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Prior registration of products as fertilizers does not preclude agency from finding them to be pesticides (Franson, J.)

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SUMMARIES

Administrative Law

Prior registration of products as fertilizers does not preclude agency from finding them to be pesticides (Franson, J.)

Caltec AG v. Department of Pesticide Regulation

C.A. 5th; January 2, 2019; F074334

The Fifth Appellate District affirmed a judgment. In the published portion of its opinion, the court held that the California Department of Food and Agriculture (DeptAg) prior registration of agricultural products as fertilizers did not preclude a finding by the California Department of Pesticides (CDP) that the products were pesticides.

Caltec Ag, Inc. marketed agricultural products Greenfeed 27-0-0, Terra Treat, and Kelpak. All three products were registered with the DeptAg as fertilizing materials. The CDP nonetheless determined that the products were pesticides, and that Caltec violated state pesticide laws by failing to register them as such. The CDP imposed fines totaling $784,000. Caltec filed a petition for writ of administrative mandate challenging that decision.

The trial court denied the petition.

The court of appeal affirmed, holding that the DeptAg’s prior registration of Terra Treat and Kelpak as fertilizers did not preclude the CDP from determining those products were pesticides. The DeptAg registered Terra Treat as an “auxiliary soil and plant substance” and Kelpak as an “organic input material.” The definitions of both of these types of fertilizer expressly exclude pesticides. Nonetheless, because the DeptAg’s registration of these products did not possess a judicial character, it had no collateral estoppel effect on the CDP. The prior registration of both products as fertilizers thus did preclude the CDP’s determination that they were both pesticides. Further, substantial evidence supported the CDP’s findings as to both products. The CDP found Terra Treat to be a spray adjuvant—a wetting agent that aids the application of pesticides. The product label described Terra Treat as a soil surfactant/penetrant designed to uniformly distribute fertilizer, pesticides and water throughout the root zone, and a 2011 technical information sheet stated that Terra Treat significantly increased the effectiveness of certain insecticides and herbicides. These and other documents supported the CDP’s finding that Terra Treat was a pesticide. As to Kelpak, substantial evidence supported findings that (1) Kelpak was a liquid auxin concentrate, (2) naturally occurring auxins in concentrated form are plant growth regulators, and (3) Caltec sold Kelpak with the intent that it be used as a plant growth regulator. Accordingly, the CDP did not commit factual error in determining Kelpak was a plant growth regulator and thus a pesticide. Acting Presiding Justice Poochigian concurred, writing separately to question various peculiarities in California’s pesticide regulation laws, including that non-toxic adjuvants are regulated as pesticides.

Civil Rights

Government’s defense of “No Fly list” error erroneously found to be substantially justified and in good faith (Wardlaw, J.)

Ibrahim v. U.S. Department of Homeland Security

9th Cir.; January 2, 2019; 14-16161

The court of appeals reversed a district court judgment, vacated the court’s award of attorney fees, and remanded. The court held that the district court, in determining that the government acted in good faith, erred in failing to consider the entirety of the government’s conduct in refusing to admit, for almost a decade, that it had mistakenly placed plaintiff on the No Fly List.

In November 2004, FBI Special Agent Michael Kelley, by misreading the instructions on a form he was filling out, inadvertently placed Stanford graduate student Dr. Rahinah Ibrahim on the TSA’s No Fly list. In early January 2005, she flew to Kuala Lumpur. While she was there, as a result of her placement on the No Fly list and without notice to her, her student visa was revoked. Despite subsequently discovering Agent Kelley’s error, the government maintained Dr. Ibrahim on its terrorist watch list and barred her from returning to the United States. In January 2006, Dr. Ibrahim filed suit. After almost a decade of vigorous and fiercely contested litigation, Dr. Ibrahim won a complete victory. In 2014, the federal government conceded that she did not pose and had never posed a threat to or national security and should never have been placed on the No Fly list. Counsel for Dr. Ibrahim, who had thus far litigated the case without compensation, moved for an award of $3,630,057.50 in attorney fees and $293,860.18 in expenses.

After disallowing much of the work done by counsel, the district court awarded Dr. Ibrahim $419,987.36 in fees and $34,768.71 in expenses.

The court of appeal vacated the fee award and remanded, holding that the district court erred in determining Dr. Ibrahim’s entitlement to attorney fees. First, the district court erred in taking a piecemeal approach to determining whether the government’s position was “substantially justified,” and so disallowing fees for particular stages of proceedings rather than examining the record as a whole and making a single finding. The district court further erred by treating alternative claims or theories for the same relief Dr. Ibrahim achieved—which the court, therefore, did not reach—as unsuccessful, and reducing fees for work pursuing those claims. These er-
rors were compounded by the now-withdrawn three-judge panel decision, which wrongly concluded that because the claims in the alternative were “mutually exclusive,” they were not related. To the contrary, all of the legal theories pursued on behalf of Dr. Ibrahim challenged the same and only government action at the heart of this lawsuit: the government’s placement of her name on the No Fly list without any basis for doing so. Finally, the district court erred in its assessment of whether the government acted in bad faith, limiting its consideration to the initial and inadvertent placement of Dr. Ibrahim on the No Fly list and failing to consider the totality of the government’s conduct after it discovered the error. That conduct included continuing to place Dr. Ibrahim’s on federal watchlists, barring her from reentering the country to attend trial, obstructing her daughter from entering the county to testify at trial, refusing to disclose Dr. Ibrahim’s current watchlist status, and myriad obstructionist litigation tactics, including noncompliance with discovery orders, repeated attempts to relitigate matters previously decided by the court, and interference with the public’s right of access to the trial. A finding of bad faith would allow a fee award in excess of the $125 per hour cap set by the Equal Access to Justice Act (EAJA). The court remanded with directions, among others, that the district court consider whether the government had a good faith basis to defend its No Fly list error as the litigation evolved. Judge Callahan, joined by Judges N.R. Smith and Nguyen, dissented in part, finding that the majority erred by determining in the first instance that the government’s position was not substantially justified and by setting aside the district court’s finding that the defendants did not proceed in bad faith. Judge Callahan would accordingly affirm the district court’s limitation of Dr. Ibrahim’s attorneys’ fees to the statutory rate of $125 per hour set by the EAJA.

Employment Litigation

Litigation of employee claims of discrimination and retaliation not preempted by federal labor law (Duarte, J.)

Rymel v. Save Mart Supermarkets, Inc.

C.A. 3rd; December 31, 2018; C085863

The Third Appellate District affirmed trial court judgments. The court held that federal labor law did not preempt litigation of employee claims of discrimination and retaliation.

In separate actions, Jose Robles, Christopher Rymel, and David Hagins each sued employer Save Mart Supermarkets, Inc., alleging medical condition discrimination and/or whistleblower retaliation and related claims. Save Mart moved to compel arbitration, arguing that plaintiffs were subject to a collective bargaining agreement (CBA) that covered their claims. Save Mart argued that resolving the disputes would require interpretation of the CBA or would be “substantially dependent” on such interpretation, that the claims were “inextricably intertwined” with parts of the CBA, and that judicial resolution of them would infringe on the arbitration process set forth in the CBA.

The trial court denied the motions. Save Mart appealed, arguing that plaintiffs’ claims were preempted by §301 of the Labor Management Relations Act.

The court of appeal affirmed, holding that plaintiffs’ claims were not preempted. Plaintiffs’ claims were based on nonnegotiable rights afforded them under state law. At issue was whether their claims could be resolved without the need to interpret the CBA. The answer was yes. The plaintiffs alleged that Save Mart’s discriminatory and retaliatory conduct included forcing them to wear “degrading” safety vests. Although Save Mart’s defense to that claim—that the custom and practice at plaintiffs’ workplace called for workers with certain tasks to wear those vests—might require reference to the CBA or union rules, Save Mart did not demonstrate that it would require interpretation of the CBA. Similarly, although Hagins’ claim of inappropriate discipline might require reference to the disciplinary rules set forth in the CBA, it would not require interpretation of the CBA. Consultation of the CBA is not the same as interpretation of the CBA, and does not trigger preemption.

Employment Litigation

Denial of costs on appeal does not preclude award of attorney fees on appeal (Collins, J.)

Stratton v. Beck

C.A. 2nd; December 7, 2018; B287001

The Second Appellate District affirmed a trial court order. The court held that its prior order stating that the parties were not entitled to costs on appeal did not preclude a trial court order awarding appellate attorney fees to the prevailing party.

Anthony Stratton filed a claim with the Division of Labor Standards Enforcement for $300 in wages owed him by former employer Thomas Beck. After hearing, the Labor Commissioner awarded Stratton the $303.50 he requested, plus an additional $5,757.46 in liquidated damages, interest, and statutory penalties. Beck sought de novo review of the Labor Commissioner’s order. The trial court upheld the order and awarded Stratton an $31,365 in attorney fees. Beck appealed. The court of appeal affirmed, but specifically directed that the parties “bear their own costs of appeal.” Upon issuance of the remittitur, Stratton moved for an award of appellate attorney fees pursuant to Labor Code §98.2(c). Beck opposed, arguing that the court of appeal’s directive that both parties “bear their own costs” precluded an award of fees.
The trial court disagreed and awarded Stratton an additional $57,420 in attorney fees. Beck appealed.

The court of appeal affirmed, holding that its directive that the parties bear their own costs on appeal did not preclude an award of appellate attorney fees. Rule 8.278(d)(2) of the Cal. Rules of Ct. expressly provides, “Unless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.” Because an award of costs on appeal does not encompass appellate attorney fees, the court’s prior directive precluding an award of costs on appeal had no bearing on attorney fees and did not preclude an award of fees. Beck’s arguments to the contrary disregarded established case law reaching the same conclusion.

**Family Law**

**Automatic 30-day stay of family court order allowing removal of minor child from state not triggered by tentative ruling (Irion, J.)**

**Lief v. Superior Court (Nissan)**

C.A. 4th; December 6, 2018; D074947

The Fourth Appellate District granted a petition for writ of mandate. The court held that the automatic 30-day stay of any family court judgment or order allowing the removal of a minor child from the state does not begin until the family court enters a final judgment to that effect.

Lief and Nissan met in Israel in 2010. Nissan moved to San Diego and married Lief in 2011. They had a son in 2014. Lief filed a marital dissolution action in 2017. In August 2018, the family court issued a tentative ruling granting Nissan’s request to move with the child to Israel. Upon Lief’s motion for reconsideration, the family court reopened the hearing to consider additional evidence and argument. The court ultimately entered a judgment granting Nissan’s move-away request on November 7, 2018. After receiving notice from Nissan that she intended to depart for Israel with the child on November 22, 2018, Lief filed an ex parte application with the family court for an order preventing the move-away until December 7, citing Code Civ. Proc. §917.7, which provides for a 30-day stay of any family court judgment or order allowing the removal of a minor child from the state.

The court denied the application, finding that its August 10, 2018 order tentatively granting Nissan’s move-away request started the stay period running. The court ordered Lief to turn over the child to Nissan immediately. Lief petitioned the court of appeal for a writ of mandate challenging that ruling.

The court of appeal granted Lief’s writ petition, holding that the 30-day stay did not begin until the family court issued its final judgment on November 7. A tentative decision does not constitute a judgment and is not binding on the court. Here, in the family court’s written statement of decision, it expressly acknowledged it “had not entered judgment and its decision remained tentative pending the final statement of decision.” The family court accordingly erred in later finding that it August 10 tentative decision triggered the 30-day statutory stay period.
FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 19 C.D.O.S. 203

DR. RAHINAH IBRAHIM, an individual, Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; TERRORIST SCREENING CENTER; FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER A. WRAY,* in his official capacity as Director of the Federal Bureau of Investigation; KIRSTJEN NIELSEN, in her official capacity as Secretary of the Department of Homeland Security; MATTHEW G. WHITAKER, in his official capacity as Acting Attorney General; CHARLES H. KABLE IV, in his official capacity as Director of the Terrorist Screening Center; JAY S. TABB, JR., in his official capacity as Executive Assistant Director of the FBI’s National Security Branch; NATIONAL COUNTERTERRORISM CENTER; RUSSELL “RUSS” TRAVERS, in his official capacity as Director of the National Counterterrorism Center; DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; UNITED STATES OF AMERICA, Defendants-Appellees.

Nos. 14-16161, 14-17272

United States Court of Appeals for the Ninth Circuit
D.C. No. 3:06-cv-545-WHA
Appeal from the United States District Court for the Northern District of California
William Alsup, District Judge, Presiding
Argued and Submitted En Banc March 20, 2018
San Francisco, California
Filed January 2, 2019


Opinion by Judge Wardlaw;

Partial Concurrence and Partial Dissent by Judge Callahan

*Current cabinet members and other federal officials have been substituted for their predecessors pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

COUNSEL

Marwa Elzankaly (argued), Jennifer Murakami, Ruby Kazi, Christine Peek, Elizabeth Pipkin, and James McManis, McManis Faulkner, San Jose, California, for Plaintiff-Appellant.

Joshua Waldman (argued) and Sharon Swingle, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Defendants-Appellees.


OPINION

WARDLAW, Circuit Judge:

This appeal arises out of Dr. Rahinah Ibrahim’s 2005 detention at the San Francisco International Airport (SFO) while en route to Malaysia with a stopover in Hawaii for a Stanford University conference. U.S. authorities detained Dr. Ibrahim because her name was on the Transportation Security Administration’s (TSA) “No Fly” list (the No Fly list). After almost a decade of vigorous and fiercely contested litigation against our state and federal governments and their officials, including two appeals to our court and a weeklong trial, Dr. Ibrahim won a complete victory. In 2014, the federal government at last conceded that she poses no threat to our safety or national security, has never posed a threat to national security, and should never have been placed on the No Fly list. Through Dr. Ibrahim’s persistent discovery efforts, which were met with stubborn opposition at every turn, she learned that she had been nominated to the No Fly list and the Interagency Border Inspection System (IBIS), which are stored within the national Terrorist Screening Database (TSDB)—the federal government’s centralized watchlist of known and suspected terrorists—and which serve as a basis for selection for other counterterrorism sub-lists. From there, a Federal Bureau of Investigation (FBI) special agent so misread a nomination form that he accidentally nominated Dr. Ibrahim to the No Fly list, intending to do the opposite, as the No Fly list is supposed to be comprised of individuals who pose a threat to civil aviation.
But Dr. Ibrahim did not accomplish this litigation victory on her own. Indeed, since she was finally allowed to travel to Malaysia in 2005, the United States government has never allowed her to return to the United States, not even to attend the trial that cleared her name. Throughout this hard-fought litigation, the civil rights law firm McManis Faulkner has represented her interests without pay, but with the understanding that if it prevailed on her behalf, it could recover reasonable attorneys’ fees and expenses, in addition to costs, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

The firm filed a motion for an award of attorneys’ fees and expenses, supported by documentary evidence and declarations, which the government opposed. The motion was met with the “compliments” of the district court and drastic reductions in the claimed fees, by almost ninety percent. In reducing the claimed legal fees, the district court misapplied Commissioner, I.N.S. v. Jean, 496 U.S. 154 (1990), by taking a piecemeal approach to determining whether the government’s position was “substantially justified,” and so disallowing fees for particular stages of proceedings rather than examining the record as a whole and making a single finding. The district court further erred by treating alternative claims or theories for the same relief Dr. Ibrahim achieved—which the court, therefore, did not reach—as unsuccessful, and reducing fees for work pursuing those claims, contrary to Hensley v. Eckerhart, 461 U.S. 424 (1983). These errors were compounded by the now-withdrawn three-judge panel decision, which misapplied the Hensley standard for determining “relatedness,” i.e., whether the claims arose from a “common course of conduct,” to wrongly conclude that because the claims in the alternative were “mutually exclusive,” they were not related. In point of fact, all of the legal theories pursued on behalf of Dr. Ibrahim challenged the same and only government action at the heart of this lawsuit: the government’s placement of her name on the No Fly list without any basis for doing so. Finally, our prior precedent, which we now reaffirm, requires that when a district court analyzes whether the government acted in bad faith, it must consider the totality of the circumstances, including both the underlying agency action and the litigation in defense of that action.

We reconsider this appeal en banc to clarify the standards applicable to awards of attorneys’ fees under the EAJA. We now reverse, vacate the award of attorneys’ fees, and remand with instructions to recalculate fees consistent with this opinion.¹

I.

A. Dr. Ibrahim

Dr. Ibrahim is a Muslim woman, scholar, wife, and mother of four children. She lived in the United States for thirteen years pursuing undergraduate and post-graduate studies. Here’s what happened to Dr. Ibrahim, as the events that ultimately excluded her from this country unraveled:

In early January 2005, Dr. Ibrahim planned to fly from San Francisco to Hawaii and then to Los Angeles and on to Kuala Lumpur. She intended to attend a conference in Hawaii sponsored by Stanford University from January 3 to January 6, at which she would present the results of her doctoral research. She was then working toward a Ph.D. in construction engineering and management at Stanford University under an F-1 student visa. On January 2, 2005, Dr. Ibrahim arrived at SFO with her daughter, Rafeah, then fourteen. At the time, Dr. Ibrahim was still recovering from a hysterectomy performed three months earlier and required wheelchair assistance.

When Dr. Ibrahim arrived at the United Airlines counter, the airline staff discovered her name on the No Fly list and called the police. Dr. Ibrahim was handcuffed and arrested. She was escorted to a police car (while handcuffed) and transported to a holding cell by male police officers, where she was searched for weapons and held for approximately two hours. Paramedics were called to administer medication related to her surgery. No one explained to Dr. Ibrahim the reasons for her arrest and detention.

Eventually, she was released and an aviation security inspector with the Department of Homeland Security (DHS) informed Dr. Ibrahim that her name had been removed from the No Fly list. The police were satisfied that there were insufficient grounds for making a criminal complaint against her. Dr. Ibrahim was told that she could fly to Hawaii the next day.

The next day she returned to SFO where an unspecified person told her that she was again—or still—on the No Fly list. She was nonetheless allowed to fly, but was issued an unusual red boarding pass with the letters “SSSS,” meaning Secondary Security Screening Selection, printed on it. Dr. Ibrahim flew to Hawaii and presented her doctoral findings at the Stanford conference. From there, she flew to Los Angeles and then on to Kuala Lumpur.

Two months later, on March 10, 2005, Dr. Ibrahim was scheduled to return to Stanford University to complete her work on her Ph.D. and to meet with an individual who was one of her Stanford dissertation advisors and also her friend, Professor Boyd Paulson, who was very ill. But when she arrived at the Kuala Lumpur International Airport, she was not permitted to board the flight to the United States. She was told by one ticketing agent that she would have to wait for clearance from the U.S. Embassy, and by another that a note by her name indicated the police should be called to arrest her. Dr. Ibrahim has not been permitted to return to the United States to this day.

On March 24, 2005, Dr. Ibrahim submitted a Passenger Identity Verification Form (PIVF) to TSA. Before 2007, individuals who claimed they were denied or delayed boarding a plane in or for, or entry to, the United States, or claimed they were repeatedly subjected to additional screening or inspection, could submit a PIVF to TSA. A PIVF prompted various

¹ For ease of reading, attached as Appendix A is a glossary of the numerous acronyms referenced throughout this opinion.
agencies to review whether an individual was properly placed in the TSDB or in related watchlist databases.\(^2\)

Next, on April 14, 2005, the U.S. Embassy in Kuala Lumpur wrote to inform Dr. Ibrahim that the Department of State had revoked her F-1 student visa on January 31, 2005, which seemed to explain why she had not been allowed to fly in March, but gave her no further information regarding her status. The April 14 letter cited Dr. Ibrahim’s possible ineligibility “under Section 212(a)(3)(B) of the Immigration and Nationality Act [(INA)],” codified at 8 U.S.C § 1182(a)(3)(B), to explain the revocation. That section prohibits entry into the U.S. by any person who engaged in terrorist activity, was reasonably believed to be engaged in or likely to be engaged in terrorist activity, or who has incited terrorist activity, among other things. 8 U.S.C. § 1182(a)(3)(B). However, the letter also told her that the revocation did “not necessarily indicate that [she would be] ineligible to receive a U.S. visa in [the] future.” Not having heard back from TSA, Dr. Ibrahim retained McManis Faulkner. And on January 27, 2006, she filed the underlying action to challenge her placement on the No Fly list, as well as the federal and state governments’ administration of the list and their treatment of her with respect to it.

In a letter dated March 1, 2006, Dr. Ibrahim received a response to her PIVF. That letter stated that TSA had “conducted a review of any applicable records in consultation with other federal agencies, as appropriate,” and continued, “[w]here it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may have experienced as a result of the watchlist screening process.” The letter did not indicate Dr. Ibrahim’s status with respect to the No Fly list or any other federal watchlist.

In 2009, Dr. Ibrahim applied for a visa to attend proceedings in this action. The U.S. Embassy in Kuala Lumpur interviewed her on September 29, 2009. On December 14, 2009, a consular officer of the U.S. Department of State sent a letter to Dr. Ibrahim notifying her of her visa application’s denial. The consular officer wrote the word “(Terrorist)” next to the checked box for INA § 212(a)(3)(B) on an accompanying form to explain why Dr. Ibrahim was deemed inadmissible.

In September 2013, Dr. Ibrahim submitted a visa application so that she could attend the trial in her case. She went to a consular officer interview in October 2013. At the interview, the consular officer asked her to provide supplemental information via e-mail, which Dr. Ibrahim duly provided. Trial in this action began on December 2 and ended on December 6. While she did not receive a response to her visa application before trial, at trial, government counsel stated that the visa had been denied. Dr. Ibrahim’s counsel said that they had not been aware of the denial and that Dr. Ibrahim had not been notified.

### B. United States Government

While Dr. Ibrahim stood in limbo, unaware of her status on any list and unable to return to the United States, even to attend the trial of her own case, the government was well aware that her placement on the No Fly list was a mistake from the get-go.\(^4\)

Here it is helpful to understand, as much as we can on this record, how the U.S. “government maintains and operates a web of interlocking watchlists, all now centered on the [TSDB],” as described in the district court’s post-trial order.\(^4\) The FBI, DHS, the Department of State, and other agencies administer an organization called the Terrorist Screening Center (TSC), which manages the TSDB. Both the TSC and TSDB were created in response to the terrorist attacks on September 11, 2001, in order to centralize information about known and suspected terrorists. That information is then exported as appropriate to various “customer databases,” i.e., government watchlists, operated by other agencies and government entities. In this way, “the dots could be connected.”

While the TSDB does not contain classified information, the government stores classified “derogatory” information in a closely allied and separate database called the Terrorist Identities Datamart Environment (TIDE), which is operated by the National Counterterrorism Center (NCTC) branch of the Office of the Director of National Intelligence. These terrorist watchlists, and others, provide information to the United States intelligence community, a coalition of seventeen agencies and organizations within the executive branch, and also provide information to certain foreign governments.

Today, individuals are generally nominated to the TSDB using a “reasonable suspicion standard,” meaning “articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities.” This standard was created by executive branch policy and practice and was not promulgated by Congress or the judicial branch. However, from 2004 to 2007, the executive branch and its agencies employed no uniform standard for TSDB nominations, allowing each agency to use its own nominating procedures for inclusion in the TSDB based on each agency’s interpretation of homeland security presidential directives and the memorandum of opinion that established the TSC. These directives provided little instruction. For example, one such directive was Homeland Security Presidential Directive 6 (HSPD-6), which stated,

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\(^2\) This avenue of redress was replaced in 2007 by the Travel Redress Inquiry Program (TRIP), see 49 U.S.C. § 44926(a), which requires a “timely and fair” process for persons wrongly delayed or prohibited from boarding a commercial aircraft.

\(^4\) None of the following information was deemed classified or otherwise privileged before or during trial.
“[t]his directive shall be implemented in a manner consistent with the provisions of the Constitution and applicable laws, including those protecting the rights of all Americans.”

As the centralized database, the TSDB is the repository for all watchlist nominations. Various government agents nominate individuals by filling out a physical form, which is later computerized and used by the TSDB to indicate on which watchlist each nominee should be included or excluded. There are several watchlists affected by the TSDB, namely:

- the No Fly list (TSA);
- the Selectee list (TSA);
- Known and Suspected Terrorist File (KSTF; previously known as the Violent Gang and Terrorist Organizations File);
- Consular Lookout and Support System (CLASS, including CLASS-Visa, a Department of State database used for screening of visa applicants, and CLASS-Passport, a database that applies only to United States citizens who might be watchlisted) (Department of State);
- TECS (not an acronym, but the successor to the Treasury Enforcement Communications System) (DHS);
- Interagency Border Inspection System (IBIS) (DHS);
- Tipoff United States-Canada (TUSCAN) (used to export information from the United States to Canada); and
- Tipoff Australia Counterterrorism Information Control System (TACTICS) (used to export information from the United States to Australia).

These TSDB designations are then exported to the customer/government watchlists, which are each operated by various government entities and used in various ways. For example, TSDB nominations are transmitted to the Department of State for inclusion in CLASS-Visa or CLASS-Passport. In ruling on visa applications, consular officers review the CLASS database for information that may inform the visa application and adjudication process.

In November 2004, shortly after Dr. Ibrahim’s husband Mustafa Kamal Mohammed Zaini visited her from Malaysia to help her after her surgery, FBI Special Agent Kevin Michael Kelley (Agent Kelley), located in San Jose, California, unintentionally nominated Dr. Ibrahim, who was then a graduate student at Stanford University, to various federal watchlists using the FBI’s National Crime Information Center (NCIC) Violent Gang and Terrorist Organizations (VGTO) File Gang Member Entry Form (VGTOF). VGTO was an office within NCIC. Agent Kelley misunderstood the directions on the form and erroneously nominated Dr. Ibrahim to the TSA’s No Fly list and DHS’s IBIS. He did not intend to do so.

Agent Kelley testified at trial that he intended to nominate Dr. Ibrahim to the CLASS, the TSA Selectee list, TUSCAN (information exported to Canada), and TACTICS (information exported to Australia) lists. He checked the wrong boxes, filling out the form exactly contrary to the form’s instructions. The form expressly indicated that he was to check the boxes for the databases into which the subject should NOT be placed. Here is a blank copy of the form:

[ IMAGE DELETED ]

In other words, Agent Kelley was instructed to check the boxes for the watchlists for which Dr. Ibrahim was NOT to be nominated. Here is the form as Agent Kelley completed it:

[ IMAGE DELETED ]

Agent Kelley, by failing to check the boxes for the No Fly list and IBIS, placed Dr. Ibrahim on those watchlists (and by checking the boxes for CLASS, the TSA Selectee list, TUSCAN, and TACTICS, Agent Kelley did not place her on those lists).

Agent Kelley’s squad also was conducting a mosque outreach program. One purpose of the program was to provide a point of contact between law enforcement and mosques and Islamic associations. The outreach program included Muslim and Sikh communities and organizations in the San Francisco Bay Area. In December 2004, Agent Kelley and his colleague interviewed Dr. Ibrahim while she was still attending Stanford University. He asked, among other things, about her plans to attend a conference in Hawaii, her dissertation work, her plans after graduation, her involvement in the Muslim community, her husband, her travel plans, and the organization Jemaah Islamiyah, a Department of State-designated terrorist organization that Dr. Ibrahim had heard of only on the news. She was not a member. The Freedom of Information Act-produced version of Agent Kelley’s interview notes with Dr. Ibrahim were designated by the FBI as “315,” which denotes “International Terrorism Investigations.”

6. Again, we do not know on this record the motivation for singling out Dr. Ibrahim for the interview, but we note that the district court stated “it [was] plausible that Dr. Ibrahim was interviewed in the first place on account of her roots and religion.” The interview also came soon on the heels of her Muslim husband’s visit. However, the motivation question was the basis for one of the claims the district court found it unnecessary to reach.

7. Dr. Ibrahim was a member of a non-terrorist organization with a similar-sounding name, Jemaah Islah Malaysia, a Malaysian professional organization composed primarily of individuals who studied in the United States or Europe. The district court declined to find that Agent Kelley confused Jemaah Islah Malaysia with Jemaah Islamiyah.

5. This is information derived solely from the record before us, so we do not represent that this is an exclusive list or that there have not been subsequent changes to the lists.
On January 2, 2005, when Dr. Ibrahim was detained at SFO on her way to Hawaii, a DHS aviation security inspector told her that her name had been removed from the list.

Meanwhile, on January 3, 2005, in the visa office of the Department of State, one official was sitting on a stack of pending visa revocations that were based on the VGTO watchlist from which Agent Kelley had nominated Dr. Ibrahim to the No Fly list. That official e-mailed another visa official to report that although “[t]hese revocations contain virtually no derogatory information,” he was going to revoke them. The official wrote, because “there is no practical way to determine the basis of the investigation … we will accept that the opening of an investigation itself is a prima facie indicator of potential ineligibility under [§ 212(a)(3)(B) of the INA, relating to terrorist activities].” One of the revocations in that stack was Dr. Ibrahim’s student visa.

Sure enough, on January 31, 2005, the Department of State revoked Dr. Ibrahim’s F-1 student visa pursuant to § 212(a)(3)(B). In an e-mail conversation dated February 8, 2005 between the chief of the consular section at the U.S. Embassy in Kuala Lumpur and an official in the coordination division at the Department of State’s visa office, designated “VOL/C,” the consular chief asked about a prudential visa revocation cable he had received concerning the events Dr. Ibrahim experienced in January 2005. The Department of State official replied,

I handle revocations in VOL/C. The short version is that this person’s visa was revoked because there is law enforcement interest in her as a potential terrorist. This is sufficient to prudentially revoke a visa but doesn’t constitute a finding of ineligibility. The idea is to revoke first and resolve the issues later in the context of a new visa application … . My guess based on past experience is that she’s probably issuable. However, there’s no way to be sure without putting her through the interagency process.

After Dr. Ibrahim’s visa was revoked, the Department of State entered a record into CLASS that notified any consular official adjudicating a future visa application on her behalf that she may be inadmissible under § 212(a)(3)(B). In December 2005, Dr. Ibrahim was removed from the TSA’s Selectee list. Around this time, however, she was added to TACTICS (exports to Australia) and TUSCAN (exports to Canada). The government has never explained this placement or the effect of Dr. Ibrahim’s placement on TACTICS or TUSCAN. 8

Two weeks later, on January 27, 2006, Dr. Ibrahim filed the underlying action. On February 10, 2006, an unidentified government agent requested that Dr. Ibrahim be “Remove[d] From ALL Watchlisting Supported Systems (For terrorist subjects: due to closure of case AND no nexus to terrorism).” Answering the question “Is the individual qualified for placement on the no fly list?” the “No” box was checked. For the question, “If No, is the individual qualified for placement on the selectee list?” the “No” box was checked.

On September 18, 2006, the government removed Dr. Ibrahim from the TSD because she did not meet the “reasonable suspicion standard” for placement on it, which requires that the government believe “an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities.” The record, however, does not indicate whether she was removed from all of the customer watchlists that subscribed to the TSDB.

On March 2, 2007, Dr. Ibrahim was placed back on the TSDB. The record does not explain why she was relisted on the TSDB or which customer watchlists were to be notified. Two months later, however, on May 30, 2007, Dr. Ibrahim was again removed from the TSDB. The record does not show the extent to which Dr. Ibrahim’s name was then removed from the other customer watchlists, nor the reason for the removal.

Dr. Ibrahim’s 2009 visa application to attend proceedings in this case was initially refused under § 221(g) of the INA, 8 U.S.C. § 1201(g), because it was determined that there was insufficient information to make a final adjudication in the matter. The consular officer requested a Security Advisory Opinion from the Department of State. The consular official was concerned that Dr. Ibrahim was potentially inadmissible under § 212(a)(3)(B) of the INA, which provides nine classes of aliens ineligible for visas or admission into the United States based on terrorist activities. The Security Advisory Opinion from the Department of State, initially unavailable to Dr. Ibrahim but later produced in discovery, stated:

Information on this applicant surfaced during the SAO review that would support a 212(a)(3)(B) inadmissibility finding. Posts should refuse the case accordingly. Since the Department reports all visa refusals under INA Section 212(a)(3)(B) to Congress, post should notify [the Coordination Division within the Visa Office] when the visa refusal is affected [sic]. There has been no request for an INA section 212(d)(3)(A) waiver at this time.

Based on the Security Advisory Opinion’s finding, the consular officer denied her visa application, and wrote the word “(Terrorist)” on the form to explain the inadmissibility determination to Dr. Ibrahim.

On October 20, 2009, Dr. Ibrahim was again nominated to the TSDB pursuant to a secret exception to the reasonable suspicion standard. The government claims that the nature of the exception and the reasons for the nomination are

8. The record does not reflect how Canada and Australia use the information exported into the TUSCAN and TACTICS databases. The government declined to provide this information during discovery, deeming it outside the scope of the Federal Rule of Civil Procedure 30(b)(6) subpoena.
state secrets. In Dr. Ibrahim’s circumstance, the effect of the
nomination was that Dr. Ibrahim’s information was exported
from the TSDB database solely to the Department of State’s
CLASS database and DHS’s TECS database.

From October 2009 to the present, Dr. Ibrahim has been
included on the TSDB, CLASS, and TECS watchlists. She
has been off the No Fly and Selectee lists. She remains in the
TSDB, even though she does not meet the “reasonable suspi-
cion standard,” pursuant to a classified and secret exception
to that standard.

Government counsel conceded at trial that Dr. Ibrahim
was not a threat to the national security of the United States
and that she never has been. She did not pose (and has not
posed) a threat of committing an act of international or
domestic terrorism with respect to an aircraft, a threat to airline
passenger or civil aviation security, or a threat of domestic
terrorism. Despite this assessment, Dr. Ibrahim has been un-
able to return to the United States to this day.

II.

On January 27, 2006, Dr. Ibrahim filed suit against DHS,
TSAs, the TSC, the FBI, the Federal Aviation Administration
(FAA), and individuals associated with these entities (col-
collectively, the federal defendants); the City and County of
San Francisco, the San Francisco Police Department, SFO,
the County of San Mateo, and individuals associated with
these entities (collectively, the city defendants); and United
Airlines, UAL Corporation, and individuals associated with
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these entities (collectively, the private defendants). Dr. Ibra-
him asserted § 1983 and state-law tort claims arising
out of her detention at SFO, as well as several constitu-
tional claims based on the inclusion of her name on govern-
ment terrorist watchlists. On August 16, 2006, the district
court dismissed her claims against the federal defendants under
49 U.S.C. § 46110(a), which vests exclusive original jurisdic-
tion in the courts of appeals over suits challenging security
orders issued by TSA. The order also dismissed Dr. Ibrahim’s
claims against a TSA employee and the airline. Dr. Ibrahim
appealed.

We affirmed in part, reversed in part, and remanded. We
reversed the district court’s dismissal of the federal defen-
dants, holding that § 46110(a) does not bar district court jur-
sisdiction over Dr. Ibrahim’s challenges to her placement on
the government terrorist watchlists, including the No Fly list,
but stopped short of attempting to force the government to
issue her a visa.

Both the Federal Defendants and Non-Federal Defendants
filed motions to dismiss with respect to the majority of the
claims. In an order dated July 27, 2009, the district court
partially granted the Non-Federal Defendants’ motions to
dismiss. Thereafter, all of the Non-Federal Defendants en-
tered into cash settlements with Dr. Ibrahim.

In the same order, the district court again dismissed Dr.
Ibrahim’s claims against the Federal Defendants. These
claims alleged that the inclusion of Dr. Ibrahim’s name on the
government’s terrorist watchlists violated her First Amend-
ment right to freedom of association and her Fifth Amend-
ment rights to due process and equal protection. She also al-
leged that the Federal Defendants violated the APA, arguing
that the APA waives the sovereign immunity of the United
States, thereby allowing her claims under the First and Fifth
Amendments and authorizing remedies for those claims.

The district court held that while Dr. Ibrahim could seek
damages for her past injury at SFO (and had successfully set-
tled that part of the case), she had voluntarily left the United
States and, as a nonimmigrant alien abroad, no longer had
standing to assert constitutional and statutory claims to seek
prospective relief. The district court held that, although non-
immigrant aliens in the United States had standing to assert
constitutional and statutory claims, a nonimmigrant alien
who had voluntarily left the United States and was at large
abroad had no standing to assert federal claims for prospec-
tive relief in our federal courts. Dr. Ibrahim filed a second
appeal.

9. We held that although the TSA employee “lives in Virginia
and has no ties to California,” the court had specific jurisdic-
tion over Dr. Ibrahim’s claims against him because “(1) [he] purposefully directed
his action (namely, his order to detain Ibrahim) at California; (2) [Dr.]
Ibrahim’s claim arises out of that action; and (3) jurisdiction is reason-
able.” Ibrahim I, 538 F.3d at 1258 (citation omitted).

9. We held that although the TSA employee “lives in Virginia
and has no ties to California,” the court had specific jurisdic-
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his action (namely, his order to detain Ibrahim) at California; (2) [Dr.]
Ibrahim’s claim arises out of that action; and (3) jurisdiction is reason-
able.” Ibrahim I, 538 F.3d at 1258 (citation omitted).
We affirmed in part, but reversed as to prospective standing by holding that even a nonimmigrant alien who had voluntarily left the United States nonetheless has standing to litigate federal constitutional claims in the district courts of the United States so long as the alien had a “substantial voluntary connection” to the United States. Ibrahim v. Dep’t of Homeland Sec., 669 F.3d 983, 996 (9th Cir. 2012) (Ibrahim II). We held that Dr. Ibrahim had such a connection because of her time at Stanford University, her continuing collaboration with professors in the United States, her membership in several professional organizations located in the United States, the invitations for her to return, and her network of close friends in the United States. Id. at 993–94, 996. The government did not seek review by the Supreme Court.

Following the second remand, the government again filed a motion to dismiss, which the district court denied. Despite the unequivocal pronouncement from our court and the district court that Dr. Ibrahim had adequately pleaded Article III standing, the government argued over the next year that Dr. Ibrahim lacked standing. The government made this argument in its third motion to dismiss, its motion for summary judgment, its statements during trial, and its proposed findings of fact and conclusions of law. The government persisted, even though it was abundantly clear that “the standing issue had gone the other way on appeal.”

From the February 2012 remand through trial, the parties and the district court were embroiled in discovery disputes involving the state secrets privilege, the law enforcement privilege, and assertions of “sensitive security information” (SSI), 49 C.F.R. § 1520.5. The government invoked these as bases for withholding classified and otherwise allegedly sensitive government information from Dr. Ibrahim and her counsel.

On April 19, 2013, after years of litigation, the district court finally issued two orders granting in part and denying in part Dr. Ibrahim’s motions to compel discovery. Resolving these disputes required the district court judge to review individually each of the documents Dr. Ibrahim sought. Most of this review was conducted ex parte and in camera due to the privileged, classified, or secret nature of the documents. The state secrets privilege was upheld as to nearly all of the classified documents in question. The government’s assertion of other privileges regarding non-classified documents was overruled as to the majority of the remaining documents. The district court compelled the government to release information specifically related to Dr. Ibrahim’s watchlist history, in addition to her current watchlist statuses. It also required the government to produce Federal Rule of Civil Procedure 30(b)(6) witnesses.

At last, Dr. Ibrahim and her attorneys were able to learn what the government had known all along. On May 2, 2013, the government stated that Dr. Ibrahim was inadvertently placed on the No-Fly list but did not explain the details of this mistake, or who was involved. On May 2, 2013, when the government responded to Dr. Ibrahim’s interrogatory requests, Dr. Ibrahim learned, for the first time, her historical and current watchlist statuses.10 On September 12, 2013, again over the government’s vigorous objections, Dr. Ibrahim’s attorneys deposed Agent Kelley and learned that her placement on the No Fly and IBIS watchlists was, in fact, a mistake based on Agent Kelley’s misreading of the form.11 In sum, the government failed to reveal that Dr. Ibrahim’s placement on the No Fly list was a mistake until two months before trial, and eight years after Dr. Ibrahim filed suit. And at all times, as the government vigorously contested Dr. Ibrahim’s discovery requests, and lodged over two hundred objections and instructions not to answer questions in depositions, the government was aware that she was not responsible for terrorism or any threats against the United States.

The government’s discovery games stretched up to and through trial. The government announced on at least two occasions that if it invoked the state secrets privilege to withhold information, then that evidence could not be relied upon by either side at trial. After making such representations on the record, on September 13, 2013, the district court ordered the government to confirm that neither party could use information withheld on grounds of state secrets privilege. The government affirmed it would not rely on any information withheld on grounds of privilege from Dr. Ibrahim. The government nevertheless reversed course during trial and sought to prevail by having this action dismissed due to its inability to disclose state secrets.

The government also filed a motion for summary judgment. A hearing was held on the government’s motion on October 31, 2013. Instead of discussing the merits of the summary judgment motion, the government used the vast majority of the hearing time to discuss whether or not the trial should be open to the public and whether certain information listed on Dr. Ibrahim’s demonstratives was subject to various privileges. The district court ultimately declined to hear further argument and decided the motion on the papers.

The government’s motion for summary judgment was granted in limited part but mostly denied on November 4, 2013. Dr. Ibrahim’s “exchange of information” claim based on the First Amendment was dismissed. Dr. Ibrahim’s claims based on procedural and substantive due process, equal protection, and First Amendment rights of expressive associa-

10. The government designated all of its interrogatory responses “attorneys’ eyes only,” which, under the protective order, meant that only Dr. Ibrahim’s attorneys were allowed to review information produced with this stamp, and Dr. Ibrahim herself was not permitted to review those documents. As a result, it is difficult to discern precisely when Dr. Ibrahim herself was able to learn certain information. However, with respect to information regarding her current and historical watchlist statuses, the district court concluded those were not protected by privilege in its April 2013 order, so it is likely counsel was able to inform Dr. Ibrahim of her watchlist statuses the day the interrogatory responses were filed.

11. Dr. Ibrahim first learned that Agent Kelley had participated in the 2004 interview and that Kelley was personally responsible for nominating her to the TSDB during the deposition of the Acting Deputy Director of the TSC on May 29, 2013.
tion and against retaliation proceeded to trial. The government raised lack of standing, yet again, and was denied, yet again. For the first time, and contrary to what it had represented before, the government further argued that summary judgment in its favor was appropriate based on the state secrets privilege, pursuant to our court’s decision in Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc) (noting that even when evidence is excluded via an invocation of state secrets, the case may still need to be dismissed because “it will become apparent during the [United States v. Reynolds, 345 U.S. 1 (1953)] analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets”).

At the final pretrial conference, the government made what amounted to a motion for reconsideration of its previously denied motion for summary judgment on state secrets grounds. The government argued that the action should be dismissed because the core of the case had been excluded as state secrets. The motion was denied on several grounds. First, the government had failed to raise such an argument until weeks before trial. Second, it was too late and too unsettling for the government to reverse its prior position. Third, even under Jeppesen, 614 F.3d at 1080, the district court could not say with certainty that Dr. Ibrahim would be unable to prove her case at trial or that the government would be absolutely deprived of a meritorious and complete defense. The district court planned to allow both sides to present their unclassified evidence through the “normal” trial procedure and then to allow the government to submit an ex parte and under seal submission to try to explain how its state secrets might bear on the actual trial issues. Surprisingly, although no classified information was used at trial, the government made numerous privilege assertions and motions to close the courtroom. Due to these assertions, the district judge at least ten times “reluctantly” asked the press and the public to leave the courtroom.

On December 2, 2013, the first day of trial, before opening statements, Dr. Ibrahim’s counsel reported that Dr. Ibrahim’s daughter—a U.S. citizen born in the United States and a witness disclosed on Dr. Ibrahim’s witness list—was not permitted to board her flight from Kuala Lumpur to attend trial, evidently because she too was now on the No Fly list. Consequently, Dr. Ibrahim’s daughter missed her flight and was forced to reschedule. The district court concluded this was a mistake, and the government quickly remedied this error.

After a one-week bench trial, in the first No Fly list trial ever conducted, the district court found in Dr. Ibrahim’s favor on her procedural due process claim and ordered the government to remove all references to the mistaken designations by Agent Kelley in 2004 on all terrorist watchlist databases and records; to inform Dr. Ibrahim of the specific subsection of the INA that rendered Dr. Ibrahim ineligible for a visa in 2009 and 2013; to inform Dr. Ibrahim she is no longer on the No Fly list and has not been since 2005; and to inform Dr. Ibrahim that she is eligible to apply for a discretionary visa waiver under 8 U.S.C. § 1182(3)(D)(iv) and 22 C.F.R. § 41.121(b)(1). The district court declined to reach Dr. Ibrahim’s substantive due process, equal protection, First Amendment, and APA claims, because “those arguments, even if successful, would not lead to any greater relief than already ordered.”

Having won an outstanding victory, Dr. Ibrahim’s lawyers petitioned for fees under the EAJA. In the district court’s April 15, 2014 fee order, although the district court applauded the lawyers’ commitment to this difficult and unprecedented case, it awarded only limited compensation. The court acknowledged that Dr. Ibrahim “did not outright lose” on her substantive due process, equal protection, First Amendment, and APA claims, but treated those claims as “unsuccessful” when it calculated fees under Hensley. The district court found that her substantive due process and APA claims were related to the procedural due process claim on which she prevailed, so it allowed fees on these claims. But the court also ruled that her First Amendment and equal protection claims were not related to the successful claim, and denied fees for work performed on those claims. The district court also concluded that Dr. Ibrahim’s counsel was not entitled to fees for work performed on Dr. Ibrahim’s visa issues, the settlement with the Non-Federal Defendants, litigation of standing prior to Ibrahim II (although it permitted fees for time after Ibrahim II), litigation of privilege issues, and other miscellaneous work. The district court also found that the government did not act in bad faith, that Dr. Ibrahim’s counsel was not entitled to a rate enhancement beyond the $125 per hour fee stated in 28 U.S.C. § 2412(d)(2)(A)(ii), and that counsel was not entitled to fees as discovery sanctions pursuant to Federal Rules of Civil Procedure 37 and 16. The district court appointed a special master to determine the appropriate award of fees and costs based on the district court’s findings.

Thereafter, the parties and the court engaged in a lengthy and contentious fee dispute before the special master. The district court ultimately adopted the special master’s findings and reduced Dr. Ibrahim’s fees for various witnesses and costs associated with those witnesses, expenses related to obtaining TSA clearance, costs that would be “reasonably

12. Analyzing claims under the Reynolds privilege involves three steps:

First, we must “ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.” Second, we must make an independent determination whether the information is privileged .... Finally, “the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.”

Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1202 (9th Cir. 2007) (quoting El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007)).

13. The district court allowed a rate enhancement for James Manis because of his “distinctive knowledge and skills.”
charged” to the client, and costs for multiple copies of the same book; and rejected certain expenses for lack of supporting documentation or sufficient itemization. In total, Dr. Ibrahim sought $3,630,057.50 in market-rate attorneys’ fees and $293,860.18 in expenses. On October 9, 2014, the district court ultimately awarded Dr. Ibrahim $419,987.36 in fees and $34,768.71 in expenses. Dr. Ibrahim appealed the underlying legal framework the district court utilized to determine the fees she was eligible to recover, various specific reductions to eligible fees, and the striking of her objections to the special master’s recommendations.

On appeal, in the now-withdrawn panel opinion, our court adopted a number of the district court’s rulings under a different approach. *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 1048 (9th Cir. 2016), reh’g en banc granted, 878 F.3d 703 (9th Cir. 2017) (*Ibrahim III*). The three-judge panel concluded that “it was not an abuse of discretion to find that [Dr.] Ibrahim’s unsuccessful claims were unrelated, because although the work done on those claims could have contributed to her ultimately successful claim, the facts and legal theories underlying [Dr.] Ibrahim’s claims make that result unlikely.” *Id.* at 1063. The panel rested this conclusion on the novel theory that, because the theories underlying claims the district court declined to reach were “mutually exclusive” to the successful claims, the unreached claims were unrelated. *Id.* at 1062–63. The panel also held that the district court incorrectly considered substantial justification at each stage of litigation; that the government did not act in bad faith; that the district court did not err in determining that Dr. Ibrahim had failed to abide by its page limits in objecting to the special master’s report and recommendation; and that the district court did not abuse its discretion in striking Dr. Ibrahim’s objections to the special master’s report and recommendation. *Id.* at 1052, 1065–66.

We now clarify that when a district court awards complete relief on one claim, rendering it unnecessary to reach alternative claims, the alternative claims cannot be deemed unsuccessful for the purpose of calculating a fee award. We also reject the post hoc “mutual exclusivity” approach to determining whether “unsuccessful” claims are related to successful claims and reaffirm that *Hensley* sets forth the correct standard of “relatedness” for claims under the EAJA. And we reaffirm that in evaluating whether the government’s position is substantially justified, we look at whether the government’s and the underlying agency’s positions were justified as a whole and not at each stage.

### III.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court’s award of fees under the EAJA for abuse of discretion. *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005); *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005); *Schwarz v. Sec’y of Health & Human Servs.*, 73 F.3d 895, 900 (9th Cir. 1995). We review a district court’s finding on the question of bad faith for clear error. *Cazers v. Barber*, 959 F.2d 753, 754 (9th Cir. 1992). We review the district court’s interpretation of the EAJA de novo. *Edwards v. McMahon*, 834 F.2d 796, 801 (9th Cir. 1987). “[A] district court’s fee award will be overturned if it is based on an inaccurate view of the law or a clearly erroneous finding of fact.” *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991).

### IV.

The parties now14 do not dispute that Dr. Ibrahim is entitled to attorneys’ fees under the EAJA. What they do dispute is whether the amount of fees the district court awarded resulted from a proper application of the EAJA and common law.

In enacting the EAJA, Congress stated:

For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process… . When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.


“The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.” *Ardestani v. I.N.S.*, 502 U.S. 129, 138 (1991); *see also Jean*, 496 U.S. at 163 (“[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.”). Congress specifically intended the EAJA to deter unreasonable agency conduct. *Jean*, 496 U.S. at 163 n.11 (quoting the statement of purpose for the EAJA, Pub. L. No. 96-481, §§ 201–08, 94 Stat. 2321, 2325–30 (1980)).

The policy behind the EAJA “is to encourage litigants to vindicate their rights where any level of the adjudicating agency has made some error in law or fact and has thereby forced the litigant to seek relief from a federal court.” *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007). “[W]e have consistently held that regardless of the government’s conduct in the federal court proceedings, unreasonable agency action at any level entitles the litigant to EAJA fees.” *Id.*

“The EAJA applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim.” *Jean*, 496 U.S. at 163–64. The EAJA was designed to remedy this situation by providing for an award of reasonable attorneys’ fees to a

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14. Before the district court, the government opposed Dr. Ibrahim’s request for attorneys’ fees on substantial justification grounds, and it originally cross-appealed the entire award in this appeal. Before argument, however, the government moved to voluntarily dismiss the cross-appeal and paid to Dr. Ibrahim the now uncontestoned amounts of attorneys’ fees and expenses awarded by the district court.
“prevailing party” in a “civil action” unless the position taken by the United States at issue “was substantially justified” or “special circumstances make an award unjust.” Id. at 158; 28 U.S.C. § 2412(d)(1)(A).

The EAJA specifically provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.


Thus, as the Supreme Court held in Jean:

eligibility for a fee award in any civil action requires: (1) that the claimant be “a prevailing party”; (2) that the Government’s position was not “substantially justified”; (3) that no “special circumstances make an award unjust”; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement.

496 U.S. at 158.

The district court correctly concluded that Dr. Ibrahim was the prevailing party in this case. The third and fourth Jean factors are not at issue. The only remaining issue as to Dr. Ibrahim’s entitlement to fees is whether the government’s position was substantially justified.

A. Substantial Justification

Where, as here, a movant under the EAJA has established that it is a prevailing party, “the burden is on the government to show that its litigation position was substantially justified on the law and the facts.” Cinciarelli v. Reagan, 729 F.2d 801, 806 (D.C. Cir. 1984). To establish substantial justification, the government need not establish that it was correct or “justified to a high degree”—indeed, since the movant is established as a prevailing party it could never do so—but only that its position is one that “a reasonable person could think it correct, that is, [that the position] has a reasonable basis in law and fact.”18 Pierce v. Underwood, 487 U.S. 552, 565, 566 n.2 (1988). That the government lost (on some issues) does not raise a presumption that its position was not substantially justified. Edwards, 834 F.2d at 802 (citation omitted). Fees may be denied when the litigation involves questions of first impression, but “whether an issue is one of first impression is but one factor to be considered.” United States v. Marolf, 277 F.3d 1156, 1162 n.2 (9th Cir. 2002).

When evaluating the government’s “position” under the EAJA, we consider both the government’s litigation position and the “action or failure to act by the agency upon which the civil action is based.” 28 U.S.C. § 2412(d)(1)(B). Thus, the substantial justification test is comprised of two inquiries, one directed toward the government agency’s conduct, and the other toward the government’s attorneys’ conduct during litigation. See Gutierrez v. Barnhart, 274 F.3d 1255, 1259 (9th Cir. 2001). The test is an inclusive one; we consider whether the government’s position “as a whole” has “a reasonable basis in both law and fact.” Id. at 1258, 1261; see also Meier v. Colvin, 727 F.3d 867, 870 (9th Cir. 2013).

The district court, invoking our decision in Corbin v. Apfel, 149 F.3d 1051 (9th Cir. 1998), concluded that, in exceedingly complex cases, a court may appropriately determine whether the government was substantially justified at each “stage” of the litigation and make a fee award apportioned to those separate determinations. It accordingly disallowed fees for discrete positions taken by the government at different stages of the litigation because, in its view, the government’s positions in each instance were substantially justified. This approach was error, as it is contrary to the Supreme Court’s instructions in Jean.

In Jean, the Supreme Court rejected the government’s argument that it could assert a “‘substantial justification’ defense at multiple stages of an action.” 496 U.S. at 158–59. Examining the statutory language, the Court noted the complete absence of any textual support for this position. Id. at 159. Moreover, “[s]ubsection (d)(1)(A) refers to an award of fees ‘in any civil action’ without any reference to separate parts of the litigation, such as discovery requests, fees, or appeals.” Id. The Court also noted that “[t]he reference to ‘the position of the United States’ in the singular also suggests that the court need make only one finding about the justification of that position.” Id. An amendment to the EAJA made clear that the “‘position of the United States’ means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based.” Pub. L. No. 99-80, § 2(c)(2)(B), 99 Stat. 183, 185 (1985) (codified at 28 U.S.C. § 2412(d)(2)(D)). As the Court reiterated, “Congress’ emphasis on the underlying Government action supports a single evaluation of past conduct.” Jean, 496 U.S. at 159 n.7 (citing H.R. Rep. No. 98-992, at 9, 13 (1984) (“[T]he amendment will make clear that the Congressional intent is to provide for attorney fees when an unjustifiable agency action forces litigation, and the agency then tries to avoid such liability by reasonable behavior during the litigation.”)), and S. Rep. No. 98-586, at 10 (1984) (“Congress expressly recognized ‘that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or ad-

15. The partial dissent is incorrect to view the issue as solely a factual one, as we must consider the law as applied to the facts.
judicate has helped to define the limits of Federal authority.” (citation omitted)). The Jean Court concluded that “[t]he single finding that the Government’s position lacks substantial justification, like the determination that a claimant is a ‘prevailing party,’ thus operates as a one-time threshold for fee eligibility.” Id. at 160.

In sum, “[a]ny given civil action can have numerous phases,” as evidenced by the case at hand. Id. at 161. But the Supreme Court clearly instructed, and almost all courts have clearly understood, that “the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items.” See Glenn v. Comm’r of Soc. Sec., 763 F.3d 494, 498–99 (6th Cir. 2014) (adopting a single inquiry test and noting that district courts cannot simply compare the number of successful claims to the number of unsuccessful claims in a single appeal) (“Rather, the question is whether the government’s litigation position … is justified to a degree that could satisfy a reasonable person and whether it was supported by law and fact.”) (internal quotation marks and citations omitted)). United States v. 515 Granby, LLC, 736 F.3d 309, 315–17 (4th Cir. 2013) (considering the government’s pre- and post-litigation conduct as a whole and noting that “an unreasonable pretitigation position will generally lead to an award of attorney’s fees under the EAJA”); United States v. Hurt, 676 F.3d 649, 653–54 (8th Cir. 2012) (examining government’s conduct as a whole); Gomez-Beleno v. Holder, 644 F.3d 139, 145 n.3 (2d Cir. 2011) (considering the government’s position as a whole rather than making separate substantial justification findings for different stages of the proceedings); Wagner v. Shinseki, 601 F.3d 1353, 1359 (Fed. Cir. 2011) (assessing the government’s litigation position in totality); Savsana v. Gillen, 614 F.3d 1, 5–7 (1st Cir. 2010) (same); Hackett v. Barnhart, 475 F.3d 1166, 1173–74 (10th Cir. 2007) (same); Sims v. Apfel, 238 F.3d 597, 602 (5th Cir. 2001) (same); United States v. Jones, 125 F.3d 1418, 1428–29 (11th Cir. 1997) (same); Hanover Prods. Corp. v. Shalala, 989 F.2d 123, 131 (3d Cir. 1993) (adopting a single inquiry test, though contrary to our holding in this case, requiring a district court to “evaluate every significant judgment made by an agency … to determine if the argument is substantially justified” as “necessary to … determine whether, as a whole, the Government’s position was substantially justified”).

The D.C. and Seventh Circuits stand alone in declining to adopt a single inquiry test. The D.C. Circuit has rejected a reading of Jean that would preclude a claim-by-claim determination on the ground that such a rule would render the EAJA “a virtual nullity” because government conduct is nearly always grouped with or part of some greater, such a rule would preclude a claim-by-claim determination on the ground that the government was “substantially justified.” Rather, the question is whether the government’s litigating position was based was not justified at all, much less substantially.

There is little effect in cases where the government agency’s conduct is unjustified, as EAJA “fees generally should be awarded where the government’s underlying action was unreasonable even if the government advanced a reasonable litigation position.” Marolf, 277 F.3d at 1159.

16. All but two circuits agree that “the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items.” See Glenn v. Comm’r of Soc. Sec., 763 F.3d 494, 498–99 (6th Cir. 2014) (adopting a single inquiry test and noting that district courts cannot simply compare the number of successful claims to the number of unsuccessful claims in a single appeal) (“Rather, the question is whether the government’s litigation position … is justified to a degree that could satisfy a reasonable person and whether it was supported by law and fact.”) (internal quotation marks and citations omitted)). United States v. 515 Granby, LLC, 736 F.3d 309, 315–17 (4th Cir. 2013) (considering the government’s pre- and post-litigation conduct as a whole and noting that “an unreasonable pretitigation position will generally lead to an award of attorney’s fees under the EAJA”); United States v. Hurt, 676 F.3d 649, 653–54 (8th Cir. 2012) (examining government’s conduct as a whole); Gomez-Beleno v. Holder, 644 F.3d 139, 145 n.3 (2d Cir. 2011) (considering the government’s position as a whole rather than making separate substantial justification findings for different stages of the proceedings); Wagner v. Shinseki, 601 F.3d 1353, 1359 (Fed. Cir. 2011) (assessing the government’s litigation position in totality); Savsana v. Gillen, 614 F.3d 1, 5–7 (1st Cir. 2010) (same); Hackett v. Barnhart, 475 F.3d 1166, 1173–74 (10th Cir. 2007) (same); Sims v. Apfel, 238 F.3d 597, 602 (5th Cir. 2001) (same); United States v. Jones, 125 F.3d 1418, 1428–29 (11th Cir. 1997) (same); Hanover Prods. Corp. v. Shalala, 989 F.2d 123, 131 (3d Cir. 1993) (adopting a single inquiry test, though contrary to our holding in this case, requiring a district court to “evaluate every significant judgment made by an agency … to determine if the argument is substantially justified” as “necessary to … determine whether, as a whole, the Government’s position was substantially justified”).

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17. “Remand” is something of a misnomer, albeit one oft used in agency cases, as in fact “the civil action seeking judicial review of the … final decision,” Shalala v. Schaefer, 503 U.S. 292, 299 (1993) (internal citation and quotation marks omitted), is terminated, not remanded.

18. And even if Corbin did apply to this case, the district court misapplied Corbin because it evaluated whether each individual argument at each stage of the litigation was substantially justified, rather than the government’s position at each stage as a whole.
The district court correctly recognized as much, finding: “The original sin—Agent Kelley’s mistake and that he did not learn about his error until his deposition eight years later—was not reasonable” under the EAJA. Whether the error is attributable to the failure to train Agent Kelley, the counter-intuitive nature of the form (check the categories that do NOT apply), the lack of cross-checking or other verification procedures, or anti-Muslim animus (Agent Kelley interviewed Dr. Ibrahim on December 23, 2004, as part of an International Terrorism Investigation), the precise cause is irrelevant to, and does not mitigate, the lack of any basis to place Dr. Ibrahim on the list, nor does it justify a reduction in fees.19 See Marolf, 277 F.3d at 1159 (holding that EAJA “fees generally should be awarded where the government’s underlying action was unreasonable even if the government advanced a reasonable litigation position”).

The district court correctly concluded that the government’s litigation position—to defend the indefensible, its No Fly list error—was not reasonable. As the district court stated, “[t]he government’s defense of such inadequate due process in Dr. Ibrahim’s circumstance—when she was concededly not a threat to national security—was not substantially justified.”

Those conclusions should have been the end of the district court’s EAJA eligibility analysis. After the government engaged in years of scorched earth litigation, it finally conceded during trial in December 2013 that Dr. Ibrahim is “not a threat to our country. She does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism.” But the government knew this in November 2004, when Agent Kelley completed the form; it knew it in January 2005, when the DHS agent told Dr. Ibrahim she was not on the No Fly list; and it knew it in January 2005, when the government knew this in November 2004, when Agent Kel.

Further, when considering the government’s litigation position, we also consider the government’s positions on discovery and other non-merits issues, i.e., the government’s conduct as a whole. See United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996) (citing United States v. Powell, 379 U.S. 48, 57–58 (1964)) (considering government’s conduct during discovery when performing substantial justification inquiry). Here, as discussed at length below, the government played discovery games, made false representations to the court, misled the court’s time, and interfered with the public’s right of access to trial. Thus, the government attorneys’ actual conduct during this litigation was ethically questionable and not substantially justified.

21. The partial dissent argues that “Supreme Court precedent requires that we allow the district court to make [the] determination” as to whether the government’s position was substantially justified. Concurring & Dissenting Op. at 78 (citing Pierce, 487 U.S. at 560); see also id. at 78–81. Not so. The dissent is actually quoting from the portion of the Pierce decision where Justice Scalia is deciding which of the three general standards of review should apply to the district court’s “substantial justification” determination—de novo, clear error, or abuse of discretion. Pierce, 487 U.S. at 558. He decides that the abuse of discretion standard applies because the appropriate degree of deference is inherent in the standard itself. Id. at 559–63. Here, we applied the abuse of discretion standard and concluded the district court abused its discretion. Notably, in Pierce, the Court also declared that an abuse of discretion standard will “implement our view that a ‘request for attorney’s fees should not result in a second major litigation,’” id. at 563 (quoting Hensley, 461 U.S. at 437). But that is exactly what has happened here. See infra Part V. We have already engaged in the “unusual expense” of reviewing over 7,000 pages of record and over 1,000 pages of trial exhibits, Pierce, 487 U.S. at 560, and we see no further need to duplicate this work.

19. We make no findings, nor can we on appeal, as to how this mistaken placement came about, and we ascribe no nefarious motivations to the government as an entity. Again, we cannot know on this record precisely why Dr. Ibrahim’s name was listed on the TSDB watchlist to begin with.

20. We do not find that the government’s defense of this litigation was unreasonable at all points of the litigation. Instead, what was not substantially justified was the government’s continued defense of issues even after the reasons justifying their defense disappeared. For example, the government was justified in initially raising standing arguments, but was not justified in continuing to raise the same meritless standing arguments on numerous occasions once that issue had been definitively resolved by both our court and the district court. In a similar vein, while the government may have been justified in defending this litigation and refusing to tell Dr. Ibrahim her No Fly list status pursuant to its Glomar policy—a policy whereby the government refuses to confirm or deny the existence of documents in response to a Freedom of Information Act request, see N.Y. Times v. U.S. Dep’t of Justice, 756 F.3d 100, 105 (2d Cir. 2014), amended by 758 F.3d 436 (2d Cir. 2014)—any justification it had to defend Dr. Ibrahim’s No Fly list status vanished once she was made aware of her watchlist statuses and it had admitted its mistake in 2013.
496 U.S. at 161. “It remains for the district court to determine what fee is ‘reasonable.’” *Hensley*, 461 U.S. at 433.

**B. Reasonableness**

In *Hensley*, the Supreme Court set out a two-pronged approach for determining the amount of fees to be awarded when a plaintiff prevails on only some of his claims for relief or achieves “limited success.” *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (citing *Hensley*, 461 U.S. at 436–37). First, we ask, “did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?” *Hensley*, 461 U.S. at 434. This inquiry rests on whether the “related claims involve a common core of facts or are based on related legal theories,” *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003) (citing *Hensley*, 461 U.S. at 435), with “the focus … on whether the claims arose out of a common course of conduct,” *id.* at 1169 (emphasis added) (citing *Schwarz*, 73 F.3d at 903 (interpreting *Hensley*)). Second, we ask whether “the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?” *Hensley*, 461 U.S. at 434. If the court concludes the prevailing party achieved “excellent results,” it may permit a full fee award—that is, the entirety of those hours reasonably expended on both the prevailing and unsuccessful but related claims. *Id.* at 435; *Schwarz*, 73 F.3d at 905–06.

1. **“Unsuccessful Claims”**

The district court erroneously determined that Dr. Ibrahim was entitled to reasonable fees and expenses with respect to only her procedural due process claim, which provided her with substantial relief, and her related substantive due process and APA claims. Because Dr. Ibrahim’s equal protection, APA, substantive due process, and First Amendment claims “would not lead to any greater relief than [what the district court had] already ordered,” the district court declined to reach them. The district court then treated these unreached claims as unsuccessful, even while acknowledging that Dr. Ibrahim “did not outright lose on these claims,” and disallowed counsel’s reasonable fees and expenses on the “unrelated” First Amendment and equal protection claims. This overall approach was error.

The *Hensley* Court recognized that in complex civil rights litigation, plaintiffs may raise numerous claims, not all of which will be successful: “Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.” *Hensley*, 461 U.S. at 435 (emphasis added). And where, as here, “a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” *Id.* The district court’s rationale—that because Dr. Ibrahim won substantial relief on one claim, and it was therefore unnecessary to reach her other equally pursued claims that could also lead to the same relief, no fees were available for the unreached claim—turns *Hensley* on its head.

We are aware of no court that has held that a plaintiff who obtains full relief on some claims, thereby rendering it unnecessary to reach the remaining claims, “lost” on the unreached claims. When confronted with this question, our sister circuits that have addressed the issue have uniformly declined to adopt the district court’s analysis. The Sixth Circuit “decline[d] the government’s invitation to apportion [plaintiff’s] attorney fees to the single claim addressed in [its] previous opinion.” *Sakhawati v. Lynch*, 839 F.3d 476, 480 (6th Cir. 2016). The Eighth Circuit also refused to reduce fees where the district court found in plaintiffs’ favor on their state claim without reaching the federal claims, because plaintiffs’ federal claims “were alternative grounds for the result the district court reached” and “plaintiffs fully achieved [their] goal by prevailing on their state constitutional claim.” *Emsry v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001). And the Seventh Circuit rejected defendants’ argument that plaintiff did not succeed on her sexual harassment claim where “the court did not find in [defendant’s] favor on the sexual harassment claim; it merely did not reach the merits of the issue.” *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 874 (7th Cir. 1995).

We agree with our sister circuits that a district court’s “failure to reach” certain grounds does not make those grounds “unsuccessful,” and conclude that the district court clearly erred in holding that Dr. Ibrahim’s unreached claims were “unsuccessful.”

2. **Related Claims**

The district court and the original panel exacerbated this error in analyzing whether the claims the district court did not reach were related to her successful claims. The district court correctly concluded that Dr. Ibrahim’s substantive due process and APA claims were related to her prevailing procedural due process claim and allowed recovery of some of those fees and expenses. Without much analysis, however, the district court also concluded that her equal protection and First Amendment claims were not related “because they involved different evidence, different theories, and arose from a different alleged course of conduct.” The three-judge panel stepped into the breach with its newly devised “mutually exclusive” rationale to determine that the claims were unrelated because, after trial, the district court found that Dr. Ibrahim was placed on the No Fly list due to negligence, and her First Amendment and equal protection claims alleged intentional discrimination. The three-judge panel concluded that the two mens rea requirements were “mutually exclusive.”

But both the district court and the now-withdrawn opinion failed to follow clear precedent to the contrary. The Court made clear in *Hensley* that, while hours spent on an unsuccessful claim “that is distinct in all respects from [the plaintiff’s] successful claim” should be excluded, “[w]here a lawsuit consists of related claims, a plaintiff who has won
substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised.” 461 U.S. at 440. Construing the Hensley Court’s statement that claims are “unrelated” if they are “entirely distinct and separate” from the prevailing claims, we have held that “related claims involve a common core of facts or are based on related legal theories.” Webb, 330 F.3d at 1168 (citations omitted). We do not require commonality of both facts and law to conclude that claims are related. Id. Rather “the focus is to be on whether the unsuccessful and successful claims arose out of the same ‘course of conduct.’ If they didn’t, they are unrelated under Hensley.” Schwarz, 73 F.3d at 903. The three-judge panel’s introduction of the mutual-exclusivity test is contrary to Supreme Court precedent,22 our precedent,23 and the precedent of every other circuit interpreting Hensley that has addressed the question.24 We are aware of no other court that has adopted the mutual-exclusivity test, and we now disavow its use as a standard for relatedness.

All of Dr. Ibrahim’s claims arose from a “common course of conduct” and are therefore related under Hensley. See Webb, 330 F.3d at 1169. The First Amended Complaint at bottom was a challenge to “defendants’ administration, management, and implementation of the ‘No-Fly List.’” Specifically, Dr. Ibrahim alleged that the manner in which the government created, maintained, updated, and disseminated the No Fly list led to the humiliating treatment she experienced at SFO in January 2005 and afterwards, as she was unable to learn whether she was on or off the list or why she was placed there in the first place. She alleged several alternative theories for this treatment, five of which ultimately went to trial against the federal government. That the government’s actions arose from negligence or unconstitutional animus could not have been known until the case was tried, and we still do not know whether, in addition to Agent Kelley’s negligence in placing her on the No Fly list, the government’s initial interest in Dr. Ibrahim stemmed from its allegedly heightened interest in foreign students from Muslim countries here on U.S. student visas,25 or her husband’s recent visit, or her request if successful and unsuccessful claims are based on a “common core of facts.” … Claims are also related to each other if based on ‘related legal theories.’” (citations omitted); Keely v. Merit Sys. Prot. Bd., 793 F.2d 1273, 1275–76 (Fed. Cir. 1986) (rejecting the government’s argument that the court should reduce attorneys’ fees and individually evaluate each of the plaintiff’s separate arguments where the plaintiff only prevailed on one); Citizens Council of Del. Cty. v. Brinegar, 741 F.2d 584, 596 (3d Cir. 1984) (concluding that “it is clear that there was a sufficient interrelationship among the essential claims advanced by the plaintiff in the course of the litigation that the district court was not required to apportion fees based on the success or failure of any particular legal argument advanced by the plaintiff”); cf. Paris v. U.S. Dep’t of Hous. & Urban Dev., 988 F.2d 236, 240 (1st Cir. 1993) (concluding, in the context of analyzing a related provision of the Fair Housing Act, that if the case involves what is essentially a single claim arising from “a common nucleus of operative fact,” and the plaintiff advances separate legal theories that “are but different statutory avenues to the same goal,” then all of the time should be compensable), overruled on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598 (2001). Only the Second Circuit has interpreted Hensley to allow the lodestar reductions in cases where multiple claims involve a common nucleus of fact. Kassim v. City of Schenectady, 415 F.3d 246, 256 (2d Cir. 2005) (“A district judge’s authority to reduce the fee awarded to a prevailing plaintiff below the lodestar by reason of the plaintiff’s ‘partial or limited success’ is not restricted … to cases of multiple discrete theories …’”). The Fourth and Fifth Circuits have not yet reached this issue. See Vaughns by Vaughns v. Bd. of Educ. of Prince George’s Cty., 770 F.2d 1244, 1245 (4th Cir. 1985) (affirming the district court’s fee determination based on the standard of review, and not reaching whether its relatedness analysis, which focused on whether the claims arose from a common course of conduct, was accurate). 25. In opening argument at trial, Dr. Ibrahim’s attorney Elizabeth Pipkin stated:

In another Homeland Security presidential directive, the president calls for the end of abuse of student visas and increased the scrutiny of foreign students during the time that Dr. Ibrahim was studying at Stanford. In the months prior to the November 2004 presidential election and continuing up until the inauguration, the government ramped up its efforts to interrogate Muslims in America in a national dragnet.
regular attendance at a mosque, or her involvement in the Islamic Society of Stanford University, which, if true, would have shown discriminatory intent. And because the district court did not reach the First Amendment and equal protection claims, we will never know whether placement on the TSDB was a result of discrimination on the basis of her race, religion, country of origin, or association with Muslims and Muslim groups.

There is no question that all of these claims arise from the government’s common course of conduct toward Dr. Ibrahim. To hold otherwise would ignore the realities of lawyering. As here, the key question in a lawsuit is often not what happened—but why. Before the litigation begins and while it is ongoing, the plaintiff and her lawyers cannot know for sure why someone else did something, but may, as here, have evidence suggesting various possibilities. So, as here, the plaintiff raises alternative claims and theories as to why something was done, some of which may be ultimately inconsistent, with regard to a single set of facts. The plaintiff’s claims are then tested by dispositive motions, discovery, and perhaps (as happened here) trial. The fact that one claim or theory is eventually determined to be true does not mean that the claims were unrelated to one another.

It is common to plead that a defendant committed some act “intentionally, knowingly, or recklessly,” or simultaneously to bring different claims premised on distinct mental states. This widely accepted litigation strategy is accommodated by the clear standard pronounced by the Supreme Court and previously applied by our court, which focuses on whether the claims are premised on an “entirely distinct and separate” set of facts, not whether they are based on different “mental states.” The analysis in the now-withdrawn opinion shows that had it applied the correct standard, it would have recognized that all of Dr. Ibrahim’s claims were based on the same set of facts—the placement of Dr. Ibrahim’s name on the government’s watchlists—regardless of what “mental state” was required to prove each particular claim. *Ibrahim III*, 835 F.3d at 1063 (“If the government negligently placed [Dr.] Ibrahim on its watchlist because it failed to properly fill out a form, then it could not at the same time have intentionally placed [Dr.] Ibrahim on the list based on constitutionally protected attributes [Dr.] Ibrahim possesses, and vice versa.”).

Allowing hindsight to creep in to fee awards also would put lawyers in an untenable ethical position. Res judicata bars claims that could have been raised in an earlier litigation that arise out of the same “transactional nucleus of facts.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (internal quotation marks and citation omitted). Ethical obligations—or perhaps more likely, the specter of malpractice liability—thus require a lawyer to bring all reasonably related, viable claims in a single action.26 But the three-judge panel’s “mutually exclusive” rule raises the possibility that some fraction (perhaps a substantial one) of these reasonably related, ethically compelled claims, which a lawyer must research and litigate, will be excluded from a fee award.

Dr. Ibrahim’s lawyers may have violated their ethical duties and risked malpractice if they had failed to bring all claims that their client could present in good faith. See Model Rules of Prof’l Conduct r. 1.3 cmt. (Am. Bar Ass’n 2016) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”). Dr. Ibrahim and her lawyers faced an uphill battle. The government vigorously defended this case, and Dr. Ibrahim did not have access to meaningful discovery until a few months before trial, after years of litigation and two appeals—she was fighting blind against the Many-Faced Bureaucratic God.27

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26. Our sister circuits have recognized the difficult task facing lawyers navigating the complexities of civil rights litigation. The D.C. Circuit, for example, has emphasized that

[a] lawyer who wins full relief for her client on one of several related claims ... is not apt to be criticized because the court failed to reach some of the grounds, or even ruled against the client on them... . After the fact, it is of course easier to identify which arguments were winners and which were losers and state forcefully how an attorney’s time could have been better spent. But litigation is not an exact science. In some cases, the lawyer’s flagship argument may not carry the day, while the court embraces a secondary argument the lawyer rated less favorably. That is precisely why lawyers raise alternative grounds—a practice which is explicitly sanctioned by our Rules of Civil Procedure. *Goos v. Nat’l Ass’n of Realtors*, 68 F.3d 1380, 1386 (D.C. Cir. 1995); *see also id.* at 1384–86.

The Seventh Circuit similarly has rejected the panel’s ex post approach:

For tactical reasons and out of caution lawyers often try to state their client’s claim in a number of different ways, some of which may fall by the wayside as the litigation proceeds. The lawyer has no right to advance a theory that is completely groundless or has no factual basis, but if he presents a congeries of theories each legally and factually plausible, he is not to be penalized just because some, or even all but one, are rejected, provided that the one or ones that succeed give him all that he reasonably could have asked for.

*Lenard v. Argento*, 808 F.2d 1242, 1245–46 (7th Cir. 1987). Other circuits are in accord. See, e.g., *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006) (“[L]itigation is not an ‘exact science’: Lawyers cannot preordain which claims will carry the day and which will be treated less favorably.”); *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10th Cir. 1998) (“Litigants should be given the breathing room to raise alternative legal grounds without fear that merely raising an alternative theory will threaten the attorney’s subsequent compensation.”).

27. See Game of Thrones: The Red Woman (Home Box Office,
And as demonstrated by the complex and longstanding procedural history, it was not even clear that Dr. Ibrahim could advance the case beyond the dismissal stage.

Applying the correct “common course of conduct” test to Dr. Ibrahim’s claims for procedural and substantive due process, violations of her First Amendment and equal protection rights and the APA, we conclude that Dr. Ibrahim meets the first prong of Hensley. All of Dr. Ibrahim’s claims arose from her wrongful placement on the No Fly list, and are therefore related. Fees for each of these claims are thus recoverable. All of these claims derive from the government’s interest in Dr. Ibrahim’s activities, which led to her placement on the No Fly list, her placement on and off various other watchlists (which the district court deemed “Kafkaesque”), her attempts to learn why she was on the No Fly list, her attempts to get herself removed from the No Fly list, and the government’s intransigence in setting the record straight for almost a decade. As the district court found, this treatment had a “palpable impact, leading to the humiliation, cufing, and incarceration of an innocent and incapacitated air traveler.” Dr. Ibrahim’s “litany of troubles” flow directly from her erroneous placement on the No Fly list, as do all of the claims that went to trial. None of the claims was distinct or separable from another, and each claim sought the same relief Dr. Ibrahim ultimately obtained.

3. Level of Success

Dr. Ibrahim also satisfied Hensley’s second prong because she “achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award.” Sorenson, 239 F.3d at 1147 (internal punctuation omitted) (quoting Hensley, 461 U.S. at 434). The district court found that Dr. Ibrahim had only “limited” success. We disagree.

The achievement of Dr. Ibrahim and her attorneys in successfully challenging her No Fly list placement and forcing the government to fix its error was not just “excellent,” but extraordinary. Hensley, 461 U.S. at 435. Although this is not a class action, and thus we assess Dr. Ibrahim’s individual success, the pathbreaking nature of her lawsuit underscores her achievement. Dr. Ibrahim was the first person ever to force the government to admit a terrorist watchlisting mistake; to obtain significant discovery regarding how the federal watchlisting system works; to proceed to trial regarding a watchlisting mistake; to force the government to trace and correct all erroneous records in its customer watchlists and databases; to require the government to inform a watchlisted individual of her TSDB status; and to admit that it has secret exceptions to the watchlisting reasonable suspicion standard.

Dr. Ibrahim, in her first appeal to our court, established that district courts have jurisdiction over challenges to placement on terrorist watchlists, including the No Fly list. Ibrahim I, 538 F.3d at 1254–57. In her second appeal, she established that even aliens who voluntarily depart from the U.S. have standing to bring constitutional claims when they have had a significant voluntary connection with the U.S. Ibrahim II, 669 F.3d at 993–94. Moreover, on her journey, Dr. Ibrahim established important principles of law, benefiting future individuals wrongfully placed on government watchlists. Previously, most such challenges failed at the pleading stage. See, e.g., Shearson v. Holder, 725 F.3d 588 (6th Cir. 2013); Rahman v. Chertoff, No. 05 C 3761, 2010 WL 1335434 (N.D. Ill. Mar. 31, 2010); Scherfen v. U.S. Dep’t of Homeland Sec., No. 3:CV-08-1554, 2010 WL 456784 (M.D. Penn. Feb. 2, 2010); Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119 (W.D. Wash. 2005).

Dr. Ibrahim’s victory affected more than just her case—it affected the way all individuals can contest their placement on these watchlists. The EAJA rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law.

Escobar Ruiz v. I.N.S., 813 F.2d 283, 288 (9th Cir. 1987) (quoting H.R. Rep. No. 1418, at 10 (1980)). Dr. Ibrahim refined federal watchlisting policy by creating a roadmap for other similarly situated plaintiffs to seek judicial redress for alleged wrongful placement on government watchlists.

The significance of Dr. Ibrahim’s roadmap cannot be overstated. Any person could have the misfortune of being mistakenly placed on a government watchlist, and the court...
sequences are severe. Placement on the No Fly list, if left unchanged, prevents an individual from ever boarding an airplane that touches the vast expanse of U.S. airspace. Travel by air has become a normal part of our lives, whether for work, vacations, funerals, weddings, or to visit friends and family. In 2017 alone, there were 728 million airline passengers in the United States. It is debilitating to lose the option to fly to one’s intended destination. Today, those misplaced on the No Fly list can contest that placement, and, if misplaced, regain their right to flight. See Saenz v. Roe, 526 U.S. 489, 498 (1999) (“[T]he ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).

A full award of attorneys’ fees here is consistent with the EAJA’s goal of creating a level playing field in cases in which there is an imbalance of power and resources. “The EAJA grew out of a concern for the unequal position of the individual vis-à-vis an insensitive and ever-expanding governmental bureaucracy. The House Report expresses concern about the fact that ... the government with its greater resources and expertise can in effect coerce compliance with its position.” Escobar Ruiz, 813 F.2d at 288 (internal quotation marks and citation omitted). Dr. Ibrahim—a professor and person of ordinary means—not have the resources to pay an attorney to pursue her claims, which ultimately cost more than $3.6 million dollars to litigate. And the small seventeen-lawyer law firm that represented her, McManis Faulkner, had similarly limited resources, but, when others refused, they agreed to take on her case, uncertain whether they would ever be compensated. On the other side of the table was the government and its virtually unlimited resources. The government had a team of twenty-six lawyers—more lawyers than McManis Faulkner employed—and spent at least 13,400 hours—in other words, 558 days of one person working 24 hours a day—vigorously defending this litigation.

Accordingly, we find that Dr. Ibrahim achieved excellent results and is therefore entitled to reasonable fees consistent with that outcome.

C. Bad Faith

Generally, attorneys’ fees are capped under the EAJA at $125 per hour. 28 U.S.C. § 2412(d)(2)(A)(ii). The EAJA provides, however, that “[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law.” 28 U.S.C. § 2412(b). Thus, under the common law a court may assess attorneys’ fees against the government if it has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir. 2008) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991)). “[W]e hold the government to the same standard of good faith that we demand of all non-governmental parties.” Id. The purpose of such an award is to “deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.” Copeland v. Martinez, 603 F.2d 981, 984 (D.C. Cir. 1979). “The district court may award attorney fees at market rates for the entire course of litigation, including time spent preparing, defending, and appealing the two awards of attorney fees, if it finds that the fees incurred during the various phases of litigation are in some way traceable to the [government’s] bad faith.” Brown v. Sullivan, 916 F.2d 492, 497 (9th Cir. 1990). And in evaluating whether the government acted in bad faith, we may examine the government’s actions that precipitated the litigation, as well as the litigation itself. Rawlings v. Heckler, 725 F.2d 1192, 1195–96 (9th Cir. 1984); see also Hall v. Cole, 412 U.S. 1, 15 (1973) (concluding that the “dilatory action of the union and its officers” in expelling an individual from the union following his resolutions unsuccessfully condemning union management’s alleged undemocratic and short sighted policies constituted bad faith (internal quotation marks and citation omitted)); Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1298 (9th Cir. 1982) (concluding that an employer would have acted in bad faith if it pursued a defense of an action based on a lie).

“A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.” Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 649 (9th Cir. 1997) (internal quotation marks and citation omitted). “Mere recklessness does not alone constitute bad faith; rather, an award of attorney’s fees is justified when reckless conduct is combined with an additional factor such as frivolousness, harassment, or an improper purpose.” Rodriguez, 542 F.3d at 709 (internal quotation marks omitted) (quoting Fink v. Gomez, 239 F.3d 989, 993–94 (9th Cir. 2001)). It is also shown when litigants disregard the judicial process. Brown, 916 F.2d at 496 (concluding that the “cumulative effect” of the Appeals Council’s review of a claim for social security benefits, including the “failure to review a tape of an ALJ’s hearing, a statutory duty, and other acts that
caused delay and necessitated the filing and hearing of additional motions, viz., the Secretary’s delay in producing documents and in transcribing the tape” constituted bad faith); see also Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1758 (2014) (allowing fee-shifting for willful disobedience of a court’s order); Beaudry Motor Co. v. Abko Props., Inc., 780 F.2d 751, 756 (9th Cir. 1986) (bringing a case barred by the statute of limitations); Toombs v. Leone, 777 F.2d 465, 471–72 (9th Cir. 1985) (deliberately failing to comply with local rules regarding exchange of exhibits); Int’l Union of Petroleum & Indus. Workers v. W. Indus. Maint., Inc., 707 F.2d 425, 428–29 (9th Cir. 1983) (refusing to abide by arbitrator’s award).

Though the district court cited some of this relevant case law, including Rodríguez, Chambers, and Brown, it erroneously applied a piecemeal approach to its bad faith determination in conflict with the cases it cited. See Rodríguez, 542 F.3d at 712. We have long established that to make a bad faith determination, we must review the totality of the government’s conduct. See Brown, 916 F.2d at 496; see also Rawlings, 725 F.2d at 1196. However, “it is unnecessary to find that every aspect of a case is litigated by a party in bad faith in order to find bad faith by that party.” Rodríguez, 542 F.3d at 712.

The district court clearly erred by failing to consider the totality of the government’s conduct, particularly its comportment after discovering Agent Kelley’s error. See Mendenhall v. Nat’l Transp. Safety Bd., 92 F.3d 871 (9th Cir. 1996). In Mendenhall, we held that a government agency, there the FAA, acted in bad faith, thereby allowing the prevailing party, Mendenhall, to recover fees at a reasonable market rate. We held that “[t]he moment the FAA acknowledged” that its complaint against her was baseless, “the agency was no longer justified in pursuing its action.” Id. at 877. “The agency’s continuation of an action it knew to be baseless … is a prime example of bad faith.” Id. (internal quotation marks omitted) (quoting Brown, 916 F.2d at 495–96).

The only post-litigation agency conduct that the district court considered was whether the government obstructed Dr. Ibrahim or her daughter, Rafeah, from appearing at trial. The court unreasonably concluded, at least with respect to Rafeah, that there was no evidence that the government did so. That conclusion by the district court is “without support in inferences that may be drawn from the facts in the record” and is thus clearly erroneous. Crittenden v. Chappell, 804 F.3d 998, 1012 (9th Cir. 2015). Dr. Ibrahim’s daughter, a U.S. citizen with a U.S. passport, was flagged by the National Targeting Center (NTC) as potentially inadmissible to the United States. NTC determined that she had been listed in the TSDB database by other government entities as an individual about whom those agencies possessed “substantive ‘derogatory’ information” that “may be relevant to an admissibility determination under the Immigration and Nationality Act.” But, as a U.S. citizen, Dr. Ibrahim’s daughter clearly was not subject to the INA.

Although Dr. Ibrahim’s daughter carried a U.S. passport and U.S. Customs and Border Protection recognized that she appeared to be a U.S. citizen, NTC requested that Philippine Airlines perform additional screening of her in the following e-mail:

[Subject line:] POSSIBLE NO BOARD REQUEST-PNR WNDYJS

[Body:] NOTICE TO AIR CARRIER The [DHS and U.S. Customs and Border Protection] recommends the airline to contact [the carrier liaison group] when the following passenger shows up to check in … .

After Philippine Airlines received this notice, Rafeah was not permitted to board her flight, causing her to miss her mother’s trial, where she had been listed as a witness. The government did not update the TSDB to reflect that Dr. Ibrahim’s daughter was a U.S. citizen until after it had purportedly investigated the situation.

The district court also disregarded the government’s response to Agent Kelley’s error once the error was discovered. On remand, the district court should take into account in its analysis of bad faith the government’s conduct together with the consequences Dr. Ibrahim suffered as a result. For example, the district court failed to consider the February 2006 order to remove Dr. Ibrahim from all watchlist databases because she had “no nexus to terrorism.” Despite this order, the government continued to place Dr. Ibrahim on and off federal watchlists, providing no reasonable explanation for Dr. Ibrahim’s never-ending transitions in watchlist status. Further, the only justification for her continued watchlist placement is claimed to be a state secret. This assertion begs the question: Why was Dr. Ibrahim added to any watchlist once the government determined she was not a threat? Moreover, was there any justification for her seemingly random addition to and removal from watchlists? The district court should also consider the government’s failure to remedy its own error until being ordered to do so and its failure to inform Agent Kelley of his mistake for eight years.

33. The district court made no findings as to whether the agencies acted in bad faith before litigation, and we do not have a record basis upon which to consider this argument. As the district court speculated, however, the government’s initial interest in Dr. Ibrahim may have rested on shaky constitutional grounds because it may have been motivated by racial or religious animus. Dr. Ibrahim alleged that, at the time Agent Kelley first investigated Dr. Ibrahim for potential watchlisting placement, the government had a heightened interest in foreign students like her who were in the United States from Muslim countries on U.S. student visas. Stanford University had specifically contacted these students, warning them of the government’s potential interest. However, because the district court did not reach this issue despite having more familiarity with the extensive record, we cannot conclude that the government’s initial interest in Dr. Ibrahim was in bad faith.

34. Even after Agent Kelley learned of his mistake, Agent Kelley never reviewed his old files to see if he had accidentally nominated others to the No Fly list in the hope it was a one-time mistake.
The district court also wrongly rejected as a basis for bad faith the government’s numerous requests for dismissal on standing grounds post- Ibrahim II, where we determined unequivocally that Dr. Ibrahim had Article III standing even though she voluntarily left the United States. The government knowingly pursued baseless standing arguments in its third motion to dismiss, its motion for summary judgment, statements during trial, and post-trial proposed findings of fact and conclusions of law. The district court found that the government’s position was “unreasonable,” particularly after it “continue[d] to seek dismissal based on lack of standing in the face of our court of appeal’s decision,” but it did not account for this unreasonableness in its bad faith determination. See Ibrahim II, 669 F.3d at 997. This was contrary to our longstanding precedent that when an attorney knowingly or recklessly raises frivolous arguments, a finding of bad faith is warranted. Fink, 239 F.3d at 993–94; see also Optyl Eyewear Fashion Int’l Corp. v. Style Cos., 760 F.2d 1045, 1052 (9th Cir. 1985). As the district court acknowledged, “the government should have sought review by the United States Supreme Court,” rather than to repeatedly assert an argument for dismissal it knew to be baseless.

Although the district court concluded that “the government was wrong to assure all that it would not rely on state-secrets evidence and then reverse course and seek dismissal at summary judgment,” it incorrectly found that the error was not knowingly or recklessly made. The government falsely represented to both the district court and to Dr. Ibrahim’s counsel—orally in court and in written filings—that it would not rely on evidence withheld on the basis of a privilege to “prevail in this action.”35 And yet, after these representations, the government raised the very argument it had promised to forego. This is precisely the type of “abusive litigation” disallowed in the EAJA, which is focused on “protecting the integrity of the judicial process.” Copeland, 603 F.2d at 984 (concluding that the government was entitled to bad faith fees where the plaintiff brought a frivolous suit under Title VII of the Civil Rights Act of 1964 because the purpose of a fee award under the bad faith exception includes “protecting the integrity of the judicial process”).

The district court also clearly erred in concluding the government’s privilege assertions were made in good faith by considering only the merits of the privilege arguments themselves (“some were upheld, some were overruled”). The district court disregarded the government’s stubborn refusal to produce discovery even after the district court ordered it produced. But “willful disobedience of a court order” supports a bad faith finding. Octane Fitness, LLC, 134 S. Ct. at 1758 (citation omitted); see also Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978) (noting that a court can “award attorney’s fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order”). Here, the government refused to produce evidence designated “sensitive security information” (SSI), even after Dr. Ibrahim’s attorneys obtained the requisite security clearance and the court ordered the government to produce discovery. Contrary to its April 2014 bad faith finding, the district court itself, in a December 20, 2012 order, admonished the government for its “persistent and stubborn refusal to follow the statute” that required the government to produce this information in these circumstances.36

The district court’s 2012 reprimand had little effect on the government’s conduct. After this order, the government continued to drag its feet and refused to produce any privileged information—which Dr. Ibrahim’s attorneys were cleared to review—because it wanted to renegotiate an already-in-place protective order. The district court, noting its dissatisfaction with the government’s handling of this litigation in 2013, emphasized that the government had “once again miss[ed] a deadline to produce materials in this long-pending action.”

The government also refused to comply with the district court’s order to produce Dr. Ibrahim’s current watchlist status until it was compelled to do so. Dr. Ibrahim should not have been required to pursue a motion to compel to require the government to produce this information, especially when the government’s justifications for refusing to produce it were baseless. The government first argued that Dr. Ibrahim did not have standing to assert a right to learn the status of her No Fly list placement—a meritless reassertion of a settled issue. The government alternatively argued that her historical watchlist status was irrelevant to this case—a plainly frivolous contention given that Dr. Ibrahim’s watchlist status is at the heart of this dispute. These actions, too, support a bad faith finding.

On remand, when analyzing the government’s litigation conduct through a totality of the circumstances lens, the district court must also consider other relevant conduct, including the government’s abuse of the discovery process;37 interference with the public’s right of access to trial by making at least ten motions to close the courtroom, see Foltz v.

36. Dr. Ibrahim also argues that the government acted in bad faith by giving the district court secret evidence and secret case law. While the district court ultimately held that the government was not justified in these ex parte communications, it is not clear that such communications were so clearly precluded by precedent that the ex parte communications were outside the bounds of acceptable conduct.

37. For example, the government also made depositions exceedingly difficult by lodging over 200 objections and instructions not to answer to questions.

But Agent Kelley’s hope was not grounded in reality. If Agent Kelley nominated Dr. Ibrahim because he misread the form, this may well not have been a one-time event—he likely would have made the same mistake other times he used the same form.35 The government explicitly stated in a response to a court order asking the government to confirm its position on this very question:

Defendants affirm that they will not rely on any information they have withheld on grounds of privilege from Plaintiff in response to a discovery request in this case. Defendants are mindful of the Court’s December 20, 2012 ruling (Dkt. [No.] 399) that the Government may not affirmatively seek to prevail in this action based upon information that has been withheld on grounds of privilege, and have acted in a manner consistent with that ruling in both the assertion of privilege and summary judgment briefing.

37. For example, the government also made depositions exceedingly difficult by lodging over 200 objections and instructions not to answer to questions.
special master have had to consider the merits of this claim while the attorneys’ fees and costs continue to mount. The district court and original panel’s substantive determination of issues are precisely the type of “second major litigation” that the Hensley Court directed us to avoid.

That is not to say that all of the special master’s findings and recommended fee reductions accepted by the district court were incorrect. As the Supreme Court noted in Hensley, consideration of the twelve factors laid out in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974), abrogated on different grounds by Blanchard v. Bergeron, 489 U.S. 87 (1989), was entirely appropriate. 461 U.S. at 429–30. For example, the special master did err in considering whether there was duplicative or block billing. However, when revisiting this case, the fee reductions should not be so pervasive that they completely eliminate the reasonable fees to which Dr. Ibrahim’s attorneys are entitled.

When the district court recalculates these fees, the calculation should acknowledge that Dr. Ibrahim and her lawyers, facing overwhelming odds, won a groundbreaking victory, and that they are entitled to the fees they’ve earned and the vast majority of fees they requested. Cf. Moreno v. City of Sacramento, 534 F.3d 1106, 1115 (9th Cir. 2008) (“The district court’s inquiry must be limited to determining whether the fees requested by this particular legal team are justified for the particular work performed and the results achieved in this particular case.”).

We therefore REVERSE, VACATE the award of attorneys’ fees, and REMAND to allow the district court to make a bad faith determination under the correct legal standard in the first instance, and to re-determine the fee award in accordance with this opinion.40

[APPENDIX A DELETED]

CALLAHAN, Circuit Judge, joined by N.R. SMITH and NGUYEN, Circuit Judges, concurring in part and dissenting in part:

39. The Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717–19.

40. We do not reach each of the objections to the special master’s recommendations, as the fee award is vacated, and many of the objections may be mooted as a result of our opinion, which will require a substantial redetermination of the fee award, as well as commensurate costs.
I agree with the majority that Dr. Ibrahim is the prevailing party in this case and that the test for substantial justification is an inclusive one: whether the government’s position as a whole has a reasonable basis in fact and law. I further agree that Dr. Ibrahim’s equal protection and First Amendment claims are sufficiently related to her other claims such that the district court’s failure to reach those issues does not justify the district court’s curtailment of attorneys’ fees. But the majority exceeds our role as an appellate court by determining in the first instance that the government’s position was not substantially justified. Supreme Court precedent requires that we allow the district court to make that determination on remand. See Pierce v. Underwood, 487 U.S. 552, 560 (1988). I also dissent from the majority’s setting aside of the district court’s finding that the defendants did not proceed in bad faith. Applying the applicable standard of review, see Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir. 2008), Dr. Ibrahim has not shown that the district court committed clear error. Accordingly, I would affirm the district court’s limitation of Dr. Ibrahim’s attorneys’ fees to the statutory rate of $125 per hour set by Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

Although I agree that substantial justification requires a single-finding, the majority errs in proceeding to make this factual determination. In Pierce, the Supreme Court held that the language in 28 U.S.C. § 2412(d)(1)(A)—that attorneys’ fees shall be awarded “unless the court finds that the position of the United States was substantially justified”—contemplates that “the determination is for the district court to make and suggests some deference to the district court.” 487 U.S. at 559. The Court explained why the district court is in a better position than an appellate court to make this determination:

To begin with, some of the elements that bear upon whether the Government’s position “was substantially justified” may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge’s full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

Id. at 560 (emphasis in original). The EAJA is materially indistinguishable from the statute at issue in Pierce, and our case presents just the type of situation alluded to by the Supreme Court. The district court has managed this litigation for twelve years. It is uniquely positioned to determine based on the totality of the circumstances whether the government’s position was substantially justified.

Despite its ultimate factual conclusion that “neither the agencies’ conduct nor the government’s litigation position was substantially justified” (Maj. Opn. at 46), the majority’s own description of the litigation shows why the district court should decide the issue in the first instance. The majority “ascribe[s] no nefarious motivations to the government” (Maj. Opn. at 43 n.19) and declines to find that “the government’s defense of this litigation was unreasonable at all points of the litigation.” Maj. Opn. at 45 n.20. Later in its opinion, the majority notes that “[t]hough the government may have had a legitimate basis to defend this litigation initially, whether the government’s defense of this litigation was ever in good faith is a different question from whether it was always in good faith.” Maj. Opn. at 72. The majority’s recognition of the complexities of this litigation illustrates precisely why the issue should be decided in the first instance by the district court.

As the Supreme Court directed in Pierce, our iteration of the single-finding requirement compels a remand to the district court to make that finding in the first place. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (“Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced.”). The government would then have the opportunity to explain its reasons for its positions and offer evidence in support of its positions, and, of course, Dr. Ibrahim would be entitled to respond to the government’s arguments and evidence. See Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 314 (2013) (noting that “fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis”). The district court would then make its independent determination, which we could then review should either side take exception. We are not a fact-finding court, and our feelings concerning the reasonableness of the government’s overall litigation strategy do not justify our expropriation of the district court’s responsibility to make such a determination in the first instance.41

41. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985) (“The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.”); see also S.E.C. v. Rogers, 790 F.2d 1450, 1458 (9th Cir. 1986) (noting that “as a court of limited review” the Ninth Circuit “must abide by the clearly erroneous rule when reviewing a district court’s findings.”).
Although the majority correctly notes that a finding of bad faith permits a market-rate recovery of attorneys’ fees, in reversing the district court’s finding of no bad faith, the majority fails to apply, let alone acknowledge, the proper standard of review. “We review a district court’s finding regarding a party’s bad faith for clear error.” Rodriguez, 542 F.3d at 709.

“A finding is clearly erroneous if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” Crittenden v. Chappell, 804 F.3d 998, 1012 (9th Cir. 2015) (internal quotation marks omitted) (quoting United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). The Supreme Court has cautioned that pursuant to Federal Rule of Civil Procedure 52, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Anderson, 470 U.S. at 573. The Supreme Court has counseled:

If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.

Id. at 573–74.

The majority turns the standard of review on its head by analyzing and emphasizing the pieces of evidence that it concludes “support a bad faith finding.” Maj. Opn. at 71–72; see generally Maj. Opn. at 65–75. But to reverse for clear error, we should consider whether the district court’s finding was plausible and not simply identify evidence that arguably supports a conclusion contrary to the district court’s determination.

None of the arguments proffered by Dr. Ibrahim support a finding of clear error. She first argues that there is bad faith because she was wrongly placed on the watchlist, the government refused to acknowledge this fact, and the government continued to oppose her even after it knew its conduct was wrong. But this argument fails to acknowledge the evolution of the law—which has been prompted, at least in part, by this litigation. We now know that Dr. Ibrahim was placed on the watchlist by a mistake of a single federal employee. Moreover, at the time Dr. Ibrahim was placed on the government’s watchlist, there was no uniform standard. Also, as the three-judge panel observed, “[p]rior to this suit no court had held a foreign national such as Ibrahim possessed any right to challenge their placement—mistaken or not—on the government’s terrorism watchlists.” Ibrahim v. U.S. Dep’t. of Homeland Sec., 835 F.3d 1048, 1058 (9th Cir. 2016) (Ibrahim III), reh’g en banc granted, 878 F.3d 703 (9th Cir. 2017). Thus, it was not necessarily bad faith for the government to assert that Dr. Ibrahim did not possess such a right. Id. Furthermore, it appears that the government removed Dr. Ibrahim from the No-Fly List more than a year prior to Dr. Ibrahim filing this action in 2016. Id.

Second, Dr. Ibrahim asserts that the government’s raising of its standing defense after Ibrahim v. Dep’t. of Homeland Security, 669 F.3d 983 (9th Cir. 2012) (Ibrahim II), demonstrates bad faith. However, the three-judge panel noted:

Ibrahim fails to point to any evidence indicating the government reraised standing as a defense at summary judgment and trial with vexatious purpose. What’s more, the government correctly points out that there was at minimum a colorable argument that the different procedural phases of the case rendered their subsequent standing motions nonfrivolous.

Ibrahim III, 835 F.3d at 1059. Although we held that Dr. Ibrahim had standing in Ibrahim II, 669 F.3d at 992–94, this did not preclude the government from seeking to preserve the issue or from challenging her underlying constitutional claims. See Ibrahim II, 669 F.3d at 997 (noting that we expressed “no opinion on the validity of the underlying constitutional claims”).

Third, Dr. Ibrahim’s claim that the government’s privilege assertions were made in bad faith is not compelling as the government was successful on many of its privilege assertions. See Ibrahim III, 835 F.3d at 1059.

Fourth, the three-judge panel noted:

Nor is there any evidence in the record demonstrating the government prevented Ibrahim from entering the United States to offer testimony in this suit, and with respect to her daughter, Ibrahim fails to explain why there was any error in the district court’s determination that the government’s initial refusal to allow her into the country was anything but a mistake, and a quickly corrected one at that.

Id. at 1060. The majority, however, asserts that it was unreasonable for the district court to conclude that “there was no evidence that the government” obstructed Dr. Ibrahim’s daughter from appearing at trial. Maj. Opn. at 66. But the question is not whether there is evidence that the government interfered with the daughter’s travel to the United States, but whether it did so in bad faith. The majority notes that as a citizen the daughter “was not subject to the INA,” (Maj. Opn. at 67), but the No-Fly List and other travel restrictions are applicable to citizens as well as others.

Finally, I agree with the three-judge panel that:

42. The majority asserts that the government should have sought review of Ibrahim II by the Supreme Court, but as Ibrahim II reversed and remanded for further proceedings, the government could have decided not to press the issue at that time.
Ibrahim’s argument that the district court erred by making piecemeal bad faith determinations is unpersuasive. Her sole authority on point is our decision in *McQuistan v. Marsh*, 707 F.2d 1082, 1086 (9th Cir. 1983), superseded by statute as recognized by *Melkonyan v. Sullivan*, 501 U.S. 89, 96, 111 S. Ct. 2157, 115 L. Ed. 2d 78 (1991), where we made the unremarkable observation that “[b]ad faith may be found either in the action that led to the lawsuit or in the conduct of the litigation.” She fails, however, to point to any case where we have elevated that observation to edict. Rather, we have consistently required fee awards based on bad faith to be “traceable” to the conduct in question. *See*, e.g., *Rodriguez*, 542 F.3d at 713. It was therefore proper for the district court to consider each claimed instance of bad faith in order to determine whether the associated fees should be subject to a market-rate increase. *Ibrahim III*, 835 F.3d at 1060.

Of course, we as an en banc panel are free to disagree with the conclusions drawn by the three-judge panel, but where, as here, the standard of review is clear error, the fact that several appellate judges agreed with the district court is some evidence that the district court’s decision was not clear error.

Although the majority remanded the issue of bad faith to the district court for its independent re-assessment of the issue, as an appellate court we should allow the district court’s determination of no bad faith to stand unless appellant shows clear error. *Anderson*, 470 U.S. at 572; *Rodriguez*, 542 F.3d at 709. Because Dr. Ibrahim has not shown clear error, the district court’s finding of no bad faith should be affirmed.

III

The majority, having determined that the test for substantial justification under the EAJA is an inclusive one—whether the government’s position as a whole has a reasonable basis in fact and law—gets carried away and arrogates to itself the determination in the first instance that the government’s position was not reasonable. However, the Supreme Court has clearly directed that such a determination should be made by the district court, *Pierce*, 487 U.S. at 560, where the parties will have an opportunity to present argument and evidence applying our substantial justification test to the particularities of this litigation. *See Fisher*, 570 U.S. at 314. And while the majority, by remanding the bad faith issue to the district court, resisted the temptation to decide itself whether the government has proceeded in bad faith, it should have recognized that there was no need for a remand because Dr. Ibrahim failed to show clear error in the district court’s holding that the government did not proceed in bad faith. *See Rodriguez*, 542 F.3d at 709. Accordingly, I agree with the majority’s test for substantial justification, but I dissent from its factual determination in the first instance that the government’s litigation position was not justified and from its disturbance of the district court’s finding that the government did not proceed in bad faith.
ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit. Judge McKeown did not participate in the deliberations or vote in this case.
California Courts of Appeal

Cite as 19 C.D.O.S. 227

ANTHONY STRATTON, Plaintiff and Respondent,

v.

THOMAS E. BECK, Defendant and Appellant.

No. B287001
In The Court of Appeal of the State of California
Second Appellate District
Division Four
(Los Angeles County Super. Ct. No. BS152046)
APPEAL from an order of the Superior Court of Los Angeles
County, Edward J. Moreton Jr., Judge. Affirmed.
Filed December 7, 2018
Certified for Publication January 2, 2019

COUNSEL
David M. Balter for Plaintiff and Respondent.

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on December 7, 2018 was not certified for publication in the Official Reports. Upon application of respondent and interested parties and for good cause appearing, it is ordered that the opinion shall be published in the Official Reports.

Pursuant to California Rules of Court, rule 8.1105(b), this opinion is certified for publication.

MANELLA, P.J., WILLHITE, J., COLLINS, J.

OPINION

This case began as a dispute over approximately $300 in unpaid wages. It has since transmogrified into a dispute concerning attorney fees totaling nearly 200 times that amount and is here now for the second time. In the previous appeal, appellant Thomas Beck challenged the trial court’s award of attorney fees for work that respondent Anthony Stratton’s attorney performed in that forum. We affirmed the trial court’s ruling, holding that Stratton’s motion for $31,365 in statutory attorney fees was timely and supported by substantial evidence. At the conclusion of our opinion, we stated, “In the interest of justice, the parties are to bear their own costs of appeal.” (Stratton v. Beck (2017) 9 Cal.App.5th 483, 487, 498 (Stratton)). We reiterated that allocation in the ensuing remittitur: “The parties are to bear their own costs of appeal.” The parties interpreted this directive differently. Beck maintained that “costs” included attorney fees on appeal, precluding Stratton from seeking them under Labor Code section 98.2, subdivision (c). Stratton disagreed and filed a motion in the trial court seeking $114,840 in appellate attorney fees—a lodestar of $57,420, doubled in light of the complexity of the underlying issues. The trial court awarded Stratton the lodestar and denied Beck’s motion to reconsider or clarify the ruling. It also awarded Stratton an additional $9,020 in fees he incurred opposing the motion to reconsider.

Beck appealed. He contends that our order on costs deprived the trial court of jurisdiction to entertain Stratton’s motion for appellate attorney fees. He further argues that the trial court erred in denying his motion to reconsider or clarify, in which he requested a more thorough explanation for the appellate attorney fee award. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

I. PRIOR APPEAL

This case began when Beck’s employee of two months, Stratton, quit and claimed he was owed wages of $1,075. (Stratton, supra, 9 Cal.App.5th at p. 487.) For reasons that remain unclear, Beck’s payroll service paid Stratton $771.45 rather than the $1,075 he claimed he was owed. (Ibid.) Stratton filed a claim for the approximately $300 difference with the Division of Labor Standards Enforcement, the state agency empowered to enforce California labor laws. (Ibid.) “After conducting an administrative hearing, the Labor Commissioner awarded Stratton the $303.50 he requested, plus an additional $5,757.46 in liquidated damages, interest, and statutory penalties, for a total award of $6,060.96.” (Ibid.)

Beck sought de novo review of the Labor Commissioner’s order in the Los Angeles County superior court pursuant to Labor Code section 98.2, subdivision (a). (Stratton, supra, 9 Cal.App.5th at pp. 487-488.) The trial court awarded Stratton $6,778.85, exclusive of fees and costs. (Id. at p. 489.) Stratton’s attorney sought fees under Labor Code section 98.2, subdivision (c) (“Labor Code section 98.2(c)”), which provides: “If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.” (Lab. Code, § 98.2(c).) The trial court awarded Stratton $31,365 in attorney fees. (Stratton, supra, 9 Cal.App.5th at p. 491.)

Beck appealed, arguing that the motion for attorney fees was untimely because the underlying civil case was limited rather than unlimited. (Stratton, supra, 9 Cal.App.5th at p. 491.) He also challenged the reasonableness of the fee award. (See id. at pp. 495-497.) We affirmed the trial court’s judg-
II. MOTION FOR APPELLATE ATTORNEY FEES

Balter timely filed a motion in the trial court requesting appellate attorney fees pursuant to Labor Code section 98.2(c). He sought a lodestar of $57,420, to compensate for 127.6 hours of work at a rate of $450 per hour, and a multiplier of 1.3. He estimated he would incur the additional 14 hours “to: review defendant’s anticipated opposition, research and prepare a reply memorandum, travel to and from the hearing, and attend the hearing to argue the motion.”

Prior to filing an opposition, Beck filed a motion in this court to recall the remittitur “to clarify whether this court’s disposition stating that the parties bear their own costs includes attorney fees.” We denied the motion.

Beck obtained counsel, who filed an opposition to the motion for appellate fees. The opposition asserted that our disposition stating that the parties bear their own costs includes attorney fees. “We denied Beck’s petition for rehearing.” See “[j]n the interest of justice.” (Id. at p. 498.)

We denied Beck’s petition for rehearing. Beck then filed a petition for review of our decision, but the Supreme Court rejected it as untimely. The Supreme Court also denied Beck’s subsequent motion for reconsideration of that decision.

Beck, an attorney who is representing himself, then reached out to Stratton’s counsel, David Balter, to arrange payment of the fees. Balter informed Beck that he planned to seek appellate fees in the sum of $48,375. Beck responded by requesting authority for the proposition that Balter could pursue appellate fees in light of our order that the parties were to bear their own costs. Balter directed Beck to California Rule of Court, rule 8.278(d)(2) ("rule 8.278(d)(2)"), which provides, “Unless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.” He also cited a case and a treatise. Beck disputed the applicability of these authorities.

Several weeks later, the remittitur from our previous decision issued. Like our order, it stated, “The parties are to bear their own costs of appeal.”

III. MOTION FOR RECONSIDERATION/CLARIFICATION

Beck, acting in propria persona, subsequently filed a “motion for reconsideration/clarification of October 17, 2017 ruling granting Stratton’s post appeal fee motion, CCP § 1008(a)(b).” He argued that the trial court committed “manifest error” by issuing an order that “remain[ed] silent on each of the key issues the opposition to Stratton’s motion pointed out.” Beck asserted that “it cannot be determined how and why the court assumed it had jurisdiction in light of the appellate court’s denial of costs to Stratton and whether or not in the court’s thoughts, costs are or are not the equivalent of L.C. § 98.2(c) fees.” Beck further asserted that the order impermissibly overruled the ruling of another trial court judge,
who apparently stayed payment of the fees while the appeal was pending on the grounds that attorney fees were costs.\(^2\)

Beck also reiterated his earlier attempts to distinguish Butler-Rupp and Mustachio. In his accompanying declaration, Beck asserted that he “consider[ed] the failure of the court to issue a reviewable ruling to be a fact discovered only after the October 16th hearing.”

Balter opposed the motion on the grounds that it failed to meet the jurisdictional threshold for reconsideration because it did not allege new or different facts, circumstances, or law as required by section 1008, subdivision (a). He argued that the order itself did not constitute a new fact that properly could support the motion. He also disputed Beck’s contentions that the trial court lacked jurisdiction to award attorney fees, and that a prior order staying enforcement of the judgment precluded the court from awarding attorney fees incurred on appeal.

In reply, Beck asserted that “[t]he most significant new facts which prompted this motion are the delivery of the order into which the court penciled in $57,420 (which calculates from $450/hr x 127.6 hours) without a mention of the court’s reasoning on any vital contested issue in the pleadings by either side.” He also pointed to an “additional new fact,” “the absence of any insight as to why this court granted compensa-

The trial court held a hearing on the motion. At the outset, it told the parties that its tentative was to deny the motion on the grounds that there were no new facts or law, and no need for clarification. It further stated that it was “not going to rehear an argument about the definition of costs.” It then allowed the parties to be heard. Beck argued that he filed the motion because he “had to deduce where you came up with that money for that amount,” emphasizing his uncertainty about the basis for the 14 estimated hours. The trial court told Beck it did not believe the 14 hours constituted a new fact, and Beck responded it did “[b]ecause I didn’t realize until the number came out that you were awarding for the full amount of money that the motion demanded, even though the motion said as of August 3rd, and left it at that, that 14 hours of those dollars were merely estimates.” Balter responded, accurately, said as of August 3rd, and left it at that, that 14 hours of those

2. The appellate record does not contain any documents relevant to this assertion.

court applied rule 8.278(d)(2) or considered section 1033, subdivision (a). The court took the matter under submission.

It subsequently issued a minute order denying the motion for reconsideration. That order stated: “The motion for reconsideration is DENIED. The court notes, however, as follows: In determining the amount of reasonable attorneys fees awarded in the October 17, 2017 order, the court accepted the rate, [sic] and rationale proposed by plaintiff, but declined to apply the 2.0 multiplier requested by plaintiff.”

Beck timely filed a notice of appeal.\(^3\)

**DISCUSSION**

**I. THE TRIAL COURT HAD JURISDICTION TO AWARD FEES**

Beck contends that this court’s order directing the parties to bear their own costs of the prior appeal “implicitly denied statutory attorneys fees on appeal to Stratton’s counsel,” and deprived the trial court of jurisdiction to consider Balter’s motion, because section 1033.5 and Labor Code section 98.2(c) define attorney fees as a component of costs. He further argues that rule 8.278(d)(2) does not alter this conclusion in this case, because we “ordered otherwise” by directing the parties to bear their own costs. In addition, he contends that the trial court exceeded its authority by contradicting the earlier determination of a different trial judge that the previously awarded fees were costs that did not have to be paid while this matter previously was pending on appeal.

Where, as here, the evidence underlying a trial court’s determination that it has subject matter jurisdiction is not in dispute, the existence of subject matter jurisdiction presents a legal question subject to de novo review. (Saffer v. JP Morgan Chase Bank, N.A. (2014) 225 Cal.App.4th 1239, 1248.) The trial court’s interpretation of both statutes (Goodman v. Lozano (2010) 47 Cal.4th 1327, 1332) and court rules (In re Daniel M. (1996) 47 Cal.App.4th 1151, 1154) likewise is subject to de novo review. We also review de novo the trial court’s determination of the legal basis for an award of attorney’s fees. (Butler-Rupp, supra, 154 Cal.App.4th at p. 923.)

Attorney fees are recoverable as costs only where expressly authorized by contract or statute. (§ 1021; Session Payroll Management, Inc. v. Noble Construction Co., Inc. (2000) 84 Cal.App.4th 671, 677.) The relevant statute here is Labor Code section 98.2(c), which provides: “If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney’s fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.” Although by its terms Labor Code section 98.2(c) applies only to “an appeal

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3. Balter subsequently filed a motion for attorney fees incurred in connection with the motion for reconsideration. The trial court awarded him $9,090, “without invoking CCP 1033.” The trial court also granted Beck’s request for stay of execution of that award until completion of the instant appeal.
to the superior court,” “[a] statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise.” (Evans v. Unkow (1995) 38 Cal.App.4th 1490, 1499; see also Morcos v. Board of Retirement (1990) 51 Cal.3d 924, 927 [“statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals”].)

Beck contends this general principle is not applicable to Labor Code section 98.2(c), because it contains “unambiguous, explicit limiting terms” restricting its ambit to fees incurred in the trial court. We disagree. Both Eicher v. Advanced Business Integrators, Inc. (2007) 151 Cal.App.4th 1363, 1384 and Nishiki v. Danko Meredith, APC (2018) 25 Cal.App.5th 883, 899-900 have held that Labor Code section 98.2(c) authorizes appellate attorney fees, and we are not persuaded by Beck’s efforts to distinguish these and authorities interpreting other fee-shifting statutes.

When attorney fees are recoverable pursuant to statute, contract, or law, section 1033.5 provides that they are “allowable as costs under Section 1032.” (§ 1033.5, subd. (a)(10).) Therefore, Beck argues, our order that the parties bear their own costs necessarily included appellate attorney fees, which are defined as costs by section 1033.5, subdivision (a). This argument ignores the statutory distinction between appellate costs and trial costs.

“The very language and context of … section 1033.5 indicates [sic] that it does not govern costs on appeal.” (Alan S. v. Superior Court (2009) 172 Cal.App.4th 238, 259.) “The context of section 1032—using language that speaks of plaintiffs, defendants, and prevailing parties being those with “net monetary recovery”—implies that the statute is directed at the trial court. So does the context of section 1033, with its reference to a party recovering a judgment. Section 1033.5, which is a list of what is, and is not, allowable as a cost, similarly is trial-court-oriented, with items exclusively related to trial court proceedings (e.g., references to jury fees, taking depositions, process servers, etc.).” (Ibid.)

“Moreover, another statute—Code of Civil Procedure section 1034, subdivision (b)—tells us specifically what law governs costs on appeal.” (Alan S. v. Superior Court, supra, 172 Cal.App.4th at p. 259.) It provides, “The Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs.” (§ 1034, subd. (b).) That rule is California Rules of Court, rule 8.278, which is entitled “Costs on appeal.” As section 1033.5 does for trial-related costs, rule 8.278 enumerates “recoverable costs,” which it expressly provides are the only costs that may be recovered on appeal. (Cal. Rules of Court, rule 8.278(d)(1).) Those costs include filing fees, brief printing, and the cost to produce additional evidence on appeal. (Cal. Rules of Court, rule 8.278(d)(1)(A), (C), (E).) They do not include attorney fees. (See generally Cal. Rules of Court, rule 8.278(d)(1).)

Rule 8.278(d)(2) further underscores the distinction between trial costs, which may include attorney fees, and appellate costs, which do not. It provides, “Unless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.” The plain meaning of rule 8.278(d)(2) is that an award of costs in the court of appeal generally has no bearing on a party’s ability to seek appellate attorney fees in the trial court. Indeed, a leading treatise instructs, “Unless an appellate decision expressly awards or denies fees, any decision on allocation of appellate costs is irrelevant to a later motion for fees in the trial court.” (Pearl, California Attorney Fee Awards (2d ed. Cal. CEB) Obtaining Fees for Appellate Services, § 12.4.)

Beck argues that rule 8.278(d)(2) is not applicable here, however, because we denied rather than awarded costs or “ordered otherwise” by ordering the parties to bear their own costs. These arguments were rejected in Butler-Rupp, supra, 154 Cal.App.4th 918, which we find closely analogous and extremely persuasive.

Butler-Rupp dealt with a case that was before the court of appeal for the second time. In its first ruling, the court of appeal affirmed the judgment of the trial court in part and reversed in part. It also stated, “The parties to the appeal are to bear their own costs of appeal.” (Butler-Rupp, supra, 154 Cal.App.4th at p. 922.) On remand, the respondents filed a motion for attorney fees they incurred in connection with the appeal. The trial court granted their motion. (Ibid.) The appellants then brought a second appeal challenging the award of appellate fees. They argued that “[t]he trial court had no jurisdiction to award appellate attorney fees to respondents because [the court of appeal] did not award appellate costs to respondents in the prior appeal.” (Ibid.) Like Beck, they contended that a prior version of current rule 8.278(d)(2) did not apply because no “award” of costs was made. (Id. at p. 925.) That prior rule, California Rule of Court, rule 27(c)(2), was very similar to the current version of rule 8.278(d)(2), stating, “[u]nless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 870.2.” (Ibid.)

The court acknowledged that it “did not ‘award’ either party their costs” when it directed each to bear its own. (Butler-Rupp, supra, 154 Cal.App.4th at p. 925.) Nevertheless, it concluded that its order did not bar “an award of attorney fees under these circumstances.” (Ibid.) The court looked to an even earlier iteration of current rule 8.278(d)(2), former rule 26(a)(4), which provided: “Unless otherwise ordered by the reviewing court, (i) an order or judgment regarding costs on appeal neither includes attorney fees on appeal nor precludes any party from seeking fees on appeal; and (ii) the issue of entitlement to attorney fees on appeal shall be determined by motion made in the trial court under rule 870.2.” (Ibid.) Under this rule, it was clear that, unless specifically addressed, an “order or judgment regarding costs on appeal” did not include attorney fees; nor did it preclude a party from seeking them.
The court examined the legislative history underlying the changes in the rule and determined that the change from the more expansive “order or judgment regarding costs on appeal” to the seemingly more restrictive “award of costs” was not intended to be substantive. (Butler-Rupp, supra, 154 Cal.App.4th at p. 925.) It additionally stated in dicta that a conclusion otherwise would likely render former rule 27(c)(2) inconsistent with section 1032’s prescription that attorney fees are recoverable to prevailing parties irrespective of whether they prevail in an appeal that does not result in final judgment. (Ibid.) The court further emphasized that “former rule 27(c)(2) did not state that attorney fees may be awarded only if the Court of Appeal decides to award costs. It simply stated that where costs are awarded, such an award does not include attorney fees … . Attorney fees are not included as recoverable” under the forerunner of rule 8.278(d)(1), former rule 27(c)(4). (Id. at p. 927.) It ultimately concluded, “In sum, in arguing that an award of attorney fees on appeal is dependent on the appellate court’s issuance of an award of costs, appellants read a limitation into the rule that finds no linguistic or historical support.” (Ibid.)

Butler-Rupp is indistinguishable from the instant case. Beck argues otherwise, pointing to the court’s use of the phrase “under these circumstances” and the different underlying basis for the attorney fee award, Civil Code section 1717. The basis for the fees awarded in Butler-Rupp was not relevant to its textual and historical analysis of the relevant appellate court rule. The same appellate court rule applies regardless of the basis on which a party may seek fees. The court’s use of the phrase “under these circumstances” likewise did not limit its reasoning to the precise factual scenario presented or to cases involving Civil Code section 1717. The court made that statement in the following context: “Appellants read much significance into the 2003 amendments to [former] Cal. Rules of Court, rule 26), however, are entirely separate from the contractual provision for fees and do not depend on the party winning the appeal being the ultimate prevailing party. [This] contention is inconsistent with the provision allowing costs on appeal” (Civil Code section 1717 validates the type of contractual provision involved here and requires the courts to award fees to the prevailing party in actions on contracts containing such clauses. . . .) It is well settled a party who prevails on appeal is not entitled under a section 1717 fee provision to the fees he incurs on appeal where the appellate decision does not decide who wins the lawsuit but instead contemplates further proceedings in the trial court. (Citations.) … The provisions allowing costs on appeal (Civil Code, §§ 1034 and supra, 48 Cal.App.4th at p. 1149.) Plaintiff Mustachio then moved for attorney fees on remand, which the trial court awarded. Defendant Great Western Bank appealed, arguing that “by ordering each party to bear its own costs on appeal, this court also determined that the parties should bear their own attorney’s fees on appeal.” (Ibid.)

The court of appeal rejected that contention thusly: “‘Civil Code section 1717 validates the type of contractual provision involved here and requires the courts to award fees to the prevailing party in actions on contracts containing such clauses. . . .’ It is well settled a party who prevails on appeal is not entitled under a section 1717 fee provision to the fees he incurs on appeal where the appellate decision does not decide who wins the lawsuit but instead contemplates further proceedings in the trial court. (Citations.) … The provisions allowing costs on appeal (Civil Code, §§ 1034 and supra, 48 Cal.App.4th at p. 1149.) Plaintiff Mustachio then moved for attorney fees on remand, which the trial court awarded. Defendant Great Western Bank appealed, arguing that “by ordering each party to bear its own costs on appeal, this court also determined that the parties should bear their own attorney’s fees on appeal.” (Ibid.)

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The court of appeal rejected that contention thusly: “‘Civil Code section 1717 validates the type of contractual provision involved here and requires the courts to award fees to the prevailing party in actions on contracts containing such clauses. . . .’ It is well settled a party who prevails on appeal is not entitled under a section 1717 fee provision to the fees he incurs on appeal where the appellate decision does not decide who wins the lawsuit but instead contemplates further proceedings in the trial court. (Citations.) … The provisions allowing costs on appeal (Civil Code, §§ 1034 and supra, 48 Cal.App.4th at p. 1149.) Plaintiff Mustachio then moved for attorney fees on remand, which the trial court awarded. Defendant Great Western Bank appealed, arguing that “by ordering each party to bear its own costs on appeal, this court also determined that the parties should bear their own attorney’s fees on appeal.” (Ibid.)

Beck argues that Mustachio is distinguishable for several reasons, including its reliance on Civil Code section 1717, now-rewritten and renumbered rules of court, and a version of section 1033.5 predating its amendment in 1990 “at which time attorneys fees by contract were expressly made allowable as costs rather than as damages to be proven.” The last contention is puzzling, as Mustachio was decided in 1996, long after any amendment to section 1033.5 made in 1990 would have taken effect. The others are not persuasive. As explained above, the applicable appellate rule was not substantively different, and section 1033.5 defines attorney fees incurred in the trial court as “costs” regardless of the statute authorizing them. (§ 1033.5, subd. (a)(10).)

Beck’s final argument regarding the trial court’s authority to award appellate fees appears to rest on its alleged disagreement with an earlier trial court ruling that the fees were costs. According to Beck, the trial court ruled prior to Stratton I that the trial court fees at issue there were costs such that Beck did not have to post an undertaking prior to the appeal. He contends, “a new judge could not contradict the trial court’s earlier determination unless the Court of Appeals said otherwise. The second superior court judge [to whom the case was reassigned on remand] could not overrule the first superior court judge’s fees as cost classification determina-
tion by characterizing §98.2(c) fees as being something other than the costs upheld in Stratton I.” Beck further asserts that Stratton “did not challenge this fees-as-costs determination in the Superior Court nor at the Court of Appeal in the course of Stratton I. Therefore the trial court’s judicial determination equating the trial court’s judicial determination equating §98.2(c) fees as costs remains and could not be disturbed in the absence of direction from the Court of Appeals.”

It is unclear what judicial determination Beck is referring to. The portion of his opening brief outlining this argument contains no citations to the record, and we did not find any such ruling in the record during our review. The closest we can find is an assertion in Beck’s motion for reconsideration/clarification that “The court (Judge Mark A. Borenstein) ruled that no undertaking was required because the attorney fee award under this Labor Code section was a ‘cost’ as defined by CCP § 1033.5(a)(10)(C).”

To the extent Beck appears to refer to a determination that the trial court fees awarded in connection with his initial appeal of the Labor Commissioner’s decision were costs, such determination has no relevance to the classification of fees on appeal. As we explained above, items recoverable as “costs” in trial court are distinct from those recoverable as “costs” in appellate court. To the extent Beck may be referring to some other ruling, he has failed to include that ruling in the record or otherwise demonstrate error. Marshaling the record and affirmatively demonstrating error are the appellant’s burdens, and Beck failed to carry those burdens here. (See Denham v. Superior Court (1970) 2 Cal.3d 557, 564.)

II. THE TRIAL COURT’S ORDER WAS ADEQUATE

Beck also challenges the adequacy of the court’s order granting Balter’s motion for attorney fees. He contends the trial court “erred by refusing to shed light on its decision making.” He argues that the order, which tracked Balter’s proposed order in all respects except the amount of fees awarded, “say[s] nothing about and gives no insight into the judge’s reasoning relative to any of the issues presented in opposition to Mr. Balter’s fee motion. It also does not reflect the judge’s reasoning relative to any of the issues presented in opposition to Mr. Balter’s fee motion. It also does not reflect the judge’s reasoning relative to any of the issues presented in opposition to Mr. Balter’s fee motion.” (Kerkeles v. City of San Jose (2015) 243 Cal.App.4th 88, 102 (Kerkeles) for the proposition that the court of appeal is required to “provide a reasonably specific explanation of all aspects of a fee determination.” This case, which addresses fees awarded under 42 U.S.C. § 1988, is not on point. The court in Kerkeles calculated the lodestar and then made an “across the board 50% reduction in the claimed hours billed” without further explanation. (Kerkeles, supra, 243 Cal.App.4th at p. 101.) The appellate court rejected this sweeping cut as inadequately supported. It reasoned that federal courts reviewing fees awarded under 42 U.S.C. § 1988 apply “heightened scrutiny” to “percentage cuts to large fee requests. (Id. at p. 102.) Examining several cases, it concluded that “when imposing a reduction greater than 10 percent, the court ’must explain why it chose to cut the number of hours or the lodestar by the specific percentage it did.’” (Id. at p. 103.) Here, the court did not cut the lodestar or make other factual rulings; it made a legal determination that it had the authority to award fees. Further explanation was not required.

Beck also argues that the trial court failed to exercise its discretion under section 1033, subdivision (a), which states, “Costs or any portion of claimed costs shall be determined by the court in its discretion in a case other than a limited civil case in accordance with Section 1034 where the prevailing party recovers a judgment that could have been rendered in a limited civil case.” He did not bring that statute to the court’s attention, however, until he filed his motion for reconsideration. He argues in his reply brief that section 1033 does not “on its face … require the parties to move for its invocation but exists for trial courts to consider when calculating reason-
able fees in cases where the prevailing party failed to attain a judgment meeting the $25,000 limited jurisdiction level.” He relies only on a depublished case to support this assertion; such cases are not proper authority and may not be cited. (See Cal. Rules of Court, rule 8.1115(a).) Moreover, nothing in the record indicates that the court failed to recognize its discretion under section 1033, subdivision (a) when it concluded that the full amount of fees requested was proper.

Beck further contends that the trial court improperly refused his motion for reconsideration or clarification. An order denying a motion for reconsideration is not separately appealable, but may be reviewed as part of an appeal of the order subject to the motion. (§ 1008, subd. (g).) Our review reveals no abuse of discretion. (See California Correctional Peace Officers Association v. Virga (2010) 181 Cal.App.4th 30, 42.) The trial court’s original order and oral remarks adequately informed Beck of the basis for its ruling, and Beck did not offer any new facts or law in support of the motion for reconsideration. Though it denied the motion, the trial court explained in its order that it “accepted the rate, and rationale proposed by plaintiff” when it made the fee award. This explanation should have clarified the matter for Beck, who was well aware of Balter’s legal arguments in support of the award and failed to object to the additional 14 estimated hours at the hearing. His assertion that the trial court is to blame for the continuation of this case is not well taken.

**DISPOSITION**

The order of the trial court is affirmed. Respondent is awarded his costs of appeal.

COLLINS, J.

We concur: MANELLA, P. J., WILLHITE, J.

Cite as 19 C.D.O.S. 233

CHRISTOPHER RYMEL, Plaintiff and Respondent,

v.

SAVE MART SUPERMARKETS, INC., Defendant and Appellant.

No. C085863
In The Court of Appeal of the State of California
Third Appellate District
(Placer)
(Super. Ct. No. SCV-0037893)

JOSE ROBLES, Plaintiff and Respondent,

v.

SAVE MART SUPERMARKETS, INC., Defendant and Appellant.

No. C085865
In The Court of Appeal of the State of California
Third Appellate District
(Placer)
(Super. Ct. No. SCV-0038597)

DAVID HAGINS, Plaintiff and Respondent,

v.

SAVE MART SUPERMARKETS, INC., Defendant and Appellant.

No. C085886
In The Court of Appeal of the State of California
Third Appellate District
(Placer)
(Super. Ct. No. SCV-0038598)
APPEAL from a judgment of the Superior Court of Placer County, Michael W. Jones, Judge. Affirmed.
Filed December 31, 2018

COUNSEL

Sheppard, Mullin, Richter & Hampton, Paul S. Cowie, Babak Yousefzadeh and Karin Dougan Vogel for Defendant and Appellant.

The Velez Law Firm, Mark P. Velez and Samantha J. Tanner for Plaintiffs and Respondents.
OPINION

Plaintiffs Jose Robles, Christopher Rymel, and David Hagins sued defendant Save Mart Supermarkets, Inc., alleging various state law statutory employment claims. After successfully moving to sever, Save Mart moved to compel arbitration as to each plaintiff. The motions were heard together, and the trial court denied the motions by substantively identical orders. Save Mart timely appealed in each case. The appeals lie. (See Code Civ. Proc., § 1294, subd. (a).) We consolidated the appeals for oral argument and decision and shall affirm the orders denying the motions to compel arbitration.

BACKGROUND

Generally, a collective bargaining agreement (CBA) providing for arbitration of employment grievances does not provide for arbitration of a worker’s claims based on violations of state anti-discrimination or retaliation statutes, nor do federal labor relations laws preempt such claims. The trial court reasoned that the CBA at issue did not clearly and unmistakably provide for arbitration of the claims asserted. We agree and further conclude that the claims asserted by plaintiffs are not preempted by federal law, specifically section 301 of the Labor Management Relations Act, 1947 (LMRA) (29 U.S.C. § 185(a)).

The Complaints

The original complaint alleged each plaintiff had been employed as an order selector at Save Mart’s Roseville Distribution Center (Rymel was also a forklift driver). Each alleged an industrial injury and torts flowing therefrom (failure to accommodate, retaliation, wrongful discharge, etc.) under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Hagins also alleged he was retaliated against after he reported a workplace safety hazard, purportedly a whistleblower violation under Labor Code section 1102.5. After the court granted Save Mart’s motion to sever, each plaintiff filed a separate complaint.

Robles alleges he suffered an industrial injury to his thumb and his doctor found he could work with restrictions. He was then given degrading tasks and forced to work on the cold side of Save Mart’s warehouse, which aggravated his back condition. When he complained he was told to go to an emergency room and have new work restrictions imposed, an impractical solution. When he complained about unduly narrow aisles, he was forced to wear a degrading safety vest. A manager taunted him with questions about his medical condition. Ultimately, Rymel was told he could not work until he was completely healed. Rymel alleges statutory theories of medical condition discrimination, harassment, and retaliation, failure to engage in an interactive process to accommodate, failure to adopt and implement a solution. When he complained he was told to go to an emergency room and have new work restrictions imposed, an impractical solution. When he complained about unduly narrow aisles, he was forced to wear a degrading safety vest. A manager taunted him with questions about his medical condition. Ultimately, Rymel was told he could not work until he was completely healed. Rymel alleges statutory theories of medical condition discrimination, harassment, and retaliation, failure to engage in an interactive process to accommodate, failure to adopt and implement a solution.

Hagins alleges he and another employee reported a safety violation to a manager, regarding unduly narrow aisles. The manager replied that if Save Mart had to fix the problem it would instead shut down the warehouse and fire everyone. Soon thereafter Save Mart was cited by Cal-OSHA for this violation. Four months later Hagins suffered an industrial injury. He tried to work despite the pain, and when he complained he was told to keep working. After he saw his doctor (who diagnosed a torn meniscus) he was placed on light duty. Save Mart then fired him. He alleges statutory theories of medical condition discrimination, retaliation, whistleblower retaliation, failure to prevent discrimination and retaliation, and termination in violation of public policies set by statute (FEHA and the workers’ compensation laws).

Rymel alleges he suffered an industrial injury to his back and was out on workers’ compensation leave. Because he needed to return to work for financial reasons his doctor lifted his work restrictions. He found it hard to work and asked to be moved to a different position but received no reply. He was forced to perform degrading tasks and work on the cold side of the warehouse, which aggravated his back condition. When he complained he was told to go to an emergency room and have new work restrictions imposed, an impractical solution. When he complained about unduly narrow aisles, he was forced to wear a degrading safety vest. A manager taunted him with questions about his medical condition. Ultimately, Rymel was told he could not work until he was completely healed. Rymel alleges statutory theories of medical condition discrimination, harassment, and retaliation, failure to engage in an interactive process to accommodate, failure to adopt and implement a solution, and failure to take steps to prevent harassment, discrimination, and retaliation, as well as termination in violation of public policy (set by FEHA and the workers’ compensation laws).

Motions to Compel Arbitration

In each case Save Mart moved to compel arbitration, citing the California Arbitration Act (CAA) (Code Civ. Proc., § 1280 et seq.) the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) and the federal Labor Management Relations Act, section 301. Save Mart alleged plaintiffs were members of Teamsters Local 150 and were employed by Save Mart under a CBA that covered the pleaded disputes. Save Mart argued that resolving the disputes would require interpretation of the CBA or would be “substantially dependent” on such interpretation, that the claims were “inextricably intertwined” with mission to use the bathroom and having to wear a degrading safety vest, and when he complained he was suspended without pay. He alleges statutory theories of medical condition discrimination, harassment, retaliation, and failure to take steps to prevent harassment, discrimination, and retaliation.

Hagins alleges he and another employee reported a safety violation to a manager, regarding unduly narrow aisles. The manager replied that if Save Mart had to fix the problem it would instead shut down the warehouse and fire everyone. Soon thereafter Save Mart was cited by Cal-OSHA for this violation. Four months later Hagins suffered an industrial injury. He tried to work despite the pain, and when he complained he was told to keep working. After he saw his doctor (who diagnosed a torn meniscus) he was placed on light duty. Save Mart then fired him. He alleges statutory theories of medical condition discrimination, retaliation, whistleblower retaliation, failure to prevent discrimination and retaliation, and termination in violation of public policies set by statute (FEHA and the workers’ compensation laws).

1. The relevant language appears in section 301(a) of the bill popularly known as the Taft-Hartley Act. (Pub.L. No. 101 (June 23, 1947) 61 Stat. 156.) The provision reads: “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.” (29 U.S.C. § 185(a).) Courts typically refer to the statutory provision as section 301, rather than by citation to the United States Code.

2. Our Supreme Court has held the policy or policies must be rooted in positive law, i.e., regulatory, statutory, or constitutional provisions. (See Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 71-72.)
parts of the CBA, and that judicial resolution of them would infringe on the arbitration process set forth in the CBA. The CBA was tendered as an exhibit. Article 21 addresses arbitration of grievances.

As for Robles, Save Mart contended his allegations “are based largely on (1) the tasks and schedules he has been assigned to by his employer, (2) his employer’s requirement for doctor’s notes in response to his complaints of injury, (3) his employer’s requirements to wear safety gear, and (4) a three-day suspension he was given pursuant to the strictures of his [CBA].” Save Mart alleged its defense would be that its challenged actions were governed by the CBA, prior practices between Save Mart and the Teamsters, and Save Mart’s reserved management rights under the CBA. Save Mart made analogous contentions about the complaints filed by Rymel and Hagins.

Save Mart’s motions included meet-and-confer e-mails wherein plaintiffs’ counsel cited Mendez v. Mid-Wilshire Health Care Center (2013) 220 Cal.App.4th 534 (Mendez) and Vasquez v. Superior Court (2000) 80 Cal.App.4th 430 (Vasquez) to argue that Save Mart could not rely on the CBA to compel arbitration of FEHA claims. Save Mart did not reply with contrary authority nor did it offer any factual or other basis for distinguishing these two cases.

Plaintiffs opposed the motions, in part citing Vasquez and Mendez (which we discuss post) and arguing the pleaded claims did not fall within the scope of the CBA. They also cited Wright v. Universal Maritime Service Corp. (1998) 525 U.S. 70 (Wright) and argued that to overcome the presumption that statutory violations are not arbitrable, a CBA must be explicit on that point.

At the hearing on the motions, Save Mart argued that preemption analysis under section 301 was independent of the analysis required under the FAA and CAA and was unrelated to the arbitration provision of the CBA. Plaintiffs argued that their claims do not rely on the CBA. The trial court denied the motions to compel, finding Save Mart had not shown a valid arbitration provision covering the disputed claims existed, and plaintiffs had not waived their right to sue for state statutory claims. The trial court did not explicitly address preemption. Save Mart addresses only preemption in its initial briefing.

**DISCUSSION**

**I Legal Background**

The parties agree that the CBA does not explicitly refer to FEHA, the whistleblower statute, and the California workers’ compensation laws; the CBA is silent on the California statutes plaintiffs contend Save Mart violated.

To be valid, an arbitration agreement must reflect the mutual intention of the parties that disputes between them will be resolved out of court; in doing so it operates as a waiver of the right to sue for redress of grievances. A party is not generally compelled to arbitrate a claim unless she has agreed to do so; arbitration is conducted by consent. (See, e.g., AT&T Technologies v. Communications Workers (1986) 475 U.S. 643, 648; Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236.)

A CBA is an agreement between an employer and a union and thus may be construed to waive the rights of union members even without explicit, individual consent of each member. But such a waiver, if applied to statutory rights, must be “clear and unmistakable.” (Wright, supra, 525 U.S. at p. 80; see Vasserman v. Henry Mayo Memorial Hospital (2017) 8 Cal.App.5th 236, 239 [“The [CBA] here required arbitration of claims arising under the agreement, but it did not include an explicitly stated, clear and unmistakable waiver of the right to a judicial forum for claims based on statute”]; Choate v. Celite Corp. (2013) 215 Cal.App.4th 1460, 1465 [a CBA “waives a union member’s right to litigate . . . in a judicial forum only if the waiver is clear and unmistakable”] (Choate).)

Ordinarily, a CBA cannot be invoked to bypass state law statutory protections. “When liability is governed by independent state law, the bare fact that a [CBA] will be consulted in the course of state-law litigation” is not sufficient to invoke preemption under section 301. (Sciborski v. Pacific Bell Directory (2012) 205 Cal.App.4th 1152, 1164 (Sciborski), quoting Livadas v. Bradshaw (1994) 512 U.S. 107, 124 [reviewing cases and holding “These principles foreclose even a colorable argument that a claim under [California Labor Code § 203 was pre-empted here”].)

Numerous California and Ninth Circuit cases have applied this rule to hold that claims under FEHA and similar remedial state statutes are not pre-empted by section 301 and therefore are not subject to arbitration under a CBA. This body of case law includes Mendez and Vasquez, the two cases plaintiffs’ counsel cited in its meet and confer letters and to the trial court. (See, e.g., Mendez, supra, 220 Cal.App.4th at p. 544 [CBA did not require arbitration of FEHA claims; “It does not mention FEHA, it does not explicitly incorporate by reference any statutory antidiscrimination laws, and it does not contain an explicit waiver of the right to seek judicial redress for statutory discrimination causes of action”]; id. at p. 546 [“At a minimum, the agreement must specify the statutes for which claims of violation will be subject to arbitration”]; Choate, supra, 215 Cal.App.4th at p. 1467 [to effect a waiver the CBA “must be specific, and mention either the statutory protection being waived or, at a minimum, the statute itself”]; Vasquez, supra, 80 Cal.App.4th at pp. 432, 434-436 [no preemption of claims of wrongful termination based on medical condition under FEHA and retaliation for adverse testimony under Labor Code, § 230]; Ackerman v. Western Electric Co. (9th Cir. 1988) 860 F.2d 1514, 1517 [the statutory right not to be discriminated against because of physical
handicap or medical condition is defined and enforced under state law without references to the CBA.)

Not all work-related state law tort claims avoid section 301 preemption. For example, in Chmiel v. Beverly Wilshire Hotel Co. (9th Cir. 1989) 873 F.2d 1283, the employee in part brought common law claims of wrongful termination and breach of contract. In effect, he claimed that he was entitled to greater employment protection than provided by the CBA, therefore, because “Chmiel’s independent contract claim concerns a job position governed by the [CBA], it is completely preempted by section 301. [Citation.]” (Id. at p. 1286.) Similarly, Chmiel’s tort claims based on breach of the implied covenant and fair dealing and intentional infliction of emotional distress were preempted because they placed in issue the terms of the CBA. (See ibid.) However, his statutory age discrimination claim was not preempted, because the relevant statute set forth “a nonnegotiable right” that applied “to both unionized and nonunionized workers. [Citation.]” (Ibid.) In other words, it was not dependent on or connected to the relevant CBA. (Cf. Cortez v. Doty Bros. Equipment Co. (2017) 15 Cal.App.5th 1, 13-14 [CBA clearly and unmistakably set out other rules for determining the compensability of such time. (Cf. supra.)]

In Cramer v. Consol. Freightways, Inc. (9th Cir. 2001) 255 F.3d 683, an employer installed cameras in bathrooms behind two-way mirrors to detect drug use, a misdemeanor violation of California law. Employees sued for invasion of privacy. The employer removed the matter to federal court and argued the claims were preempted by section 301 because their resolution required interpretation of the CBA. (Id. at pp. 688-689.) The Cramer court explained that “states may provide substantive rights to workers that apply without regard to a CBA; a state court suit seeking to vindicate these rights is preempted only if it ‘requires the interpretation of a [CBA].’ ” (Ibid. at p. 690, italics added.) The fact that the CBA referenced drug testing and surveillance did not insulate the employer from state law liability, but was merely an effort to use the CBA as a defense and thereby “‘transform’” a state law suit into a federal case. (Id. at p. 694.) But under settled Supreme Court precedent, § 301 does not grant the parties to a CBA the ability to contract for what is illegal under state law.” [Citation.]” (Id. at p. 695.)

In Burnside v. Kiewit Pacific Corp. (9th Cir. 2007) 491 F.3d 1053 (Burnside), class members alleged violations of California statutes and regulatory orders after their employer failed to pay them for the time spent traveling from meeting sites and job sites and back again. (Id. at pp. 1055, 1058) Their CBAs included rules about shift length, overtime, and compensation for transportation. (Id. at pp. 1056-1057.) But state law set out other rules for determining the compensability of such time. (Id. at pp. 1060-1061.) Burnside held the claims were not preempted. First, the claims were based on state laws independent of the CBA. (See Burnside, supra, 491 F.3d at pp. 1060-1070.) Next, the claims did not substantially depend on the CBA. Although the CBA set out detailed work rules; even if state law and the CBA had parallel provisions requiring interpretation that did not mean the state law claims depended on the CBA. (See id. at p. 1072; see also Moreau v. San Diego Transit Corp. (1989) 210 Cal.App.3d 614, 623 (“A mere overlapping of protections or terms found in both a [CBA] and state law does not necessarily require preemption.”).) Finally, the fact that ascertainment of damages might require consulting the CBA did not suffice to show preemption, because merely looking at the CBA to determine the appropriate wage rate would not interpret the CBA. (See Burnside, at pp. 1073-1074.)

A defense must require interpretation of the CBA before preemption will be found. “Although the plaintiff cannot avoid preemption by ‘artfully pleading’ the claim [citation], the claim must ‘require interpretation’ of the [CBA]. . . . Preemption occurs when a claim cannot be resolved on the merits without choosing among competing interpretations of a [CBA] and its application to the claim.” (Sciborski, supra, 205 Cal.App.4th at pp. 1164-1165.)

As we explain post, because a CBA cannot authorize violations of state law, resolution of plaintiffs’ claims does not require interpreting the CBA, and the CBA does not reference the statutes on which these plaintiffs rely, plaintiffs’ claims are neither arbitrable under the CBA nor preempted by section 301.

II

Save Mart’s Claims

Save Mart insists that all the claims against it are arbitrable under the CBA and preempted by section 301. We disagree. Save Mart neither acknowledges the force of the controlling authority nor explains how plaintiffs’ claims do not fall within the authorities cited ante that have found state statutory claims functionally identical to plaintiffs’ claims were not preempted. Ignoring precedent is not persuasive.

A. Preemption Findings

Save Mart first faults the trial court’s written ruling for purportedly truncating the analysis after finding the CBA did not cover plaintiffs’ claims. In Save Mart’s view, “The trial court’s order, which failed to address this issue of law [i.e., preemption], should be reversed and arbitration of [the] claims ordered.” Save Mart cites no authority for the implied proposition that a trial court’s purported failure to analyze all relevant legal issues in a written ruling requires reversal.3 It does not.

A written statement of reasons prepared by a trial court does not equate to a statement of decision. (See Taormino v. Denny (1970) 1 Cal.3d 679, 684; Tyler v. Children’s Home

3. When asked about this proposition at oral argument, counsel for Save Mart appeared to retreat from the position taken in Save Mart’s briefing.
B. Preemption of the Claims

Save Mart next contends that every single claim of each plaintiff herein is preempted by section 301. This position is incorrect and ignores binding precedent.

1. Test for Preemption

The Ninth Circuit “has articulated a two-step inquiry to analyze § 301 preemption of state law claims. First, a court must determine ‘whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted, and [the] analysis ends there.’ [Citation.] If the court determines that the right underlying the plaintiff’s state law claim(s) ‘exists independently of the CBA,’ it moves to the second step, asking whether the right ‘is nevertheless “substantially dependent on analysis of a [CBA].” ’ [Citation.] Where there is such substantial dependence, the state law claim is preempted by § 301. If there is not, then the claim can proceed under state law.” (Kobold v. Good Samaritan Regional Medical Center (9th Cir. 2016) 832 F.3d 1024, 1032-1033, fn. omitted (Kobold).)

As we have set forth in Part I, ante, when determining independence from the CBA, the courts focus on the legal character of the claim rather than the underlying set of facts. The question is whether the claim can be resolved by looking to the CBA without the need for interpretation of the CBA. “ ‘[I]n the context of § 301 complete preemption, the term “interpret” is defined narrowly—it means something more than “consider,” “refer to,” or “apply.” ’ [Citation.] And, notably, ‘a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state law claim, transform the action into one arising under federal law.’” (Kobold, supra, 832 F.3d at p. 1033.)

2. Analysis

All of plaintiffs’ claims here are based on nonnegotiable state law policies against medical condition discrimination and related torts (under FEHA), whistleblower retaliation (under Lab. Code, § 1102.5), and discipline in violation of public policies set by positive law (here, FEHA and the workers’ compensation statutes).

Plaintiffs’ primary claims are that Save Mart violated FEHA by not accommodating their medical conditions. Although the CBA might address things like work assignments and scheduling, which could potentially be relevant in a FEHA suit, the CBA would not have to be interpreted in order to reference this information. Nor could the CBA possibly permit Save Mart to violate FEHA by making (or denying) work assignments because of an employee’s medical condition, rather than for neutral business reasons. (See Matson v. United Parcel Service, Inc. (9th Cir. 2016) 840 F.3d 1126, 1133-1134 (Matson) (“Put differently, Matson’s contention is not that UPS created a hostile work environment by violating her contractual seniority rights. Rather, her position is that failing to assign her the work despite her seniority is evidence of UPS’s hostility toward her because of her gender”).)

Generally, a claim based on a “nonnegotiable” right will rarely require interpretation of a CBA, which by definition represents the culmination of negotiations between labor and management. (See, e.g., White, Section 301’s Preemption of State Law Claims: A Model for Analysis (1990) 41 Ala. L.Rev. 377, 425-426 (“‘nonnegotiable’ rights are designed to protect the public good rather than the rights of a single individual;” and “State law claims of discrimination and of retaliatory discharge are the most frequently encountered claims in the section 301 preemption context. At the outset, it should be noted that such claims will rarely be completely preempted.”).) One California treatise collects cases finding various rights were nonnegotiable state law rights, including retaliatory discharge, discharge in violation of public policy, and discrimination “based on protected classifications such as race, age, sex, disability, etc.,” among others. (Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) Preemption Defenses, §§ 15:301-316.) And the Ninth Circuit has observed that in the enforcement of state law employment discrimination protections: “Litigation concerning such protections ordinarily focuses on adverse workplace incidents, probing into whether discriminatory motives underlay those incidents. As the focus is not only on what happened but why it happened, resolving such litigation will rarely rest on rights created by CBAs or require interpreting CBAs in the sense required for § 301 preemption.” (Matson, supra, 840 F.3d at p. 1136, italics added.)

Here, Robles and Rymel allege they were required to wear degrading safety vests. Save Mart argues it would defend the claims on the ground that the custom and practice at the warehouse—endorsed by the union local—called for workers with certain tasks to wear those vests, and Robles and Rymel were not treated differently than other similar workers. That defense might look to the CBA or union practices

4. In making this argument, Save Mart suggests that preemption analysis is entirely unrelated to the arbitrability question. But the two inquiries largely overlap. If a CBA does not provide for arbitration of a state statutory tort, there would rarely be a need to interpret the CBA to resolve that tort.

5. “Under longstanding labor law principles, the scope and meaning of a [CBA] is not limited to the text of the agreement. Instead, ‘the industrial common law—the practices of the industry and the shop—is
to ascertain the ability of Save Mart to impose safety rules, but Save Mart does not demonstrate that it would require an interpretation of the CBA. Robles and Rymel would have the burden to show they were forced to wear degrading safety vests for discriminatory reasons violating FEHA, and if they were, nothing in the CBA would change that fact or require interpretation. 

Similarly, if Hagins were disciplined because he reported the narrow aisle safety hazard that later led Cal-OSHA to cite Save Mart, nothing in the CBA would (or could) protect Save Mart from liability, nor would interpretation of the CBA be necessary.

Save Mart argues it fired Hagins for repeatedly violating production norms endorsed by the CBA and the custom and practice between the union local and Save Mart, and that it followed all progressive discipline rules set forth therein, and makes similar claims as to the other plaintiffs. If proven, these points could well provide Save Mart with solid defenses. But the CBA does not have to be interpreted to make out these defenses, it merely needs to be consulted, or viewed. (See Kobold, 832 F.3d supra, at p. 1033.)

Save Mart asserts that Rymel’s and Roble’s FEHA claims are based on the application of work rules under the CBA, legitimate request for medical documentation as provided by the CBA and governing customs, or neutral (grievable) rules about modified work duties. But again, claims that Save Mart acted with an improper motive do not depend on interpreting the CBA.

The two cases Save Mart appears to rely on most heavily prove inapposite and unpersuasive. Ruiz, supra, 122 Cal. App.4th 520 involved common law claims, not statutory claims. Ruiz was fired but then reinstated through a grievance under the relevant CBA; he then sued his employer for defamation and related torts based on “the employer’s conduct during the investigation and interviews . . . and subsequent notification of the police of alleged false accusations.” (Id. at pp. 524, 529.) The relevant CBA required the employer to investigate the matter, and Ruiz held the claims raised were necessarily intertwined with that investigation. (Id. at p. 530.) The cases here are nothing like Ruiz.

Evangelista v. Inlandboatmen’s Union of Pacific (9th Cir. 1985) 777 F.2d 1390 is even further afield. There the employee was suing because a grievance proceeding initiated by another employee resulted in her loss of seniority; she initiated a second grievance challenging the decision, to no avail. (Id. at pp. 1393-1394.) She sued, in part alleging wrongful discharge, interference with economic advantage and inducing breach of contract. (Id. at pp. 1394, 1400.) Her claims were ruled preempted by section 301 because they hinged on whether the relevant CBA authorized the seniority decision or implicated her union’s duty to fairly represent her. (Id. at p. 1401.) The Ninth Circuit pointed out that “Evangelista does not allege that her reduction in seniority interferes with any independent state public policy.” (Ibid.) Evangelista does not help Save Mart, because here plaintiffs do allege violations of independent state public policies.

Accordingly, none of the plaintiffs’ claims are preempted.

C. Infringement

Finally, Save Mart contends that allowing any of plaintiffs’ claims to proceed would “infringe” on the arbitration grievance process set out in the CBA. Save Mart explains that the CBA establishes a for-cause disciplinary scheme with strict procedural safeguards for employees, and argues that allowing these civil tort suits to go forward would frustrate those protections. Save Mart speculates that if any plaintiff succeeded in court, he might leverage that finding to argue the “just cause” provision of the CBA was violated even if both the union local and Save Mart agreed the discipline at issue was appropriate, thereby exposing Save Mart to liability under the CBA by effectively bypassing its arbitration grievance procedures.

Save Mart cites Ruiz to argue that if an employee’s claims do not require interpretation of the CBA, “the court must determine whether permitting the state law claims to proceed would infringe upon the arbitration process established by the [CBA].” [Citation.]” (Ruiz, supra, 122 Cal.App.4th at p. 529.) Ruiz was quoting from Tellez v. Pacific Gas and Elec. Co., Inc. (9th Cir. 1987) 817 F.2d 536 (at p. 538). It appears the infringement language was first used casually by Tellez and was interpreted by Ruiz and a federal district court (Riggs v. Continental Baking Co. (N.D. Cal. 1988) 678 F.Supp. 236, 238) as if there were a separate infringement test. A treatise also quotes that part of Tellez, albeit with no analysis. (See 2 Advising Cal. Employers and Employees (Cont.Ed.Bar 2018) Mediation and Arbitration of Employment Disputes, § 20.34.) Save Mart does not clearly explain the test for purported infringement, nor does Save Mart explain how it would be functionally different from the other ways to determine whether allowing a civil suit to proceed will disrupt the expected (and federally protected) labor-management bargain consummated by a CBA. 7

Assuming the “infringement” test Save Mart invokes exists, Save Mart does not explain how its application would make a difference in this case. Save Mart explains that disputes about the employee termination and production norm

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6. Although the legal theories differ in some ways, all the alleged claims require a finding of discriminatory or retaliatory intent. (See, e.g., Harris v. City of Santa Monica (2013) 56 Cal.4th 203, 232 [FEHA plaintiff must show discrimination was a “substantial motivating factor” in adverse employment decision]; Morgan v. Regents of University of California (2000) 88 Cal.App.4th 52, 69 [whistleblower must prove retaliatory motive]; Holmes v. General Dynamics Corp. (1993) 17 Cal. App.4th 1418, 1426 [retaliatory termination in violation of public policy].)

provisions of the CBA are intended to be resolved through grievances. As an abstract proposition we do not disagree. But we fail to see how that changes the analysis we have already conducted, which covers Save Mart’s points. The plaintiffs retain an independent (nonnegotiable) state law right to be free of discipline caused by protected activity, such as whistleblowing (Hagins) or exercising his FEHA rights (all plaintiffs). 8

DISPOSITION

The orders denying Save Mart’s motions to compel arbitration are affirmed. Save Mart shall pay each plaintiff’s costs on appeal. (See Cal. Rules of Court, rule 8.278.)

Duarte, J.

We concur: Murray, Acting P. J., Hoch, J.

CITE AS

19 C.D.O.S. 239

YARON LIEF, Petitioner,
v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;
PNINA NISSAN, Real Party in Interest.

No. D074947
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(San Diego County Super. Ct. No. 17FL003120C)
Filed December 6, 2018
Certified for Publication January 2, 2019

COUNSEL

Dennis Temko for petitioner.
No appearance for respondent.
Bickford & Blado LLP and Andrew J. Botros for real party in interest.

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in this case filed December 6, 2018, was not certified for publication. It appearing the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c), the request pursuant to rule 8.1120(a) for publication is GRANTED.

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and ORDERED that the words “Not to Be Published in the Official Reports” appearing on page one of said opinion be deleted and the opinion herein be published in the Official Reports.

AARON, Acting P. J.

Copies to: All parties

OPINION

Petitioner Yaron Lief challenges by petition for writ of mandate an ex parte order of respondent San Diego County Superior Court (the family court) purporting to allow real party in interest Pnina Nissan to move with their minor child to Israel before expiration of the 30-day statutory stay of the judgment allowing removal of the child from California. (Code Civ. Proc., § 917.7.) We grant the petition.

8. We also decline to address Save Mart’s hypothetical about a plaintiff prevailing (that is, proving Save Mart violated FEHA or the California whistleblower statute) and then bringing a separate suit or filing a grievance under the CBA raising the same claims. The hypothetical does not change our analysis of Save Mart’s claims about the instant lawsuits presently before the court.
BACKGROUND

Lief and Nissan met in Israel in 2010. Nissan moved to San Diego and married Lief in 2011. They had a son in 2014. Lief filed a marital dissolution action against Nissan in 2017. The family court bifurcated the issue of custody and visitation, held a trial on Nissan’s request to move with the child to Israel, and tentatively granted the request on August 10, 2018. Upon Lief’s motion for reconsideration, the family court reopened the hearing to consider additional evidence and argument. The court ultimately entered a judgment granting Nissan’s move-away request on November 7, 2018.

After receiving notice from Nissan that she intended to depart for Israel with the child on November 22, 2018, Lief filed an ex parte application with the family court for an order preventing the move-away until after December 7, when the 30-day stay of the judgment granting the move-away request would expire. (Code Civ. Proc., § 917.7.) The court ruled its August 10, 2018 order tentatively granting Nissan’s move-away request started the stay period running, denied Lief’s application on November 21, and ordered Lief to turn over the child to Nissan that evening.

Lief petitioned us for a writ of mandate and requested an immediate stay of the ex parte order purporting to allow Nissan to move to Israel with the child on November 22, 2018. Lief argued Nissan could not then take the child to Israel because the stay of the judgment provided by Code of Civil Procedure section 917.7 would not expire until December 7. We stayed the family court’s order, advised the parties we were considering issuing a peremptory writ in the first instance, and invited Nissan to file a response to the petition. (See Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171, 180.) In her response, Nissan conceded Lief is entitled to relief and agreed not to leave the state until after December 7.

DISCUSSION

The family court erred when it ruled the 30-day statutory stay period. Rather, the period began to run when the family court filed the judgment granting Nissan’s move-away request on November 7. (Id., rule 8.104(c)(1) [entry date of judgment is date of filing].)

To correct the family court’s error in ruling the stay began to run on August 10, 2018, issuance of a peremptory writ in the first instance is appropriate. The material facts are not in dispute, the applicable law is settled, Nissan concedes Lief is entitled to relief, the need for final resolution of the child’s custody is urgent, and no useful purpose would be served by plenary consideration of the issue. (Code Civ. Proc., § 1088; Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1240-1241; Jane J. v. Superior Court (2015) 237 Cal.App.4th 894, 909-910.)

DISPOSITION

Let a writ issue commanding respondent, immediately upon receipt of the writ, to vacate its November 21, 2018 order denying petitioner’s ex parte application for an order preventing real party in interest from removing the child from this state, and to enter a new order granting the application. The stay previously issued by this court is dissolved. This opinion shall be final as to this court upon filing. (Cal. Rules of Court, rules 8.490(b)(2)(A).) Petitioner is entitled to costs. (Id., rule 8.493(a)(1)(B).)

IRION, J.

WE CONCUR: AARON, Acting P. J., DATO, J.
January 4, 2019


No. F074334
In The Court of Appeal of the State of California Fifth Appellate District
(Super. Ct. No. 2016497)
Appeal from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.
Filed January 2, 2019

CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II., III., V.E., and V.F.

COUNSEL

King Williams and Jennifer Hartman King for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, Annadel A. Almendras, Barbara C. Spiegel and Bryant B. Cannon, Deputy Attorneys General, for Defendants and Respondents.

OPINION

Appellant Caltec Ag, Inc. (Caltec) challenges a final administrative decision of the California Department of Pesticide Regulation (Department or DPR) that three of Caltec’s products were pesticides. Pursuant to Food and Agricultural Code sections 12993 and 12999.4, the Department imposed fines totaling $784,000, finding that the products should have been registered as pesticides before being sold in California.

California’s statutory scheme for the regulation of pesticides defines “pesticide” to include (1) any “spray adjuvant,” (2) any mixture of substances intended to be used for regulating plant growth, and (3) any substance used to prevent, destroy, repel or mitigate any pest. (§ 12753.) Here, the Department determined products named “Greenfeed 27-0-0” and “Terra Treat” were spray adjuvants and a product named “Kelpak,” a liquid extract from edible seaweed, was intended to be used as a plant growth regulator. Prior to the Department’s determinations, the California Department of Food and Agriculture (DeptAg) had issued certificates registering the products as specific types of “fertilizing materials.” (§ 14533.) Greenfeed 27-0-0 was registered as a “commercial fertilizer” (§ 14522), Terra Treat as an “auxiliary soil and plant substance” (§ 14513), and Kelpak as an “organic input material” (§ 14550.5). Thus, Caltec contends the products were fertilizers and not pesticides.

As to Greenfeed 27-0-0, we conclude substantial evidence supports the finding that this commercial fertilizer is also a plant growth regulator. A Caltec document states Greenfeed 27-0-0 is compatible with pesticides other than sulfur, has excellent sticking and spreading qualities, and can be used as a carrier for pesticides. The document supports a finding that Greenfeed 27-0-0 is a spreading agent intended to be used with another pesticide as an aid to the application of the other pesticide. Consequently, Greenfeed 27-0-0 satisfies the definition of a spray adjuvant. (§ 12758.)

Substantial evidence also supports the findings that Terra Treat is a spray adjuvant—specifically, a wetting agent that aids the application of pesticides. Terra Treat’s label described it as a soil surfactant/penetrant designed to uniformly distribute fertilizer, pesticides and water throughout the root zone. Also, a May 2011 technical information sheet states Terra Treat significantly increases the effectiveness of certain insecticides and herbicides. Based on these and other documents in the record, the Department’s finding that Terra Treat is a spray adjuvant and, therefore, a pesticide under section 12753 is supported by substantial evidence.

As to Kelpak, substantial evidence supports the findings that (1) Kelpak is a liquid auxin concentrate, (2) naturally occurring auxins in concentrated form are plant growth regulators, and (3) Caltec sold Kelpak with the intent that it be used as a plant growth regulator. Accordingly, the Department did not commit factual error in determining Kelpak is a plant growth regulator and, therefore, a pesticide under section 12753.

As to the questions of statutory construction involving the relationship between the chapter of the Food and Agricultural Code governing pesticides and the chapter governing fertilizers, we conclude the DeptAg’s prior registration of Terra Treat as an “auxiliary soil and plant substance” (§ 14513) and Kelpak as an “organic input material” (§ 14550.5) does not preclude the Department from determining those products were fertilizers.

Caltec also has raised claims of procedural and evidentiary error. We conclude any procedural error was not prejudicial and Caltec has failed to demonstrate the hearing officer’s treatment of the evidence violated an applicable rule of law. We therefore affirm the judgment.

FACTS AND PROCEEDINGS

Caltec markets and sells a variety of agricultural plant nutrients, crop protectors and chemicals. In December 2012, the Department received an email from a licensed pest control advisor stating that a product named Microlife was being...
actively promoted and sold as a nematicide by Caltec even though Microlife was not registered as a pesticide. The email attached copies of labels used by the companies selling the product. On the morning of May 30, 2013, the Department issued a “NOTICE OF INSPECTION” to Caltec for its office in Modesto. The inspector was Saiful Chowdhury, who works as an environmental scientist in the Department’s product compliance branch. Chowdhury spoke with Caltec’s office manager who informed him no products were located at the corporate office in Modesto and customers took possession of the materials they ordered at Caltec’s warehouse in Fresno. The office manager provided Chowdhury with copies of labels for the products sold and a guide manual for Kelpak. After reviewing the documents, Chowdhury issued “PESTICIDE STATUTES VIOLATION NOTICE[S]” relating to four products that were not registered as pesticides with the Department. The products were Microlife, Greenfeed 27-0-0, Terra Treat, and Kelpak. The notices (1) stated the Department’s opinion that the products were pesticides that required registration, (2) advised Caltec it was illegal to sell unregistered pesticides in California, and (3) noted Caltec had refused to provide sales invoices for the products.

On June 17, 2013, counsel for Caltec responded to the violation notices by sending the Department a letter stating (1) Greenfeed was a fertilizer, (2) Terra Treat was a soil penetrant used in irrigation to prevent puddling and to promote lateral movement of water in soil, and (3) “Kelpak is a natural plant growth regulator made out of sea weed and is used to increase the set and quality of fruits and vegetables.” The letter stated Caltec’s position that the products were not pesticides and asserted the products were not intended to control or destroy pests. The letter requested the withdrawal of the violation notices.

The Department did not withdraw the violation notices and continued its attempts to obtain sales information for the products. Meanwhile, in November 2013, Chowdhury completed an investigation summary using the Department’s preprinted form. The investigation summary concluded Microlife, Greenfeed, Terra Treat and Kelpak were pesticides. Exhibits to the investigation summary included (1) documents obtained from Caltec’s Web site, (2) a September 13, 2012, press release from the United States Environmental Protection Agency (EPA), (3) a Kelpak label received from Caltec’s owner, (4) documents from the Web site of Kelpak’s manufacturer, and (5) the June 17, 2013, letter from Caltec’s counsel.

In December 2013, the Department again requested sales information for the products by sending Caltec’s owner a letter. Counsel for Caltec responded in a letter dated January 13, 2014, which asserted the products were fertilizers, not pesticides, and refused to provide the sales data.

On May 29, 2014, after failing to obtain sales information through less formal means, the Department issued an administrative subpoena duces tecum to Caltec for all invoices, bills of lading, receipts and other documents evidencing the sale of Microlife, Greenfeed, Terra Treat and Kelpak in California from June 1, 2010, to June 1, 2014. In October 2014, Caltec finally produced its sales invoices.

**Notice of Violations**

On January 29, 2015, the Department issued a notice of proposed action to levy civil penalties under section 12999.4 (Notice of Proposed Action). The Department alleged Caltec violated section 12993 by selling Microlife (17 sales), Greenfeed (133 sales), Terra Treat (7 sales), and Kelpak (282 sales) in California when those products were not registered as pesticides. The Department proposed levying a civil penalty totaling $789,000. The Notice of Proposed Action stated Caltec could contest the proposed action by requesting a hearing no later than 20 days after its receipt of the notice. A form for requesting a hearing was attached.

**Administrative Proceedings and Decision**

On February 19, 2015, Caltec requested a hearing. The next day—a Friday—the Department sent Caltec a notice of hearing stating the hearing would begin on Thursday, March 12, 2015, and proposed ongoing hearing dates of the next three business days. Caltec’s appellate briefing represents Caltec received the notice of hearing on February 25, 2015, a Wednesday. Additional details about the procedural steps in the administrative process leading to the Department’s decision are provided in the chronology of events set forth in part II.A.3., post.

On July 14, 2015, after various procedural steps were completed, including the hearing itself, the hearing officer submitted a proposed decision to the Department. The proposed decision set forth the statutory definitions of pesticide (§ 12753), spray adjuvant (§ 12758), pest (§ 12754.5), and regulating plant growth (§ 12756) and the regulatory definition of the phrase “intended to be used” (Cal. Code Regs., tit. 3, § 6145 (Regulation 6145)). The proposed decision stated (1) Microlife was intended to suppress nematodes, (2) Greenfeed was a spray adjuvant, (3) Terra Treat was a spray adjuvant, and (4) Kelpak was a liquid auxin concentrate sold as a plant growth regulator. As a result, the proposed decision concluded the four products were pesticides and recommended a penalty totaling $939,000 for 438 sales of unregistered pesticides. The unregistered sales had generated proceeds of approximately $5,168,000 and, therefore, the proposed fine equaled about 18.2 percent of the sales revenue.

2. On appeal, Caltec has not challenged the determination that Microlife was a pesticide.

3. The Department contends the notice was delivered to the offices of Caltec’s attorney by certified mail on February 23, 2015, at 3:59 p.m. and cites information printed from the United States Postal Service’s tracking Web site.

4. Microlife’s label described it as a “Nematode Suppressant.”
On July 17, 2015, the director of the Department, Brian Leahy (Director), issued a decision and order adopting the findings in the proposed decision and amending the per violation penalties, which reduced the total fine to $784,000. The proposed decision as modified and adopted by the Director is referred to as the “Decision” in this opinion.

Administrative Mandamus Proceedings

In August 2015, Caltec filed a petition for writ of administrative mandamus pursuant to Food and Agricultural Code section 12999.4 and Code of Civil Procedure section 1094.5. In December 2015, Caltec filed an amended petition.

After briefing, a hearing on the writ petition, and a hearing on objections to the superior court’s statement of decision, the court denied the petition. In September 2016, the superior court signed and filed an amended statement of decision and amended judgment implementing its decision to deny Caltec’s petition for writ of administrative mandamus. Caltec filed a timely notice of appeal challenging the final judgment.

DISCUSSION

I. GENERAL PRINCIPLES

A. Standard of Review

Decisions of the Director are subject to judicial review pursuant to section 1094.5 of the Code of Civil Procedure, which governs administrative mandamus. (§ 12999.4, subd. (c).) When conducting such a review, the court’s inquiry “shall extend to the questions [1] whether the respondent has proceeded without, or in excess of, jurisdiction; [2] whether there was a fair trial; and [3] whether there was any prejudicial abuse of discretion.” (Code Civ. Proc., § 1094.5, subd. (b).) An abuse of discretion can occur three different ways: (1) “the [Director] has not proceeded in the manner required by law,” (2) the “decision is not supported by the findings,” or (3) “the findings are not supported by the evidence.” (Ibid.)

Generally, one of two different statutory standards govern challenges to the sufficiency of the evidence supporting a final administrative decision. The appropriate standard is determined by whether the superior court is authorized to exercise its independent judgment on the evidence. (Code Civ. Proc., § 1094.5, subd. (c).) Here, neither party contends the superior court was authorized to exercise its independent judgment. Therefore, the reviewing court must determine whether the findings are “supported by substantial evidence in light of the whole record.” (Ibid.)

B. Regulation of Pesticides


FIFRA expressly allows states to “regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].” (7 U.S.C. § 136v(a).) To promote uniformity, states shall not impose labeling or packaging requirements different from those required by FIFRA. (7 U.S.C. § 136v(b).) In accordance with the provisions of FIFRA, the California Legislature has enacted a statutory scheme for the regulation of pesticides.

1. Registration in California

A pesticide cannot be sold in California unless the product’s label is registered with the Department. (§ 12993.5) The purposes of the pesticide registration requirements are to (1) provide for the proper, safe, and efficient use of pesticides essential for (a) production of food and fiber and (b) protection of the public health and safety; (2) protect the environment by regulating or ensuring proper stewardship of pesticides; (3) assure safe working conditions for agricultural and pest control workers; (4) assure users that pesticides are properly labeled and are appropriate for the use designated by the label; and (5) assure users that information on pesticidal use of the product disseminated by state or local government is consistent with the uses for which the product is registered. (§ 11501.)

Before a pesticide can be registered in California, it must first be registered by the EPA. (Pesticide Action Network North America v. Department of Pesticide Regulation (2017) 16 Cal.App.5th 224, 232–233.) Compliance with FIFRA and its registration requirement has been described as “extremely expensive and time consuming.” (Hansen, Agricultural Nonpoint Source Pollution: The Need for an American Farm Policy Based on an Integrated Systems Approach Recoupled to Ecological Stewardship (1994) 15 Hamline J. Pub. L & Pol’y 303, 320.) After the EPA has registered a pesticide,

5. The Department (i.e., DPR) is one of six agencies operating under the California Environmental Protection Area. (§ 11451.) The California Environmental Protection Agency and the DPR were created in 1991 pursuant to the Governor’s Reorganization Plan. (See Fernandez v. California Dept. of Pesticide Regulation (2008) 164 Cal. App.4th 1214, 1222.) The DeptAg previously administered California’s pesticide regulatory program, but the Governor’s Reorganization Plan transferred the responsibility for that program to the DPR. (Ibid.; § 11454.) The DPR and the DeptAg are separate agencies and do not share a common parent organization, a fact that has some relevance in determining the effect on the DPR of the DeptAg’s decision to register a product as a fertilizing material.

6. “To register a pesticide, [EPA] requires the registration applicant to submit a large number of studies concerning the chemistry and toxicology of the pesticide, the potential risks it may pose to worker safety and public health, the effects it may have on the environment, fish, wildlife and non-target insects, and other studies that bear on the
it is eligible for the Department’s review. (Pesticide Action Network, supra, at p. 233.) The Department is charged with thoroughly evaluating the pesticide to ensure that, when used in conformance with its labeling, it is effective and will not harm human health or the environment. (Ibid.; § 12824.)

To summarize, the federal pesticide regulatory program and the state program require sequential registration of a product the Department has decided is a “pesticide.” This registration process is slow and expensive.

2. Statutory Definitions

California’s definition of “pesticide” includes (1) any “spray adjuvant” and (2) any substance or mixture “intended to be used for [(a)] defoliating plants, [(b)] regulating plant growth, or [(c)] for preventing, destroying, repelling, or mitigating any pest … which may infest or be detrimental to vegetation, man, animals, or households, or be present in any agricultural or nonagricultural environment whatsoever.” (§ 12753.) In comparison, FIFRA defines “pesticide” to mean “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer,” subject to certain exceptions that are not relevant here. (7 U.S.C. § 136(u).) Thus, the federal definition does not include “spray adjuvants” and California’s definition does not include nitrogen stabilizers.

For purposes of this appeal, two significant components of the definition of “pesticide” are (1) the term “spray adjuvant” and (2) the phrase “regulating plant growth.” “‘Spray adjuvant’ means any wetting agent, spreading agent, deposit builder, adhesive, emulsifying agent, deflocculating agent, water modifier, or similar agent, with or without toxic properties of its own, which is intended to be used with another pesticide as an aid to the application or effect of the other pesticide, and sold in a package that is separate from that of the pesticide other than a spray adjuvant with which it is to be used.” (§ 12758.)

“‘Regulating plant growth’ [generally] means the use of any substance or mixture of substances intended, through physiological action, for accelerating or retarding the rate of growth or rate of maturation, or for otherwise altering the behavior of plants or the produce thereof.” (§ 12756.) The statute also sets forth two exceptions to this general rule. First, the phrase “shall not include the use of substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants, and soil amendments.” (Ibid.) Second, “‘regulating plant growth’ shall not be required to include at all the use of any of such of those nutrient mixtures or soil amendments as [1] are commonly known as vitamin-hormone horticultural products, intended for improvement, maintenance, survival, health, and pesticides safety and effectiveness.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 124, as amended Jun. 11, 1996, p. 2.)

The first two definitions are based on intent. The third definition is based on the ingredients and does not involve the intent of the seller or the intent to the user.

3. Interpreting Regulation 6145

The parties disagree as to the proper interpretation of subdivision (c) of Regulation 6145. Caltec contends the phrase “has no significant commercially valuable use” refers to the “substance” and not to “one or more active ingredients.” (Regulation 6145, subd. (c).) On appeal, the Department contends the third definition of “intended to be used” (Regulation 6145, subd. (c)) allows for the intended use of a substance to be demonstrated by the presence of “active ingredients” and, so long as an active ingredient’s only significant commercially valuable use is as a pesticide, the actions or mental state of the distributor or seller are irrelevant.7

7. Neither the Director nor the hearing officer expressly interpreted subdivision (c) of Regulation 6145 to mean the phrase “has no significant commercially valuable use” refers to “one or more active ingredients” and not to the “substance.” Generally, when an agency’s interpretation is carefully considered by senior agency officials, it is entitled to correspondingly greater weight. (Allende v. Department of California Highway Patrol (2011) 201 Cal.App.4th 1006, 1018.) In contrast, an argument advanced by the agency’s litigating counsel is not regarded as an agency interpretation and, thus, is given less weight. (Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (2d Cir. 1977) 567 F.2d 1174, 1177, fn. 3; see 2B Singer & Singer, Statutes and Statutory Construction (7th ed. 2012) § 49:4, p. 85 [“arguments of an agency’s counsel do not have the probative force of an official agency
We conclude the words and grammar of subdivision (c) of Regulation 6145 are not ambiguous on the question of whether the phrase “has no significant commercially valuable use” refers to the “substance” or, alternatively, refers to “one or more active ingredients.” The phrase refers to the “substance,” that is the product being sold or distributed. Accordingly, to establish a product is a pesticide under the ingredients-based definition in subdivision (c) of Regulation 6145, the Department must prove the “substance” [1] consists of or contains one or more active ingredients and [2] has no significant commercially valuable use as distributed or sold other than” use as a pesticide. The use of the conjunction “and” clearly establishes that the substance must satisfy two elements. (In re C.H. (2011) 53 Cal.4th 94, 101 [ordinary and usual usage of statutory term “and” as a conjunctive, meaning an additional thing, also, or plus].) If the reference to the absence of commercial value had been intended to modify the phrase “one or more active ingredients,” the words “and has” would have been replaced with “that have” or “having.” (See Surfrider Foundation v. California Regional Water Quality Control Bd. (2012) 211 Cal.App.4th 557, 576 [courts must interpret statutes consistent with the meaning derived from its grammatical structure].)

The interpretation of subdivision (c) of Regulation 6145 advocated by counsel for the Department on appeal cannot be adopted by this court because it is contrary to the unambiguous language of the regulation. Thus, that interpretation, in effect, rewrites the regulation. To be valid, such a rewriting (i.e., amendment) of the regulation must be adopted in substantial compliance with the procedures of the Administrative Procedures Act (Gov. Code, § 11340 et seq.). (See Patterson Flying Service v. Department of Pesticide Regulation (2008) 161 Cal.App.4th 411, 429 [“underground regulation” is not adopted in compliance with Administrative Procedures Act and, thus, is invalid].)

Based on the foregoing interpretation, the critical facet of the regulatory definition of “intended to be used” is set forth in subdivision (a)(1) of Regulation 6145. That definition is satisfied when the company selling or distributing the substance claims, states, or implies that the substance can or should be used as a pesticide. Under this definition, a company must be careful in marketing a product because claims about its capabilities, even if inaccurate, could cause that product to be subject to the pesticide regulatory program.

C. Auxins and Cytokinins

As part of his investigation, Chowdhury printed a page from a Web site at http://www.kelpak.com/activity/how_it_works.html on June 10, 2013. The page describes auxins and cytokinins as follows:

“Auxins are natural plant hormones produced in a plant’s shoot tips and translocate downwards. One of its effects is to signal a plant to increase its root growth.

“Cytokinins are natural plant hormones produced in root tips and translocated upwards. One of its effects is to signal a plant to produce more and larger foliage.”

The subject of plant growth regulators is addressed in part II of chapter 15 of Anderson & Simon, Defending Pesticides in Litigation (2018) (Defending Pesticides). Section 15:34 of Defending Pesticides states that “[i]n 1934, auxins were found to enhance root formation in cuttings.” Section 15:35 of Defending Pesticides states: “Auxins are compounds that induce elongation in shoot cells. Some occur naturally, whereas others are manufactured. Auxin precursors are materials that are metabolized to auxins in plants.” It also states the mechanism of action is not completely understood, but with the addition of auxin the individual cells become larger by a loosening of the cell wall, which is followed by increased water uptake and expansion of the cell wall. Auxins include the herbicide 2,4-D.

Section 15:37 of Defending Pesticides describes cytokinins as “naturally occurring or manufactured compounds that induce cell division in plants.” It also states cytokinins were discovered in 1955 and have two notable effects in plants—that is, “the induction of cell division and the regulation of differentiation in removed plant parts.” Section 15:34 of Defending Pesticides states that six classes of plant growth regulators are recognized by the American Society for Horticultural Science, including auxins, gibberellins, cytokinins and ethylene generators.

[ PARTS II. AND III., SEE FOOTNOTE®, Ante ]

IV. TERRA TREAT

A. Background

1. Administrative Decision

Part F of the analysis section of the Decision states there is ample evidence to support the Department’s assertion “that Terra Treat is a spray adjuvant that Caltec claimed could be used to disburse other pesticides into the soil.” The evidence includes a label that described Terra Treat as a soil surfactant/penetrant designed to uniformly distribute fertilizer, pesticides and/or water throughout the root zone. Based on invoices for seven sales of Terra Treat, the Department fined

8. Section 14031 uses “2,4-D” to mean “any form of 2,4-dichlorophenoxyacetic acid.” In 1949, the Legislature made 2,4-D a restricted material. (People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 481; see Cal. Code Regs., tit. 3, § 6400, subd. (c) [2,4-D included in pesticides designated restricted materials].)
Caltec a total of $7,000—that is, $1,000 for each sale of the unregistered pesticide.

2. Terra Treat’s Certification

The March 2015 declaration of Caltec’s president and owner states Caltec held a certificate of registration for fertilizing materials from the DeptAg that listed Terra Treat as an “Auxiliary Soil and Plant Substance.” A copy of the certificate of registration is attached to the declaration. The declaration states Caltec has held a certificate of registration for Terra Treat since approximately 1995.

B. Statutory Construction

1. Contentions of the Parties

Caltec contends that because Terra Treat is registered with the DeptAg as an “auxiliary soil and plant substance” and the statutory definition of “auxiliary soil and plant substance” excludes pesticides (§ 14513), it follows that Terra Treat is not a pesticide. Caltec argues California’s two statutory schemes relating to fertilizing materials and pesticides must be read together and the term “pesticide” given the same meaning in each scheme. In Caltec’s view, the statutory language evinces an intent to avoid the duplicative regulation of auxiliary soil and plant substances as pesticides, and vice versa. This argument suggests that Caltec regards the DeptAg’s registration of Terra Treat as an auxiliary soil and plant substance as a final administrative determination that Terra Treat is not a pesticide under section 12753.

The Department argues the term “pesticide” used in the exception to the statutory definition of auxiliary soil and plant substance does not have the same meaning as the term “pesticide” defined by section 12753. In the Department’s view, which was adopted in the Decision, section 14513’s exclusion used the term “pesticide” in its ordinary sense, rather than in the technical sense set forth in section 12753. Under this statutory interpretation, it is possible for a product to be a pesticide under the technical elements of section 12753 and also be an auxiliary soil and plant substance under the statutory scheme governing fertilizing materials.

2. Statutory Text

Chapter 5 of division 7 of the Food and Agricultural Code governs fertilizing materials and contains provisions for licensing sellers, registering products, labeling, inspections, and procedures for prosecuting violations. (§§ 14501–14682.) In contrast, chapter 2 of the same division governs pesticides. (§§ 12751–13192.)

“Fertilizing materials” is defined as “any commercial fertilizer, agricultural mineral, auxiliary soil and plant substance, organic input material, or packaged soil amendment.” (§ 14533.) Each component of this definition, in turn, is defined by statute. (§§ 14522 [commercial fertilizer], 14512 [agricultural mineral], 14513 [auxiliary soil and plant substance], 14550.5 [organic input material], 14552 [packaged soil amendment].) “Auxiliary soil and plant substance” includes, without limitation, (1) substances applied to soil for corrective purposes; (2) substances intended to improve desirable characteristics in plants, such as germination, growth or yield; and (3) substances intended to produce chemical, biological or physical change in soil. (§ 14513.) The statute also provides that the term “auxiliary soil and plant substance” “does not include commercial fertilizers, agricultural minerals, pesticides, soil amendments except biochar, or manures.” (§ 14513, italics added; see § 14545 [manure].)

In comparison, the statutory definitions of “pesticide” and “spray adjuvant” do not contain an exclusion for “auxiliary soil and plant substance.” (See §§ 12753, 12758.) The parties dispute how these statutory definitions fit together.

3. Meaning of the Word “Pesticide”

For purposes of this opinion, we assume without deciding that Caltec has properly interpreted the statutory scheme and the term “pesticide” appearing in section 14513’s exclusion has the same meaning as the term “pesticide” defined by section 12753. Under this assumption, if a material qualifies as a “pesticide” subject to regulation under chapter 5 of division 7 of the Food and Agricultural Code, it is not an “auxiliary soil and plant substance” subject to regulation under the chapter governing fertilizing materials because of the exclusion in section 14513.

4. Impact of Terra Treat’s Registration

The next legal question presented is whether the DeptAg’s registration of Terra Treat as an “auxiliary soil and plant substance” means Terra Treat is not a “pesticide” subject to regulation by the Department under chapter 2 of division 7 of the Food and Agricultural Code. Based on the circumstances of this case, we conclude the registration does not prevent Terra Treat from being a pesticide subject to regulation by the Department.

The definition “auxiliary soil and plant substance” excludes “pesticides.” (§ 14513.) In comparison, the definition of “pesticides” set forth in section 12753 does not exclude “auxiliary soil and plant substance” or the broader term “fertilizing materials.” When these provisions are read together, the classification of a material as a “pesticide” precludes it from also being classified as an “auxiliary soil and plant substance.”

Here, the sequence of the determinations was different. Terra Treat was registered as an “auxiliary soil and plant substance” before the Department determined it was a “pesticide.” As a result, the narrow question presented is whether the DeptAg’s registration of Terra Treat as an “auxiliary soil and plant substance” precludes the Department from subsequently determining Terra Treat was a “spray adjuvant” under section 12758 and, thus, a “pesticide” under section 12753.

Caltec’s argument is the equivalent of claiming that the DeptAg’s registration is a binding determination that Terra Treat is not a “pesticide.” The parties have not analyzed the
issue from this perspective. For instance, they have not set forth any rules of law that identify when a determination by one administrative agency is binding upon another administrative agency. One set of legal rules addressing this topic is the doctrine of collateral estoppel, as modified for administrative decisions.

“For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character. [Citation.] Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party’s ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision.” (Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal.4th 921, 944.) Here, the DeptAg’s registration of Terra Treat did not possess a judicial character and, therefore, the registration has no collateral estoppel effect on the Department.

In the absence of any other legal doctrine supporting the conclusion that the Department is bound by the DeptAg’s registration, we conclude the registration of Terra Treat as an “auxiliary soil and plant substance” did not preclude the Department from determining Terra Treat was also a pesticide subject to regulation under chapter 2 of division 7 of the Food and Agricultural Code. Therefore, the Department did not act in excess of its jurisdiction for purposes of subdivision (b) of Code of Civil Procedure section 1094.5.

C. Sufficiency of the Evidence

Caltec also contends the evidence is insufficient to support the Department’s finding that Terra Treat was a spray adjuvant. We disagree.

1. Documents in Administrative Record

Caltec asserts that “Terra Treat is a soil wetting agent that is intended to be applied to soil to improve water penetration.” One of the documents cited by Caltec to support this assertion states that “managers often experience problems getting irrigation water to effectively and efficiently penetrate soil” (boldface and italics omitted) and explains that the surface tension of water may prevent it from physically penetrating the soil surface and root zone. The document then states:

“The surfactants in Terra Treat Soil Penetrant are specifically designed to improve the spreading and penetration of water applied through irrigation systems. Injecting Terra Treat into irrigation system reduces the surface tension of water, which facilitates penetration of irrigation water.

“Terra Treat surfactant molecules in the irrigation water also attach to the water repellent ‘coating’ on thatch material and on the soil surface. This increases the adhesion between applied water and these surfaces.…

“The net effect of reduced surface tension and increased adhesion of applied water at the water thatch and water soil interface will enhance spreading and penetration into the soil and root profile.

“The improved pattern of penetration, spreading, and hydration allows water to move more quickly and more efficiently into the soil. Reduction of water loss due to surface evaporation and run-off can be expected.”

The second page of the document asks, “EVER WONDER WHERE YOUR WATER AND PESTICIDES WENT?” That page states Terra Treat distributes water laterally and uniformly beneath the soil surface 8 to 12 inches deep. It also states Terra Treat can be applied through drip, flood, furrow, micros, or sprinklers and added with soil pesticides.

The label for Terra Treat appears in the administrative record at pages 1387 to 1388 and 1509. Each version of the label states: “A SOIL SURFACTANT/PENETRANT DESIGNED TO UNIFORMLY DISTRIBUTE FERTILIZER, PESTICIDES, AND/OR WATER THROUGHOUT THE ROOT ZONE.”


2. Application of Statutory Definition of “Spray Adjuvant”

The statutory elements of a “spray adjuvant” are (1) any wetting or similar agent, (2) intended for use with another pesticide, (3) “as an aid to the application or effect of the other pesticide,” (4) which is sold in a separate package. (§ 12758.)

Terra Treat easily satisfies the first and fourth elements. Caltec’s opening brief states “Terra Treat is a soil wetting agent” and the phrase “soil wetting agent” appears in the technical information sheet dated May 2011. As to packaging, the labels in the record demonstrate Terra Treat is sold in separate containers or packaging rather than being premixed by Caltec with other substances, such as fertilizers or other pesticides.

As to the second and third elements, Caltec contends “there is nothing in the record demonstrating that Terra Treat
is intended to be used with other pesticides to improve the efficacy of the other pesticide.” One shortcoming of this argument is that it overlooks part of the statutory definition. The definition is not limited to agents that aid the effect (i.e., improve the efficacy) of another pesticide. It also covers agents that are “an aid to the application ... of the other pesticide.” (§ 12758, italics added.) Terra Treat’s label states it is capable of uniformly distributing pesticides throughout the root zone. This statement about uniform distribution is sufficient to support the factual finding that Terra Treat is an aid to the application of pesticides. Accordingly, the third element has sufficient evidentiary support.

As to whether Terra Treat is intended for use with another pesticide, the regulatory definition of “intended to be used” is satisfied when the seller of a substance claims or states, by labeling or otherwise, that the substance, by itself or in combination with any other substance, can be used as a pesticide. (Regulation 6145, subd. (a)(1).) A claim that a substance can “be used as a pesticide” necessarily includes the more specific claim that the substance can be used as a spray adjuvant because the statutory definition of “pesticide” includes “spray adjuvant.” (§ 12753.) Here, Caltec has claimed that Terra Treat can be used as a spray adjuvant by stating it was designed to uniformly distribute pesticides throughout the root zone.

Consequently, we conclude that there is sufficient evidence to support the finding that Terra Treat is a wetting agent, sold in separate packaging, and intended to be used as an aid to the application of other pesticides. Accordingly, the Department’s findings and conclusions as to Terra Treat, along with the fine of $7,000, shall be upheld.

V. KELPAK

A. Background

1. Violations Alleged

The Notice of Proposed Action alleged Kelpak, as a plant growth regulator, is a pesticide product. It also alleged (1) Caltec had sold Kelpak in California a total of 282 times from June 1, 2010, through June 30, 2014; (2) the sales totaled $4,165,862.50; (3) during that period, Kelpak was not registered as a pesticide in California; and (4) the sales of the unregistered Kelpak violated section 12993. The Notice of Proposed Action stated the Department sought a penalty of $2,000 per sale, which totaled $564,000.

2. The Decision

The Decision states that (1) pesticides include plant growth regulators, (2) auxins and cytokinins are plant growth regulators, and (3) Kelpak is a liquid auxin concentrate and, therefore, a plant growth regulator. The Decision acknowledged Caltec’s factual assertions that Kelpak is derived solely from edible seaweed, does not include added plant hormones, and is registered as an organic input material with the DeptAg. The Decision stated: “Auxins in seaweed are plant hormones which in un-concentrated form is possibly a fertilizer. But in concentrated form seaweed auxins are probably plant growth regulators or pesticides, not fertilizers.”

The Director imposed the penalty recommended in the Notice of Proposed Action. Thus, Caltec was fined $2,000 for each of the 282 sales of Kelpak that violated section 12993, or a total of $564,000.

B. Evidence Presented

1. Documents

Caltec’s invoices for its sales of Kelpak include a box labeled “Description.” The entries in this box describe Kelpak as a “Liquid Auxin Concentrate.” Kelpak’s label describes it as a “Liquid Seaweed Concentrate” and an “Organic Plant Nutrient.” The label includes a logo stating it is a material registered with the Washington State Department of Agriculture for use in organic agriculture. The label also directs users to refer to the Kelpak Application Guide for specific crop recommendations.

A “Kelpak Guide Manual” included in the administrative record contains sections for (1) product specifications and (2) mode of action and responses. The product specifications state the active ingredients are “Natural Auxins 11 mg / litre” and “Natural Cytokinins 0.031 mg / litre.” The first two paragraphs of the section labeled “MODE OF ACTION AND RESPONSES” state:

“Kelpak is a plant bioregulator made from the seaweed species Ecklonia maxima (commonly known as kelp), and found in the cold waters of the South African West Coast. This species has a prolific growth rate, due mainly to the presence of the plant hormone groups auxins and cytokinins. The cell sap containing these hormones is extracted from freshly-harvested kelp with the unique cell burst technology, patented worldwide. No heat, freezing or harsh chemicals are used to break the cell wall in the extraction process. This ensures that the delicate compounds found in the kelp are maintained in their active form in Kelpak. The natural high auxin to low cytokinin ratio in the fresh kelp is therefore maintained in the end product. The Institute of Marketecology (IMO), BCS Oko-Garantie, The UK Soil Association, Australian Biological Farmers and SGS have ac-

10. A second shortcoming is Caltec’s failure to address the Terra Treat technical information sheet dated May 2011 and its statement that Terra Treat significantly increases the effectiveness of soil-injected, band-applied insecticides, fumigants and herbicides. This statement is the equivalent of saying Terra Treat is “an aid to the ... effect of [a] pesticide.” (§ 12758.)

credited this organic product for use in organic agriculture.

“This auxin-dominated extract stimulates prolific adventitious root formation when Kelpak is applied to almost any plant. This drastic increase in root tips leads to an increased level of cytokinins in treated plants, as this group of hormones is mainly produced in root tips. The increased root volume and number of root tips also increases moisture and nutrient uptake from the soil. The improved nutrient status, together with the higher level of cytokinin in the plant, gives better top growth which causes the increase in yield and quality of crops. The improved root system also makes the plant more resistant to stresses such as drought, waterlogging, soil nutrient deficiency and salinity, nematode infestations and soil-borne diseases.”

The last paragraph in this section refers to Kelpak “as a cost effective agricultural biostimulant.” A June 2010 Kelpak Guide for new plantings, trees and vines, includes the line: “Use Kelpak auxin concentrate plant growth regulator as follows.” This guide includes Caltec’s name, address and phone numbers. Caltec’s 2008 product guide lists Kelpak under the heading “Auxin Concentrate.”

Exhibit D to the investigation summary prepared by Chowdhury was a September 13, 2012, press release issued by the EPA. The press release announced three enforcement actions by the EPA against Missouri pesticide distributors involving the sale of plant growth regulators, which are regulated as pesticides under FIFRA. The release stated: “FIFRA defines plant growth regulators as substances intended to accelerate or retard the growth of plants. Among other things, substances considered to be plant regulators may include hormone additives intended to stimulate plant root growth or fruiting, such as gibberellins, auxins, and cytokinins derived from seaweed. Products containing these additives are often marketed as fertilizers, but such claims do not exempt products from regulation as pesticides.”

2. Caltec’s Evidence

The March 2015 declaration of Caltec’s owner states Caltec holds a certificate of registration for organic input material from the DeptAg for Kelpak liquid seaweed concentrate and includes a copy of the certificate. Also attached to the declaration is a copy of a material registration certificate from the Washington State Department of Agriculture, which states Kelpak has “been verified to comply with the USDA National Organic Standards (7 CFR Part 205).”

Caltec submitted a March 2015 declaration of Adriaan Francois Lourens, Ph.D. Dr. Lourens obtained a Ph.D. in plant physiology from the University of California, Davis and bachelor’s and master’s degrees from the University of Stellenbosch, South Africa. Dr. Lourens works for Kelp Products (Pty) Ltd., the company that developed and manufactures Kelpak. Dr. Lourens’s declaration asserts Kelpak (1) is derived entirely from the edible seaweed species Ecklonia maxima, (2) is nontoxic, (3) includes soluble potash (K₂O) and lower levels of calcium and magnesium, and (4) contains no hormone additives. The declaration also asserts “Kelpak was developed with the sole intention that it be sold and used as an organic plant nutrient.”

Dr. Lourens’s declaration states: “All seaweed species naturally contain varying amounts of auxins and cytokinins, plant hormones that are necessary to the normal growth of plants. Similarly, Ecklonia maxima has naturally-occurring auxins and cytokinins, with the auxin levels being higher than cytokinin levels.” The declaration also states the levels of auxin and cytokinin listed on Kelpak’s label—11 mg/liter and 0.03 mg/liter—were obtained from a typical bioassay for auxin-like and cytokinin-like activity and then asserts: “These values of auxins and cytokinins were later found to be a gross over-estimation of what were found by high technology physical analyses of the product.” The declaration does not state how the timing of these later analyses relates to the period covered by the Notice of Proposed Action. In particular, it does not state when the analyses were completed or describe how the new information affected the labeling and marketing of Kelpak, if at all. Thus, the new information about grossly over-estimated auxin levels is not linked to what Caltec stated or implied about Kelpak in connection with the 282 sales that are the subject to the Notice of Proposed Action. (See Regulation 6145, subd. (a).)

Caltec also submitted a March 2015 declaration of Roy Slack, the current managing director of Kelp Products (Pty) Ltd., which states he is responsible for the development of Kelpak’s North America markets. Slack’s declaration states that since Kelpak distribution began in the United States, neither the EPA nor any state other than California has characterized Kelpak as a pesticide. Slack’s declaration also states Kelpak is registered as an organic input material with the DeptAg and, to maintain this specific type of registration, additional fees must be paid and labeling requirements satisfied.

C. Kelpak’s Registration as an Organic Input Material

It is undisputed that Kelpak is registered with the DeptAg as an organic input material. Section 14550.5 defines “organic input material” as “any bulk or packaged commercial

12. We note that Dr. Lourens’s declaration did not attach any of his journal articles discussing seaweed concentrate. (See Ferreira & Lourens, The efficacy of liquid seaweed extract on the yield of canola plants (2002) 19(3) S. Afr. J. Plant Soil 159, 161 [“Liquid seaweed concentrate (Kelpak) … contains natural plant growth regulators that are high in auxins and low in cytokinins”; “Kelpak … appeared to be an effective and consistent growth regulator for increasing canola yield.”]) We have not relied on this or any other article authored by Dr. Lourens in deciding this appeal.

13. The new findings about Kelpak’s (unspecified) auxin levels resulting from the high technology physical analyses did not affect Caltec’s invoices from May 2014, which continued to describe Kelpak as a “Liquid Auxin Concentrate.”
fertilizer, agricultural mineral, auxiliary soil and plant substance, specialty fertilizer, or soil amendment, excluding pesticides, that is to be used in organic crop and food production and that complies with” certain national organic standards contained in the Code of Federal Regulations. (Italics added.) This definition, like the definition of “auxiliary soil and plant substance” set forth in section 14513, excludes “pesticides.”

Caltec argues that Kelpak is not a plant growth regulator and, thus, is not a pesticide because the DeptAg has registered Kelpak as an organic input material. First, on the question of statutory interpretation, we conclude the Legislature intended “pesticide” to mean the same thing in section 14550.5 as it does in sections 12753 and 14513. Second, as in our analysis of Terra Treat, we conclude the DeptAg’s determination that a substance is a particular type of fertilizing material with a definition that excludes pesticides is not a final and binding determination that the material is not a pesticide. Consequently, Kelpak’s registration as an organic input material does not preclude the Department from determining it is a pesticide.

D. Sufficiency of the Evidence

First, Caltec argues the record does not contain sufficient evidence to support the finding that all types of cytokinins and auxins, regardless of their intended use or physical composition, are plant growth regulators and pesticides. This argument need not be discussed in detail because the Decision does not contain such a broad finding. Instead, the Decision clearly states Kelpak is a liquid that concentrates the auxins contained in seaweed and was intended for use as a liquid auxin concentrate. Thus, the Decision does not relate to all types of auxins, whether or not they are concentrated.

Second, Caltec argues substantial evidence does not support the finding that seaweed auxins in concentrated form are probably plant growth regulators and are not fertilizers. The Decision made the general observation that “in concentrated form seaweed auxins are probably plant growth regulators, not fertilizers.” Then, the Decision addressed the specific question presented by the sales of Kelpak by stating “Caltec sold Kelpak as a Liquid Auxin Concentrate on each invoice—a plant growth regulator and not a plant nutrient.”

Substantial evidence supports the explicit finding that Caltec sold Kelpak as a liquid auxin concentrate. Caltec’s invoices contain that description of Kelpak. The invoices do not state Kelpak contains any primary plant nutrient, any secondary plant nutrient, or any micronutrients. Thus, the description in the invoices supports the inference that Kelpak is intended to be used as an auxin concentrate, rather than intended to supply a plant nutrient not mentioned in the label or invoice. In addition, Caltec’s 2008 product guide lists Kelpak as an auxin concentrate. The product specifications given in a Kelpak guide manual state the active ingredients in Kelpak are natural auxins (11 mg/liter) and natural cytokinins (0.031 mg/liter). These figures are consistent with the information provided in Dr. Lourens’s declaration. These documents constitute substantial evidence that Kelpak was intended to be used as an auxin concentrate.

Substantial evidence also supports the finding that, as a liquid auxin concentrate, Kelpak was sold as a plant growth regulator. The Kelpak Guide Manual includes a section labeled “MODE OF ACTION AND RESPONSES” that describes Kelpak as “a plant bioregulator made from the seaweed species Ecklonia maxima”; an “auxin-dominated extract”; and “a cost effective agricultural bio stimulant.” Moreover, Caltec’s June 2010 Kelpak guide for new plantings, trees and vines, uses the phrase “Kelpak auxin concentrate plant growth regulator.” Besides the explicit use of the term “plant growth regulator,” the use of the terms “plant bioregulator” and “agricultural bio stimulant” reasonably support the inference that Kelpak was sold as a plant growth regulator and not a plant nutrient. Furthermore, Caltec’s argument that the weight of the evidence supports a finding that Kelpak was intended to be used as an organic input material and plant nutrient is off point, because the applicable test for reviewing the evidence is the substantial evidence standard, which does not allow a reviewing court to reweigh the evidence in the record. (See Montebello Rose Co. v. Agricultural Labor Relations Bd. (1981) 119 Cal.App.3d 1, 21 [power of appellate court reviewing findings of a lower tribunal begins and ends with determining whether there is substantial evidence, contradicted or not, that supports the findings].) In short, the possibility that the trier of fact could have drawn other inferences from the evidence does not establish factual error. In sum, we conclude substantial evidence supports a finding that Kelpak was a mixture of substances “intended to be used for … regulating plant growth” and, therefore, qualifies as a “pesticide” under section 12753. (See Regulation 6145, subd. (a).)

14. Nitrogen, available phosphoric acid, and soluble potash are primary plant nutrients. (§ 14556.) The secondary plant nutrients are calcium, magnesium and sulfur, alone or in combination. (§ 14559.) “Micronutrients” means boron, chlorine, cobalt, iron, manganese, molybdenum, sodium, or zinc, alone or in any combination. (§ 14546.)

15. Under section 12756, the definition of regulating plant growth does “not include the use of substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants, and soil amendments.” Here, the Director was not compelled by the evidence to find that the intended use of Kelpak was as a plant nutrient. As a result, the Director’s determination that the exception did not apply to Kelpak does not constitute error.

DISPOSITION

The judgment is affirmed. Appellant’s November 27, 2018, request for judicial notice of legislative history is granted. Respondents shall recover their costs on appeal.
FRANSON, J.

I CONCUR: MEEHAN, J.

POOCHIGIAN, Acting P.J., concurring.

I concur in the judgment but write separately to discuss several peculiarities of pesticide regulation in California.

I. REGULATIONS SIGNIFICANTLY LIMIT FACT-FINDERS’ ABILITY TO HEIGH COMPETING INDICIA OF INTENT

In most contexts, the intent of an actor is determined by a finder-of-fact weighing conflicting inferences from various pieces of circumstantial evidence. As this case demonstrates, the concept of intent is also important in the realm of pesticide regulation. The statutory definition of pesticide includes any substance “intended to be used for” certain purposes (e.g., destroying or preventing pests, etc.) (Food & Agr. Code, § 12753, subd. (b)). By itself, this language would suggest a finder-of-fact can look to various factors to try to discern the intent of the seller in a particular transaction. However, attendant administrative regulations found at 3 California Code of Regulations section 6145 (Regulation 6145.) severely limit the fact-finder’s prerogative.

Under Regulation 6145, a substance is “considered to be ‘intended to be used’ ” for a pesticidal purpose if any of the following three circumstances apply:

“(a) A person who distributes or sells the substance claims, states, or implies, by labeling or otherwise, that:

“(1) The substance, either by itself or in combination with any other substance, can or should be used as a pesticide; or

“(2) The substance consists of or contains an active ingredient and can be used to manufacture a pesticide; or

“(b) A person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended by the user to be used, as a pesticide; or

“(c) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than:

“(1) Use as a pesticide, by itself or in combination with any other substance; or

“(2) Use in the manufacture of a pesticide.” (Regulation 6145.)

By using the disjunctive “or” between subdivision (a), (b), or (c), Regulation 6145 provides that if any one of the several factors applies, then the requisite “intent” is necessarily established. Thus, rather than allowing the finder-of-fact to weigh various evidentiary clues of intent and arrive at an independent conclusion, this administrative regulation stacks the deck against the seller. For example, say an organic farmer makes clear to a seller that he is purchasing an adjuvant solely to aid in application of an organic foliar fertilizer. The farmer, a longtime client of the seller, has never used pesticides and plans never to do so. Yet, somewhere on the adjuvant’s label there is a notation that the adjuvant could be used to aid in application of fertilizers or pesticides. In that circumstance, Regulation 6145, subdivision (a)(1) would require a finding the adjuvant was “intended to be used” as an aid to application of a pesticide even though neither the seller nor the buyer had any such intent.

In sum, the circumstances listed in Regulation 6145, subdivision (a)(1) should be subsidiary factors in discerning the ultimate issue of intent, not independently-sufficient proxies for intent. As currently written, the regulation hinders fact-finders and makes it unduly difficult for sellers to rebut the issue of intent. It should be reevaluated by the Department of Pesticide Regulation or addressed by the Legislature.

II. PERMITTING THE CLASSIFICATION OF A SUBSTANCE AS A PESTICIDE TO TURN ON STATEMENTS IN MARKETING MATERIALS AND WEBSITES IS QUESTIONABLE

One of the factors in Regulation 6145 concerns representations by the seller. (Regulation 6145, subd. (a).) The provision provides that a seller is deemed to have intended a substance to be used as a pesticide if the seller “claims, states, or implies, by labeling or otherwise” that the substance can or should be used as a pesticide or can be used to manufacture a pesticide. (Ibid.) Indeed, this factor plays a central role in our holding today. Yet, the relevance of marketing materials and website descriptions in classifying a substance as a pesticide under the statute is questionable. Because of their chemical properties, pesticides can pose threats to the safety of drinking water, farmworkers, farming families, and schoolchildren. (See, e.g., §§ 12980, 13141, 13182.) But a pesticide’s chemical properties are not changed by the marketing materials that accompany them. It is peculiar, then, that the definition of pesticide can turn on whether marketing materials suggests it can or should be used in a particular manner.

16. All further statutory references are to the Food and Agricultural Code unless otherwise stated.

17. Such materials are—and should remain—relevant to other issues, such as whether the seller has “misbranded” the substance. (12881, et seq.)
For example, if Caltec had not indicated that Greenfeed is “compatible” with pesticides and can be a “carrier” for pesticides, then Greenfeed would arguably not be considered a pesticide. Yet, whether Greenfeed poses a threat to human health is not impacted by its marketing materials.

Or, consider a seller who incorrectly believes a substance has pesticidal effects. The substance’s labeling would result in a pesticide classification, even if it has no such qualities and is entirely harmless.

Unmooring the definition of a pesticide from a substance’s chemical properties would not seem to further the goal of protecting public health or the environment.

III. IT IS UNCLEAR WHY NON-TOXIC ADJUVANTS ARE REGULATED AS PESTICIDES

Adjuvants can be used in a variety of ways, not just pesticide application. (Application of Lemin (51 C.C.P.A. 942) 326 F.2d 437, 944–945.) Some adjuvants are labeled as multipurpose. Under current regulations, if just one of those purposes is to aid in the application of a pesticide, then the adjuvant itself is considered a pesticide. (See § 12758; Regulation 6145, subd. (a).) This is true even if the adjuvant has no “toxic properties of its own.” (§ 12758.) It is unclear what government interest is furthered by regulating nontoxic adjuvants as pesticides. In contrast, the federal definition of pesticide in title 7 United States Code section 136(u) does not expressly include adjuvants. The Legislature may wish to consider reexamining whether nontoxic adjuvants should be removed from the definition of pesticide, consistent with the federal statute.

With these observations, I concur in the judgment.

POOCHIGIAN, Acting P.J.