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NINTH CIRCUIT COURT OF APPEALS

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SUMMARIES

Copyright

Contractual assignee of bare right to sue for copyright infringement of newspaper articles had no exclusive rights in articles and thus lacked standing to sue (Clifton, J.)

Righthaven v. Hoehn

9th Cir.; May 9, 2013; 11-16751

The court of appeals affirmed in part and vacated in part judgments of the district court. The court held that a contractual assignee of a bare right to sue for copyright infringement of newspaper articles did not own any exclusive rights in those articles and thus lacked standing to sue.

Righthaven LLC contracted with third parties to identify infringements of copyrights on behalf of those parties and to sue for such infringements. Under such contracts, Righthaven received "limited, revocable assignement[s]" of copyrights and was entitled to sue for their infringement. Specifically, each copyright assignment purported to grant Righthaven "all copyrights requisite to have Righthaven recognized as the copyright owner" for purposes of Righthaven's being able to claim ownership and the right to sue for infringement. Righthaven separately sued Wayne Hoehn and Thomas DiBiase for posting online and without authorization copyrighted articles from a particular newspaper.

Hoehn and DiBiase both successfully moved to dismiss the Righthaven actions for lack of standing. The district court found that Righthaven did not own of any of the exclusive rights in the articles that was required for standing under the Copyright Act and pursuant to *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881 (9th Cir. 2005). With respect to Hoehn, the district court also alternatively found that a fair-use defense applied and granted Hoehn summary judgment on that ground. Righthaven appealed in both cases, which then were consolidated.

The court of appeals affirmed in part and vacated in part, holding that Righthaven lacked standing to sue Hoehn and DiBiase for copyright infringement.

Under 17 U.S.C. §501(b) of the Copyright Act, only the "legal or beneficial owner of an exclusive right under a copyright" has standing to sue for infringement of that right. The exclusive rights that can be held are listed in §106, but the right to sue for infringement is not among them. Accordingly, *Silvers* held that assignment of the bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under the Copyright Act and does not confer standing to sue. *Silvers* controlled here.

The mere presence of some language in the contract that described Righthaven as the owner did not itself prove that Righthaven owned any exclusive rights. Rather, the substance and effect of the contract provided that any copyrights transferred to Righthaven were subject to other contractual terms that placed limits on what Righthaven could do with any assigned copyright. Under those limits, Righthaven did not actually possess any exclusive rights under the Copyright Act.

The contract provided that the owner of the newspaper automatically received an exclusive license in any copyrighted work it assigned to Righthaven, so that the newspaper-owner retained "the unfettered and exclusive ability" to exploit the copyrights. Righthaven, on the other hand, had "no right or license" to exploit the work or to participate in any royalties associated with the exploitation of the work. Thus, the contract left Righthaven without any ability to reproduce the works, to distribute them, or to exploit any other §106 exclusive right.

The court noted that under §101, the exclusive license granted to the newspaper-owner constitutes a "transfer of copyright ownership." Thus, even if Righthaven was the copyright owner, under its grant of an exclusive license of particular rights, only the exclusive licensee and not the original owner could sue for infringement of those rights.

Moreover, the contract evinced not just an intent that Righthaven would receive whatever rights were necessary for it to sue, but also an intent that the newspaper-owner retain complete control over all exclusive rights. Thus, the problem was not, as Righthaven argued, that the district court did not read the contract in accord with the parties' intent. The problem was that what the parties intended was invalid under the Copyright Act and *Silvers.*

Finally, with respect to Hoehn, the district court lacked jurisdiction to grant summary judgment because Righthaven lacked standing to bring its action in the first instance. Accordingly, the summary judgment in favor of Hoehn had to be vacated.

Immigration Law

California crime of sexual penetration by foreign object constitutes categorical aggravated felony crime of violence (Beistline, J.)

United States v. Sandoval-Orellana

9th Cir.; May 9, 2013; 12-50095

The court of appeals affirmed a district court judgment. The court held that an immigrant was deportable as an aggravated felon upon conviction in California of the categorical aggravated felony crime of violence of sexual penetration by a foreign object.

After being admitted to the United States as a lawful permanent resident, Irvin Sandoval-Orellana was convicted of "sexual penetration by a foreign object" in violation of California Penal Code §289(a)(1). Sandoval-Orellana was later found removable under Immigration and Nationality

Act (INA) §237(a)(2)(A)(iii), which declares that any alien convicted of an aggravated felony after admission is deportable. Specifically, an immigration judge (IJ) found Sandoval-Orellana removable and ineligible for voluntary departure as an aggravated felon.

Sandoval-Orellana was detained later the same year when he attempted to re-enter the country. Sandoval-Orellana was indicted for attempted entry after deportation.

Sandoval-Orellana moved to dismiss the indictment on the ground that his original deportation was invalid. According to Sandoval-Orellana, he was wrongfully deported because he was never convicted of an aggravated felony and thus was eligible for various types of discretionary relief, including cancellation of removal, voluntary departure, and waiver of excludability. The district court denied the motion, and Sandoval-Orellana entered a conditional guilty plea.

The court of appeals affirmed, holding that Sandoval-Orellana's crime of conviction was a categorical aggravated felony crime of violence under 18 U.S.C. §16(b).

The court of appeals observed that an "aggravated felony" includes a "crime of violence" as defined in 18 U.S.C. §16, and for which the term of imprisonment is at least one year. Thus a crime of violence for purposes of the INA is (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The court first applied the categorical approach to determine whether Sandoval-Orellana's criminal offense qualified as an aggravated felony, turning to the language of the California Penal Code section under which he was convicted. That section criminalized an act of sexual penetration when the act was accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

The court rejected Sandoval-Orellana's attempt to analogize his crime to that of statutory rape, which had been deemed not categorically a crime of violence because of the possibility of the victim's consent. Unlike statutory rape, Sandoval-Orellana's crime did not rest on the victim's legal incapacity to consent, but rather required that the sexual penetration be accomplished against the victim's will. The crimes therefore were not analogous, as Sandoval-Orellana suggested.

The court noted that §16(b) requires only a substantial risk of violence, not actual violence. Here, the district court correctly concluded that some violations of California Penal Code §289(a) may not involve actual violence, but all will involve a substantial risk of violence. Sexual penetration against the victim's will might be done without force because of coercion, but it remained precisely the type of felony that, "by its nature" in the ordinary case, is accompanied by a "substantial risk" that physical force would be used during the crime. As a result, Sandoval-Orellana's California conviction qualified as a crime of violence under §16(b), he committed an aggravated felony, and he was deportable under INA §237(a)(2)(A)(iii).

The court found that California Penal Code §289(a)(1) proscribes a categorical aggravated felony crime of violence under §16(b). The court clarified, however, that because the crime also can be accomplished by means of duress, which does not necessarily involve the use, attempted use, or threatened use of violent physical force, §289(a)(1) did not qualify as a crime of violence under §16(a).

The court went on to explain that Sandoval-Orellana's sentence of fifty-seven months of imprisonment was reasonable.

Family Law

Father's prolonged and egregious sexual abuse of female child supported finding of dependency jurisdiction as to victim's male siblings (Chin, J.)

In re I.J.

Cal.Sup.Ct.; May 9, 2013; S204622

The California Supreme Court affirmed a decision of the court of appeal. The court held that a father's prolonged and egregious sexual abuse of his minor daughter was sufficient, standing alone, to support a finding of dependency jurisdiction as to his minor sons.

Twelve-year old I.J. reported that her father, J.J., had been molesting her. Upon investigation, the Los Angeles County Department of Children and Family Services discovered ongoing abuse, dating back at least two years. But I.J.'s younger sister and three younger brothers uniformly reported that they felt safe in the home, liked living with their parents, and were never touched inappropriately or in a sexual manner by their father or anyone else. None of them was aware of any inappropriate conduct by their father towards I.J.

The county initiated dependency proceedings as to both I.J. and her siblings. As to the siblings, the county asserted jurisdiction under Welf. & Inst. Code §§300(b), (d), and (j).

The dependency court sustained the county's petition as to all five children and ordered them removed from their father's custody, finding, by clear and convincing evidence, that there was "a substantial danger to the children, if returned to the home, to the physical health, safety, protection, physical, emotional well-being of the children," and that there were no reasonable means, short of removal, by which the children's physical health could be protected.

The court of appeal affirmed, holding that substantial evidence supported the dependency's court's findings.

Justice Flier dissented in part, finding that no substantial evidence supported jurisdiction over I.J.'s brothers.

The California Supreme Court affirmed, holding that J.J.'s abuse of his eldest daughter was sufficient to support the dependency court's finding of jurisdiction as to her three brothers.

The court acknowledged that there was no evidence that J.J. ever physically or sexually abused or neglected the three boys. The court found, however, that the three subdivisions of §300 at issue here, subdivisions (b), (d), and (j), do not require that a child actually be abused or neglected before the dependency court can assume jurisdiction. Rather, they require only a "substantial risk" of abuse or neglect. As stated in §300.2, the purpose of these provisions "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." The dependency court is not required to wait until a child is seriously abused or injured in order to assume jurisdiction and take measures to protect the child.

Where, as here, a dependency petition asserts multiple grounds for jurisdiction, a reviewing court can affirm the dependency court's finding of jurisdiction over the minor where any one of those statutory bases for jurisdiction is supported by substantial evidence. In this case, subdivision (j) was the one that most closely described the brothers' situation. That subdivision applies if (1) the child's sibling has been abused or neglected as defined in specified other subdivisions and (2) there is a substantial risk that the child will be abused or neglected as defined in those subdivisions. In this case, J.J. was found to have sexually abused the boys' sister. The first requirement was thus met. At issue was the second requirement.

As to that requirement, subdivision (j) includes a list of factors to be considered: "the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." By citing these factors, the court found, subdivision (j) implies that the more egregious the abuse, the more appropriate for the dependency court to assume jurisdiction over the siblings. If the sibling abuse is relatively minor, the dependency court might reasonably find insubstantial a risk the child will be similarly abused; but as the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse.

The court agreed with the majority below that the evidence in this case was sufficient to support a finding of dependency. The majority below accurately described J.J.'s behavior as "aberrant in the extreme." He both digitally penetrated his daughter's vagina and forcibly raped her. Also relevant to the totality of the circumstances was the violation of trust shown, as to all of the children, by J.J.'s sexual abuse of one child while the other children lived in the same home and could easily have learned of or even interrupted the abuse. The serious and prolonged nature of I.J.'s sexual abuse under these circumstances supported the dependency court's finding that the risk of abuse as to her siblings was substantial.

To the extent that *In re Alexis S.* (2012) 205 Cal.App.4th 48, *In re Maria R.* (2010) 185 Cal.App.4th 48, and *In re Rubisela E.* (2000) 85 Cal.App.4th 177 held that a father's sexual abuse of a female child could not, standing alone, support a finding of dependency jurisdiction as to male siblings, the court expressly disapproved those opinions.

Chin, J., joined by Cantil-Sakauye, C.J., and Kennard, Baxter, Werdegar, Corrigan, and Liu, JJ.

FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 13 C.D.O.S. 4665

RIGHTHAVEN LLC, Plaintiff-Appellant,

v.

WAYNE HOEHN, Defendant-Appelle*e.*

No. 11-16751
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:11-cv-00050-PMP-RJJ
Appeal from the United States District Court for the District of Nevada
Philip M. Pro, District Judge, Presiding

RIGHTHAVEN LLC, Plaintiff-Appellant,

v.

THOMAS A. DIBIASE, Defendant-Appellee.

No. 11-16776
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:10-cv-01343RLH-PAL
Appeal from the United States District Court for the District of Nevada
Roger L. Hunt, Senior District Judge, Presiding
Argued and Submitted February 5, 2013—Pasadena, California
Filed May 9, 2013
Before: Diarmuid F. O'Scannlain, Stephen S. Trott, and Richard R. Clifton, Circuit Judges.
Opinion by Judge Clifton

COUNSEL

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Steven J. Metalitz and J. Matthew Williams, Mitchell Silberberg & Knupp LLP, Washington, D.C., for amici curiae The Association of American Publishers and The Recording Industry Association of America.

OPINION

CLIFTON, Circuit Judge:

Abraham Lincoln told a story about a lawyer who tried to establish that a calf had five legs by calling its tail a leg. But the calf had only four legs, Lincoln observed, because calling a tail a leg does not make it so.[1] Before us is a case about alawyer who tried to establish that a company owned a copyright by drafting a contract calling the company the copyright owner, even though the company lacked the rights associated with copyright ownership. Heeding Lincoln's wisdom, and the requirements of the Copyright Act, we conclude that merely calling someone a copyright owner does not make it so.

Plaintiff Righthaven LLC filed separate copyright infringement suits against defendants Wayne Hoehn and Thomas DiBiase for posting articles from the *Las Vegas Review-Journal* online without authorization. The two cases have been consolidated on appeal. In each of the cases, the district court concluded that Righthaven lacked standing to sue for infringement because it was not the owner of any of the exclusive rights in the news articles required for standing under the Copyright Act and our decision in *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc). In *Hoehn*, the district court also held in the alternative that the defendant was covered by a fair use defense, and it granted summary judgment on that ground.

We agree that Righthaven lacks standing in both cases. Because Righthaven lacks standing, we also conclude that we lack jurisdiction to rule on the merits of the fair use claim. Therefore, we affirm the motions to dismiss in both cases, but vacate the portion of the district court order in *Hoehn* granting summary judgment on fair use.

I. BACKGROUND

Plaintiff Righthaven LLC was founded, according to its charter, to identify copyright infringements on behalf of third parties, receive "limited, revocable assignment[s]" of those copyrights, and then sue the infringers. Righthaven filed separate suits against defendants Hoehn and DiBiase for displaying copyrighted *Las Vegas Review-Journal* articles without authorization on different websites. Hoehn, who frequently commented in discussion boards at MadJackSports.com, had pasted an opinion piece about public pensions into one of his comments on the site. DiBiase, a former Assistant United States Attorney who maintained a blog about murder cases in which the victim's body was never found, reproduced an article about one of these "no body" cases on his blog.

Righthaven was not the original owner of the copyrights in these articles. Stephens Media LLC, the company that owns

1. *See* David Herbert Donald, *Lincoln* 396 (1995).

the *Las Vegas Review-Journal*, held them at the time defendants posted the articles. After the alleged infringements occurred, but before Righthaven filed these suits, Stephens Media and Righthaven executed a copyright assignment agreement for each article. Each copyright assignment provided that, "subject to [Stephens Media's] rights of reversion," Stephens Media granted to Righthaven "all copyrights requisite to have Righthaven recognized as the copyright owner of the Work for purposes of Righthaven being able to claim ownership as well as the right to seek redress for past, present, and future infringements of the copyright . . .in and to the Work."

Righthaven and Stephens Media had previously entered into a Strategic Alliance Agreement ("SAA"), however, that controlled what Righthaven could do with any copyrights assigned to it. After assignment of a copyright, Righthaven was to search for instances of infringement. When Righthaven found an infringement, it could pursue the infringer, but that right was subject to Stephens Media's veto. If Righthaven did not obtain a settlement or initiate litigation, it had to reassign the copyright to Stephens Media. Righthaven was required to split any recovery it received with Stephens Media.

The SAA also placed sharp limits on what Righthaven could do with any assigned copyright. Righthaven had no right to exploit the copyrights or participate in any royalties. Stephens Media retained "an exclusive license" to exploit the copyrights "for any lawful purpose whatsoever," and to the extent that Righthaven's pursuit of infringement would "in any manner" diminish Stephens Media's right to exploit the assigned copyrights, Righthaven granted a license to Stephens Media "to the greatest extent permitted by law so that Stephens Media shall have unfettered and exclusive ability" to exploit its copyrights. Moreover, by providing Righthaven thirty days prior notice, Stephens Media could revert the ownership of any assigned copyright back to itself.

After Righthaven filed suit against Hoehn and DiBiase, each defendant filed a motion to dismiss for lack of standing. Righthaven and Stephens Media subsequently executed a "Clarification and Amendment to Strategic Alliance Agreement." The agreement purported to clarify that the parties' intent in entering the SAA was to "convey all ownership rights in and to any identified Work to Righthaven through a Copyright Assignment so that Righthaven would be the rightful owner of the identified Work."

The district court in each case granted defendant's motion to dismiss based on Righthaven's lack of standing. In addition, in the *Hoehn* case, after granting defendant's motion to dismiss, the district court went on to grant defendant's motion for summary judgment on fair use as an alternative basis of decision. Righthaven timely appealed in both cases.

II. STANDING

In each of the decisions below, the district court held that Righthaven lacked standing to sue for copyright infringement. Reviewing de novo, *see Preminger v. Peake*, 552 F.3d 757, 762 n.3 (9th Cir. 2008), we reach the same conclusion.

Under the Copyright Act, only the "legal or beneficial owner of an exclusive right under a copyright" has standing to sue for infringement of that right. *See* 17 U.S.C. § 501(b); *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc) (holding that, under § 501, only a party with an ownership interest has standing to sue). Section 106 of the Copyright Act lists the "exclusive rights" that can be held. They include the right to reproduce the copyrighted work, to prepare derivative works based on the work, and to distribute copies of the work by selling, renting, leasing, or lending. *See* 17 U.S.C. § 106. Absent from the list of exclusive rights is the right to sue for infringement. Accordingly, we held en banc in *Silvers* that the assignment of the bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under the Copyright Act and does not confer standing to sue. 402 F.3d at 890. That covers Righthaven, for all it was really assigned was a bare right to sue for infringement.

Righthaven contends that it owns one or more "exclusive rights" under the Copyright Act pursuant to the express language of the assignment contracts, which stated that Righthaven received "all copyrights requisite to have Righthaven recognized as the copyright owner of the Work for purposes of Righthaven being able to claim ownership as well as the right to seek redress for past, present, and future infringements of the copyright . . . in and to the Work." That some language in the contract described Righthaven as the owner, however, does not itself prove that Righthaven owned any exclusive rights.

When determining whether a contract has transferred exclusive rights, we look not just at the labels parties use but also at the substance and effect of the contract. *See Campbell v. Bd. of Trs. of Leland Stanford Junior Univ.*, 817 F.2d 499, 503–04 (9th Cir. 1987). In *Campbell*, a contract concerning a copyright specifically stated that Stanford, the original owner, remained "the sole and exclusive proprietor" of the copyright. *Id.* at 503. The district court relied on this language to conclude that no copyright interest had been transferred. *Id.* at 503–04. We reversed, concluding that even though Stanford "purport[ed] to retain 'ownership' of the copyrights . . . Stanford clearly transferred part of [its] property interest" to the other party. *Id.* at 504; *see also Nafal v. Carter*, 540 F. Supp. 2d 1128, 1141–43 (C.D. Cal 2007) (looking at the substance of an assignment contract purporting to give plaintiff ownership and concluding that the plaintiff had been assigned only the right to sue), *aff'd*, 388 F. App'x 721 (9th Cir. 2010).

Therefore, that the assignment agreements used language purporting to transfer ownership to Righthaven is not conclusive. We must consider the substance of the transaction. The SAA provided that any copyrights transferred to Righthaven were subject to the terms of the SAA, and many of these terms placed limits on what Righthaven could do with any copyright assigned to it. Those limits lead us to conclude that Righthaven did not actually possess any exclusive

rights under the Copyright Act.The SAA provided that Stephens Media automatically received an exclusive license in any copyrighted work it assigned to Righthaven, so that Stephens Media retained "the unfettered and exclusive ability" to exploit the copyrights. Righthaven, on the other hand, had "no right or license" to exploit the work or participate in any royalties associated with the exploitation of the work. The contracts left Righthaven without any ability to reproduce the works, distribute them, or exploit any other exclusive right under the Copyright Act. *See* 17 U.S.C. § 106. Without any of those rights, Righthaven was left only with the bare right to sue, which is insufficient for standing under the Copyright Act and *Silvers.*

Righthaven makes a number of arguments to avoid this result, but none are persuasive. First, Righthaven argues that the sequence of transactions set forth in the assignment contract and SAA made it the owner of exclusive rights and left Stephens Media as a mere licensee. According to this argument, Righthaven was given full ownership of the contract under the assignment contract. The SAA, in turn, required Righthaven to grant an exclusive license in the copyright to Stephens Media. Righthaven argues that, as a matter of logic, Righthaven could have granted a license to Stephens Media only if ownership first vested in Righthaven.

This argument again emphasizes form over substance. But even analyzing it on its own formalistic terms, the argument still fails because once Righthaven granted Stephens Media an exclusive license, Righthaven was no longer the owner of exclusive rights under the Copyright Act. The Copyright Act does not distinguish between transferring a copyright via an assignment or an exclusive license. Both, unlike an assignment of a non-exclusive license, constitute a "transfer of copyright ownership." 17 U.S.C. § 101; *see also Campbell*, 817 F.2d at 504 (relying on this section of the Copyright Act to construe a contract as transferring the ownership of a copyright, even though the contract used the term "exclusive license"). It follows that if a copyright owner grants an exclusive license of particular rights, only the exclusive licensee and not the original owner can sue for infringement of those rights. 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.02[C] (2012).

Righthaven also argues that the district court failed to construe the contract in accordance with the "parties' intent to convey all rights necessary . . . for Righthaven to have standing." Under Nevada law, which the SAA provided should govern its interpretation, courts should effectuate the intent of the parties when construing ambiguous contracts. *Sheehan & Sheehan v. Nelson Malley & Co.*, 117 P.3d 219, 223–24 (Nev. 2005). But the contract was not ambiguous. The SAA clearly delineated the respective rights of Righthaven and Stephens Media in any assigned works. Moreover, the contract evinced not just an intent that Righthaven receive whatever rights were necessary for it to sue, but also an intent that Stephens Media retained complete control over all exclusive rights. The problem is not that the district court did not read the contract in accordance with the parties' intent; the problem is that what the parties intended was invalid under the Copyright Act.

Righthaven chastises the district court for not correcting any defect in the agreement, as allowed by the SAA. The SAA provided: "If any provision of this Agreement should be held to be void or unenforceable . . . then such court shall correct the defect . . . to approximate the manifest intent of the Parties." But Righthaven cites no authority suggestingthat the district court had an obligation to reshape its contract. And, as explained above, the parties' intended result was invalid under the Copyright Act and *Silvers*, so reshaping the contract in light of that intent could not have saved it.

Finally, Righthaven argues that it has standing under the amended version of the SAA. After the defendants had each filed a motion to dismiss for lack of standing, Righthaven and Stephens Media executed a "Clarification and Amendment to Strategic Alliance Agreement." The agreement purported to clarify that the parties' intent in entering the SAA was to "convey all ownership rights in and to any identified Work to Righthaven through a Copyright Assignment so that Righthaven would be the rightful owner of the identified Work" and made several substantive amendments to the SAA that applied retroactively to all copyright assignments executed under the original SAA.

In general, jurisdiction is based on facts that exist at the time of filing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992); *see also Keene Corp. v. United States*, 508 U.S. 200, 207–08 (1993) (in affirming a motion to dismiss on jurisdictional grounds, looking at the facts as they existed at the time the complaint was filed, rather than the time of the trial court's ruling on the motion to dismiss as urged by plaintiff). The Supreme Court has enunciated few exceptions to this general principle. *See, e.g.*, *NewmanGreen, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (holding that federal courts can dismiss dispensable nondiverse parties to cure jurisdictional defects). So far, permitting standing based on a property interest acquired after filing is not one of them.

We need not decide whether the circumstances of this case call for a new exception to the general rule, however, because Righthaven lacked standing either way. Even under the amended SAA, Righthaven did not possess any exclusive rights. At first blush, the amendments to the SAA appear to have removed the most obvious impediments to Righthaven having standing. The amendments removed the provision explicitly prohibiting Righthaven from exploiting assigned copyrights. In addition, instead of receiving an exclusive license, Stephens Media received a non-exclusive license. But these changes made little practical difference to Righthaven's ability to exploit the copyrights, however, in light of limitations added by the amendments.

For example, under the amended SAA, Righthaven could only exploit a work if it gave Stephens Media thirty days prior notice. And Stephens Media could ensure that Righthaven never actually exploited any assigned copyright, because it

retained the unilateral right to repurchase all rights and title back from Righthaven after giving fourteen days notice and paying a nominal sum of ten dollars. Consequently, Righthaven was still unable to exploit any exclusive rights unless Stephens Media permitted it to. Meanwhile, Stephens Media was free to exploit the works to the full extent it wished, and it presumably would with any article that it perceived to have additional value. A hypothetical possibility that Righthaven might be able to exercise exclusive rights if Stephens Media decided to allow it at the time is not sufficient for standing.

Under either the original or amended SAA, Righthaven was not the owner of any exclusive rights under the Copyright Act. It therefore lacked standing to sue forinfringement. The motions to dismiss in both *Hoehn* and *DiBiase* were properly granted.

III. FAIR USE

In *Hoehn*, after the district court granted defendant's motion to dismiss for lack of subject matter jurisdiction on the ground that Righthaven lacked standing, it went on to grant defendant's motion for summary judgment on fair use, thus providing an alternative basis for decision in favor of defendant. Righthaven argues that, if it lacks standing, then the court has no power to reach the merits of the fair use defense. In that position it is joined by amici curiae The Association of American Publishers and The Recording Industry Association of America. We agree.

The Supreme Court has rejected the "doctrine of hypothetical jurisdiction," in which a federal court assumes jurisdiction for the purpose of reaching the merits, as the practice "carries the courts beyond the bounds of authorized judicial action." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). In *Steel Co.*, after the Court determined that the respondent lacked standing to maintain the suit, it held that the Court and lower courts lacked Article III jurisdiction to reach the merits question and vacated the judgment below. *Id.* at 110.

Hoehn argues that subject matter jurisdiction and standing are separate concepts, and that even if Righthaven lacked standing to sue, the district court still had subject matter jurisdiction over the dispute. The holding in *Steel Co.*, however, pertained to reaching the merits when a court lacked Article III jurisdiction on account of standing, which is precisely the situation in this case. In the absence of standing, a federal court "lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co.*, 523 U.S. at 101). Therefore, absent an exception to the rule in *Steel Co.*, we must vacate the grant of summary judgment below.

We have recognized that "jurisdiction [can be] so intertwined with the merits that its resolution depends on the resolution of the merits." *Orff v. United States*, 358 F.3d 1137, 1150 (9th Cir. 2004) (internal quotation marks omitted), *aff'd*, 545 U.S. 596 (2005). This is not one of those cases. The analysis the district court performed in analyzing the fair use defense—which focused on Hoehn's use of the article, the nature of the article itself, and the market impact of the use—is distinct from the analysis of the assignment contracts that was necessary for determining standing.

We understand why the district court reached the fair use issue. By providing an alternative basis for decision, the court sought to deal with this case in a more efficient manner. If we disagreed with the district court and concluded that Righthaven had standing to bring this copyright infringement action, we could have proceeded directly to the next issue, fair use, without requiring a remand and a further appeal.

Nonetheless, because we agree that Righthaven did not have standing, it is not appropriate for us to go further or for the district court's alternative ruling to stand. We therefore vacate the portion of the district court's order that analyzed the merits of the fair use defense and granted the motion for summary judgment.

IV. CONCLUSION

We affirm the dismissal for lack of standing in both cases. In *Hoehn*, we vacate the portion of the district court's order granting the motion for summary judgment on fair use grounds. Costs are awarded to defendants-appellees.

AFFIRMED IN PART; VACATED IN PART.

Cite as 13 C.D.O.S. 4669

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

IRVIN SANDOVAL-ORELLANA,
Defendant-Appellant.

No. 12-50095
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:11-cr-00920BEN-1
Appeal from the United States District Court for the Southern District of California
Roger T. Benitez, District Judge, Presiding
Argued and Submitted March 6, 2013—Pasadena, California
Filed May 9, 2013
Before: Sidney R. Thomas and Andrew D. Hurwitz, Circuit Judges, and Ralph R. Beistline, Chief District Judge.*
Opinion by Judge Beistline

* The Honorable Ralph R. Beistline, Chief District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

COUNSEL

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OPINION

BEISTLINE, Chief District Judge:

Irvin Sandoval-Orellana appeals his conviction of attempted entry after deportation in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

Sandoval-Orellana was born in Guatemala in 1979 and was admitted to the United States on or about August 28, 1992, as a lawful permanent resident. In August 2003, he was convicted of "sexual penetration by foreign object" in violation of California Penal Code ("PC") § 289(a)(1), for which he was sentenced to three years in custody.

On April 27, 2010, Sandoval-Orellana was served with a notice to appear, and on May 24, 2010, was placed in deportation proceedings. The immigration judge ("IJ") found him removable under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), which states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii).[1] Sandoval-Orellana requested voluntary departure, but the IJ found him ineligible because he was an aggravated felon. Sandoval-Orellana was removed from the United States to Guatemala on or about June 15, 2010.

On December 31, 2010, Sandoval-Orellana applied for entry into the United States at the San Ysidro, California, Port of Entry. He presented what appeared to be a valid permanent resident card and indicated that he was traveling back to Los Angeles from a visit with family in Mexico. He was detained by immigration. On March 9, 2011, a grand jury returned an indictment charging Sandoval-Orellana with attempted entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b).

A person accused of violating 8 U.S.C. § 1326 may collaterally attack the underlying deportation in certain circumstances. 8 U.S.C. § 1326(d). Accordingly, on April 26, 2011, Sandoval-Orellana filed a motion to dismiss the indictment, claiming that his original deportation was invalid.

On July 25, 2011, the district court issued a written decision denying Sandoval-Orellana's Motion to Dismiss. *United States v. Sandoval-Orellana*, No. 3:11-cr-920 BEN (S.D. Cal. July 25, 2011). Sandoval-Orellana subsequently entered a conditional guilty plea and was sentenced to fifty-seven months in prison and three years of supervised release.

Sandoval-Orellana appeals, arguing that he was wrongfully deported because he was never convicted of an aggravated felony and thus was eligible for various types of discretionary relief, including cancellation of removal under 8 U.S.C. § 1229b(a), voluntary departure under 8 U.S.C. § 1229c, and waiver of excludability under 8 U.S.C. § 1182(h). Sandoval-Orellana also argues the fifty-seven month sentence imposed was more severe than necessary to meet the goals of 18 U.S.C. § 3553(a).

II.

Under Section 237(a)(2)(A)(iii) of the INA, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" includes "a crime of violence" as defined in 18 U.S.C. § 16 for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). A crime of violence under Title 18 (and for purposes of the INA) is defined as

1. In addition to his conviction for unlawful penetration, Sandoval-Orellana was also deemed removable under INA Section 237(a)(2)(A)(ii) for having been convicted of two crimes involving moral turpitude, forgery (PC § 475(c)) and grand theft (PC § 487), which did not arise out of a single scheme of criminal conduct. 8 U.S.C. § 1227(a)(2)(A)(ii). This finding is not at issue in this appeal.

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (emphasis added).

We review whether a prior conviction constitutes a crime of violence de novo. *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1049 (9th Cir. 2003). We also review de novo the denial of a motion to dismiss pursuant to 8 U.S.C. § 1326(d). *United States v. Ramos*, 623 F.3d 672, 679 (9th Cir. 2010). A district court's findings of fact underlying its denial of such a motion are reviewed for clear error, and we may affirm the denial of a motion to dismiss on any basis supported by the record. *See United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042 (9th Cir. 2012).

To determine whether a criminal offense qualifies as an aggravated felony, we first apply the categorical approach set out in *Taylor v. United States*, 495 U.S. 575 (1990).[2] Under that approach, we "look only to the fact of conviction and the statutory definition of the prior offense and compare it to the generic definition of the offense." *Ramirez-Villalpando v. Holder*, 645 F.3d 1035, 1039 (9th Cir. 2010) (internal quotation marks and citation omitted).

PC § 289(a)(1) states, in relevant part: "Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment." (emphasis added). Sandoval-Orellana notes that PC § 289 can be violated with consent given under duress, and therefore argues that commission of the crime does not necessarily involve violence. He attempts to draw a parallel with *Valencia v. Gonzales*, in which we held that statutory rape in violation of PC § 261.5(c) is not categorically a crime of violence given the possible consensual nature of such sexual intercourse. *See* 439 F.3d 1046, 1051, 1053 (9th Cir. 2006). The *Valencia* court noted that the statute prohibits a broad range of conduct including "consensual sexual intercourse between a twenty-one-yearold and a minor one day shy of eighteen," and thus reasoned that violation of the statute did not necessarily involve a substantial risk of violence under § 16(b). *Id.* at 1051–52. Sandoval-Orellana suggests the same rationale demonstrates that PC § 289(a)(1) is not categorically a "crime of violence" under § 16(b).

But a conviction under PC § 289(a) does not rest on the victim's legal incapacity to consent to sexual penetration; rather, it requires that the sexual penetration be accomplished "against the victim's will." PC § 289(a)(1). The statutory rape provision in *Valencia*, PC § 261.5(c), contains no comparable language.[3] The rationale of *Valencia* therefore does not apply.

Section 16(b) does not require actual violence, but rather only a substantial risk of violence. We agree with the district court's conclusion that although some violations of PC § 289(a) may not involve actual violence, all will involve a substantial risk of violence. Although sexual penetration against the victim's will may be accomplished without the use of any physical force because psychological coercion may suffice, this is precisely the type of felony that "by its nature" brings with it a "substantial risk" that physical force will be used during the course of the crime. *See Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005) (finding that sexual battery under California PC § 243.4(a) carries a substantial risk of force).[4] The district court aptly noted that "sexual penetration of another person's body is not the type of conduct that occurs accidentally or negligently," and that it involves an intimate violation likely to elicit physical resistance from the victim. It therefore concluded that Sandoval-Orellana's prior California conviction for violating PC § 289(a)(1) categorically qualified as a "crime of violence" under 18 U.S.C. § 16(b), and therefore he had committed an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), making him deportable under INA § 237(a)(2)(A)(iii).

We agree. In *James v. United States*, 550 U.S. 192 (2007), the Supreme Court explained that the "ordinary case" is the proper focal point of a court's inquiry under the categorical approach:

> [T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury—for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets[.]

Id. at 208 (emphasis added) (citation omitted). Sandoval-Orellana would have us do precisely what *James* advises against, hypothesizing a case where a person consents to sexual intercourse under duress in circumstances not present-

2. The court concludes that the modified categorical approach also discussed in *Taylor* is not relevant in this case.

3. "Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison." Cal. Penal Code § 261.5(c) (1997).

4. *Lisbey* is distinguishable insofar as a conviction for sexual battery under PC § 243.4(a) "requires that the sexual touching not only be committed against the victim's will, but also by the restraint of the victim." *Lisbey*, 420 F.3d at 933. While this attribute of PC § 243.4(a) strengthens the case for finding sexual battery to be a categorical crime of violence, however, it does nothing to undermine the conclusion that forcible sexual penetration in violation of PC § 289(a) is also a crime of violence because it too involves a substantial risk that force will be used.

ing a real risk of violence, such as where the victim agrees to have sex to avoid eviction or professional reprisals. He argues that in both examples duress could support a conviction, and the statute therefore criminalizes conduct that does not create a "substantial risk that physical force may be used" because the intercourse would be consensual. But this argument requires the sort of theoretical possibility that was cautioned against in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007)[5]:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. at 193.

We agree with the district court that in the "ordinary case," a conviction for sexual penetration with a foreign object involves a substantial risk of the use of force against another and therefore qualifies as an aggravated felony crime of violence as defined in 8 U.S.C. § 1101(a)(43)(F). We accordingly find that PC § 289(a)(1) proscribes a categorical aggravated felony crime of violence under 18 U.S.C. § 16(b). However, because the crime may also be accomplished by means of "duress" and duress does not necessarily involve the use, attempted use, or threatened use of violent physical force, we find that sexual penetration in violation of PC § 289(a)(1) does not qualify as a crime of violence under § 16(a).

III.

Sandoval-Orellana also collaterally attacks the deportation order. "To succeed in such a challenge . . . an alien must demonstrate that: '(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.'" *Reyes-Bonilla*, 671 F.3d at 1042–43 (quoting 8 U.S.C. § 1326(d)).

Even assuming arguendo that Sandoval-Orellana could satisfy the first two requirements, he cannot meet the third. To show fundamental unfairness, he must establish prejudice. *United States v. Bustos-Ochoa*, 704 F.3d 1053, 1056 (9th Cir. 2012). Because we conclude that Sandoval-Orellana has been convicted of an aggravated felony, he cannot establish prejudice. *Id.* at 1056–57.

IV.

We review all sentences—"whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). However, absent objection at sentencing, we review for plain error a claim that the district court procedurally erred by failing to adequately explain its sentence. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). We will reverse under the plain error standard only if we find error, the error was obvious, and the error affected the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993).

We also review sentences to ensure that they are procedurally reasonable, which requires us to determine whether the district court appropriately responded to any nonfrivolous arguments for a below-Guideline sentence made by the defendant. *United States v. Carty*, 520 F.3d 984, 992–93 (9th Cir. 2008) (en banc). In determining reasonableness, a reviewing court determines whether the district court properly calculated the Guideline range, properly treated the Guidelines as advisory, evaluated the factors under 18 U.S.C. § 3553(a), and adequately explained the reasons for the sentence. *Id.* In particular, we review whether the district court committed a significant procedural error. A district court commits "significant procedural error" by "failing to consider the § 3553(a) factors" or by "failing to adequately explain the chosen sentence." *Gall*, 552 U.S. at 51.

There is no dispute here as to the proper Guidelines calculation. Nor is there a dispute that Sandoval-Orellana was given the opportunity to argue for a reduced sentence. But Sandoval-Orellana argues that the sentence imposed was more severe than necessary to meet the goals of 18 U.S.C. § 3553(a) and complains that the district court failed to adequately address his argument for imposition of a below-Guideline thirty-six month sentence.

It is well established that "when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation." *Rita v. United States*, 551 U.S. 338, 356 (2007). When a party raises a specific, non-frivolous argument that is relevant to sentencing, "the judge should normally explain why he accepts or rejects the party's position." *Carty*, 520 F.3d at 992–93. However, the district court's failure to do so is not procedural error where "adequate explanation" may "be inferred from the PSR or the record as a whole." *Id.* at 992. A thorough explanation is not necessary where the defendant's argument for a lower sentence is straightforward and uncomplicated. *United States v. Overton*, 573 F.3d 679, 699–700 (9th Cir. 2009).

If the record "makes clear that the sentencing judge listened to each argument" and "considered the supporting evidence," the district court's statement of reasons for the

5. It also requires us to ignore the significant possibility that a victim who "consents" to sexual intercourse against his or her will under duress may change his or her mind during the act and begin to resist, prompting the perpetrator to use force to complete the act.

sentence, although brief, will be "legally sufficient." *Rita*, 551 U.S. at 358. Here, the district court announced a tentative sentence of sixty-three months. But after hearing from defense counsel and Sandoval-Orellana, and after considering all the § 3553(a) factors, the district court imposed a sentence at the low end of the advisory range, and six months lower than its previously-announced tentative sentence. The district court specifically noted that it saw nothing that would warrant a variance below the Guideline range. The record as a whole shows that the district court considered Sandoval-Orellana's claims about his rehabilitation. There is no plain error.

CONCLUSION

Sandoval-Orellana's prior conviction for unlawful sexual penetration in violation of California Penal Code § 289(a)(1), for which he was sentenced to more than one year in custody, constituted an aggravated felony under 18 U.S.C. § 16(b) and 8 U.S.C. § 1101(a)(43)(F). Accordingly, he was ineligible for discretionary relief as an aggravated felon and the district court appropriately denied his motion to dismiss. The fifty-seven month sentence was reasonable.

AFFIRMED.

Cite as 13 C.D.O.S. 4672

MARTIK SARGSYAN and KRISTINE SARGSYAN, Petitioners,

v.

ERIC H. HOLDER, JR., Attorney General, Respondent.

No. 08-72040
United States Court of Appeals for the Ninth Circuit
Agency Nos. A078-249-396, A078-364-947
Filed May 9, 2013
Before: Jerome Farris, John T. Noonan, and Jay S. Bybee, Circuit Judges.

ORDER

The motion for attorney's fee is DENIED. The government's position was substantially justified.

NOONAN, Circuit Judge, concurring:

I concur because the statute is clear. I regret the result. An able and experienced lawyer who devoted substantial time to aid persons threatened with deportation is denied remuneration for her services. At the very least, we should be able to postpone a decision on the fees until the conclusion of the case. The EAJA does not work well when it compels a court to cut off compensation of careful and effective advocacy.

Cite as 13 C.D.O.S. 4673

In re I.J. et al., Persons Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent,

v.

J.J., Defendant and Appellant.

No. S204622
In The Supreme Court Of California
Ct.App. 2/8 B237271
(Los Angeles County) (Super. Ct. No. CK 59248)
Filed May 9, 2013

COUNSEL

Cristina Gabrielidis, under appointment by the Supreme Court, and Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer B. Henning for California State Association of Counties as Amicus Curiae on behalf of Plaintiff and Respondent.

OPINION

The Court of Appeal upheld a juvenile court's finding that a father sexually abused his daughter over a three-year period. It further held that this finding supports the determination that the daughter and her younger sister are dependents of the court under Welfare and Institutions Code section 300. Those questions are not before us. Rather, we must decide whether a father's sexual abuse of his *daughter* supports a determination that his *sons* are juvenile court dependents when there is no evidence the father sexually abused or otherwise mistreated the boys, and they were unaware of their sister's abuse before this proceeding began.

We conclude that a father's prolonged and egregious sexual abuse of his own child may provide substantial evidence to support a finding that all his children are juvenile court dependents.

I. FACTS AND PROCEDURAL HISTORY

We take these facts largely from the majority opinion in the Court of Appeal.

J.J. (father) is the father of two daughters and three sons. On August 8, 2011, the Los Angeles County Department of Children and Family Services (Department) filed a petition alleging that all five children — daughters who were then 14 and nine years old, twin 12-year-old boys, and a boy who would soon turn eight years old — were dependents of the juvenile court under Welfare and Institutions Code section 300.[1] The petition alleged that father had sexually abused I.J., the older daughter, and that the abuse also placed the younger siblings at risk of harm. Regarding the younger siblings, the petition cited section 300, subdivisions (b) (failure to protect), (d) (sexual abuse), and (j) (abuse of sibling). Father denied the allegations of sexual abuse.

The juvenile court sustained allegations that on August 2, 2011, "and on prior occasions for the past three years," father sexually abused I.J. "by fondling the child's vagina and digitally penetrating the child's vagina and forcefully raped the child by placing the father's penis in the child's vagina. On prior occasions, the father forced the child to expose the child's vagina to the father and the father orally copulated the child's vagina. On a prior occasion, the father forced the child to watch pornographic videos with the father. [I.J.] is afraid of the father due to the father's sexual abuse of [I.J.]. The sexual abuse of [I.J.] by the father endangers [I.J.'s] physical health and safety and places the child and the child's siblings… at risk of physical harm, damage, danger, sexual abuse and failure to protect."

There is no evidence or claim that father sexually abused or otherwise mistreated his three sons, and the evidence indicates that they had not witnessed any of the sexual abuse and were unaware of it before this proceeding began. The boys said they felt safe in the home and liked living with their parents.

After sustaining the factual allegations, the juvenile court declared all the children dependents of the court. It found, "by clear and convincing evidence, … that there is a substantial danger to the children, if returned to the home, to the physical health, safety, protection, physical, emotional well-being of the children, and there are no reasonable means by which the children's physical health can be protected without removing the children from the father's custody in this case." It removed the children from father's custody, and ordered them placed with their mother under the Department's supervision. The court ordered visits for father monitored by someone other than the mother, and ordered father to attend a "program of sex abuse counseling for perpetrators" and to undergo family counseling.

Father appealed. The Court of Appeal unanimously held that the evidence was sufficient to support the juvenile court's finding that father had sexually abused I.J., and that the abuse supported the court's declaring I.J. and her sister to be dependants of the court. It divided on the question of whether the abuse also warranted the court's further declaring her brothers

1. Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

to be dependents of the court. The majority, in an opinion by Justice Grimes, joined by Presiding Justice Bigelow, upheld the jurisdictional finding. Justice Flier dissented, arguing that father's sexual abuse of his daughter, without more, did not warrant the court's assuming jurisdiction over his sons.

We granted father's petition for review to decide whether his abuse of his daughter supported the court's declaring his sons to be dependents of the court.

II. DISCUSSION

The Court of Appeal unanimously held that the evidence supports the juvenile court's finding that father abused his daughter. That holding is not before us on review and, accordingly, we accept the Court of Appeal's conclusion in this regard. (See *People v. Weiss* (1999) 20 Cal.4th 1073, 1076–1077.) Father contends, however, that evidence that he sexually abused his daughter does not support the juvenile court's finding that his sons are dependents of the court under section 300.

Section 300 begins: "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court… ." Then follow several subdivisions describing children who may be adjudged dependents of the court. The Department alleged that the younger siblings, including the sons, come within three of these subdivisions: subdivision (b) ("The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent… to adequately supervise or protect the child… ."); subdivision (d) ("The child has been sexually abused, or there is substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent… ."); and subdivision (j) ("The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.").

The Department has the burden of proving by a preponderance of the evidence that the children are dependents of the court under section 300. (§ 355, subd. (a); see *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.)

The Court of Appeal below correctly stated the applicable standard of review: "In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. 'In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court.' (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) 'We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] " '[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence… such that a reasonable trier of fact could find [that the order is appropriate].' " [Citation.]' (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)" (See also *In re Angelia P.* (1981) 28 Cal.3d 908, 924.)

No evidence exists that father physically or sexually abused or neglected the boys themselves. But section 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here require only a "substantial risk" that the child will be abused or neglected. The legislatively declared purpose of these provisions "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children *who are at risk of that harm.*" (§ 300.2, italics added.) "The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.)

"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. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence." (*In re Alexis E.* (2009) 171 Cal. App.4th 438, 451.) Subdivision (j) of section 300 is the one that most closely describes the situation regarding the boys. Accordingly, we will focus on that subdivision.

Subdivision (j) applies if (1) the child's sibling has been abused or neglected as defined in specified other subdivisions and (2) there is a substantial risk that the child will be abused or neglected as defined in those subdivisions. (§ 300, subd. (j).) Here, father sexually abused the boys' sister as defined in subdivision (d). So the first requirement is met. At issue is the second requirement. "[S]ubdivision (j) was intended to expand the grounds for the exercise of jurisdiction as to children whose sibling has been abused or neglected as defined in section 300, subdivision (a), (b), (d), (e), or (i). Subdivision (j) *does not* state that its application is limited to the risk that the child will be abused or neglected *as defined in the same subdivision* that describes the abuse or neglect of the sibling. Rather, subdivision (j) directs the trial court to consider whether there is a substantial risk that the child will be harmed under subdivision (a), (b), (d), (e) *or* (i) of section 300, notwithstanding which of those subdivisions describes the child's sibling." (*In re Maria R.* (2010) 185 Cal.App.4th 48, 64 (*Maria R.*).)

Unlike the other subdivisions, subdivision (j) includes a list of factors for the court to consider: "The court shall consider the circumstances surrounding the abuse or neglect of

the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." (§ 300, subd. (j).) "The 'nature of the abuse or neglect of the sibling' is only one of many factors that the court is to consider in assessing whether the child is at risk of abuse or neglect in the family home. Subdivision (j) thus allows the court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of those subdivisions. [¶] The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance." (*Maria R.*, *supra*, 185 Cal.App.4th at p. 64.)

Several Court of Appeal cases have considered, in varying factual contexts, whether sexual abuse of a daughter supports finding a son to be a dependent of the court, with sharply conflicting results. (Compare *In re R.V.*, *supra*, 208 Cal.App.4th at pp. 842–848 [upholding finding the son was a court dependent when the son had witnessed some of the sexual abuse], *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1330–1332 [upholding, over a dissent, finding the son was a court dependent], *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1410–1415 [upholding finding the son was a court dependent when the father exposed himself to a daughter while the son was in the same room], *In re P.A.* (2006) 144 Cal. App.4th 1339, 1345–1347 [upholding finding the son was a court dependent], *In re Karen R.* (2001) 95 Cal.App.4th 84, 89–91 [upholding finding the sons were court dependents when the sons had observed some forms of physical abuse and heard their sister report a rape to their mother], and *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1213–1218 [upholding finding the son was a court dependent when there was also evidence the father had engaged in at least one homosexual relationship, shared a bedroom with the son, and showered with him at least twice] with *In re Alexis S.* (2012) 205 Cal.App.4th 48, 53–56 [overturning finding the son was a court dependent], *Maria R., supra*, 185 Cal.App.4th at pp. 62–70 [overturning finding the sons were court dependents], and *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 197–199 [overturning finding the sons were court dependents]; see also *In re Jordan R.* (2012) 205 Cal.App.4th 111, 137–139 [upholding the juvenile court's *refusal* to find the son was a court dependent].)

Some of these cases are distinguishable from this one and each other, in that some of the cases upholding the jurisdictional finding contained additional evidence that is lacking here. But to some extent, the cases simply disagree with each other. The majority below agreed with the cases finding the evidence sufficient, while the dissent agreed with the cases finding the evidence insufficient.

Two typical cases upholding the jurisdictional finding are *In re P.A.*, *supra*, 144 Cal.App.4th 1339, and *In re Karen R.*, *supra*, 95 Cal.App.4th 84. The *Karen R.* court said that "a father who has committed two incidents of forcible incestuous rape of his minor daughter reasonably can be said to be so sexually aberrant that both male and female siblings of the victim are at substantial risk of sexual abuse… . Although the danger of sexual abuse of a female sibling in such a situation may be greater than the danger of sexual abuse of a male sibling, the danger of sexual abuse to the male sibling is nonetheless still substantial. Given the facts of this case, the juvenile court reasonably could conclude every minor in the home, regardless of gender, was in substantial danger of sexual abuse by father." (*In re Karen R.*, *supra*, at pp. 90–91.)

In *P.A.*, the juvenile court sustained an allegation that the father had sexually abused his daughter by touching her vagina under her clothes and on top of her underwear. (*In re P.A., supra*, 144 Cal.App.4th at pp. 1341, 1343.) There was no evidence the father had inappropriately touched or otherwise sexually abused his sons, and it appeared the boys were unaware of the abuse. (*Id.* at p. 1345.) Nevertheless, relying in part on *In re Karen R.*, *supra*, 95 Cal.App.4th 84, the court upheld the jurisdictional finding as to the sons. It acknowledged that the abuse in its case was "less shocking than the abuse in *Karen R.*," but it was "convinced that where, as here, a child has been sexually abused, any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual abuse. As we intimated in *Karen R.*, aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior." (*In re P.A., supra*, at p. 1347.)

The *P.A.* court found its conclusion "consistent with section 355.1, subdivision (d), which provides in pertinent part that: '(d) Where the court finds that either a parent, a guardian, or any other person who resides with… a minor who is currently the subject of the petition filed under Section 300… (3) has been found in a prior dependency hearing… to have committed an act of sexual abuse, … that finding shall be *prima facie* evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The *prima facie* evidence constitutes a presumption affecting the burden of producing evidence.' [¶] Although section 355.1, subdivision (d), was not triggered here because there was no prior dependency proceeding at the time of the jurisdictional hearing, it nonetheless evinces a legislative determination that siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts." (*In re P.A.*, *supra*, 144 Cal.App.4th at p. 1347.)

A relatively early case overturning the jurisdictional finding is *In re Rubisela E.*, *supra*, 85 Cal.App.4th 177. The *Rubisela E.* court did "not discount the real possibility that brothers of molested sisters can be molested [citation] or in

other ways harmed by the fact of the molestation within the family. Brothers can be harmed by the knowledge that a parent has so abused the trust of their sister. They can even be harmed by the denial of the perpetrator, the spouse's acquiescence in the denial, or their parents' efforts to embrace them in a web of denial." (*Id.* at p. 198.) But, the court found, "in the case at bench, while such a showing is possible, there has been no demonstration by the department that 'there is a substantial risk [to the brothers] that [they] will be abused or neglected, as defined in… [the applicable] subdivisions… .' " (*Id.* at p. 199.)

Relying partly on *In re Rubisela E., supra*, 85 Cal.App.4th 177, the *Maria R.* court "disagree[d] with prior cases to the extent that they have held, either explicitly or implicitly, that a parent's sexual abuse of a daughter, either alone or in combination with a factor or factors that have no established correlation with sexual abuse, is sufficient to establish that the parent's son is at risk of sexual abuse by that parent… ." (*Maria R.*, *supra*, 185 Cal.App.4th at p. 63.) It agreed with *Rubisela E.* "that the brothers of molested girls may be harmed by the fact of molestation occurring in the family," but it did not "agree with prior cases to the extent that they have held or implied that the risk that the brothers face may — in the absence of evidence demonstrating that the perpetrator of the abuse may have an interest in sexually abusing male children — be deemed to be one of 'sexual abuse' within the meaning of subdivision (d)… . [T]he phrase 'sexual abuse' for purposes of section 300 is defined by reference to the offenses enumerated in Penal Code section 11165.1, whether the allegation of sexual abuse is filed under subdivision (d) or (j). [Citation.] Penal Code section 11165.1 refers to specific sex acts committed by the perpetrator on a victim… and *does not include* in its enumerated offenses the collateral damage on a child that might result from the family's or child's reaction to a sexual assault on the child's sibling." (*Maria R.*, *supra*, at pp. 67–68.)

The *Maria R.* court noted that "[n]one of the courts that have held or impliedly concluded that a child, regardless of gender, whose sibling was sexually abused, may be found to be at risk of *sexual abuse* under subdivision (d), either directly or under subdivision (j) [of section 300], has cited any scientific authority or empirical evidence to support the conclusion that a person who sexually abuses a female child is likely to sexually abuse a male child. [Citing *In re P.A.*, *supra*, 144 Cal.App.4th 1339, and *In re Andy G.*, *supra*, 183 Cal.App.4th 1405.] In the absence of evidence demonstrating that a perpetrator of sexual abuse of a female child is in fact likely to sexually abuse a male child, we are not persuaded that the rule of general applicability enunciated in *P.A.*, and repeated by the *Andy G.* court, is grounded in fact. For this reason, we decline to adopt the reasoning of *P.A.* and *Andy G.*" (*Maria R.*, *supra*, 185 Cal.App.4th at p. 68.) The court concluded that "[s]ince there is no evidence in the record that would tend to support a finding that [the father] has an interest in engaging in sexual activity with a male child, we cannot… conclude that [the father's] sexual abuse of his daughters — as aberrant as it is — establishes that [the son] is at substantial risk of *sexual abuse* within the meaning of subdivision (j), as defined in subdivision (d) and Penal Code section 11165.1." (*Ibid.*)[2]

We agree with the majority below that the evidence in this case was sufficient to support the juvenile court's dependency finding. Among the factors cited in subdivision (j) for the court to consider are the circumstances surrounding, and the nature of, father's sexual abuse of his daughter. By citing these factors, subdivision (j) implies that the more egregious the abuse, the more appropriate for the juvenile court to assume jurisdiction over the siblings. (§ 300, subd. (j).) "Some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great… . Conversely, a relatively high probability that a very minor harm will occur probably does not involve a 'substantial' risk. Thus, in order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of potential harm… ." (*People v. Hall* (Colo. 2000) 999 P.2d 207, 217–218 [considering what constitutes a "substantial and unjustifiable risk" of death].) In other words, the more severe the type of sibling abuse, the lower the required probability of the child's experiencing such abuse to conclude the child is at a substantial risk of abuse or neglect under section 300. If the sibling abuse is relatively minor, the court might reasonably find insubstantial a risk the child will be similarly abused; but as the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse.

The majority below accurately described father's behavior as "aberrant in the extreme: he sexually abused his own daughter 'by fondling the child's vagina and digitally penetrating the child's vagina and forcefully raped the child by placing the father's penis in the child's vagina.' " Also relevant to the totality of the circumstances surrounding the sibling abuse is the violation of trust shown by sexually abusing one child while the other children were living in the same home and could easily have learned of or even interrupted the abuse. "[S]exual or other serious physical abuse of a child by an adult constitutes a fundamental betrayal of the appropriate relationship between the generations… . When a parent abuses his or her child, … the parent also abandons and contravenes the parental role. Such misparenting is among the specific compelling circumstances which may justify state intervention, including an interruption of parental custody. (See § 300, subds. (d), (e), (j).)" (*In re Kieshia E.* (1993) 6 Cal.4th 68, 76–77.) The serious and prolonged nature of father's sexual abuse of his daughter under these circumstances

2. However, the *Maria R.* court remanded the matter to the juvenile court for further proceedings to determine whether the son might be a dependent child under section 355.1, subdivision (d)(3). (*Maria R.*, *supra*, 185 Cal.App.4th at pp. 69–72.) In light of our resolution of this case, we need not, and do not, consider whether the *Maria R.* court erred in this respect.

supports the juvenile court's finding that the risk of abuse was substantial as to all the children.

The *Maria R.* court criticized cases like *In re P.A.*, *supra*, 144 Cal.App.4th 1339, for not citing scientific authority or empirical evidence to support the conclusion that a father who abuses his daughter is likely to abuse his son. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 68.) But nothing in the statutes suggests a legislative intent to *require* a court to consult scientific authority or empirical evidence before it makes the "substantial risk" determination. The specific factors the Legislature stated in section 300, subdivision (j) do not include such evidence. Rather, after considering the nature and severity of the abuse and the other specified factors, the juvenile court is supposed to use its best judgment to determine whether or not the particular substantial risk exists. As the majority below noted, "It is of course impossible to say what any particular sexual predator — and here a predator who has raped his own daughter — is likely to do in the future in any particular instance. But in our view that very uncertainty makes it virtually incumbent upon the juvenile court to take jurisdiction over the siblings… ."

Another statute that does not directly apply here supports the conclusion that a court need not consult scientific authority before it finds the requisite substantial risk when a parent has sexually abused a sibling. Section 355.1, subdivision (d), provides that a prior finding of sexual abuse (of anyone, not just a sibling) is *prima facie* evidence that the child who is the subject of the dependency hearing is subject to the court's jurisdiction under section 300. When it enacted subdivision (d) of section 355.1, the Legislature found "that children of the State of California are placed at risk when permitted contact with a parent or caretaker who has committed a sex crime. Further, the Legislature finds that children subject to juvenile court dependency jurisdiction based on allegations of molestation are in need of protection from those persons." (Stats. 1999, ch. 417, § 1, p. 2780.) Nothing in this subdivision suggests it is limited to sexual abuse of a person of the same gender as the child before the court.

Father correctly argues that section 355.1 does not apply here because there was no finding in a *prior* proceeding that he committed sexual abuse. But neither the *P.A.* court, nor the Court of Appeal here, nor the Department contends it does apply. Rather, section 355.1 is relevant because it evinces a legislative intent that sexual abuse of someone else, without more, at least *supports* a dependency finding. (See *In re P.A.*, *supra*, 144 Cal.App.4th at p. 1347.)

Citing empirical studies, father argues that when a father sexually abuses a daughter, his sons are at significantly lower risk of sexual abuse than are his other daughters. Amicus curiae California State Association of Counties challenges father's statistics and argues that empirical studies show the risk to boys when a sister is abused is greater than father argues. We need not examine these studies in detail. For present purposes, we may assume that father's other daughter is at greater risk of sexual abuse than are his sons. But this does not mean the risk to the sons is nonexistent or so insubstantial that the juvenile court may not take steps to protect the sons from that risk. "Although the danger of sexual abuse of a female sibling in such a situation may be greater than the danger of sexual abuse of a male sibling, the danger of sexual abuse to the male sibling is nonetheless still substantial." (*In re Karen R.*, *supra*, 95 Cal.App.4th at p. 91.) The juvenile court need not compare relative risks to assume jurisdiction over all the children of a sexual abuser, especially when the abuse was as severe and prolonged as here.

The juvenile court's assumption of jurisdiction under section 300 does not itself mean father will lose all parental rights. "A dependency adjudication is a preliminary step that allows the juvenile court, within specified limits, to assert supervision over the endangered child's care. But it is merely a first step, and the system includes many subsequent safeguards to ensure that parental rights and authority will be restricted only to the extent necessary for the child's safety and welfare." (*In re Ethan C.* (2012) 54 Cal.4th 610, 617.) All we are holding at this point is that when a father severely sexually abuses his own child, the court may assume jurisdiction over, and take steps to protect, the child's siblings.

We agree with the Court of Appeal's conclusion. "The juvenile court is mandated to focus on 'ensur[ing] the safety, protection, and physical and emotional well-being of children who are at risk' of physical, sexual or emotional abuse. (§ 300.2.) That is what the court did here." As we noted earlier, the juvenile court found, "by clear and convincing evidence, … that there is a substantial danger to the children, if returned to the home, to the physical health, safety, protection, physical, emotional well-being of the children, and there are no reasonable means by which the children's physical health can be protected without removing the children from the father's custody in this case." In upholding the assertion of jurisdiction in this case, we are not holding that the juvenile court is compelled, as a matter of law, to assume jurisdiction over all the children whenever one child is sexually abused. We merely hold the evidence in this case supports the juvenile court's assertion of jurisdiction. (*Cf. In re Jordan R.*, *supra*, 205 Cal.App.4th 111 [upholding the juvenile court's refusal to assert jurisdiction].)

III. CONCLUSION

We affirm the judgment of the Court of Appeal and disapprove, to the extent they are inconsistent with this opinion, *In re Alexis S.*, *supra*, 205 Cal.App.4th 48, *In re Maria R.*, *supra*, 185 Cal.App.4th 48, and *In re Rubisela E.*, *supra*, 85 Cal.App.4th 177.

CHIN, J.

WE CONCUR: CANTIL-SAKAUYE, C.J., KENNARD, J., BAXTER, J., WERDEGAR, J., CORRIGAN, J., LIU, J.

Cite as 13 C.D.O.S. 4678

TODD KURTIN, Plaintiff and Appellant,

v.

BRUCE ELIEFF, Defendant and Appellant.

No. G043999
In the Court of Appeal of the State of California
Fourth Appellate District
Division Three
(Super. Ct. No. 30–2007-00100307)
Filed May 8, 2013

ORDER DENYING REHEARING AND MODIFYING OPINION;

NO CHANGE IN JUDGMENT

The petition for rehearing filed April 30, 2013 is DENIED.

The opinion filed April 16, 2013 is hereby modified in the following particulars:

(1) On page 5 of the slip opinion, in the first sentence of the first full paragraph, delete the words "including Moorpark and SJD" so that the sentence reads: "After the arbitration, Kurtin filed this action against Elieff and the Joint Entities."

(2) On page 22 of the slip opinion, in the first sentence of the first full paragraph, the word "not" should be inserted between "are" and "necessarily" so that the sentence reads: "Third, and most importantly, the last antecedent rule strongly indicates the arbitrator's powers are not necessarily pinned down by a requirement to only be exercised to 'save' the agreement."

These modifications do not affect the judgment.

RYLAARSDAM, ACTING P. J.

We concur: ARONSON, J., FYBEL, J.