posited in *Murphy*, a defendant cannot constitutionally be forced to choose between waiving his Fifth Amendment privilege and suffering revocation of his probation, we do not see how a defendant can constitutionally be forced to choose between waiving his privilege and suffering outright denial of probation and immediate incarceration. We think the same follows from the plurality's suggestion in *McKune* that an inmate cannot be forced constitutionally to choose between waiving his Fifth Amendment privilege and suffering extended incarceration or loss of parole.

The Attorney General puts great stock in the United States Supreme Court's decision in *Chavez v. Martinez* (2003) 538 U.S. 760, 769–770 [155 L.Ed.2d 984, 123 S.Ct. 1994] (*Chavez*), decided one year after *McKune, supra*, 536 U.S. 24, and the California Supreme Court's decision in *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112 [140 Cal.Rptr.3d 113, 274 P.3d 1110] (*Maldonado*), relying on *Chavez* to allow prosecution access to compelled mental examinations. Both cases are readily distinguishable, and

neither so much as suggests that the United States Supreme Court has retreated from its “penalty cases,” and specifically from *Murphy* and *McKune*.

The issue in *Chavez, supra*, 538 U.S. 760 was whether an interrogating officer could claim qualified immunity in a civil rights case brought by one Oliverio Martinez, who had been questioned without *Miranda*³ warnings while being treated in an emergency room. In an even more fractured opinion than *McKune*, the high court reversed the Ninth Circuit Court of Appeals’ opinion denying qualified immunity and remanded for consideration of whether Martinez could base his 42 United States Code section 1983 claim on substantive due process grounds.⁴ A majority of the justices agreed Martinez could not base his section 1983 claim on the Fifth Amendment, but offered varying reasons.

Justice Thomas, joined by the Chief Justice and Justices O’Conner and Scalia, expressed the view that Martinez could not anchor his 42 United States Code section 1983 claim on the Fifth Amendment because his incriminating statements were never used against him in a criminal prosecution. The Fifth Amendment on its face, stated Justice Thomas, provides only that a person cannot “‘be compelled in any criminal case to be a witness against himself.’” (*Chavez, supra*, 538 U.S. at p. 766, italics omitted.) Thus, while officials may “impair” the Fifth Amendment right against self-incrimination prior to trial, “‘a constitutional violation occurs only at trial.’” (*Chavez*, at p. 767, italics omitted, quoting *United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 264 [108 L.Ed.2d 222, 110 S.Ct. 1056].) Therefore, “mere use of compulsive questioning, without more,” could not support Martinez’s action for damages. (*Chavez*, at p. 767.) Justice Thomas explained this result was fully consistent with the court’s case law, including *Murphy*, in which the court made clear individuals *can* be compelled to reveal incriminating information, including on pain of contempt, “so long as those statements (or evidence derived from those statements) cannot be used against the speaker in any criminal case.” (*Id.* at pp. 767–768.) Martinez’s situation was not materially different, since his compelled statements were never used against him. (*Id.* at p. 769.) That Martinez could not point to any completed

³ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

⁴ Justice Souter authored the “opinion” of the court, joined by Justices Breyer, Stevens, Kennedy, and Ginsburg, which consisted of a single sentence remanding the case for consideration of whether Martinez could pursue a substantive due process claim (not a 5th Amend. claim). (*Chavez, supra*, 538 U.S. at p. 777.) Justice Thomas announced the “judgment” of the court, joined by the Chief Justice and Justices O’Connor and Scalia (*id.* at p. 763), and concurred in by Justice Souter (*id.* at p. 777 (conc. opn. of Souter, J.)). Justice Scalia concurred “in part” with the judgment. (*Id.* at p. 780 (conc. opn. of Scalia, J.)) While Justice Ginsburg stated “[t]o assure a controlling judgment” she was joining “Part II” of Justice Souter’s opinion, part II is actually designated the “opinion” of the court. (*Id.* at p. 802 (conc. & dis. opn. of Ginsburg, J.); see *id.* at p. 777.)

constitutional tort was also not at odds with the court’s creation of “prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause,” specifically referencing the court’s “penalty cases jurisprudence.” (*Id.* at pp. 770, 772, fn. 3 [“That the privilege is a prophylactic one does not alter our penalty cases jurisprudence, which allows such privilege to be asserted prior to, and outside of, criminal proceedings”].) In his separate concurring opinion, Justice Scalia emphasized “[s]ection 1983 does not provide remedies for violations of judicially created prophylactic rules.” (*Chavez, supra*, 538 U.S. at p. 780 (conc. opn. of Scalia, J.).)

Justices Souter and Breyer also agreed Martinez could not ground his 42 United States Code section 1983 claim on the Fifth Amendment. “Martinez claims more than evidentiary protection in asking this Court to hold that the questioning alone was a completed violation of the Fifth and Fourteenth Amendments subject to redress by an action for damages under [section] 1983. [¶] To recognize such a constitutional cause of action for compensation would, of course, be well outside the core of Fifth Amendment protection” (*Chavez, supra*, 538 U.S. at p. 777 (conc. opn. of Souter, J., Breyer, J., joining).) Indeed, if the court did recognize such a damages claim it “would revolutionize Fifth and Fourteenth Amendment law,” a result Justices Souter and Breyer believed was unsupported and unwarranted. (*Id.* at p. 779 (conc. opn. of Souter, J.).) They also observed that refusing to embrace such an “extension” of the Fifth Amendment was not incompatible with other Fifth Amendment holdings, including the “penalty cases” such as *McKune*.⁵ (See *Chavez*, at pp. 777–778 (conc. opn. of Souter, J.).)

Chavez thus confronted the high court with a civil rights claim for damages based on coercive questioning, alone, and a majority of the court could not countenance this kind of extension of Fifth Amendment law. However, what is significant for our purposes is that regardless of the multiplicity of reasoning in *Chavez*, there is no mistaking that the court preserved its “penalty case” jurisprudence, including *Murphy* and *McKune*.

In *Maldonado*, after the defendant’s notification that he intended to present mental-state evidence, the prosecution sought and the trial court ordered compelled mental examinations by three court-appointed experts. (*Maldonado, supra*, 53 Cal.4th at p. 1119.) The defendant then sought and was granted a protective order barring the prosecution from attending the examinations, barring access to reports, notes and recordings of the examinations, and barring contact with the experts until the close of the defendant’s case and

⁵ Justices Kennedy, Stevens, and Ginsburg were of the view an actionable Fifth Amendment violation can occur immediately upon coercive extraction of incriminating statements. (*Chavez, supra*, 538 U.S. at pp. 790–795 (conc. & dis. opn. of Kennedy, J., joined by Stevens, J., and, in part, by Ginsburg, J.); *id.* at p. 799 (conc. & dis. opn. of Ginsburg, J.).)

until the trial court had reviewed the material and resolved admissibility issues. (*Maldonado*, at p. 1120.) He claimed that unless he actually presented a mental-state defense at trial, his Fifth Amendment privilege applied to anything he told the examiners. (*Maldonado*, at pp. 1120–1121.)

■ Citing extensively to *Chavez*, *supra*, 538 U.S. 760, our Supreme Court explained the Fifth Amendment is not “a guarantee against officially compelled disclosure,” but rather is protection against being compelled to testify against oneself in a criminal proceeding. (*Maldonado*, *supra*, 53 Cal.4th at pp. 1127–1128.) Accordingly, the Fifth Amendment cannot be invoked to bar the prosecution from access to the compelled mental state examination materials. However, continued the court, the state can compel incriminating statements only so long as it recognizes such statements *cannot be used* against the individual in a criminal proceeding, absent his or her waiver of the Fifth Amendment. (*Maldonado*, at pp. 1129–1130.) ■ In other words, the state may compel incriminating statements if it preserves the individual’s core Fifth Amendment right not to testify against oneself in a criminal case. The court went on to ensure this protection for defendants subject to compelled mental examinations by judicially immunizing from use at trial, as “prophylactic protection of their Fifth Amendment privilege,” any incriminating statements made during the course of such examinations, unless and until the defendant waives the privilege by presenting mental state evidence. (*Maldonado*, at p. 1129, fn. 10.) Thus, while the prosecution can have pretrial access to compelled mental examination materials, it cannot use incriminating information in those materials until the defendant actually waives his Fifth Amendment privilege by presenting mental state evidence at trial. (*Maldonado*, at p. 1132 [defendant “retains the ‘unfettered choice’ whether to actually present such a defense at trial”; if he decides to forgo such defense, “any self-incriminating results of the examinations cannot be introduced or otherwise used against him”].)

■ Thus, contrary to what the Attorney General suggests, *Maldonado* in no way departs from what we view as the controlling United States Supreme Court cases, *Murphy* and *McKune*. On the contrary, *Maldonado* recognizes that state-compelled disclosure of incriminating information is permissible only if the state *preserves* the individual’s right to invoke the Fifth Amendment’s core protection against testifying against oneself in a criminal proceeding. And that is the essential problem with the statutorily mandated probation condition—it does not preserve the probationer’s Fifth Amendment privilege. Rather, it not only compels the probationer to answer any and all questions, regardless of whether the answers are incriminating, it *also* compels him to waive his Fifth Amendment right. While binding United States Supreme Court and California Supreme Court precedent permits the state’s first act of compulsion, it precludes the state from also demanding the

second. We therefore order the Fifth Amendment waiver struck from defendant's probation condition.

2. *The Polygraph Requirement, Absent the Compelled Fifth Amendment Waiver, Is Valid*

Having held that the compelled Fifth Amendment waiver is invalid, we now consider whether requiring defendant to submit to polygraph examinations, without the compelled waiver, impermissibly infringes upon his Fifth Amendment privilege against self-incrimination.

■ On this issue we agree with the Attorney General that *Chavez* and *Maldonado* clearly permit compelled answers, so long as the probationer retains his core Fifth Amendment right not to have any incriminating answers used against him in a pending or future criminal proceeding. That is also the import of *Murphy* and *McKune*. As we have discussed, in both cases, a majority of the court recognized that if the defendant's statements were "immunized"—i.e., could not be used against him in a pending or subsequent criminal proceeding—then compelled truthfulness would not implicate the Fifth Amendment. (See *McKune, supra*, 536 U.S. at p. 35 [if state "offered immunity, the self-incrimination privilege would not be implicated"]; *Murphy, supra*, 465 U.S. at p. 426 [witness may refuse to answer "unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant"]); *Murphy*, at p. 437 [probation condition only required truthfulness, it "said nothing about his freedom to decline to answer particular questions"].)

■ Indeed, it has long been settled law in our state that requiring a polygraph examination does not violate an individual's Fifth Amendment right. (E.g., *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 320 [124 Cal.Rptr.2d 43] ["The fact that [the defendant] has a duty to answer the polygraph examiner's question truthfully does not mean his answers are compelled within the meaning of the Fifth Amendment."]; *People v. Miller* (1989) 208 Cal.App.3d 1311, 1315 [256 Cal.Rptr. 587] "[a]lthough defendant [a probationer convicted of a sex offense] has a duty to answer the polygraph examiner's questions truthfully, unless he invokes the privilege, [or] shows a realistic threat of self-incrimination [but] nevertheless is required to answer, no violation of his right against self-incrimination is suffered."].)

Apart from his Fifth Amendment challenge, defendant maintains the polygraph requirement is impermissibly overbroad, asserting "[i]t contains no limitation whatever on the types of questions that can be asked." Defendant contends that to pass muster under *People v. Lent* (1975) 15 Cal.3d 481 [124 Cal.Rptr. 905, 541 P.2d 545], questions must be limited to those "reasonably

related to his successful completion of the sex offender management program, the crime of which he was convicted, or related criminal behavior, whether past or future.”

■ Pursuant to section 9003, subdivisions (a), (b), and (d), the California Sex Offender Management Board (CASOMB) is required to publish on its website certification standards for sex offender management programs and professionals.⁶ All polygraph examiners working with a certified sex offender management program must meet these standards. (CASOMB, Post-Conviction Sex Offender Polygraph Standards, *supra*, Introduction.) The standards set forth a model policy, program goals, the various types of examinations to be administered, and the types of questions that examinations should include, among other criteria. These examinations may be used “to test the limits of an examinee’s admitted behavior and to search for other behaviors or offenses not included in the allegations made by the victim of the instant offense.” (*Id.*, § 8.1.2.)

“Examiners, along with the other members of the community supervision team, should select relevant targets from their concerns regarding additional or unreported offense behaviors in the context of the instant offense.” (CASOMB, Post-Conviction Sex Offender Polygraph Standards, *supra*, § 8.1.2.1.) “Examiners should use the Prior Allegation Exam (PAE) to investigate and resolve all prior alleged sex offenses (i.e., allegations made prior to the current conviction) before attempting to investigate and resolve an examinee’s history of unknown sexual offenses.” (*Id.*, § 8.2.) To discover “unreported victims,” examiners should “thoroughly investigate the examinee’s lifetime history of sexually victimizing others, including behaviors related to victim selection, victim access, victim impact, and sexual offenses against unreported persons.” (*Id.*, § 8.3.2.) The sex offense monitoring examination may be used at the request of other team members “to explore the possibility the examinee may have been involved in unlawful sexual behaviors including a sexual re-offense” during the period of supervision. (*Id.*, § 8.5.) Questions about illegal conduct are not limited to sex offenses; they may include, but are not limited to, questions about the use or distribution of illegal drugs or controlled substances. (*Id.*, § 4.2.3.) Polygraph examiners should disseminate a written report regarding all pertinent information, test questions and answers, and results to members of the community supervision team and “to the court, parole board or other releasing agency.” (*Id.*, § 11.1.1.)

The Attorney General does not disagree with defendant’s view that the scope of the required polygraph examinations is properly defined by the

⁶ CASOMB, Post-Conviction Sex Offender Polygraph Standards (June 2011) <http://www.casomb.org/docs/Polygraph_Standards_FINAL.PDF> (as of Oct. 4, 2016).

purposes of the sex offender management program mandated by section 1203.067, subdivision (b)(2). She argues this is self-evident from the statutory language and context, and therefore there is no need to judicially add limiting language, particularly in light of the CASOMB standards developed to implement the program.

■ We agree with the Attorney General that the structure and language of the statute make it clear the required polygraph examinations are a tool to implement the sex offender management program and are to be administered in accordance with the CASOMB standards. Subdivision (b)(3) specifically states the polygraph examinations are “part of the sex offender management program.” (§ 1203.067, subd. (b)(3).) Subdivision (b)(2), in turn, provides that the probationer shall successfully complete the program, “following the standards developed pursuant to Section 9003.” (*Id.*, subd. (b)(2).) And it is pursuant to section 9003 that CASOMB promulgated the standards for administering the polygraph examinations that are part of the program. (§ 9003.)

It therefore seems apparent to us that the required polygraph examinations are not unfettered and cannot probe any area of inquiry with impunity, whether or not questions are related to the sex offender management program. Rather, it is inherent in the structure and language of the statute that polygraph examinations be used only in furtherance of the probationer’s treatment. (See *Brown v. Superior Court, supra*, 101 Cal.App.4th at p. 321 [modifying undefined polygraph condition imposed after defendant failed to cooperate in stalking therapy program to limit questions “to those relating to the successful completion of” the program and the crime of which defendant was convicted].) Given this construction of the statute, there is no need to include any limiting language in the probation condition itself.

The “No Contact with Minors” Condition

Defendant contends the probation condition ordering him not to “initiate, establish, or maintain contact with any minor, male or female, under the age of 18 years unless in the presence of a responsible adult and with prior approval of the Probation Officer” is constitutionally infirm because it lacks a scienter, or knowledge, requirement. He urges that the condition be modified to state he shall not “initiate, establish, or maintain contact with any minor, male or female, *that he knows is* under the age of 18 years.” The Attorney General agrees the condition should be so modified, citing *People v. Turner* (2007) 155 Cal.App.4th 1432 [66 Cal.Rptr.3d 803]. In *Turner*, the appellate court ordered a very similar condition modified on the ground the defendant might not know an individual was under the age of 18. (*Id.* at pp. 1435–1436.)

We agree with the parties and order the probation condition modified accordingly.

The “Not Near Minors” Condition

Defendant similarly contends the probation condition ordering him not to “reside near, visit or be in or about parks, schools, day care centers, swimming pools, beaches, theaters, arcades or other places where children congregate without prior approval of your Probation Officer” is constitutionally deficient for lack of specificity as to what “near” means, lack of a knowledge requirement, and because it assertedly prohibits him from being in places essential to ordinary living, such as a grocery store. He suggests the specific residential distance set forth in section 3003.5 (2,000 feet) be used in place of “near” and a specific knowledge requirement be included. He urges the prohibition on visiting or being in or about “other places” where children congregate be stricken in its entirety.

The Attorney General agrees the term “near” is vague and can be replaced with the 2,000-foot distance set forth in section 3003.5. She also agrees a knowledge requirement is appropriate. She does not agree, however, that the condition is otherwise constitutionally overbroad, citing *People v. Delvalle* (1994) 26 Cal.App.4th 869, 878 [31 Cal.Rptr.2d 725].

In *Delvalle* the court upheld a probation order requiring the defendant to “‘stay away from any places where minor children congregate.’” (*People v. Delvalle, supra*, 26 Cal.App.4th at p. 878.) The trial court then explained, “‘[t]he obvious places that come to mind are elementary schools, day care, parks. [¶] Stay away from places where young children are around.’” (*Ibid.*) The appellate court concluded the places the trial court specifically mentioned provided sufficient examples of the kinds of places the defendant was to avoid. (*Id.* at p. 879; see also *U.S. v. Bee* (9th Cir. 1998) 162 F.3d 1232, 1235 [upholding probation condition that defendant “‘not loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18’”].)

While we agree replacing “near” with 2,000 feet and including a knowledge requirement are warranted, we conclude the probation condition otherwise passes muster. If defendant is concerned he is precluded from going to a locale necessary for everyday living, such as a grocery store, laundromat, or gasoline station (none of which reasonably qualifies as a place where children congregate), he simply needs to confirm with his probation officer that his presence is permissible.

III.

DISPOSITION

We order struck the probation condition that defendant, pursuant to section 1203.067, subdivision (b)(3), waive his Fifth Amendment privilege against incrimination. Shorn of that Fifth Amendment waiver requirement, we uphold the condition that defendant, pursuant to that statutory provision, submit to polygraph examinations. We order the no contact with minors condition modified to read defendant is not to “initiate, establish, or maintain contact with any minor, male or female, that defendant knows is under the age of 18 years unless in the presence of a responsible adult and with prior approval of the Probation Officer.” We order the not near minors condition modified to read defendant is not to “reside within 2,000 feet of, or visit or be in or about, parks, schools, day care centers, swimming pools, beaches, theaters, arcades, or other places where defendant knows children congregate without prior approval of defendant’s Probation Officer.”

Margulies, Acting P. J., and Dondero, J., concurred.

Respondent’s petition for review by the Supreme Court was granted December 14, 2016, S238013. On May 10, 2017, cause transferred to Court of Appeal, First Appellate District, Division One, with directions.

[No. B266718. Second Dist., Div. Four. Oct. 5, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JANE JEOUNGMI PAK, Defendant and Appellant.

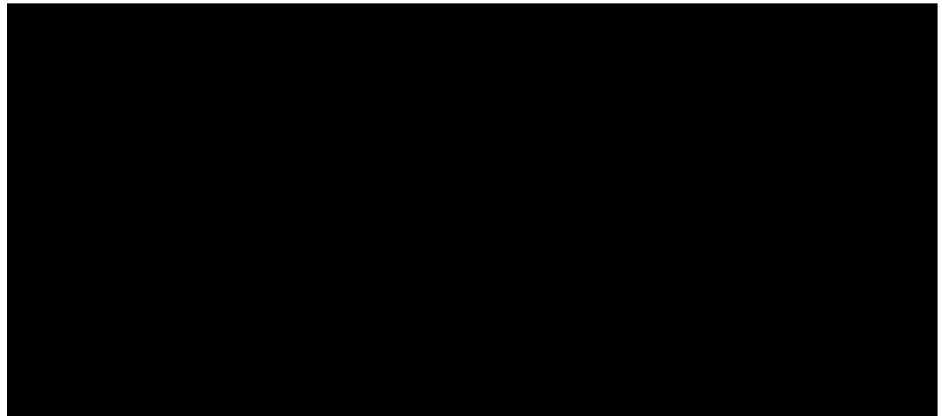
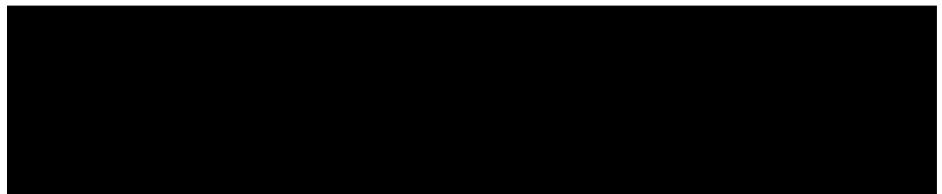
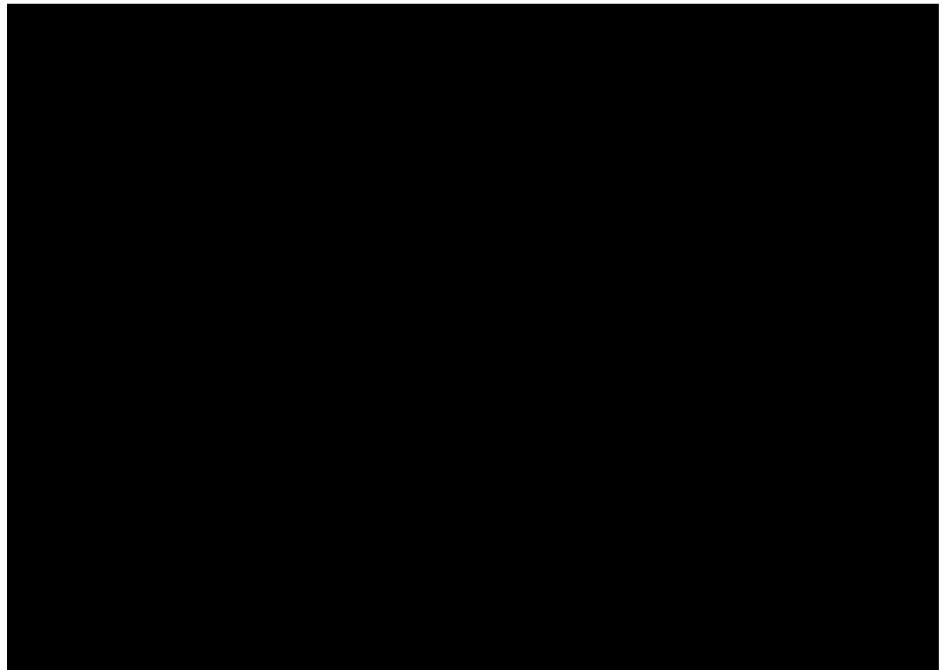
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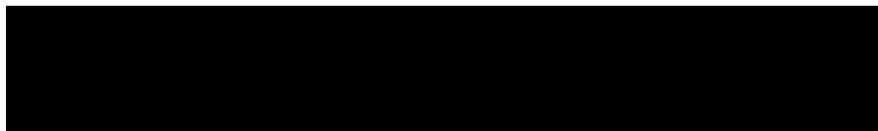
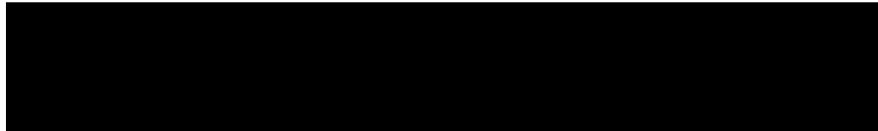
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COUNSEL

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

OPINION

COLLINS, J.—This appeal presents the question of which value is relevant in determining whether the burglary of a pawn shop achieved through pawning stolen goods is reducible to misdemeanor shoplifting under Proposition 47: the value of the stolen goods pawned, or the value of the property obtained in exchange. The trial court concluded that the value of the stolen goods pawned was the key consideration and denied appellant Jane Jeoungmi Pak’s application to designate her burglary conviction as a misdemeanor on that basis. We disagree with the trial court’s analysis. In a commercial burglary involving the successful pawning of stolen goods, the relevant value for Proposition 47 purposes is that of the property received in exchange for the stolen goods. We nonetheless affirm the judgment of the trial court, because appellant did not present evidence that she obtained \$950 or less from the pawn shop. Under Proposition 47, the applicant seeking to reduce a burglary conviction to a shoplifting one bears the burden of proving the value of the property taken or intended to be taken. Appellant presented only an assertion that the property taken was valued at less than \$950, as well as a comment to that effect from her attorney. Though uncontested, these assertions were insufficient to carry her burden. The affirmance is without prejudice to subsequent consideration of a new, properly supported petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

By information filed September 15, 2011, the Los Angeles County District Attorney (the People) charged appellant with one count of residential burglary (Pen. Code, § 459),¹ two counts of check forgery (§ 470, subd. (d)), two counts of commercial burglary (§ 459), and one count of theft of access card information (§ 484e, subd. (d)). The commercial burglary counts alleged that, on two separate occasions, appellant entered “a commercial building occupied by MAINE PAWN SHOP with the intent to commit larceny and any felony.” According to statements made by the court and counsel during the hearing on appellant’s Proposition 47 petition, appellant pawned a stolen projector during the first pawn shop burglary and a stolen camcorder, watch, and earrings during the second.

Appellant pleaded nolo contendere to all six counts on May 25, 2012. The trial court imposed suspended concurrent sentences and placed appellant on formal probation for three years, with the condition that she serve 365 days in county jail.

Upon completing her probation, appellant filed a petition pursuant to sections 17, subdivision (b) and 1203.4 to dismiss or reduce to misdemeanors all three burglary convictions. She also filed an application pursuant to Proposition 47, section 1170.18, subdivision (f), to designate as misdemeanors the felony forgery convictions and the burglary convictions involving the pawn shop. In that application, she asserted that all four of those felony convictions should be designated as misdemeanors because the value of the property stolen was less than \$950.

The trial court held a hearing on the Proposition 47 application on July 31, 2015.² At the hearing, the parties stipulated that the forgery convictions were reducible to misdemeanors under Proposition 47 because the amount of the checks forged was less than \$950. The trial court also reduced the burglary conviction involving the projector to a misdemeanor based on the prosecutor’s representation that the value of the projector was less than \$950.

The burglary conviction involving the watch, earrings, and camcorder prompted more discussion, “because we’re dealing with entry into a pawnshop with stolen goods that are undoubtedly above [\$]950.” The parties agreed that these stolen items collectively had “[a]n estimated value well in excess of \$5,000.” They also agreed with the trial court’s statement that “she

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The trial court took the section 1203.4 petition under submission during the hearing. It denied the petition in full on August 4, 2015.

goes into that pawnshop and gets less than that" for pawning the items. Defense counsel further represented, "I saw that the district attorney had slips from the pawnshop and they all appeared to be less than \$950." The prosecutor did not correct or object to this representation.

The trial court concluded the conviction was not reducible. It explained: "I don't even think 459.5 shoplifting applies under these circumstances. It's entry into a pawnshop with stolen property with the intent to get money for that property[,] that's the gravity of the offense. It's not a shoplifting case because they're not stealing property from the shelf, hiding it, and trying to go out. And so my view is if somebody goes in with property valued at thousands of dollars, they may get low-balled by the pawnshop. But, certainly, if their intent going in is to get as much as possible. We're talking about the value of the property, again, is \$5,000. [¶] . . . [¶] And I think you've both made very compelling arguments. Do we look at the value of the property being brought in, as in the People's position? Do we look at the property taken out, as in the money? And Prop. 47 doesn't answer that. My view is if we look at the value of the property intended to be taken, because it's taken or intended to be taken, under Prop. 47, I think somebody's going in with a \$5,000 watch. They're certainly intending to get as much as they possibly can. So based on that, I'm going to deny the request to reduce count 6. But I think that's a wonderful issue for an appeal."

Appellant timely filed a notice of appeal on September 3, 2015. On March 11, 2016, appellant's court-appointed counsel filed an opening brief requesting this court independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441 [158 Cal.Rptr. 839, 600 P.2d 1071]. On March 15, 2016, we sent a letter to appellant's last known address, advising her that she had 30 days within which to submit by brief or letter any contentions or argument she wished this court to consider. We received no response.

Subsequently, we identified a potential arguable issue and asked the parties to address the following: "Whether the crime of obtaining by false pretenses a sum less than \$950 from a pawn shop is shoplifting as defined by Penal Code section 459.5 where the value of the property pawned to obtain the funds exceeds \$950." Appellant's court-appointed counsel timely filed a letter brief. We received no response from the People.

DISCUSSION

On November 4, 2014, California voters approved Proposition 47, which took effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th

1085, 1089 [183 Cal.Rptr.3d 362].) Proposition 47 reclassified certain drug- and theft-related offenses as misdemeanors, unless the offenses were committed by ineligible defendants. (*People v. Rivera*, at p. 1091.) Proposition 47 also added the misdemeanor crime of shoplifting to the Penal Code. The new shoplifting statute, section 459.5, provides in relevant part: “Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. . . . [¶] Any act of shoplifting as defined . . . shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.” (§ 459.5, subds. (a) & (b).) Thus, after Proposition 47, a defendant who previously would have been charged with felony burglary under section 459³ must be charged with misdemeanor shoplifting if he or she (1) entered into a commercial establishment, (2) with intent to commit larceny, (3) while the establishment is open during regular business hours, and (4) took or intended to take property valued at \$950 or less. (See *People v. Stylz* (2016) 2 Cal.App.5th 530, 534 [206 Cal.Rptr.3d 301].) Such a defendant no longer may be charged with burglary. (See § 459.5, subd. (b).)

■ Proposition 47 also included a provision, codified at section 1170.18, subdivision (f), that allows a person who has completed his or her sentence for a felony who would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the crime to apply to have the trial court designate the felony conviction as a misdemeanor. (See *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313–314 [187 Cal.Rptr.3d 828].) Appellant potentially falls into that category: she was convicted of felony burglary under section 459, served her sentence, and properly filed in the trial court an application to designate her burglary convictions as misdemeanor shoplifting. The issue here is whether one of her burglary convictions met the shoplifting criteria. Appellant had the burden of proving to the trial court that it did. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879–880 [191 Cal.Rptr.3d 295].) On the extremely limited record before us, it appears there was no dispute that appellant’s pawn shop burglary conviction satisfied the first three elements of the shoplifting statute.⁴ We accordingly focus our attention on the fourth element, “the value of the property that is taken or intended to be taken

³ Burglary is defined as entry into “any house, room, . . . shop, . . . store, . . . or other building . . . with intent to commit grand or petit larceny or any felony.” (§ 459.)

⁴ We note that courts considering the second element, intent to commit larceny, have construed it in light of section 490a, which provides, “[w]henever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor.” (See *People v. Fusting* (2016) 1 Cal.App.5th 404, 409–411 [205 Cal.Rptr.3d 88].) The crime of theft may be committed by “knowingly giv[ing] false information or provid[ing] false verification as to the

does not exceed nine hundred fifty dollars (\$950).” The trial court concluded that someone who pawns stolen goods worth more than \$950 “may get low-balled by the pawnshop,” but would intend “going in . . . to get as much as possible.” The trial court reasoned that, accordingly, we “look at the value of the property being brought in.” Because the parties in this case agreed the pawned property was valued at more than \$950, the trial court denied appellant’s petition. The trial court thus emphasized the phrase “intended to be taken” in the shoplifting statute at the expense of the word “taken.”

■ We review the trial court’s interpretation of the shoplifting statute de novo. (*People v. Abarca* (2016) 2 Cal.App.5th 475, 481 [205 Cal.Rptr.3d 888]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136 [197 Cal.Rptr.3d 743] (*Perkins*).) The shoplifting statute was enacted as part of the Proposition 47 voter initiative, but we apply the same interpretative principles that govern the interpretation of statutes enacted by the Legislature. (*Perkins, supra*, 244 Cal.App.4th at p. 136.) Our fundamental aim is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. (*Ibid.*) “‘In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’” (*Ibid.*) We avoid interpretations that would lead to absurd consequences. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [40 Cal.Rptr.2d 903, 893 P.2d 1224].)

We begin by considering the usual, ordinary meaning of the words used in the shoplifting statute. (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 746 [205 Cal.Rptr.3d 142].) “When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122 [29 Cal.Rptr.3d 262, 112 P.3d 647].)

■ Section 459.5 provides that, if the other three elements are satisfied, shoplifting occurs where “the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” A plain reading

person’s true identity or as to the person’s ownership interest in property or the person’s authority to sell property in order to receive money or other valuable consideration from a pawnbroker . . . and . . . receiv[ing] money or other valuable consideration from the pawnbroker.” (§ 484.1, subd. (a).) Courts including this one also have concluded that the more broadly defined crime of theft by false pretenses (§ 484) satisfies the “intent to commit larceny” element of the shoplifting statute. (*People v. Garner* (2016) 2 Cal.App.5th 768, 770 [206 Cal.Rptr.3d 453]; *People v. Fusting, supra*, 1 Cal.App.5th at p. 411; *People v. Garrett* (2016) 248 Cal.App.4th 82, 89 [203 Cal.Rptr.3d 369].)

of this language indicates that the relevant value is that “of the property that is taken or intended to be taken.” The ordinary meaning of the word “property” in the context of theft is “a thing or things owned,” or “[a]ny external thing over which the rights of possession, use, and enjoyment are exercised.” (Webster’s New World Dict. (3d college ed. 1991) p. 1078; Black’s Law Dict. (10th ed. 2014) p.1410.) The word “property” is modified or described by the phrase “that is taken or intended to be taken.” The usual and ordinary meaning of the word “taken,” the past participle of the verb “to take,” is having obtained possession or control of something. (See Webster’s New World Dict. (3d college ed. 1991) p. 1363 [defining “take” as “to get possession of by force or skill; seize, grasp, catch, capture, win, etc.”]; Black’s Law Dict. (10th ed. 2014) p. 1681 [defining “take” as “To obtain possession or control, whether legally or illegally”].) Property that is taken, then, is property over which a defendant successfully has obtained possession or control.

The word “taken” is followed by the word “or.” “The plain and ordinary meaning of the word ‘or’ is well established: it indicates an intention to designate separate, disjunctive categories.” (*People v. Gibson* (2016) 2 Cal.App.5th 315, 326–327 [206 Cal.Rptr.3d 253].) Here, the word “or” demarcates two categories of property: property “that is taken” or property “that is . . . intended to be taken.” Construed in accord with its ordinary meaning, the phrase “intended to be taken” means that possession of the property was sought but not obtained. (See Webster’s New World Dict. (3d college ed. 1991) p. 702 [defining “intend” as “to have in mind as a purpose; plan”]; Black’s Law Dict. (10th ed. 2014) p. 930 [defining “intend” as “To have in mind a fixed purpose to reach a desired objective; to have as one’s purpose”].) Thus, for purposes of the shoplifting statute, there are two potentially relevant values: (1) the value of property that is taken, or (2) the value of property that is intended to be taken.

Here, the parties agreed that appellant was successful in obtaining property from the pawn shop. In other words, property was “taken” and not merely “intended to be taken.” However, the trial court exclusively focused on the “intended to be taken” clause, concluding that appellant must have intended to take “as much as possible” regardless of what she actually took. This was error for two reasons.

First, the disjunctive “or” in the shoplifting statute creates a distinction between shoplifting in which property “is taken” and shoplifting in which property merely was “intended to be taken.” Under the plain meaning of the terms and the wording of the statute, the phrase “value of the property that is taken” logically applies when a defendant succeeds in taking the subject property. The phrase “value of the property . . . that is intended to be taken”

applies in situations where a defendant is unsuccessful in taking property but otherwise satisfies the elements of the shoplifting statute. Considering the value of property that was intended to be taken in cases where property in fact was taken obscures the distinction mandated by the word “or.” Moreover, it renders the phrase “property that is taken” superfluous: if the value of property that is taken is not pertinent in a case in which property is taken, when would that value ever be relevant?

Second, considering the value of stolen goods brought into a pawn shop is not consistent with the plain language of the shoplifting statute. Such property is neither “taken” nor “intended to be taken” from the victim pawn shop. It is already in the defendant’s possession. The value of stolen goods outside the context of the pawn shop transaction may be relevant to a prosecution for the theft of those goods. However, the prosecution here concerned the theft from the pawn shop, not the theft from the original owner of the goods. Under the circumstances of this case, the only property that possibly could be “taken” or “intended to be taken” was money from the pawn shop. Once that money was taken, the relevant value for purposes of the shoplifting statute became the amount appellant took.

■ Proposition 47 contains a provision requiring that the initiative “be liberally construed to effectuate its purposes.” (Prop. 47, eff. Nov. 5, 2014, § 18; Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 74; see *People v. Tidwell* (2016) 246 Cal.App.4th 212, 219 [200 Cal.Rptr.3d 567] [“[t]he text of Proposition 47, as enacted by the voters, provides that ‘[t]his act shall be liberally construed to effectuate its purposes’ ”].) One of those purposes was to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.” (Voter Information Guide, *supra*, text of Prop. 47, p. 70.) (6) Pawning stolen goods is a form of theft that is neither violent nor, on the spectrum of crimes, particularly serious. Victim pawn shops are injured financially, “‘to the extent that they paid out or loaned money on the property.’ [Citation.]” (*People v. Davis* (1998) 19 Cal.4th 301, 319 [79 Cal.Rptr.2d 295, 965 P.2d 1165].) Section 459.5 says the relevant value to make the crime a misdemeanor instead of a felony is that “of the property that is taken” *or* of the property “intended to be taken.” If a petitioner or applicant who successfully pawned stolen goods can prove that he or she received \$950 or less in exchange for the stolen property—in other words, that the pawning of the goods did not injure the pawn shop beyond the \$950 threshold applicable in most theft cases—he or she should be entitled to relief under a liberally construed Proposition 47.

■ The problem for appellant is that she did not introduce any evidence, either in her application or at the hearing on her application, to establish that

the value of the property she received from the pawn shop was less than or equal to \$950. She asserted in her application that the value was less than \$950, and her attorney told the trial court, "I saw that the district attorney had slips from the pawnshop and they all appeared to be less than \$950." Counsel did not offer the slips into evidence, and neither counsel, appellant, nor any witness provided sworn testimony or a sworn affidavit about the value of the property appellant took from the pawn shop. Counsel's unsworn, unsupported statement about the contents of the slips is not evidence and accordingly is not sufficient to carry defendant's burden. (See, e.g., *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11 [2 Cal.Rptr.3d 683, 73 P.3d 541].) Even though the People did not contest counsel's representation, and we have no reason to doubt its veracity, appellant cannot rest upon the statement of her counsel to establish her eligibility for relief under Proposition 47. Regardless of the People's arguments, or lack thereof, it was appellant's initial burden to provide some evidence of the value of the property she took from the pawn shop. She cannot prevail without doing so.

Our determination that appellant's petition was deficient does not prevent her from filing another petition supported by sufficient proof of value. In any new petition, appellant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing she is eligible for relief. (*People v. Perkins, supra*, 244 Cal.App.4th at p. 140.)

DISPOSITION

We affirm the trial court's denial of appellant's application without prejudice to subsequent consideration of a new, properly supported application in accordance with this opinion.

Epstein, P. J., and Willhite, J., concurred.

[No. D068135. Fourth Dist., Div. One. Sept. 19, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
STEVEN NACHBAR, Defendant and Appellant.

THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) December 14, 2016, S238210.

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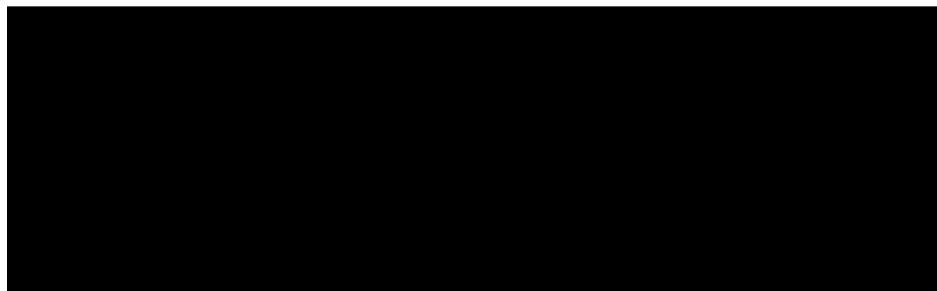
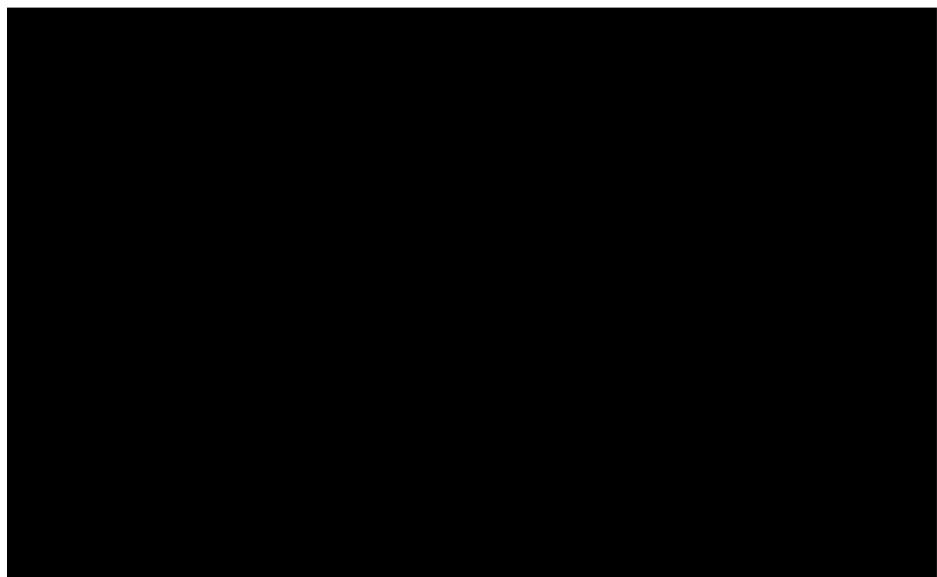
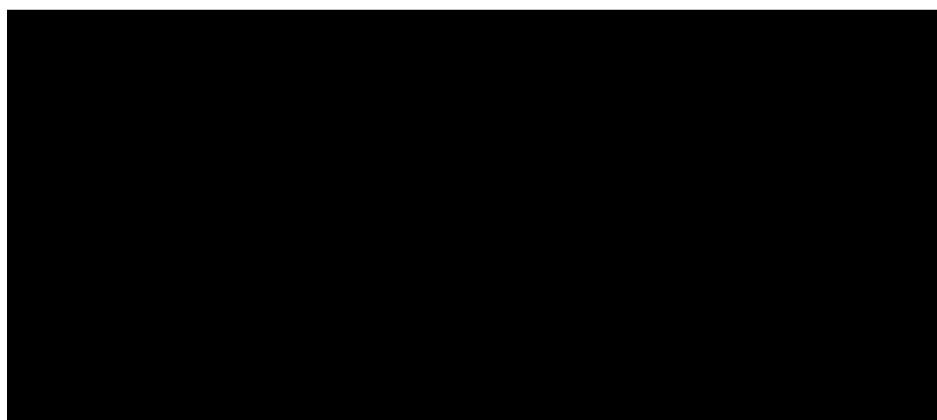
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COUNSEL

Daniel Yeager, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HALLER, J.—Defendant Steven Nachbar pleaded guilty to one count of unlawful sexual intercourse with a minor more than three years younger (Pen. Code,¹ § 261.5, subd. (c)). The court placed him on formal probation and required him to register as a sex offender. Defendant now challenges four of the conditions to his probation: that he (1) not have photographic equipment; (2) not have toys, video games, or similar items that attract children; (3) obtain approval of his residence from his probation officer; and (4) submit to warrantless and suspicionless searches of his computers and recordable media. We conclude defendant forfeited his challenges to the conditions regarding toys and residence approval because he did not object to them in the trial court. His challenges to the remaining probation conditions lack merit.

Defendant also contends the trial court erred by requiring him to register as a sex offender “for life” because he may someday obtain a certificate of

¹ All further statutory references are to the Penal Code.

rehabilitation that relieves him of the duty to continue registering. This argument also lacks merit. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2014, when defendant was 22 years old, he was placed on summary probation for having unlawful sexual intercourse with a minor, a 17-year-old girl. While on probation for that offense, defendant met the victim in this case, a 15-year-old girl. They met through a mutual friend, became friends on Facebook, and exchanged text messages. Several of defendant's text messages were sexually explicit and indicated he wanted to have sex with the victim. Some of the victim's responses were "OMG," "LOL," and that defendant was too old for her.

The victim's parents are divorced and live down the street from each other. On September 14, 2014, the victim told her father she would be staying at her mother's house that night. Her mother was out of town. The victim and defendant arranged to meet at the mother's house, but she told him he could not stay too long because it was a school night. Defendant arrived around 8:00 p.m. and they tried to watch a movie in the victim's bedroom on her cell phone. When they were unable to do so, the victim asked defendant to leave. Defendant said he wanted to cuddle, but the victim asked him to come back another time.

Instead of leaving, defendant grabbed the victim's breasts; she asked him to stop. Defendant moved his hands toward the victim's pants; she attempted to push his hands away. Defendant removed the victim's shirt and fondled her breasts. He reached underneath the victim's pants and underwear and digitally penetrated her vagina several times; she continued to tell defendant to stop. Defendant removed the victim's pants and underwear, got on top of her, and penetrated her vagina with his penis. The victim asked defendant to stop and was eventually able to push him off of her. She asked defendant to leave, and he exited her bedroom. The victim believed defendant had left the house.

The victim put on her clothes and informed a friend by text message that defendant had just raped her. The friend notified the victim's father, who notified law enforcement. When the victim left her bedroom, she saw defendant sleeping on the couch. When sheriff's deputies arrived, they found the victim crying on the driveway and defendant asleep on the couch.

Deputies woke, arrested, and admonished defendant. He initially denied having any sexual contact with the victim, stating he knew it would be wrong because she was only 15 years old. However, during transport, defendant

admitted he digitally penetrated the victim's vagina and had sexual intercourse with her. He denied the victim ever told him "no." Defendant said he was "'coming down'" from having smoked methamphetamine before meeting with the victim.

Defendant was charged in a four-count felony complaint with forcible rape (§ 261, subd. (a)(2)); sexual penetration using force (§ 289, subd. (a)(1)(A)); unlawful sexual intercourse with a minor more than three years younger (§ 261.5, subd. (c)); and penetration by a foreign object (§ 289, subd. (i)). Pursuant to a plea agreement, defendant pleaded guilty to the unlawful sexual intercourse count and the remaining counts were dismissed.

The probation officer's presentencing report assessed defendant as having a moderate to high risk of committing another sexual offense if released on probation, but stated that his chances of success would likely improve if he were "managed on formal probation with intensive monitoring and case planning."

The trial court sentenced defendant to 381 days in custody (which was set off by custody credits) and placed him on formal probation for three years. As relevant, the conditions of defendant's probation provide that he (1) not have photographic equipment; (2) not have toys, video games, or similar items that attract children; (3) obtain approval of his residence from his probation officer; and (4) submit to warrantless and suspicionless searches of his computers and recordable media.

The court also exercised its discretion to require that defendant register as a sex offender.² The court explained that although it understood the Act required that defendant register for life, and that the court thought requiring registration for "10 years or something like that would be appropriate," the court nonetheless required that defendant register because of how quickly he reoffended after his prior offense. Both the order granting formal probation and the judgment state defendant is to "[r]egister per . . . [Penal Code section] 290."

² The Sex Offender Registration Act (§ 290 et seq.; the Act) imposes *mandatory* lifetime registration for offenders convicted of certain enumerated offenses, and allows *discretionary* registration for others (including unlawful sexual intercourse with a minor). (§§ 290, subd. (b), 290.006; *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874 [183 Cal.Rptr.3d 96, 341 P.3d 1075].)

DISCUSSION

I. *Probation Conditions*

A. Applicable Legal Principles and Standard of Review

■ “Following a defendant’s conviction of a crime, the sentencing court may choose among a variety of dispositional options. One option is to release the offender on probation. ‘Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation.’ [Citation.] A grant of probation is ‘qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither “punishment” [citation] nor a criminal “judgment” [citation]. Instead, courts deem probation an act of clemency in lieu of punishment [citation], and its primary purpose is rehabilitative in nature [citation].’” (*People v. Moran* (2016) 1 Cal.5th 398, 402 [205 Cal.Rptr.3d 491, 376 P.3d 617] (*Moran*).) Accordingly, “a grant of probation is an act of grace or clemency, and an offender has no right or privilege to be granted such release.” (*Ibid.*) “Stated differently, ‘[p]robation is not a right, but a privilege.’” (*Ibid.*)

Consequently, a sentencing court may impose conditions to further the rehabilitative and protective purposes of probation. (*Moran*, *supra*, 1 Cal.5th at pp. 402–403.) Under *People v. Lent* (1975) 15 Cal.3d 481 [124 Cal.Rptr. 905, 541 P.2d 545] (*Lent*), “[a] condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality” (People v. *Olguin* (2008) 45 Cal.4th 375, 379 [87 Cal.Rptr.3d 199, 198 P.3d 1], quoting *Lent* at p. 486.) “This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*Olguin*, at p. 379; see *Moran*, at p. 403.)

“ ‘A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as []constitutionally overbroad.’ [Citation.] ‘The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.’ ” (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 [159 Cal.Rptr.3d 335].)

"As a general rule, failure to challenge a probation condition on constitutional or *Lent* grounds in the trial court waives the claim on appeal." (*In re*

Antonio C. (2000) 83 Cal.App.4th 1029, 1033 [100 Cal.Rptr.2d 218]; see *People v. Welch* (1993) 5 Cal.4th 228, 237 [19 Cal.Rptr.2d 520, 851 P.2d 802]; *In re Sheena K.* (2007) 40 Cal.4th 875, 889 [55 Cal.Rptr.3d 716, 153 P.3d 282].)

We generally review the imposition of probation conditions for an abuse of discretion, and constitutional challenges to probation conditions *de novo*. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 [199 Cal.Rptr.3d 637] (*Appleton*)).

B., C.*

.....

D. *Search of Computers and Recordable Media*

Defendant contends the probation condition that requires him to submit his computers and recordable media to suspicionless searches is unconstitutionally overbroad. We disagree.⁴

To support his position, defendant cites the Sixth District Court of Appeal's recent decision in *Appleton, supra*, 245 Cal.App.4th 717. The defendant in that case pleaded guilty to false imprisonment by means of deceit as part of a plea bargain after initially being charged with oral copulation with a minor, whom he had met via a social media smartphone application. (*Id.* at pp. 719–720.) The defendant was placed on probation, one of the conditions of which provided that the defendant's electronic devices “‘shall be subject to forensic analysis search for material prohibited by law.’” (*Id.* at p. 721.) The defendant appealed this condition on *Lent* and constitutional grounds. (*Id.* at pp. 721–722.)

The Court of Appeal found the electronics search condition did “not run afoul of the first *Lent* factor requiring ‘no relationship to the crime’” (*Appleton, supra*, 245 Cal.App.4th at p. 724), but concluded the condition was unconstitutionally overbroad (*id.* at pp. 725–727). The court reasoned the condition “would allow for searches of vast amounts of personal information unrelated to defendant’s criminal conduct or his potential future criminality” (*id.* at p. 727), such as his “medical records, financial records, personal diaries, and intimate correspondence with family and friends” (*id.* at p. 725). In reaching this conclusion, the *Appleton* court relied on the Supreme Court’s

*See footnote, *ante*, page 1122.

⁴ Although defendant did not object to this probation condition in the trial court, we decline to find a forfeiture because the authority on which he bases the argument did not yet exist.

rationale in *Riley v. California* (2014) 573 U.S. ____ [189 L.Ed.2d 430, 134 S.Ct. 2473] (*Riley*), which held that a warrantless search of a suspect's cell phone incident to arrest implicated and violated his Fourth Amendment rights. (*Riley*, at p. ____ [134 S.Ct. at p. 2493].) The Supreme Court emphasized the wealth of information contained in modern cell phones. (*Id.* at p. ____ [134 S.Ct. at pp. 2489–2490].) The *Appleton* court struck the probation condition and remanded for the trial court to fashion one more narrowly tailored. (*Appleton*, at pp. 728–729.)

■ More recently, in *In re J.E.* (2016) 1 Cal.App.5th 795 [205 Cal.Rptr.3d 28], our colleagues in the Court of Appeal for the First District, Division Four, concluded the *Riley* court's privacy concerns in the context of a search incident to arrest are inapposite in the context of determining the constitutional reasonableness of probation conditions allowing searches of electronic devices. (*In re J.E.*, at pp. 803–804.) As the *In re J.E.* court explained, unlike the defendant in *Riley* "who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence," a probationer does not enjoy "'the absolute liberty to which every citizen is entitled.'" (*In re J.E.*, at p. 804.) That is, "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*Ibid.*, quoting *United States v. Knights* (2001) 534 U.S. 112, 119 [151 L.Ed.2d 497, 122 S.Ct. 587].) The court recognized that although electronics may be a "bottomless pit" of personal information, "courts have historically allowed . . . probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read." (*In re J.E.*, at p. 804, fn. 6.) The court noted the absence of evidence in the record indicating the probationer's electronics contained any of these types of sensitive information. (*Ibid.*) The court further noted that the Supreme Court in *Riley* clarified that although cell phone data is subject to Fourth Amendment protection, it is not "'immune from search.'" (*In re J.E.*, at p. 804, quoting *Riley, supra*, 573 U.S. at p. ____ [134 S.Ct. at p. 2493].) The *In re J.E.* court thus concluded that although the probationer's right to privacy was *implicated* by the electronics search condition, the right was not *violated* under the circumstances. (*In re J.E.*, at p. 805.)

We find *In re J.E.* persuasive. As a defendant who has pleaded guilty to a felony and accepted probation in lieu of additional punishment, defendant has a diminished expectation of privacy as compared to law-abiding citizens or those subject to searches incident to arrest. Thus, we conclude the privacy concerns voiced in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition.

We further conclude the probation condition is suitably tailored in light of the substantial protective and rehabilitative concerns demonstrated by the record. The condition is related to defendant's crime because he communicated with his victim via social media, sent her sexually explicit text messages, and intended to watch a movie with her on a mobile device on the date of the offense.⁵ Defendant reoffended with a younger victim within a matter of mere months, while already on probation. His psychological evaluation revealed he is sexually attracted to adolescents and "has some emotional difficulties and anxieties regarding interpersonal relationships that place him at a higher risk for engaging in sexual acts with younger persons." And the probation officer reported defendant had a moderate to high risk of reoffending if released on probation, and his chances of success would likely improve if he were "intensive[ly] monitor[ed]." Under these circumstances, we conclude the probation condition allowing searches of defendant's computers and recordable media is reasonable.

E. *Residence Approval*^{*}

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II. *Sex Offender Registration*^{*}

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DISPOSITION

The judgment is affirmed.

Huffman, Acting P. J., and Nares, J., concurred.

Appellant's petition for review by the Supreme Court was granted December 14, 2016, S238210.

⁵ The issue of whether an electronics search probation condition may be imposed upon a juvenile when that condition has *no relationship* to the crimes committed is currently pending before our Supreme Court. (See *In re Ricardo P.* (2015) 241 Cal.App.4th 676 [193 Cal.Rptr.3d 883], review granted Feb. 17, 2016, S230923.)

*See footnote, *ante*, page 1122.

[No. G051391. Fourth Dist., Div. Three. Sept. 14, 2016.]

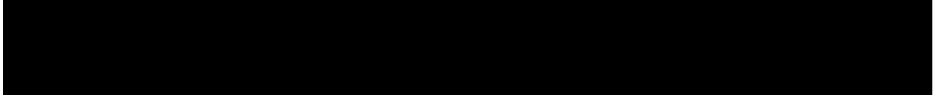
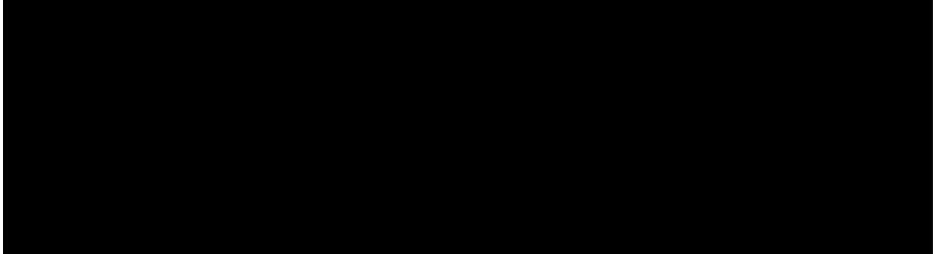
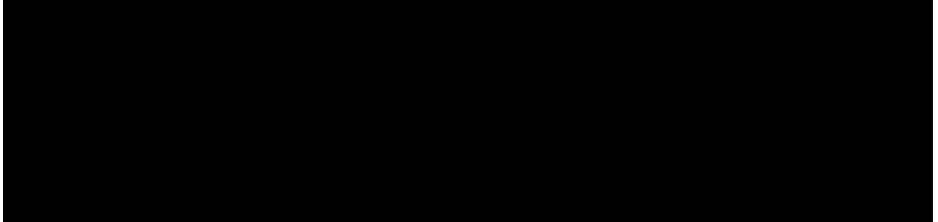
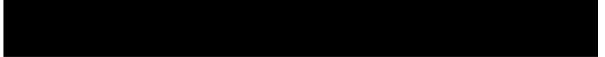
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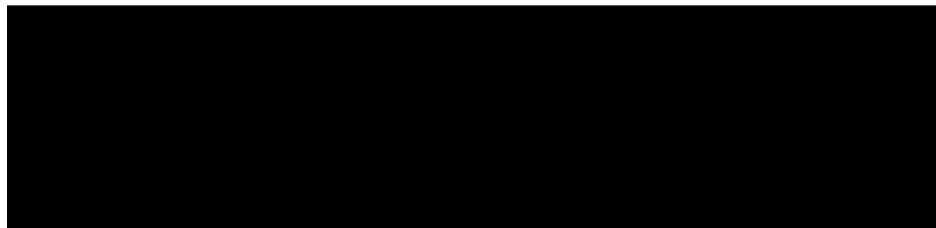
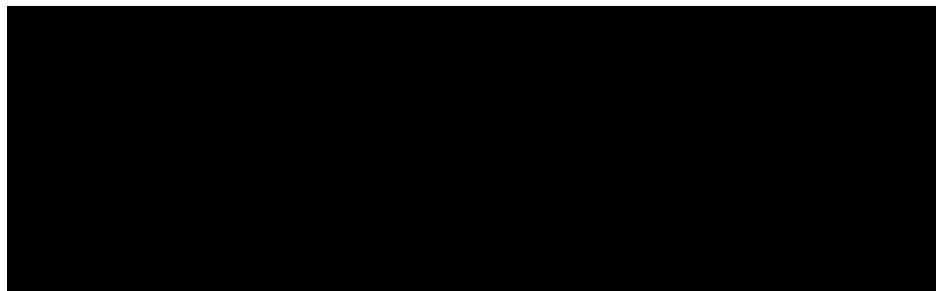
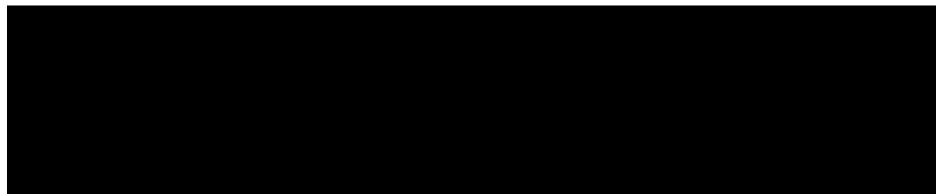
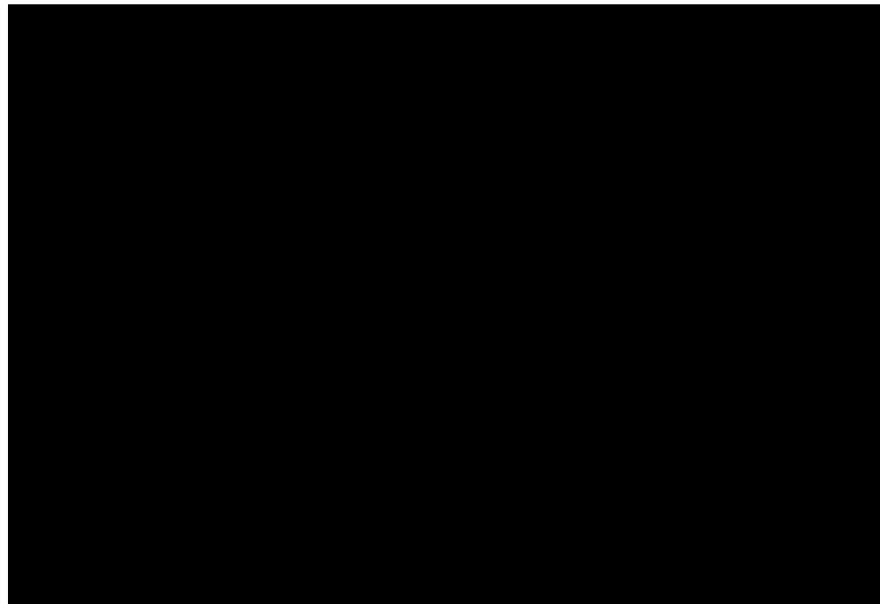
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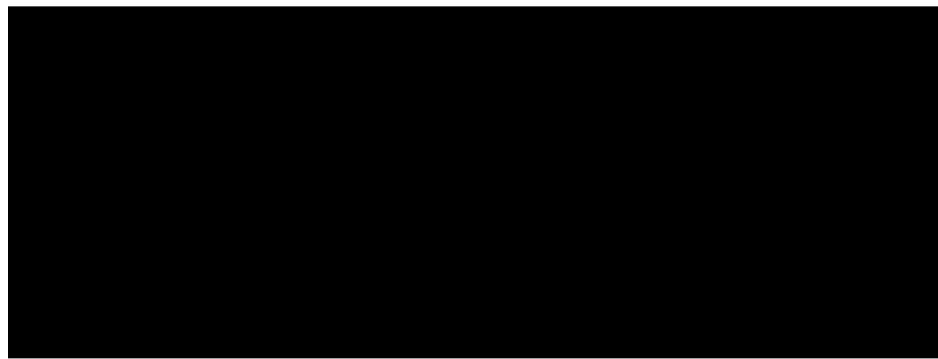
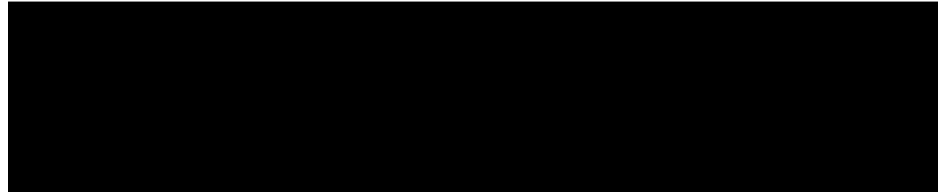
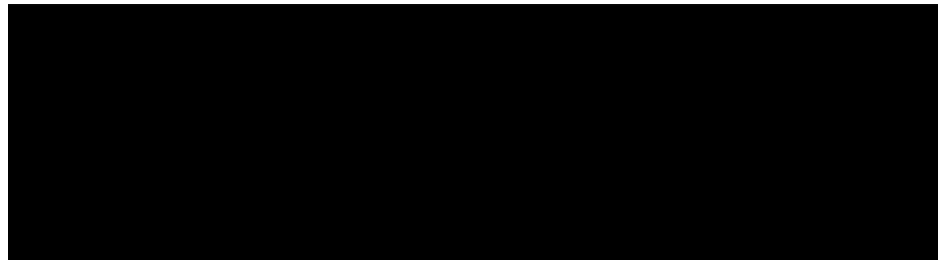
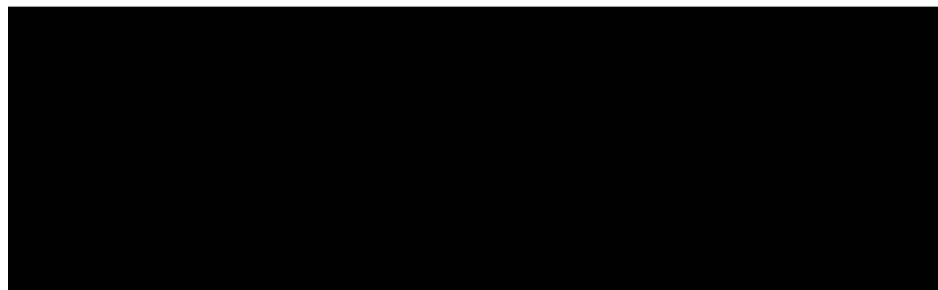
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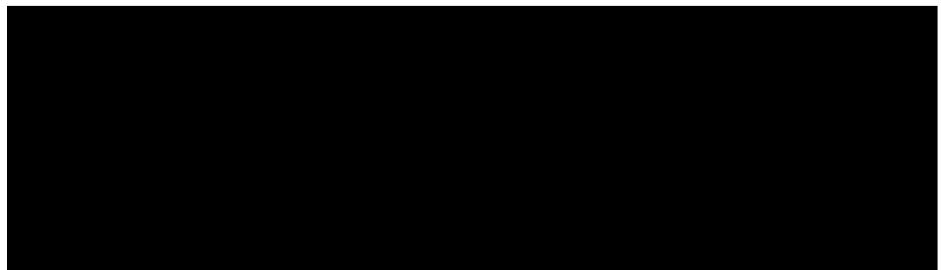
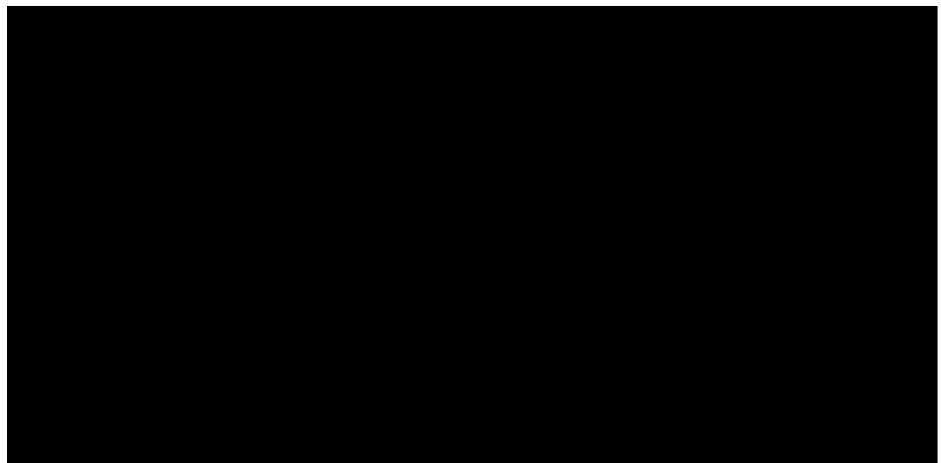
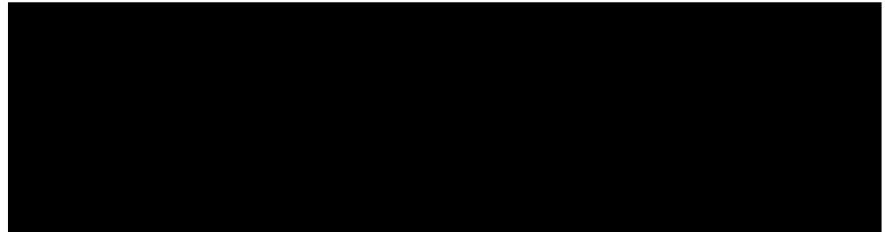
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COUNSEL

Law Office of Barry Kramer, Barry L. Kramer; Carpenter Law and Gretchen Carpenter for Plaintiff and Appellant.

Shulman Hodges & Bastian, Ronald S. Hodges, Gary A. Pemberton and Heather B. Dillion for Defendants and Respondents.

OPINION

MOORE, J.—A person receiving medical treatment at a hospital’s emergency room who pays for it out of pocket can be charged substantially more for that care than one who is covered by either a government-sponsored program or private insurance. This case concerns whether one can maintain an action challenging this variable pricing practice under the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.), the Consumer Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.), or for declaratory relief (Code Civ. Proc., § 1060). While most of the claims asserted by plaintiff Gene Moran lack merit, we conclude he has sufficiently alleged facts supporting a conclusion he has standing to claim the amount of the charges defendants’ hospital bills self-pay patients is unconscionable. Therefore, we reverse the trial court’s judgment of dismissal in this case.

I**BACKGROUND**

On three occasions in October 2013, plaintiff, “a self-pay patient,” went to the emergency room of a hospital owned and operated by defendants Prime Healthcare Management, Inc., Prime Healthcare Services, Inc., Prime Healthcare Foundation, Inc., and Prime Healthcare Huntington Beach, LLC. Each time, he signed a printed conditions of admission agreement (Contract) and received medical treatment. Subsequently, plaintiff received bills from the hospital for the treatment provided during the three visits that exceeded \$10,000.¹

In November 2013, plaintiff filed this putative class action against defendants. The initial complaint stated causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the UCL, restitutionary relief under the CLRA, and declaratory relief. Plaintiff subsequently dropped the first and second counts. His first amended complaint also expanded the scope of the CLRA cause of action to include a request for damages by alleging that he complied with the statutory requirement of giving defendants notice of the purportedly unlawful practice and a demand for correction of it. Although verbose, confusing, containing contradictory allegations, and contentions of law, each iteration of the complaint is

¹ The hospital continued to send bills to plaintiff even after he filed this action. But in July 2014, plaintiff received a letter from the hospital stating that after “administrative review of [his] account,” the account balance had been reduced to “zero.” The letter also informed plaintiff the hospital would send him a check to refund his previous payment of \$50. At oral argument, defendants made clear they contend plaintiff lacks standing because he never suffered injury in fact or an imminent threat of injury, not that their unilateral action in July 2014 eliminated his standing.

based on allegations the rates defendants charge self-pay patients are discriminatory, exceed the reasonable value of the treatment, and are “artificially inflated and grossly excessive.”

Defendants demurred to the first and the second amended complaints, arguing the counts in each pleading failed to allege facts sufficient to state a cause of action. The trial court sustained both demurrers with leave to amend. Plaintiff filed a third amended complaint (TAC), again stating causes of action for violations of the UCL, CLRA, and declaratory relief.

Attached to the TAC was one of the Contracts plaintiff signed. The Contract contains several paragraphs relevant to a patient’s financial obligation for medical treatment and services. However, the TAC primarily focuses on only two of these clauses. Paragraph 16 states in part: “I . . . understand that I am responsible to the hospital and physician(s) for all reasonable charges, listed in the hospital charge description master^[2] and if applicable the hospital’s charity care and discount payment policies and state and federal law incurred by me and not paid by third party benefits.” Paragraph 18 provides: “You may be eligible for the Charity Care and Discounted Payment Program. Please contact the business office.” Copies of the hospital’s charity care and discounted payment policies manual and forms are attached to the TAC. The TAC alleges “[n]othing in the Contract requires” a patient apply for financial assistance and mentions several reasons why a person would not want to do so.

Although not mentioned in his prior pleadings, the TAC also alleges that, “before receiving bills . . . , Plaintiff sent correspondence to [the] Hospital,” informing it that he “was currently unemployed and uninsured and asking that the hospital ‘take into consideration my financial status of being unemployed and not having insurance in addressing the bill,’ ” and expressing his desire “‘to take care of this immediately with what [he had] available right now, not knowing what [his] future monetary situation will be during this recession.’ ” According to the TAC, the hospital never responded to plaintiff’s correspondence.

Defendants demurred to the TAC, again arguing each of its counts failed to state a cause of action. This time, the trial court sustained the demurrer without leave to amend, primarily concluding plaintiff had failed to allege sufficient facts to establish his standing to maintain the action.

² Throughout their appellate briefs, the parties refer to the phrase “charge description master” as “the chargemaster rates.”

II

DISCUSSION

A. *Introduction*

This case involves an appeal from a judgment for defendants entered after the trial court sustained their demurrer to plaintiff's TAC without leave to amend.

Our scope of review is well established. "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)

The parties' appellate briefs focus on the issue of whether plaintiff had standing to maintain his causes of action alleging violations of the UCL and CLRA. On appeal, "[w]e perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action." (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1536 [178 Cal.Rptr.3d 897].) Thus, "we do not review the validity of the trial court's reasoning," nor are we "bound by the trial court's construction of the complaint, but must make [our] own independent interpretation." (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958 [93 Cal.Rptr.2d 413].)

B. *The UCL*1. *Background*

Plaintiff's first cause of action seeks restitutionary and injunctive relief under the UCL.

The TAC alleges defendants' Contract violates the UCL on several grounds. It alleges the charges billed to self-pay patients seeking emergency care are discriminatory because "self-pay emergency care patients signing" the Contract "reasonably expected and relied on the[] reasonable belief that they would be billed at the same rates as those applicable to other patients signing the same Contract and receiving similar emergency treatment/services." The TAC also asserts self-pay patients "reasonably expected to be billed at rates which reflected no more than the *reasonable value* of the treatment and services," and were "not expecting to be billed at the artificial and grossly excessive rates for which they were subsequently billed." Another claim is that defendants "fail to inform and/or conceal from . . . self-pay patients" the "uniform policy" of charging them the higher rates.

■ Business and Professions Code section 17200 declares "unfair competition" includes "any unlawful, unfair or fraudulent business act or practice." Cases have recognized "the unfair competition law's scope is broad," covering "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [83 Cal.Rptr.2d 548, 973 P.2d 527] (*Cel-Tech*).) In addition, "[b]ecause Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.''" (*Ibid.*)

However, "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." (*Cel-Tech, supra*, 20 Cal.4th at p. 182.) Thus, "[i]n any unfair competition case, *Cel-Tech* requires us to engage in a two-step process. First, we determine whether the Legislature has provided a 'safe harbor' for the defendant's alleged conduct. If not, we determine whether that conduct is unfair." (*McCann v. Lucky Money, Inc.* (2005) 129 Cal.App.4th 1382, 1387 [29 Cal.Rptr.3d 437]; see *Cel-Tech, supra*, 20 Cal.4th at p. 187.)

■ A further constraint on UCL actions limits an action by a private party to one who "meets the standing requirements." (Bus. & Prof. Code, § 17203.) Thus, to maintain a private enforcement action under the UCL, a plaintiff must be "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

2. *The Safe Harbor Defense*

Defendants contend plaintiff cannot maintain his UCL cause of action because the hospital's variable pricing regimen has been legislatively endorsed. We conclude this argument has only partial merit.

■ In *Cel-Tech, supra*, 20 Cal.4th 163, the Supreme Court recognized the safe harbor doctrine "does not . . . prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct. There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful." (*Id.* at pp. 182–183.)

■ As for plaintiff's discriminatory pricing claim, we conclude the safe harbor defense applies. Business and Professions Code section 16770, subdivision (f), states "[t]he Legislature . . . finds and declares that the public interest in ensuring that citizens of this state receive high-quality health care coverage in the most efficient and cost-effective manner possible is furthered by permitting negotiations for alternative rate contracts between purchasers or payers of health care services, and institutional and professional providers, or through a person or entity acting for, or on behalf of, a purchaser, payer, or provider." Also Business and Professions Code section 17042, subdivision (c) states, "A differential in price for any article or product as between any customers in different functional classifications" is not prohibited by the Unfair Practices Act (Bus. & Prof. Code, § 17000 et seq.). These statutes permit the use of variable pricing. Thus, to the extent plaintiff alleges defendants violated the UCL by discriminatorily charging self-pay patients more than patients covered by government programs or private insurance, his argument fails.

However, as noted above, plaintiff further argues he expected to pay either the same amount for the medical services provided as other patients receiving the same treatment or only the reasonable value of those services, but was billed at what he describes as "artificial and grossly excessive rates." Defendants claim the Hospital Fair Pricing Act (Health & Saf. Code, § 127400 et seq.) defeats this latter allegation.

■ The Hospital Fair Pricing Act requires licensed hospitals to maintain and administer "an understandable written policy regarding discount payments for financially qualified patients as well as an understandable written charity care policy" and details mandatory requirements for the policy. (Health & Saf. Code, § 127405, subd. (a)(1)(A).) The Act further provides it shall not

“be construed to prohibit a hospital from uniformly imposing charges from its established charge schedule or published rates, nor shall this article preclude the recognition of a hospital’s established charge schedule or published rates for purposes of applying any payment limit.” (Health & Saf. Code, § 127444.) But it also declares “[t]he rights, remedies, and penalties established by this article are cumulative, and shall not supersede the rights, remedies, or penalties established under other laws.” (Health & Saf. Code, § 127443.)

Thus, the Hospital Fair Pricing Act imposes on licensed hospitals the requirement that they establish, give notice of, and administer financial aid and charity care policies, and allows a hospital to bill for treatment and services based on its own schedule of fees. However, it does not preclude claims based on what a patient allegedly expected to pay or authorize costs that are allegedly exorbitant. Consequently, the Act neither “‘bar[s]’ [an] action” under the UCL, nor does it “clearly permit” a hospital to charge self-pay emergency care patients “artificial and grossly excessive rates.” (*Cel-Tech, supra*, 20 Cal.4th at p. 183.)

3. *Unlawful Acts or Practices*

Plaintiff’s UCL cause of action sought recovery on all three grounds listed in Business and Professions Code section 17200. The applicability of each variety of unfair competition is governed by different legal standards. We consider each ground separately.

■ Under the unlawful prong, “‘the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.’ [Citation.] Thus, a violation of another law is a predicate for stating a cause of action under the UCL’s unlawful prong.” (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554 [62 Cal.Rptr.3d 177].)

To support the unlawful prong, plaintiff alleges defendants’ billing and collection practices “violate[d] the [CLRA] as set forth” in the TAC’s second cause of action. The latter count is based on four grounds: (1) “Defendants’ acts and practices constitute misrepresentations that the services and/or supplies in question had characteristics uses and/or benefits which they did not have” (see Civ. Code, § 1770, subd. (a)(5)); (2) “Defendants’ acts and practices constitute misleading statements of fact concerning reasons for, existence of, or amounts of price reductions” (see Civ. Code, § 1770, subd. (a)(13)); (3) “Defendants represent[ed] that a transaction involves obligations which it does not have or involve, or which are prohibited by law” (see Civ. Code, § 1770, subd. (a)(14)); and (4) “Defendants insert[ed] an unconscionable provision into their Contracts” (see Civ. Code, § 1770, subd. (a)(19)).

■ As noted, to support a private action under the UCL, plaintiff needs to allege standing. (Bus. & Prof. Code, § 17204.) “To satisfy the narrower standing requirements imposed by [the enactment of Business and Professions Code section 17204], a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the *gravamen* of the claim.” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 [120 Cal.Rptr.3d 741, 246 P.3d 877]; see *Sarun v. Dignity Health* (2014) 232 Cal.App.4th 1159, 1166 [181 Cal.Rptr.3d 545] (*Sarun*).)

Plaintiff argues he satisfied the standing requirement because “he received a bill from [defendants], paid a portion of that bill, and [until defendants later unilaterally returned his payment and eliminated all charges], remained liable on the balance.” This allegation supports plaintiff’s claim that he suffered the requisite economic injury required to maintain a private enforcement action under the UCL. “Although [defendants] had not begun any collection activity, the existence of an enforceable obligation, without more, ordinarily constitutes actual injury or injury in fact.” (*Sarun, supra*, 232 Cal.App.4th at p. 1167; see *Kwikset Corp. v. Superior Court, supra*, 51 Cal.4th at p. 325 [recognizing “a monetary payment in response to an unlawful debt collection demand” constitutes economic injury].)

■ But the first three grounds cited in the TAC supporting the unlawful prong of the UCL cause of action involve allegations of misrepresentation. To satisfy the causation element “under the ‘unlawful’ prong of the UCL, in which the predicate unlawful conduct is based on misrepresentations,” a plaintiff “must show actual reliance on the alleged misrepresentation, rather than a mere factual nexus between the business’s conduct and the consumer’s injury.” (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1355 [108 Cal.Rptr.3d 682]; see *Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1385 [108 Cal.Rptr.3d 669] (*Hale*)).

The decision in *Durell* presents an analogous situation. That case also involved a patient lacking health insurance coverage who went to the defendants’ hospital emergency room on several occasions, each time signing an admissions agreement that obligated him to pay the “‘usual and customary charges for . . . services.’” (*Durell v. Sharp Healthcare, supra*, 183 Cal.App.4th at p. 1356.) After being billed for the hospital’s full standard rates, Durell sued. In part, he alleged the hospital’s disparate billing practices that required uninsured patients to pay its full standard rate for medical care while patients covered by government programs and private insurance paid a lesser amount constituted an unlawful business practice. To support this claim, Durell alleged the defendants’ pricing policy violated provisions of CLRA, all of which involved making a false or misleading representation.

■ The Court of Appeal affirmed a judgment dismissing the action after sustaining the defendants' demurrer to the second amended complaint. The appellate court held, “[a] consumer's burden of pleading causation in a UCL action should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes.” (*Durell v. Sharp Healthcare, supra*, 183 Cal.App.4th at p. 1363.) It cited the California Supreme Court's decision in *In re Tobacco II Cases* (2009) 46 Cal.4th 298 [93 Cal.Rptr.3d 559, 207 P.3d 20], which held Business and Professions Code section 17204's “‘as a result of’” requirement “imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong” (*In re Tobacco II Cases, supra*, 46 Cal.4th at p. 326). Relying on that decision, *Durell* held where “as here, the predicate unlawfulness is misrepresentation and deception[,] . . . the ‘concept of reliance’ unequivocally applies.” (*Durell v. Sharp Healthcare, supra*, 183 Cal.App.4th at p. 1363.) Since *Durell* did not allege [he] relied on either [the hospital's] Web site representations or on the language in the Agreement for Services in going to [the hospital] or in seeking or accepting services once he was transported there,” or that he “ever visited [the hospital's] Web site or even . . . ever read the Agreement for Services” (*ibid.*), his amended complaint failed to state a cause of action under the UCL's unlawful prong. (*Durell v. Sharp Healthcare, supra*, at p. 1364.)

In the present case, plaintiff alleged he signed defendants' Contract each time he visited the emergency room. While plaintiff's TAC asserts that he “reasonably expected to be billed and to pay at the same rates as other emergency care patients signing the same Contract and receiving similar emergency care,” or would “not be required to pay more than the *reasonable value* of the treatment/services received,” plaintiff never alleged that he actually read or relied on the Contracts. Nor does plaintiff allege that he relied on other oral or written representations made by defendants or any of their employees concerning how much he would be charged for the medical treatment provided to him.

Plaintiff relies on the related opinion issued by the same appellate court in *Hale, supra*, 183 Cal.App.4th 1373, to support his argument, plus *Sarun, supra*, 232 Cal.App.4th 1159. *Sarun* does not help plaintiff in this context. It did not involve allegations that the defendant misrepresented the nature of its medical charges. Rather, *Sarun* addressed whether an uninsured patient who had paid a portion of his bill and remained obligated to pay the balance of it had adequately alleged he suffered damage under the UCL and CLRA even though he failed “to seek financial assistance,” under the hospital's discounted billing policy. (*Sarun, supra*, at p. 1168.)

However, *Hale* is similar to *Durell* and the present case. In *Hale*, the plaintiff was admitted to the defendants' hospital after signing an admission

agreement obligating her “‘to pay . . . the hospital in accordance with [its] regular rates and terms.’” (*Hale, supra*, 183 Cal.App.4th at pp. 1377–1378.) The appellate court reversed a judgment dismissing the action as to Hale’s UCL and CLRA causes of action. Citing the amended complaint’s allegation that “Hale signed the Admission Agreement, and ‘at the time of signing the contract, she was *expecting* to be charged “regular rates,”’” the appellate court concluded, “‘to the extent [she] is bringing a fraud-based claim under the UCL, she has reasonably pled reliance.’” (*Hale, supra*, at p. 1385.) In reaching this conclusion, *Hale* rejected the defendants’ assertion Hale “would not have seen the Admission Agreement until after she arrived at the hospital” noting “[i]t is possible, however, for a person who has arrived at the hospital to rely on the Admission Agreement in deciding whether to proceed with treatment.” (*Id.* at p. 1386.)

Plaintiff’s TAC also alleges his expectations concerning payment for the emergency medical services provided to him. But we conclude *Hale* is distinguishable from this case and, in any event, plaintiff’s allegations concerning what he expected to pay for defendants’ medical treatment are contradicted by the agreements he signed.

First, in *Hale* the language of the hospital’s admissions contract at issue in *Hale* referred to payment at “‘regular rates.’” (*Hale, supra*, 183 Cal.App.4th at p. 1378.) The plaintiff challenged the hospital’s billing on the ground that rather than the “‘‘regular rates’’” she was expecting to pay, the hospital sent a bill for “‘grossly excessive rates.’” (*Id.* at p. 1385.) Plaintiff signed admission agreements obligating him to pay “all reasonable charges, listed in the hospital charge description master and if applicable” defendants’ “charity care and discount payment policies” or “state and federal law incurred by me and not paid by third party benefits.” It is not clear whether the phrase “all reasonable charges” refers to the fairness of the cost of the treatment or to the scope of that treatment. But even assuming it is the former, this paragraph is not consistent with plaintiff’s allegation that he “reasonably expected . . . that [he] would be billed at [either] the same rates as those applicable to other patients signing the same Contract and receiving similar emergency treatment” or “at rates which reflected no more than the *reasonable value* of the treatment.”

■ First, even assuming plaintiff actually read the Contract, he cannot prevail on a theory that he expected to pay the same amount as other patients covered by government programs or private insurance. As noted, plaintiff attached a copy of one of the Contracts to the TAC and relied on the terms of the agreement to support his expectation theories. “While the ‘allegations [of a complaint] must be accepted as true for purposes of demurrer,’ the ‘facts appearing in exhibits attached to the complaint will also be accepted as true

and, if contrary to the allegations in the pleading, will be given precedence.’’ (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767 [153 Cal.Rptr.3d 1]; see *Alphonzo E. Bell Corp. v. Bell etc. Synd.* (1941) 46 Cal.App.2d 684, 691 [116 P.2d 786] [“conclusions of the pleader . . . contrary to the express terms of [an] instrument . . . made a part of the complaint” are treated “as surplusage”].)

■ In this case, plaintiff bases his claims for relief on the terms of an express contract. When interpreting a contract, a court must consider the “clear and explicit” “language of [the] contract” (Civ. Code, § 1638), generally construing “[t]he words . . . in their ordinary and popular sense . . . unless used by the parties in a technical sense” (Civ. Code, § 1644), and taking “[t]he whole of [the] contract . . . together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other” (Civ. Code, § 1641).

Plaintiff’s assertion that he expected to pay no more than patients covered by government programs or private insurance is contradicted by the language of the Contracts he signed. The agreements included paragraphs requiring an insured patient to “irrevocably assign[]” his or her “insurance benefits” for the services and treatment rendered by the hospital and hospital-based physicians, and advised an insured patient that he or she will be “personally responsible for payment of . . . charges” if the “insurance does not cover” them. Another paragraph informed Medicare-eligible patients that some procedures “may not be covered” and authorized the hospital to “release certain medical information about the patient to the Social Security Administration . . . for this or a related Medicare claim.”

Paragraph 16 itself also conflicts with plaintiff’s interpretation of the Contract. It states a patient is obligated to pay “all reasonable charges, listed in the hospital charge description master and if applicable the hospital’s charity care and discount payment policies and state and federal law incurred by me and not paid by third party benefits.” The latter clause modifies the phrase “all reasonable charges,” reflecting charges to patients covered by government programs, or receiving “third party benefits,” or who are eligible for either the hospital’s charity care or discount programs would differ from the amounts “listed in the hospital charge description master.”

■ Second, as for plaintiff’s reasonable value claim, in the case of an express contract, reasonable value applies only when the agreement “does not determine the amount of consideration, nor [provide] the method by which it is to be ascertained.” (Civ. Code, § 1611.) “[I]t is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation.” (*Hedging*

Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 Cal.App.4th 1410, 1419 [49 Cal.Rptr.2d 191].) The actual amount plaintiff would be obligated to pay for the hospital's medical treatment is not listed in the Contract. But the agreements provided a means by which a patient can ascertain the amount due for the treatment and services reasonably provided. Because this case involves an express contract containing a means of determining what plaintiff would have to pay for his medical care, his reliance on the reasonable value discussion in *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260 [172 Cal.Rptr.3d 861] lacks merit. That case concerned reimbursement for services during a 10-month period when the parties *did not have* a contractual relationship. Thus, plaintiff's reliance on a reasonable value theory lacks merit.

Finally, we note the TAC acknowledges plaintiff did not have a reasonable expectation that he would pay no more than other patients. Paragraph 34 of the TAC alleges “[p]atients covered by insurance, including governmental and private insurance . . . reimburse Defendants based on governmentally regulated or privately negotiated rate structures rather than Chargemaster rates.” The TAC further states, “Defendants’ Chargemaster rates are not amounts which Defendants expect to be paid by any category of patient.”

Thus, to the extent plaintiff relies on purported violations of the CLRA premised on misrepresentation, his claim that defendants' business practice is unlawful fails because he does not allege facts supporting a finding he actually relied on or could reasonably rely on any misrepresentation in seeking medical treatment at defendants' hospital.

The remaining basis cited by plaintiff for the “unlawful” prong of his UCL cause of action is that the Contract’s financial liability provision is unconscionable. The TAC alleged in part, plaintiff was “not expecting to be billed at the artificial and grossly excessive rates for which [he was] subsequently billed.” To support this assertion, the TAC stated defendants’ charges for medical treatment “are not tethered to their actual costs,” but are “four to six times” those costs “and far beyond any reasonable profit margin.” Further, it is claimed defendants’ charges are intended “to boost hospital reimbursement rates, as well as reflect a higher level of Charity contribution and Financial Assistance given to the local community.” Thus, “Defendants’ pricing, billing and collection practices have a significant detrimental impact on the large population of self-pay emergency care patients.”

“The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as “‘overly harsh’” [citation], “‘unduly oppressive’” [citation], “‘so one-sided as to ‘shock the conscience’’” [citation], or “‘unfairly one-sided’”

[citation]. All of these formulations point to the central idea that unconscionability doctrine is concerned not with “a simple old-fashioned bad bargain” [citation], but with terms that are “unreasonably favorable to the more powerful party.”’’’ (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910–911 [190 Cal.Rptr.3d 812, 353 P.3d 741].) A claim of contractual unconscionability, “‘‘has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.’’’ (*Id.* at p. 910.) “‘‘The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ‘‘which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’’’’’ (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133 [163 Cal.Rptr.3d 269, 311 P.3d 184].) “‘‘Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.’’’’ (*Ibid.*)

The Contracts plaintiff signed were printed documents and the TAC alleged all emergency room patients must sign the same document before being treated. These averments support a finding of procedural unconscionability.

■ As for substantive unconscionability, the price term of a contract can be the basis for relief. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926 [216 Cal.Rptr. 345, 702 P.2d 503]; *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1323 [27 Cal.Rptr.3d 797].) But “[a]llegations that the price exceeds cost or fair value, standing alone, do not state a cause of action.” (*Perdue v. Crocker National Bank*, *supra*, 38 Cal.3d at p. 926.) “The courts look to the basis and justification for the price [citation], including ‘the price actually being paid by . . . other similarly situated consumers in a similar transaction.’” (*Id.* at pp. 926–927.) In addition, “courts consider not only the market price, but also the cost of the goods or services to the seller [citations], the inconvenience imposed on the seller [citation], and the true value of the product or service.” (*Id.* at p. 927; see *Morris v. Redwood Empire Bancorp*, *supra*, 128 Cal.App.4th at p. 1323.)

■ This case concerns the cost of medical care provided to uninsured patients visiting defendants’ hospital emergency room. Plaintiff has alleged that defendants’ charge description master rates not only far exceed the actual cost of care and provide for a large profit margin, he further maintains the purpose of defendants’ charging excessive costs to self-pay patients is to increase the hospital’s reimbursement for medical care by dramatically increasing its profit margin for treatment to persons particularly vulnerable because they are in need of emergency medical care. Generally, “[u]nconscionability is a question of law for the court,” but “factual issues may bear on

that question.” (*Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 480 [37 Cal.Rptr.3d 544]; see *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892 [71 Cal.Rptr.3d 854].) Also, the Legislature has mandated that “[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.” (Civ. Code, § 1670.5, subd. (b).)

■ To the extent plaintiff alleges the financial liability provision of defendants’ Contract is unconscionable, we conclude he has sufficiently stated a cause of action under the unlawful prong of the UCL.

4. *Fraudulent Acts or Practices*

The TAC enumerates several grounds supporting the fraud prong of plaintiff’s UCL cause of action. It alleges defendants “fail[ed] to inform and/or conceal[ed] from . . . self-pay patients” their “uniform policy to bill and require payment from self-pay patients at rates . . . higher than rates paid by other patients signing the same [c]ontract.” Other claims are the Contract “misrepresent[ed] . . . the[] ‘charge description master’ rates constitute ‘reasonable charges,’ ” and “attending physician(s) . . . list their charges in the Hospital’s charge description master,” and that the Contract “contains confusing, conflicting, and unintelligible provisions.” As for the Contract’s financial aid provision, the TAC avers it “requires an uninsured patient, as a prerequisite to challenging the amount of a . . . bill, to first apply for Charity and Financial Aid programs,” obligates “an uninsured patient . . . provide total strangers with extensive personal and financial information . . . as a prerequisite for challenging a bill,” but “nevertheless compute[s] and send[s] out bills . . . to such patients at the Hospital’s [charge description master] rates.” Finally, the TAC maintains defendants “bill uninsured patients at [charge description master] rates, when the[] . . . [c]ontract does not permit billing at such rates,” and “seek to collect from uninsured patients billed charges that are so excessive and unreasonable as to be unconscionable.”

■ Many of the alleged bases for plaintiff’s fraud theory do not involve conduct that is likely to deceive a consumer or contradict the language of the Contracts he signed. Also, as discussed above, the UCL’s fraud prong generally “‘require[s] . . . a showing that members of the public are likely to be deceived.’ ” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 81 [163 Cal.Rptr.3d 804].) To establish a private party’s standing to maintain a UCL cause of action under the fraud prong *In re Tobacco II Cases, supra*, 46 Cal.4th 298, held the phrase “as a result of” appearing in Business and Professions Code section 17204 “imposes an

actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL’s fraud prong.” (*In re Tobacco II Cases, supra*, 46 Cal.4th at p. 326.) Given our prior discussion of this issue, no basis exists to conclude plaintiff’s complaint supports recovery under the UCL’s fraud prong.

5. *Unfair Acts or Practices*

To support his claim under the “unfair” prong of the UCL, plaintiff alleges defendants “fail[ed] to charge [self-pay emergency room patients] reasonable rates as required by the terms of the[] Contract[], and instead interpret[ed] the[] Contracts to collect exorbitant amounts . . . expressly prohibited under the federal tax code, and in violation of the [CLRA],” and which “offend established public policies, . . . are immoral, unethical, oppressive, and unscrupulous.”³

Cases have employed three different criterion to determine whether a business practice is “unfair” under the UCL. One states “‘[a]n ‘unfair’ business practice occurs when that practice ‘offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’’’’ (*Lueras v. BAC Home Loans Servicing, LP, supra*, 221 Cal.App.4th at p. 81.) A second rule provides “‘the public policy which is a predicate to the action must be ‘tethered’ to specific constitutional, statutory or regulatory provisions.’’’ (*Ibid.*) A third holds “‘[a]n act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided.’” (*Berryman v. Merit Property Management, Inc., supra*, 152 Cal.App.4th at p. 1555.)

The TAC appears to rely on both the first and second approaches to support a claim under the UCL’s unfair prong. In any event, it is not necessary to resolve the appropriate standard under the unfair prong. As discussed above, plaintiff has alleged sufficient facts to maintain his UCL cause of action on the basis defendants’ billing the full amount to self-pay patients is unconscionable.

Defendants respond, arguing plaintiff lacked standing under this prong because the Contracts offered plaintiff a means to avoid paying the full cost

³ The TAC’s reference to an alleged violation of the Internal Revenue Code is confusing. The paragraph in the UCL count alleging defendants engaged in an unfair business practice does not cite to any specific section of the Internal Revenue Code. However, in another paragraph the TAC mentions title 26 United States Code section 501(r)(5)(A) and (B). But in a footnote the TAC states it “is not asserting any private right of action under” this statute.

of his care by seeking a reduction or elimination of his financial liability through the hospital's financial assistance or charity care policy. As noted, the Hospital Fair Pricing Act required defendants' hospital to maintain and administer that policy. And, as acknowledged in the TAC, the Contracts informed a patient of the policy.

Contrary to defendants' argument, the availability of its financial assistance and charity care policy did not eliminate plaintiff's standing to maintain this action. In *Sarun*, *supra*, 232 Cal.App.4th 1159, the court rejected a similar claim. “[A]lthough a further discount from Dignity’s ‘full charges’—even a complete elimination of the charges in excess of what Sarun already had paid—may have been available, the invoice as presented to Sarun . . . stated a \$23,487.90 balance was due. Sarun was not merely ‘exposed’ to the allegedly unlawful pricing system . . . Dignity’s invoice told him to pay the full remaining sum unless he sought relief.” (*Id.* at pp. 1168–1169.) The appellate court further concluded “[t]o avoid the consequences of its allegedly unlawful ‘full charges’ pricing structure for uninsured emergency care patients, Dignity required Sarun to apply for financial assistance, including providing tax return information and other personal financial data. The tangible burden of such an application process is far more than the ‘identifiable trifle’ required to confer injury in fact standing.” (*Id.* at p. 1169.)

Plaintiff alleged defendants sent him a bill demanding that he pay \$10,000 for the medical care he received. While the Contracts advised plaintiff to contact the hospital's business office to see if he could qualify for a reduction or elimination of the amount owed, as *Sarun* concluded this application process also constituted a tangible burden. Thus, we conclude plaintiff had standing under the unfair prong.

Furthermore, we note the TAC contains an allegation that plaintiff sent the hospital “correspondence” informing it of his financial condition and seeking a quick resolution of the charge for his medical treatment, to which the hospital purportedly never responded. Assuming there is evidence to support this allegation, notwithstanding the TAC's allegation that there are reasons why some self-pay patients may not want to seek financial assistance, plaintiff has alleged a basis for finding he substantially complied with the duty to seek financial assistance before suing defendants.

Thus, plaintiff has established a basis for maintaining his UCL cause of action on the basis defendants' policy of billing self-pay patients the full amount of its charge description master rates was unfair because the amount sought was allegedly unconscionable.

C. The CLRA

Civil Code section 1780, subdivision (a) authorizes “[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action” for relief. As noted above, plaintiff cites subdivision (a)(5), (13), (14), and (19) of section 1770 in support of his CLRA cause of action. In addition, plaintiff repeats the allegation he “reasonably expected and relied on the[] . . . belief that Defendants would bill [him] at the same rates as other patients signing the same Contract and receiving similar emergency treatment/services,” or that his bill would be “for no more than the *reasonable value* of the treatment,” and he “was certainly not expecting to be billed at the artificial and grossly excessive rates for which he was subsequently billed.”

For the reasons previously discussed, we conclude the trial court properly sustained the demurrer as to the allegations of misrepresentation. Because plaintiff failed to allege he read and relied on the signed Contracts or other representation by defendants, he lacks standing to maintain the CLRA cause of action on this basis. “Under Civil Code section 1780, subdivision (a), CLRA actions may be brought ‘only by a consumer ‘who suffers any damage *as a result of the use or employment*’ of a proscribed method, act, or practice. (Italics added.) ‘This language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof.’ [Citation.] Accordingly, ‘plaintiffs in a CLRA action [must] show not only that a defendant’s conduct was deceptive but that the deception caused them harm.’’ [Citation.] A ‘misrepresentation is material for a plaintiff only if there is reliance—that is, “‘without the misrepresentation, the plaintiff would not have acted as he did’’’ [Citation.]’ (*Durell v. Sharp Healthcare, supra*, 183 Cal.App.4th at pp. 1366–1367; see *Hale, supra*, 183 Cal.App.4th at pp. 1386–1387.) Further, even if plaintiff did read the Contracts, as explained above, his interpretation of them is contrary to both the language of the instruments and the applicable law.

However, as to the allegation of Civil Code section 1770, subdivision (a)(19), declaring unlawful “[i]nserting an unconscionable provision in [a] contract,” based on the foregoing discussion under the UCL’s unlawful prong, we conclude plaintiff has stated a basis for maintaining the CLRA cause of action on this ground.

D. Declaratory Relief

The TAC’s third count sought declaratory relief under Code of Civil Procedure section 1060. It requested the trial court decree: (1) “Defendants’

billing practices as they relate to [self-pay patients] are unfair, unreasonable, and illegal"; (2) self-pay patients "are liable to Defendants for no more than the *reasonable value* of the treatment/services provided"; and (3) "neither provision 18 of the Contract nor any . . . law or statute establishes a duty on the part of an uninsured patient to seek out and apply for Charity or Financial Aid as a prerequisite to legally challenging the amount of a Hospital bill that the patient deems to be unfair, unreasonable, or unlawful." On appeal, plaintiff's argument addresses only the second and third grounds.

Code of Civil Procedure section 1060 allows "[a]ny person interested under a written instrument, . . . or under a contract, or who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract." However, Code of Civil Procedure section 1061 states "[t]he court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

As discussed above, we have rejected plaintiff's claim the Contract can be reasonably construed as limiting defendants' recovery from self-pay emergency care patients to the reasonable value of the services provided. Nor does the third ground for declaratory relief appear to be a matter currently in dispute. While defendants assert plaintiff is not entitled to relief because he never sought financial assistance, they do not take the position that a patient must first seek financial aid before challenging the amount of a hospital bill.

That leaves only the TAC's first ground as a basis for declaratory relief. " ‘The purpose of a declaratory judgment is to ‘serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.’ ” [Citation.] “Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation [citation].” [Citation.]’ [Citation.] ‘One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff’s future conduct in order to preserve his legal rights.’ ” (Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, 647 [88 Cal.Rptr.3d 859, 200 P.3d 295].) Since plaintiff in part seeks injunctive relief to prohibit defendants from future attempts to collect unconscionable amounts for his medical care, we conclude this issue is ripe for declaratory relief.

III

DISPOSITION

The judgment is reversed and the matter remanded to the superior court for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

Bedsworth, Acting P. J., and Ikola, J., concurred.

[No. A142723. First Dist., Div. Two. Sept. 9, 2016.]

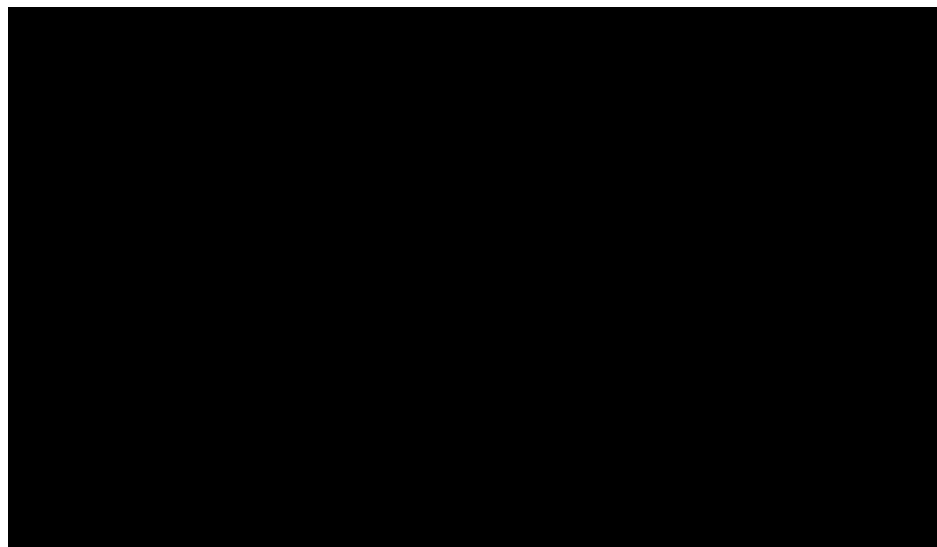
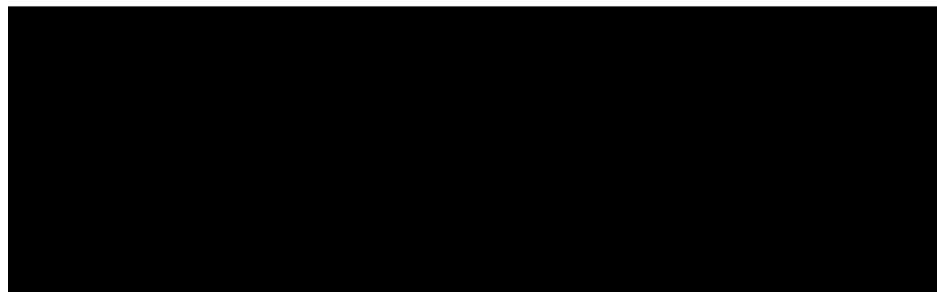
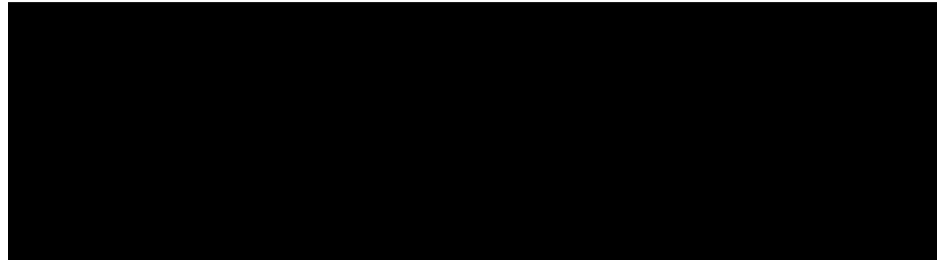
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PROMETHEUS REAL ESTATE GROUP, INC., Defendant and Appellant.

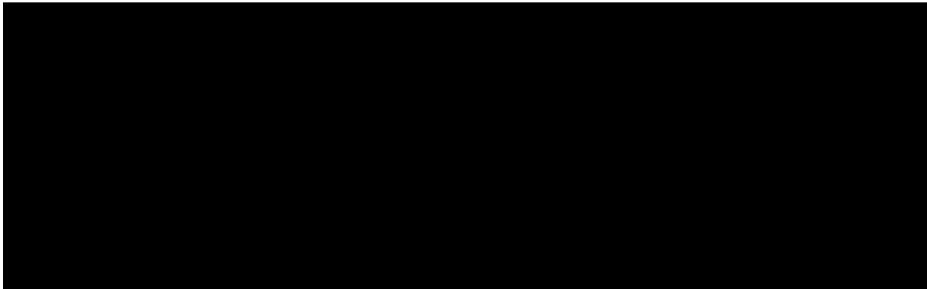
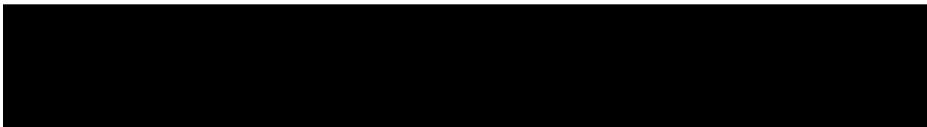
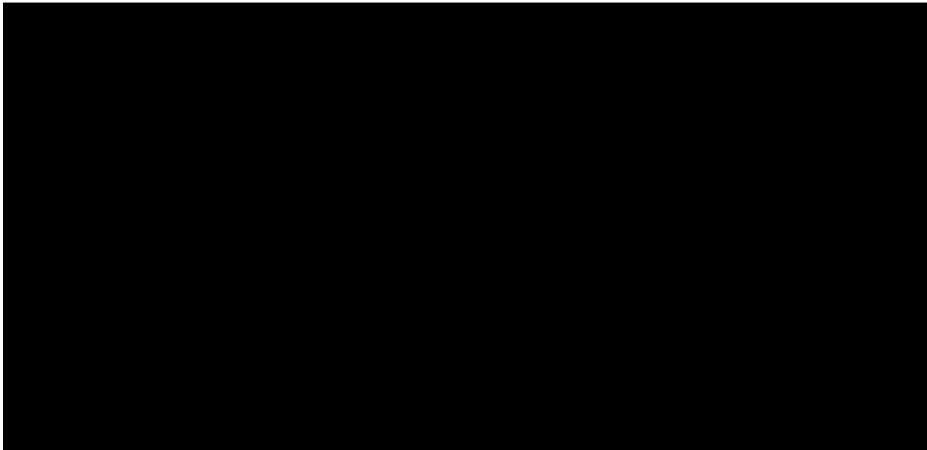
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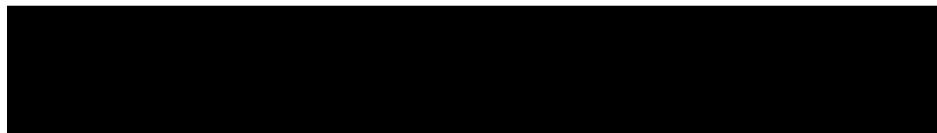
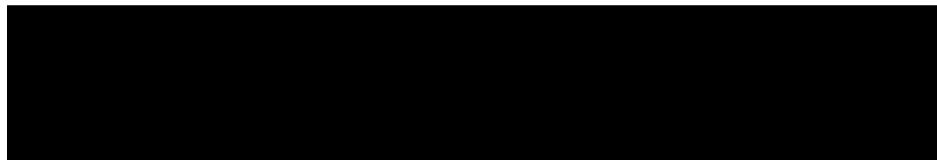
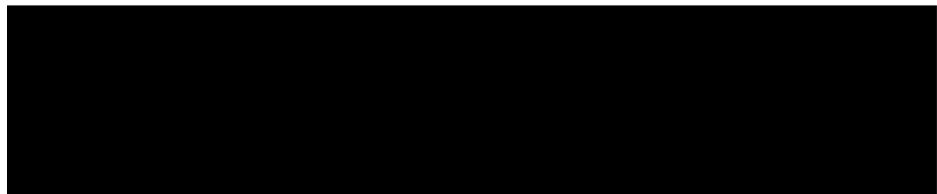
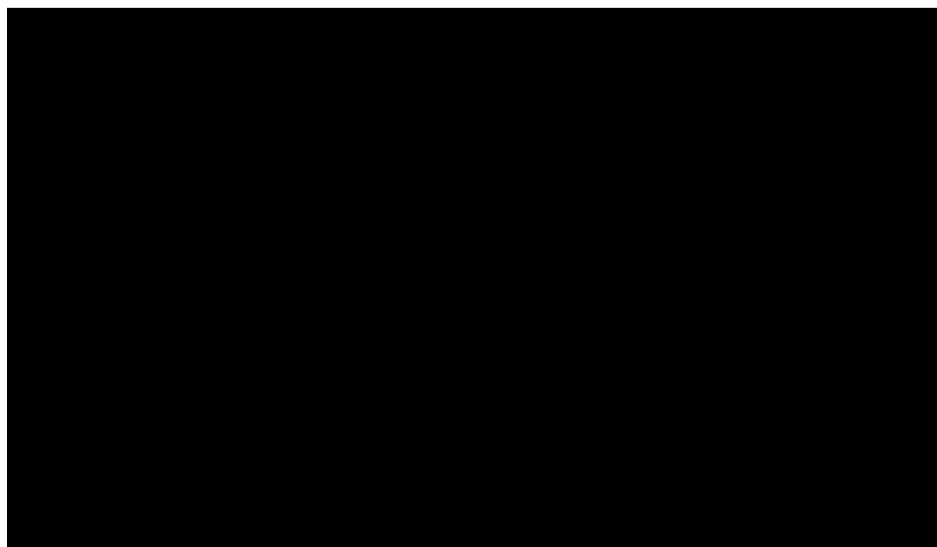
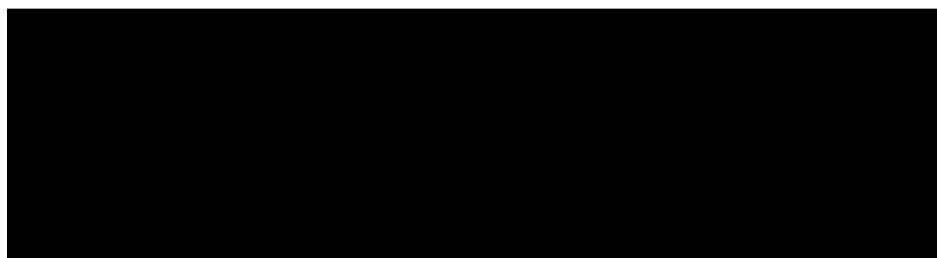
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The trial court then awarded the Hjelms their attorney fees based on Civil Code section 1717. We affirm.

BACKGROUND

In May 2011, the Hjelms signed a residential lease agreement, renting apartment 1720A in the Chesapeake Point Apartments, San Mateo (the property). As Prometheus itself describes it, the Hjelms “entered into a one-year residential lease with Prometheus for the property.” The Hjelms signed the lease without any negotiation, indeed, while they were still out of state in their former home, the lease having been mailed to them.

The lease was a standard Prometheus-drafted lease. The basic agreement was seven pages long and, with various addenda, it totaled 24 pages. As discussed in detail below, the lease (and one addendum) had three provisions allowing Prometheus to recover attorney fees, all of them one-sided, allowing fees only to Prometheus.

In June 2011, the Hjelms moved into apartment 1720A. Fifteen months later, they moved out, their apartment plagued by a bedbug infestation that Prometheus failed to address, not to mention that there was raw sewage on the property.

In September 2012, the Hjelms filed suit against Prometheus. The operative first amended complaint (complaint) alleged seven causes of action, styled as follows: (1) negligence; (2) premises liability; (3) constructive eviction; (4) breach of warranty of habitability; (5) negligent infliction of emotional distress; (6) breach of the covenant of quiet enjoyment; and (7) nuisance. The complaint referred to Prometheus’s duty under the lease to provide the Hjelms safe and habitable premises, illustrated, for example, by the cause of action for breach of the covenant of quiet enjoyment, which specifically alleged that “through the lease of the Premises, as well as implicit in Plaintiffs’ tenancy,” the Hjelms were “entitled to quiet enjoyment of their tenancy as it is defined by Civil Code § 1927.” The prayer sought damages and among other things “attorney fees pursuant to contract and statute.”

Prometheus filed a general denial that included numerous affirmative defenses, some relevant only to contract claims, illustrated by the 15th, which alleged that “plaintiffs substantially and materially breached the contract complained of prior to commencement of this action, which conduct extinguishes the right to maintain the instant action.” The 13th affirmative defense alleged that the applicable statute of limitations were Code of Civil Procedure sections 337 (contract) and 337.2 (breach of written lease).

Prometheus filed two motions for summary adjudication on the issue of the Hjelms' entitlement to attorney fees. Both motions were denied, the trial court concluding that Civil Code section 1717 (section 1717) applied, to render the attorney fees provisions reciprocal should the Hjelms prevail at trial. Thus, for example, the second order held in pertinent part as follows: "While Defendant argues at length that the multiple attorney's fees provisions contained in the parties' written lease are applicable only in specific circumstances, Plaintiffs are correct in pointing out that these circumstances cover nearly every situation in which the landlord would be aggrieved. There is no reciprocal remedy for any situation in which the tenant is the injured party. [¶] The Court notes that Paragraph 30 of the lease, which contains an attorney's fee provision, contains this language: 'Resident(s) shall further indemnify, defend and hold harmless Management from and against all claims arising from any breach of default in the performance of any obligation on Resident(s) part to be performed under the terms of the Rental Agreement.' Such a one-sided attorney's fee provision is in violation of Civil Code § 1717(a). *Trope v. Katz* (1995) 11 Cal.4th 274, 285 [45 Cal.Rptr.2d 241, 902 P.2d 259]."

The case proceeded to jury trial, with the Honorable Joseph Bergeron presiding. Trial began on March 25, 2014, with testimony taken over eight days. On April 4, the jury returned a verdict for the Hjelms on all counts, awarding economic damage to the Hjelms in the amount of \$11,652; noneconomic damage to Christine Hjelm of \$35,000; and noneconomic damage to Justin Hjelm of \$25,000. Prometheus did not ask for any clarification of the damages.

Judge Bergeron entered judgment on April 11, and the Hjelms gave notice of entry on April 14.

On April 25, Prometheus filed a notice of intention to move for new trial. Judge Bergeron denied it by order of June 12.

Meanwhile, on April 14, the Hjelms filed a motion for attorney fees. The original moving papers totaled some 76 pages, including a lengthy declaration and a supplemental declaration from the Hjelms' attorney supporting the amount sought. Prometheus filed lengthy opposition, and the Hjelms a reply. The motion came on for hearing on June 12, following which Judge Bergeron permitted Prometheus to file a supplemental brief concerning a new case it had cited at the hearing, addressing an issue of apportionment, a brief that was filed.

Meanwhile, following the June 12 hearing, three minute orders were entered that day. One denied a new trial. Another, which is pertinent here,

ordered that “Plaintiff’s Motion for an Order, Awarding Reasonable Attorney’s Fees . . . [is] GRANTED. [¶] Amount of attorneys fees to be determined after further briefing by counsel.”

On June 30, Judge Bergeron filed two formal orders, one denying Prometheus’s motion to tax costs, the other denying Prometheus’s motion for new trial. He also filed a final judgment after verdict which, as pertinent here, recited that he “granted [the Hjelms’] motion for an order awarding reasonable attorney’s fees in the amount of \$326,475.00 The court finds that the amount of fees requested is reasonable. Therefore, [the Hjelms] are awarded \$326,475.00 in attorney’s fees.”

On August 11, Prometheus filed its notice of appeal.

DISCUSSION

Introduction

Prometheus has filed a 64-page appellant’s opening brief. It has two arguments. The first, comprising some 70 percent of the argument, is that the attorney fee award “was incorrect and should be reversed.” The second is that the “underlying verdict should be reversed.” Since the second argument, if successful, would render the attorney fee award—and the first argument—moot, we begin with it. And conclude it cannot succeed—the appeal as to the verdict is untimely, not to mention premised on a factual representation in utter disregard of the rules of appellate procedure.

No Appeal of the Verdict Can Succeed

■ As noted above, judgment on the jury verdict was entered on April 11. Notice of entry was served on April 11 and filed on April 14. So, under the general rule, any appeal would have to be filed within 60 days. (Cal. Rules of Court, rule 8.104.) However, on April 25, Prometheus moved for a new trial. And, as noted, Judge Bergeron denied it by minute order of June 12. An order denying new trial was approved by Prometheus’s counsel on June 24 and filed on June 30. Thus California Rules of Court, rule 8.108(b)(1)(B) governed the time to appeal: “If any party serves and files a valid notice of intention to move for a new trial, the following extensions of time apply: [¶] (1) If the motion for a new trial is denied, the time to appeal from the judgment is extended for all parties until the earliest of: [¶] (A) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (B) 30 days after denial of the motion by operation of law” Thus, the time to appeal expired on July 30.

On June 30, Judge Bergeron also entered a new judgment that restated the denial of the motion for new trial and awarded the Hjelms attorney fees.

Prometheus filed its notice of appeal August 11. That appeal was timely to attack the attorney fee award. But not the verdict. And Judge Bergeron's second judgment does not help Prometheus.

■ *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214 [64 Cal.Rptr.3d 495] (*Torres*) is on point. And dispositive. There, city retirement board members obtained summary judgment on their claims the city had to pay for their defense in an action against them filed by the city attorney. The city filed a late notice of appeal, and the Court of Appeal dismissed it. The trial court later issued an order awarding attorney fees. The city appealed again, which appeal included an attack on the summary judgment. The Court of Appeal dismissed the appeal to the extent it concerned the summary judgment. Discussing the effect of a second judgment, the court began by noting that “[t]he effect of an amended judgment on the appeal time period depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error.” (*Id.* at p. 222, quoting Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2006) ¶ 3:56, pp. 3-24 to 3-25.) And the court concluded, “It is well settled, however, that ‘[w]here the judgment is modified merely to add costs, attorney fees and interest, the original judgment is not substantially changed and the time to appeal it is therefore not affected.’” (*Torres, supra*, at p. 222; accord, *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583 [120 Cal.Rptr.2d 213].)

■ *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 504–505 [121 Cal.Rptr.3d 435], discusses *Torres* and its holding at length: “In *Torres, supra*, 154 Cal.App.4th 214, the issue was whether the amendment of the judgment to include an amount for attorney fees and costs was a substantial amendment, enabling the court to consider the propriety of granting summary judgment. (*Id.* at p. 221.) Again citing The Rutter Group treatise on Civil Appeals and Writs, the *Torres* court concluded that there is no substantial modification to a judgment when it is merely amended to add costs, attorney fees and interest. (*Torres, supra*, 154 Cal.App.4th at p. 222). . . . The cases that have developed this rule with respect to attorney fees and interest appear to find ultimate support for their position in the line of cases that hold that postjudgment awards of attorney fees, costs and interest are separately appealable matters collateral to the actual judgment if they are not included therein. (See *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1517–1518 [34 Cal.Rptr.2d 291]; *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 996–998 [3 Cal.Rptr.2d 654]; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46

[269 Cal.Rptr. 228].) In light of these rulings and the line of cases that they represent, it makes sense to conclude that a separately appealable order after final judgment does not substantially modify the judgment itself for purposes of computing the time in which to file a notice of appeal. Any problem the parties might have with the amendment can be pursued through a separate appeal of the postjudgment order.”

In sum, to the extent the appeal sought to attack the verdict, it was too late. But even if it were not, we would refuse to consider it, because Prometheus’s brief violates settled rules of appellate procedure.

To put the issue in context, Prometheus’s brief statement of facts refers to the Hjelms’ “contention that their apartment . . . was uninhabitable,” ignoring, of course, all the evidence in the case supporting the *facts* of the bedbug infestation. Prometheus’s brief then goes on to discuss the companies it hired to address the problem, and on which it relied, ignoring, along the way, just what Prometheus’s own responsibility was—and how it was not met.

And as to the raw sewage issue, this is how Prometheus’s brief describes it: “Another issue at trial was the Hjelms’ complaint of sewage in the common area behind their apartment. [Citations.] Ms. Hjelm testified that she and her husband had reported the sewage issue to Prometheus, but neither she nor her husband provided a written complaint. [Citation.] She further testified that Prometheus scheduled a time to fix the sewer line and that its maintenance employees responded to her complaints, although ineffectively in her opinion. [Citation [asserting that Prometheus’s maintenance employees ‘would . . . use little tools, but not fix anything’].] The evidence further showed that Prometheus was seeking a long-term solution for repairing the sewer line [citation], but the issue was not resolved during the Hjelms’ tenancy. [Citation.]”

Then, in its argument asserting “there was no evidence that Prometheus breached the standard of care applicable to property managers,” Prometheus fundamentally argues that the Hjelms provided no expert witness, at least not one with the required qualifications. As Prometheus sums up at one point, “[t]hus, while Dr. Kaae’s testimony may have been relevant to the standard of care applicable to professionals in the *pest control industry*, it was not relevant to the *property management industry*.” Prometheus says the same thing about the sewer line, and then sums up by reference to its expert, who, it claims, provided the “only competent expert testimony on the subject of property management.”

Prometheus’s argument has several fundamental flaws.

To begin with, Prometheus may be content to call itself a property manager. The fact is, it signed the lease.

Second, Prometheus cites nothing supporting the proposition that one needs expert testimony to support a claim that bedbug infestation and/or raw sewage on the property may violate the warranty of habitability or the covenant of quiet enjoyment. Put otherwise, is that not something that might be within the knowledge of an average juror?

Third, and most fundamentally, Prometheus's brief ignores all the evidence—and much there was in the eight-day trial—about prior complaints about bedbugs and about the lack of training Prometheus gave to its employees about how to address the issue. A few illustrations should suffice.

Prometheus's employee Jennifer Lau testified that the tenants of 1732A made several complaints about bedbugs. Terminex employee Joel Pangilinan testified that the 1732A bedbug infestation was "severe."

The Hjelms' expert on bedbugs, Dr. Richard Kaae, confirmed that Prometheus had not followed its own bedbug policy in this case—indeed, that its bedbug policy was inadequate, even if it had been followed. Because bedbug detection is so difficult, it should not have been left to Prometheus's untrained maintenance crew.

The evidence also established that Prometheus failed to adequately train its management personnel, and that there was such significant turnover that new employees often did not even have the ability to consult with their predecessors. Kevin Song, the property manager at the complex in August 2012, testified that he received very little training or support from management. When he began his job, he learned that one of the buildings had a bedbug infestation that had not been addressed for over a year. He had no prior experience dealing with bedbugs, and was unaware of Prometheus's bedbug policy.

Multiple witnesses testified to observing the raw sewage on the property behind the apartment buildings. Lau testified that she called for support to clean up raw sewage upon seeing toilet paper floating up onto the property grounds, and cleaned it up herself on at least one occasion. Song said that Prometheus just fixed the sewage in a "patchwork" way. All this was against the background that Prometheus's own expert, David Saldivar, conceded that raw sewage is a public health and safety emergency.

None of this is mentioned in Prometheus's brief, which recites the facts favorable to it. Such conduct is "not to be condoned," as we said in *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531 [125 Cal.Rptr.3d 292], going on to explain why:

■ "California Rules of Court, rule 8.204(a)(2)(C) provides that an appellant's opening brief shall '[p]rovide a summary of the significant

facts' And the leading California appellate practice guide instructs about this: 'Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias; and likewise as to the applicable law. [¶] Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly "undo" an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case!' (Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2010) ¶ 9:27, p. 9-8 . . . , *italics omitted.*) [Prometheus's] brief . . . ignores such instruction.

"[The] brief also ignores the precept that all evidence must be viewed most favorably to [the Hjelms] and in support of the [verdict]. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925–926 [101 Cal.Rptr. 568, 496 P.2d 480]; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362].) . . .

"What [Prometheus] attempts here is merely to reargue the 'facts' as [it] would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that [it] is not to 'merely reassert [its] position at . . . trial.' (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687 [48 Cal.Rptr. 901]; accord, *Albaugh v. Mt. Shasta Power Corp.* (1937) 9 Cal.2d 751, 773 [73 P.2d 217].) In sum, [Prometheus's] brief manifests a treatment of the record that disregards the most fundamental rules of appellate review. (See 9 Witkin, *Cal. Procedure* (5th ed. 2008) *Appeal*, §§ 365, 368, 421–424, pp. 425–426.) As Justice Mosk well put it, such 'factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail.' (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398–399 [185 Cal.Rptr. 654, 650 P.2d 1171].)"

And fail it does, as we deem the argument waived. (See *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 [69 Cal.Rptr.3d 365] ["Where a party presents only facts and inferences favorable to his or her position, 'the contention that the findings are not supported by substantial evidence may be deemed waived' "]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 [19 Cal.Rptr.3d 416].)

The Attorney Fee Award Was Proper

Background and Introduction to the Issue

As mentioned, two different provisions in the lease provided for attorney fees, paragraphs 23 and 30, as follows:

Paragraph 23: “Resident(s) agrees that if they fail to vacate past the ending date of a proper notice to terminate by either party, [sic] shall become a holdover tenancy commencing with the first day after the expiration of the notice period, and that Resident(s) shall be responsible for all losses suffered by management and displaced tenants who anticipated taking occupancy at the end of the notice period, including attorney’s fees and costs.”

Paragraph 30: “This Agreement is made on the express condition that Management is to be free from all liability or loss caused by Resident(s), or Resident(s) guests’, agents’ or invitees’, improper, negligent or intentional acts or omissions Resident(s) hereby covenants and agrees to indemnify, hold harmless, and defend Management against all claims, losses or liabilities . . . by Resident(s) or Resident(s) agents or invitees, unless such claim, loss or liability is solely as a result of Management’s gross negligence or willful misconduct. Such indemnification shall include and apply to attorney’s fees, investigator costs, and other costs actually incurred by Management. Resident(s) shall further indemnify, defend and hold harmless Management from and against any and all claims arising from any breach or default in the performance of any obligation on Resident(s) part to be performed under the terms of this Rental Agreement.”

The mold addendum also had a fee provision: “Resident agrees to defend, indemnify and hold harmless Management . . . from claims, liabilities, losses, damages and expenses (including attorneys’ fees), that they incur that are related to the Resident’s breach of the Resident’s obligations to Management.”

In light of these provisions giving Prometheus the right to recover attorney fees if it were to sue the Hjelms, the Hjelms sought attorney fees under section 1717. Judge Bergeron agreed, and awarded the Hjelms fees.

Prometheus appeals, its fundamental argument being that section 1717 does not apply, an argument with three subparts, described by Prometheus as follows:

“(1) The Hjelms asserted no contract claims, so section 1717 did not apply. . . .

“(2) The Hjelms elected—and accepted—a distinctive tort remedy (i.e., emotional distress damages), so their action was not ‘on a contract’ under section 1717. . . .

“(3) The Lease contained three narrow attorney fee provisions that did not apply to the Hjelms’ noncontract claims.”

Section 1717 and Its Application

Section 1717 provides in pertinent part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.” (§ 1717, subd. (a).)

■ The primary purpose of section 1717 is “to establish mutuality of remedy when a contractual provision makes recovery of attorney fees available to only one party, and to prevent the oppressive use of one-sided attorney fee provisions.” (*Trope v. Katz, supra*, 11 Cal.4th at p. 285; see *Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 [71 Cal.Rptr.2d 830, 951 P.2d 399].) The section “reflects legislative intent that equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction.” (*International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 224 [145 Cal.Rptr. 691, 577 P.2d 1031].) So, to achieve its goal, section 1717 “‘generally must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed.’” (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1113–1114 [86 Cal.Rptr.2d 614, 979 P.2d 974]; accord, *Santisas, supra*, at p. 611.) In short, section 1717 was enacted to “avoid the perceived unfairness of one-sided attorney fee provisions.” (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1182 [101 Cal.Rptr.2d 532].)

Finally, and fundamentally, “California courts liberally construe the term ‘‘‘on a contract’ ’’ as used within section 1717. [Citation.] As long as the action ‘involve[s]’ a contract it is ‘‘‘on [the] contract’ ’’ within the meaning of section 1717. [Citations].” (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455 [33 Cal.Rptr.3d 694]; see *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 706 [126 Cal.Rptr. 761].)

The Hjelms Sued on a Contract

Prometheus’s first argument is that section 1717 did not apply because the Hjelms “asserted no contract claims.” Prometheus is wrong.

■ Among other things, the Hjelms sued for breach of the warranty of habitability. Such claim can be “a contract action with contract damages.” (See generally 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 627, p. 733; *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 927 [109 Cal.Rptr.2d 442] (*Fairchild*).

Prometheus recognizes this principle, but attempts to distinguish it away, its opening brief stating as follows: “Moreover, while a claim for breach of the warranty of habitability or breach of covenant of quiet enjoyment may sound in contract, the facts necessary to support such claims may also be pled in tort. (See *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 918–919 [162 Cal.Rptr. 194] [‘. . . assuming appropriate pleadings of fact, a tenant may state a cause of action in tort against his landlord for damages resulting from a breach of the implied warranty of habitability’]; see also *Green v. Superior Court* (1974) 10 Cal.3d 616, 619 [111 Cal.Rptr. 704, 517 P.2d 1168] [recognizing ‘a common law implied warranty of habitability in residential leases in California . . .’].) Here, the Hjelms pled facts sounding in tort only and they sought tort damages with respect to all seven of their claims, including Breach of Warranty of Habitability and Breach of Covenant of Quiet Enjoyment. ([Citations] [specifically seeking damages for ‘emotional distress’].)”

Prometheus’s attempt at distinction is myopic: the Hjelms’ claims were not “in tort only.” *Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281 [173 Cal.Rptr.3d 159] persuasively shows why. There, in a demurrer case, the Court of Appeal summed up its discussion—and its holding for the plaintiffs—as follows: “Here, the complaint contains causes of action for breach of the warranty of habitability in various forms—(1) ‘Violation of California Civil Code Section 1942.4’; (2) ‘Tortious Violation for Breach of the Warranty of Habitability’; (3) ‘Intentional Infliction of Extreme Emotional Distress’; (4) ‘Negligent Infliction of Extreme Emotional Distress’; and (5) ‘Negligence: Violation of Duty to Maintain Habitable Conditions.’ Based on the foregoing, we cannot say as a matter of law that these causes of action are not viable.” (*Erlach v. Sierra Asset Servicing, LLC*, *supra*, at p. 1299.) So, the warranty of habitability claim can take many forms, as the Hjelms demonstrated here.

■ In sum, the claim for breach of warranty of habitability was on the contract. So, too, the claim for constructive eviction. It, too, arises from the lease, as conceded by Prometheus’s counsel below, conceding that apportionment under Proposition 51 was not proper because constructive eviction is not a tort claim.

Beeman v. Burling (1990) 216 Cal.App.3d 1586 [265 Cal.Rptr. 719] is instructive. There, a plaintiff brought a wrongful eviction action under a housing ordinance, and was awarded economic damages, emotional distress damages, and punitive damages. The court held that the plaintiff was entitled to attorney fees under section 1717 because his action was “fundamentally . . . based upon the lease.” (*Beeman*, *supra*, at p. 1608; see also

Bruckman v. Parliament Escrow Corp. (1987) 190 Cal.App.3d 1051, 1059 [235 Cal.Rptr. 813] [action was on a contract even though it also contained negligence claims].)

■ In sum, courts have found claims to be “on a contract” in a variety of circumstances extending beyond a direct breach of contract claim. (See, e.g., *In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1601 [124 Cal.Rptr.3d 352] [action for declaratory and injunctive relief to enforce consent decree]; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347–348 [85 Cal.Rptr.3d 532] [equitable action seeking declaratory and injunctive relief and quiet title based on violations of the terms of a promissory note and deed of trust]; *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 490 [70 Cal.Rptr.3d 9] [unlawful detainer action based on a lessee’s breach of covenants in a lease].)

Summing up in a lengthy exposition of the law, the court in *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241–242 [149 Cal.Rptr.3d 440] distilled the following principle: “An action (or cause of action) is ‘on a contract’ for purposes of section 1717 if (1) the action (or cause of action) ‘involves’ an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party’s rights or duties under the agreement, and (2) the agreement contains an attorney fees clause.”

Prometheus’s second sub-argument is that the Hjelms “Elected and Accepted Distinctive Tort Remedies, so Their Action was Not ‘On a Contract’ Within the Meaning of Section 1717.” Prometheus is wrong again.

The argument begins this way: “In addition to alleging tort claims only, the Hjelms elected distinctive tort remedies; they sought, and were awarded, emotional distress damages, further barring section 1717’s application here. (*Perry v. Robertson* [(1988)] 201 Cal.App.3d [333,] 335 [247 Cal.Rptr. 74] . . . ; *Fairchild v. Park*[, *supra*,] 90 Cal.App.4th 919, 924–925 . . . ; *Stoiber v. Honeychuck*, *supra*, 101 Cal.App.3d at 929–930)” This is a less than accurate description of the record.

While the Hjelms were in fact awarded emotional distress damages, this does not mean they “elected distinctive tort remedies.” They “elected” nothing. As noted, the Hjelms’ complaint alleged contract claims. The jury was instructed on contract claims. The lawyers argued contract claims. And the jury in fact awarded the Hjelms economic damages, not just damages for emotional distress.

Prometheus states that “the trial court instructed the jury as to negligence, but not breach of contract.” Had Prometheus read a few pages later in the instructions, however, it would come upon the special instructions, which included these:

“Every lease contains an implied covenant of quiet enjoyment where the landlord promises . . . to allow the tenant to quiet enjoyment of the premises. If the defendant Prometheus Real Estate Group Inc.’s act or omissions substantially interfered with Christie Hjelm and Justin Hjelm’s right to use and enjoy the premises for the purposes contemplated by the tenancy, the defendant, Prometheus Real Estate Group Inc., has breached the covenant of quiet enjoyment.

“If defendant Prometheus Real Estate Group Inc.’s acts or omissions affected Christie Hjelm and Justin Hjelm’s use or enjoyment of the property and the Hjelms were compelled to vacate, there is a constructive eviction and Christie Hjelm and Justin Hjelm are not liable for the remaining portion of rent under the lease. [¶] . . . [¶]

“Under the implied warranty of habitability in a residential lease, the defendant, Prometheus Real Estate Group Inc., promised that premises leased to Christie Hjelm and Justin Hjelm . . . would be maintained in a habitable state for the duration of the lease. Defendant, Prometheus Real Estate Group Inc., was required to maintain a building, grounds, and all area of the—all area under its control clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin. [¶] . . . [¶]

“If you decide that Christie Hjelm and Justin Hjelm have proven their claim against Prometheus Real Estate Group, you must decide how much money will reasonably compensate Christie Hjelm and Justin Hjelm for the harm. This compensation is called damages. The amount of damages must include an award for each item of harm that was caused by Prometheus Real Estate Group Inc.’s wrongful conduct, even if that particular harm could not have been anticipated.

“Christie Hjelm and Justin Hjelm do not have to prove the exact amount of damages that will provide reasonable compensation for the harm; however, you must not speculate or guess in awarding damages. The damages claimed by Christie Hjelm and Justin Hjelm for the harm caused by Prometheus Real Estate Group fall into two categories called economic damages and noneconomic damages. You will be asked on the verdict form to state the two categories of damages separately.

“The following are the items of economic damages claimed by Christie Hjelm and Justin Hjelm[:] property damage; moving expenses; and lost earnings. [¶] . . . [¶]

“Christie Hjelm and Justin Hjelm seek damages from Prometheus Real Estate Group Inc. under more than one legal theory; however, each item of damages may be awarded only once regardless of the number of legal theories alleged. You will be asked to decide whether Prometheus Real Estate Group is liable to Christie Hjelm and Justin Hjelm under the following reasonable theories[:] negligence; premises liability; constructive eviction; breach of the implied warranty of habitability; negligent infliction of emotional distress; breach of the covenant of quiet enjoyment; nuisance.

“Economic damages are recovered [*sic: recoverable*] under the following legal theories[:] negligence; premises liability; constructive eviction; breach of the implied warranty of habitability; breach of the covenant of quiet enjoyment.

“Noneconomic damages are recovered [*sic: recoverable*] under the following legal theories[:] negligence; premises liability; constructive eviction; breach of [the] implied warranty of habitability; negligent infliction of emotional distress; breach of the covenant of quiet enjoyment; and nuisance.”

The jury verdict included findings for the Hjelms on multiple theories, including their claims for constructive eviction, breach of the warranty of habitability, and breach of the covenant of quiet enjoyment. And the jury answered “[y]es,” the Hjelms were damaged under each theory, in answers to questions B3, C3, and E3.

The penultimate page of the verdict reads as follows:

“DAMAGES”

“If Christie Hjelm and Justin Hjelm have proved any damages, then please proceed below. [¶] . . . [¶]

“If you answered ‘YES’ to any of the following questions: Question No. A.4, B.3, C.3, E.3 or G.4, please answer the following section:

“1. What are Christie Hjelm and Justin Hjelm’s total economic damages?

“*Economic loss*

“Property damage and loss \$6,965

“Moving expenses \$2,687

“Lost earnings \$600

“Security deposit \$1,400

“Total Economic Damages: \$11,652

“If you answered ‘YES’ to any of the following questions: Question No. A.4, B.3, C.3, D.3, D.4, E.3, F.5, please answer the following section:

“2. What are Christie Hjelm’s total non-economic damages?

“*Non-economic loss for Christie Hjelm*

“Past noneconomic loss, including

“mental suffering and emotional distress \$35,000

“Future noneconomic loss, including

“mental suffering and emotional distress \$0

“Total Non-Economic Damages for Christie Hjelm: \$35,000.”

In sum and in short, the Hjelms sued on theories that included contract. The jury found for the Hjelms on those theories, and that Prometheus’s breach or violation caused damage. Those theories included constructive eviction. There is no doubt that is a contract claim, as Prometheus’s own counsel acknowledged below, in the post instruction preclosing argument conference, where Prometheus was arguing, however belatedly, for Proposition 51 apportionment. And Prometheus’s counsel said, “[w]e’re only asking for a portion as to the tort causes of action. Constructive eviction is a contract claim. We’re not asking for an apportionment on that.”

The three cases cited by Prometheus are not to the contrary—indeed, they support the Hjelms.

■ *Perry v. Robertson, supra*, 201 Cal.App.3d 333, the primary case on which Prometheus relies, was an action by Perry against her real estate broker and salespersons, claiming she received inadequate compensation for the sale of her home due to their negligence in drafting the written sales agreement. The complaint was in “a single count,” the court noted, with allegations “adequate to tender both the tort and contract claims for relief.” (*Id.* at pp. 340–341.) Perry won and the trial court awarded her attorney fees. The defendants appealed, and the Court of Appeal affirmed, ending its opinion with this: “The question is whether plaintiff may pursue a breach of contract theory of remedy when defendants have negligently failed to adequately

perform a contractual undertaking. Such an action is one to enforce the provisions of the contract. For the reasons given, we hold that when the prevailing plaintiff in such an action has not elected a distinctive *remedy* in tort, such an action may be, and here is, ‘on a contract’ within the meaning of section 1717.” (*Id.* at p. 344.)

Prometheus’s reliance on the observation in the case that “Perry did not pursue . . . damages for personal injuries, a characteristic tort remedy” has nothing to do with the case here, where the Hjelms did pursue both contract and tort claims. (*Perry v. Robertson, supra*, 201 Cal.App.3d at p. 342.) Prometheus’s reliance on *Perry* is hard to understand. Its reliance on *Fairchild* is astonishing.

In *Fairchild, supra*, 90 Cal.App.4th 919, a tenant was successful in suing his landlord, but the trial court denied him attorney fees. The Court of Appeal reversed. Doing so, this is how the court described the issue: “The landlord contends that the tenants are not entitled to attorney’s fees under the lease because they prevailed on a tort claim, not a contract claim. . . . But we conclude that the tenants are entitled to attorney’s fees on a contract theory.

■ “There is ‘a common law implied warranty of habitability in residential leases in California’ (*Green v. Superior Court[, supra]*, 10 Cal.3d 616, 619) In the present case, the tenants ‘did assert a contractual cause of action: breach of the implied warranty of habitability.’ (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1798 [54 Cal.Rptr.2d 541].) ‘An action by a tenant alleging a breach of the warranty of habitability is an action on the contract that authorizes the recovery of fees pursuant to an attorney fee provision in the rental agreement.’ (9 Miller & Starr, Cal. Real Estate (2001 supp.) § 30:17, p. 383.)

“Further, ‘[w]hether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. If based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious. . . . If unclear the action will be considered based on contract rather than tort. . . . ¶¶¶ In the final analysis we look to the pleading to determine the nature of plaintiff’s claim.’ [Citations.]” (*Fairchild, supra*, 90 Cal.App.4th at pp. 924–925.)

Three paragraphs later the court said this: “And, even assuming that the habitability claim was based on more than one theory—contract, statutory, or tort—the tenants would still be entitled to attorney’s fees on the contract theory. As one Court of Appeal has explained in a similar situation: ¶¶¶ ‘ “[T]he same act may be both a breach of contract and a tort. Even where there is a contractual relationship between parties, a cause of action [may be] in

tort”’’ (*Fairchild, supra*, 90 Cal.App.4th at p. 925.) *Fairchild* went on to discuss that Court of Appeal opinion at length. That opinion was *Perry*. (*Fairchild, supra*, at pp. 925–927.)

Stoiber v. Honeychuck, supra, 101 Cal.App.3d 903, had nothing to do with attorney fees. It arose when a trial court sustained demurrers and granted motions for judgment on the pleadings, to the end that all the tenant’s causes of action were struck other than her one cause of action for breach of the warranty of habitability. The Court of Appeal reversed, and issued a writ of mandate to set aside its orders as to the tenant’s claims for nuisance, intentional infliction of emotional distress, and constructive eviction. (*Id.* at p. 932.) In the words of the court: “[T]he tenant’s remedies against the landlord are not limited to breach of the warranty of habitability and he may also plead tort actions” (*Id.* at pp. 929–930.)

In light of all of the above, we question how Prometheus can assert that “under *Perry*, *Fairchild* and *Stoiber*, the plaintiff must choose between inconsistent remedies.”

Prometheus’s last argument against any fee award is that the lease contained “three narrow attorney fee provisions that did not apply to the Hjelms’ noncontract claims.” The argument is fatuous.

Paragraph 23 of the lease broadly provides for attorney fees to Prometheus if it gives the tenant notice to terminate the lease for any reason and the tenants do not move out. The clause broadly provides that the tenants “shall be responsible for all losses suffered by management and displaced tenants who anticipated taking occupancy at the end of the notice period, including attorney’s fees and costs.” Prometheus asserts, in conclusory fashion, that this is not a case of a holdover tenancy and therefore the attorney fee provision does not apply here.

■ To interpret this provision as Prometheus asserts is contrary to the express language of section 1717, that where a contract provides for attorney fees to enforce the contract, “that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.” (§ 1717, subd. (a).) There is no dispute that the Hjelms were not represented by counsel, and had no opportunity to negotiate the terms of the lease.

■ Perhaps recognizing the weakness of this argument, Prometheus then claims that the attorney fees provision in paragraph 23 cannot apply because a claim involving a holdover tenancy—that is, an unlawful detainer action—is a tort claim that it is beyond the reach of section 1717. Prometheus

is wrong again, as shown, for example, by *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.*, *supra*, 158 Cal.App.4th 479, holding that an unlawful detainer action based upon an “alleged breach of the lease covenant concerning use of the premises during an unexpired term” was a contract action for purposes of section 1717. (*Mitchell Land & Improvement Co.*, *supra*, at p. 488.)

The broad attorney fees provision in paragraph 23 does not restrict fees only to claims arising due to a holdover after expiration of the lease. To the contrary, it applies to virtually any situation under which Prometheus seeks to take action against its tenants. So, for example, under this provision Prometheus could give notice and deem a tenant a holdover for, among other things, nonpayment of rent, subletting, having a pet, causing a disturbance—indeed, any minor violation of the lease. All that Prometheus would want under the lease are possession and money. And it has given itself the right to collect attorney fees in the pursuit of both. Section 1717 applies to give the Hjelms equal rights.

Prometheus Has Not Demonstrated That the Fee Award Should Be Reduced

Prometheus’s next argument is that the fee award “should be reduced, as the trial court offered no reasoning for its award.” Prometheus also suggests a 0.163 multiplier, based on the proportion of the economic loss to the total damage award. We are not persuaded.

We set forth the applicable law in *Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 619–620 [184 Cal.Rptr.3d 225]:

“We have on many occasions set out the law and the standard of review when the issue is the reasonableness of attorney fees awarded, most recently in *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 697–698 [172 Cal.Rptr.3d 456]:

“‘The abuse of discretion standard governs our review of the trial court’s determination of a reasonable attorney fee. [Citations.]

“‘Under the lodestar method, attorney fees are calculated by first multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation. [Citations.]’ [Citations.]

“‘Our Supreme Court has recognized that the lodestar is the basic fee for comparable legal services in the community and that it may be adjusted by the court based on a number of factors in order “to fix a fee at the fair market

value for the particular action. . . . '[T]he Legislature appears to have endorsed the [lodestar adjustment] method of calculating fees, except in certain limited situations.' [Citation.] When the Legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated." [Citations.] . . . Here, as appropriate in this type of case, counsel were compensated based on the lodestar calculated by the court, without adjustment.' "

Here, as noted, the Hjelms' motion was supported by detailed declarations from their counsel that included all of the actual time and expense records in the case. The motion was based on a lodestar analysis with no multiplier, and with an hourly rate that was below market rate for an attorney of counsel's experience. (See *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009 [156 Cal.Rptr.3d 26].) In short, the Hjelms produced substantial—and unrebutted—evidence of the amount of hours spent by their counsel. Judge Bergeron, who had been involved with the case almost from inception, determined that the fees claimed based on that evidence were "reasonable." He was in the best position to determine that, a determination within his discretion. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 [95 Cal.Rptr.2d 198, 997 P.2d 511] [hourly rate]; *Syers Properties III, Inc. v. Rankin, supra*, 226 Cal.App.4th at p. 698 [number of hours].) We can reverse only if Prometheus establishes an abuse of that discretion. (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1258 [105 Cal.Rptr.3d 214].) It has not.

To the extent Prometheus argues that Judge Bergeron did not apportion fees, settled law is contrary: "Once a trial court determines entitlement to an award of attorney fees, apportionment of that award rests within the court's sound discretion." (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505 [14 Cal.Rptr.3d 467].) And the burden is on Prometheus "to establish that discretion was clearly abused and a miscarriage of justice resulted." (*Carver, supra*, at p. 505.) Prometheus ignores this law—and the record, where the issues were "inextricably intertwined." (*Id.* at p. 506.)

Many cases address the issue of attorney fees in the context where the claims are so intertwined as to make it impracticable, if not impossible, to separate the attorneys' time, exemplified by *Maxim Crane Works, L.P. v. Tilbury Constructors* (2012) 208 Cal.App.4th 286 [145 Cal.Rptr.3d 406] (*Maxim*). *Maxim* arose when a construction worker sued Maxim, a crane company, for personal injuries arising from a worksite incident. Maxim filed a cross-complaint against the injured worker's employer, Tilbury, seeking indemnity. The cross-complaint failed, as the trial court enforced an unfavorable choice-of-law provision in the contract written by Maxim, and found the indemnity agreement inapplicable to the employee's claim. The trial court

thereafter awarded Tilbury its full attorney fees, accepting “Tilbury’s contention that defense against Maxim’s indemnity cross-complaint was ‘inextricably intertwined’ with Tilbury’s defense against Gorski’s tort suit.” (*Id.* at p. 297.) The Court of Appeal affirmed.

After beginning with the observation its scope of review was “narrow” (*Maxim, supra*, 208 Cal.App.4th at p. 297), *Maxim* concluded with this:

■ “The California Supreme Court has stated that, ‘Attorney’s fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.’ (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129–130 [158 Cal.Rptr. 1, 599 P.2d 83]; see *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [51 Cal.Rptr.2d 286].)

“Further, ‘Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney’s time into compensable and noncompensable units.’ (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 [98 Cal.Rptr.2d 263]; see *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493 [209 Cal.Rptr. 623] [‘Attorneys fees need not be apportioned between distinct causes of action where plaintiff’s various claims involve a common core of facts or are based on related legal theories.’].)’ (*Maxim, supra*, 208 Cal.App.4th at p. 298.)

Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265 [87 Cal.Rptr.2d 497], cited by Prometheus for the proposition that the “trial court abused [its] discretion by failing to apportion fees,” is distinguishable. *Heppler* recognized the trial court’s discretion, and that a “‘recognized barrier to’” apportionment is “‘inextricably intertwined issues.’” (*Id.* at p. 1297.) The court nevertheless held some fees had to be apportioned in the setting there, which included that the trial court assessed all fees against Martin, including trial preparation and “trial time (seven weeks) of plaintiffs’ counsel.” (*Ibid.*) The Court of Appeal held that “Martin’s part of the case could have been tried in considerably less time than seven weeks had the trial not taken up issues that involved the other nonsettling subcontractors. It strikes us as eminently unfair to tag Martin with all of plaintiffs’ attorney fees for the entire seven-week trial.” (*Ibid.*) There is nothing unfair about the award here.

■ Prometheus’s brief asserts that we “may also see fit to reduce the overall attorney fee award because the trial court offered no reasoning for its decision.” The assertion is less than candid, as Judge Bergeron found that the “amount of fees requested is reasonable.” This is enough, as a ruling on a fee motion does not require judicial explanation or a statement of decision.

(*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294 [240 Cal.Rptr. 872, 743 P.2d 932]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 67 [100 Cal.Rptr.3d 152].)

The Verdict Form Was Not Error

Prometheus's last argument, set forth in a page, is that “[t]he trial court also erred when it overruled Prometheus's objection to the single verdict form which did not allow the jury to apportion damages as to each cause of action.” The essence of the argument is that the damages portion of the verdict should have been set forth specifically between contract and tort claims, apparently so that the attorney fees could be apportioned. Prometheus demonstrates no error.

■ As the leading treatise on trial practice puts it, “The use of special verdicts is discretionary with the trial court. Thus, refusal of a request for a special verdict is rarely ground for reversal on appeal.” (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 17:14, p. 17-6.)

Prometheus has shown no abuse.

Beyond that, to the extent that Prometheus's argument focuses on attorney fees, its argument would fail under the cases and authorities discussed above.

DISPOSITION

The judgment is affirmed. The Hjelms shall recover their costs on appeal and, in addition, their appropriate attorney fees for their success on appeal, to be determined by the trial court on remand.

Kline, P. J., and Miller, J., concurred.

[No. D068515. Fourth Dist., Div. One. Sept. 19, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ACCREDITED SURETY & CASUALTY CO., Defendant and Appellant.

[REDACTED]

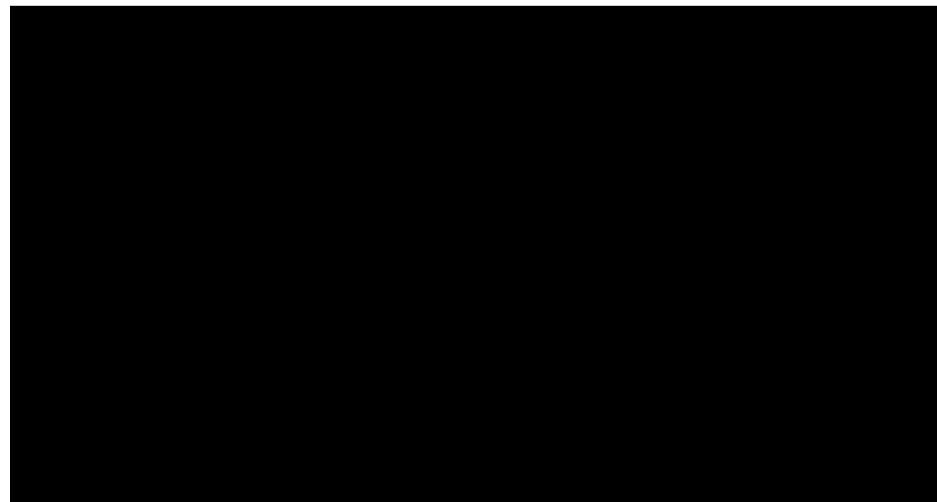
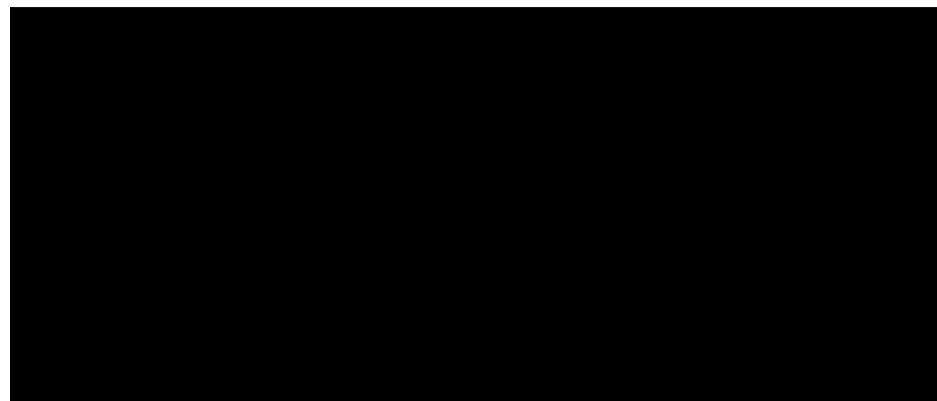
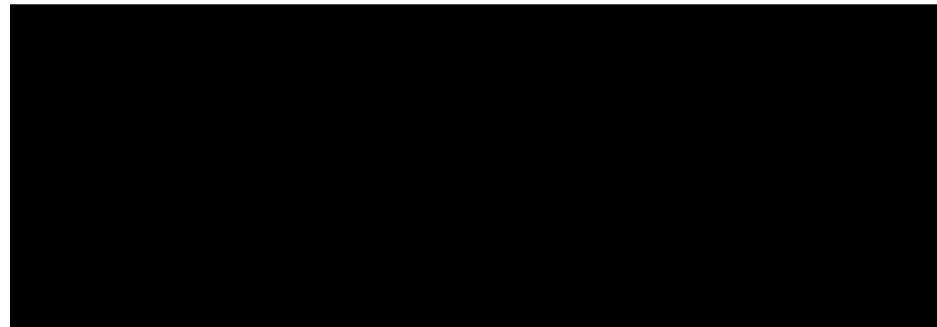
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COUNSEL

John M. Rorabaugh, E. Alan Nunez and Robert T. White for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, and Walter J. De Lorrell III, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

HUFFMAN, Acting P. J.—Defendant Accredited Surety & Casualty Co. (Surety) appeals an order and judgment in favor of the People following forfeiture of Surety’s bail bond under Penal Code section 1305.¹ Surety contends the court erred by denying its motion to vacate the forfeiture and exonerate the bond. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Surety posted a \$25,000 bail bond for the release of Jose Espinoza Estrada, who had been charged in San Diego County Superior Court with several felony offenses. After Estrada failed to appear for his arraignment, the trial court ordered Surety’s bond forfeited.

Surety moved to vacate the forfeiture and exonerate the bond under section 1305, subdivision (g). Surety contended it had located Estrada in Mexico, identified him with and in the presence of local law enforcement officers, informed the district attorney of Estrada’s whereabouts, and understood the district attorney had elected not to extradite him. In support of its motion, Surety submitted declarations from its investigator and two Mexican police officers, copies of Estrada’s Mexican driver’s license and passport, a signed statement from Estrada acknowledging receipt of his driver’s license and passport, and a letter from Surety’s counsel to the district attorney regarding extradition.

¹ Further statutory references are to the Penal Code.

In his declaration, Surety's investigator, Jerry Anderson, explained that he traveled to San Luis Rio Colorado in the Mexican state of Sonora with two officers from the fugitive apprehension unit of the state police for the Mexican state of Baja California. While there, Anderson and the officers met with Estrada and verified his identity based on Estrada's driver's license and passport. Anderson returned the driver's license and passport to Estrada and obtained his signed acknowledgment. Anderson and the officers attempted to photograph Estrada, but Estrada's father (who was present) refused.

The declarations submitted by the two Mexican police officers, Alfredo Arenas Moreno and Hector Ojeda Alcala, generally confirmed Anderson's statements. Moreno identified himself as a member of the international liaison unit and fugitive recovery unit of Baja California State Police. He stated that he accompanied Anderson to San Luis Rio Colorado and identified Estrada on the basis of his driver's license. Alcala identified himself as a sworn peace officer of the City of Mexicali in Baja California. Alcala stated that Estrada was temporarily detained in his presence, that he verified Estrada's identity on the basis of his driver's license and passport, and that those documents were returned to Estrada afterward.

The People opposed Surety's motion. The People argued that Surety had not satisfied the requirements of section 1305, subdivision (g) because Moreno and Alcala were not local law enforcement officers from the Mexican state of Sonora, where Estrada was located, and the San Diego County District Attorney did not make an election not to extradite Estrada. The People submitted a declaration from Richard Madruga, a deputy district attorney for San Diego County. Madruga explained that, based on conversations with his Mexican liaison, Mexican police officers from Baja California and Mexicali have no jurisdiction in Sonora. Madruga attached his letter responding to Surety's correspondence regarding Estrada. In the letter, Madruga expressed several concerns regarding the validity of the information provided by Surety, including Moreno's and Alcala's lack of jurisdiction in Sonora.

In reply, Surety disputed the People's interpretation of the statute. Surety submitted a declaration from its counsel describing extradition procedures and identification requirements for extradition from Mexico. Surety also submitted a further declaration from Alcala. This time, Alcala identified himself as a member of the international fugitive apprehension unit of the Mexican State Police in Baja California.

After hearing argument, the trial court denied Surety's motion and entered judgment. Surety appeals.

DISCUSSION

■ “Section 1305 provides that bail is to be forfeited if the defendant fails to appear when lawfully required to do so. That section sets forth situations when the forfeiture must be vacated and the bond exonerated.” (*County of Los Angeles v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 538, 543 [92 Cal.Rptr.3d 767] (*Fairmont*).) One such situation is described in subdivision (g) of section 1305, which “provides a means for exonerating the bail of a fleeing defendant if the bail bond agency locates the defendant in another jurisdiction and brings him before a local law enforcement officer but the district attorney elects not to seek the defendant’s extradition.” (*County of Los Angeles v. American Contractors Indemnity Co.* (2007) 152 Cal.App.4th 661, 663 [61 Cal.Rptr.3d 367].) That subdivision provides as follows: “In all cases of forfeiture where a defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, and is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court shall vacate the forfeiture and exonerate the bond on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.” (§ 1305, subd. (g).)

Surety contends it complied with the requirements of the statute and the court erred by denying its motion to vacate forfeiture and exonerate its bond. We review the trial court’s ruling for abuse of discretion. (*People v. Bankers Ins. Co.* (2010) 181 Cal.App.4th 1, 5 [104 Cal.Rptr.3d 87].) “As the Supreme Court has noted, however, ‘the abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed *de novo*, and its application of the law to the facts is reversible only if arbitrary and capricious.’” (*Fairmont, supra*, 173 Cal.App.4th at p. 543.)

■ Surety frames its argument on appeal as a question of statutory interpretation. Surety appears to argue that the statutory phrase “local law enforcement officer of the jurisdiction in which the defendant is located” should be interpreted to include law enforcement officers who are part of an international fugitive apprehension task force, regardless of whether they are from the Mexican state where the defendant was located. (§ 1305, subd. (g).) Applying ordinary rules of statutory construction (*County of Orange v. Ranger Ins. Co.* (1998) 61 Cal.App.4th 795, 800 [71 Cal.Rptr.2d 811]) and mindful that the statute ““must be strictly construed in favor of the surety to avoid

the harsh results of a forfeiture”’’ (*County of Los Angeles v. American Contractors Indemnity Co., supra*, 152 Cal.App.4th at pp. 665–666), we conclude on de novo review that Surety’s interpretation of the statute is incorrect. The ordinary meaning of “jurisdiction” in this context is “[a] geographic area within which political or judicial authority may be exercised” or “[a] political or judicial subdivision within such an area.” (Black’s Law Dict. (10th ed. 2014) p. 980.) “[J]urisdiction” here is based on geography, as the language of the statute makes clear: the relevant jurisdiction is the one “in which the defendant is *located*.²” (§ 1305, subd. (g), italics added.) The statute admits no exception from this requirement for local law enforcement officers from a *different* jurisdiction, even if those officers are engaged in specialized law enforcement work involving international fugitives. The policy reasons behind the statute and the international extradition procedures cited by Surety cannot override the plain meaning of the statute. (See *People v. Loeun* (1997) 17 Cal.4th 1, 9 [69 Cal.Rptr.2d 776, 947 P.2d 1313] [“If there is no ambiguity in the language of the statute, ‘then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.’ ’’].)

Given our interpretation of the statute, we conclude the trial court did not err by denying Surety’s motion to vacate forfeiture and exonerate its bond. As we have discussed, the relevant statute requires that the defendant be temporarily detained “in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located” and that the local law enforcement officer positively identify him. (§ 1305, subd. (g).) It was Surety’s burden to show that its case falls within this subdivision. (*People v. Accredited Surety & Casualty Co.* (2004) 132 Cal.App.4th 1134, 1139 [34 Cal.Rptr.3d 199].) Here, Estrada was located in San Luis Rio Colorado in the Mexican state of Sonora. The relevant local jurisdictions were San Luis Rio Colorado and Sonora.² According to Surety’s evidence, the law enforcement officers who were allegedly present when Estrada was detained were from Baja California. The officers here were neither officers of San Luis Rio Colorado nor officers of Sonora. The record contains no evidence of their relationships, if any, to those jurisdictions. The trial court was therefore entitled to find they were not “local law enforcement officer[s] of the jurisdiction in which [Estrada was] located” within the meaning of the statute. This finding is amply supported by the evidence, and the trial court did not abuse its discretion by denying Surety’s motion. In light of our conclusion, we need not consider the People’s alternative argument in favor of affirmance.

² The country of Mexico, of course, is another possible local jurisdiction. This case does not present the issue, and we need not decide, whether law enforcement officers of the Mexican federal government would qualify under the statute.

DISPOSITION

The order and judgment are affirmed.

Nares, J., and Haller, J., concurred.

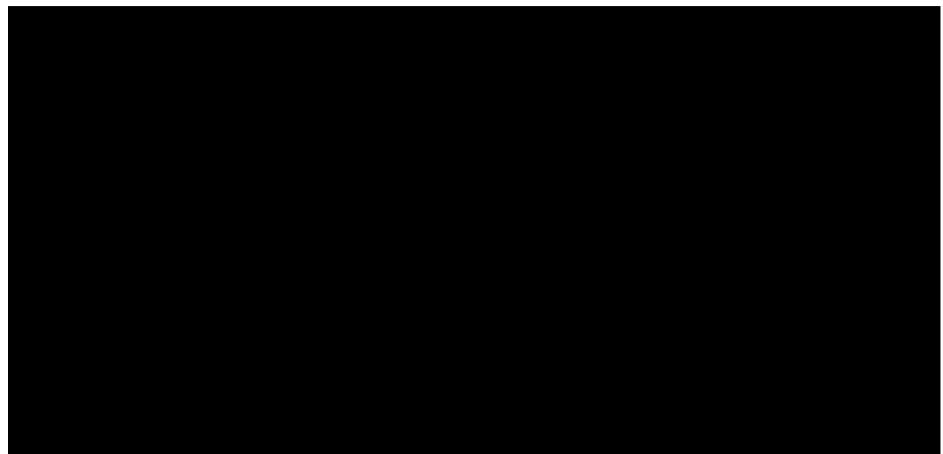
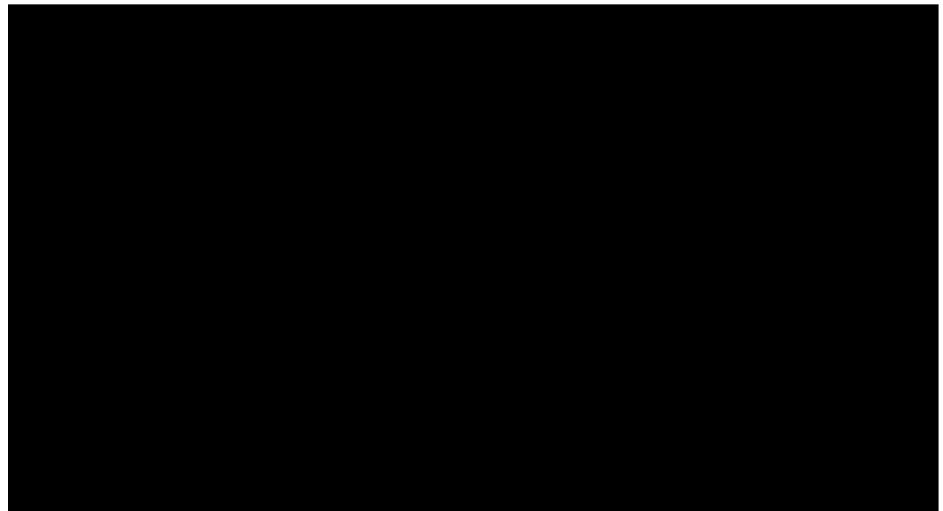
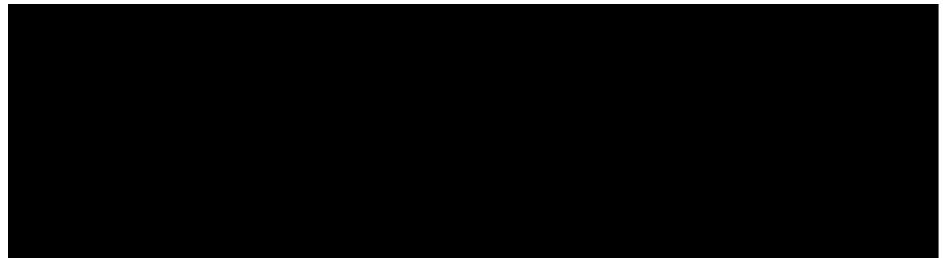
[No. F069946. Fifth Dist. Oct. 5, 2016.]

THE PEOPLE, Plaintiff and Appellant, v.
DARRELL KEITH VONWAHLDE, Defendant and Respondent.

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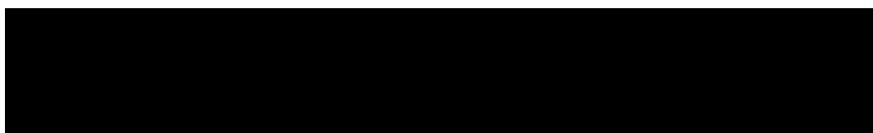
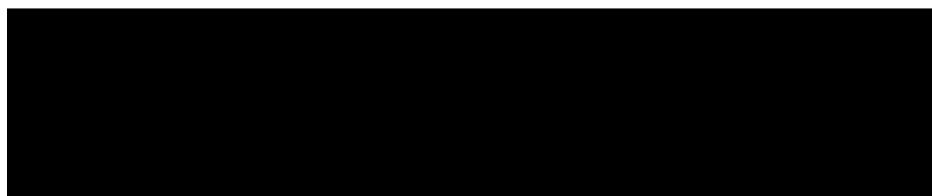
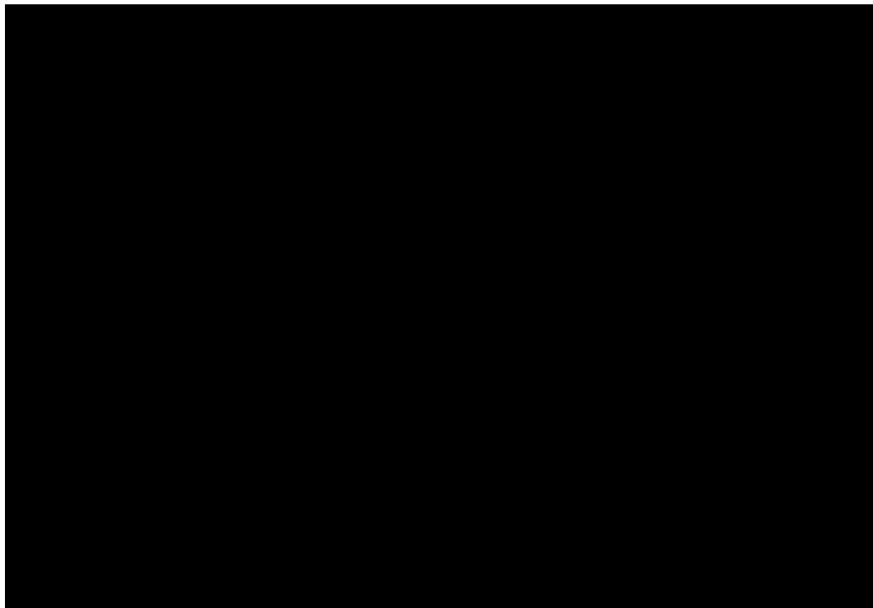
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COUNSEL

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, George M. Hendrickson and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Appellant.

Michael Satris, under appointment by the Court of Appeal, for Defendant and Respondent.

OPINION

DETJEN, J.—A defendant is on parole in one case when he or she is sentenced to prison in another case. Does the trial court have authority to terminate parole in the first case? We hold it does not. We further hold the People can appeal an order purporting to do so.

PROCEDURAL HISTORY

On May 4, 2010, Darrell Keith VonWahlde (defendant) was convicted in Fresno County Superior Court case No. F09906698 (hereafter the original case) of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1)), apparently under circumstances involving domestic violence.² He was released on parole on October 31, 2013, with supervision scheduled to expire on October 31, 2016. On February 25, 2014, defendant reported to his parole officer with a misdemeanor minute order indicating he was on parole. He was directed to obtain his felony minute order, and return for processing. He failed to return. A warrant was issued for his arrest and, on May 28, 2014, he was “arrested and booked.”

On June 26, 2014, a petition for revocation of parole was filed in Fresno County Superior Court case No. P14900105 (hereafter the parole revocation case), alleging defendant violated the conditions of his parole by absconding from parole supervision. The court found probable cause to support revocation and preliminarily revoked supervision. The parole revocation case was continued; defendant was facing new charges in Fresno County Superior Court case No. F14900323 (hereafter the new case).

On July 3, 2014, defendant entered into a plea agreement in the new case. He pled no contest to running a chop shop operation (Veh. Code, § 10801) and admitted having a prior strike conviction and having served a prior prison term. The agreement provided for a stipulated term of five years to run concurrently with the parole revocation case. In exchange, count two and additional prison prior allegations in the new case, and another case in which charges were pending, would be dismissed. The court found defendant in violation, and ordered that defendant’s parole remain revoked.

Sentencing in the new and parole revocation cases took place on August 4, 2014. Before sentence was imposed, the following occurred:

¹ All statutory references are to the Penal Code unless otherwise stated.

² Because the record on appeal does not contain any additional facts concerning this offense, we dispense with a statement of facts.

“THE COURT: Let me ask this . . . , with regards to the matter for which he’s on parole, is there any need to continue him on parole when it’s been stipulated to a five-year term?

“[DEFENSE COUNSEL]: Our request is that parole be terminated today. Or at the very least, give him credit for time served so that he can be transported as soon as possible to [prison], but he’s going to be in custody.

“[PROSECUTOR]: We’d ask that Parole handle that matter . . . I don’t believe this Court has jurisdiction under . . . [section] 1203.

“THE COURT: Well, I have a question about that. . . . What’s to be gained by having him on parole while he’s getting a five-year term in prison according to the stipulation of the parties? Secondly, because the matter’s been submitted to the Court through the [L]egislature—through the Penal Code, why isn’t this an action that can be dismissed according to 1385 of the Penal Code?

“[PROSECUTOR]: I understand the Court’s position But the Parole has indicated to me that they . . . stand by the position that they want anyone who’s still on parole to remain on parole, . . . whether or not the person has incurred a new . . . commitment or supervisory situation or if he’s still on parole. I’ve also spoken to Presiding Judge Conklin, he’s indicated to me that [p]arole is not to be terminated by judicials.

“THE COURT: That’s all fine and well and we’re all independent constitutional law officers and I understand his position is that maybe, but I’m just curious as to what’s to be gained by having [defendant] on a grant of parole when he’s going to be doing five years in prison? [¶] . . . [¶]

“[DEFENSE COUNSEL]: . . . [W]e stand by our request . . . to terminate parole. . . .

“THE COURT: Pursuant to 1385?

“[DEFENSE COUNSEL]: Yes, and he’s serving five years with limited time credits because of the prior strike.”

The court proceeded to impose the stipulated five-year term in the new case. This ensued: “[THE COURT:] With regards to the parole matter; the Court’s thought and comments stand that it serves no good purpose to keep this gentleman on a grant of formal parole. Noting that the Penal Code itself seems to indicate that the Court has no ability to terminate parole, but also noting that the [L]egislature deems fit to submit these matters to the Court for

the purposes of an action for consideration of parole status, revocation hearings, the Court would deem this to be an action pursuant to 1385 and would exercise its discretion under 1385 to terminate parole. He's to be afforded 180 days of custody credits in that matter. The reasons in the minutes are that he is receiving a five-year stipulated prison term in [the new] case . . . and as such, in the interest of justice, parole is therefore terminated pursuant to 1385[, subdivision](a) of the Penal Code.”³

The People filed a timely notice of appeal pursuant to section 1238, subdivision (a)(5).

DISCUSSION

I

APPEALABILITY

■ “The prosecution’s right to appeal in a criminal case is strictly limited by statute. [Citation.]” (*People v. Chacon* (2007) 40 Cal.4th 558, 564 [53 Cal.Rptr.3d 876, 150 P.3d 755]; accord, *People v. Williams* (2005) 35 Cal.4th 817, 822–823 [28 Cal.Rptr.3d 29, 110 P.3d 1239].) “The circumstances allowing a People’s appeal are enumerated in section 1238.” (*People v. Chacon*, *supra*, 40 Cal.4th at p. 564.) “‘[C]ourts are precluded from so interpreting section 1238 as to expand the People’s right of appeal into areas other than those clearly specified by the Legislature.’” (*In re Anthony* (2015) 236 Cal.App.4th 204, 211 [186 Cal.Rptr.3d 343].)

³ Although the court referred to “[t]he reasons in the minutes,” the minute order contains no statement of reasons, but merely provides, “Court orders Parole terminated,” “Defendant released on all counts,” and “Defendant released on this case only.”

At the time the court ruled, former section 1385, subdivision (a) provided, in pertinent part: “The reasons for the dismissal must be set forth in an order entered upon the minutes.” The law was settled that this requirement was mandatory; where the reasons were not set out in the minutes, the dismissal could not be considered as one made under the authority of section 1385, regardless of whether the reasons could be gleaned from the reporter’s transcript. (E.g., *People v. Bonnetta* (2009) 46 Cal.4th 143, 149–152 [92 Cal.Rptr.3d 370, 205 P.3d 279]; *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 54 [77 Cal.Rptr.3d 352]; *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 135–136 [262 Cal.Rptr. 576]; *People v. Smith* (1975) 53 Cal.App.3d 655, 657 [126 Cal.Rptr. 195].) Effective January 1, 2015, former subdivision (a) of section 1385 was amended to provide in part: “The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter.”

Because, as we explain, we conclude section 1385 did not authorize the trial court’s termination of parole, we need not determine the effect, if any, of the failure to comply with former section 1385, subdivision (a) as it stood at the time of the court’s ruling. (See *People v. Jones* (2016) 246 Cal.App.4th 92, 96–97 [200 Cal.Rptr.3d 671].)

“Long-standing authority requires adherence to these limits even though . . . ‘the People may thereby suffer a wrong without a remedy.’ [Citation.]” (*People v. Chacon, supra*, 40 Cal.4th at p. 564.)

■ The People rely on subdivision (a)(5) of section 1238, which permits them to appeal from “[a]n order made after judgment, affecting the substantial rights of the people.” Defendant contends the appeal in this case does not fall into this category, because (1) the parole termination order was made under a different case number than the original case in which judgment was pronounced, and (2) no substantial rights possessed by the People were affected by the court’s order, since defendant’s entire parole period would have run while defendant was serving his prison term in the new case.

The People’s appeal is authorized by subdivision (a)(5) of section 1238. The Legislature has decreed that, generally speaking, “[a] sentence resulting in imprisonment in the state prison . . . shall include a period of parole supervision or postrelease community supervision” (§ 3000, subd. (a)(1).) Although “the period of parole is *not* part of a defendant’s prison term” (*People v. Jefferson* (1999) 21 Cal.4th 86, 95 [86 Cal.Rptr.2d 893, 980 P.2d 441]), “parole is a form of punishment accruing directly from the underlying conviction” (*People v. Nuckles* (2013) 56 Cal.4th 601, 609 [155 Cal.Rptr.3d 374, 298 P.3d 867]) and is “a direct and, pragmatically, an inexorable penal consequence” thereof (*In re Carabes* (1983) 144 Cal.App.3d 927, 930 [193 Cal.Rptr. 65]). Since the parole period fastens to the prison sentence imposed in the underlying criminal case, a superior court’s decision to assign parole revocation actions their own case numbers is not controlling. A trial court’s order concerning revocation and/or termination of parole remains one “made after judgment.” (§ 1238, subd. (a)(5).)

■ Moreover, substantial rights of the People are affected by an order terminating parole. The Legislature has found and declared “that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions” (§ 3000, subd. (a)(1).) “[T]he prosecutor’s role [is] as representative of the People as a body ‘The prosecutor speaks . . . for all the People.’” (*People v. Eubanks* (1996) 14 Cal.4th 580, 589 [59 Cal.Rptr.2d 200, 927 P.2d 310]; accord, *People v. Seumanu* (2015) 61 Cal.4th 1293, 1345 [192 Cal.Rptr.3d 195, 355 P.3d 384].) Accordingly, the prosecution has a considerable interest in the protection of public safety and prevention of recidivism. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 679 [143 Cal.Rptr.3d 742]; *People v. Beebe* (1989) 216 Cal.App.3d 927, 934 [265 Cal.Rptr. 242].)

“ ‘[I]n order to affect the People’s substantial rights an order “must in some way affect the judgment or its enforcement or hamper the further prosecution of the particular proceeding in which it is made.”’ [Citations.]’ (*People v. Leonard* (2002) 97 Cal.App.4th 1297, 1300 [119 Cal.Rptr.2d 57].) It is not enough for the order merely to relate to a collateral matter. (*Ibid.*)

Where a sentence in a criminal case is required to include a period of parole, an order cutting that period short is not merely collateral to the underlying criminal case, but rather directly affects the judgment. (See *In re Carabes, supra*, 144 Cal.App.3d at pp. 931–932.) It also directly implicates the protection of public safety. It thus affects the People’s substantial rights. (See, e.g., *In re Anthony, supra*, 236 Cal.App.4th at pp. 211–212 [§ 1238, subd. (a)(5) authorizes People to appeal orders affecting defendant’s sentence or timing of his or her release]; *People v. McGuire* (1993) 14 Cal.App.4th 687, 701 [18 Cal.Rptr.2d 12] [§ 1238, subd. (a)(5) authorizes People’s appeal of order granting defendant bail pending appeal; order releasing convicted felon into society affects enforcement of judgment and implicates People’s substantial rights to security]; *People v. Minjarez* (1980) 102 Cal.App.3d 309, 312 [162 Cal.Rptr. 292] [§ 1238, subd. (a)(5) allows People to appeal award of time credits].)

Defendant says the trial court’s ruling has “no real-world effect” since defendant will be in prison the entire period of parole. Even if we determined appealability based on the specific facts of a case rather than the nature of the order at issue, we would still find the People’s appeal authorized by subdivision (a)(5) of section 1238. There is simply no guarantee defendant will not be released early, particularly given the state of flux in which the state’s sentencing laws have been for several years and continue to be. (See, e.g., the Safe Neighborhoods and Schools Act, added by initiative, Gen. Elec. (Nov. 4, 2014) Prop. 47; Three Strikes Reform Act of 2012, added by initiative, Gen. Elec. (Nov. 6, 2012) Prop. 36; 2011 Realignment Legislation addressing public safety (Stats. 2011, ch. 15) operative Oct. 1, 2011 (hereafter Realignment or the Realignment Act); see also proposed initiative measure Prop. 57, The Public Safety and Rehabilitation Act of 2016, § 3, found online at <<http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>> [as of Oct. 5, 2016].)⁴

⁴ Having concluded the People’s appeal is authorized by subdivision (a)(5) of section 1238, we need not decide whether it is also authorized by subdivision (a)(6) of section 1238 as “[a]n order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed,” or whether the People could properly rely on that subdivision in their briefs when it was not included in their notice of appeal. (See *People v. Alice* (2007) 41 Cal.4th 668, 674 [61 Cal.Rptr.3d 648, 161 P.3d 163].)

II**AUTHORITY TO TERMINATE PAROLE**

■ Prior to the advent of Realignment, virtually all authority over parole and parolees—including whether a period of parole was to be required; if so, its duration and conditions; and the power to revoke parole—resided in the paroling authority, either the California Department of Corrections and Rehabilitation (CDCR) or the Board of Parole Hearings (formerly known as the Board of Prison Terms). (See, e.g., *In re Lira* (2014) 58 Cal.4th 573, 584 [167 Cal.Rptr.3d 409, 317 P.3d 619]; *Department of Corrections & Rehabilitation v. Superior Court* (2015) 237 Cal.App.4th 1472, 1480 [188 Cal.Rptr.3d 641] (*Department*); *People v. Stevens* (2001) 92 Cal.App.4th 11, 14–15 [111 Cal.Rptr.2d 633]; *People v. McMillion* (1992) 2 Cal.App.4th 1363, 1368 [3 Cal.Rptr.2d 821]; see also §§ 3000.09, 3056; former § 3060.) With Realignment came an enhanced role for superior courts. (*Department, supra*, 237 Cal.App.4th at p. 1480.) Now, a person such as defendant, who is released from state prison after serving a prison term for a serious felony as described in subdivision (c) of section 1192.7, “is subject to parole supervision by [CDCR] and the jurisdiction of the court in the county in which the parolee is released, resides, or in which an alleged violation of supervision has occurred, *for the purpose of hearing petitions to revoke parole and impose a term of custody.*” (§ 3000.08, subd. (a), italics added.)

The question we must answer is whether this vesting of jurisdiction in the superior court gives that court authority to terminate parole. The issue is one of statutory construction, which is subject to our independent review. (*People v. Tran* (2015) 61 Cal.4th 1160, 1166 [191 Cal.Rptr.3d 251, 354 P.3d 148]; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1034 [171 Cal.Rptr.3d 55]; see *Department, supra*, 237 Cal.App.4th at p. 1475.)

■ Section 3000.08, subdivision (f) permits the supervising parole agency to petition for revocation of parole, pursuant to section 1203.2, either in the court in the county in which the parolee is being supervised, or in the court in the county in which the alleged violation of supervision occurred. If the court finds the supervised person violated the conditions of his or her parole, “the court shall have authority to do any of the following: [¶] (1) Return the person to parole supervision with modifications of conditions, if appropriate, including a period of incarceration in county jail. [¶] (2) Revoke parole and order the person to confinement in the county jail. [¶] (3) Refer the person to a reentry court . . . or other evidence-based program in the court’s discretion.” (§ 3000.08, subd. (f).)

Section 1203.2 in turn describes the general procedure to be followed when a person is subject to parole revocation. It permits the court in the county of

supervision or in the county in which the alleged violation of supervision occurred to modify, revoke, or terminate supervision of the person “if the interests of justice so require,” either upon rearrest of the person (*id.*, subd. (a)), or upon the court’s own motion or upon petition of the supervised person, the parole officer, or the district attorney (*id.*, subd. (b)). Both subdivisions (a) and (b) of the statute provide, however, that “the court shall not terminate parole pursuant to this section.”⁵

Neither section 1203.2 nor section 3000.08 expressly precludes the termination of parole pursuant to section 1385. An examination of that statute and its long-standing judicial interpretation convinces us, however, that section 1385 does not apply.

■ “Section 1385 permits a court, ‘in furtherance of justice, [to] order an action to be dismissed.’ (*Id.*, subd. (a).) Although the statute literally authorizes a court to dismiss only an entire criminal action, [the California Supreme Court has] held it also permits courts to dismiss, or ‘strike,’ factual allegations relevant to sentencing, such as those that expose the defendant to an increased sentence. [Citations.] However, the court’s power under section 1385 is not unlimited; it reaches only the ‘individual charges and allegations in a criminal action.’ [Citation.] Thus, a court may not strike facts that need not be charged or alleged, such as the sentencing factors that guide the court’s decisions whether to grant probation [citation] or to select the upper, middle or lower term for an offense [citation]. [Citation.]” (*People v. Lara* (2012) 54 Cal.4th 896, 900–901 [144 Cal.Rptr.3d 169, 281 P.3d 72]; see, e.g., *In re Varnell* (2003) 30 Cal.4th 1132, 1137, 1139 [135 Cal.Rptr.2d 619, 70 P.3d 1037]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 [53 Cal.Rptr.2d 789, 917 P.2d 628]; see also *People v. Espinoza* (2014) 232 Cal.App.4th Supp. 1, 4–5 [181 Cal.Rptr.3d 741].)

“‘The *only* action that may be dismissed under . . . section 1385, subdivision (a), is a criminal action or a part thereof.’ [Citation.]” (*In re Varnell, supra*, 30 Cal.4th at p. 1137.) A period of parole is not a criminal action or a part thereof as contemplated by section 1385. Rather, it is “a form of punishment accruing directly from the underlying conviction.” (*People v. Nuckles, supra*, 56 Cal.4th at p. 609.) “Although parole constitutes a distinct phase from the underlying prison sentence, . . . [b]eing placed on parole is a direct consequence of a felony conviction and prison term.” (*Ibid.*) It need not be charged or alleged, and “[n]either the prosecution nor the sentencing court has the authority to alter the applicable term of parole established by the Legislature. [Citations.]” (*In re Moser* (1993) 6 Cal.4th 342, 357 [24 Cal.Rptr.2d 723, 862 P.2d 723], fn. omitted.) “Section 1385 does not give the

⁵ Sections 1203.2 and 3000.08 were amended, effective January 1, 2016 (Stats. 2015, ch. 61, §§ 1, 2), in a manner not material to the issues presented in this appeal.

trial court discretion to modify statutorily prescribed consequences of a conviction” (*People v. Tuck* (2012) 204 Cal.App.4th 724, 731 [139 Cal.Rptr.3d 407] [trial court lacks authority to strike sex offender registration requirement].)

■ Defendant’s mandatory parole requirement “is not an action, a criminal count, or a factual allegation.” (*People v. Tuck, supra*, 204 Cal.App.4th at p. 730.) “In the absence of a charge or allegation, there is nothing to order dismissed under section 1385.” (*In re Varnell, supra*, 30 Cal.4th at p. 1139.) The trial court here erred by purporting to terminate parole, as it lacked the authority to do so.⁶

Defendant contends the trial court had the authority to terminate parole *supervision*. We agree. This is not what the trial court purported to do, however, and—contrary to defendant’s claim—its order terminating parole does not “come[] well within [the] statutory umbrella” of section 1203.2. Accordingly, defendant’s reliance on the maxim that “‘ ‘a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason’ ’” (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [17 Cal.Rptr.2d 122, 846 P.2d 704]; see *People v. Campbell* (1991) 230 Cal.App.3d 1432, 1443 [281 Cal.Rptr. 870]) is to no avail.

Similarly futile is defendant’s claim that under the unique factual scenario of this case, there is no parole during the period defendant is in prison on the new case. Defendant argues the five-year prison sentence “rendered superfluous any further parole period” and “effectively nullified and terminated” defendant’s parole. As a matter of *fact*, defendant may be correct. However, “the sole issue before us is one of statutory construction, a task blind to the [arguably] compelling and unopposed facts presented to the trial court. As a matter of *law* and despite the many good reasons justifying the trial court’s order, we must agree with the [People]” (*Department, supra*, 237 Cal.App.4th at p. 1475, italics added.) As a matter of law, the trial court erred.

DISPOSITION

The order terminating defendant’s parole is vacated. The matter is remanded to the superior court with directions to reinstate the parole violation

⁶ We express no opinion concerning whether a parole revocation proceeding—as opposed to parole itself—constitutes “an action” within the purview of section 1385, or whether a superior court has authority under that statute to dismiss such a proceeding or, for example, factual allegations contained in the parole revocation petition.

finding and impose a term of custody on the parole violation consistent with the plea bargain made by the parties.

Hill, P. J., and Gomes, J., concurred.

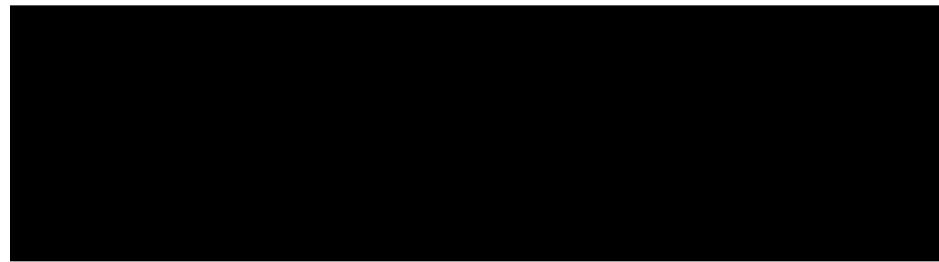
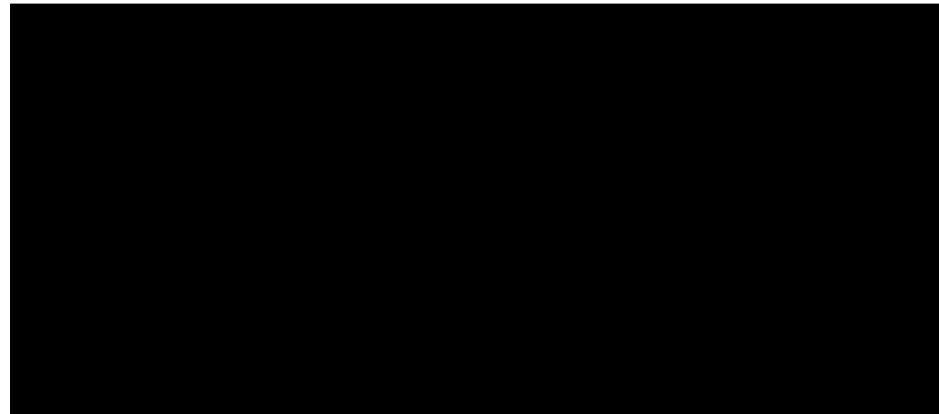
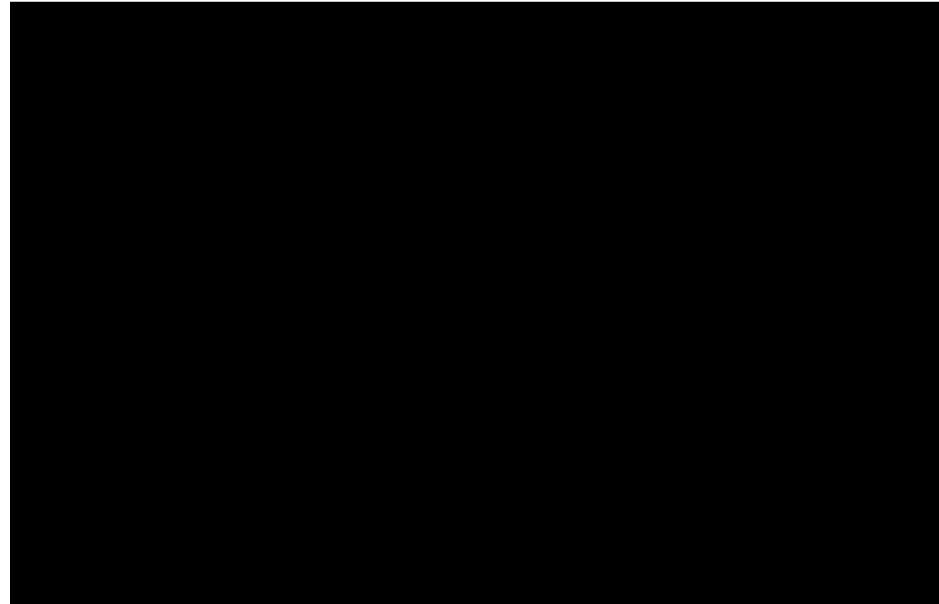
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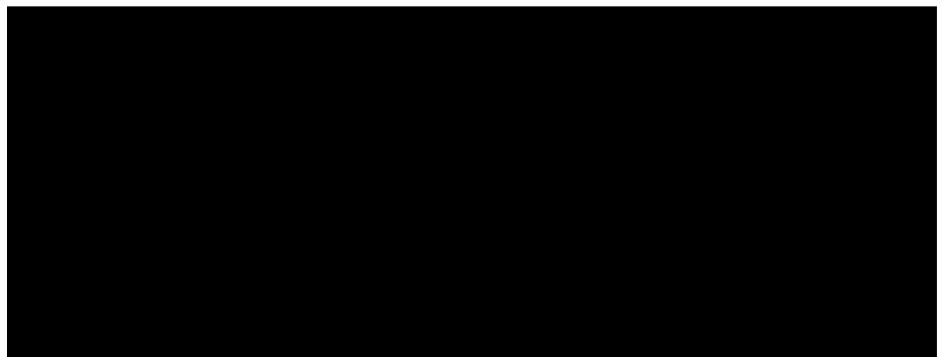
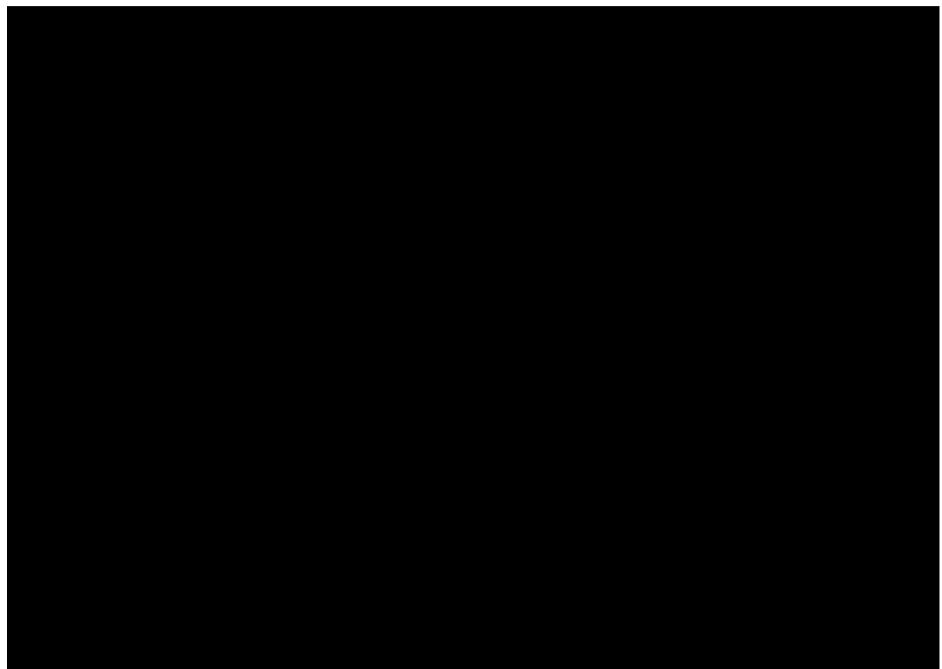
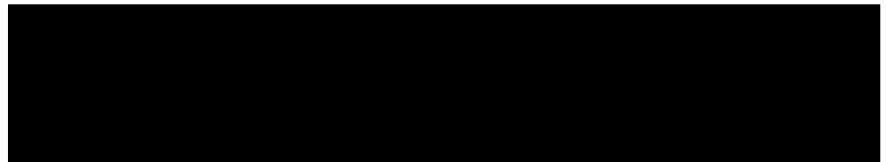
KRISTEN NICODEMUS et al., Plaintiffs and Appellants, v.
SAINT FRANCIS MEMORIAL HOSPITAL et al., Defendants and
Respondents.

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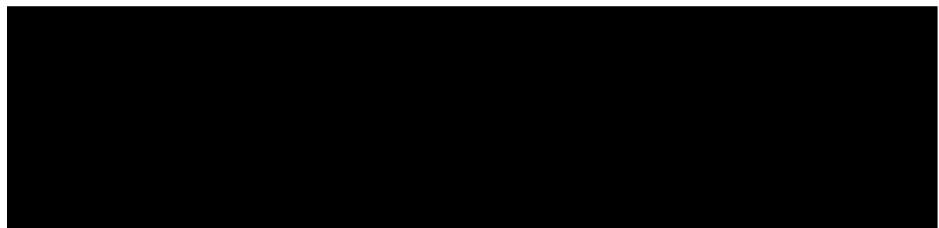
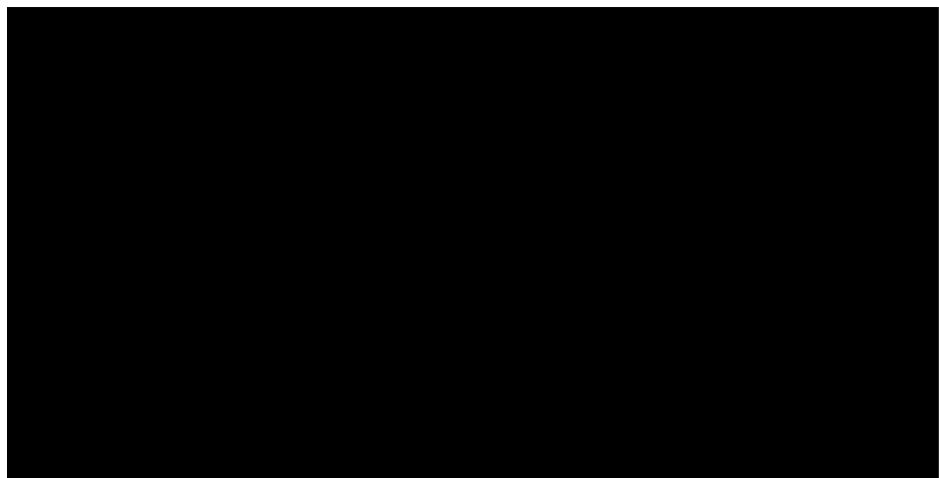
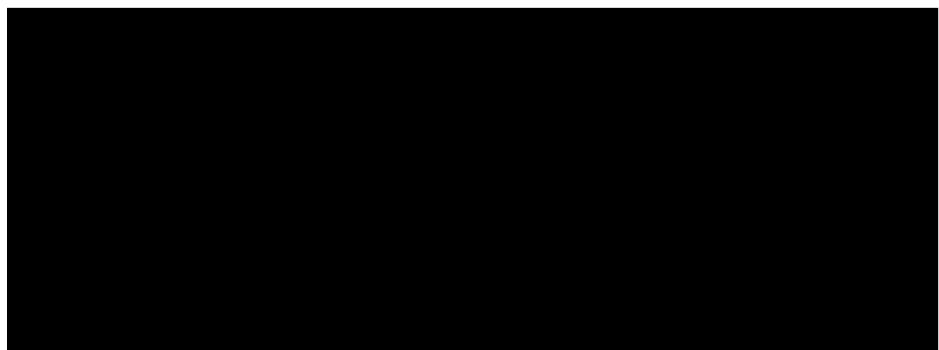
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COUNSEL

Andrus Anderson, Lori E. Andrus; Hersh & Hersh and Mark E. Burton for Plaintiffs and Appellants.

Woollacott and Jay Woollacott for Defendants and Respondents.

OPINION

RIVERA, J.—Plaintiff Kristen Nicodemus filed this action against HealthPort Technologies, LLC (HealthPort), and Saint Francis Memorial Hospital (Saint Francis) (collectively, defendants), alleging they overcharged her for copies of her patient medical records. She sought to bring the action on her own behalf and on behalf of others who, acting through an attorney, requested patient medical records from a medical provider in California prior to litigation and were charged more than the amounts specified in Evidence Code¹ section 1158. Plaintiff's motion to certify the class was denied. We conclude this was error and reverse.

I. BACKGROUND**A. Statutory Framework**

Section 1158 is designed to require medical providers to produce the medical records demanded by patients through their attorneys prior to litigation in a timely fashion and at a reasonable cost. At the time of plaintiff's appeal, section 1158 provided in pertinent part: "Whenever, prior to the filing of any action or the appearance of a defendant in an action, an attorney at law . . . presents a written authorization therefor signed by an adult patient [or by a patient's guardian, conservator, parent, or personal representative], . . . a licensed hospital . . . shall make all of the patient's records . . . available for inspection and copying by the attorney at law . . . promptly upon the presentation of the written authorization." (Former

¹ All statutory references are to the Evidence Code.

§ 1158.)² The statute authorizes the requesting attorney to employ a professional photocopier to obtain the records on the attorney's behalf, and the provider must produce the records within five days. (Former § 1158.) All "reasonable costs" incurred by a medical provider in locating, copying, or making the records available may be charged to the requesting party, subject to limits set forth in the statute, which include \$0.10 per page for reproducing documents measuring up to 8.5 by 14 inches, \$0.20 per page for producing documents from microfilm, and clerical costs not to exceed \$16 per hour per person for locating and making records available. (*Ibid.*)

"The legislative purpose behind the enactment [of section 1158] is not stated, but its apparent goal is to permit a patient to evaluate the treatment he or she received before determining whether to bring an action against the medical provider. Section 1158 also enables the patient to seek freely advice concerning the adequacy of medical care and to create a medical history file for the patient's information or subsequent use. It operates to prevent a medical provider from maintaining secret notes which can be obtained by the patient only through litigation and potentially protracted discovery proceedings.' " (*Thornburg v. Superior Court* (2006) 138 Cal.App.4th 43, 50 [41 Cal.Rptr.3d 156], quoting *National Football League Management Council v. Superior Court* (1983) 138 Cal.App.3d 895, 903 [188 Cal.Rptr. 337] (*National Football League*).)

B. Plaintiff's Request for Medical Records

According to the complaint, in June 30, 2011, plaintiff was admitted to Saint Francis for treatment of injuries sustained when she was burned by exploding fuel gel from a firepot. Later she engaged an attorney to represent her in a potential lawsuit. Plaintiff's attorney sent a fax to Saint Francis asking that it provide her copies of plaintiff's medical records, and attaching a signed authorization to release the information.

² Although former section 1158 was amended effective January 1, 2016 (Stats. 2015, ch. 528, § 1), the amendments did not alter the substance of the provisions relevant to this appeal. As amended, section 1158, subdivision (b) now provides, "Before the filing of any action . . . , if an attorney at law . . . presents a written authorization therefor signed by an adult patient [or by a patient's guardian, conservator, parent, or personal representative] . . . to a medical provider, the medical provider shall promptly make all of the patient's records . . . available for inspection and copying by the attorney at law . . ." And, subdivision (a) now defines "'medical provider'" as including "a licensed hospital." (§ 1158, subd. (a).) The amendments included no changes to the language of the paragraph defining "'[r]easonable cost.'" (§ 1158, subd. (e)(2); compare Stats. 2015, ch. 528, § 1 with Stats. 1997, ch. 442, § 15.)

In that period, HealthPort provided Saint Francis with patient medical record release of information services pursuant to a contract (the contract).³ Under the contract, HealthPort agreed, among other things, to review requests for patient medical records that Saint Francis received, gather responsive records, and provide copies to requestors. When attorneys requested client medical records “in a matter in which the medical records are an issue (including a request issued pursuant to CA Evidence Code 1158),” HealthPort agreed it would provide those same services as “representative of [the attorney] request[er] . . . after receiving written authorization from the attorney.” HealthPort assigned personnel on site at Saint Francis to perform the services.

Operating under the contract, HealthPort responded to plaintiff’s attorney’s request for plaintiff’s medical records, sending a “California Agent Fee Information” sheet (information sheet) and an invoice. In a section explaining the invoice charges, the information sheet quoted section 1158, acknowledging its requirement that medical providers must allow attorneys to inspect and copy patient records on presentation of a patient’s written authorization. The information sheet, however, went on to state: “HealthPort has agreed to copy records for you, upon your hiring of HealthPort as your representative/agent for purposes of making such copies. The rates that HealthPort is charging do not fall under [section] 1158.”⁴

HealthPort’s invoice to plaintiff’s counsel sought payment of \$86.52, and provided directions for payment. The amount included a \$30 “basic fee,” a \$15 “retrieval fee,” \$25.25 for copying 101 pages at \$0.25 per page, \$10.30 for shipping, and \$5.97 for sales tax. The invoice included a statement directing requestors to the information sheet for more details, and advising, “Payment implies that you agreed to employ HealthPort as your professional photocopy representative for purposes of this request and that you accepted the charge denoted below on this invoice.”

Plaintiff’s attorney paid HealthPort’s invoice in full, noting on the check’s memo line, “under protest • in violation of CA EVID CODE 1158,” and plaintiff later reimbursed her attorney for that cost. HealthPort delivered the requested copies.

³ The parties agree that (1) the contract is reflected in multiple agreements between HealthPort, on the one hand, and Saint Francis or Dignity Health, on the other; (2) Dignity Health is the parent company of Saint Francis; and (3) Dignity Health previously was known as Catholic Healthcare West.

⁴ HealthPort would also schedule a time for attorneys to inspect records and, under the contract, had to allow attorneys the option of sending in a different photocopy service if they prefer.

C. Plaintiff's Action and Motion for Class Certification

In May 2013, plaintiff filed her complaint against defendants alleging causes of action for violation of section 1158 and violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). (*Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 204–205 [48 Cal.Rptr.3d 840] [§ 1158 is enforceable by private right of action].)

On November 22, 2013, plaintiff moved for an order certifying the following class: “All adult patients, guardians or conservators of adult patients (or of the adult patient’s estate), parents or guardians of minor patients, or personal representatives or heirs of deceased patients, who: (1) requested medical records from a hospital or other medical provider (as enumerated in [§ 1158]) located in California; (2) through an attorney at law or his/her representative; (3) prior to litigation[;] and (4) were charged by HealthPort more than: (a) ten cents (\$0.10) per page for reproduction of medical records [8.5] x 14 inches or less, (b) twenty cents (\$0.20) per page for reproduction of medical records from microfilm, (c) \$16.00 per hour (computed on the basis of four dollars per quarter hour or fraction thereof) for clerical costs, (d) actual postal charges, and/or (e) actual costs charged by a third person, from May 1, 2009 to present.”

In support of her motion for class certification, plaintiff submitted evidence obtained through discovery describing HealthPort’s procedure for handling attorney requests seeking client medical records. According to that material, if the attorney requesting the records did not indicate plans to use a different photocopy service, the receiving medical facility automatically forwarded the request to its on-site HealthPort representative. That person obtained and combined all responsive paper and electronic medical records, transmitting them together in an encrypted format to the corporate office in Georgia.

In Georgia, HealthPort personnel indexed all requests, assigning them to categories, depending on the context. Requests involving subpoenas or workers’ compensation claims, respectively, for example, are grouped in separate categories.

HealthPort tracked all requests using a database. The database included requester (or “customer”) names and contact information, patient names, medical provider names, and fee and invoicing information. It also assigned index numbers for billing purposes based on request categories. For example, all attorney requests—or “attorney personal injury” requests, as HealthPort refers to them—that attach release authorization forms and seek patient records of California medical providers were indexed with the billing code “07.”

After requests were entered into its database, HealthPort sent invoices to requesters, releasing records to them once it received payment, or earlier if the requester had an existing agreement with HealthPort. HealthPort has followed the same process at all of its California locations since May 1, 2009. Between May 1, 2009, and July 31, 2013, it processed 152,546 attorney requests for California medical providers, using the same invoice form, and charging the same per-page copying fee (\$0.25).

D. Defendants' Evidence Opposing Class Certification

In opposition to the motion for class certification, HealthPort submitted the declaration of Matthew J. Rohs, its executive vice-president and general manager for release of information (Rohs declaration). In his declaration, Rohs advised that, while some of the attorney requests tracked in HealthPort's database specifically referred to section 1158, "[m]any, if not most," did not. For those that did not, he maintained, HealthPort lacks information necessary to determine whether the section applies. For example, section 1158 applies to requests made before "the filing of any action or the appearance of the defendant in an action," but attorney requests usually do not indicate the timing of the records requests in relation to litigation or whether records are sought in connection with litigation at all. The attorney request data set, therefore, Rohs maintained, would include any instances in which patients or their personal representatives had their attorneys request their records for a purpose independent of litigation.

Further, HealthPort contended, relying on the Rohs declaration, although the attorney request data set included patient names, this information alone would not suffice to identify all class members. Some requests sought the records of patients who were minors, deceased, or subject to a conservatorship or guardianship. In such instances, the release authorization form would have been signed by the patient's personal representative, and HealthPort did not enter those names in its database. To obtain those names, therefore, its staff would have to separately search electronically stored copies of the release authorization forms, recording each name as it went, a process that would take "at least 2 to 3 minutes for each transaction."

Saint Francis joined HealthPort in opposing class certification, and also argued separately that the proposed class was overbroad as against Saint Francis. The proposed class, it observed, would include all those who, through an attorney, requested copies of medical records from "a hospital or other medical provider . . . located in California" and were charged by HealthPort more than the amounts specified in section 1158. While HealthPort

processed 152,546 attorney requests in California in the relevant period (May 1, 2009, to July 31, 2013), only a small number of those transactions (2,429) involved Saint Francis.⁵

E. *The Trial Court's Ruling*

The trial court denied the motion for class certification. It ruled plaintiff had not demonstrated the proposed class was ascertainable, or that common issues predominated, because she had not presented a mechanism for determining whether attorneys' requests were submitted "‘prior to litigation’ . . . without individualized inquiry, for example, by asking" each attorney. The court concluded HealthPort's data set was both over- and under-inclusive. The data set was overinclusive, the court reasoned, because it would encompass requests that were not submitted "prior to litigation" and may not have had anything to do with contemplated litigation. It was under-inclusive because it did not capture the names of class members who authorized records requests as a patient's guardian, conservator, or personal representative.⁶ "This is an ascertainability problem," the court concluded, "as well as a problem of individual issues overwhelming any common issues."

The trial court also observed that the class definition did not rely on or require contact with Saint Francis, leaving unclear the theory under which class members as a whole might recover against that defendant.

This timely appeal ensued.

II. DISCUSSION

A. *Standard of Review*

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in

⁵ The parties appear to agree that HealthPort processed attorney requests for "more than 500" medical facilities or providers in California in the relevant period. The only evidentiary citation offered to support this agreed-upon fact is to a cryptic statement included in plaintiff's counsel's declaration. Plaintiff's counsel averred that a spreadsheet provided by defense counsel, which contained transactions for Saint Francis, identified "500 unique entries under the column heading 'Requester Name.' " The statement seems to describe the number of individuals who requested records from Saint Francis, rather than the number of entities contracting with HealthPort for services. As the specific assertion is not critical to our decision in this matter, we need not resolve the ambiguity.

⁶ The trial court's order stated, somewhat ambiguously on this point, that the data set did not "capture class members" who requested records as a patient's guardian, conservator, or personal representative. The Rohs declaration, which the order cited, confirmed, however, that requests submitted by such individuals would be captured, although only patient names would be recorded.

granting or denying certification. (*[In re Tobacco II Cases* (2009)] 46 Cal.4th [298,] 311 [93 Cal.Rptr.3d 559, 207 P.3d 20].) In the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed unless (1) improper criteria were used or (2) erroneous legal assumptions were made. (*Ibid.*) When a trial court's decision rests on an error of law, that decision is an abuse of discretion. (*Ibid.*)” (*Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 629 [105 Cal.Rptr.3d 795].) Accordingly, in our review of an order denying class certification, “we consider only the reasons given by the trial court for the denial, and ignore any other grounds that might support denial.” (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1447 [19 Cal.Rptr.3d 508].) “‘Any valid pertinent reason stated will be sufficient to uphold the order.’ [Citation.]” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 [97 Cal.Rptr.2d 179, 2 P.3d 27] (*Linder*).)

B. Standards for Class Certification

■ “The criteria for class certification are well established. ‘Code of Civil Procedure section 382 authorizes class actions “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court” The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members.’” (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 96 [82 Cal.Rptr.3d 1] (*Medrazo*), quoting *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 [17 Cal.Rptr.3d 906, 96 P.3d 194] (*Sav-On*)). “‘The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” [Citation.] A trial court ruling on a certification motion determines “whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” [Citations.]’” (*Ibid.*)

■ “[T]his state has a public policy which encourages the use of the class action device.” (*Sav-On, supra*, 34 Cal.4th at p. 340.) “‘Generally, a class suit is appropriate ‘when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.’ [Citations.]’” [Citation.] “[R]elevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing.” [Citation.] “[B]ecause group action also has the potential to create injustice, trial courts are required to ‘“carefully weigh

respective benefits and burdens to allow maintenance of the class action only where substantial benefits accrue to both litigants and the courts.”’ [Citation.]”’ (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1333 [83 Cal.Rptr.3d 241], quoting *Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101 [13 Cal.Rptr.3d 343].)

C. *Ascertainability*

1. *Legal Principles*

■ “‘Ascertainability is achieved “by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.”’ (*Bomersheim v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1483 [109 Cal.Rptr.3d 832], quoting *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915 [107 Cal.Rptr.2d 761] (*Hicks*).)” (*Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1300 [184 Cal.Rptr.3d 415] (*Aguirre*).) “‘While often it is said that “[c]lass members are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference to official records” [citations], that statement must be considered in light of the purpose of the ascertainability requirement.’ (*Medrazo, supra*, 166 Cal.App.4th at p. 101.) ‘Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata.’ (*Hicks, supra*, 89 Cal.App.4th at pp. 914; see [*Aguiar v. Cintas Corp. No. 2* (2006)] 144 Cal.App.4th [121,] 135 [50 Cal.Rptr.3d 135]; *Medrazo, supra*, 166 Cal.App.4th at p. 101.)” (*Aguirre, supra*, 234 Cal.App.4th at p. 1300.)

“The goal in defining an ascertainable class ‘is to use terminology that will convey “sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent.”’ [Citation.] “. . . Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating.”’ (*Global Minerals [& Metals Corp. v. Superior Court* (2003)] 113 Cal.App.4th [836,] 858 [7 Cal.Rptr.3d 28].)” (*Aguirre, supra*, 234 Cal.App.4th at pp. 1300–1301.) The representative plaintiff is not obligated, however, to “identify, much less locate, individual class members to establish the existence of an ascertainable class. [Citations.] Nor must the representative plaintiff establish a means for providing personal notice of the action to individual class members. [Citation.]” (*Id.* at p. 1301.)

■ “In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members.” (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207 [76 Cal.Rptr.3d 804] (*Bufile*).)

2. Application of Principles

HealthPort conceded the “07” attorney request data set included all attorney requests attaching release authorizations that California medical providers received and forwarded for HealthPort to handle. The court found the data set was overinclusive as a means of identifying class members because “[s]ome of the requests [the data set captured] may have been made prior to litigation that was filed, some after litigation was filed, and some may have been made *in contemplation of litigation . . . which actually never was filed.*” The data set also “will capture requests which . . . may not have anything to do with contemplated litigation,” the court concluded. The only evidence offered on this point was provided in the Rohs declaration.

Rohs stated: “Many, if not most attorney requests . . . do not contain any of the information necessary to determine whether or not Section 1158 applies. . . . Requests by attorneys almost never say anything about the timing of the request in relation to actual or contemplated litigation, and usually do not indicate whether the request even relates to litigation. HealthPort personnel are not tasked to determine whether the requests by attorneys fall within the statutory requirements of Section 1158, and they do not have the information needed to do so. HealthPort has no way to look into the ‘07’ data set and determine which, if any, of the transactions there involved requests that met the requirements of Section 1158. The ‘07’ data set also includes requests in which patients, or the personal representatives of [patients], want copies of the patient records for their own purposes, but communicate their request through their attorneys rather than doing so themselves.”

This declaration does not provide evidence that the “07” data set includes many, or even any, attorney requests made either after litigation was commenced or unrelated to litigation. HealthPort conceded at oral argument that the data set did not track the timing of requests: “[T]he 07 data set is used for requests that come in from attorneys [T]he criteria for [section] 1158 are . . . not disclosed in the requests that come in from attorneys, typically. Specifically, the temporal connection, whether [the request is] before litigation . . . whether it has any connection to contemplated litigation, all of that’s a factor. [¶] That information is simply not provided in the request itself.”

The court’s finding that the “07” data set was overinclusive, therefore, appears to be pure speculation. Indeed, the fact that HealthPort characterizes the data set internally as “attorney personal injury” requests suggests it expects attorneys submitting such requests do so for the purpose of pursuing litigation. Consistent with this apparent expectation, HealthPort notifies *all attorneys* whose requests it handles that section 1158 cost limitations will not apply if it makes and delivers the requested copies. Based on HealthPort’s

speculative assertions, the trial court concluded that the data set may include requests not covered by section 1158. This mere possibility does not demonstrate that the data set is overinclusive.

■ But even assuming the attorney request data set does include some unknown number of requests that were submitted after litigation was commenced (or after defendants' first appearance) or for reasons unrelated to litigation, this fact would not defeat ascertainability. HealthPort argued, and the trial court concluded, that a class is not ascertainable if the class members who are entitled to recover from the defendants cannot be identified without an individualized inquiry. That is not, however, the standard for determining whether a class is *ascertainable*. As noted, “[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata. [Citations.] . . . As long as the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who will be bound by the results of the litigation, the ascertainability requirement is met.” (*Medrazo, supra*, 166 Cal.App.4th at p. 101.) Plaintiff here has identified the class in terms of objective characteristics, tracking the provisions of section 1158; if it is determined later in the litigation that the “07” data set includes requests not made pursuant to section 1158, “those [persons] can be eliminated from the class at that time.” (*Aguiar v. Cintas Corp. No. 2, supra*, 144 Cal.App.4th at p. 136 (*Aguiar*); see also *Sav-On, supra*, 34 Cal.4th at p. 333 [“‘a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery’”]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 743 [9 Cal.Rptr.3d 544] [class of all employees in certain job categories ascertainable even though some employees may not have worked overtime and thus may not be entitled to any recovery].) Nor should a court “decline to certify a class simply because it is afraid that insurmountable problems may later appear at the remedy stage.” (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1275 [242 Cal.Rptr. 339] (*Reyes*).)

HealthPort acknowledges case law establishing that “certification is not defeated by a subset of non-claimants in a class ascertainable from the defendant’s records.” But it maintains that the class in this case is not ascertainable at all because HealthPort’s records do not establish the timing or purpose of attorney requests. We disagree. The attorney request data set sufficiently matches the class definition, with the exceptions noted by HealthPort. At this stage of the litigation, for the reasons discussed above, it is reasonable to infer that most of the requests included in the data set were

submitted “prior to litigation.”⁷ (See *Aguiar, supra*, 144 Cal.App.4th at p. 136; *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 753–754 [182 Cal.Rptr. 800].) HealthPort has presented no reliable evidence to the contrary.

The cases that HealthPort cites on this point are distinguishable. *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50 [180 Cal.Rptr.3d 825], for example, affirmed an order decertifying a class after nearly three years of litigation on the issue. There, the defendant was required to develop a protocol to identify from its records the class of persons who “self-pa[id]”—and were allegedly overcharged—for their emergency room treatment. (*Id.* at p. 55.) Based upon the results of that protocol, notice was sent to more than 120,000 patients as potential class members. (*Id.* at p. 53.) After receiving responses, and taking discovery from some of the putative class members, the defendant presented evidence that the protocol was not successful in identifying the “self-pay” class members, nor in determining whether they were overcharged. The defendant explained that there was no reliable way of ascertaining the class without individual inquiry because a record marked “self-pay” was not updated if the patient’s bill was actually paid by a third party. (*Id.* at p. 55.) Additionally, the defendant presented evidence that common issues did not predominate because the determination of whether rates charged to “self-pay” patients were higher than those charged to insured patients would require the analysis of over 7,000 line items for the procedures, services and goods provided to each patient, and then a comparison to the myriad of reimbursement rates which, in turn, varied broadly because they were “‘patient-specific, contract-specific, and plan-specific.’” (*Id.* at p. 65.) Accomplishing the task would require the construction of additional databases and tens of thousands of hours to review the patient notes sections of each patient’s file, and then make the calculations. (*Id.* at pp. 65–66.) Therefore, the core question in *Hale*—whether the defendant charged “self-pay” patients more than it charged to insured patients—could not be determined without an individualized assessment of each patient’s records. Consequently, the court affirmed the trial court’s decertification of the class. (*Id.* at pp. 66–67.)⁸

⁷ HealthPort acknowledges that requests are “prior to litigation” even if no related litigation is later commenced. At least one appellate court also has suggested that an attorney request intended to “create a medical history file for the patient’s information or subsequent use” would be within the scope of section 1158, contrary to HealthPort’s arguments in speculating about other purposes possibly motivating attorney requests. (*National Football League, supra*, 138 Cal.App.3d at p. 903.)

⁸ *Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1 [152 Cal.Rptr.3d 190], which HealthPort cited at oral argument, is also inapposite. There, this court affirmed an order denying class certification because the definition of the proposed class exceeded the scope authorized under the relevant statute, and the plaintiff could not show—and did not even

Apart from the distinctive procedural posture of *Hale*—a motion for class decertification *after* notice and discovery—it is distinguishable on its facts. There, it was indisputably demonstrated that there was simply no way to avoid a complicated individualized inquiry to determine not just eligibility for damages but to prove liability. (*Hale v. Sharp Healthcare*, *supra*, 232 Cal.App.4th at pp. 54, 63–64.) Conversely, we find the *Bufil* case instructive. There, employees of a check-cashing chain brought meal and rest break claims. (*Bufil*, *supra*, 162 Cal.App.4th at pp. 1196–1197.) The proposed class was defined as employees for whom the defendant’s records showed a meal period not taken because the employee was the only person in the store or was the only person present except for a trainee. (*Id.* at pp. 1201, 1203.) Although employees who missed a meal period could be identified from the defendant’s records, employees who missed a rest period could not be identified from the records. (*Id.* at pp. 1207–1208.)

■ Reversing the trial court’s denial of class certification on this basis, the Court of Appeal concluded the class was ascertainable from the defendant’s records. (*Bufil*, *supra*, 162 Cal.App.4th at p. 1207.) In doing so, the court rejected the defendant’s “speculation” that an employee who missed a meal break nonetheless might have received a rest break, observing “speculation that goes to the merits of ultimate recovery [was] an inappropriate focus for the ascertainability inquiry.” (*Id.* at p. 1208; accord, e.g., *Medrazo*, *supra*, 166 Cal.App.4th at p. 101 [defendant’s sales records offered an objective means of identifying potential class members, and plaintiff’s inability at the class certification stage to identify precisely which buyers qualified as class members was “irrelevant”]; *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 976 [84 Cal.Rptr.3d 532] [“the need to individually examine each member’s contract to ultimately determine whether he or she qualifies for inclusion in the class does not . . . demonstrate a lack of ascertainability or manageability”].)

■ We reach the same conclusion here. The potential class members may readily be identified by reference to HealthPort’s attorney request data set. HealthPort’s speculation that some included requesters may have sought records after filing a lawsuit or without any thought of doing so—speculation that goes to the merits of each class member’s recovery—was an inappropriate focus for the ascertainability inquiry.

■ The trial court also erred in finding that HealthPort’s attorney request data set did not provide an adequate mechanism for identifying class members because it was underinclusive. The court stated that the data set did not capture class members who authorized requests as a patient’s guardian,

attempt to show—that there was any means to identify a class of persons whose transactions were within the statutory proscription. (*Id.* at pp. 7–9.)

conservator, or personal representative, apparently relying on the fact that it did not capture their *names*.⁹ It is undisputed, however, that the data set does include all such requests, and contains other relevant information such as patient names, and the names and contact information for the attorney requesters. The primary purpose of ascertainability is to provide notice to all potential class members. (*Hicks, supra*, 89 Cal.App.4th at p. 914.) HealthPort’s “07” data set contains sufficient information for identifying this subset of class members and, therefore, does not defeat ascertainability.

“[I]t is firmly established a plaintiff is not required at this stage of the proceedings to establish the . . . identity of class members.” (*Reyes, supra*, 196 Cal.App.3d at p. 1274.) “‘A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.’ [Citations.]” (*Aguirre, supra*, 234 Cal.App.4th at pp. 1299–1300).¹⁰ Even if “class members are unidentifiable” at the class certification stage, this would “not preclude a complete determination of the issues affecting the class.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 [63 Cal.Rptr. 724, 433 P.2d 732].)

The trial court itself rejected HealthPort’s argument that it would be difficult to provide notice to those class members for whom it lacked names, concluding “there may be other means to contact them, such as various forms of publication.” In doing so, it cited plaintiff’s reply brief supporting the motion for class certification, which suggested alternatives including combining direct mail to patients’ attorneys (whose contact information HealthPort has) with publication of notice (an alternative defense counsel had supported in representing HealthPort’s predecessor in another action). HealthPort does not suggest this method would be ineffective.

We, accordingly, conclude that the court erred as a matter of law in finding the proposed class was not ascertainable.

⁹ See footnote 6, *ante*, at page 1210.

¹⁰ We reject defendants’ argument that potential class members would not be able to self-identify because they would not themselves have personal knowledge whether their attorneys requested their medical records *before* litigation. We think it likely many clients would recall the juncture at which they signed the medical release form; additionally, we expect they could ascertain the timing of the request by consulting their attorneys or any litigation records they retained. It is also possible that notice might be mailed directly to attorneys who presumably would be able to determine this point for their clients.

D. *Community of Interests*

1. *Legal Principles*

■ To obtain class certification, the party advocating class treatment also must demonstrate a “well-defined community of interest among the class members.” (*Linder, supra*, 23 Cal.4th at p. 435.) This requirement “ ‘embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’ ” [Citation.]” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 [139 Cal.Rptr.3d 315, 273 P.3d 513] (*Brinker*)).

■ “The ‘ultimate question’ the element of predominance presents is whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.] The answer hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.]” (*Brinker, supra*, 53 Cal.4th at p. 1021.) A theory of liability that a defendant has “a uniform policy . . . [that] allegedly violates the law . . . is by its nature a common question eminently suited for class treatment.” (*Id.* at p. 1033.)

2. *Application of Principles*

The trial court denied class certification on the additional ground that common questions did not predominate; it concluded “difficulties in identifying which [attorney] requests were made ‘prior to litigation’ present[ed] individual issues” that “would overwhelm the common issues.” Again, we must disagree. The predominance of common questions requirement is patently satisfied here. Plaintiff presented evidence at the class certification hearing, and HealthPort conceded that, as a release of information service provider to Saint Francis and others, it has a uniform practice of informing requesting attorneys it will copy records but will charge them \$0.25 per page for copying (and other fees). The common class question is whether this practice violates section 1158—which places limits on the copying and other fees that may be charged—insofar as the practice applied to attorney requests “prior to litigation.” In other words, the common goal of the entire class is to adjudicate whether HealthPort is improperly charging attorneys requesting copies of patient medical records before litigation more than the amounts specified in section 1158.

■ It is well established that “[p]redominance is a comparative concept, and “the necessity for class members to individually establish eligibility

and damages does not mean individual fact questions predominate.”” (*Medrazo, supra*, 166 Cal.App.4th at pp. 99–100, quoting *Sav-On, supra*, 34 Cal.4th at p. 334; accord, *Collins v. Rocha* (1972) 7 Cal.3d 232, 238 [102 Cal.Rptr. 1, 497 P.2d 225] [“that each class member might be required ultimately to justify an individual claim does not necessarily preclude the maintenance of a class action”]; see *Reyes, supra*, 196 Cal.App.3d at p. 1278 [“it is firmly established that ‘a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery’ ”].)

“The relevant comparison lies between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions—not between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever.” (*Sav-On, supra*, 34 Cal.4th at p. 339, fn. 10.) As the California Supreme Court has recognized, class actions eliminate ““the possibility of repetitious litigation and provide[] small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.”” (*Id.* at p. 340, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469 [174 Cal.Rptr. 515, 629 P.2d 23].) “[T]he possibility that a defendant may be able to defeat the showing of an element of a cause of action ‘as to a few individual class members[,] does not transform the common question into a multitude of individual ones’ [Citation.]” (*Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1235 [103 Cal.Rptr.3d 614].)

The common question here is the application of section 1158 to HealthPort’s uniform practices in response to attorney requests for medical records. The fact that each class member ultimately may be required to establish his or her records request was submitted before or in contemplation of litigation does not overwhelm the common question regarding those uniform copying practices. The trial court erred in ruling otherwise.¹¹

¹¹ We do not reach HealthPort’s related but distinct argument that the trial court’s ruling should be affirmed because plaintiff did not present a plan for managing individual showings as to eligibility for recovery (i.e., a procedure for proving class members requested records “prior to litigation”). (See, e.g., *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28–29 [172 Cal.Rptr.3d 371, 325 P.3d 916] (*Duran*).) As HealthPort itself acknowledges, the trial court did not cite this consideration in its ruling, and “we are constrained by the reasons set forth by the court for denying certification.” (*Bafil, supra*, 162 Cal.App.4th at p. 1206.) Nor do we anticipate manageability would be a significant issue in this case. Determining whether individual class members requested records before litigation would not appear to require an involved procedure or a complex analysis. (See *Sav-On, supra*, 34 Cal.4th at p. 339 [“For decades, ‘[t]his court has urged trial courts to be procedurally innovative’ [citation] in managing class actions”]; cf. *Duran, supra*, 59 Cal.4th at p. 28 [“class treatment is not appropriate ‘if every member of the alleged class would be required to litigate numerous and

E. *Saint Francis*

As a final reason for its decision to deny class certification, the trial court questioned the propriety of including Saint Francis in the action, observing that the proposed class also would extend to those who requested records of other California medical providers. Deeming the class definition “ambiguous with respect to the role of [Saint] Francis,” the court expressed uncertainty about the theory upon which “the class as a whole if certified would be entitled to recover against [Saint] Francis.” In the class certification hearing, the court remarked, “I don’t know why we have Saint Francis in the case at all. Maybe Saint Francis isn’t necessary.” “[H]ow are we going to manage [damages],” it continued. “Saint Francis is not surely going to be jointly and severally liable with respect to the whole class?”

The trial court thus appeared to conclude that plaintiff’s joinder of Saint Francis created an ascertainability problem distinct from the one discussed above, i.e., that class members would have to present a separate claim against Saint Francis. We do not agree that the inclusion of Saint Francis as a defendant presented an ascertainability problem.

■ A court may deny certification on ascertainability grounds, finding a class definition overbroad, if there is substantial evidence that a significant part of the putative class is ineligible to recover against any defendant under any theory alleged in the complaint. (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 729–730 [158 Cal.Rptr.3d 694].) Such a finding, however, is not supported by the mere fact that each class member cannot pursue his or her claims against all defendants. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 805 [94 Cal.Rptr. 796, 484 P.2d 964] is a case in point. The California Supreme Court concluded the complaint in that action alleged an ascertainable class, even though each class member had claims both against a single seller and also against one of three finance companies to whom the seller had assigned the class member’s contract. (*Id.* at pp. 805, 810–811, 815; see, e.g., *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1345–1346 [235 Cal.Rptr. 228] (*B.W.I. Custom Kitchen*) [reversing denial of class certification in action by California businesses that indirectly purchased glass containers from any one of numerous corporate defendants].) Similarly, in this case, the class definition includes all those whose attorney requests HealthPort processed under contract with a California medical provider. Each class member arguably will have a claim against HealthPort and also the individual medical provider that held its records. The class definition is not limited to Saint Francis patients.

substantial questions determining his individual right to recover following the “class judgment” ‘on common issues’ (italics added)].)

The court did not question the viability of plaintiff's claims against Saint Francis. Although plaintiff did not also join other California medical providers who contracted with HealthPort, there has been no suggestion she was obligated to do so. “ ‘It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.’ ” [Citation.]” (*Van Zant v. Apple Inc.* (2014) 229 Cal.App.4th 965, 979 [177 Cal.Rptr.3d 805].)¹²

■ The court also appears to have been concerned about the possibility that Saint Francis might be held responsible, at the damages stage, for HealthPort's alleged overcharging for providing copies of records held by other California medical providers. We agree with plaintiff, however, that this is not a reason to deny class certification. “It has been repeatedly held . . . that the presence of individual damage issues cannot bar certification.” (*B.W.I. Custom Kitchen, supra*, 191 Cal.App.3d 1341, 1354 [to deny class certification “‘on the issue of damages . . . may well be effectively to sound the death-knell of the class action device’ ”].)

“[I]n most circumstances a court can devise remedial procedures which channel the individual [damage] determinations that need to be made through existing forums.” [Citation.] A bifurcated trial, subclasses, and other methods may be employed to simplify the proceedings.” (*B.W.I. Custom Kitchen, supra*, 191 Cal.App.3d at p. 1354.) At the class certification stage, however, it is not necessary to determine the appropriate method for resolving such questions, as they may wait “until the class-wide issues have been determined.” (*Ibid.*; accord, *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 417 [17 Cal.Rptr.3d 1] [antitrust class action against original and generic manufacturers of antibiotic drug].)

III. DISPOSITION

The order denying class certification is reversed and the matter is remanded with directions to grant the motion for class certification. Plaintiff shall recover costs incurred on appeal.

Ruvolo, P. J., and Reardon, J., concurred.

A petition for a rehearing was denied October 6, 2016, and the opinion was modified to read as printed above. Respondents' petition for review by the Supreme Court was denied December 14, 2016, S237976.

¹² As one may not recover twice for the same injury (see, e.g., *Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1237 & fn. 4 [167 Cal.Rptr.3d 874]), plaintiff's theory appears to be that HealthPort and each medical provider are jointly liable for each instance of alleged overcharging.

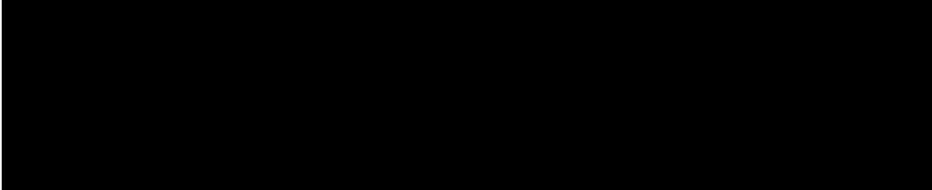
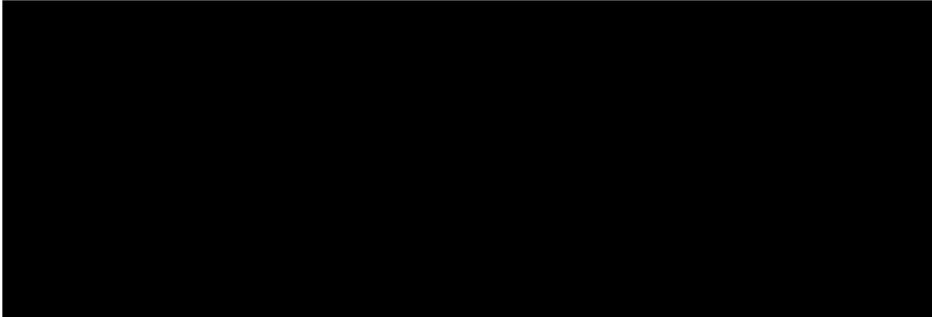
[No. B268282. Second Dist., Div. Five. Oct. 6, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
MARIO REYES, Defendant and Appellant.

[No. B276919. Second Dist., Div. Five. Oct. 6, 2016.]

In re MARIO REYES on Habeas Corpus.

[REDACTED]



Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent The People.

OPINION

KRIEGLER, J.—This consolidated appeal and habeas corpus petition involve a single issue: may the two-year enhancement set forth in Penal Code section 12022.1¹ be imposed on defendant/appellant and petitioner Mario Reyes for conviction of a felony in a “secondary offense” while on bail on a felony in a “primary offense,” when the primary offense is settled by a no contest plea to a misdemeanor? Based on language in *People v. Walker* (2002) 29 Cal.4th 577 [128 Cal.Rptr.2d 75, 59 P.3d 150] (*Walker*), we hold the two-year enhancement under section 12022.1 does not apply when the primary offense is reduced to a misdemeanor and resolved by a plea of no contest.

PENAL CODE SECTION 12022.1

Section 12022.1 creates an enhancement for persons convicted of a felony while released on bail or on their own recognizance on a felony charge. “Any person arrested for a secondary offense that was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years, which shall be served consecutive to any other term imposed by the court.” (§ 12022.1, subd. (b).) The statute provides specific definitions of primary and secondary offenses:

“(a) For the purposes of this section only: [¶] (1) ‘Primary offense’ means a felony offense for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final, including the disposition of any appeal, or for which release on bail or his or her own recognizance has been revoked. In cases where the court has granted a stay of execution of a county jail commitment or state prison commitment, ‘primary offense’ also means a felony offense for which a person is out of custody during the period of time between the pronouncement of judgment and the time the person actually surrenders into custody or is otherwise returned to custody.

“(2) ‘Secondary offense’ means a felony offense alleged to have been committed while the person is released from custody for a primary offense.” (§ 12022.1, subd. (a)(1)–(2).)

¹ Statutory references are to the Penal Code, unless otherwise stated.

PROCEDURAL HISTORY

The Primary Offense²

Reyes was charged in *People v. Reyes* (Super. Ct. L.A. County, 2014, No. NA098956) with second degree commercial burglary committed on April 22, 2014, in violation of section 459. On November 18, 2014, the information was amended to deem the burglary a misdemeanor pursuant to section 17, subdivision (b). On that date, Reyes entered a plea of no contest to the misdemeanor charge to resolve the primary case.

The Secondary Offenses

In the case on appeal, *People v. Reyes* (Super. Ct. L.A. County, 2015, No. BA428669), Reyes was charged with three offenses committed on August 23, 2014: in count 1 with assault with a firearm (§ 245, subd. (a)(2)); in count 2 with assault with a semiautomatic firearm (§ 245, subd. (b)); and in count 3 with possession of a firearm by a felon (§ 29800, subd. (a)(1)). The information in the secondary case alleged that Reyes had been released from custody on bail or on his own recognizance in the primary case for purposes of the enhancement in section 12022.1. The information also alleged application of various recidivism provisions not pertinent to this appeal.

Trial of the secondary case was by jury. During the trial, on June 5 and 8, 2015, defendant stipulated that he was on bail in the primary offense at the time of the secondary offenses for purposes of the section 12022.1 allegations. Reyes did not, however, stipulate that he had been convicted of a felony in the primary case. Reyes was convicted in the secondary case on counts 1 and 3. The jury found true the allegations that Reyes had been released on bail or on his own recognizance under section 12022.1 at the time of the offenses. The trial court sentenced Reyes to 41 years to life in state prison. The sentences on counts 1 and 3 included two-year enhancements under section 12022.1.

DISCUSSION³

The appeal from the judgment in the secondary case and the petition for writ of habeas corpus both address the same issue. Defendant argues the two section 12022.1 enhancements must be stricken from the sentence in the secondary case because the primary case was resolved as a misdemeanor.

² The records in the primary case are not contained in the appellate record, but are properly before this court on Reyes's habeas corpus petition.

³ Because the facts at trial are not in dispute, and the only issue involves the section 12022.1 enhancements, we omit a statement of facts from the opinion.

Defendant relies on language in *Walker* indicating that if the primary case does not result in a felony conviction, section 12022.1 is not violated. We agree and accordingly grant the petition for writ of habeas corpus.

Standard of Review of Statutory Interpretation

■ “We begin by examining the words of the respective statutes; if the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs. (*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227 [120 Cal.Rptr.2d 795, 47 P.3d 639] (*Allen*); *People v. Coronado* (1995) 12 Cal.4th 145, 151 [48 Cal.Rptr.2d 77, 906 P.2d 1232] (*Coronado*).) If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Ibid.*) In such situations, we strive to select the construction that comports most closely with the Legislature’s apparent intent, with a view to promoting rather than defeating the statutes’ general purposes. (*Ibid.*) We will avoid any interpretation that would lead to absurd consequences. (*Ibid.*)” (*Walker, supra*, 29 Cal.4th at p. 581.)

Analysis

■ Language in *Walker*, although characterized as dicta by the Attorney General, points the way to the correct result in this case. Under section 12022.1, “the defendant must be convicted of the primary offense before punishment can be imposed. Although section 12022.1, strictly speaking, does not appear to make the defendant’s conviction of the primary offense an element of the enhancement in order to prove the enhancement, the statute makes crystal clear that imposition of the enhancement requires conviction of the primary offense at some stage of the proceedings. (§ 12022.1, subds. (b), (c), (d); see *People v. McClanahan* [(1992)] 3 Cal.4th [860.] 869–871 [12 Cal.Rptr.2d 719, 838 P.2d 241].)” (*Walker, supra*, 29 Cal.4th at p. 586.)

Walker additionally explained the various ways in which a charge on a primary offense could fail to result in a felony conviction: “[A] charge on a primary offense can fail in any number of ways to result in a felony conviction and defeat section 12022.1’s application. For example: (1) the prosecutor might move to dismiss the felony charge for insufficient evidence or after suppression of the evidence (§§ 1385, 1538.5); (2) the court might dismiss the charge or set aside the indictment or information (§§ 871, 995, 1385) or enter a judgment of acquittal before submission of the case to the jury (§ 1118.1); (3) the prosecutor might move to dismiss the charge in the

interests of justice or reduce it to a misdemeanor as part of a plea bargain; (4) the court might reduce the charge to a misdemeanor (§ 17, subd. (b)); (5) the jury might acquit the defendant; or (6) the conviction might be reversed or dismissed on a state or federal writ of habeas corpus.” (*Walker, supra*, 29 Cal.4th at p. 587, italics added.)

■ Here, the record in the primary case reflects that the felony charge was reduced to a misdemeanor under section 17, subdivision (b). Reyes then entered a plea of no contest to the misdemeanor charge. It is undisputed Reyes did not suffer a felony conviction in the primary case. The third and fourth situations set forth above in *Walker, supra*, 29 Cal.4th at page 587, “defeat section 12022.1’s application.”

The Attorney General argues that section 12022.1 is intended to prevent recidivist conduct while an accused felon is released on bail or on his or her own recognizance, and this purpose would be undermined if a conviction of a misdemeanor in the primary case negated application of the enhancement. (See *People v. McCloanahan, supra*, 3 Cal.4th at p. 868 [“the underlying purpose of section 12022.1 enhancements is to punish this particular form of recidivism with increased penalties”].) The Attorney General’s point does not lead to the conclusion that conviction of a misdemeanor satisfies the primary offense requirement of section 12022.1.

The Attorney General forthrightly acknowledges what she considers to be dicta in *Walker* is inconsistent with her argument. We need not decide whether the quoted language is dicta, because it is prudent to follow the Supreme Court’s clear and unambiguous language that the primary offense must result in a felony conviction. As explained by this division’s former Presiding Justice Otto M. Kaus in *People v. Trice* (1977) 75 Cal.App.3d 984, 986–987 [143 Cal.Rptr. 730]: “[O]ur problem is not whether the Supreme Court’s statement . . . is dictum but whether we are bound by it—de facto if not de jure. [¶] . . . Whether the Supreme Court’s obvious awareness of the consequences of its statement elevates the dictum to a holding or whether it is a dictum that we must follow, does not make much difference. We follow.” (Italics & fn. omitted.)

DISPOSITION

Because no error appears in the record on appeal, the judgment is affirmed. Error is demonstrated in the petition for habeas corpus, which we grant, and direct the trial court to strike the enhancements under Penal Code section 12022.1 as to counts 1 and 3. The court is directed to forward a copy

of an amended abstract of judgment to the Department of Corrections and Rehabilitation.

Turner, P. J., and Baker, J., concurred.

[No. C078237. Third Dist. Oct. 7, 2016.]

CLAUDIA COVARRUBIAS et al., Plaintiffs and Appellants, v.
MICHAEL COHEN, as Director, etc., et al., Defendants and Respondents;
CITY OF WINTERS, as Taxing Entity, etc., et al., Real Parties in Interest
and Respondents.

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Western Center on Law & Poverty, S. Lynn Martinez, Richard A. Rothschild, Navneet Grewal; Legal Services of Northern California, Alysa E. Meyer, Sarah Steinheimer; Public Interest Law Project, Deborah A. Collins, Michael Rawson; Arnold & Porter and Steven L. Mayer for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Douglas J. Woods, Assistant Attorney General, Marc A. LeForestier and Nancy J. Doig, Deputy Attorneys General, for Defendants and Respondents.

Fagen Friedman and Fulfrust, Paul G. Thompson and Travis A. Brooks for Real Party in Interest and Respondent Winters Joint Unified School District.

No appearance for remaining Real Parties in Interest and Respondents.

OPINION

BUTZ, J.—Nominal plaintiffs Claudia Covarrubias, Veronica Alvarado, Rebecca Rivas, and Lucila Gomez¹ brought this action against Michael Cohen, in his capacity as the Director of the Department of Finance (the Department), in order to compel the Department to approve the City’s continued payments of set-asides from “tax increment”—the increase above the tax base level attributed to redevelopment (*City of Brentwood v. Campbell* (2015) 237 Cal.App.4th 488, 492, fn. 4 [188 Cal.Rptr.3d 88] (*Brentwood*))—to the fund for subsidized housing in the City’s redevelopment project area that was previously mandated under redevelopment law (Health & Saf. Code, §§ 33334.2, subd. (a), 33334.3, subd. (a), 33334.6, subd. (c), 33670).² Plaintiffs argued these come within the definition of “[e]nforceable obligation[s]” (§ 34171, subd. (d)(1)) of the City’s former redevelopment agency because the *entirety* of the set-asides to be paid over the life of a redevelopment project was due *ab initio*, and thus survived the abolishment of tax increment in the “‘Great Dissolution’” in 2012 (*Brentwood*, at p. 491).³ The trial court ruled that the strictly statutory obligation to make set-asides accrued on an *annual* basis and accordingly expired when the “Great Dissolution” took place; the set-asides therefore were no longer enforceable obligations of the redevelopment agency. It entered judgment in favor of both defendants and real parties in interest. We shall affirm.

¹ Plaintiffs are residents of the City of Winters (the City) who are allegedly qualified for subsidized housing that purportedly *could* be built in the City; we assume for purposes of this appeal that this is sufficient to confer standing.

² Undesignated statutory references are to the Health and Safety Code.

³ The petition’s designation in the trial court of the litigation status of the parties needs to be modified: It included both the Department *and* Michael Cohen, as its director; this is redundant, and we delete the former as a party. (*Brentwood*, *supra*, 237 Cal.App.4th at p. 492, fn. 3.) The petition also listed the City—as both the successor agency to its former redevelopment agency, and as its housing successor as well (*id.* at p. 491 & fn. 2; §§ 34171, subd. (j), 34173, 34176, subd. (a)(3))—as a real party in interest, even though the City does not oppose the litigation (indeed, requesting in its answer that the trial court *grant* the requested relief against it). We have thus redesignated the City as a nominal defendant, along with the *other* two nominal defendants who did not take any position on the entry of judgment against them in this dispute (Howard Newens, as the Auditor-Controller of Yolo County, a neutral stakeholder who is the administrator of the property tax trust fund at issue (*Brentwood*, at p. 492, fn. 3), and Betty Yee, as State Controller). Furthermore, the appellate title did not reflect the amendment that added the “taxing entities” in June 2014, which are properly real parties in interest in the outcome of this litigation because it affects their share of property tax (*id.* at p. 492), and in whose favor judgment was entered as well. These include the City yet again in *this* capacity, along with a mosquito district, a community college district, a school district (the Winters Joint Unified School District, which joined in the Department’s brief on appeal), a cemetery district (which was the only real party in interest to argue in the trial court), a flood control district, and the county office of education. We accordingly add them to the appellate title as the correct real parties in interest.

FACTUAL AND PROCEDURAL BACKGROUND

As is generally the case in Great Dissolution appeals, the facts are undisputed and merely serve to provide a contextual framework. Our analysis is concerned principally with statutory interpretation.

The City established its former redevelopment agency (the Winters Community Development Agency) in 1992, and adopted a redevelopment plan for the project area (which consists of about 41 percent of the total land area of the City). In 2008, the City voted to extend the expiration date of the plan to 2033, and the authority of the redevelopment agency to receive tax increment and pay related debts until 2043. In its 2009 five-year redevelopment plan, the City noted that the Sacramento Area Council of Governments had identified a need in the project area for 431 units of subsidized housing; as of that date, none had been built with money from the housing fund.

In order to satisfy its constitutionally mandated minimum funding obligation, the Legislature directed redevelopment agencies to transfer tax increment to school and community college districts in funds created for “educational revenue augmentation” or “supplemental educational revenue augmentation” on multiple occasions between 1992 and 2009 (see *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 245, 248 [135 Cal.Rptr.3d 683, 267 P.3d 580] (*Matosantos I*); *California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1467 [152 Cal.Rptr.3d 269] (*Matosantos II*)). In imposing this obligation, the Legislature authorized the redevelopment agencies to borrow from their annual set-asides for their subsidized housing funds, requiring the loans to be repaid within 10 years. (E.g., §§ 33681.7, subd. (b) [2002–2003 fiscal year], 33681.9, subd. (b) [2003–2004 fiscal year], 33681.12, subd. (b) [2004–2005 fiscal year and 2005–2006 fiscal year], 33690, subds. (a)(1)(A) & (c)(2) [2009–2010 fiscal year, to be repaid by June 30, 2015], 33690.5, subds. (a)(1)(A) & (c)(2) [2010–2011 fiscal year, to be repaid by June 30, 2016].) In addition, the redevelopment agencies were authorized generally to defer set-asides if there was insufficient tax increment to satisfy other obligations. (§ 33334.6.) Plaintiffs do not appear to contend that any such sums are owed to the subsidized housing fund from the former redevelopment agency.

The amount of tax increment to which a redevelopment agency is entitled is limited to the amount of its total indebtedness (both existing and executory), less available revenue. Thus, the redevelopment agency must annually prepare a statement of its total indebtedness and submit it to the county auditor (or other responsible officer). (*Matosantos I*, *supra*, 53 Cal.4th at p. 264; *Matosantos II*, *supra*, 212 Cal.App.4th at p. 1465; *Glendale Redevelopment Agency v. County of Los Angeles* (2010) 184 Cal.App.4th 1388, 1393–1394

[109 Cal.Rptr.3d 815]; § 33675, subd. (b).) As noted in the State Controller's final annual report on redevelopment agencies for the fiscal year ending June 2011, the definition of "indebtedness" for the purposes of this form "is not limited to the formal accounting definition of indebtedness, but is expanded to include all redevelopment obligations," including obligations to the housing fund. This statement of indebtedness "is perhaps the least understood aspect of redevelopment finance. It itemizes all *future* tax increment requirements for the purpose of repaying indebtedness." (Italics added.) The statement is accompanied by a reconciliation document that identifies all changes from the prior year's statement. Moreover, pursuant to the State Controller's instructions for preparing the statement, total indebtedness is increased by the 20 percent obligation for the housing fund (as well as percentages for other similar statutory obligations) so that sufficient revenue is available for the remaining redevelopment obligations. (§ 33675, subd. (f) [for purposes of this statement "the amount an agency *will deposit* in its . . . Housing Fund . . . shall constitute an indebtedness of the agency" (italics added)].) When the statement is filled out "as directed, an agency will have disclosed: the total amount of tax increment an agency will need to satisfy any and all uses . . . for the life of the project" in addition to the use of tax increment for the current year.

The City's former redevelopment agency filed its final indebtedness statement in 2011 for the 2010–2011 tax year. At that point, the Legislature had enacted the Great Dissolution in June 2011, which the Supreme Court subjected to a stay while it undertook original review of its legality. (*Matosantos I, supra*, 53 Cal.4th at pp. 241, 251.) In accordance with the State Controller's instructions and statutory directive, the statement showed the "debt" to the housing fund listed in the previous statement of \$12,532,563, with a \$282,004 "[d]ecrease in [passthrough] required" and \$322,072 in payments from tax increment, leaving a balance of \$11,928,487 of what is designated as "Principal/Interest Due During Tax Year." (All sums herein are rounded to the nearest dollar.)

Following the Great Dissolution, redevelopment agencies and tax increment per se were abolished as of February 2012 (§§ 34170, subd. (a), 34172, subd. (a)(1); *Matosantos I, supra*, 53 Cal.4th at pp. 250–251, 274–275); "all provisions of the Community Redevelopment Law that depend on the allocation of tax increment to redevelopment agencies . . . shall be inoperative" upon the effective date of the act (§ 34189, subd. (a)). Instead, a county's auditor-controller simply allocates to a trust fund an amount of property tax equal to the enforceable obligations of the former redevelopment agency that the successor agency will use to pay the obligations. (§§ 34172, subd. (d), 34182, subd. (c).)

A “[s]uccessor agency” submits a document—listing the minimum payments and due dates of enforceable obligations coming within section 34171 over the course of a six-month period—called a “‘Recognized Obligation Payment Schedule’” (ROPS), to the Department for approval. (§ 34171, subds. (j) & (h); see *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1463 & fn. 3 [176 Cal.Rptr.3d 729].)

The City elected to become the successor agency to its former redevelopment agency. It also elected to become the successor housing agency for purposes of administering the housing “asset” fund, which is the successor to the previous fund for subsidized housing. (§ 34176.) In its initial ROPS for the period of January through June 2012, the City listed the roughly \$12 million amount identified on its 2011 indebtedness schedule as an outstanding debt to the former housing fund, with a payment due of \$169,000. It submitted this ROPS to the Department in April 2012. In response to an inquiry from the Department about the basis of this obligation, the City cited section 33334.2. It explained that it had based its calculation on the amount the former redevelopment agency would have deposited into the former housing fund over the remaining life of the project. The Department notified the City that the set-aside was not required any longer and returned the ROPS for reconsideration. The City filed an amended ROPS I omitting this debt, and did not include it in the ROPS II and III for the period of July 2012 through June 2013.

In what we will call “ROPS IV” for consistency (July through Dec. 2013), the City once again included the \$12 million as an outstanding debt to the former housing fund. When the Department requested documentation of the debt, the City responded with a letter from one of the attorneys for plaintiffs, which demanded inclusion of the set-aside in ROPS IV, asserting the opinion that the entire amount of set-aside for the housing fund over the life of the project area was due *ab initio* and simply paid in annual increments (much like a mortgage). The Department again rejected the inclusion of this debt because the obligation expired with the end of redevelopment. This action followed in September 2013.

In denying the petition for writ of mandate, the trial court first rejected the argument that the set-asides from tax increment to be paid to the former housing fund over the life of the project were due “from its initiation, and [were] deferred” within the meaning of section 34171.⁴ The trial court pointed out that section 33334.2, subdivision (a), which establishes the

⁴ To quote the pertinent provision, an “[e]nforceable obligation” includes “payments owing to [the subsidized housing fund] of a redevelopment agency, which had been *deferred* as of the effective date of the act adding this part . . . Repayments shall be transferred to the [housing asset fund]” (§ 34171, subd. (d)(1)(G), italics added.)

set-asides, mandates that “20 percent of all taxes that are allocated to the [redevelopment] agency *pursuant to [s]ection 33670* shall be used . . . for the purpose[] of” subsidized housing (italics added; see § 33334.6, subd. (c) (“taxes allocated . . . pursuant to [s]ection 33670”]), and the cross-referenced statute anticipates annual payments rather than the total of set-asides over the life of the project. As a result, once tax increment was abolished, this ended the source of revenue for the set-asides. As for their alternative argument, invoking another definition that includes “obligations imposed by state law” (§ 34171, subd. (d)(1)(C)), the trial court ruled that this flies in the face of the directive that any obligation depending on allocation of tax increment is *inoperative* (§ 34189, subd. (a)) and therefore the set-asides cannot be an obligation under state law.

DISCUSSION

In truth, we have little to add to the trial court’s succinct dispatch of the merits of the petition. We are obligated to respond to the arguments plaintiffs renew at length on appeal. We remain unpersuaded.

1.0 *The Set-asides Are Not “Deferred” for Purposes of Section 34171, Subdivision (d)(1)(G)*

Throughout their argument, plaintiffs beg the central question in characterizing the future set-asides as a “debt” being “owed” to the former housing fund and its successor asset fund. The statutory authority and budgeting procedures on which they rely do not provide any support for their wishful characterizations.

The Legislature does describe the set-asides as an “indebtedness” of the project, as plaintiffs note. (§§ 33334.2, subd. (h), 33334.6, subd. (h).) But the label is being applied to the set-aside paid from tax increment *pursuant to section 33670*, which divvied up the property tax in a redevelopment project levied *each year* between the redevelopment agencies and taxing entities. These sections do not describe *future* payments as a *presently due* indebtedness. The indebtedness to which the Legislature refers is the current year’s allocation under section 33670 and *prior* deficits in set-asides authorized under the statutes (§§ 33334.2, subd. (k), 33334.6, subds. (d), (e) & (g)). The same is true of the characterization as indebtedness to which plaintiffs direct us in section 33487 (which mandates set-asides “for redevelopment projects merged pursuant to this article”) (§ 33487, subd. (a); see *id.*, subd. (b)). Therefore, these references are not a basis for a claim that the future payments are deferred debt under this definition.

It is also a non sequitur to rely on the inclusion of future housing set-asides from tax increments for purposes of calculating a redevelopment agency's entitlement to tax increment in the indebtedness statement (as we have described above), pursuant to section 33675.⁵ That the Legislature authorized (and the State Controller instructed) redevelopment agencies to make sure they *plan* for the surcharged set-asides *as well as* the underlying obligations, in order to guarantee that the redevelopment agencies receive sufficient tax increment over the life of the project to satisfy *both* as the set-asides come due in the future, does not transmute the future set-asides into a deferred present obligation.⁶ The lengthy focus of plaintiffs on the internal budgeting process of the former redevelopment agency is misfocused as well: Regardless of the manner in which it had *memorialized* future payments to the former housing fund, this does not *impose* any obligation that is deferred within the meaning of the statute. The set-asides themselves are based *not* on this identified total indebtedness, but on the tax increment *actually received* after the calculation of total indebtedness.

While the Department's latest instructions for completing an ROPS acknowledge *loans or deferrals* owed to a former housing fund (other than supplemental education augmentation) as an enforceable obligation, this is immaterial on the issue of future set-asides.⁷ As we have already noted above, such loans and deferrals relate to *past* obligations to the former housing fund authorized under law. *These* are what were "frozen in time" (to use plaintiffs' term) upon the "'[e]nd of [r]edevelopment [a]s [w]e [k]new [i]t'" (*Brentwood, supra*, 237 Cal.App.4th at p. 499).

This leaves plaintiffs' invocation of section 33333.8. The Department does not respond to this provision explicitly. In pertinent part, it provides, "Every redevelopment agency shall comply with and fulfill its obligations with regard to the provision of affordable housing . . . prior to the time limit on the effectiveness of the redevelopment plan . . . A legislative body may not adopt an ordinance terminating a redevelopment project area if the agency

⁵ Plaintiffs invoke the status of the statement as "prima facie evidence" of the former redevelopment agency's indebtedness. (§ 33675, subd. (h)(1).) This is, however, in the context of the document's submission to the county auditor-controller in support of an allocation of tax increment.

⁶ Indeed, the State Controller's instructions for the indebtedness statement counsel on the need to anticipate annually the future set-asides even though the amounts would be "difficult to calculate due to the fact that these amounts are primarily dependent *upon actual tax increment receipts*." (Italics added.)

⁷ Plaintiffs' request that we take judicial notice of the Department's latest instructions for completing an ROPS is denied. (*People v. Eubanks* (2011) 53 Cal.4th 110, 129, fn. 9 [134 Cal.Rptr.3d 795, 266 P.3d 301].)

has not complied with its affordable housing obligations. . . . [¶] (1) The[se] affordable housing obligations . . . shall include . . . : [¶] (A) The obligation to make deposits to . . . the [subsidized housing fund] . . . [and] [¶] (B) [t]he obligation to eliminate project deficits pursuant to [s]ection[] 33334.6 . . .” (§ 33333.8, subd. (a)(1)(A)–(B).) To iterate yet again, the obligation identified in subdivision (a)(1)(A) is ultimately dependent upon the receipt of tax increment, which has ceased; the obligation in subdivision (a)(1)(B) is to catch up with *past* obligations before terminating a project. As a result, the statute does not create an obligation with respect to future set-asides for the remainder of a project’s duration that can be considered “deferred” for purposes of this definition of enforceable obligation.

2.0 Section 34189 Abrogates Any Statutory Obligation Within the Definition of Section 34171, Subdivision (d)(1)(C)

■ Attempting to avoid a painful reality, plaintiffs assert at length that regardless of section 34189, the housing set-aside continues to be an obligation under state law that comes within the meaning of section 34171, subdivision (d)(1)(C). Their kaleidoscopic argument flies in the face of the plain meaning of section 34189.

The statute makes a blanket declaration that “*all provisions* of the Community Redevelopment Law that depend on the allocation of tax increment to redevelopment agencies” are inoperative. (§ 34189, subd. (a), italics added.) As the housing set-asides are premised on the receipt of tax increment, they are accordingly inoperative.

Plaintiffs invoke “‘[e]xpressio unius est exclusio alterius’” (*People v. Johnston* (2016) 247 Cal.App.4th 252, 257 [201 Cal.Rptr.3d 886], review granted, July 13, 2016, S235041, cited for persuasive value pursuant to Cal. Rules of Court, rule 8.1115; see 2A Singer & Singer, *Sutherland Statutes and Statutory Construction* (7th ed. 2014) § 47:23, pp. 406–413, 423–424) as a basis for inferring an exclusion of section 33334.2 from the reach of section 34189 because the latter does not *expressly* include the former, or because section 33334.2 remains on the books. The principle is inapt. Section 34189 is a blanket declaration that *any* provision depending on allocation of tax increment is inoperative, as opposed to choosing some related provisions but not others, which is the basis for the logic in this interpretive principle.

In the same vein of attempting to evade the plain meaning of the statute, plaintiffs reiterate their failed metaphysic that the future set-asides have been

already allocated as a statutory obligation under state law, adding that this must be the legislative intent because obligations to the housing fund are not excluded from those considered enforceable. It is not any more persuasive through repetition.

Plaintiffs point to numerous statutory provisions (which we will not repeat) for ongoing responsibilities of successor housing agencies for subsidized housing. The short answer is that these apply only to already encumbered housing funds (the Legislature having made the choice to distribute unencumbered funds to the taxing entities in each county (§ 34177, subd. (d)),⁸ or reimbursements for *past* loans from the housing funds and shortfalls in *past* annual set-asides (§ 34176, subd. (e)(6)). Plaintiffs fail to identify any provision that provides for a postdissolution set-aside from collected property tax, let alone a formula for calculating such a set-aside. Furthermore, the Legislature expressly stated when enacting the postdissolution housing asset fund that “[t]his section shall not be construed to provide any stream of tax increment financing” (§ 34176, subd. (h)), which eviscerates the inference of legislative intent that plaintiffs would draw.

■ This leaves an argument that takes longer to explain than refute. For the housing asset fund created in section 34176, the Legislature decreed it “shall be subject to the provisions of the Community Redevelopment Law (. . . (commencing with [s]ection 33000)) . . . except as follows” (§ 34176.1), thereafter setting out ways in which the successor housing agency’s authority deviates from existing law. In particular, the statute permits the successor housing agency “[n]otwithstanding [s]ection 33334.2” to expend funds on homeless prevention and rapid rehousing services (§ 34176.1, subd. (a)(2)) and to expend program income anywhere within its jurisdiction “notwithstanding subdivision (g) of [s]ection 33334.2” (§ 34176.1, subd. (c)(1)). Plaintiffs contend this limited restriction on the effects of section 33334.2 “demonstrates [an] intention that the affordable housing obligations expressed in that section survive dissolution.” This would be a very roundabout and obscure way in which to accomplish such an end, and drafters of legislation are not presupposed to hide the elephant of such a major element inside an apparently unrelated mouse hole, when it would have been so much more straightforward to amend section 33334.2 itself to provide that it continues to entail property tax paid to successor agencies notwithstanding section 34189. (*Brentwood, supra*, 237 Cal.App.4th at p. 501.) We therefore reject this proffered “intent.”

⁸ The Department has determined that the former redevelopment agency’s housing fund does not have any such unencumbered funds available for distribution.

DISPOSITION

Plaintiffs' request for judicial notice is denied. The judgment is affirmed. Costs on appeal are awarded to the Department. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

Nicholson, Acting P. J., and Duarte, J., concurred.

Appellants' petition for review by the Supreme Court was denied January 11, 2017, S238430.

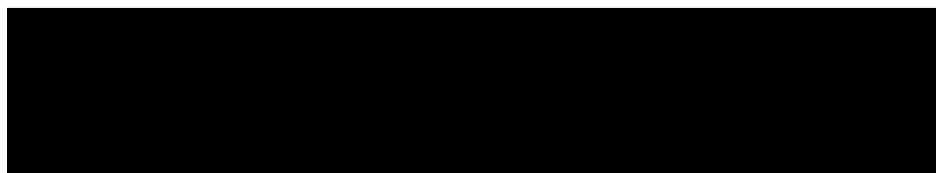
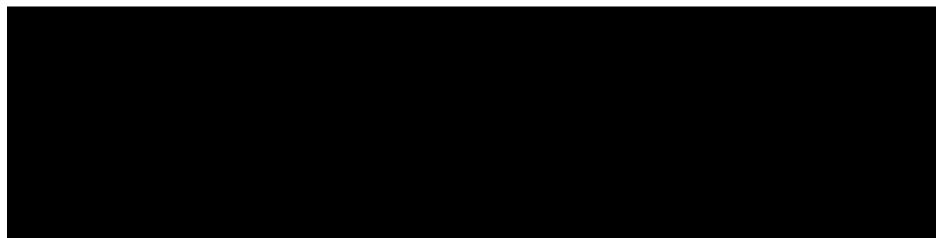
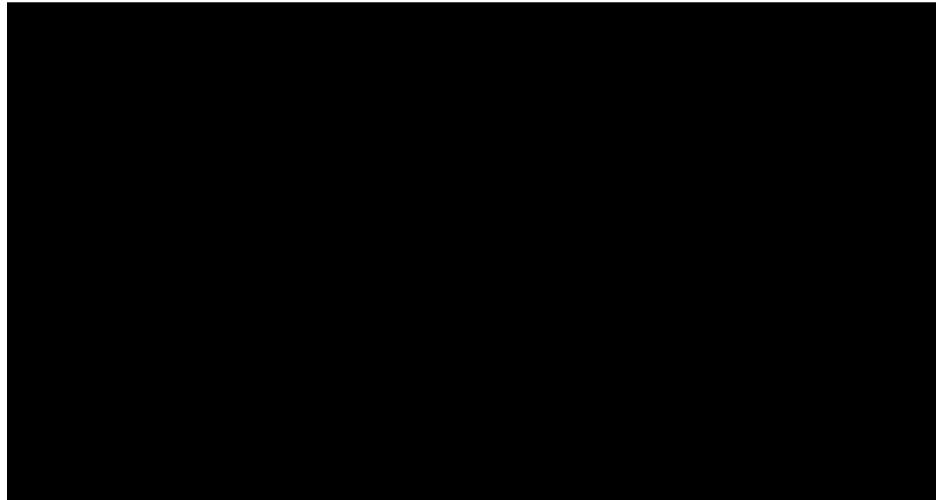
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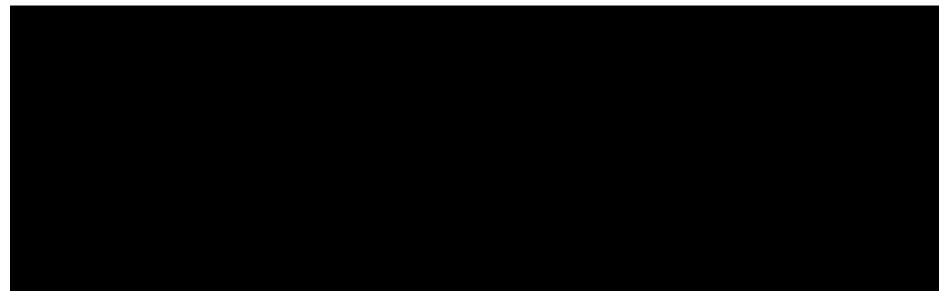
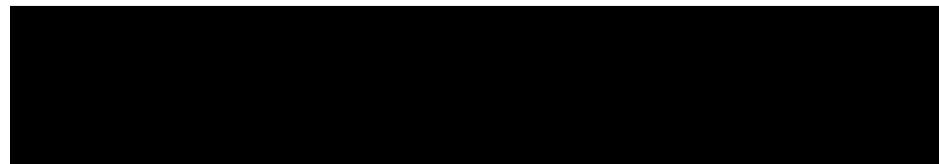
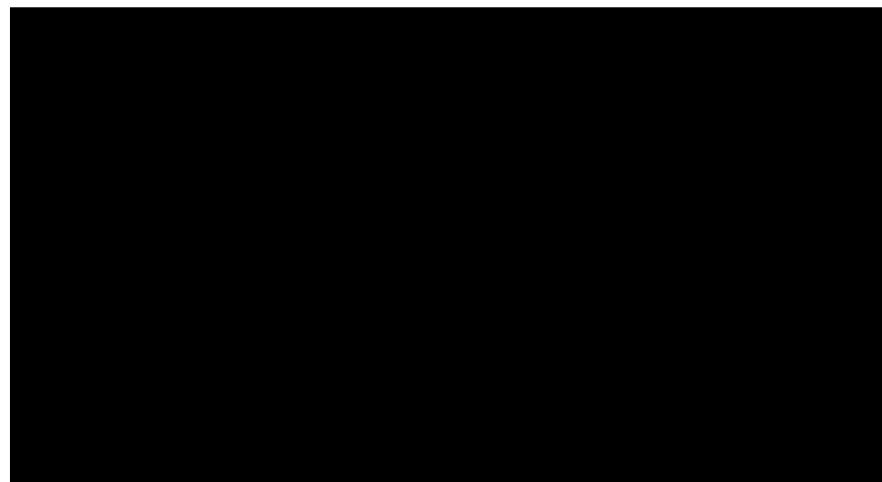
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SOCAL IP LAW GROUP, LLP, Defendant and Respondent.

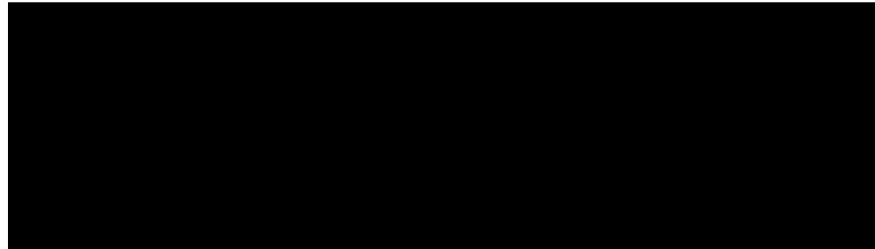
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COUNSEL

Parker Mills, David B. Parker, Joel A. Osman and Andrew A. Talebi for Plaintiff and Appellant.

Klinedinst, Gregor A. Hensrude, Bradley R. Cochran and Sarah H. Lanham for Defendant and Respondent.

OPINION

YEGAN, Acting P. J.—In this legal malpractice action, GoTek Energy, Inc. (client), appeals from the judgment entered in favor of SoCal IP Law Group, LLP (firm one). The trial court granted firm one’s motion for summary judgment. Client also appeals from a postjudgment order awarding firm one attorney fees of \$140,000.

Firm one was client’s patent counsel. Firm one failed to timely file patent applications. Client retained Parker Mills (firm two) to bring a malpractice action against firm one. The trial court ruled that firm two had not filed the action within the one-year statute of limitations. Client contends that the statute of limitations was tolled under the continuous representation exception of Code of Civil Procedure section 340.6, subdivision (a)(2).¹ Even if the statute of limitations was not tolled, client contends that firm one is not entitled to recover attorney fees. We affirm.

Factual and Procedural Background

As client’s patent counsel, firm one’s duties included obtaining “patent rights in all applicable foreign countries.” In June or July 2012, firm one informed client that it failed to timely file applications for patent rights in Japan and Brazil. In August 2012, firm one “admitted . . . that it was

¹ Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

negligent.” On September 26, 2012, client retained firm two “for the purpose[] of investigating whether [firm one’s] negligence in failing to timely file the patents in Japan and Brazil amounted to legal malpractice.”

On November 5, 2012, firm one received a fax from firm two stating that client was making a malpractice claim against it. Firm two requested that firm one “tender this claim to your insurance carrier.”

On November 7, 2012, firm one sent an e-mail to client stating that, in view of the malpractice claim, it “must withdraw” as counsel. “Consequently, the firm’s attorney-client relationship with [client] is terminated forthwith, and we no longer represent [it] with regard to any matters.” Firm one continued, “Please tell us immediately where we should send [client’s] files, and we will arrange for their delivery. You should retain patent counsel to handle your patent matters.”

In a November 8, 2012 letter to firm one, client requested that firm one “immediately make all necessary preparations and take all necessary actions to deliver all [of client’s] files to” Lucas Wenthe at Armstrong Teasdale, LLP. Client had previously “engaged the services of Armstrong Teasdale to render legal work, primarily in the realm of trademarking.” In the letter client noted: “It would be helpful to transfer all electronic files by Nov. 16, 2012 and remaining original hard copies (where electronic copies aren’t available) by Nov. 23, 2012.” The concluding sentence states, “[Client] sincerely appreciates the services provided by [firm one].” On November 8, 2012, client e-mailed to firm one “a signed copy of the request for Transfer of Files from [firm one] to Lucas Wenthe at Armstrong Teasdale, LLP.”

On November 15, 2012, firm one e-mailed a letter to client stating: “Pursuant to your request, this will confirm that we have terminated the attorney client relationship with you. . . . [W]e are no longer representing you with regard to your patent matters. As requested, we are transferring your files to Lucas Wenthe of Armstrong Teasdale, LLP.” On the same date, firm one sent to Armstrong Teasdale via FedEx a “CD with all pertinent GoTek Energy files.” In its opening brief, client alleges that “the record clearly establishes [that] on November 15, 2012,” firm one “transferred to [client] its files.”

Steven Herbruck, client’s chief executive officer, testified that he believed “the relationship” with firm one had ended on November 15, 2012, “[b]ecause the files had been transferred. As far as we were concerned, then they no longer represented us on any matters.”

The following year, on November 14, 2013, client filed the malpractice action against firm one. In its motion for summary judgment, firm one argued

that the one-year statute of limitations began to run no later than November 8, 2012, “when [client] consented to the termination of the attorney-client relationship and demanded that its files be sent to its replacement patent counsel.” Thus, the complaint filed on November 14, 2013, was “too late.”

In its ruling granting the motion for summary judgment, the trial court reasoned: “Arguably, the attorney-client relationship ended on November 7, [2012,] but it clearly terminated the following day when [client] responded to the letter telling [firm one] where to send its files. Following that correspondence, a reasonable client would no longer entertain the belief that [firm one] would provide further legal services. The administrative functions [the transfer of client’s files to replacement counsel] that took place after November 8, 2012, were not legal services and therefore do not change this result.”

Summary Judgment/Standard of Review

“The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 [107 Cal.Rptr.2d 841, 24 P.3d 493].) “[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Id.*, at p. 850, fn. omitted.)

“To determine whether triable issues of fact do exist, we independently review the record that was before the trial court when it ruled on [firm one’s] motion. [Citations.] In so doing, we view the evidence in the light most favorable to [client] as the losing part[y], resolving evidentiary doubts and ambiguities in [its] favor. [Citation.]” (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68 [109 Cal.Rptr.3d 514, 231 P.3d 259].) “We must presume the judgment is correct” (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376 [62 Cal.Rptr.3d 200].) Thus, “[o]n review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . ‘[I]t is the appellant’s responsibility . . . to point out the triable issues the appellant claims are present by citation to the record and any supporting authority.’” (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230 [35 Cal.Rptr.3d 837].)

Tolling of Statute of Limitations: Continuous Representation

■ “The applicable statute of limitations for legal malpractice claims is section 340.6.” (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 110 [103

Cal.Rptr.3d 811].) It provides that a malpractice action must be commenced “within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission” (§ 340.6, subd. (a).) The running of the statute of limitations is tolled during the time that “[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.” (*Id.*, subd. (a)(2); see also *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 505 [66 Cal.Rptr.3d 52, 167 P.3d 666] [“Under California law, the statute of limitations for attorney malpractice claims arising from a given matter is tolled for the duration of the attorney’s representation of the client in that matter”].) The tolling is referred to as the “continuous representation exception.” (*Id.*, at p. 511; *Truong v. Glasser, supra*, 181 Cal.App.4th at p. 115.) “Code of Civil Procedure section 340.6 does not expressly state a standard to determine when an attorney’s representation of a client regarding a specific subject matter continues or when the representation ends, and the legislative history does not explicitly address this question.” (*Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 28 [43 Cal.Rptr.3d 866].)

The Tolling of the Statute of Limitations Ended No Later Than November 8, 2012

■ Client contends that there is a triable issue of fact whether the one-year statute of limitations was tolled under the continuous representation exception. We disagree. As a matter of law, the tolling of the statute of limitations ended no later than November 8, 2012, more than one year before the filing of the malpractice action.

■ “An attorney’s representation of a client ordinarily ends when the client discharges the attorney or consents to a withdrawal, the court consents to the attorney’s withdrawal, or upon completion of the tasks for which the client retained the attorney. [Citations.]” (*Gonzalez v. Kalu, supra*, 140 Cal.App.4th at p. 28.) Pursuant to this rule, firm one’s representation of client ended on November 8, 2012, when client wrote a letter to firm one requesting that it “immediately make all necessary preparations and take all necessary action to deliver all [of client’s] files to” Armstrong Teasdale, LLP. On the same date, client e-mailed to firm one “a signed copy of the request for Transfer of Files from [firm one] to . . . Armstrong Teasdale, LLP.” By requesting that its files be immediately delivered to replacement counsel, client consented to firm one’s express withdrawal the previous day. Client did not object to the withdrawal or indicate that it wanted firm one to continue to represent it. Instead, it wrote, “[Client] sincerely appreciates the services provided by [firm one].”

Even if firm one had withdrawn without client's consent, the withdrawal would still have been effective. "[F]or purposes of Code of Civil Procedure section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations.] That may occur upon the attorney's express notification to the client that the attorney will perform no further services Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. After a client has no reasonable expectation that the attorney will provide further legal services, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end." (*Gonzalez v. Kalu, supra*, 140 Cal.App.4th at pp. 30–31, fns. omitted.)

Pursuant to this rule, firm one's representation ended on November 7, 2012. On that date firm one e-mailed client that it "must withdraw" as client's attorney, that its "attorney-client relationship with [client] is terminated forthwith," and that it "no longer represent[s] [client] with regard to any matters." After receiving the e-mail, client could not reasonably have expected that firm one would provide further legal services.²

Client argues that it reasonably believed that firm one would continue to provide legal services by transferring its files to Armstrong Teasdale, LLP. Client asserts, "[Firm one's] possession and transfer of [client's] files constitutes legal services." Thus, firm one's representation continued until the records were transferred on November 15, 2012.

If client actually believed that firm one would continue to provide legal services by transferring its files to replacement counsel, its belief was

² In its reply brief, client asserts that firm one's e-mail was not an express notification of the termination of legal services because the e-mail stated, "*In due course*, we will withdraw as your attorneys of record in the United States Patent and Trademark Office . . . and will advise foreign attorneys handling your matters that they should begin communicating with your named patent counsel." (Italics added.) Client contends that the "due course" language indicated that firm one would continue to provide legal services. The contention is forfeited because it was not made in client's opening brief. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894–895, fn. 10 [93 Cal.Rptr.2d 364].) In any event, the acts in question— withdrawing as attorneys of record and advising foreign attorneys of new patent counsel—do not constitute the provision of legal services. (See *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 846 [236 Cal.Rptr. 696] ["the failure to formally withdraw as attorney of record, standing alone, will not toll the statute of limitations under the rubric of continued representation"].)

unreasonable as a matter of law. Firm one made clear in its e-mail that it would not provide further legal services. The transfer of the files was a clerical, ministerial activity. (See *Muller v. Sturman* (N.Y.App.Div. 1981) 79 A.D.2d 482, 483–488 [437 N.Y.S.2d 205, 207–209] [attorney did not continue to represent client until files were returned to her because attorney had previously ceased to provide legal services].)

■ In *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488 [35 Cal.Rptr.2d 169], the court stated what has been referred to as “[a]n objective standard . . . to determine whether an attorney’s representation has been continuous.” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887 [110 Cal.Rptr.2d 877].) The standard is as follows: “Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.” (*Worthington v. Rusconi, supra*, 29 Cal.App.4th at p. 1498, fn. omitted.) Client cannot prevail under this standard. Firm one’s possession of client’s files after November 8, 2012, and its transfer of the files on November 15, 2012, are not “evidence of an ongoing *mutual* relationship.” (*Ibid.*) Nor do they constitute “activities in furtherance of the relationship.” (*Ibid.*) The relationship ended no later than November 8, 2012, when client consented to firm one’s withdrawal.

For the first time on appeal, client claims that firm one’s representation could not have ended on November 8, 2012, because at that time it had not completed its “ethical obligations” to “allow for [a] reasonable time for the employment of [replacement] counsel” and “to insure that [client] had counsel in place to protect its intellectual property.” Client relies on the Rules of Professional Conduct of the State Bar of California (Rules). Rule 3-700(A)(2) provides, “A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, [and] allowing time for employment of other counsel”

This issue is forfeited because client failed to raise it in the trial court. (*Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 594 [148 Cal.Rptr.3d 412].) In any event, the Rules were not violated because on November 8, 2012, client consented to firm one’s withdrawal and requested that its files be transferred to replacement counsel, Armstrong Teasdale, LLP.

Attorney Fees

The trial court awarded firm one attorney fees of \$140,000 pursuant to a “Legal Services Agreement” (Agreement). The Agreement provides, “In the

event there is any dispute between us relating to this agreement, the prevailing party to any litigation or arbitration shall be awarded its reasonable attorneys fees and costs.” The trial court reasoned, “The language of the fee provision (‘any dispute between us relating to this agreement’) is neither hidden nor ambiguous, and is broad enough to infer the parties’ intent to include the instant professional malpractice action. [Citations.]”

■ Where, as here, there is no conflicting extrinsic evidence, we independently review the trial court’s interpretation of the attorney fees clause. (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1110 [192 Cal.Rptr.3d 354].) A “contract containing . . . attorney fees provisions must be analyzed on its own terms, and in context, pursuant to the usual rules of contract interpretation for determining the actual intent of the parties. [Citations.]” (*Rideau v. Stewart Title of California, Inc.* (2015) 235 Cal.App.4th 1286, 1297 [185 Cal.Rptr.3d 887].)

On May 13, 2009, the Agreement was signed by Steven Herbruck, “doing business as GoTek Energy.” Client is a corporation, GoTek Energy, Inc., and Herbruck is its chief executive officer. Client argues that Herbruck signed the Agreement in his individual capacity. His signature, therefore, does not bind the corporation, which did not exist until after the Agreement was signed. Client “has forfeited this argument by failing to raise it below. [Citation.]” (*Golden State Water Co. v. Casitas Municipal Water Dist.* (2015) 235 Cal.App.4th 1246, 1259 [186 Cal.Rptr.3d 64].) In its opposition to firm one’s motion for attorney fees, client took a contrary position. It referred to “the Legal Services Agreement executed between Plaintiff [client] and Defendant [firm one].” If client “executed” the Agreement, then it was bound by the Agreement. Client cannot change course on appeal and argue that it was not bound because Herbruck signed the Agreement in his individual capacity. (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 872–873 [36 Cal.Rptr.3d 515].)

■ We reject client’s contention that the attorney fees clause “was not drafted with sufficient clarity as to whether it covered this legal malpractice action.” The clause applies broadly to “any dispute” between the parties “relating to” the Agreement. “A ‘dispute’ is a . . . general term that includes any conflict or controversy,” including but not limited to “a conflict giving rise to an action.” (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 337 [4 Cal.Rptr.3d 905].) The malpractice action arose from a dispute relating to the Agreement because it arose from firm one’s negligence in securing client’s patents. The first paragraph of the Agreement states: “Initially, you have asked us to help you focus your ideas on what should be patented in your ‘Dynakinetic Engine’, and to help you prepare a patent strategy.” In the

operative first amended complaint, client alleged, “The Underlying Engagement [i.e., the Agreement] included [firm one’s] obligation to timely secure patent rights in all applicable foreign countries.”

Client asserts, “In order to recover fees pursuant to the agreement between the parties, there necessarily must be a dispute that involves **both** contract and tort claims.” Client maintains that the attorney fees clause is inapplicable because the malpractice action involves only a tort claim. “The underlying dispute was not brought pursuant to the . . . Agreement (i.e., as a breach of contract action), nor was it brought to enforce any of the provisions of the . . . Agreement.”

■ Client’s position is untenable. Parties to a contract “‘may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.’ [Citation.]” (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 [71 Cal.Rptr.2d 830, 951 P.2d 399]; accord, *Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1076 [109 Cal.Rptr.3d 392]; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341 [5 Cal.Rptr.2d 154].) Section 1021 provides, “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties” “There is nothing in the statute that limits its application to contract actions alone.” (*Xuereb v. Marcus & Millichap, Inc.*, *supra*, 3 Cal.App.4th at p. 1341.) Thus, the attorney fees clause here applies to client’s malpractice claim because it constitutes a “dispute” between the parties “relating to” the Agreement. (See *id.*, at p. 1342 [based on “the broad right of parties pursuant to Code of Civil Procedure section 1021 to make attorney fees agreements,” it “was . . . error for the trial court to conclude that Civil Code section 1717 would independently bar an award of attorney fees . . . because the causes of action argued at trial sounded in tort rather than in contract”].)

■ In any event, client’s malpractice action sounded in both tort and contract. “Legal malpractice consists of the failure of an attorney ‘to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.’ [Citation.] . . . When such failure proximately causes damage, it gives rise to an action in tort. . . . Since in the usual case, [as in the instant case,] the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney’s failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. *Thus legal malpractice constitutes both a tort and a breach of contract.*” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 180–181 [98 Cal.Rptr. 837, 491 P.2d 421], italics added, fns. omitted.)

Conclusion

The record does not show why firm two waited until what it believed was the “eleventh hour” to file the malpractice action. We agree with the trial court that it waited too long.

The judgment and postjudgment order awarding attorney fees to firm one are affirmed. Firm one shall recover its costs on appeal.

Perren, J., and Tangeman, J., concurred.

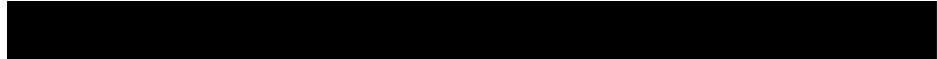
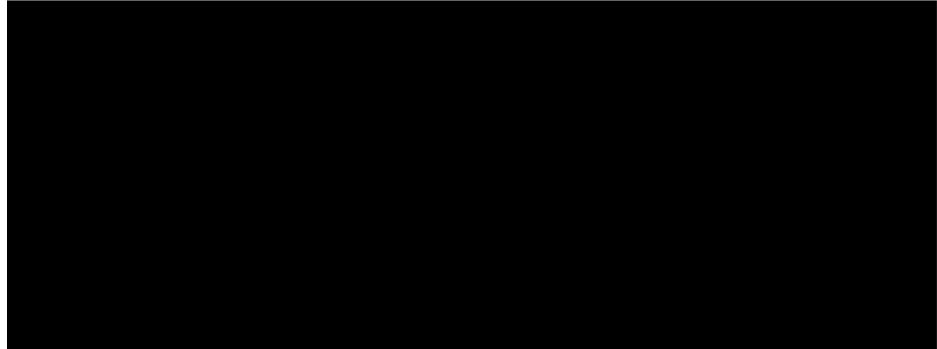
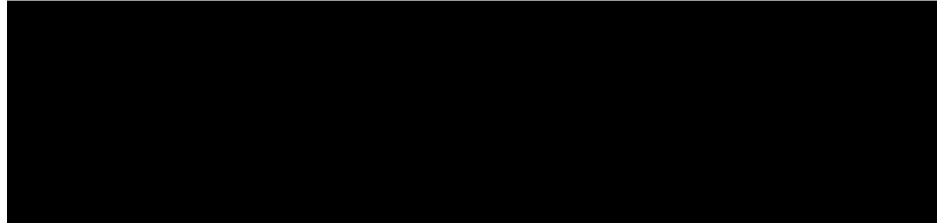
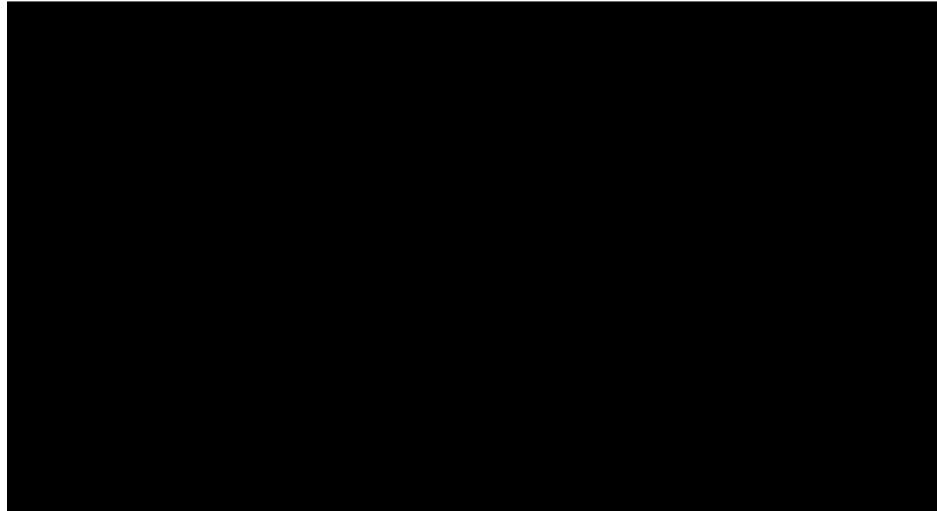
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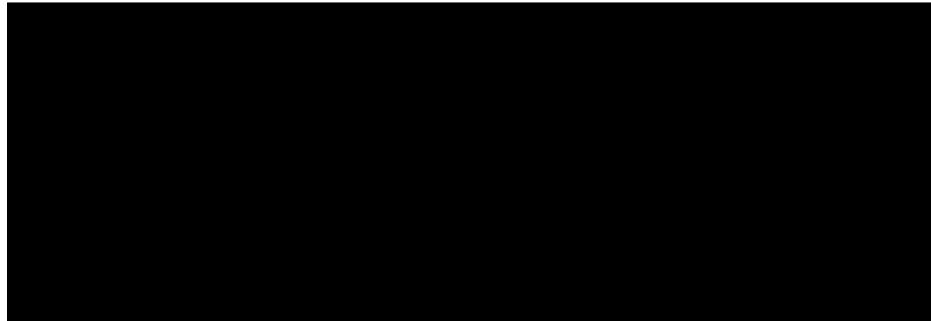
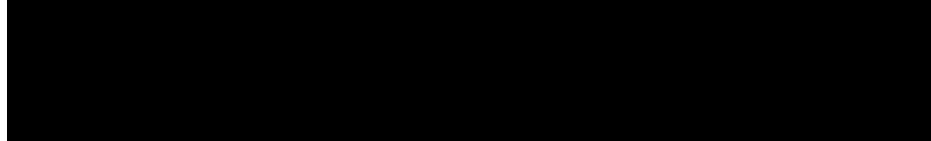
A.M., a Minor, etc., Plaintiff and Appellant, v.
VENTURA UNIFIED SCHOOL DISTRICT et al., Defendants and
Respondents.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Law Offices of Robert S. Gerstein, Robert S. Gerstein; Law Offices of Robert H. Tourtelot and Robert H. Tourtelot for Plaintiff and Appellant.

Woo Houska, Carol A. Woo and Maureen M. Houska for Defendants and Respondents.

OPINION

PERREN, J.—D.G., as guardian ad litem for her minor daughter, A.M. (appellant), sued the Ventura Unified School District (District), Michael Tapia, and Gwen Fields (collectively, respondents) for negligence. Appellant alleged, among other things, that respondents negligently allowed male students to sexually abuse her while at school. The trial court granted summary judgment for respondents, concluding that appellant failed to file the required government tort claim with the District.

Appellant concedes she did not file a tort claim, but asserts she was excused from doing so pursuant to Government Code section 905, subdivision (m), which exempts “[c]laims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood

sexual abuse.”¹ Section 340.1, subdivisions (a)(2) and (b)(1) set forth the limitations period for bringing actions “for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.” (§ 340.1, subd. (a)(2).) Such actions must be commenced before the victim’s 26th birthday. (§ 340.1, subd. (b)(1).) Appellant’s is such an action.

Because section 340.1 provides the limitations period for appellant’s claims of childhood sexual abuse, appellant was exempt from filing a tort claim under Government Code section 905, subdivision (m). As we shall explain, the trial court erred by concluding the exemption applies only if the alleged childhood sexual abuse was committed by an employee, volunteer, representative or agent of the public entity. We reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Appellant was a second grade student at an elementary school in Ventura. Between September 2012 and April 2013, appellant allegedly was bullied, battered and sexually abused by some of her fellow students. A.R., a male student, hit and kicked her, touched her private parts, pinched her buttocks, hugged her and pressed himself against her. Another student exposed himself to appellant and rubbed his private parts on her. On one occasion, appellant was knocked unconscious.

D.G. reported the abuse to various District employees, including appellant’s teacher (Fields) and the school’s principal (Tapia). When D.G. attempted to see the superintendent, she was referred to another District employee, who referred her back to Tapia. According to D.G., the District did nothing to stop the attacks on appellant. Fields told D.G. that “[she needs] to fix things on [her] own,” and Tapia suggested that she move appellant to another school.

As a result of the bullying and attacks, appellant was afraid to go to school or to play outside with her friends. In April 2013, D.G. began homeschooling appellant.

In June 2013, appellant presented a tort claim to the County of Ventura, which is a separate entity from the District. The County of Ventura sent a notice of rejection. No claim was presented to the District.

Appellant and D.G. filed a complaint for damages against respondents for (1) negligent supervision of students; (2) negligent supervision of school

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

premises; (3) violation of article I, section 28, subdivision (c) of the California Constitution, Government Code section 44807,² Education Code section 8202 and California Code of Regulations, title 5, section 5552; (4) sexual harassment; (5) negligent infliction of emotional distress as to appellant; and (6) negligent infliction of emotional distress as to D.G. Only the sixth cause of action was brought by D.G. on her own behalf. After respondents demurred to most of the causes of action, appellant and D.G. voluntarily dismissed the common law claims, leaving only appellant's claims for negligent supervision of students, negligent supervision of school premises and violation of constitutional and statutory rights. The trial court overruled the demurrer as to those three claims.

Respondents moved for summary judgment on the ground that the remaining three causes of action are barred due to appellant's failure to comply with the claims presentation requirement set forth in Government Code section 911.2. Appellant did not dispute the facts raised in respondents' motion. She argued that because her claim was made pursuant to section 340.1 for "childhood sexual abuse," she was not required to file a government tort claim. (Gov. Code, § 905, subd. (m).)

The trial court rejected appellant's contention "that a claim was not required in the first place pursuant to an exception granted by Government Code section 905 [subdivision] (m) and the revival language contained [in] section 340.1." It concluded "that that these sections apply to childhood sexual abuse committed by an employee, volunteer, representative or agent of a public entity," and not by "third parties (students)." The court accordingly granted summary judgment for respondents. This appeal followed.³

DISCUSSION

A. Standard of Review

We review a grant of summary judgment de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142 [12 Cal.Rptr.3d 615, 88 P.3d 517].) In addition, "the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is

² Although the complaint alleges a violation of Government Code section 44807, that section does not exist.

³ Respondents correctly contend that D.G. lacks standing to appeal the trial court's summary judgment on her own behalf. Because D.G. dismissed her individual claim before judgment was entered, she is not a party to the judgment except in her capacity as guardian ad litem for her daughter. The notice of appeal confirms that D.G. appealed the judgment strictly on appellant's behalf.

subject to de novo review on appeal. [Citation.]” (*Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515 [73 Cal.Rptr.2d 450].)

■ “We begin with the fundamental rule that our primary task is to determine the lawmakers’ intent” in enacting the relevant statute. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) “In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387 [241 Cal.Rptr. 67, 743 P.2d 1323].)

*B. Enactment of Government Code Section 905,
Subdivision (m)*

The Government Claims Act (Gov. Code, § 810 et seq.) requires that “[b]efore suing a public entity, the plaintiff must present a timely written claim for damages to the entity. [Citations.]” (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 [64 Cal.Rptr.3d 210, 164 P.3d 630] (*Shirk*.)) “A claim relating to a cause of action for . . . injury to person[s] . . . shall be presented . . . not later than six months after the accrual of the cause of action.” (Gov. Code, § 911.2, subd. (a).) “Timely claim presentation is not merely a procedural requirement, but is . . . ‘‘a condition precedent to plaintiff’s maintaining an action against defendant’’” [citations], and thus an element of the plaintiff’s cause of action. [Citation.]” (*Shirk*, at p. 209.) With certain exceptions, once a claim has been presented and rejected, a plaintiff has six months to file a lawsuit. (Gov. Code, § 945.6, subd. (a)(1).) These time periods are generally not tolled while the plaintiff is a minor. (Ed. Code, § 352, subd. (a); *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1238 [92 Cal.Rptr.3d 1]; *County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1268–1269 [26 Cal.Rptr.3d 445].)

As discussed more fully below, section 340.1 “sets forth a special statute of limitations for victims of childhood sexual abuse.” (*County of Los Angeles v. Superior Court, supra*, 127 Cal.App.4th at p. 1268; see *K.J. v. Arcadia Unified*

School Dist., *supra*, 172 Cal.App.4th at p. 1238.) In *Shirk*, our Supreme Court concluded that the delayed discovery provisions in section 340.1 did not toll the period in which to present a claim under the Government Claims Act (Gov. Code, § 810 et seq.). The court held specifically that a timely six-month claim is a prerequisite to maintaining an action for childhood sexual abuse against a public entity school district. (*Shirk*, *supra*, 42 Cal.4th at p. 214.)

■ In direct response to *Shirk*, the Legislature enacted Government Code section 905, subdivision (m), which eliminates the claim presentation requirement for “[c]laims made pursuant to Section 340.1 . . . for the recovery of damages suffered as a result of childhood sexual abuse.” (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640 (2007–2008 Reg. Sess.) as amended June 9, 2008, p. 3 [“This bill is intended to address the *Shirk* decision by expressly providing that childhood sexual abuse actions against public entities are exempted from government tort claims requirements and the six-month notice requirement”].) This exemption applies to claims arising out of conduct occurring on or after January 1, 2009. (Gov. Code, § 905, subd. (m); *J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 333, fn. 6 [181 Cal.Rptr.3d 286] [“Effective January 1, 2009, the government claim presentation requirement no longer applies to claims for childhood sexual abuse”]; accord, *S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 721, fn. 6 [109 Cal.Rptr.3d 270].)

Appellant’s complaint alleges that, while she was a second grade student at a Ventura elementary school in 2012 and 2013, respondents negligently failed to supervise “the conduct of children on school grounds and to enforce the rules and regulations necessary to protect [her and other] students” from sexual abuse and that she suffered harm from such abuse. Appellant did not present a timely tort claim to the District, and the question before us is whether her action, which arose out of post-2008 conduct, is exempt from that requirement under Government Code section 905, subdivision (m). The answer lies in whether her sexual abuse claims fall within section 340.1.

C. Interpretation and Application of Section 340.1

Section 340.1 contains varying limitations periods for bringing actions for childhood sexual abuse against different groups of defendants. Subdivision (a) of section 340.1 provides that “[i]n an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires

later, for any of the following actions: [¶] (1) An action against any person for committing an act of childhood sexual abuse. [¶] (2) *An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.* [¶] (3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.” (Italics added.)

Notwithstanding this language, an action against third parties brought under section 340.1, subdivision (a)(2) and (3) must be brought before the plaintiff’s 26th birthday. Section 340.1, subdivision (b)(1) expressly states: “(1) No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff’s 26th birthday.” But this subdivision is subject to an exception. Section 340.1, subdivision (b)(2) provides that the age cutoff in subdivision (b)(1) “does not apply if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment.” (Italics added.)

1. *Relevant History of Amendments to Section 340.1*

As a general rule, a cause of action for childhood sexual abuse accrues at the time of molestation. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 443 [256 Cal.Rptr. 766, 769 P.2d 948].) Prior to the enactment of section 340.1 in 1986, courts applied former section 340, which provided a one-year statute of limitations for child sexual abuse claims. Courts also applied section 352, subdivision (a), which tolled the running of the statute while the plaintiff was still a minor. (See former § 340, subd. (3).)

In 1986 the Legislature enacted section 340.1, which expanded the limitations period to three years for sexual abuse by a relative or household member of a child under 14 years of age. (Former § 340.1, added by Stats. 1986, ch. 914, § 1, pp. 3165–3166.) “In 1990, the limitations period for actions against the actual perpetrator was extended in all cases to the later of three years from discovery that adult-onset psychological injury had been caused by the abuse, or the plaintiff’s 26th birthday.” (*Doe v. Doe I* (2012) 208 Cal.App.4th 1185, 1189 [146 Cal.Rptr.3d 215]; see *Quarry v. Doe I* (2012) 53 Cal.4th 945, 963 [139 Cal.Rptr.3d 3, 272 P.3d 977] (*Quarry*)).

■ Amendments in 1998 and 1999 applied an extended limitations period to third party defendants “who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff,” with an absolute cutoff at age 26 regardless of when discovery occurred. (§ 340.1, subd. (a)(2); see *Doe v. Doe I*, *supra*, 208 Cal.App.4th at p. 1189; *Quarry*, *supra*, 53 Cal.4th at pp. 965–967.) This law changed in 2003 when section 340.1 was amended to expand the limitations period for childhood sexual abuse claims against certain third parties to the later of plaintiff’s 26th birthday or three years from discovery that the abuse caused adult-onset psychological injury. (*Doe*, at pp. 1189–1190.) But “[t]his expansion applied to *only a limited class of [third party] defendants*, [i.e.,] those who knew, or had reason to know, or were otherwise on notice of any unlawful sexual conduct by an employee or other agent and failed to take reasonable steps and to implement reasonable safeguards to avoid acts of unlawful sexual conduct by that person in the future. As to all other third party defendants, the age 26 cutoff still applied.” (*Doe*, at p. 1190, italics added; see *Quarry*, at pp. 968–969 [“This exception was adopted to apply to claims against a subcategory of the third party defendants that already had been defined in section 340.1, subdivision (a)(2) and (3)’].)

2. Application of Section 340.1 to Appellant’s Claims

The trial court determined that by creating a subcategory of third party defendants to which the expanded statute of limitations applies, the Legislature meant to also limit third party claims arising out of section 340.1, subdivision (a)(2) to those in which an employee, volunteer, representative, or agent of the person or entity committed the alleged abuse. We do not read the statute’s language so broadly. All the Legislature did was eliminate “ ‘the age 26 cutoff as against a *narrow* category of third party defendants who had both the knowledge and the ability to protect against abusive behavior [by an employee, volunteer, representative, or agent], but failed to do so. Anyone discovering that childhood abuse was the cause of the injuries after 2003 could sue these—more culpable—defendants without regard to the age 26 cutoff.’ ” (*Quarry*, *supra*, 53 Cal.4th at p. 978, italics added.)

There is nothing to suggest that the Legislature intended to modify section 340.1, subdivision (a)(2) to limit “[a]n action for liability against any person or entity who owed a duty of care to the plaintiff” to cases in which the alleged abuse was committed by an employee, volunteer, representative or agent of the person or entity. To the contrary, the statutory amendment simply clarified that claims against third parties under section 340.1, subdivision (a)(2) remain subject to the age 26 cutoff unless extended by section 340.1, subdivision (b)(2). (*Quarry*, *supra*, 53 Cal.4th at pp. 969, 988; accord, *Dutra v.*

Eagleson (2006) 146 Cal.App.4th 216, 224 [52 Cal.Rptr.3d 788] [“[O]nly those actions against the actual perpetrator, or against a third party defendant described in subdivision (b)(2), could be brought after the plaintiff’s 26th birthday, up to three years after the plaintiff discovered the cause of his adult-onset psychological injuries”]; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544 [67 Cal.Rptr.3d 330, 169 P.3d 559] [“Subdivision (b)(2) extends past a plaintiff’s 26th birthday claims against a nonperpetrator defendant who is or was in a specified relationship with the perpetrator—‘employee, volunteer, representative, or agent’—and who, ‘knew or had reason to know, or was otherwise on notice’ of the perpetrator’s ‘unlawful sexual conduct’ and ‘failed to take “preventative measures to” avoid acts of unlawful sexual conduct in the future’ by that perpetrator”].)

Here, appellant is still a minor and therefore has no need to invoke the three-year revival provision in section 340.1, subdivision (b)(2). Her claims against respondents were timely filed under section 340.1, subdivision (a)(2) because they were discovered and brought before her 26th birthday. (See § 340.1, subds. (a)(2), (b)(1).) Although respondents argue that this statute of limitations does not apply to appellant’s sexual abuse claims, they provide no alternative statute of limitations for us to consider. Indeed, the trial court did not question section 340.1’s applicability to childhood sexual abuse claims brought against third parties. It just found, albeit incorrectly, that the claims must involve abuse by an employee, volunteer, representative or agent of the public entity for section 340.1, subdivision (a)(2) to apply.

Aaronoff v. Martinez-Senftner (2006) 136 Cal.App.4th 910 [39 Cal.Rptr.3d 137] does not aid respondents’ position. The plaintiff in that case was 40 years old when she sued her parents for damage inflicted by her father’s sexual abuse. She claimed that because her parents were in business together, her father was her mother’s agent. (*Id.* at p. 923.) On that basis she argued that her case fell within section 340.1, subdivision (b)(2), thereby freeing her from the ban on suits against third parties by victims over age 26. The court disagreed, concluding the relationship was not an agency relationship within the meaning of section 340.1, subdivision (b)(2) and, consequently, the claim was properly dismissed as untimely. (*Aaronoff*, at p. 923.) As previously discussed, section 340.1, subdivision (b)(2) has no application here.

Nor are we persuaded by *S.M. v. Los Angeles Unified School District, supra*, 184 Cal.App.4th 712, in which the court determined that the plaintiff’s cause of action accrued for purposes of the tort claim presentation requirement when she learned of the purported sexual abuse. (*Id.* at p. 721.) That decision is inapplicable because the alleged abuse predates the effective date of Government Code section 905, subdivision (m). As the court noted, “[i]n apparent recognition of the dilemma faced by families of children abused by public school officials, the law has changed. For claims described in . . .

section 340.1 for the recovery of damages suffered due to childhood sexual abuse occurring after January 1, 2009, the tort claim presentation requirement no longer applies.” (*S.M.*, at pp. 721–722, fn. 6, citing Gov. Code, § 905, subd. (m); see *J.P. v. Carlsbad Unified School Dist.*, *supra*, 232 Cal.App.4th at p. 333, fn. 6 [“Because the abuse here occurred before [January 1, 2009], the claim requirement (with its six-month time limitation) governs this case”]; *K.J. v. Arcadia Unified School Dist.*, *supra*, 172 Cal.App.4th 1229, 1234, fn. 2 [“The 2008 amendment [creating Government Code section 905, subdivision (m)], by its terms, does not apply to the instant case”]; *County of Los Angeles v. Superior Court*, *supra*, 127 Cal.App.4th at p. 1266 [alleged sexual abuse occurred in 2001 before enactment of Gov. Code, § 905, subd. (m)].)

■ Respondents argue that even if the trial court did misconstrue the application of section 340.1 to appellant’s case, the summary judgment must be upheld for other reasons. First, they assert appellant failed to allege in her complaint that she was making claims pursuant to section 340.1 and that she may not make this allegation for the first time on a summary judgment motion. We are not persuaded. Section 340.1 is not a type of claim per se; it is a statute of limitations governing claims such as those raised by appellant’s complaint. (*County of Los Angeles v. Superior Court*, *supra*, 127 Cal.App.4th at p. 1268.) Appellant alleged facts showing that the limitations period in section 340.1, subdivision (a)(2) applies, and that was sufficient to raise the issue for purposes of the summary judgment motion. (See *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1449 [198 Cal.Rptr.3d 900].)

■ Second, respondents contend appellant’s defense fails because appellant is not in the class of persons for whom section 340.1 was enacted. Specifically, they assert section 340.1 applies only to adult plaintiffs, and not minor plaintiffs. We recognize that the primary purpose of section 340.1 is to extend the statute of limitations for adults who discover they had been abused as children, but respondents cite no persuasive authority suggesting that section 340.1, subdivision (a)(2) does not apply to situations in which the abuse is discovered while the plaintiff is still a minor. (See *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal.App.4th 222, 232 [30 Cal.Rptr.2d 514] [“The obvious goal of amended section 340.1 is to allow sexual abuse victims a longer time period in which to become aware of their psychological injuries and remain eligible to bring suit against their abusers”].) Although *Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405, 1419–1420 [21 Cal.Rptr.3d 208], noted that the limitations period for adult plaintiffs to file civil actions based on childhood sexual abuse is governed by section 340.1, it had no occasion to interpret that statute. Opinions are not authority for issues they do not consider and decide. (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 27 [27 Cal.Rptr.2d 249].)

■ Section 340.1 provides that, with certain exceptions not applicable here, an action against a third party for damages arising from childhood

sexual abuse must be brought before age 26. (*Id.*, subds. (a)(2), (b)(1).) Here, it is undisputed that appellant is making a claim of sexual abuse that occurred during her childhood and that was brought before the age of 26. Nothing in the statutory language implies that the action cannot be brought while the plaintiff is still a minor. If that were the case, a childhood sexual abuse claim discovered shortly before the plaintiff's 18th birthday would be subject to the government claim presentation requirement, while a claim discovered shortly after that birthday would be exempt under Government Code section 905, subdivision (m). We must refrain from an interpretation of a statute that would result in absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [111 Cal.Rptr.2d 564, 30 P.3d 57].)

Third, respondents maintain that acts alleged to have been committed by seven-year-old children do not fall within the definition of "'[c]hildhood sexual abuse'" in section 340.1, subdivision (e). Subdivision (e) states: "'Childhood sexual abuse' as used in this section includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by Section 266j of the Penal Code; Section 285 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 286 of the Penal Code; subdivision (a) or (b) of Section 288 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 288a of the Penal Code; subdivision (h), (i), or (j) of Section 289 of the Penal Code; section 647.6 of the Penal Code or any prior laws of this state of similar effect at the time the act was committed. Nothing in this subdivision limits the availability of causes of action permitted under subdivision (a), including causes of action against persons or entities other than the alleged perpetrator of the abuse." (§ 340.1, subd. (e).)

Appellant's complaint alleges that between September 2012 and April 2013, appellant was sexually abused by two of her fellow students. A.R., a male student, touched her private parts, pinched her buttocks, hugged her and pressed himself against her, while another student exposed himself to her and also rubbed his private parts on her. These actions qualify as lewd and lascivious acts committed upon a child under the age of 14. (See Pen. Code, § 288, subd. (a).)

Respondents argue that these students are not legally responsible for these acts because Penal Code section 26 provides that a child under the age of 14 is not capable of committing a crime in the absence of clear proof that, at the time of committing the charged act, he or she knew its wrongfulness. Respondents did not, however, submit any evidence on this point. (§ 437c, subd. (p)(2).) Their motion for summary judgment was limited to issues concerning appellant's failure to present a government tort claim. It is well established that when a "new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or

presented at the trial the opposing party should not be required to defend against it on appeal. [Citations.]” (*Panopoulos v. Maderis* (1956) 47 Cal.2d 337, 341 [303 P.2d 738]; see *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 [242 Cal.Rptr. 184].) We therefore decline to consider the issue for the first time on appeal.

Finally, the legislative history of Government Code section 905, subdivision (m) confirms that the purpose of that section was “‘to ensure that victims severely damaged by childhood sexual abuse are able to seek compensation from those responsible, whether those responsible are private or public entities.’” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640, *supra*, at p. 3.) The author of the legislation explained this would be accomplished “by specifically exempting Section 340.1 civil actions for childhood sexual abuse from government tort claim requirements, thereby treating Section 340.1 actions against public entities the same as those against private entities.” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640, *supra*, at p. 3.) Our decision is consistent with this intent.

■ In sum, we conclude that appellant’s claim for liability against respondents is subject to the limitations period in section 340.1, subdivisions (a)(2) and (b)(1). Because section 340.1 applies to appellant’s claims for childhood sexual abuse, she was not required to present a tort claim to the District in order to raise those claims. (Gov. Code, § 905, subd. (m).) The trial court erred by holding that the alleged perpetrators of the wrongful conduct had to be employees, volunteers, representatives or agents of the public entity for section 340.1 to apply.⁴

DISPOSITION

We reverse the judgment and remand the matter to the trial court for further proceedings on appellant’s claims for childhood sexual abuse. Appellant shall recover her costs on appeal.

Yegan, Acting P. J., and Tangeman, J., concurred.

On October 19, 2016, the opinion was modified to read as printed above.

⁴ The complaint alleges claims for harassment and other nonsexual abuse claims. Having failed to file a valid government tort claim, appellant may not pursue those claims. (See Gov. Code, § 911.2, subd. (a); *Shirk, supra*, 42 Cal.4th at p. 208.) The exemption under Government Code section 905, subdivision (m) applies only to her childhood sexual abuse claims.

[No. E060028. Fourth Dist., Div. Two. Oct. 12, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JAVANTE MARQUIS SCOTT, Defendant and Appellant.

[REDACTED]

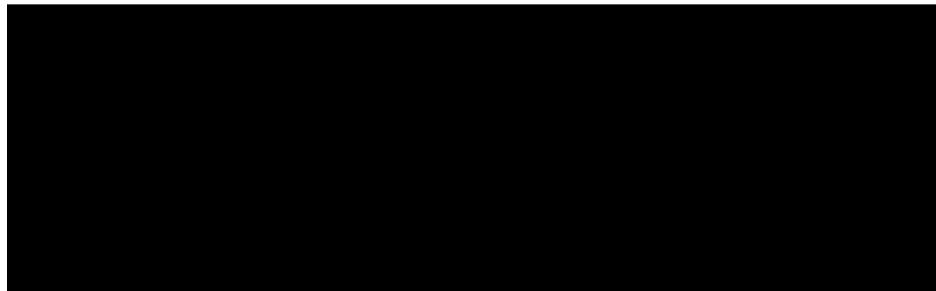
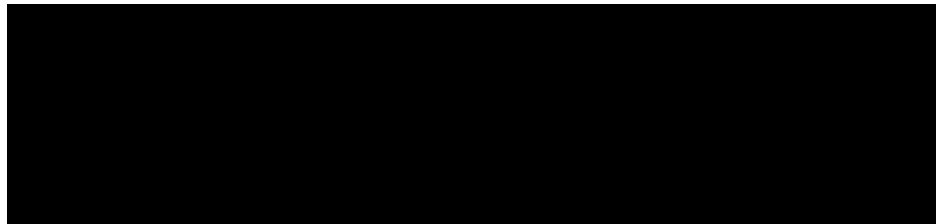
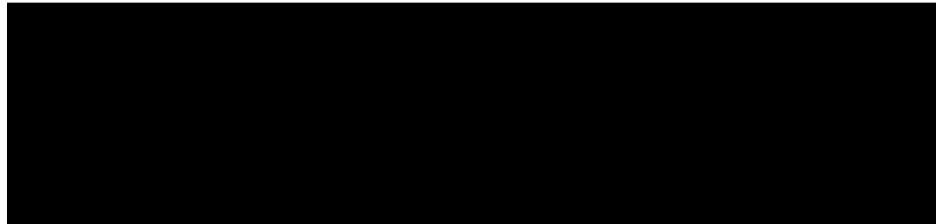
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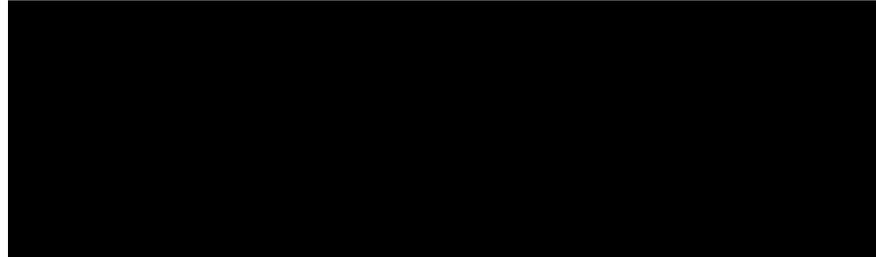
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COUNSEL

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RAMIREZ, P. J.—Defendant and appellant Javante Marquis Scott appeals after the trial court, at a resentencing hearing, imposed the same 120-year-to-life term as at his original sentencing. Defendant was a minor at the time he committed his crimes, but was tried as an adult and convicted of three counts of attempted murder with firearm enhancements. Defendant contends the sentence is cruel and unusual because it imposes a de facto life sentence on him as a juvenile offender. The People argue that a new statute, Penal Code section 3051,¹ which guarantees defendant a future parole eligibility hearing, renders the sentence constitutional. We hold that section 3051 complies with

¹ All section references are to the Penal Code unless otherwise indicated.

the central constitutional requirement that the state provide a juvenile offender with a meaningful opportunity to obtain release within his or her expected lifetime. For this reason we affirm, with directions that the trial court determine whether defendant was afforded an adequate opportunity to make a record that complies with the requirements set forth in *People v. Franklin* (2016) 63 Cal.4th 261, 283–284 [202 Cal.Rptr.3d 496, 370 P.3d 1053].²

FACTS AND PROCEDURAL HISTORY

On February 13, 2009, defendant was 16 years old. Around 10:00 p.m. that night, defendant was riding in a car driven by an adult friend. He told the friend that he wanted to “dump” some Mexicans, meaning he wanted to shoot or kill someone. Defendant told the friend where to drive, pulled a gun from his pocket, and said, “Watch this, watch these dicks [*sic*] run.”³ At this time, three Hispanic youths were walking on University Avenue in Riverside on their way to a fast-food restaurant. None of the youths were gang members. Defendant fired four shots at the youths, hitting one in the lower back and seriously injuring him.

At trial, defendant admitted firing the shots, but testified that he did so only because the driver of the car told him to and that he “didn’t intend to hit nobody.”

Evidence at trial showed that defendant’s father and older brother were or had been members of a local Crips gang. Defendant’s father was known by the moniker “Tiptoe.” Defendant’s brother was known by the moniker “Lil’ Tiptoe.” Although defendant himself did not have any gang tattoos, and he denied gang membership, he had come to be known as “Baby Tiptoe.” A gang expert testified at trial that defendant committed the shootings for gang purposes. Defendant wrote rap lyrics about cruising around in a car and shooting rival gang members. His cell phone identified him as “Baby Duke Killa.”

On September 15, 2010, the jury convicted defendant of a number of charges and found true a number of enhancement allegations, as follows.

² We deny defendant’s motion for judicial notice, filed September 1, 2016. The probation report and minutes from the initial sentencing are not relevant to this court’s very narrow role in making a limited remand to the trial court following *People v. Franklin*, *supra*, 63 Cal.4th at pages 283–284. (Evid. Code, § 350.)

³ Defendant and other members of his gang referred to members of the Hispanic gang, the Tiny Dukes, as “Tiny Diccs” or just “Diccs.”

First, the jury convicted defendant of three counts of attempted murder (§§ 664, 187, subd. (a)), each with a firearm enhancement (former § 12022.53, subds. (d) & (e)) and a gang enhancement (§186.22, subd. (b)). Second, the jury convicted defendant of one count of gang participation (§ 186.22, subd. (a)). Third, the jury convicted defendant of two counts of assault with a firearm (§ 245, subd. (b)), each with a firearm enhancement (former §§ 12022.5, subd. (a), 12022.55) and a gang enhancement (§ 186.22, subd. (b)), and one with a great bodily injury enhancement (former § 12022.7, subd. (a)).

On November 5, 2010, the trial court sentenced defendant to 120 years to life in prison, as follows: 15 years to life for each of the three attempted murders, plus 25 years to life for each of the three firearm enhancements, all to run consecutively. The court imposed a concurrent sentence of three years for the gang participation and imposed but stayed the sentences for the assault counts pursuant to section 654.

Defendant appealed, and in *People v. Scott* (E052276) (nonpub. opn.), dated May 17, 2012, this court modified the sentence to stay the term for gang participation pursuant to section 654.

On April 22, 2013, defendant filed a petition for writ of habeas corpus. Defendant sought resentencing, arguing that the imposition of an indeterminate sentence of 120 years to life is a de facto life sentence, which recent case law from the California Supreme Court held violated the Eighth Amendment prohibition against cruel and unusual punishment when imposed on a juvenile for a nonhomicide crime. On June 28, 2013, the Riverside Superior Court granted the petition, vacated defendant's sentence and ordered the trial court to hold a resentencing hearing.

While the hearing was pending, the Legislature passed, and the Governor signed, legislation enacting section 3051, which provides for juvenile offenders in defendant's position to be afforded a parole hearing after a maximum wait of 25 years, depending on the sentence imposed.

At the resentencing hearing held on September 20, 2013, the prosecutor took the position that the enactment of section 3051 cured the constitutional deficiency posed by defendant's sentence. Defense counsel essentially conceded, stating, "So he appears to fall within this legislation, and I'll submit to the Court's discretion, Your Honor, as to whether this issue was moot." The trial court accepted the People's argument, found that defendant would be eligible for a parole review in 25 years under section 3051, and resentenced defendant to 120 years to life.

Defendant now appeals.

DISCUSSION

I. Standard of Review

The issue presented is whether defendant's sentence violates the constitutional prohibitions against cruel and unusual punishment, as explained in *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825, 130 S.Ct. 2011] (*Graham*), *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407, 132 S.Ct. 2455] (*Miller*), and *People v. Caballero* (2012) 55 Cal.4th 262 [145 Cal.Rptr.3d 286, 282 P.3d 291] (*Caballero*), or whether the constitutional concerns have been addressed by section 3051. Because the issue is one of constitutional and statutory interpretation, it presents a question of law, which we review de novo. (See *Finberg v. Manset* (2014) 223 Cal.App.4th 529, 532 [167 Cal.Rptr.3d 109] ["We review de novo questions of interpretation and constitutionality of a statute."]; see also *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 [109 Cal.Rptr.3d 620, 231 P.3d 350] ["We review questions of law about the meaning of Prop. 218 [adopting provisions of the California Constitution], as other questions of law, de novo"].)

II. Background: Graham, Miller, and Caballero

We first examine the salient United States and California Supreme Court precedents on the issue of life sentences without parole, both for juveniles convicted of nonhomicide offenses and those convicted of homicide offenses.

In *Graham*, the defendant was convicted of armed burglary with assault or battery, and attempted armed robbery, both committed when he was 16 years old. Although the trial court initially sentenced the defendant to probation, the court later revoked his probation after he violated its terms by committing other crimes. The trial court then imposed the maximum sentence on each count: life imprisonment for the armed burglary, and 15 years for the attempted armed robbery. (*Graham, supra*, 560 U.S. at p. 57.) "Because Florida has abolished its parole system, [citation] a life sentence gives a defendant no possibility of release unless he is granted executive clemency." (*Ibid.*)

The United States Supreme Court held that "'the task of interpreting the Eighth Amendment remains [the court's] responsibility.'" (*Graham, supra*, 560 U.S. at p. 67.) "The judicial exercise of independent judgment requires consideration of the culpability of the offenders . . . in light of their crimes

and characteristics, along with the severity of the punishment in question.” (*Ibid.*) The court held that it was clearly established that juveniles have lessened culpability compared to adult offenders. Consequently, they are less deserving of the most severe punishments. “As compared to adults, juveniles have a ‘‘lack of maturity and an underdeveloped sense of responsibility’’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’” (*Id.* at p. 68.) The court found it “‘difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” (*Ibid.*) Juvenile offenders cannot therefore be reliably classified as among the worst offenders. (*Ibid.*)

As to the culpability of the offenders in terms of the crimes and characteristics under review, nonhomicide crimes that do not involve killing, intent to kill, or foreseeing that death could occur “are categorically less deserving of the most serious forms of punishment than are murderers.” (*Graham, supra*, 560 U.S. at p. 69.) Some nonhomicide crimes do involve very serious harm, but such crimes are not as morally depraved as murder, because of a murderer’s “‘severity and irrevocability.’” (*Ibid.*) “This is because ‘[I]ife is over for the victim of the murderer,’ but for the victim of even a very serious nonhomicide crime, ‘life . . . is not over and normally is not beyond repair.’” (*Ibid.*) A juvenile offender “who did not kill or intend to kill has a twice diminished moral culpability,” because of both the age of the offender and the nature of the crime. (*Ibid.*)

With respect to punishment, life without the possibility of parole (LWOP) is the second most severe penalty allowed under the law. “Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years . . . of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” (*Graham, supra*, 560 U.S. at p. 70.) The Supreme Court found the penological justifications for such a sentence somewhat lacking with respect to juvenile offenders. The objective of retribution should be directly related to personal culpability. The case for retribution is weaker with a minor as compared to an adult; it is weaker still if the minor did not commit a homicide. (*Id.* at pp. 71–72.) Deterrence also does not justify such a severe sentence. Juveniles are less likely to understand or to be able to take account of deterrence, because of their lack of maturity, underdeveloped sense of responsibility, and lesser ability to consider consequences. “This is particularly so when [the most severe] punishment is rarely imposed.” (*Id.* at p. 72.) Incapacitation, a third

possible penological goal, also did not justify an LWOP sentence for juvenile nonhomicide offenders. “To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.” (*Ibid.*) The court remarked that such a judgment is questionable, even for expert psychologists, and noted that “‘incorrigibility is inconsistent with youth.’” (*Id.* at p. 73.) A penalty of LWOP “forswears altogether the rehabilitative ideal,” by “denying the defendant the right to reenter the community,” and making “an irrevocable judgment about [the] person’s value and place in society.” (*Id.* at p. 74.) An LWOP sentence for a juvenile nonhomicide offender is incompatible with rehabilitation as a penological goal. LWOP prisoners are, for example, foreclosed from vocational training or other programs and rehabilitative services that are available to other prisoners. In light of a juvenile’s reduced culpability and capacity for change, an LWOP sentence, and concomitant exclusion from rehabilitative opportunities, is inappropriate for juvenile nonhomicide offenders. (*Id.* at p. 74.)

The United States Supreme Court ruled that, although a state is not required to guarantee eventual release to a juvenile nonhomicide offender, “What the State must do, however, is give [juvenile] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.” (*Graham, supra*, 560 U.S. at p. 75.) The court observed that some juvenile nonhomicide defendants might actually turn out to be incarcerated for life. “Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.” (*Ibid.*) The court fashioned a categorical rule that “gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above, . . . it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the

perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." (*Id.* at p. 79, citation omitted.) The United States Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Id.* at p. 82.)

In *Miller*, the United States Supreme Court addressed the imposition of LWOP terms for juveniles who were convicted of homicide offenses. The court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" (*Miller, supra*, 567 U.S. at p. 465 [132 S.Ct. at p. 2460].)

The court began with the principle that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.' " (*Miller, supra*, 567 U.S. at p. 471 [132 S.Ct. at p. 2464].) The United States Supreme Court line of precedents on that issue set out "three significant gaps between juveniles and adults. First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" [Citation.]" (*Ibid.*) The *Miller* court stated, "To be sure, [the] flat ban on life without parole applied [in *Graham, supra*, 560 U.S. 48] only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. [Citation.] But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when[, e.g.,] a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." (*Miller, supra*, 567 U.S. at p. 473 [132 S.Ct. at p. 2465].)

Sentencing schemes that mandate LWOP for juveniles tried as adults "prevent the sentencer from taking account of these central considerations.

By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*’s . . . foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” (*Miller, supra*, 567 U.S. at p. 474 [132 S.Ct. at p. 2466].)

In making its categorical rule, that LWOP sentences cannot be imposed upon juveniles, *Graham* analogized the effect of the LWOP sentence on juveniles to the death penalty. That analogous correspondence made relevant “a second line of our precedents, demanding individualized sentencing when imposing the death penalty.” (*Miller, supra*, 567 U.S. at p. 475 [132 S.Ct. at p. 2467].) The United States Supreme Court found of special significance “that a sentencer have the ability to consider the ‘mitigating qualities of youth.’ [Citation.]” (*Ibid.*) Mandatory LWOP sentencing was flawed because it, “by [its] nature, preclude[d] a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.” (*Miller, supra*, 567 U.S. at pp. 476–477 [132 S.Ct. at pp. 2467–2468].) The court declined to make a categorical bar on LWOP sentences for juveniles who commit homicide crimes, but, given its relevant decisions in other cases, the court opined that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citations.] Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Id.* at pp. 479–480 [132 S.Ct. at p. 2469].) Individualized sentencing is required when imposing the harshest penalties. The court stated, in its conclusion, that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” (*Id.* at p. 489 [132 S.Ct. at p. 2475].)

In *Caballero, supra*, 55 Cal.4th 262, the California Supreme Court considered the sentence for a 16-year-old juvenile who had fired a gun at three

members of a rival gang. Two of the victims were unhurt; the third was injured but survived. The defendant was convicted of three counts of attempted murder, plus enhancements for personal discharge of a firearm, gang enhancements, and a great bodily injury enhancement as to one victim. He received a sentence of 15 years to life for the first attempted murder, plus 25 years to life for the firearm enhancement. He was sentenced to a consecutive term of 15 years to life for the second attempted murder count, plus 20 years for the firearm enhancement. He was sentenced to another consecutive term of 15 years to life on the third attempted murder count, plus 20 years for the firearm enhancement. The defendant's total term was 110 years to life. (*Id.* at p. 265.)

The California Supreme Court determined that the sentence of 110 years to life was the functional equivalent of an LWOP sentence, and was governed by *Graham*'s ban on LWOP sentences for juveniles in nonhomicide cases. (*Caballero, supra*, 55 Cal.4th at pp. 267, fn. 3, 268.) The defendant would become parole-eligible only after serving 110 years according to section 3046, subdivision (b). (*Id.* at p. 268.) "*Graham*'s analysis does not focus on the precise sentence meted out. Instead . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." (*Ibid.*) The Supreme Court concluded that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under *Graham*'s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Id.* at pp. 268–269.) The court ordered that juvenile offenders who had received LWOP or de facto equivalent sentences for nonhomicide crimes would be eligible to petition for writs of habeas corpus, "in order to allow the [trial] court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide

him or her a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ under *Graham’s* mandate.” (*Id.* at p. 269.)

III. Legislative Response: Senate Bill No. 260 (2013–2014 Reg. Sess.)

The Legislature, in response, enacted Senate Bill No. 260 (2013–2014 Reg. Sess.). The bill, which became effective January 1, 2014, added section 3051, which provides an opportunity for most juvenile offenders to obtain a parole hearing within their expected lifetimes.

Section 3051, subdivision (b)(1), provides that a youth offender sentenced to a determinate sentence, “shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.” Section 3051, subdivision (b)(2), provides that a youth offender sentenced to a life term of less than 25 years to life, “shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing,” unless otherwise released or entitled to earlier parole consideration under other provisions. And section 3051, subdivision (b)(3), provides that a youth offender sentenced to a term of 25 years to life, “shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing,” unless otherwise released or is eligible for an earlier parole hearing date under other provisions.

As a result of this new provision, most youth offenders would be eligible for a parole hearing after a maximum of 25 years of incarceration, within the normal life expectancy of a juvenile. It does not apply, however, to three strikes sentences, one strike sentences, or LWOP sentences, or to those who commit certain additional offenses after reaching the age of 18. (§ 3051, subd. (h).)

Section 3051, subdivision (e), states that, “The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.” Section 4801, subdivision (c), in turn, provides: “(c) When a prisoner committed his or her controlling offense . . . prior to attaining 18 years of age, the board, in reviewing a prisoner’s

suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” Section 3051, subdivision (f), echoes and expands on the requirements of section 4801, subdivision (c): “(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. [¶] (2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board. [¶] (3) Nothing in this section is intended to alter the rights of victims at parole hearings.” (§ 3051, subd. (f).)

In enacting section 3051, the Legislature made the following declaration of intent: “The Legislature finds and declares that, as stated by the United States Supreme Court in [*Miller v. Alabama, supra*,] 567 U.S. 460 [183 L.Ed.2d 407], ‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior,’ and that ‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,’ including ‘parts of the brain involved in behavior control.’ The Legislature recognizes that youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*People v. Caballero, supra*,] 55 Cal.4th 262 and the decisions of the United States Supreme Court in [*Graham v. Florida, supra*,] 560 U.S. 48, and [*Miller v. Alabama, supra*,] 567 U.S. 460 [183 L.Ed.2d 407]. Nothing in this act is intended to undermine the California Supreme Court’s holdings in [*In re Shaputis*] (2011) 53 Cal.4th 192 [134 Cal.Rptr.3d 86, 265 P.3d 253], [*In re Lawrence*] (2008) 44 Cal.4th 1181 [82 Cal.Rptr.3d 169, 190 P.3d 535], and subsequent cases. It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.” (Stats. 2013, ch. 312, § 1.)

The People urge that the enactment of section 3051 moots defendant’s claim that his Eighth Amendment rights were violated, because there are no

longer any de facto sentences of life imprisonment without parole for most youthful offenders, inasmuch as some meaningful parole opportunity will be offered after a maximum of 25 years' imprisonment. Defendant argues that section 3051 does not obviate the requirements set forth in *Graham*, *Miller* and *Caballero* that the trial court must take account of the offender's status as a juvenile in selecting the sentence to be imposed.

IV. Sentencing for Juvenile Offenders Must Satisfy the Central Constitutional Requirement Set Forth in the United States Supreme Court and California Supreme Court Precedents—A Meaningful Opportunity to Obtain Release Within the Expected Lifetime Based on Demonstrated Maturity and Rehabilitation.

We have examined the relevant foundational precedents (e.g., *Graham*, *Miller* & *Caballero*), and we discern the following rules or standards with respect to imposing LWOP sentences on offenders whose commitment offense occurred when they were a juvenile.

■ First, *Graham* imposed a categorical ban on LWOP sentences for nonhomicide offenses committed by juveniles. The state must provide such juvenile defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance." (*Graham, supra*, 560 U.S. at p. 75.) *Graham* mandates the chance to obtain release based on demonstrated maturity and rehabilitation. This crucial determination cannot in most cases be achieved at sentencing because the juvenile offender will not yet have had an opportunity to exhibit these traits. Rehabilitation and maturity await the passage of time before they can reliably reveal themselves, and this is precisely what *Graham* directs. Further, as it considers whether LWOP sentences can constitutionally be imposed on juveniles for nonhomicide offenses, the *Graham* court actually discounted the general reliability of an individualized sentencing determination at trial as opposed to a guaranteed parole hearing for a juvenile defendant in the future. The court pointed to the following deficiencies risked by case-by-case consideration at sentencing: (1) the accuracy and reliability of a sentencing choice are compromised when the brutality of a particular crime overpowers the considerations of youth, immaturity and vulnerability; (2) the immaturity of the juvenile, described in detail in *Graham* is "likely to impair the quality of a juvenile defendant's representation"; and (3) the juvenile nonhomicide offender must be given "a chance to demonstrate maturity and reform." (*Id.* at pp. 77–79) *Graham* simply does not mandate an individual sentencing determination at trial. Rather, *Graham* stresses the central importance of allowing a juvenile

offender to demonstrate his or her rehabilitation and maturity, after the passage of time, at a guaranteed parole hearing. This is the remedy provided by section 3051.

■ Second, *Caballero* extended the *Graham* ban to include not only explicit LWOP sentences but also de facto LWOP sentences. A de facto LWOP sentence is one that is not explicitly designated a life sentence, but in which a juvenile offender's "parole eligibility date . . . falls outside [his or her] natural life expectancy." (*Caballero, supra*, 55 Cal.4th at pp. 262, 268.) Defendant's sentence in this case, 120 years to life, is a de facto LWOP sentence.

■ Third, *Miller* imposed a ban on *mandatory* LWOP for homicide crimes committed by juveniles. To implement this ban, *Miller* required the sentencing court to provide an individualized sentencing determination, "considering an offender's youth and attendant characteristics" before imposing LWOP in homicide cases. (*Miller, supra*, 567 U.S. at p. 483 [132 S.Ct. at p. 2471].) The *Miller* court declined to extend *Graham*'s categorical ban on LWOP sentences to juvenile homicide offenders, choosing instead to mandate the individualized sentencing to safeguard a juvenile offender's Eighth Amendment Rights. (*Miller, supra*, 567 U.S. at p. 472 [132 S.Ct. at p. 2465].) We note that *Miller* does not state that its holding applies to nonhomicide cases. This is not surprising because, as *Miller* acknowledges, *Graham* bans LWOP in nonhomicide cases. *Miller* requires the trial court to make an individualized sentencing decision as to juvenile offenders before imposing a de facto LWOP sentence in a nonhomicide case. *Miller* devised its individualized sentencing scheme to safeguard juvenile defendants convicted of homicide offenses from receiving a *mandatory* LWOP sentence. *Miller* does not impose such a scheme as a constitutional requirement where, after *Caballero*, a juvenile nonhomicide offender can no longer receive an LWOP sentence.

■ To reiterate, after *Graham* and *Caballero*, both LWOP and de facto LWOP have been eliminated as possible sentencing choices for juveniles who commit nonhomicide crimes. The possibility that a juvenile can receive the "State's harshest penalties" is the *Miller* court's clearly stated rationale for the individualized sentencing mandate. (*Miller, supra*, 567 U.S. at p. 477 [132 S.Ct. at p. 2468].) This possibility no longer exists in California for a juvenile convicted of a nonhomicide crime. For this reason, section 3051 is fully consistent with *Miller*.

■ Fourth, while *Caballero* does envision an individualized determination at sentencing like the one set forth for homicide cases in *Miller*, the focal point of *Caballero* is the end result required by *Graham* and by the Eighth

Amendment—that a juvenile offender must have a reasonable opportunity to obtain parole within his or her lifetime upon a showing of rehabilitation. In fact, the *Caballero* court emphasized that *Graham* was not focused on “the precise sentence meted out,” but rather on the opportunity to obtain release from prison during the juvenile’s expected lifetime. (*Caballero, supra*, 55 Cal.4th at p. 268.) Section 3051, as described in detail above, provides just this opportunity no later than 25 years into the sentence, while the typical defendant is in his or her early 40’s. We recognize that *Caballero* sees the *Graham* ruling being implemented by the trial court at sentencing; that the sentencing court would consider the defendant’s individual circumstances to impose a sentence that would allow for parole review within the defendant’s expected lifetime. “Under *Graham*’s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development” (*Caballero* at pp. 268–269.) However, in the very same sentence *Caballero* very clearly identifies the whole point of this entire endeavor: “[S]o that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison ‘based on demonstrated maturity and rehabilitation.’ [Citation.]” (*Id.* at p. 269.) This is precisely what section 3051 accomplishes, following the directive of *Graham* that “It is for the State, in the first instance, to explore the means and mechanisms for compliance.” (*Graham, supra*, 560 U.S. at p. 75.)

V. Section 3051 Is a Valid and Efficient Mechanism for Providing a Juvenile Nonhomicide Offender with a Meaningful Opportunity for Release

■ For the following reasons, and based on the case law set forth above, we conclude that the definite parole eligibility schedule, devised by the Legislature, as requested by the *Caballero* court, and described in section 3051, is both constitutionally permissible and an orderly mechanism to provide juveniles convicted as adults of serious nonhomicide crimes with a meaningful opportunity for release within their lifetimes.

■ First, section 3051 has abolished de facto life sentences. *Caballero, supra*, 55 Cal.4th 262, defines a de facto life sentence as “a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life” (*Id.* at p. 268.) Section 3051 eliminates such sentences altogether by virtue of its provision for mandatory parole eligibility hearings after no more than 25 years in prison.

Second, the California Supreme Court in *Caballero* specifically asked the Legislature to enact a law that works precisely as does section 3051 for prisoners like defendant who are already serving a de facto life term: “We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.” (*Caballero, supra*, 55 Cal.4th at p. 269, fn. 5.) Again, section 3051 answers this request from the *Caballero* court. Section 3051 “establish[es] a parole eligibility mechanism” that allows such prisoners to obtain parole if they can show “rehabilitation and maturity” after a maximum of 25 years in prison.

Third, section 3051 provides certainty and predictability to both juvenile offenders and sentencing courts. The individualized determination at sentencing that defendant advocates would in practice be far more problematic than section 3051’s uniform opportunity for parole after the number of years specified. Section 3051 frees the sentencing courts to follow the existing, familiar, if convoluted, sentencing laws that can result in sentences such as defendant’s 120-year-to-life term. Without section 3051, sentencing courts tasked with avoiding de facto LWOP sentences would in some instances have to resort to imposing sentences that are not authorized by statute in order to engineer a parole eligibility date that is constitutionally permissible. Section 3051 allows the current sentencing scheme to continue without upheaval. The statute simply and clearly makes the current sentencing scheme constitutional by providing each juvenile offender, universally and on a specified schedule, with the meaningful opportunity for release within their lifetimes that the Eighth Amendment demands.

■ This analysis is consistent with the recent California Supreme Court decision in *People v. Franklin, supra*, 63 Cal.4th 268. In addition, the *Franklin* court recognized that, in order to fulfill the requirements of sections 3051 and 4801, the defendant must be “afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing” at the time of sentencing. (*Franklin, supra*, at p. 284.)

DISPOSITION

The judgment is affirmed. We remand to the trial court for the limited purpose of determining whether defendant was afforded an adequate opportunity to make a record of information that will be relevant to the Board of

Parole Hearings as it fulfills its statutory obligations under sections 3051 and 4801.

Hollenhorst, J., and McKinster, J., concurred.

On November 1, 2016, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied January 18, 2017, S238615.

[No. G047986. Fourth Dist., Div. Three. Oct. 12, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
DARRELL BOOTH, Defendant and Appellant.

[No. G052666. Fourth Dist., Div. Three. Oct. 12, 2016.]

In re DARRELL BOOTH on Habeas Corpus.

[REDACTED]

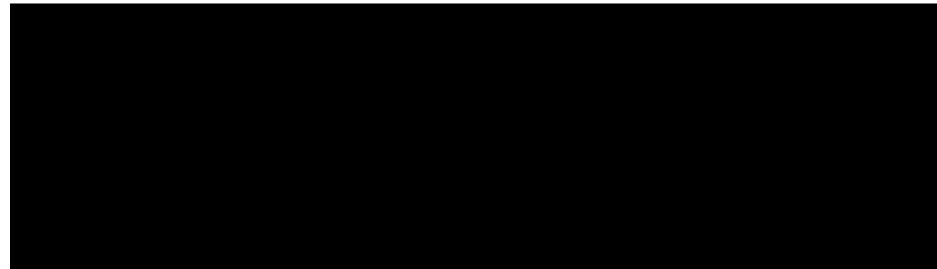
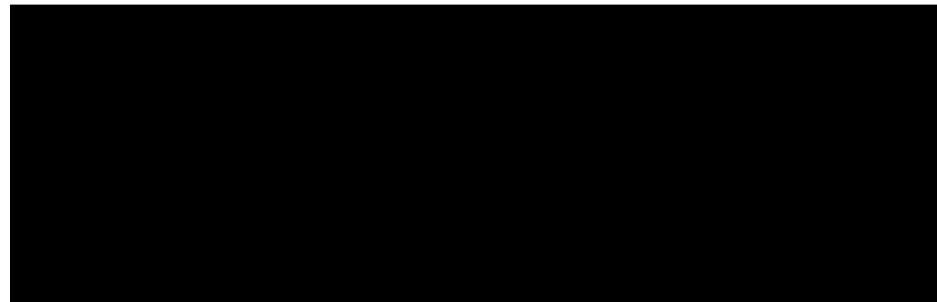
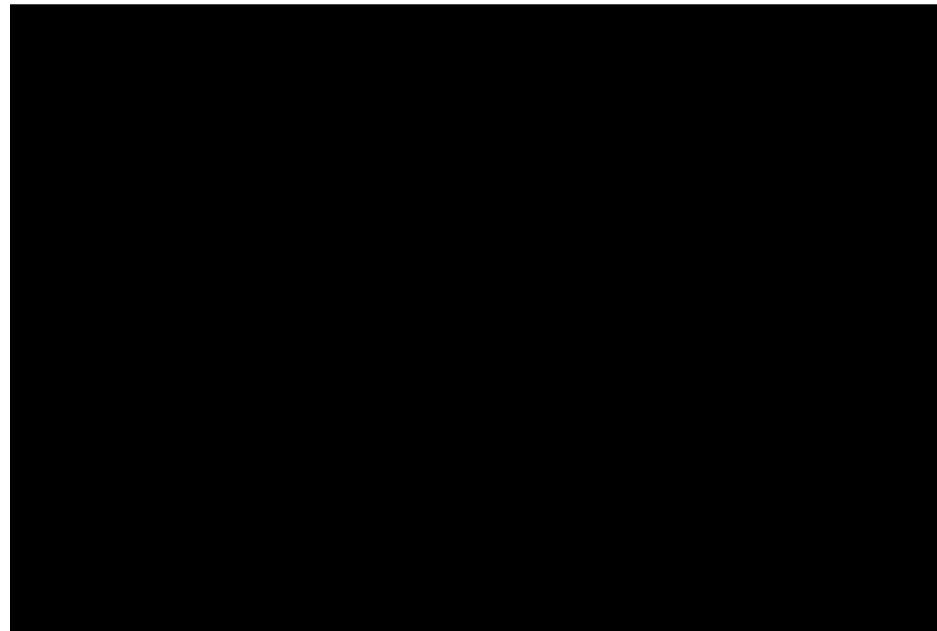
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COUNSEL

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OPINION

BEDSWORTH, J.—

I. INTRODUCTION

This case arises out of a deadly shooting that took place in 1992. Although several suspects were identified in the wake of the shooting, the case was not prosecuted until 2011. By that time, an eyewitness who had exonerated

petitioner Darrell Booth could not be found, and the case proceeded to trial in his absence. Even without this favorable defense witness, the jury acquitted Booth of first degree murder. It did, however, find Booth guilty of second degree murder, for which he received an indeterminate life sentence. In this consolidated proceeding, Booth challenges his conviction by direct appeal and petition for writ of habeas corpus. Among the claims in his habeas corpus petition, Booth contends his trial attorney was ineffective for failing to move to dismiss the case based on precharging delay. We agree with this contention. Therefore, we grant Booth's petition, reverse the judgment and remand the matter for a new trial. In light of this disposition, Booth's appeal is moot.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Shooting*

On August 1, 1992, at approximately 1:30 a.m., Stephen Strong drove a red SUV into the parking lot of the 7-Eleven at the corner of 17th Street and Spurgeon in Santa Ana. He was accompanied by his cousins Scottie Strong and Terry Ross. After Stephen backed the SUV into a parking space, Scottie entered the store. Then four Black men entered the parking lot on foot. One of the men contacted Stephen, who was sitting in the driver's seat of the SUV. Words were exchanged, and a volley of gunshots rang out.

Following the shooting, the four assailants ran to a white Ford Thunderbird parked nearby and made a successful getaway. The police arrived minutes later to find Stephen lying on the ground near the driver's door of the SUV and Ross slumped in the backseat. Both men were suffering from gunshot wounds to the chest and abdomen. Stephen was conscious and survived the shooting, but Ross died a short time later at the hospital. Investigators found several shell casings from a nine-millimeter semiautomatic handgun at the scene.

B. *The Initial Investigation*

1. *Witness Statements*

There were several people in the vicinity of the 7-Eleven when the shooting occurred, but most of them were unable to provide any useful information about the identity of the assailants. The one exception was 17-year-old Charles Honea, who turned out to be an important witness for the state. Honea lived in an apartment complex a block away from the 7-Eleven. About 30 minutes after the shooting, he contacted a police officer at the scene and told him he had been sleeping on the balcony of his second-story apartment when he heard several gunshots. Honea said he looked around

from his balcony and saw a young Black man with braided hair in an alley nearby. The man was running away from the 7-Eleven toward Honea's apartment. A white car, which Honea described as a late model Mercury Cougar, pulled up to the man and someone inside the vehicle told him to get in, which he did. Then the car left the area. Honea reported he did not see the driver of the car at all, and he did not clearly see the man who entered the car.

Later that morning, the police spoke with Scottie Strong at the hospital. Scottie said he had no information about the shooting. But when the police interviewed him later that day, he was more forthcoming. He stated he was inside the 7-Eleven when the shooting took place. When the smoke cleared, he went outside and saw Stephen lying wounded in the parking lot. Stephen said "they shot us," but he did not mention any names. Later though, when Scottie spoke to Stephen at the hospital, Stephen said "Spade" had shot him. Scottie told the police Spade was Michael Haslip. He also said he knew Haslip, and it was hard for him to believe Haslip would ever want to shoot Stephen.

The next day, the police interviewed Stephen in his hospital room. He denied knowing who shot him and denied telling Scottie that Haslip was the shooter. However, the police continued to receive information that Haslip was involved in the shooting. There were also numerous reports that Haslip's brother Tommy, who was also known as "Lamont" and "Unknown," took part in the shooting.

As the investigation unfolded, the police learned Mike Adray and Ellis Bradford might have information about the shooting. Adray operated an electronics business in Orange, and Bradford was a security guard for the business. On August 10, 1992, the police interviewed Adray and Bradford separately. Both interviews were recorded, and both interviews are included in the record before us. Because the interviews are highly relevant to the issues presented in this proceeding, we will recite them in considerable detail.

In his interview, Adray said he spoke to Bradford at his business on Monday, August 3, two days after the shooting. Bradford told him some of his friends had been shot over the weekend. Explaining what occurred, Bradford said he was driving along 17th Street early Saturday morning when he noticed a group of his friends outside Norm's Restaurant, near the 7-Eleven. Bradford drove up to the group and offered to give them a ride home, and three of the men got into his car. They then drove to the 7-Eleven, and Bradford and one of the men went inside to buy some drinks. While they were in the store, gunfire erupted in the parking lot. Bradford opened the front door of the 7-Eleven and saw several people shooting toward his car.

Then one of the shooters turned and aimed his gun at Bradford, prompting him to duck back inside the store for cover. Bradford heard the sound of glass breaking and thought shots were being fired at him. Once the gunfire stopped, he went outside and saw the shooters running away. He also realized the two friends in his car had been shot. When police arrived at the scene, they took Bradford into custody and questioned him for several hours before finally releasing him.

Adray further told the police that, after hearing this story from Bradford, he learned from one of his employees that Bradford never actually spoke to the police and that the shooting did not take place the way Bradford had explained it to him. Adray thus urged Bradford to go to the police and tell them what really happened. Bradford told Adray he was very nervous about the situation. He said the surviving victims knew who the shooters were, and they were not interested in seeking justice through the police and courts. Instead, they and their friends were bent on exacting revenge themselves and had already carried out several retaliatory shootings since the 7-Eleven incident took place. Bradford also said the people seeking revenge had shot “one of their own” because that person had intimated he was going to tell the police about the revenge shootings.

After talking to Adray, the police interviewed Bradford, who told them a very different story from the one he allegedly told Adray. For starters, Bradford said he did not give anyone a ride to the 7-Eleven on the night in question. Rather, he happened to be passing by the store on the way home from a club when he saw his friends Stephen and Scottie Strong in an SUV in the parking lot. Wanting to see what they were up to, Bradford made a U-turn on 17th Street and drove back toward the store. Just as he was about to enter the parking lot of the 7-Eleven, he heard a barrage of gunfire and saw four Black men near the Strong's vehicle. When the shooting stopped, the men scampered to a large white car on Spurgeon Street and made their getaway in the vehicle.

Bradford did not recognize the getaway car, but he did recognize the four assailants as “Lamont,” “Demetri,” “Deb” and “Peewee.” He told the police he was sure these were the men he saw in the parking lot. He also provided a detailed description of the men. Bradford claimed he had seen them around Santa Ana on multiple occasions in the past, but he did not know what their real names were or if they still lived in the area. He had heard the men were living in Riverside and that Deb was planning to go to Texas.

Describing the shooting, Bradford said it looked like Demetri and Peewee were both firing shots at the driver's side of the Strong's SUV. Demetri was closest to the vehicle and appeared to say something to Stephen after he was

shot. Bradford also claimed that once he saw all the commotion at the 7-Eleven, he decided not to go into the parking lot and went straight home instead. Thus, as far as he knew, no one was aware he had witnessed the shooting.

Later that day, around noon, Bradford learned Stephen and Ross had been shot and that Ross was dead. Bradford went over to the Strong residence to pay his respects. When he got there, Scottie told him Stephen knew who the shooters were, but Scottie did not divulge their names to Bradford. Nor did Bradford tell Scottie he had seen the shooting. Bradford kept that information to himself because Scottie and Stephen were associated with the Crips gang, and the shooters were believed to be from the Bloods gang. Bradford knew the Crips and Bloods were mortal enemies and that members of the Crips had already been attacking Bloods in retaliation for the 7-Eleven shooting. Bradford did not want to get involved. He feared his life would be in danger if he told anyone what he had seen.

The investigators who spoke to Bradford told him they understood his situation, but they wanted to know why his version of events differed so greatly from what he allegedly told Adray. Bradford said there were lots of rumors flying around his workplace following the shooting. Adray approached him and wanted to know if it was true that he was inside the 7-Eleven when the shooting occurred and that he almost got shot. Bradford assumed Adray heard this story from other workers. (In fact, during his police interview, Adray acknowledged he had talked to other people besides Bradford about the shooting.) Fearful of getting fired, Bradford told Adray he knew nothing about the shooting. But Adray kept pressing him and wanted to know whether he was with the victims when they were shot. Bradford said he was "close by," which Adray took to mean inside the 7-Eleven. However, according to Bradford, that was not the case. Rather, as recounted above, he was actually outside the parking lot when the shooting took place.

On August 13, 1992, three days after Adray and Bradford were interviewed, the police spoke to Stephen Strong at his home in Santa Ana. Stephen said the 7-Eleven shooting was precipitated by an incident that occurred at a liquor store several hours earlier. He, Scottie, and Terry Ross were at the liquor store with several of their friends when a maroon Cadillac pulled into the parking lot. Demetri, one of four Black men in the Cadillac, confronted Stephen's group and started fighting with a guy named Charles. Then Demetri's companion Michael "Spade" Haslip pulled out a handgun, and someone in Stephen's group struck Spade in the head with a bottle. After that, the crowd dispersed and the two groups went their separate ways.

Stephen's group drove to a party in San Clemente and stayed there until about 1:00 a.m. They then drove to Norm's Restaurant in Santa Ana, but not

much was happening there, so they decided to call it a night. Before doing so, they stopped at the nearby 7-Eleven to get something to eat. While Scottie was in the store, a young Black man approached Stephen, who was sitting in the driver's seat of his SUV. At first, Stephen thought the man was Spade, but then he realized it was Spade's brother, Tommy "Lamont" Haslip. When Stephen rolled down his window to see what he wanted, Tommy said "you guys hit my cousin." Then Tommy punched Stephen in the face and several shots rang out. Stephen was shot in the stomach, but he did not know where the shots were coming from. As he lay wounded, he heard several more shots before seeing Tommy and others running toward Spurgeon Street. Stephen told the police he knew Tommy from their school days, and he identified the men who were with Tommy as "Demetri," "Deb" and "Peewee."

Investigators determined "Demetri" was Demetrius Lopez and "Deb" and "Peewee" were brothers Terrance and Lemaine Timms. All three men, along with Tommy "Lamont" Haslip, had connections to the Bloods gang in Santa Ana. The police also confirmed that there had been a confrontation between the Bloods and the Crips at a liquor store before the 7-Eleven shooting and that Michael "Spade" Haslip, a member of the Bloods, was hit in the head with a bottle during the fracas.

Throughout this initial phase of the investigation, petitioner Booth was hardly mentioned. However, his name did come up as a possible source of the gun that was used in the shooting. In addition, Donnell English, who was in jail when the shooting occurred, told police that when he spoke to Tommy Haslip after the shooting, Tommy said Darrell "Bobi" Booth was with him when he (Tommy) shot Stephen Strong and Terry Ross.

2. *Photographic Evidence*

Based on the above information, the police compiled a 36-person photographic array that included the pictures of Booth, Lopez and the Timms brothers. They also assembled two six-person lineups that contained photos of Michael and Tommy Haslip. On September 4, 1992, 34 days after the shooting, the police showed the photos to Charles Honea. Honea said the photo of Booth looked like the man he had seen running in the alley near his apartment after the shooting. Honea was not sure Booth was actually the runner; all he could say was that of all the photos he was shown, Booth "most closely resemble[d]" the man he saw in the alley from his balcony.

The police also showed the photos to Stephen Strong. He was able to recognize "Spade" (Michael Haslip) and "Lamont" (Tommy Haslip), as well as "Demetri" (Demetrius Lopez) and "Deb" (Terrance Timms). However, Stephen did not identify Booth or implicate him in any way.

Next to see the photos was Ellis Bradford. When the police showed him the pictures, he said he was very nervous about identifying anyone. He studied Michael Haslip's photograph for a long time before finally saying he looked like one of the men who was involved in the shooting. Asked if he knew this person's name, Bradford said he thought it was "Lamont." Bradford also said that two of the men pictured in the photographs resembled Demetri, but he was not sure whether they were actually him. As it turned out, these two men (Terry Jordan and Charles Boyette) were police fillers and had nothing to do with the shooting.

After receiving this information from Bradford, the police learned the name "Lamont" was used by several suspects in the case. So they recontacted Bradford and asked him about his identification of Lamont. Bradford said he believed the person he identified as Lamont was Tommy "Lamont" Haslip. However, as explained above, the person was actually Tommy's brother, Michael. Bradford acknowledged the mix-up and told the police the person he saw at the shooting scene was Tommy, not Michael.

At one point, the police also asked Bradford if he recognized any of the other men who were displayed in the photographs. Looking at Booth's picture, Bradford said that he knew him as Darrell "Bobi" Booth and that he was *not* one of the four men he had seen running in the 7-Eleven parking lot after the shooting. Bradford also said Booth, Peewee and Deb were all cousins. Looking at the photo of Lemaine Timms, Bradford identified him as "Peewee," saying he was one of the men who was involved in the shooting. And looking at the photo of Terrance Timms, Bradford said he had seen him in the company of the men who carried out the shooting, but he could not specifically recall when that was.

No arrests or charges resulted from the initial phase of the investigation. Instead, the case was shelved until 2009, which is when the Santa Ana Police Department (SAPD) received a grant to fund cold case homicide investigations. This fiscal infusion allowed investigators to take a second look at the 7-Eleven shooting.

C. *The Second Phase of the Investigation*

In December 2009, 17 years after the shooting, the police interviewed Michael Haslip in prison. At that time, Michael was serving a life sentence for an unrelated murder. Recalling the fight at the liquor store before the 7-Eleven shooting, Michael told investigators someone hit him over the head with a bottle, knocking him out. He also said Demetrius Lopez drove him to a hospital in Riverside for treatment, and he was at the hospital all night. Michael did not know where his brother Tommy was that evening.

Hoping to shed light on that issue, the police interviewed Tommy on April 20, 2010. At that time, Tommy was living in Arkansas with his family and no longer involved in gang activity. At the start of the interview, the police informed Tommy he was under arrest for murder in connection with the 7-Eleven shooting. They also told him they had already talked to his brother Michael about the shooting. Tommy knew this because, before the police even contacted him, Michael had alerted him to the fact that investigators had been asking him (Michael) questions about Tommy and Booth.

After waiving his *Miranda* rights, Tommy admitted he was a member of the Bloods when the shooting occurred. He also admitted the “CK” tattooed on his left arm stood for “Crip Killer.” However, when the police told Tommy that people were implicating him as the gunman in the 7-Eleven shooting, he insisted he did not shoot Stephen Strong or Terry Ross. Tommy claimed that after he learned his brother Michael had been struck in the head with a bottle, he and three of his cousins—Booth, Lemaine Timms and Terrance Timms—immediately went to see Michael in the hospital. Michael told them Stephen Strong was present when the bottle incident occurred. Tommy knew Stephen was a Crip. Indeed, Tommy was personally familiar with Stephen because Stephen had shot him in the past.

According to Tommy, he left the hospital with Booth and the Timms brothers in a white Ford Thunderbird. As they were driving around, they talked about how they were going to “get” Stephen if they ran into him. Sure enough, they spotted Stephen’s vehicle in the parking lot of the 7-Eleven. After parking their car on Spurgeon Street, they walked into the parking lot and Tommy snuck up on Stephen, who was sitting in the driver’s seat, and started punching him. At the time, Booth was standing toward the rear of Stephen’s vehicle. It appeared to Tommy that Booth was firing a gun because there were muzzle flashes coming from his vicinity.

Tommy told police that although Booth always carried a gun and they had talked about “smoking” Stephen, he was surprised by the shooting. When he realized what was happening, he ran from the scene and was eventually picked up by his three companions in the Thunderbird. Then they drove to Riverside. On the way there, Booth still had the gun and implored everyone not to talk about what had happened.

Tommy also told the police that, following the shooting, he was arrested several times on unrelated matters before moving to Arkansas. However, on those occasions, the police never asked him about the 7-Eleven shooting. One time, an investigator did give Tommy his card and tell him he wanted to talk to him about the shooting. But that conversation never took place because

[REDACTED]

[REDACTED]

when Tommy called the investigator, they could not agree on an interview site. The investigator wanted Tommy to come down to the police station, but Tommy refused to do so.

D. *Judicial Proceedings*

1. *The Charges and the Disposition of the Codefendants' Cases*

In August 2011, 19 years after the shooting, Booth and the Timms brothers were charged with first degree murder and acting for the benefit of a criminal street gang. The prosecution further alleged Booth personally used a firearm in murdering Ross. Tommy Haslip was also charged with murder in connection with the shooting. However, he pleaded guilty to manslaughter and received a mitigated sentence of 14 years in prison in exchange for testifying at Booth's trial. After Booth's trial was over, Terrance Timms also pleaded guilty to manslaughter, and he was sentenced to six years in prison. The charges against Lemaine Timms were dropped altogether because at that time he was in extremely poor health and already serving time on an unrelated case.

2. *The Trial*

The evidentiary phase of Booth's trial lasted all of two days. Consistent with his pretrial interview, Tommy Haslip testified he, Booth and the Timms brothers were out to avenge the attack on his brother Michael when they spotted Stephen Strong at the 7-Eleven. Tommy told the jury he was unarmed at that time and only wanted to fight Stephen. However, after he and his pals parked their car on Spurgeon Street, Booth grabbed a handgun from the dashboard as they headed toward the 7-Eleven parking lot.

As they approached the driver's side of Stephen's vehicle, Tommy noticed a person in the backseat whom he did not recognize. He tapped on the driver's side window, and when Stephen lowered it, he punched him in the face. Then "bullets started flying," and Tommy made a run for it. He did not know who was shooting or where the shots were coming from. Nor did he know where his cohorts were at that time. However, all four of them made it back to their car at about the same time. When they reentered the vehicle, Booth still had the gun and told the others they had "better not say anything." They fled the area and drove to Riverside. Tommy testified that, other than Booth, he did not see anyone in his group with a gun that night.

Charles Honea testified he saw a Black man with braided hair running in the alley near his apartment following the shooting. He said a white Thunderbird pulled up to the man, and someone yelled, "We got to get out of here."

The man entered the car and it sped away. Although Honea could not identify Booth in court, he testified he was “quite certain” the man he saw in the alley was the same man he picked out of the photographs he viewed after the shooting in 1992, i.e., Booth. However, Honea also admitted that of all the men displayed in the photographs, Booth was the only one who had braided hair.

David Rondou, a corporal who was in charge of the SAPD’s gang unit at the time of the shooting, testified about the general characteristics of criminal street gangs. In his opinion, the 7-Eleven shooting was representative of the animosity that existed between the Bloods and the Crips in the early 1990’s. He surmised the murder would have elevated both the status of the Bloods who carried it out and the gang as a whole. He also stated the murder set off a wave of shootings between the Bloods and the Crips that resulted in multiple casualties.

In closing arguments, the prosecutor maintained Booth was guilty of first degree murder for personally shooting Ross with premeditation. Alternatively, the prosecutor argued Booth was guilty of that offense based on aiding and abetting principles. However, the jury acquitted Booth of murder one. It did find him guilty of murder in the second degree and that the murder was gang related, but it found the allegation he personally used a firearm not to be true.

3. *New Trial Motion*

Following the verdict, Booth fired his trial attorney, and Mitchell Haddad took over his case. Haddad filed a motion for a new trial based on newly discovered evidence and ineffective assistance of counsel. The newly discovered evidence consisted of statements and declarations from a variety of Booth’s friends and relatives.¹ Under the heading of potential alibi evidence, Michael Haslip, Ronnie Ward and Booth’s wife Arnetha all alleged that, on the night of the shooting, Booth was with them at the Riverside hospital where Michael was being treated. With respect to the shooting itself, Terrance Timms claimed that Booth was not with him and the other assailants when they carried out the shooting. Timms asserted Tommy Haslip was the triggerman, and following the shooting, they picked up Tommy in an alley before making their getaway.

Haddad argued Booth would have received a more favorable verdict had this evidence been presented at trial. He also asserted trial counsel was ineffective for rushing the case to trial and not allowing his defense investigator Jose Dominguez to gather the necessary evidence to support an alibi

¹ For purposes of the motion hearing, the parties agreed to accept the subject statements and declarations as true in lieu of presenting live testimony.

[REDACTED]

defense. As part of the new trial motion, Dominguez filed a declaration explaining his work on the case. He alleged he told trial counsel he needed more time to investigate the shooting, but trial counsel answered ready for trial anyway.

During the motion hearing, Haddad also represented that Scottie Strong, whom Haddad had recently subpoenaed, would have been available to testify had trial counsel not rushed the case to trial. According to Haddad, Scottie would have testified that after the shooting, he ran up to Stephen and asked who shot him, and Stephen replied, "Unknown," which was one of Tommy Haslip's nicknames. Scottie was also prepared to testify that he knew Booth and that Booth was not among the group of men who carried out the shooting.

The trial court was not persuaded by Haddad's arguments. It surmised the alibi and exonerating evidence that was allegedly "newly" discovered was likely available at the time of trial. And even if the subject evidence had been admitted into evidence, it probably would not have affected the outcome of the case because all of the alibi and exonerating witnesses were either related to, or friends with, Booth. As for the ineffective assistance of counsel claim, the trial court was of the opinion that trial counsel represented Booth in a competent and skillful fashion, as evidenced by the fact the jury acquitted Booth of first degree murder and found the firearm allegation not true. Although Haddad argued Booth could have been acquitted outright if trial counsel had handled the case differently, the trial court denied the new trial motion and sentenced Booth to 15 years to life in prison.

4. The Appeal and Original Habeas Corpus Petition

Booth appealed, claiming the trial court erred in denying his motion for a new trial. He also argued the trial court's flight instruction was erroneous, and trial counsel was ineffective for not objecting to certain statements in Tommy Haslip's pretrial interview with the police.

In conjunction with his appeal, Booth filed a petition for a writ of habeas corpus alleging trial counsel was ineffective for (1) failing to move to dismiss the case due to precharging delay, (2) failing to more effectively cross-examine Honea about his pretrial identification of Booth, and (3) failing to investigate and produce certain alibi and exonerating evidence. Regarding the first claim, Booth alleged the 19-year delay that occurred between the time of the shooting and the time he was charged resulted in the loss of material witness Ellis Bradford, who, despite defense investigators' efforts, could not be located at the time of trial and whose whereabouts are still unknown to this day. After receiving an informal response to the petition, we issued an

order to show cause returnable in the trial court and stayed the appeal. We also ordered the trial court to conduct an evidentiary hearing and make any necessary findings before ruling on the petition.

5. *Evidentiary Hearing and Ruling on the Habeas Corpus Petition*²

At the evidentiary hearing, trial counsel testified he contemplated putting on an alibi defense. However, there were holes in that defense so he decided to simply challenge the adequacy of the prosecution's evidence, which he felt was "weak." Trial counsel admitted he could have used more time to prepare for trial, but at the same time, he did not think his case was going to get any better if the trial were delayed. In his mind, the evidence necessary for an effective alibi defense was just not coming together, so there was no need to seek a continuance. Another factor in his decision to answer ready for trial was that Booth feared his codefendants might follow Tommy Haslip's lead and turn against him in the hope of obtaining favorable treatment from the prosecution. However, trial counsel did not have any specific information to corroborate Booth's fear in this regard. And although Booth wanted to go to trial sooner rather than later, he did waive his right to be tried within 60 days of being arraigned on the information, which suggested he might be amenable to some delays.

Defending his decision not to call Scottie or Stephen Strong as witnesses at trial, trial counsel said they were both reluctant to testify, and forcing them to do so could have been worse than not calling them at all. Trial counsel felt he did a pretty good job cross-examining Honea. And although his investigators looked "high and low" for Bradford before trial, they were unable to locate him. Trial counsel believed Bradford was a very important witness for the defense. He thought about bringing a motion to dismiss based on the theory Bradford's unavailability violated Booth's right to a fair trial. However, for reasons he could not recall, trial counsel never made such a motion. As a matter of fact, trial counsel could not remember many of the details regarding his trial strategy or whether he ever discussed bringing a dismissal motion with Booth. All he could say was that he did what he thought was best to win the case.³

² The evidentiary hearing was conducted by Judge David Hoffer due to the death of Judge Daniel Didier, who presided over Booth's trial.

³ In his prehearing declaration, trial counsel stated he did not consider making a dismissal motion "based specifically on the loss of the witness Ellis Bradford." Booth interprets this to mean trial counsel never considered making a motion based on Bradford's unavailability. However, at the evidentiary hearing, trial counsel explained that he did in fact have Bradford in mind when he contemplated making the motion. But the basis for the motion would not have been limited to Bradford's unavailability. Instead, it would have encompassed the loss of Bradford *and* the loss of any other evidence that may have resulted from the lengthy precharging delay that occurred.

Deputy District Attorney Mark Geller was the prosecutor on Booth's case. Speaking to the issue of pretrial delay, he testified the SAPD has the busiest gang unit in the county. Thus, once a case goes cold, the department does not have a lot of time or resources to reexamine it. However the department received a grant around 2009 which allowed it to focus on unsolved homicides, including this one. After investigators interviewed Tommy Haslip in 2010, Geller was confident there was sufficient evidence to file charges against Booth. However, prior to that time, Geller felt "it was a skinny case," and there was not enough evidence to convict Booth.

Asked if Tommy Haslip was ever interviewed when the initial investigation took place back in 1992, Geller answered, "I don't know."⁴ However, Geller said gang members generally do not like talking to the police because "that's frowned upon in the gang culture." It has been Geller's experience that when gang members are subpoenaed to testify in court, they will often lie on the witness stand or claim they do not remember the events in question.

At the evidentiary hearing, the People also presented evidence that Bradford, Michael Haslip, and Scottie and Stephen Strong all have criminal records. Michael, as mentioned, was serving a life sentence on an unrelated case at the time of Booth's trial, and Scottie and Stephen have extensive rap sheets. As for Bradford, the record shows he pleaded guilty to inflicting corporal injury on his spouse in 1998, and in 2004 he was convicted of perjury for submitting false information in connection with his application for a driver's license.

Despite Bradford's convictions, Haddad argued he was a credible and material witness who could have exonerated Booth had the case proceeded to trial in a timely fashion. Haddad further asserted that even though Tommy Haslip was a gang member when the shooting occurred in 1992 and *might* not have cooperated with investigators back then, the police should have at least made an effort to talk to him at that time since he was implicated in the murder by a variety of sources. Haddad maintained, "It just seems like there wasn't diligent investigation, and [the authorities] just kind of put this evidence on the back burner and forgot" about it until "20 years later [when they] . . . pick[ed] it up . . . and arrest[ed] the prime suspect (Tommy Haslip) and crack[ed] the case."

The prosecution argued it made sense for trial counsel not to bring a motion to dismiss based on precharging delay because such a motion would have delayed the trial even more and also signaled weakness in the defense case. The prosecution further asserted that a motion to dismiss would have

⁴ Geller did not start prosecuting gang cases until 2001.

been unsuccessful on its merits because Bradford had credibility problems, and the delay in charging was justifiable due to lack of investigative resources. The prosecutor even went so far as to say Bradford had the credibility “of a complete dirt bag” and that he lied to the police about having witnessed the shooting because it made him feel important.

After taking the matter under submission, the trial court issued a lengthy written ruling. It rejected as not “remotely convincing” the prosecution’s assertion that there was a possible strategic justification for trial counsel’s failure to bring a motion to dismiss based on precharging delay. In that regard, the court stated, “First, there is no reason for the motion to have delayed the proceedings. Although the trial occurred relatively quickly after charges were brought, the statutory time for a motion to dismiss was available. Second, even if trial counsel would not want to divulge the absence of witness Bradford, it seems clear he would do so if it could result in a dismissal of the case.” While the court had little difficulty with this issue, it found the question of whether a motion to dismiss would have been successful on the merits considerably more vexing.

On the one hand, the court felt Booth was “powerfully prejudiced by the loss of witness Bradford.” Indeed, the court acknowledged Bradford could have provided evidence that “both directly inculpated all four of the suspects [i.e., Tommy Haslip, Demetrius Lopez and Terrance and Lemaine Timms] and specifically exculpated” Booth. The court also recognized the prejudice from Bradford’s unavailability was “enhanced by the weakness of the evidence against [Booth] and the closeness of the trial.” Given what it described as “the limitations of the evidence and the jury’s implicit rejection of some of it,” the court determined Bradford’s absence “likely had a substantial impact on the jury’s view of the case.”

On the other hand, the court felt Bradford’s credibility would have been a potential problem for the defense because Bradford was a convicted felon and he had trouble identifying Michael and Tommy Haslip from the lineups he was shown shortly after the shooting. The court was also concerned Bradford told the police a “wildly different story” from the one he allegedly told Mike Adray. Skeptical of Bradford’s claim he witnessed the shooting, the court surmised it was “far more likely [Bradford] put together the suspect list the next day when he admittedly visited the Strong residence while they were planning their retaliation.” Thus, even though the court felt Bradford’s absence at trial was “extremely prejudicial” to the defense, it did not believe Bradford’s presence would necessarily have changed the outcome of the case.

Moreover, the court felt the lack of investigative resources was a strong justification for the precharging delay that occurred. It discerned no bad faith or negligence on the prosecution's behalf, and it dismissed Booth's claim the police could have obtained Tommy Haslip's cooperation earlier than they did as "pure speculation."

In sum, the court concluded, "Although the powerful prejudice from the absence of . . . exculpatory witness [Bradford] makes this case extraordinarily close, . . . the balance tips in favor of the justification and . . . had the trial judge faced the issue of pre-accusation delay, he would have denied a motion to dismiss." Therefore, the court ruled trial counsel was not ineffective for failing to bring such a motion. The court also rejected Booth's alternative claims that trial counsel was ineffective for failing to impeach Honea more effectively and failing to investigate and present evidence from the alleged alibi and exonerating witnesses. It thus denied Booth's petition for a writ of habeas corpus.

III. DISCUSSION

In this habeas corpus petition, Booth renews his claim that trial counsel was ineffective for, *inter alia*, failing to move to dismiss the case on the basis of precharging delay. We agree this failure violated Booth's Sixth Amendment right to effective assistance of counsel. Therefore, we will reverse the judgment and remand the matter for a new trial.

A. Applicable Legal Principles

■ The right to counsel is enshrined in both the federal and state Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) It entitles a criminal defendant to competent and effective representation at every critical stage of the case, including pretrial proceedings. (*People v. Cudjo* (1993) 6 Cal.4th 585, 615 [25 Cal.Rptr.2d 390, 863 P.2d 635].) Although the right to counsel is one of the most important elements of due process (*Powell v. Alabama* (1932) 287 U.S. 45, 68–69 [77 L.Ed. 158, 53 S.Ct. 55]), courts must refrain from second-guessing defense counsel's tactical decisions in a given case. (*Strickland v. Washington* (1984) 466 U.S. 668, 689 [80 L.Ed.2d 674, 104 S.Ct. 2052].) Indeed, given "the variety of circumstances faced by defense counsel" and the "range of legitimate decisions regarding how best to represent a criminal defendant," judicial review of counsel's performance must be "highly deferential." (*Ibid.*) Nevertheless, because the right to counsel is "indispensable to the fair administration of our adversarial system of criminal justice" (*Maine v. Moulton* (1985) 474 U.S. 159, 168–169 [88 L.Ed.2d 481, 106 S.Ct. 477]), we must never shrink from our responsibility to carefully review claims involving alleged violations of that right.

(*People v. Centeno* (2014) 60 Cal.4th 659, 663 [180 Cal.Rptr.3d 649, 338 P.3d 938] (“deference to counsel’s performance is not the same as abdication”].)

Our review is guided by a two-part test. “ ‘[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was “deficient” because his “representation fell below an objective standard of reasonableness . . . under prevailing professional norms.”’ [Citations.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citations.] Prejudice is shown when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”’ [Citations.]’ [Citation.] This second part of the . . . test ‘is not solely one of outcome determination. Instead, the question is “whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.”’ [In re Hardy (2007) 41 Cal.4th 977, 1018–1019 [63 Cal.Rptr.3d 845, 163 P.3d 853].)

With this test in mind, we now turn to the law governing prosecutorial delay. We recognize at the outset that the primary safeguards against such delay—statutes of limitation and the constitutional guarantee of a speedy trial—are not at issue in this case because there is no statute of limitations for murder (Pen. Code, § 799), and the speedy trial right is not triggered until the defendant is formally charged or arrested (*United States v. Marion* (1971) 404 U.S. 307, 320 [30 L.Ed.2d 468, 92 S.Ct. 455]). However, the due process clause of the Fifth Amendment also has a “role to play in protecting against oppressive delay.” (*United States v. Lovasco* (1977) 431 U.S. 783, 789 [52 L.Ed.2d 752, 97 S.Ct. 2044].) It safeguards individuals from excessive delay between the commission of a crime and the initiation of criminal proceedings. (*Id.* at pp. 789–790.) While not every delay in charging violates the Constitution, it is well established that precharging delay can substantially impair a defendant’s ability to defend himself at trial. (See *United States v. Marion*, *supra*, 404 U.S. at p. 331 (conc. opn. of Douglas, J.) [“At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.”].) No person should have to stand trial if the delay in charging was so great as to offend basic standards of decency and fair play. (*United States v. Lovasco*, *supra*, 431 U.S. at p. 790; *People v. Boysen* (2007) 165 Cal.App.4th 761, 774, 777 [62 Cal.Rptr.3d 350].)

To establish a due process violation, the defendant must prove the existence of actual harm, “such as by showing the loss of a material witness

or other missing evidence, or fading memory caused by the lapse of time.” (*People v. Abel* (2012) 53 Cal.4th 891, 908–909 [138 Cal.Rptr.3d 547, 271 P.3d 1040]; see also *People v. Lazarus* (2015) 238 Cal.App.4th 734, 757 [190 Cal.Rptr.3d 195].) “If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.]” (*People v. Abel, supra*, 53 Cal.4th at p. 909.) “The balancing task is a delicate one, ‘a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. [Conversely], the more reasonable the delay, the more prejudice the defense would have to show to require dismissal.’ [Citation.]” (*People v. Boysen, supra*, 165 Cal.App.4th at p. 777.) At bottom, the court must ascertain whether the precharging delay tilted the playing field against the defendant in such a way that it prevented him from receiving a fair trial. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256 [78 Cal.Rptr.3d 69, 185 P.3d 49]; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 507 [149 Cal.Rptr. 597, 585 P.2d 219]; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 914 [55 Cal.Rptr.2d 404].)

B. Was Trial Counsel’s Performance Deficient?

The initial question presented is whether trial counsel’s failure to file a motion to dismiss based on precharging delay was objectively reasonable. Respondent argues trial counsel made a reasonable tactical decision to forgo making such a motion, and therefore his representation of Booth was not constitutionally deficient. In so arguing, respondent claims Bradford’s credibility was just too weak, and the risk of harm from further delaying the trial was just too great, to question trial counsel decision in this regard. We cannot agree.

Respondent’s argument is based on the assumption trial counsel arrived at his decision after “weigh[ing] the likelihood of success of a motion to dismiss for preaccusation delay against potential costs of delaying trial.” But that is not the record before us. At the evidentiary hearing below, trial counsel could not remember why he did not bring the motion or even whether he discussed it with Booth. Although he contemplated moving to dismiss based on Bradford’s unavailability, trial counsel testified he could not “recall why [he] did not file . . . some type of due process motion.” And as respondent correctly points out, the trial court found trial counsel to be highly credible; we are not at liberty to question his veracity on this point. (*In re Lawley* (2008) 42 Cal.4th 1231, 1241 [74 Cal.Rptr.3d 92, 179 P.3d 891].)

Of course an inevitable consequence of trial counsel not bringing a motion to dismiss is that the trial was ultimately able to get started a little earlier than if he had brought the motion. Trial counsel himself articulated this during his

testimony, and he also acknowledged Booth wanted to go to trial sooner rather than later for fear that codefendants Terrance and Lemaine Timms might turn state's evidence in the hope of receiving favorable treatment from the prosecution. However, trial counsel said this possibility was only a *theoretical* concern; he had no *specific* information that the Timms brothers had any incriminating evidence against Booth or that they were actually looking to make a deal with the state.

More importantly, as the trial court recognized, it is clear a motion to dismiss would not have delayed the trial in any material sense. In arguing otherwise, respondent contends that while Bradford's importance as a defense witness was made obvious early in the case, the trial court would still have had to give the prosecution the opportunity to justify the precharging delay that occurred. Respondent assumes this would have been a time-consuming task, but Prosecutor Geller's testimony on this topic takes up only 50 pages of the evidentiary hearing transcript. Thus, the entire motion could have been litigated fairly quickly. Because of this, and because the motion could have resulted in a complete dismissal of the charges against Booth, the conjectural possibility of additional codefendants coming forward to testify against Booth was not a reasonable justification for forgoing the motion. Indeed, we agree with the trial court that the state's argument to the contrary is not "remotely convincing." This was after all, a witness to the crime who explicitly exonerated Booth; the arguable prejudice was substantial.

Nevertheless, respondent argues trial counsel reasonably believed Bradford's credibility was so weak that it would not have been worth any delay in the trial to seek a dismissal based on Bradford's unavailability. This argument also fails for want of evidentiary support, as there is nothing in the record to substantiate respondent's claim that trial counsel lacked faith in Bradford as a witness. To the contrary, trial counsel testified he had his investigators look "high and low" for Bradford before trial because Bradford was a "very, very important person that [he] wanted to have." And this testimony came *after* the prosecution reminded trial counsel that Bradford's statements to the police were contradicted by Adray and that Bradford had problems identifying some of the suspects he implicated in the shooting. While trial counsel acknowledged these factors could have had an impact on Bradford's credibility, he still believed Bradford was a highly significant witness for the defense given that Bradford explicitly exonerated Booth of the shooting. At no time did trial counsel connect his failure to bring a dismissal motion with potential concerns about Bradford's credibility, so the Attorney General's attempt to do so is unconvincing. Considering the record in its entirety, we are convinced a reasonably competent defense attorney would have filed a motion to dismiss based on the circumstances presented in this case. Therefore, trial counsel was remiss for failing to do so.

C. Was Booth Prejudiced by Trial Counsel's Deficient Performance?

As we have explained, a defendant alleging ineffective assistance of counsel must prove both deficient performance *and* resulting prejudice. When, as in this case, the allegation is based on counsel's failure to bring a potentially dispositive motion, the defendant must show it is reasonably probable the motion would have succeeded at trial. (*Wilson v. Henry* (9th Cir. 1999) 185 F.3d 986, 990; *People v. Maury* (2003) 30 Cal.4th 342, 394 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [178 Cal.Rptr.3d 451]; *In re Elizabeth G.* (2001) 88 Cal.App.4th 496, 503–507 [105 Cal.Rptr.2d 811].) We must therefore assess the merits of a motion to dismiss based on the precharging delay in this case. That requires us to balance the prejudice Booth suffered from the delay against the state's justification for the delay. (*People v. Abel, supra*, 53 Cal.4th at p. 909; *People v. Nelson, supra*, 43 Cal.4th at pp. 1249–1256; *People v. Boysen, supra*, 165 Cal.App.4th at p. 777.)

1. Prejudice from the Delay

The prejudice, as we have said, was substantial. It cannot be gainsaid that Booth lost a potentially powerful witness in Bradford because of the lengthy precharging delay that occurred in this case. By the time Booth was charged and the case was set for trial, Bradford—an eyewitness who told the police Booth was not among the group of men that carried out the shooting—could not be found and was thus unavailable to testify on Booth's behalf. In assessing the gravity of this loss, the trial court did not mince words—it described Bradford's absence as being “extremely prejudicial” to the defense and stated Bradford's testimony would likely have had “a substantial impact on the jury's view of the case.” Yet, thinking Bradford would have been vulnerable to possible impeachment, the court did not believe he would have been a game-changing witness for the defense. Rather, the court suspected that Bradford lied about having witnessed the shooting and that he probably learned the assailants' names from talking with Scottie and Stephen Strong. For reasons we now explain, we cannot adopt the trial court's opinion in that regard.

As a preliminary matter, respondent contends the trial court's finding that Bradford lacked credibility is entitled to great deference from this court. Deference on credibility issues is rightfully owed when the trial court has the opportunity to hear the witness speak and observe his or her demeanor. (*In re Lawley, supra*, 42 Cal.4th at p. 1241; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78 [17 Cal.Rptr.3d 710, 96 P.3d 30].) But in this case, the trial court never saw the witness. Bradford's absence meant the court had to assess his credibility based largely on the police reports, the identification evidence

and the recorded statement that Bradford made to investigators following the shooting. Because all of this information is in the record before us, we are in the same position as the trial court in evaluating Bradford's credibility. Therefore, we need not defer to the trial court on this issue. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 [128 Cal.Rptr.2d 104, 59 P.3d 174] [applying independent review to documentary evidence].)

There are two main ways in which this information could have been used to impeach Bradford had he been available to testify at trial. First, it showed Bradford was unable to identify some of the people he claimed were involved in the shooting. And second, it showed Bradford provided the police with a starkly different version of events from what he allegedly told Adray. We will address the significance of these circumstances in turn.

Regarding the identification process in general, we agree with the trial court's observation Bradford's ability to identify the people he allegedly saw carry out the shooting was likely hampered by two factors that were beyond his control. First, the photographs the police showed him were rather small and included men of similar age and appearance. Second, Bradford was not well acquainted with the people he implicated in the shooting. In fact, he did not even know their formal names. It is neither terribly surprising nor particularly revealing that he had some difficulty identifying them. Nonetheless, Bradford did identify the Timms brothers. He identified Lemaine as being at the shooting, and he identified Terrance as someone who was associated with the shooters. And, Bradford also consistently implicated Tommy "Lamont" Haslip, who admitted he was present at the time of the shooting. The fact these three all pled guilty in connection with the shooting increases Bradford's credibility.

The point about Bradford having consistently implicated Tommy Haslip is not only important in terms of assessing Bradford's credibility, it raises an issue regarding the factual underpinning of the trial court's ruling. It is evident from the court's lengthy ruling that it painstakingly considered the evidence and arguments that were presented as part of Booth's habeas corpus petition. We commend the court for laying out its findings and analysis in such detailed fashion. However, one of the reasons the court was skeptical of Bradford's credibility is because it believed Bradford originally identified Michael Haslip as one of the suspects. As the Attorney General concedes, that is not correct; Bradford originally identified "Lamont," who is Tommy, not Michael, Haslip. In fact, the trial court got Tommy and Michael mixed up throughout its written ruling. (Mistakenly referring to Lamont as Michael Haslip, mistakenly referring to Tommy Haslip as Lamont's brother, and

reflecting the misunderstanding that Michael Haslip's nickname was Lamont.) This makes it even more difficult to accord deference to a fact finder looking at the very same facts we are.

As for the apparent discrepancy in Bradford's accounts of the shooting, the record is clear that Bradford gave the police a very different story from what he allegedly told Adray. Whereas Bradford told the police he never made contact with the victims on the night in question and merely witnessed the shooting from the outskirts of the parking lot, Adray claimed Bradford told him he was dodging bullets right along with the victims when the shooting occurred. Obviously, both accounts could not be true. However, in speaking with the police, Bradford denied telling Adray he was with the victims that night, and other than Adray's statement, there is no evidence to refute the truth of that denial.

Also, there was a plausible explanation as to why Adray might have been confused about what Bradford actually told him. Rumors around Adray's workplace were rampant following the shooting, and Adray himself admitted that, in addition to speaking with Bradford about what had occurred, he had multiple conversations with other employees before talking to the police. Thus, it is quite possible Adray's statement to the police regarding Bradford's involvement in the shooting conflated, at least in part, Bradford's account with what he had heard from people other than Bradford. This possibility makes even more sense when we consider Bradford provided security for Adray's business. No one, least of all a security guard, would want to exaggerate his role in a gang-related shooting to the person who signs his paycheck.

In any event, other circumstances in the case generally support the notion Bradford was telling the truth when he spoke to the police, and he would have been a favorable witness for the defense. For example, unlike Tommy Haslip, Bradford was essentially a neutral witness. He did know the victims better than the assailants, but he was not a gang member, nor was he affiliated with either group. Furthermore, his description of how the shooting occurred and who carried it out was corroborated by other witnesses in the case, including Stephen Strong, who came face-to-face with the man who shot him.

Granted, when Bradford spoke with Scottie Strong after the shooting, Scottie said Stephen knew who the assailants were, so it is possible Scottie divulged this information to Bradford. However, Bradford denied this is what occurred. He also provided a very good reason for why the Strongs would not want him to know the identity of the assailants. According to Bradford, the Strongs sought to keep that information a secret from everyone outside their circle—including the police—so they and their friends could personally exact

revenge on the people who shot Stephen Strong and Terry Ross. This “we’ll-take-care-of-things-ourselves” attitude is a well-known hallmark of gang culture. Since Bradford was not a gang member, it makes sense the Strongs would be reluctant to let him in on the specifics of their revenge plan. It also helps explain why Bradford was hesitant to reveal the information he possessed. Given the gang dynamics surrounding the case, we can fully understand why both Bradford and the Strongs would ultimately be disinclined to talk about who was involved in the shooting.

And, as it turned out, Bradford’s statement to the police about how the shooting transpired was actually more compatible with the facts than what the state’s star witness Tommy Haslip alleged. Whereas Tommy told the police the shooter was standing toward the back of the victims’ SUV, Bradford said he saw gun smoke coming from the driver’s side of the vehicle, which is consistent with the fact the victims were both shot in the abdomen, an eventuality difficult to reconcile with shots fired from behind them. And although the trial court believed Bradford’s convictions for spousal abuse and perjury cast a pall over his credibility, those convictions did not arise until 1998 and 2004, respectively. If Booth had been tried within a reasonable time of the murder in 1992, the convictions would not have been available to impeach Bradford.

The point is, despite all of the possible impeachment Bradford might have been subjected to had he been available to testify, he still had the potential to be a blockbuster witness for the defense. While it is impossible to know for sure how the jury would have perceived Bradford’s testimony, it is reasonable to conclude Booth was substantially and materially prejudiced by Bradford’s absence at his trial.

2. Justification for the Delay

That conclusion requires us to assess the strength of the justification for the 19-year delay that occurred from the time of the shooting until the time Booth was charged. Although Prosecutor Geller did not have any personal knowledge about why the initial investigation in this case did not lead to any arrests, he testified the SAPD has the busiest gang unit in the county. He also stated the impetus for the second phase of the investigation, which led to Booth’s arrest, was an influx of grant money that allowed SAPD investigators to reexamine homicide cases that had grown cold. Based on this testimony, respondent argues the lack of investigative resources provides a strong justification for the precharging delay that occurred in this case. We agree.

No one would dispute the SAPD lacks the means to exhaustively investigate every case that comes to its attention. Nor would anyone dispute that

“[s]ometimes a crime simply is not solved immediately but must await some break in the case.” (*People v. Cordova* (2015) 62 Cal.4th 104, 120 [194 Cal.Rptr.3d 40, 358 P.3d 518] [lengthy precharging delay justified where sufficient evidence to charge the defendant did not exist until DNA technology was developed and used to connect him to the subject offense]; see *People v. New* (2008) 163 Cal.App.4th 442, 465 [77 Cal.Rptr.3d 503] [reopening of investigation into decades-old murder would not have occurred but for the discovery of new evidence linking defendant to the crime].) These realities explain why the executive branch has broad discretion when it comes to deciding how to allocate scarce investigative resources and when to file criminal charges in a particular case. (*United States v. Lovasco, supra*, 431 U.S. at pp. 790–796; *People v. Abel, supra*, 53 Cal.4th at p. 911; *People v. Nelson, supra*, 43 Cal.4th at pp. 1256–1257.) And it is wholly admirable that SAPD kept after this case. We applaud their efforts.

■ But that doesn’t mean the police and prosecution are immune from judicial scrutiny when those decisions impact the defendant’s fair trial rights. Although the difficulty in allocating scarce prosecutorial resources is a strong justification for precharging delay (*People v. Nelson, supra*, 43 Cal.4th at pp. 1256–1257), courts will generally not countenance delays that are attributable to police negligence or intentional misconduct. (See *People v. Hartman* (1985) 170 Cal.App.3d 572, 581 [216 Cal.Rptr. 641] [“ ‘[n]egligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney . . . can hardly be considered a valid police purpose justifying a lengthy delay’ ”]; *People v. Pellegrino* (1978) 86 Cal.App.3d 776, 781 [150 Cal.Rptr. 486] [the police cannot merely put an ongoing investigation “on the ‘back burner’ hoping that it will some day simmer into something more prosecutable’ ”].)

So we must first deal with that question. In this case, there is no evidence the delay in charging Booth was caused by police negligence or intentional wrongdoing. Booth argues that given the evidence implicating Tommy Haslip in the shooting, the police were derelict for “fail[ing] to take the obvious[] investigative step of arresting or interviewing” Tommy in 1992. And had they done so, Booth claims, Tommy would have told investigators that Booth was the shooter, Booth would have been formally charged, and Bradford would have been available to testify on Booth’s behalf at his trial. There are several problems with this argument. For one, when he was interviewed in 2010, Tommy told the police that an investigator did contact him in the wake of the shooting but that he (Tommy) was unwilling to come in for an interview. And even if police had arrested Tommy at that time, it is purely speculative whether he would have cooperated with them since he was still embedded in the gang lifestyle at that time. (Cf. *People v. Cordova, supra*, 62 Cal.4th at p. 120 [rejecting as speculative defendant’s claim that he was prejudiced by precharging delay]; *People v. Abel, supra*, 53 Cal.4th at pp. 909–910 [same].)

Third, and perhaps most importantly, it smacks of impermissible Monday-morning quarterbacking for Booth to argue that different investigative priorities and techniques would have led to him being charged sooner than he actually was. As our Supreme Court has explained, “A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case. . . . *It is not enough for a defendant to argue that if the prosecutorial agencies had made his or her case a higher priority or had done things a bit differently they would have solved the case sooner.*” (*People v. Nelson*, *supra*, 43 Cal.4th at pp. 1256–1257, italics added.) Yet, in criticizing the SAPD’s failure to interview or arrest Tommy Haslip sooner than it did, that is precisely what Booth is arguing in this case. Therefore, we reject his claim the SAPD was negligent for failing to conduct their investigation differently. Since the precharging “delay was investigative delay, nothing else,” the justification for the delay was strong. (*Id.* at p. 1256.)

3. *Balancing Prejudice and Justification*

■ That brings us to the balancing analysis, and makes it difficult. When, as here, there is both prejudice from, as well as justification for, the precharging delay that occurred, the question of whether the delay violated due process will often depend on the strength of the prosecution’s case. (*People v. Vanderburg* (1973) 32 Cal.App.3d 526, 532–534 [108 Cal.Rptr. 104].) If the evidence of the defendant’s guilt is strong, the likelihood of consequential prejudice from the precharging delay is reduced and a longer delay will be tolerated, but if the evidence against the defendant is weak, the claimed prejudice will take on added significance and enhance the probability of an unfair trial. (*Ibid.*)

Here, the prosecution’s case against Booth was simply not very strong. It rested largely on the testimony of Charles Honea and Tommy Haslip, both of whom had considerable limitations as witnesses. Honea did “identify” Booth from a photographic lineup as the man he saw running in an alley near his apartment after the shooting. However, Honea was not sure Booth was actually the man he had observed. Honea merely stated that, of all the photos he was shown, Booth’s “most closely resemble[d]” the man he saw in the alley. Perhaps this was because Booth was the only man pictured who had braided hair. Or perhaps this was because the lineup did not take place until over a month after the shooting. At any rate, the record is clear that when the police interviewed Honea at the scene of the shooting, he admitted he did not get a very good look at the person he saw. Thus, Honea’s identification of Booth was suspect on a number of levels.

But compared to Tommy Haslip, the state’s other key witness, Honea was the human equivalent of fingerprints. An experienced gang member who has

a “Crip Killer” tattoo emblazoned on his arm, Tommy admitted to the police that Stephen Strong had actually shot him on a prior occasion before the 7-Eleven shooting occurred. However, Tommy told the police it was not him but Booth who shot the victims in retaliation for the incident that sent *Tommy’s* brother Michael to the hospital earlier that evening. Respondent claims “there is no clue why Tommy . . . would have been motivated to falsely name [Booth], who was his cousin and former co-gang member.” And by the time the police got around to interviewing Tommy about the murder, he had moved out of state, started a family and was no longer involved in gang activity. There is nothing to suggest Tommy still had any loyalty to his old gang when he was interviewed in 2010.

On the other hand, at the start of the interview, the police informed Tommy that they suspected he was the shooter. So by shifting the blame from himself to Booth, Tommy made himself look less culpable. Having been arrested multiple times in the past, Tommy also probably knew that if he claimed to have information about the shooter’s identity, he might be able to cut a deal with the prosecution for a more favorable disposition of his own case. As it turned out, that possibility became a reality because while Booth faced a possible sentence of 25 years to life for first degree murder and was ultimately sentenced to 15 years to life, Tommy copped a plea to manslaughter and received a determinate sentence of 14 years in exchange for testifying against Booth at his trial. Given the benefit Tommy received for his testimony, it is easy to see why he may have been motivated to falsely implicate Booth as the shooter. So by fingering Booth, Tommy deflected suspicion away from himself for the murder of a man who had assaulted Tommy’s brother and put himself in position to cop a plea to a *determinate* sentence rather than a life top. That seems to us to provide several of the “clues” the Attorney General could not find.⁵

■ The limitations of the prosecution’s evidence were also revealed in the jury’s verdict. Based on Tommy’s testimony that Booth was the shooter, the state charged Booth with first degree murder and personally using a firearm. But the jury acquitted Booth of murder one and found the firearm allegation not true. It looks to us like the jury probably was of the opinion that Tommy was the shooter, not Booth. But we need not speculate as to that issue. Our only concern is that the limitations of the prosecution’s witnesses

⁵ At oral argument, respondent made much of the fact Tommy and Booth are related. Respondent wanted to know why, if it were not true, Tommy would implicate his own cousin Booth when he could have easily pinned the shooting on Demetrius Lopez. The answer probably lies in the fact that Michael tipped off Tommy before his interview that the police had been asking him (Michael) questions about both Tommy *and* Booth. Knowing this, Tommy likely believed that fingering Booth fit within the investigative narrative the police were trying to put together. Nothing in this record suggests to us that Tommy would put familial loyalty ahead of his own self-interest.

likely exacerbated the prejudice Booth suffered as a result of the lengthy precharging delay that occurred in this case. Because of that delay Booth was unable to obtain the testimony of Ellis Bradford, who is on record as saying Booth was not among the people he saw carry out the shooting. Balancing the prejudice from Booth's absence against the state's justification for the precharging delay, and considering the weakness of the prosecution's case against Booth, we conclude it is at least reasonably probable the trial court would have found the delay violated Booth's right to a fair trial. Trial counsel was ineffective for failing to move to dismiss the case on that basis.

D. *Remedy for the Violation of Booth's Right to Effective Assistance of Counsel*

■ In fashioning an appropriate remedy in this case, we must keep in mind "habeas corpus is at its core, an equitable remedy." (*Schlup v. Delo* (1995) 513 U.S. 298, 319 [130 L.Ed.2d 808, 115 S.Ct. 851].) When habeas corpus relief is warranted, our power is not limited "to either discharging the petitioner from, or remanding him to, custody [citations], but extend[s] to disposing of him 'as the justice of the case may require'" (*In re Crow* (1971) 4 Cal.3d 613, 619 [94 Cal.Rptr. 254, 483 P.2d 1206], quoting Pen. Code, § 1484; see also *Harris v. Nelson* (1969) 394 U.S. 286, 291 [22 L.Ed.2d 281, 89 S.Ct. 1082] ["The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."].) Therefore, in issuing a writ of habeas corpus, courts have broad discretion to formulate a remedy that is tailored to redress the particular constitutional violation that has occurred. (*United States v. Morrison* (1981) 449 U.S. 361, 364 [66 L.Ed.2d 564, 101 S.Ct. 665]; *Harvest v. Castro* (9th Cir. 2008) 531 F.3d 737, 744; *In re Crow, supra*, 4 Cal.3d at pp. 619–620, fn. 7; *In re Gutierrez* (1997) 51 Cal.App.4th 1704, 1709 [60 Cal.Rptr.2d 332].)

In cases involving a violation of the Sixth Amendment right to effective assistance of counsel, we must strive to neutralize the taint of the violation, "while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." (*Johnson v. Uribe* (9th Cir. 2012) 700 F.3d 413, 425, quoting *Lafler v. Cooper* (2012) 566 U.S. 156, 170 [182 L.Ed.2d 398, 132 S.Ct. 1376, 1388].) For guidance on how to strike that balance here, we look to the case of *People v. Conrad* (2006) 145 Cal.App.4th 1175 [52 Cal.Rptr.3d 233] (*Conrad*).

In *Conrad*, the defendant's brother made a potentially exculpatory statement to authorities during an investigation that led to the defendant being charged with failing to register as a sex offender. (*Conrad, supra*, 145

Cal.App.4th at pp. 1179–1180.) But the brother died before trial, and the state was unable to provide any justification for the delay in prosecuting the case. (*Id.* at pp. 1181–1182.) Finding the defendant could not be afforded a fair trial without his brother's testimony, the trial court dismissed the case on due process grounds. (*Ibid.*)

■ On appeal, the *Conrad* court recognized the defendant was prejudiced by virtue of the delay in bringing the case to trial. However, the court reversed the dismissal order as being too drastic a remedy under the circumstances presented. It held, “A trial court has discretion to fashion a remedy when the prosecutor’s conduct has resulted in a loss of evidence favorable to the defense. (*People v. Price* (1985) 165 Cal.App.3d 536, 545 [211 Cal.Rptr. 642]; see also *People v. Zamora* (1980) 28 Cal.3d 88, 99 [167 Cal.Rptr. 573, 615 P.2d 1361]) When, as here, the delay in prosecution resulted in the loss to the defense of identifiable evidence, the prejudice to the defendant may be substantially mitigated, even virtually eliminated, by presenting the evidence to the jury through alternate means.” (*Conrad, supra*, 145 Cal.App.4th at p. 1185.)

The alternate method adopted in *Conrad* was to have the trial court instruct the jury as to the substance of the brother’s statement in a new trial. (*Conrad, supra*, 145 Cal.App.4th at p. 1186.) Even though the brother’s statement was rank hearsay (*id.* at p. 1185), the court determined its admission was necessary to safeguard the defendant’s constitutional rights. The court stated, “This is not a perfect solution to the problem of lost evidence; however, it adequately addresses the loss of relevant evidence in a manner that affords defendant due process and a fair trial while allowing the prosecution to go forward.” (*Id.* at p. 1186.)

Likewise, here, Booth’s constitutional right to a fair trial can be accommodated by retrying the case and allowing the jury to hear the exculpatory statements that Bradford made to the police after the shooting. Despite the hearsay nature of those statements, their admission is necessitated by Bradford’s unavailability and the unusual circumstances presented in this case. Since Bradford’s statements have been preserved on tape, the jury will be able to hear exactly what he said and how he said it. We leave to the trial court to decide how best to effectuate this remedy when the matter is retried. So long as the subject evidence is presented to the jury in a manner that protects Booth’s constitutional right to due process and a fair trial, the interests of justice will be served by allowing the prosecution—should they so choose—to retry him for the serious crime that occurred in this case.⁶

⁶ Because we find Booth is entitled to a new trial on the grounds his attorney was ineffective for failing to bring a motion to dismiss due to precharging delay we need not consider whether

IV. DISPOSITION

The petition for a writ of habeas corpus is granted, the judgment is reversed and the matter is remanded for a new trial that shall be conducted in conformance with the views expressed herein. The appeal is dismissed as moot.

O'Leary, P. J., and Moore, J., concurred.

defense counsel was ineffective for the other reasons alleged in Booth's petition. This finding also renders moot the claims raised in Booth's direct appeal.

[No. G053068. Fourth Dist., Div. Three. Oct. 12, 2016.]

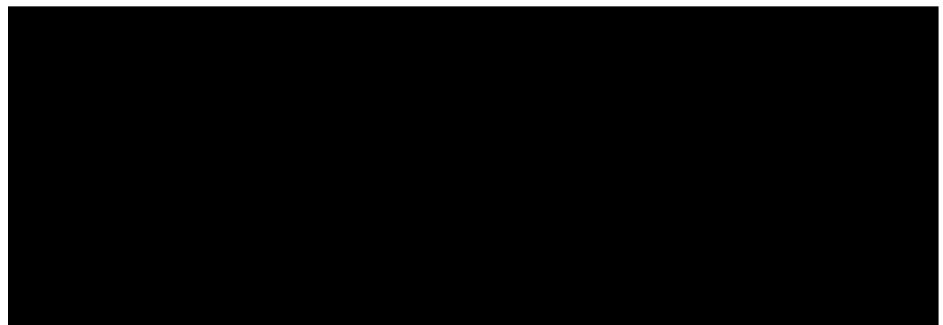
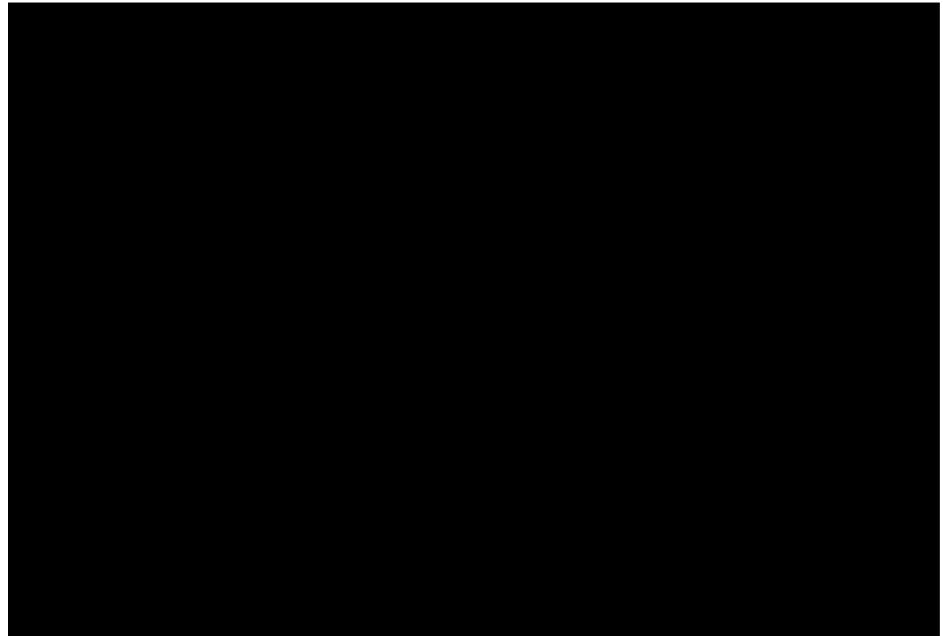
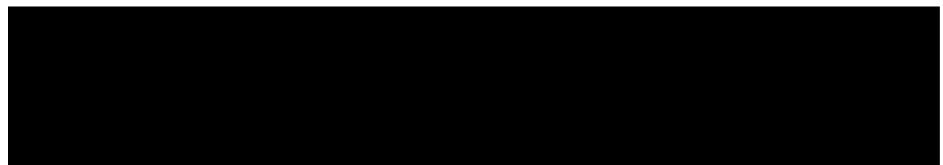
VERIO HEALTHCARE, INC., et al., Petitioners, v.
THE SUPERIOR COURT OF ORANGE COUNTY, Respondent;
SG HOME CARE, INC., et al., Real Parties in Interest.

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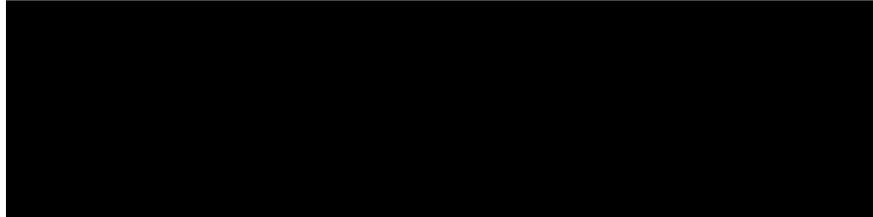
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COUNSEL

Buchalter Nemer and Donald P. Wagner for Petitioners.

No appearance for Respondent.

Rutan & Tucker, Richard K. Howell, Gerard M. Mooney and Kathryn D. Z. Domin for Real Parties in Interest.

OPINION

IKOLA, J.—Defendants Eric Schrier, Frank Frederick, and Angela Martinez had been employed in various capacities by plaintiff SG Homecare, Inc. (SG Homecare), before abruptly leaving to start a competing firm, defendant Verio Healthcare, Inc. (Verio Healthcare). SG Homecare filed the underlying complaint, alleging the individual defendants breached their contractual and fiduciary duties, and misappropriated trade secrets. Schrier and his wife cross-complained against SG Homecare and its owner, Thomas Randall Rowley (together, the SG parties), alleging wrongful termination and intentional infliction of emotional distress.

Defendant Verio Healthcare and the individual defendants are represented by Donald Wagner of the firm Buchalter Nemer, PLC. Shortly after the cross-complaint was filed, the SG parties moved to disqualify Buchalter Nemer. The motion was based on the assertion that shortly before the individual defendants' departure from SG Homecare, Buchalter Nemer executed a retainer agreement with SG Homecare and was either currently representing SG Homecare, or, alternatively, the present litigation is substantially related to Buchalter Nemer's prior representation of SG Homecare, requiring disqualification in either event.

■ At around the same time, defendants moved ex parte for a nine-month continuance of the entire litigation on the ground that defendants' attorney,

Donald Wagner, is a member of the California State Assembly.¹ Under sections 595 and 1054.1 of the Code of Civil Procedure,² attorneys who are members of the state Legislature are entitled to a continuance and an extension of time respectively unless the continuance or extension would defeat or abridge the other party's right to provisional or pendente lite relief. The SG parties opposed the motion, *inter alia*, on the ground that in *Thurmond v. Superior Court* (1967) 66 Cal.2d 836 [59 Cal.Rptr. 273, 427 P.2d 985] (*Thurmond*) our high court interpreted a prior version of sections 595 and 1054.1 as merely directory; to interpret the statutes as mandatory would have violated the separation of powers between the Legislature and the Judiciary. (*Thurmond*, at pp. 838–840.) The court denied the motion for a nine-month stay of the litigation without explaining the basis of its ruling.

Defendants petitioned this court for a writ of mandate ordering the trial court to grant the stay. We summarily denied the petition, but the California Supreme Court granted review and remanded to our court with instructions to issue an order to show cause. We issued an order to show cause, entertained argument, and now deny the requested writ for two reasons.

First, the court acted within its discretion by impliedly concluding the requested stay would “abridge a right . . . to invoke a provisional remedy” (§ 595), an express exception to the legislative directive making mandatory the granting of a continuance.

Second, although the 1968 amendment of sections 595 and 1054.1 purports to make a legislator-attorney’s request for a continuance mandatory—unless it would defeat or abridge a right to provisional relief—the amendment did not cure the constitutional deficiency identified by the *Thurmond* court if applied literally as a mandatory directive to the trial courts in other circumstances, such as staying discovery. Like the *Thurmond* court, we are not persuaded the Legislature intended to intrude on the right of the courts “‘to control [their] order of business and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs.’” (*Lorraine v. McComb* (1934) 220 Cal. 753, 756 [32 P.2d 960].) Accordingly, we hold that sections

¹ Hereafter, we will refer to defendants’ motion as a motion for a nine-month stay of the entire litigation, not a simple continuance motion, because the continuance requested by defendants encompassed “the trial and *all* pre-trial proceedings in this matter to a date that is more than thirty days beyond the final adjournment of the Legislature for the 2015–2016 session.” (Italics added.) Their motion concluded by arguing that “proceedings in this case, including any discovery, the filing of any motions or pre-trial documents, and trial itself must be held in abeyance under [Code of Civil Procedure] sections 595 and 1054.1 until, at the earliest . . . October 1, 2016.”

² All further statutory references are to the Code of Civil Procedure unless otherwise stated.

595 and 1054.1, despite the 1968 amendment of those sections, remain directory in nature, and that the statutes “are to be applied subject to the discretion of the court as to whether or not its process and order of business should be delayed.” (*Thurmond, supra*, 66 Cal.2d at pp. 839–840.)

ALLEGED FACTS

SG Homecare’s First Amended Complaint

According to SG Homecare’s operative first amended complaint, SG Homecare is a medical supply and delivery company providing equipment to patients, physicians, health plans, and others. Rowley owns SG Homecare.

Schrier was a longtime personal friend of Rowley’s. In October 2014, Schrier said he was experiencing financial difficulties, so Rowley offered to employ him at a starting salary of \$420,000. Schrier had no prior experience in the medical supply industry. Schrier’s employment contract stated, among other things, that he would not engage in any activity to compete with SG Homecare while employed there. Schrier also agreed not to use or disclose SG Homecare’s trade secrets, and not to solicit SG Homecare’s customers or employees for a period of one year after leaving SG Homecare’s employ.

Martinez was SG Homecare’s director of operations, and in that capacity she obtained knowledge of SG Homecare’s confidential information, including methods of operation, finances, customer relationships, and employees. In early 2015, Martinez admitted to embezzling over \$62,000 from SG Homecare, but Schrier convinced Rowley not to fire her, claiming Martinez’s services were needed to run the business.

Frederick was a consultant Schrier hired who worked out of SG Homecare’s Costa Mesa office and who acted as a representative of SG Homecare to procure and maintain relationships with current and potential clients. In that capacity he also obtained knowledge of confidential information, such as methods of operation, marketing, customer relationships, and employees.

While working at SG Homecare, unbeknownst to Rowley, the individual defendants were conspiring to form a competing firm, Verio Healthcare. Frederick incorporated Verio Healthcare on September 15, 2015, at which time the individual defendants were still employed by SG Homecare. On October 16, 2015, the individual defendants abruptly resigned from SG Homecare to work at Verio Healthcare.

After the individual defendants’ departure, SG Homecare discovered they had deleted numerous electronic files, including most of their e-mails, and

had removed various physical documents, including documents regarding SG Homecare's negotiations with potential clients. SG Homecare immediately demanded the return of these documents, but the defendants denied taking or destroying any documents.

SG Homecare also discovered that defendants were pursuing relationships and contracts with current and potential customers of SG Homecare, including Molina Healthcare, with which Frederick and Schrier had been negotiating on behalf of SG Homecare. Those negotiations had proceeded to the point where Molina Healthcare and SG Homecare had exchanged contract documentation. SG Homecare alleged such a contract would have generated "several millions of dollars of profits annually."

On November 20, 2015, SG Homecare filed a first amended complaint against Verio Healthcare and the individual defendants, asserting causes of action for breach of fiduciary duty, breach of contract, conversion, violation of Penal Code section 502 (unauthorized computer access),³ violation of Penal Code section 496 (receipt of stolen property), trade secret misappropriation, intentional interference with prospective economic advantage, unfair competition (Bus. & Prof. Code, § 17200), and an accounting.

On December 24, 2015, defendants answered the first amended complaint, denying the allegations, and defendant Schrier and his wife filed a cross-complaint against Rowley for wrongful termination (constructive termination) and intentional infliction of emotional distress. Donald Wagner was the signing attorney on both documents.⁴ Both documents listed one other attorney who, based on her bar number, appears to be an associate at the firm.

The Schriers' Cross-complaint

According to the Schriers' cross-complaint, Rowley and Schrier had known each other for 12 years, having met at a golf club. Beginning in January 2013, over a period of nine months Rowley attempted to recruit Schrier to work at SG Homecare. It was not until October 2014 that Schrier left his position in the print advertising industry and joined SG Homecare as its president.⁵ Over the next 10 months, Schrier doubled SG Homecare's monthly revenue.

³ Penal Code section 502, subdivision (e)(1) permits a civil action to recover expenses related to investigating the unauthorized computer access.

⁴ On July 1, 2016, we filed an order advising the parties we intended to augment the record to include the answer to the complaint. No opposition was filed. On the court's own motion, we augment the record to include the answer.

⁵ Given this timeline, the allegation that Rowley began recruiting Schrier in January 2013 may be a typographical error, as January 2014 would fit more comfortably with the allegation that Rowley recruited Schrier over a nine-month period.

“Unfortunately, . . . Schrier began to see a very dark side of . . . Rowley.” Rowley exhibited an explosive temper and was regularly intoxicated with alcohol and various drugs. Rowley ordered SG Homecare employees to purchase marijuana for Rowley using company funds. Rowley routinely made disparaging remarks to employees. For example, in business meetings Rowley would refer to Schrier as a “Jew Boy President” or “Jew President.”

Rowley had informed Schrier that SG Homecare was licensed to provide goods and services under Medicare and Medi-Cal in Orange County. This was false, and SG Homecare was benefiting from business that required such a license. Schrier discovered the falsehood and warned Rowley that this conduct was illegal, but Rowley did not remedy the problem.

After spending his first eight months on the job focusing on marketing and improving operations, Schrier turned his attention to SG Homecare’s finances. He discovered Rowley was using the company as his personal “Piggy Bank.” He was using company money to fund his drug habit and a lavish lifestyle, including making rental and mortgage payments on properties, auto payments for his girlfriend and adult children, and funding vacations in Hawaii and Mexico. To gain a tax advantage, Rowley falsely listed these expenses as company expenses. Schrier voiced his opposition to this practice and warned Rowley that the company would suffer in an audit, but Rowley ignored the warning. Schrier also discovered a major inaccuracy on SG Homecare’s tax records, which Rowley attempted to cover up by improperly recategorizing certain expenses without paying the additional taxes that would be owed.

In confronting Rowley about these various unethical and illegal practices, “Rowley repeatedly promised that he would ‘indemnify’ . . . Schrier for any damage caused by fraudulent activities. . . . Rowley went so far as to even offer to have his attorneys draft an indemnity agreement” “However, . . . Schrier was uncomfortable proceeding as an employee of [SG Homecare], despite the offer of an ‘indemnity agreement.’ ”

“Being constantly pressured to engage in fraudulent business activities and under the stress and pressure of being harassed for his religious and ethnic background, . . . Schrier believed that he had no alternative but to leave his position as president of [SG Homecare].”

In response, Rowley went into a fit of rage and left several profanity-laced, racist tirades on the voicemails of Schrier and his wife, threatening repeatedly to sue them and their five children. “Cross complainants were legitimately fearful for the[ir] lives and the lives of their children.” As a result, the Schriers called the Orange County Sheriff’s Department. A deputy responded,

and while the deputy was present, Rowley called again. The deputy answered, and Rowley “unleashed a profanity-laced tirade” at the deputy. The Schriers then hired an armed private investigator for their own safety, and obtained a temporary restraining order.

Competing Motions for Disqualification of Counsel and a Stay of All Proceedings

Less than two weeks after the cross-complaint was filed, on January 4, 2016, defendants moved the court for a continuance of the trial and all pretrial matters (in effect, a stay of all proceedings) based on the fact that their attorney, Donald Wagner, is a member of the Legislature, and thus entitled to a continuance. According to Wagner’s declaration, the Legislature reconvened from its interim recess on January 4, 2016, and was scheduled to adjourn for more than 40 days on August 31, 2016. Wagner stated, “Because of the press of legislative business in the 2016 session, I am occupied in Sacramento and unable to participate in pre-trial proceedings or otherwise prepare for trial.” The motion sought a continuance to a date on or after October 1, 2016. The hearing on the motion was set for February 3, 2016.

The next day, defendants *withdrew* the motion on the ground that “[g]ranting of a continuance under Code of Civil Procedure Section 595 is mandatory, and no hearing is required.”

Two days later, on January 7, 2016, there were three filings in quick succession. At 10:28 a.m., SG Homecare and Rowley filed a motion to disqualify Buchalter Nemer on the ground that the firm had recently represented SG Homecare in a substantially related matter. The hearing date was set for April 6, 2016. At 10:48 a.m., defendants filed an ex parte application to continue all proceedings on the same basis as their previous motion. In response, that afternoon, SG Homecare and Rowley filed an ex parte application to have the motion to disqualify heard the following day, or at the same time as the motion for a continuance. The following day, SG Homecare and Rowley filed an opposition to defendants’ motion for a continuance on the ground, *inter alia*, that they were entitled to a preliminary injunction in this case.

The motion to disqualify, supported by Rowley’s declaration, alleged many of the same facts recited in the first amended complaint. In addition, it alleged that in June or July 2015, Rowley happened upon a meeting in SG Homecare’s office between Schrier and attorneys from Buchalter Nemer, including Michael Caspino. When Rowley asked Schrier why he was meeting with attorneys from Buchalter Nemer when SG Homecare had previously used different attorneys, Schrier said Buchalter Nemer was better and would be serving as SG Homecare’s attorneys going forward.

After the individual defendants departed SG Homecare, Rowley discovered various documents pertaining to Buchalter Nemer's representation. In an e-mail dated June 3, 2015, Caspino stated that he and Julie Simer, another attorney at Buchalter Nemer, had recently toured SG Homecare's offices. The e-mail attached an engagement agreement. Schrier's calendar indicated that he met with Caspino for two hours on June 5, 2015. Schrier met with Caspino again on June 17, 2015, where Caspino introduced Schrier to Dan Starck, the CEO of Apria Healthcare, which is a competitor of SG Homecare. Caspino had previously indicated he could make this introduction without Rowley's knowledge.

On July 16, 2015, Schrier's assistant sent Caspino a fully executed engagement agreement between Buchalter Nemer and SG Homecare. Buchalter Nemer agreed to represent SG Homecare in connection with "general business matters."

In an August 6, 2015, e-mail exchange between Schrier and Attorney Simer, Schrier sent Simer a contract between SG Homecare and a client and discussed the amount of fees for her to review the contract. Rowley attested that the terms of such client contracts are confidential information, and that by sending Buchalter Nemer this contract, Buchalter Nemer gained access to confidential information. On September 8, 2015, Simer e-mailed Schrier asking if he would like Buchalter Nemer to review the contract.

On September 15, 2015 (the same day Verio Healthcare was incorporated), Caspino wrote to Schrier to "confirm that [Buchalter Nemer] will no longer act as counsel for SG Homecare." It went on to say, "Although we executed an engagement letter, our firm did not perform any services for SG Homecare."

The Hearing on the Motions and the Subsequent Writ Petition

Both ex parte motions were heard in chambers on January 8, 2016, and both were denied without explanation by the court. There was no reporter present in chambers, but according to the present writ petition, the court denied the stay request on the ground that another attorney at Buchalter Nemer could handle the case in Wagner's absence.

Defendants filed a petition for a writ of mandate in our court. We summarily denied the petition. Defendants sought review in the California Supreme Court, which granted review, issued an order staying the litigation, and transferred the matter back to our court to issue an order to show cause. We complied.

DISCUSSION

Although Technically Moot, We Decide This Case on the Merits Because the Issue May Otherwise Escape Appellate Review

■ We begin by addressing mootness. According to Wagner's declaration, the Legislature would be in session through August 31, 2016, and thus he sought a continuance through October 1, 2016. By the time this opinion is final, it will be beyond October 1, 2016. Since the California Supreme Court stayed the litigation, defendants have obtained the stay they sought through the appellate process. Nonetheless, we exercise our discretion to address the merits in this case because this issue is likely to occur in other cases where the appellate process may otherwise preclude meaningful review. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122 [105 Cal.Rptr.2d 46, 18 P.3d 1198] ["when, as here, an otherwise moot case presents important issues that are 'capable of repetition, yet evading review' [citations], we may resolve the issues"].)

Background: The Thurmond Decision and the Amendment of Sections 595 and 1054.1

Currently, section 595 provides, in relevant part, "The trial of any civil action, or proceeding in a court, . . . or the hearing of any motion, demurrer, or other proceeding, shall be postponed to a date certain when it appears to the court . . . that . . . any attorney of record therein . . . is a Member of the Legislature of this state and that the Legislature is in session . . . When the Legislature is in session . . . such action or proceeding shall not, without the consent of the attorney of record therein, be brought on for trial or hearing before the expiration of thirty (30) days next following final adjournment of the Legislature or the commencement of a recess of more than forty (40) days." "Granting of a continuance pursuant to this section is mandatory unless the court determines that such continuance would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted."⁶

The final paragraph of section 595, and similar language for extensions of time in section 1054.1, subdivision (b), was enacted in response to our high court's seminal decision in *Thurmond, supra*, 66 Cal.2d 836. *Thurmond* arose

⁶ Section 1054.1, under which defendants also moved, provides for similar relief to members of the Legislature, except that it applies to extensions of time for any "act [that] relates to the pleadings in the action."

from a paternity action in which a guardian ad litem for an unborn child sought pendente lite support from the alleged father to cover medical expenses incident to the pregnancy and birth. (*Id.* at p. 837.) The alleged father was represented by an assemblyman who sought a three-month continuance under sections 595 and 1054.1, which the court granted over the guardian ad litem's contention that the mother's expenses could not be postponed. (*Thurmond*, at pp. 838–839.)

■ The *Thurmond* court issued a writ reversing the trial court's decision. "We are persuaded that the statutory provisions upon which *Thurmond* relies should be viewed as directory only." (*Thurmond, supra*, 66 Cal.2d at pp. 838–839.) "'One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs.'" (*Id.* at p. 839.) Interpreting sections 595 and 1054.1 as mandatory would impair important rights in "cases in which a party has a right to invoke a provisional remedy, such as pendente lite support in domestic relations controversies, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining orders or preliminary injunctions. [Citation.] Situations other than those involving provisional remedies may also arise in which a substantial existing right would be defeated or abridged by extended continuances." (*Thurmond*, at p. 839.) "We are convinced that such a result, with the serious constitutional questions which would ensue, was not intended by the Legislature, and that the statutory provisions here involved are to be applied subject to the discretion of the court as to whether or not its process and order of business should be delayed. Especially is this true in the light of the 1966 amendment to the Constitution of this state, pursuant to which the Legislature may meet in extended annual regular sessions." (*Id.* at pp. 839–840, fn. omitted.)

■ "Among the factors to be considered by the court will be the nature and urgency of the rights involved [citation], whether the party seeking delay has or can secure other counsel to represent him for the particular step in the proceedings then before the court, and whether the attorney who is a member of the Legislature was employed for no other purpose than attempted delay. [Citations.] The legislative policy of granting continuances of court proceedings so as not to interfere unduly with the functions of the Legislature, reflected in section 595, has been in the law since 1880 and should be given full force and effect wherever and whenever it may be done without unduly adversely affecting the rights of others." (*Thurmond, supra*, 66 Cal.2d at p. 840, fns. omitted.)

Thurmond was decided in 1967. In 1968, the Legislature amended former section 595 to add the following provision: “Granting of a continuance pursuant to this section is mandatory unless the court determines that such continuance would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted.” (Stats. 1968, ch. 698, § 1, p. 1396.) A similar provision was added as subdivision (b) of section 1054.1. (Stats. 1968, ch. 698, § 2, p. 1397.)

The Court Did Not Abuse Its Discretion

■ We conclude the court did not abuse its discretion in denying defendants the requested extended stay of this matter for two reasons: (1) the court acted within its discretion by impliedly concluding the requested stay would “abridge a right . . . to *invoke* a provisional remedy” (§ 595, italics added), and (2) the 1968 amendment of sections 595 and 1054.1 did not cure the constitutional deficiencies identified by the *Thurmond* court if the statute is interpreted as mandatory, rather than directory.

1. *An Exception to the Mandatory Stay Language of Sections 595 and 1054.1, Subdivision (b) Applies to This Case*

As a preliminary matter, we note the absence of a record of what transpired in chambers where the court considered the ex parte motions. We do have a brief statement in a declaration from Wagner, submitted with the writ petition, that the court relied on the fact that Buchalter Nemer has other attorneys who can handle the matter. We also have a brief statement in a declaration from Gerard Mooney, attorney for SG Homecare, submitted in SG Homecare’s return to the writ petition, stating the court relied on the right to invoke provisional relief as well as the pending disqualification motion. A silent record has consequences. “A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409.) Thus, in the absence of a record of the discussion in chambers, we must presume the order of the court is correct, and that the court has made, expressly or impliedly, all findings necessary to support its order.

■ The court’s implied reliance on the potential that SG Homecare would seek a preliminary injunction, and the pending motion for disqualification of counsel, was entirely proper and sufficient under section 595 to justify

denial of the stay. Section 595 gives the court discretion to determine whether the requested stay would *abridge a right to invoke a provisional remedy*. It does not say the provisional remedy must already have been invoked. Here, plaintiffs presented allegations that defendants stole valuable trade secrets and were currently using those secrets to compete with real parties. The operative first amended complaint alleges an entitlement to preliminary and permanent injunctive relief as remedies for the alleged trade secret misappropriation and unfair competition under Business and Professions Code section 17200. In cases such as these, it is common that plaintiffs would invoke the provisional remedy of a preliminary injunction. And as plaintiffs' counsel suggested at oral argument, some discovery may be necessary before filing such a motion. A stay would effectively abridge the right to invoke provisional relief by denying discovery, thereby preventing the filing of a preliminary injunction motion.⁷

■ The pending disqualification motion was also a form of provisional relief that plaintiffs had already invoked. In *Meehan v. Hopps* (1955) 45 Cal.2d 213, 215 [288 P.2d 267], our high court held that a motion to disqualify counsel is appealable as an order “‘refusing to grant or dissolve an injunction.’” (See also *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 453 [111 Cal.Rptr.2d 842] [citing *Meehan* for the proposition “that an order denying disqualification of counsel is an order denying an injunction”].) Further, in *Benasra v. Mitchell Silberberg & Knupp* (2002) 96 Cal.App.4th 96, 110 [116 Cal.Rptr.2d 644], the court held an order on a disqualification motion is in the nature of a *preliminary injunction* rather than a permanent injunction. At oral argument, defendants responded that while an order on a disqualification motion may be in the *nature* of a preliminary injunction, it is not actually one. But section 595 is not so narrow: It permits denial of a stay where the stay would abridge the right to invoke provisional relief “such as” a preliminary injunction. Thus, on the face of the statute, denial of a stay was within the court's discretion.

2. *The 1968 Amendments of Sections 595 and 1054.1 Suffer the Same Constitutional Defect Identified in Thurmond*

As noted, defendants' motion was not limited to a request to continue a specific hearing. It sought to stay the entire litigation, without limiting the broad request to matters not exempted from the mandatory language of sections 595 and 1054.1. For that reason, we must also address the reach of these statutes in other contexts.

⁷ During oral argument, defendants' counsel suggested the court could issue a limited stay that excluded provisional relief from its scope. We offer no opinion on whether the text of sections 595 and 1054.1, subdivision (b), would support such a request, and deem it sufficient to note that defendants did not seek a stay with such limitations. Quite the contrary. Defendants' motion sought to shut the entire case down for nine months.

The 1968 amendment of sections 595 and 1054.1 did not cure the constitutional deficiencies identified in *Thurmond*. While the amendment directly incorporated a portion of what the *Thurmond* court found problematic about the statute, it left out this portion of the *Thurmond* opinion: “Situations other than those involving provisional remedies may also arise in which a substantial existing right would be defeated or abridged by extended continuances.” (*Thurmond, supra*, 66 Cal.2d at p. 839.)

Unless sections 595 and 1054.1, subdivision (b) are interpreted as directory, they continue to infringe on the independence of the judiciary. Our analysis is guided by the high court’s analysis in *People v. Engram* (2010) 50 Cal.4th 1131 [116 Cal.Rptr.3d 762, 240 P.3d 237] (*Engram*). *Engram* arose from the dismissal of a criminal case due to a large backlog of cases and severe shortage of resources in the underlying superior court. (*Id.* at p. 1136.) The superior court had devoted most, but not all, judges and courtrooms to conduct criminal trials. But the district attorney, appealing from the dismissal, argued its efforts were not enough—that the superior court was obligated under Penal Code section 1050 to devote *every* courtroom and judge to conduct criminal trials. (*Engram*, at p. 1137.) In relevant part, Penal Code section 1050 states, “It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.”

The *Engram* court analyzed whether this directive violated the independence of the judiciary. Two competing principles were at play: first, the judiciary’s inherent constitutional authority “‘to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants’” (*Engram, supra*, 50 Cal.4th at p. 1146), second, “‘[T]he power of the legislature to regulate criminal and civil proceedings and appeals’” (*Id.* at p. 1147.) “[T]he sum total of this matter is that the legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.’” (*Ibid.*)

The *Engram* court looked to precedent to determine what constitutes a material impairment of the court’s inherent functions. The court began with *Lorraine v. McComb, supra*, 220 Cal. 753 (*Lorraine*), which concerned a statute providing that “‘[i]n all cases, the court shall postpone a trial . . . for a period not to exceed thirty days, when all attorneys of record . . . agree in

writing to such postponement.’” (*Engram, supra*, 50 Cal.4th at p. 1147.) The *Lorraine* court had reasoned that if this were interpreted as an inflexible mandate, “the constitutionality of the statute would be questionable.” (*Engram*, at p. 1148.) It thus interpreted the statute as merely directory. (*Lorraine*, at p. 757.) The *Thurmond* court likewise relied on *Lorraine* in its analysis of sections 595 and 1054.1 (*Thurmond, supra*, 66 Cal.2d at pp. 838–839), and the *Engram* court went on to discuss *Thurmond* at length. (*Engram*, at p. 1149.)

The *Engram* court ultimately decided Penal Code section 1050 was saved from the constitutional issues identified in *Lorraine* and *Thurmond* because of one important qualification. Section 1050 urges criminal cases to be given priority “consistent with the ends of justice.” (*Engram, supra*, 50 Cal.4th at pp. 1150–1151.) “Because the statute explicitly recognizes a court’s fundamental and overriding obligation to administer the proceedings that are pending before it in a manner that is consistent with the ends of justice, past decisions have recognized that the provision cannot properly be interpreted as establishing an absolute or inflexible rule mandating such precedence under all circumstances or in total abrogation of a trial court’s ultimate control or discretion over the order in which the cases pending before it should be considered.” (*Id.* at p. 1151.)

■ The statutes before us contain no such qualification. To the contrary, with certain exceptions, sections 595 and 1054.1 explicitly describe the continuance or extension of time as “mandatory.” And as we noted above, the exceptions are directed entirely toward provisional relief and fail to account for our high court’s conclusion that a mandatory lengthy stay may hamper a court’s fundamental mandate even outside the context of provisional relief. We conclude, therefore, that sections 595 and 1054.1 are unconstitutional to the extent they purport to be mandatory, and should continue to be treated as directory, subject to a trial court’s discretion as set forth in *Thurmond*.

3. Application to This Case

Turning to the court’s ruling here, we conclude the court acted within its discretion in denying the stay. *Thurmond* identified three nonexclusive factors to guide a court’s discretion: (1) “the nature and urgency of the rights involved,” (2) “whether the party seeking delay has or can secure other counsel to represent him for the particular step in the proceedings then before the court,” and (3) “whether the attorney who is a member of the Legislature was employed for no other purpose than attempted delay.” (*Thurmond, supra*, 66 Cal.2d at p. 840.)

Regarding the first factor, SG Homecare’s complaint alleges an ongoing harm—a competing business utilizing its confidential information to steal

customers. If SG Homecare has a valid claim, the longer the lawsuit goes on, the more damage will be done, which may not be fully compensable with a damages award, particularly if some customers are permanently lost.

Regarding the second factor, defendants offered no reason why another attorney from Buchalter Nemer could not handle the matter at this early stage in the proceedings. The record reveals at least three attorneys from Buchalter Nemer who have appeared on defendants' behalf, and it is common knowledge that Buchalter Nemer is a large firm that enjoys a good reputation.

Regarding the third factor, we are not aware of evidence that Donald Wagner was brought into the case merely as a tactic to secure a continuance. The first two factors, however, are sufficient to support the court's exercise of its discretion in denying the stay.

DISPOSITION

The petition for a writ of mandate is denied. Having served its purpose, the order to show cause is discharged. In the interests of justice, this decision is final as to this court 10 days after the filing of this opinion. (Cal. Rules of Court, rule 8.490(b)(2)(A).) The stay issued by the California Supreme Court was to last “[p]ending further order of the Court of Appeal.” We order the stay lifted upon the finality of this decision as to this court. SG Homecare and Thomas Randall Rowley are entitled to recover their costs in this writ proceeding.

Aronson, Acting P. J., and Fybel, J., concurred.

Petitioners' petition for review by the Supreme Court was denied December 21, 2016, S238137.

