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Given this statutory structure, applying §406(b)'s 25% cap presentation and use different methods for calculating fees. The Social Security Act regulates the fees that attorneys may charge claimants seeking Title II benefits for representation both before the Social Security Administration and in federal court. For representation in administrative proceedings, the Act provides two ways to determine fees. If a fee agreement exists, fees are capped at the lesser of 25% of past-due benefits or a set dollar amount—currently $6,000. 42 U. S. C. §406(a)(2)(A). Absent an agreement, the agency may set any “reasonable” fee. §406(a)(1). In either case, the agency is required to withhold up to 25% of past-due benefits for direct payment of any fee. §406(a)(4). For representation in court proceedings, fees are capped at 25% of past-due benefits, and the agency has authority to withhold such benefits to pay these fees. §406(b)(1)(A).

Petitioner Culbertson represented Katrina Wood in Social Security disability benefit proceedings before the agency and in District Court. The agency ultimately awarded Wood past-due benefits, withheld 25% of those benefits to pay any attorney’s fees, and awarded Culbertson fees under §406(a) for representation before the agency. Culbertson then moved for a separate fee award under §406(b) for the court proceedings, requesting a full 25% of past-due benefits. The District Court granted the request, but only in part, because Culbertson did not subtract the amount he had already received under §406(a) for his agency-level representation. The Eleventh Circuit affirmed, holding that the 25% limit under §406(b) applies to the total fees awarded under both §§406(a) and (b).

Held: Section 406(b)(1)(A)'s 25% cap applies only to fees for court representation and not to the aggregate fees awarded under §§406(a) and (b). Pp. 5–7.

(a) Section 406(b) provides that a court rendering a favorable judgment to a claimant “represented before the court by an attorney” may award “a reasonable fee for such representation, not in excess of 25 percent” of past-due benefits. Here, the adjective “such,” which means “[o]f the kind or degree already described or implied,” refers to the only form of representation “already described” in §406(b)—i.e., “represent[ation] before the court.” Thus, the 25% cap applies only to fees for representation before the court, not the agency.

Subsections (a) and (b) address different stages of the representation and use different methods for calculating fees. Given this statutory structure, applying §406(b)'s 25% cap on court-stage fees to §406(a) agency-stage fees, or the aggregate of §§406(a) and (b) fees, would make little sense. For example, such a reading would subject §406(a)(1)'s reasonableness limitation to §406(b)'s 25% cap—a limitation not included in the relevant provision of the statute. Had Congress wanted agency-stage fees to be capped at 25%, it presumably would have said so directly in subsection (a). Pp. 5–7.

(b) The fact that the agency presently withholds a single pool of 25% of past-due benefits for direct payment of agency and court fees does not support an aggregate reading. The statutory text provides for two pools of money for direct payment of fees. See §§406(a)(4), (b)(1)(A). The agency’s choice to withhold only one pool of 25% of past-due benefits does not alter this text. More fundamentally, the amount of past-due benefits that the agency can withhold for direct payment does not delimit the amount of fees that can be approved for representation before the agency or the court. Pp. 7–9.

861 F. 3d 1197, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

USC’s adjudication of sexual misconduct complaint violated due process (Willhite, Acting P.J.)

Doe v. Allee

C.A. 2nd; January 4, 2019; B283406

The Second Appellate District reversed a judgment. The court held that the University of Southern California’s assignment of a single individual to both investigate and adjudicate a complaint of sexual misconduct deprived the accused of a fair hearing.

USC freshman and student athlete John Doe had a sexual encounter with student athletic trainer Jane Roe. Doe believed the encounter was consensual. Roe allegedly perceived the encounter differently and made a report of sexual misconduct to USC’s Title IX Office. Title IX investigator Kegan Allee was assigned to both investigate and adjudicate Roe’s complaint. Allee ultimately concluded that Doe had violated USC’s student conduct code by engaging in “forcible and nonconsensual” sexual activity and should be expelled. On appeal, USC’s Student Behavior Appeals Panel (SBAP) and Vice Provost Ainsley Cary upheld Allee’s decision and ordered Doe expelled immediately.

Doe filed a petition for writ of mandate challenging that decision. The trial court denied the petition.

The court of appeal reversed, holding that Doe was denied a fair hearing. Doe was accused of sexual misconduct for which he faced serious disciplinary sanctions, and the
credibility of witnesses was central to the adjudication of the allegations against him. He was entitled to a procedure in which he could cross-examine witnesses, at a hearing before a neutral adjudicator with the power to make finding of credibility and facts. USC’s assignment of a single individual, Allee, in the overlapping and inconsistent roles of investigator, prosecutor, factfinder, and sentence denied him such a procedure. In his first meeting with Allee, Doe articulated his theory that Roe, who was subject to sanctions if it were discovered that she had consensual sex with a student athlete, had a strong motive to fabricate a charge of rape. Allee apparently rejected that theory almost immediately, and did not follow up with presumably identifiable and available witnesses whose testimony would have supported Doe’s theory and weakened Roe’s credibility. By giving Allee unfettered discretion to chart the course and scope of her investigation and to determine credibility, USC deprived Doe of a fair and meaningful opportunity to defend himself. Compoundly these procedural errors, the SBAP, although charged with reviewing Allee’s decision, lacked the authority to substitute its own credibility determinations for hers, to make new factual findings, or to reweigh evidence. In light of these deficiencies, the finding that Doe committed sexual misconduct in violation of the student conduct code could not stand.

Criminal Law

Statute prohibiting unlawful alien’s possession of firearms not unconstitutional (N.R. Smith, J.)

United States v. Torres

9th Cir.; January 8, 2019; 15-10492

The court of appeals affirmed a district court judgment. The court held that a statute prohibiting the possession of firearms by an alien unlawfully present in the United States withstands constitutional scrutiny and is a valid exercise of Congressional authority.

Victor Torres was convicted of possessing a firearm while “being an alien…illegally or unlawfully in the United States,” in violation of 18 U.S.C. §922(g)(5)(A).

Torres appealed his conviction, arguing that §922(g)(5) (A) unlawfully infringed his Second Amendment rights.

The court of appeals affirmed, holding that, to the degree an unlawful alien possesses rights under the Second Amendment, §922(g)(5)(A) does not unlawfully infringe those rights. The court acknowledged that it remains an open question whether possession of firearms by unlawful aliens falls within the “historical understanding” of the scope of the Second Amendment. The text of the Second Amendment plainly states that the right “to keep and bear Arms” is reserved only to “the people.” The scope of those who fall within “the people” remains undecided, however. Assuming, without decid-

Dispute Resolution

Lack of court order for mediation does not compel finding that parties’ voluntary participation in mediation is not “reasonably necessary” (Hill, P.J.)

Berkeley Cement, Inc. v. Regents of the University of California

C.A. 5th; January 7, 2019; F073455

The Fifth Appellate District affirmed a judgment as modified. In the published portion of its opinion, the court held that the trial court did not err in awarding voluntarily incurred mediation fees as a “reasonably necessary” litigation cost.

The Regents of the University of California hired Berkeley Cement, Inc. to construct a building on one of its campuses. After paying Berkeley the full amount due under their contract, Regents refused to pay any additional expenses. Berkeley filed suit. A jury rendered judgment in favor of Regents, finding it did not breach the parties’ contract.

The trial court awarded costs to Regents, including $15,950 for fees paid to mediators. Berkeley challenged that award, Berkeley challenges this award, arguing that because the parties’ participation in mediation was voluntary and was not ordered by the court, the costs were not “reasonably necessary to the conduct of the litigation.” Rather, they were “merely convenient or beneficial to its preparation.”

The court of appeal affirmed the judgment as modified, holding that there was no error in the award of mediation fees. The court declined to accept the blanket rule proposed by Berkeley—that fees incurred for mediation that is not court-ordered are categorically not “reasonably necessary to
the conduct of the litigation,” and therefore are not allowable as costs as a matter of law. The absence of a court order is not an indication that mediation is not reasonably necessary. Notably, Code Civ. Proc. §1775.5 bars a trial court from ordering a case into mediation “where the amount in controversy exceeds fifty thousand dollars ($50,000).” Adopting Berkeley’s suggested rule would amount to finding that mediation is reasonably necessary only in some cases in which the amount in controversy is $50,000 or less, and never in cases where the amount in controversy exceeds $50,000. The fees in the latter cases would be disallowed without consideration of the circumstances of the particular case and whether, under those circumstances, mediation was a reasonably necessary means of attempting to resolve the dispute and avoid the expense of a trial. The court declined to adopt such a rule.

Dispute Resolution

“Wholly groundless” exception to arbitrability inconsistent with Federal Arbitration Act (Kavanaugh, J.)

Henry Schein, Inc. v. Archer and White Sales, Inc.

U.S.Sup.Ct.; January 8, 2019; 17–1272

Respondent Archer & White Sales, Inc., sued petitioner Henry Schein, Inc., alleging violations of federal and state antitrust law and seeking both money damages and injunctive relief. The relevant contract between the parties provided for arbitration of any dispute arising under or related to the agreement, except for, among other things, actions seeking injunctive relief. Invoking the Federal Arbitration Act, Schein asked the District Court to refer the matter to arbitration, but Archer & White argued that the dispute was not subject to arbitration because its complaint sought injunctive relief, at least in part. Schein contended that because the rules governing the contract provide that arbitrators have the power to resolve arbitrability questions, an arbitrator—not the court—should decide whether the arbitration agreement applied. Archer & White countered that Schein’s argument for arbitration was wholly groundless, so the District Court could resolve the threshold arbitrability question. The District Court agreed with Archer & White and denied Schein’s motion to compel arbitration. The Fifth Circuit affirmed.

Held: The “wholly groundless” exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court’s precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. Rent-A-Center, West, Inc. v. Jackson, 561 U. S. 63, 67. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also “‘gateway’ questions of ‘arbitrability.’” Id., at 68–69. Therefore, when the parties’ contract delegates the arbitrability question to an arbitrator, a court may not over-ride the contract, even if the court thinks that the arbitrability claim is wholly groundless. That conclusion follows also from this Court’s precedent. See AT&T Technologies, Inc. v. Communications Workers, 475 U. S. 643, 649–650.

Archer & White’s counterarguments are unpersuasive. First, its argument that §§3 and 4 of the Act should be interpreted to mean that a court must always resolve questions of arbitrability has already been addressed and rejected by this Court. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U. S. 938, 944. Second, its argument that §10 of the Act—which provides for back-end judicial review of an arbitrator’s decision if an arbitrator has “exceeded” his or her “powers”—supports the conclusion that the court at the front end should also be able to say that the underlying issue is not arbitrable is inconsistent with the way Congress designed the Act. And it is not this Court’s proper role to redesign the Act. Third, its argument that it would be a waste of the parties’ time and money to send wholly groundless arbitrability questions to an arbitrator ignores the fact that the Act contains no “wholly groundless” exception. This Court may not engrave its own exceptions onto the statutory text. Nor is it likely that the exception would save time and money systematically even if it might do so in some individual cases. Fourth, its argument that the exception is necessary to deter frivolous motions to compel arbitration overstates the potential problem. Arbitrators are already capable of efficiently disposing of frivolous cases and deterring frivolous motions, and such motions do not appear to have caused a substantial problem in those Circuits that have not recognized a “wholly groundless” exception.

The Fifth Circuit may address the question whether the contract at issue in fact delegated the arbitrability question to an arbitrator, as well as other properly preserved arguments, on remand.

878 F. 3d 488, vacated and remanded.

KAVANAUGH, J., delivered the opinion for a unanimous Court.

Employment Litigation

Statute clarifying rules applicable to piece-rate compensation does not retroactively impose new rules (Levy, Acting P.J.)

Nisei Farmers League v. California Labor and Workforce Development Agency

C.A. 5th; January 4, 2019; F075102
The Fifth Appellate District affirmed a judgment. The court held that a recently enacted statute clarifying the law applicable to piece-rate compensation was not unconstitutionally vague and did impermissibly impose new rules with retroactive effect.

In 2015, the Legislature enacted Labor Code §226.2, which addressed compensation for workers paid on a piece-rate basis. Section 226.2 codified recent case law to clarify that piece-rate workers were entitled to separate compensation both for rest periods and for time spent doing “non-productive” tasks directed by their employers. Section 226.2 expressly provided for “safe harbors” that would exempt employers from potential statutory penalties and damages on condition that they promptly made payments for previously unpaid rest periods and nonproductive time.

Nisei Farmers League and California Building Industry Association filed suit challenging the constitutional validity of §226.2, arguing it was void for vagueness and would be improperly applied retroactively. The trial court sustained defendants’ demurrer without leave to amend and dismissed the complaint.

The court of appeal affirmed, holding that plaintiffs failed to allege an adequate basis for finding the statute to be facially unconstitutional. First, the statutory phrase “other non-productive time” in §226.2 is not unconstitutionally vague. The statute explicitly defines “other nonproductive time” to mean “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.” The language of the statutory definition is reasonably clear and specific and provides adequate notice of the nature of the conduct that is being described. Moreover, the concept of “other nonproductive time” did not arise in a vacuum. Section 226.2(a) was directly premised on the recent court of appeal decisions in Gonzalez v. Downtown LA Motors, LP (2013) 215 Cal.App.4th 36 and Bluford v. Safeway Inc. (2013) 216 Cal. App.4th 864 relating to how piece-rate wages must be paid. Those decisions provided any additional helpful context for understanding the meaning of §226.2. As to plaintiffs’ claims for violation of due process, the takings clause, and the contracts clause, the court found nothing in the statutory language remotely suggesting such an impermissible retroactive construction. Rather, as the trial court correctly explained, “§226.2 ‘provides an affirmative defense for employers who follow the specified procedures and pay amounts already owed for piece-work prior to the start date.’” For purposes of that affirmative defense, the “actual sums due” for previously unpaid compensation would be the sums due under the existing law prior to enactment of §226.2. That law, the court clarified, was the law regarding piece-rate compensation as set forth in Gonzalez and Bluford, at least from the time of issuance of those decisions.

Labor Law

Public entity may not award 10-percent bidding preference to bidder whose bid does not include express declaration of intent to retain prior contractor’s employees (Segal, J.)

International Brotherhood of Teamsters, Local 848 v. City of Monterey Park (First Transit, Inc.)

C.A. 2nd; January 7, 2019; B282971

The Second Appellate District reversed a judgment and remanded. The court held that a company bidding on a public contract must declare, in its bid, its intention to retain the employees of the prior contractor for at least 90 days in order to be entitled to a 10-percent bidding preference.

The City of Monterey Park entertained bids from private contractors to operate its municipal bus system. The city gave MV Transportation, its incumbent contractor, a preference under Labor Code §1072(b), which provides for a 10-percent bidding preference “to any bidder agrees to retain the employees of the prior contractor” for at least 90 days. The city also gave a 10-percent preference to First Transit, even though First Transit did not state in its bid it would retain MV’s employees for at least 90 days. The city awarded the contract to First Transit.

Three MV employees and their union filed suit, alleging the city breached its duty under §1072 to award the bidding preference only to contractors who declared in their bids that they would retain existing employees for at least 90 days. The trial court found no such duty under the statute, sustained the city’s demurrer without leave to amend, and entered judgment in favor of the city.

The court of appeal reversed, holding that the trial court’s construction of the statute was error. Section 1072(a) states: “A bidder shall declare as part of the bid for a service contract whether or not the bidder will retain the employees of the prior contractor or subcontractor for a period of not less than 90 days…if awarded the service contract.” The words “shall declare as part of the bid” in §1072(a) mean what they say: the bidder must state in its bid whether it will retain the employees of the prior contractor for 90 days. Section 1072(b), in turn, prescribes what a public agency must do when a bidder “agrees to retain the employees of the prior contractor or subcontractor pursuant to subdivision (a)”: award the 10-percent preference. A bidder must comply with subdivision (a) before a public agency can give the bidder the preference under subdivision (b); that is what the words “pursuant to” in subdivision (b) mean. Nothing in the statutory language authorizes a public agency to give the §1072 preference to a bidder who does not make the declaration required by §1072(a) “as part of” its bid. That a bidder subsequently agrees to retain its predecessor’s employees has no bearing—
in order to be entitled to the 10-percent bidding preference, it had to have made that commitment as part of its bid.

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**Law Firm Client Relationships**

**Attorney’s prior acquisition of privileged information precludes law firm’s involvement in litigation (Perluss, P.J.)**

**O’Gara Coach Company, LLC v. Ra**

C.A. 2nd; January 7, 2019; B286730

The Second Appellate District reversed a trial court order. The court held that an attorney’s prior acquisition of privileged information while working for a party to subsequently file litigation precluded his firm’s representation of an opposing party.

Marcelo Caraveo sued O’Gara Coach Company, LLC, former senior O’Gara executive Joseph Ra, and others for fraud, conversion and unfair business practices based on their allegedly wrongful conduct with respect to Caraveo’s acquisition of luxury vehicles from O’Gara Coach. Ra filed a cross-complaint against O’Gara Coach, principal owner and chief executive officer Thomas O’Gara, and others, asserting causes of action for defamation, intentional interference with contractual relations and indemnity. O’Gara Coach thereafter filed its own cross-complaint against Caraveo, Ra, and others. Ra retained Richie Litigation, P.C. to represent him.

O’Gara Coach moved to disqualify Ritchie Litigation from representing Ra, alleging that its principal, Darren Ritchie, was O’Gara Coach’s former president and chief operating officer. In support of its motion, O’Gara Coach offered evidence that Ritchie, while president of O’Gara Coach, had been the client contact for outside counsel investigating the charges of fraudulent conduct that ultimately led to Caraveo’s lawsuit. The trial court denied the motion.

The court of appeal reversed, holding that the trial court erred in denying O’Gara Coach’s motion to disqualify Ritchie and his law firm. Ritchie could not act as Ra’s counsel because he had obtained privileged information relating to the pending litigation while serving as O’Gara Coach’s president and chief operating officer. Because Ritchie never had an attorney-client relationship with O’Gara Coach while employed as its president and chief operating officer, the trial court correctly rejected O’Gara Coach’s argument for disqualification based on a theory of improper successive representation. The trial court erred, however, in failing to consider O’Gara Coach’s alternate argument that disqualification of Ritchie and his law firm was required as a prophylactic measure because the law firm was in possession of confidential information concerning Ra’s allegedly fraudulent activities, which information was obtained by Ritchie while working for O’Gara Coach and was protected by O’Gara Coach’s attorney-client privilege. Further, absent any showing that Richie had been screened from any of the several other lawyers at Richie Litigation who had worked on the pending litigation, the doctrine of imputed knowledge required the vicarious disqualification of the entire Richie Litigation firm.
**FULL TEXT OPINION**

United States Supreme Court

Cite as 19 C.D.O.S. 325

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

No. 17–773
In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals
For The Eleventh Circuit
Argued November 7, 2018
Filed January 8, 2019

JUSTICE THOMAS delivered the opinion of the Court.

Federal law regulates the fees that attorneys may charge Social Security claimants for representation before the Social Security Administration and a reviewing court. See 42 U. S. C. §§406(a)–(b). The question in this case is whether the statutory scheme limits the aggregate amount of fees for both stages of representation to 25% of the claimant’s past-due benefits. Because §406(b) by its terms imposes a 25% cap on fees only for representation before a court, and §406(a) has separate caps on fees for representation before the agency, we hold that the statute does not impose a 25% cap on aggregate fees.

I

A

Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U. S. C. §401 et seq., “is an insurance program” that “provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need.” Bowen v. Gisbrecht, 485 U. S. 74, 75 (1988). A claimant’s application for Title II benefits can result in payments of past-due benefits—i.e., benefits that accrued before a favorable decision, 20 CFR §404.1703 (2018)—as well as ongoing monthly benefits, see 42 U. S. C. §423(a). A claimant who has been denied benefits “in whole or in part” by the Social Security Administration may seek administrative review of the initial agency determination, §405(b), and may then seek judicial review of the resulting final agency decision, §405(g).

As presently written, the Social Security Act “discretely” addresses attorney’s fees for the administrative and judicial-review stages: “§406(a) governs fees for representation in administrative proceedings; §406(b) controls fees for representation in court.” Gisbrecht v. Barnhart, 535 U. S. 789, 794 (2002). The original Social Security Act made no such provision for attorney’s fees in either proceeding. Id., at 793, n. 2. But in 1939, “Congress amended the Act to permit the Social Security Board to prescribe maximum fees attorneys could charge for representation of claimants before the agency.” Ibid. In 1965, Congress added a new subsection (b) to §406 that explicitly prescribed fees for representation before a court and “allow[ed] withholding of past-due benefits to pay” these fees directly to the attorney. Social Security Amendments of 1965, §332, 79 Stat. 403; Bowen, 485 U. S., at 76. In 1968, Congress amended subsection (a) to give the agency similar with-holding authority to pay attorney’s fees incurred in administrative proceedings. Id., at 76.

Section 406(a) is titled “Recognition of representatives; fees for representation before Commissioner” of Social Security. It includes two ways to determine fees for representation before the agency, depending on whether a prior fee agreement exists. If the claimant has a fee agreement, subsection (a)(2) caps fees at the lesser of 25% of past-due benefits or a set dollar amount—currently $6,000. §406(a)(2)(A); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (2009). Absent a fee agreement, subsection (a)(1) gives the agency authority to “prescribe the maximum fees which may be charged for services performed in connection with any claim” before the agency. If the claimant obtains a favorable agency determination, the agency may allot “a reasonable fee to compensate such attorney for the services performed by him.”

Subsection (a)(4) requires the agency to withhold up to 25% of past-due benefits for direct payment of any fee for representation before the agency:

“[I]f the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall … certify for payment out of such past-due benefits … to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits … .”

Section 406(b) is titled “Fees for representation before court.” Subsection (b)(1)(A) both limits these fees to no more than 25% of past-due benefits and allows the agency to withhold past-due benefits to pay these fees:

“Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may … certify the amount of
such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.”

At issue is whether §406(b)’s 25% cap limits the aggregate fees awarded for representation before both the agency under §406(a) and the court under §406(b), or instead limits only the fee awarded for court representation under §406(b).

B

Petitioner Richard Culbertson represented claimant Katrina Wood in proceedings seeking Social Security disability benefits. After the agency denied Wood benefits, she brought an action in district court. For the court action, Wood signed a contingency-fee agreement “to pay a fee of 25 percent of the total of the past-due benefits to which [she] is entitled” in consideration for Culbertson’s “representation of [her] in Federal Court.” App. 8–9. The agreement excludes fees for “any representation before” the agency. Id., at 9.

The District Court reversed the agency’s denial of benefits and remanded for further proceedings. The court granted Wood attorney’s fees under the Equal Access to Justice Act (EAJA), which authorizes an award against the Government for reasonable fees in “civil action[s].” 28 U. S. C. §§2412(d)(1)(A) and (2)(A).

On remand, the agency awarded Wood past-due disability benefits and withheld 25% of those benefits to pay any attorney’s fees that might ultimately be awarded. The agency also awarded Culbertson §406(a) fees for representing Wood before the agency.

Culbertson then moved the District Court for a separate fee award under §406(b) for representing Wood there. After accounting for the EAJA award, see Gisbrecht, supra, at 796; App. 9, this request amounted to a full 25% of past-due benefits. The court granted Culbertson’s request only in part because he did not subtract the amount he had already received under §406(a) for his agency-level representation. The Eleventh Circuit affirmed, relying on Circuit precedent to hold that “the 25% limit from §406(b) applies to total fees awarded under both §406(a) and (b), ‘preclud[ing] the aggregate allowance of attorney’s fees greater than twenty-five percent of the past due benefits received by the claimant.’ ” Wood v. Commissioner of Social Security, 861 F. 3d 1197, 1205 (2017) (quoting Dawson v. Finch, 425 F. 2d 1192, 1195 (CA5 1970); emphasis deleted).

Given a conflict between the Circuits on this question, see 861 F. 3d, at 1205–1206, we granted certiorari. 584 U. S. ___ (2018). Because no party defends the judgment, we appoint amici curiae in support of the judgment below. 584 U. S. ___ (2018). Amicus Weil has ably discharged her assigned responsibilities.

II

A

We “begi[n] with the language of the statute itself, and that is also where the inquiry should end, for the statute’s language is plain.” Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 U. S. ___, ___ (2016) (slip op., at 9) (internal quotation marks omitted). Under §406(b), when a court “renders a judgment favorable to a claimant … who was represented before the court by an attorney,” the court may award “a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.” 42 U. S. C. §406(b)(1)(A) (emphasis added). Both at the time of enactment and today, the adjective “such” means “[o]f the kind or degree already described or implied.” H. Fowler & F. Fowler, Concise Oxford Dictionary of Current English 1289 (5th ed. 1964); Black’s Law Dictionary 1661 (10th ed. 2014) (“[t] hat or those; having just been mentioned”). Here, the only form of representation “already described” in §406(b) is “representation before the court by an attorney.” Accordingly, the 25% cap applies only to fees for representation before the court, not the agency.

This interpretation is supported by “the structure of the statute and its other provisions.” Maracich v. Spears, 570 U. S. 48, 60 (2013). As an initial matter, subsections (a) and (b) address different stages of the representation. Section 406(a) addresses fees for representation “before the Commissioner,” whereas §406(b) addresses fees for representation in court. Because some claimants will prevail before the agency and have no need to bring a court action, it is unsurprising that the statute contemplates separate fees for each stage of representation.

These subsections also calculate fees differently. Section 406(b) applies a flat 25% cap on fees for court representation. By contrast, §406(a) provides two ways to determine fees for agency proceedings. Subsection (a)(2) caps fees based on a fee agreement at the lesser of 25% of past-due benefits or $6,000. Supra, at 2. If there is no fee agreement, the agency may set any fee, including a fee greater than 25% of past-due benefits, so long as the fee is “reasonable.” §406(a)(1).

Given this statutory structure, applying §406(b)’s 25% cap on court-stage fees to §406(a) agency-stage fees, or the aggregate of §§406(a) and (b) fees, would make little sense. Many claimants will never litigate in court, yet under the aggregate reading, agency fees would be capped at 25% based on a provision related exclusively to representation in court. Absent a fee agreement, §406(a)(1) subjects agency fees only to a reasonableness limitation, so applying §406(b)’s cap to such fees would add a limitation that Congress did not include in the relevant provision of the statute. If Congress had wanted these fees to be capped at 25%, it presumably would have said so directly in subsection (a), instead of providing for a “reasonable fee” in that subsection and adding a 25% cap in §406(b) without even referencing subsection (a).
the structure of the statute confirms that §406(b) caps only court representation fees.

B

Amicus Amy Weil agrees that “§406(a) and §406(b) provide separate avenues for an award of attorney’s fees for representation of a Social Security claimant,” but emphasizes that “these fees are certified for payment out of a single source: the 25% of past-due benefits withheld by the Commissioner.” Brief for Court-Appointed Amicus Curiae 10. According to Amicus, “[b]ecause the Commissioner withholds only one pool of 25% of past-due benefits from which to pay attorney’s fees for both agency and court representation, for an attorney to collect a fee that exceeds the 25% pool of withheld disability benefits,” the attorney may “need to file a lawsuit against his disabled client” to collect the difference. Id., at 23–24. Therefore, Amicus urges, “[w]hen the statute is read as a whole,” “it is evident that Congress placed a cumulative 25% cap on attorney’s fees payable for successful representation of a Social Security claimant before both the agency and the court.” Id., at 10.

Amicus is quite right that presently the agency withholds a single pool of 25% of past-due benefits for direct payment of agency and court fees. See Social Security Administration, Program Operations Manual System (POMS), GN 03920.035(A), online at https://policy.ssa.gov/poms.nsf/lnx/0203920035 (as last visited Jan. 2, 2019); see also 20 CFR §§404.1730(a) and (b)(1)(i). And Amicus sensibly argues that if there is only a single 25% pool for direct payment of fees, Congress might not have intended aggregate fees higher than 25%. This argument is plausible, but the statutory text in fact provides for two pools of money for direct payment of fees. Any shortage of withheld benefits for direct payment is thus due to agency policy.

Under §406(a)(4), the agency “shall” certify for direct payment of agency representation fees “an amount equal to so much of the maximum fee as does not exceed 25 percent of” past-due benefits. In other words, this subsection requires that the agency withhold the approved fees for work performed in agency proceedings, up to 25% of the amount of the claimant’s past-due benefits. But this is not the only subsection that enables the agency to withhold past-due benefits for direct payment of fees. Section 406(b)(1)(A) provides that the agency “may” certify past-due benefits for direct payment of court representation fees. As the Government explains, the agency has nevertheless “exercised its discretion … to withhold a total of 25% of past-due benefits for direct payment of the approved agency and court fees.” Reply Brief for Respondent 8 (emphasis added). The agency’s choice to withhold only one pool of 25% of past-due benefits does not alter the statutory text, which differentiates between agency representation in §406(a) and court representation in §406(b), contains separate caps on fees for each type of representation, and authorizes two pools of withheld benefits.

More fundamentally, the amount of past-due benefits that the agency can withhold for direct payment does not delimit the amount of fees that can be approved for representation before the agency or the court. The attorney might receive a direct payment out of past-due benefits, but that payment could be less than the fees to which the attorney is entitled. Indeed, prior to 1968, the statute allowed fees for agency representation but lacked a provision for direct payment of such fees from past-due benefits. See supra, at 2. And under the current §§406(a)(1) and (4), the agency can award a “reasonable fee” that exceeds the 25% of past-due benefits it can withhold for direct payment.

In short, despite the force of Amicus’ arguments, the statute does not bear her reading. Any concerns about a shortage of withheld benefits for direct payment and the consequences of such a shortage are best addressed to the agency, Congress, or the attorney’s good judgment.

***

Because the 25% cap in §406(b)(1)(A) applies only to fees for court representation, and not to the aggregate fees awarded under §§406(a) and (b), the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court’s cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68–70 (2010); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943–944 (1995).

Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is “wholly groundless.” The question presented in this case is whether the “wholly groundless” exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a “wholly groundless” exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.
II

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides:

“A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2.

Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. Rent-A-Center, 561 U. S., at 67. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also “‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” Id., at 68–69; see also First Options, 514 U. S., at 943. We have explained that an “agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” Rent-A-Center, 561 U. S., at 70.

Even when the parties’ contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the “wholly groundless” exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.

We conclude that the “wholly groundless” exception is inconsistent with the text of the Act and with our precedent.

We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not “rule on the potential merits of the underlying” claim that is assigned by contract to an arbitrator, “even if it appears to the court to be frivolous.” AT&T Technologies, Inc. v. Communications Workers, 475 U. S. 643, 649–650 (1986). A court has “‘no business weighing the merits of the grievance’” because the “‘agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.’” Id., at 650 (quoting Steelworkers v. American Mfg. Co., 363 U. S. 564, 568 (1960)).

That AT&T Technologies principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

In an attempt to overcome the statutory text and this Court’s cases, Archer and White advances four main arguments. None is persuasive.

First, Archer and White points to §§3 and 4 of the Federal Arbitration Act. Section 3 provides that a court must stay litigation “upon being satisfied that the issue” is “referrable to arbitration” under the “agreement.” Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration “in accordance with the terms of the agreement” when the court is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”

Archer and White interprets those provisions to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties’ agreement does so by “clear and unmistakable” evidence. First Options, 514 U. S., at 944 (alterations omitted); see also Rent-A-Center, 561 U. S., at 69, n. 1. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U. S. C. §2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Second, Archer and White cites §10 of the Act, which provides for back-end judicial review of an arbitrator’s decision if an arbitrator has “exceeded” his or her “powers.” §10(a)(4). According to Archer and White, if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable. The dispositive answer to Archer and White’s §10 argument is that Congress designed the Act in a specific way, and it is not our proper role to redesign the statute. Archer and White’s §10 argument would mean, moreover, that courts presumably also should decide frivolous merits questions that have been delegated to an arbitrator. Yet we have already rejected that argument: When the parties’ contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party’s claim on the merits is frivolous. AT&T Technologies, 475 U. S., at 649–650. So, too, with arbitrability.

Third, Archer and White says that, as a practical and policy matter, it would be a waste of the parties’ time and money to send the arbitrability question to an arbitrator if
the argument for arbitration is wholly groundless. In cases like this, as Archer and White see it, the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. So why waste the time and money? The short answer is that the Act contains no “wholly groundless” exception, and we may not engraft our own exceptions onto the statutory text. See Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U. S. 546, 556–557 (2005).

In addition, contrary to Archer and White’s claim, it is doubtful that the “wholly groundless” exception would save time and money systemically even if it might do so in some individual cases. Archer and White assumes that it is easy to tell when an argument for arbitration of a particular dispute is wholly groundless. We are dubious. The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

*Fourth*, Archer and White asserts another policy argument: that the “wholly groundless” exception is necessary to deter frivolous motions to compel arbitration. Again, we may not rewrite the statute simply to accommodate that policy concern. In any event, Archer and White overstates the potential problem. Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable. And under certain circumstances, arbitrators may be able to respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration. We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a “wholly groundless” exception.

In sum, we reject the “wholly groundless” exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts “should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.” First Options, 514 U. S., at 944 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
I. BACKGROUND

Defendant Victor Manuel Torres appeals his conviction for possessing a firearm while “being an alien … illegally or unlawfully in the United States,” in violation of 18 U.S.C. § 922(g)(5)(A). Torres was born in Mexico in 1985. Approximately four years later, he, his younger sister, and his mother moved to San Jose, California, to join Torres’s father, who had entered the United States a year earlier. Nothing in the record suggests that either of Torres’s parents ever had an immigration status through which Torres could qualify for legal status in the United States. Torres was enrolled in the school system in San Jose from 1991 until he was expelled in 2000. This expulsion resulted from Torres’s affiliation with the Sur Santos Pride gang, which he joined at age fourteen. Because of his gang involvement and attendant trouble at school, Torres’s parents sent him back to live in Mexico in 2002, when he was sixteen years old. After he reached adulthood, Torres attempted to unlawfully enter the United States three times in June 2005. During each of his first two attempts, Torres was apprehended and permitted to voluntarily return to Mexico. However, he successfully entered the United States unlawfully on the third attempt. Upon this reentry, Torres joined his family in San Jose and began working with his father in landscaping. In 2012, Torres married a United States citizen in San Jose. However, Torres never applied for legal status.

In March 2014, a citizen reported to the Los Gatos Police Department that there was a suspicious pickup truck in a nearby parking lot and that its driver might be attempting to sell a stolen bicycle. When officers arrived, the driver’s side door of the suspicious pickup was open. The officers found Torres working on something on the bed of the vehicle. Through the open driver’s side door, officers saw a backpack and what appeared to be counterfeit license plates. The bed of the pickup contained “a newer looking Trek road bike.” Torres told the officers that he owned the bicycle and that he had received it as a gift in December 2013. However, by reporting the bicycle’s serial number to dispatch, officers confirmed that it had been reported stolen two days earlier. When later confronted with this information, Torres admitted he knew the bicycle was stolen. Officers requested that Torres provide identification. Torres responded that it was in his vehicle. When Torres began to reach into the pickup to allegedly retrieve his identification, the officers stopped him out of concern for safety. An officer then looked into the vehicle and did not see any identification, but the officer asked if he could look inside Torres’s backpack. Torres consented. Inside the backpack, the officer found a loaded .22 caliber revolver, bolt cutters, and what appeared to be two homemade silencers for the firearm.

1. The discourse relevant to our discussion uses a variety of terms, such as “unlawful alien,” “illegal alien,” and “undocumented immigrant” (among several others) to refer to a person who is not a citizen of the United States and whose presence in the United States is not lawful. Throughout this opinion, we use the term “unlawful alien” to refer to a person with this immigration status.
Upon this discovery, officers placed Torres under arrest. In addition to the contents of Torres’s backpack, the subsequent search of his vehicle revealed a small amount of methamphetamine and a glass pipe. Officers transported Torres to a holding facility where they explained his Miranda rights to him before conducting an interview. In response to questions about two of his tattoos that indicated a gang affiliation, Torres admitted to being an active member of Sur Santos Pride. According to Torres, the stolen bicycle and the backpack containing the firearm had been placed in his vehicle by a friend (a fellow gang member), whose identity Torres refused to reveal.

Subsequently, Torres was federally indicted in the Northern District of California for one count of being an unlawful alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5)(A). Torres moved to dismiss the indictment, arguing that Second Amendment protections apply to unlawful aliens and that § 922(g)(5) violates the Second Amendment. The district court denied the motion, and the case proceeded to trial, resulting in Torres’s conviction. The district court imposed a sentence of twenty-seven months of incarceration followed by three years of supervised release.

On appeal, Torres admits that he is an alien unlawfully present in the United States and that he possessed the firearm found in his vehicle. However, he contests his conviction by challenging on constitutional grounds the federal statute under which he was convicted.

II. STANDARD OF REVIEW

We consider challenges to the constitutionality of a statute de novo. United States v. Garcia, 768 F.3d 822, 827 (9th Cir. 2014).

III. DISCUSSION

The Second Amendment to the United States Constitution guarantees that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. We must answer, as an issue of first impression in our circuit, whether this right is violated by a federal criminal statute prohibiting the possession of a firearm by an alien unlawfully in this country. The Second Amendment’s application to unlawful aliens has been widely debated among courts and scholars in recent years, with analytical divisions even among those agreeing in result. We proceed to address this issue, first, by outlining the general framework to analyze challenges under the Second Amendment. We then review the approach of other circuits to Second Amendment challenges to the specific statute at issue. Finally turning to the parties’ arguments, we assume (without deciding) that the Second Amendment extends to unlawful aliens, and we conclude that § 922(g)(5) is constitutional under intermediate scrutiny.

Central to the rights guaranteed by the Second Amendment is “the inherent right of self-defense.” District of Columbia v. Heller, 554 U.S. 570, 628 (2008). However, while the Second Amendment “guarantees the individual right to possess and carry weapons in case of confrontation,” the right “is not unlimited.” Id. at 592, 626. Congress may place certain limits on where the right is exercised, how the right is exercised, and who may exercise the right. See id. at 626–27; United States v. Carpio-Leon, 701 F.3d 974, 977 (4th Cir. 2012) (“[T]he Second Amendment does not guarantee the right to possess for every purpose, to possess every type of weapon, to possess at every place, or to possess by every person.”); United States v. Huitrón-Guzar, 678 F.3d 1164, 1166 (10th Cir. 2012) (“The right to bear arms, however venerable, is qualified by what one might call the ‘who,’ ‘what,’ ‘where,’ ‘when,’ and ‘why.’”). In fact, Congress has determined that certain groups should be prohibited altogether from possessing firearms. See 18 U.S.C. § 922(g). This case concerns such a limitation. Under § 922(g)(5), it is unlawful for an alien “illegally or unlawfully in the United States . . . to possess in or affecting commerce, any firearm.” Torres challenges this prohibition. According to Torres, § 922(g)(5) violates the Second Amendment, because it completely destroys (rather than limits) Second Amendment protections as to an entire class of people. See Heller, 554 U.S. at 628–29.

In United States v. Chovan, we adopted a two-step inquiry to analyze claims that a law violates the Second Amendment. 735 F.3d 1127, 1136 (9th Cir. 2013). This test “(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.” Id. Accordingly, we turn to the first question.

A. Does § 922(g)(5) burden conduct protected by the Second Amendment?

Under the first Chovan step, we cannot “apply the Second Amendment to protect a right that does not exist under the Amendment.” Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016) (en banc), cert. denied sub nom. Peruta v. California, 137 S. Ct. 1995 (2017). Therefore, the first step of our analysis requires us to explore the amendment’s reach “based on a ‘historical understanding of the scope of the [Second Amendment] right.’” Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014) (quoting Heller, 554 U.S. at 625). A law does not burden Second Amendment rights, if it either falls within “one of the ‘presumptively lawful regulatory measures’ identified in Heller” or regulates

3. Torres claims to make facial and as-applied challenges to this statute. However, we agree with the government that Torres fails to explain his theory of how § 922(g)(5) is unconstitutional as applied to him. Therefore, we consider only the facial challenge. See Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1217 (9th Cir. 1997) (“We review only issues which are argued specifically and distinctly in a party’s opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim . . . .” (citation omitted)).
conduct that historically has fallen outside the scope of the Second Amendment. Id.

The non-exhaustive examples of presumptively lawful regulations include “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” Heller, 554 U.S. at 626–27 & n.26; see also United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010). “These measures comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms.” Binderup v. Attorney Gen. U.S., 836 F.3d 336, 343 (3d Cir. 2016) (en banc), cert. denied sub nom. Sessions v. Binderup, 137 S. Ct. 2323 (2017), and cert. denied sub nom. Binderup v. Sessions, 137 S. Ct. 2323 (2017). However, the government does not argue that § 922(g)(5) is a presumptively lawful regulation, so that question is not before us. Therefore, we focus our inquiry on whether possession of firearms by unlawful aliens falls within the “historical understanding of the scope of the [Second Amendment] right.” Heller, 554 U.S. at 625; see also id. at 626–28 (outlining some of the historical limits on the scope of the Second Amendment right).

In this case, the question of whether possession of firearms by unlawful aliens has historically fallen outside the Second Amendment requires an examination of whether unlawful aliens are included within the term “the people.” The text of the Second Amendment plainly states that the right “to keep and bear Arms” is reserved only to “the people.” Far from plain, however, is the scope of those who fall within “the people.” On this question, there are two Supreme Court cases that provide some guidance: United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), and Heller.

In Verdugo-Urquidez, the Supreme Court held that a person who “was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico,” was not within “the people” protected by the Fourth Amendment. 494 U.S. at 274–75. The Court explained, “the people” is “a term of art employed in constitutional analysis; however, the inconsistency in reasoning among these courts—though unanimous in ultimate outcome—demonstrates that Heller and Verdugo-Urquidez do not provide us a definitive outcome.

In 2011, the Fifth Circuit addressed this question in United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011). The defendant in Portillo-Munoz, an unlawful alien, argued that under Verdugo-Urquidez’s construction of “the people,” he should be considered as within the scope of the phrase because he had “developed sufficient connection[s]” to the United States. Id. at 440. The Fifth Circuit concluded that, “[w]hatever else the term means or includes, the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States.” Id. at 442. To reach its holding, the Portillo-Munoz court relied heavily on the Supreme Court’s language from Heller that described those persons who held a Second Amendment right as “members of the political community,” “Americans,” and “law-abiding, responsible citizens.” Id. at 440. The Court concluded that “aliens who enter or remain in this country illegally and without authorization” are not included within the common usage of those terms. Id. Further, the court explicitly rejected the defendant’s Verdugo-Urquidez argument, stating that “neither this court nor the Supreme Court

Heller addressed a Second Amendment challenge to “a District of Columbia prohibition on the possession of usable handguns in the home.” Id. at 573. The Court engaged in textual and historical analyses, holding that the Second Amendment protects an “individual right,” unrelated to service in a militia, and that the District of Columbia’s prohibition of usable handguns in the home was unconstitutional. Id. at 592–94, 635. Throughout its opinion, the Court described the Second Amendment as “protecting the right of citizens” and “belong[ing] to all Americans.” Id. at 581, 595 (emphasis added). The Court also wrote that the amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” Id. at 635 (emphasis added).

However, the Heller decision did not resolve who had the Second Amendment right; Heller resolved if there were an individual right per se under the Second Amendment. Id. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”); see also Kachalsky v. Cty. of Westchester, 701 F.3d 81, 88–89 (2d Cir. 2012) (explaining that, after the Court concluded the Second Amendment was meant to protect individual rights, “[t]here was no need in Heller to further define [its] scope . . . ”). And, the Heller Court also stated that “the people,” as a term, “unambiguously refers to all members of the political community, not an unspecified subset” and block-quoted the definition of “the people” as quoted supra from Verdugo-Urquidez. Heller, 554 U.S. at 580.

Using these two guiding cases, five of our sister circuits have addressed the question of § 922(g)(5)’s constitutionality; however, inconsistency in reasoning among these courts—though unanimous in ultimate outcome—demonstrates that Heller and Verdugo-Urquidez do not provide us a definitive outcome.
has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.” Id. It explained that, even though “the people” may be in both amendments, that fact does not “mandate[] a holding that the two amendments cover exactly the same groups of people.” Id.4

Similarly, the Fourth Circuit in Carpio-Leon held that “illegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given.” 701 F.3d at 981. To reach this conclusion, the court acknowledged that Heller held “the people” is a “term of art” and cited to Verdugo-Urquidez to define who is included in that term. Id. at 978. However, the Fourth Circuit concluded that Heller’s specific use of the phrases “law-abiding,” “Americans,” and “citizenship” meant the “Supreme Court’s precedent is therefore not clear on whether ‘the people’ includes illegal aliens.” Id. at 978–81. It then reasoned that the Heller Court’s holding that the “core” of the Second Amendment right “is the right of self-defense by ‘law-abiding, responsible citizens’” was a “distinct analysis.” Id. at 978–79 (emphasis in original) (quoting Heller, 554 U.S. at 635). The Fourth Circuit then concluded that “[t]he Heller court reached the Second Amendment’s connection to law-abiding citizens through a historical analysis, independent of its discussion about who constitutes ‘the people.’” Id. at 979. It then conducted a historical inquiry as to whether or not unlawful aliens were included in the definition of “law-abiding,” and concluded that “Carpio-Leon’s historical evidence does not controvert the historical evidence supporting the notion that the government could disarm individuals who are not law-abiding members of the political community.” Id. at 979–81.

Unlike the Fourth, Fifth, and Eighth Circuits, when confronted with the instant question, the Seventh Circuit held, in United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015), that Heller’s notation that the Second, First, and Fourth Amendments all use the phrase “the people,” and its citation to Verdugo-Urquidez was sufficient to overcome the Supreme Court’s “passing references” to “law-abiding citizens” and “members of the political community,” which did not define “people.” Id. at 669–70. The Seventh Circuit reasoned that “[a]n interpretation of the Second Amendment as consistent with the other amendments passed as part of the Bill of Rights has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package.” Id. at 670. Accordingly, the Meza-Rodriguez court found the Verdugo-Urquidez test was the appropriate mechanism to determine if an unlawful alien fell within the scope of the Second Amendment right. Id. (“At a minimum, Verdugo-Urquidez governs the applicability of the Fourth Amendment to noncitizens.”). Ultimately, the court held the unlawful alien had sufficient connections to the United States because he had “lived continuously in the United States for nearly all his life,” but upheld the statute under intermediate scrutiny as an appropriate exercise of Congressional authority. Id. at 670–73.

Finally, in Huitron-Guizar, the Tenth Circuit, like the Seventh Circuit, refused to find that Heller’s use of “citizen” was a conclusive determination that unlawful aliens are not within the scope of the Second Amendment right, but, instead, assumed for the purposes of the analysis that (at least some) unlawful aliens fall within the scope and concluded the statute passed intermediate scrutiny. 678 F.3d at 1168–70. The Tenth Circuit’s conclusion was grounded in the fact that the Heller decision did not purport to decide the scope of the phrase “the people” in the Second Amendment, but, rather, “the question in Heller was the amendment’s raison d’être—does it protect an individual or collective right?—and aliens were not part of that calculus.” Id. at 1168. Further, the Tenth Circuit was concerned with finding that Heller’s decision excluded unlawful aliens because it could not conclude “the word ‘citizen’ was used deliberately to settle the question, not least because doing so would conflict with Verdugo-Urquidez, a case Heller relied on.” Id. As such, because of the “large and complicated” question of whether unlawful aliens were included in the scope of the Second Amendment, the Tenth Circuit concluded the prudent course of action was to assume so and, ultimately, concluded § 922(g)(5) passed intermediate scrutiny. Id. at 1169–70.

Here, the Government primarily focuses its argument on the approaches of the Fourth, Fifth, and Eighth Circuits by arguing that unlawful aliens are not included in “the people.” First, the government, relying on language from Heller, argues that historical evidence supports the conclusion that unlawful aliens “are not law-abiding, responsible citizens,” because “the government traditionally had the authority to disarm people who were not part of the political community, as well as people who were perceived as potentially disloyal or dangerous.” Second, the Government argues that post-Heller, the Second Amendment right is “connected to citizenship or membership in the national political community,” and unlawful aliens are not in those categories.

However, we agree with the Tenth Circuit’s approach, because we believe the state of the law precludes us from reaching a definite answer on whether unlawful aliens are included in the scope of the Second Amendment right. The Tenth Circuit correctly held that this question is “large and complicated.” Id. at 1169. Therefore, on this record, we find it imprudent to examine whether Torres (as an unlawful alien) falls within the scope of the Second Amendment right. As such, we assume (without deciding) that unlawful aliens, such as Torres, fall within the scope of the Second Amendment right as articulated under Heller and Verdugo-Urquidez, and proceed to the appropriate scrutiny we should give to § 922(g)(5).

4. Shortly after the Portillo-Munoz decision, the Eighth Circuit, without significant discussion, agreed with the Fifth Circuit and held that “the protections of the Second Amendment do not extend to aliens illegally present in this country.” United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam).
Although not dispositive of the question, we note that there has been “near unanimity in the post-Heller case law that, when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate.”

In considering the first question to determine the appropriate level of scrutiny—the proximity of the challenged law to “the core of the Second Amendment right”—“Heller tells us that the core of the Second Amendment is ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” Chovan, 735 F.3d at 1138 (emphasis added) (quoting Heller, 554 U.S. at 635). Under a different subdivision of § 922(g), which prohibits firearm possession for domestic violence misdemeanants, we held in Chovan that “Section 922(g)(9) does not implicate this core Second Amendment right because it regulates firearm possession for individuals with criminal convictions.” Id. The defendant’s asserted right to possess a firearm for self-defense was not within the core of the Second Amendment (as identified in Heller), because he was not a “law-abiding, responsible citizen.” Id. (quoting Chester, 628 F.3d at 682–83). Likewise, § 922(g)(5) does not burden this core right, because the prohibition applies only to those who are present in the United States “illegally or unlawfully.” 18 U.S.C. § 922(g)(5)(A) (emphasis added).

Under the second question for determining the level of scrutiny to apply—“the severity of the law’s burden on the right” at issue—we found in Chovan a “quite substantial” burden on Second Amendment rights from a statute imposing a lifetime “total prohibition” on firearm possession for a class of individuals.” Chovan, 735 F.3d at 1138 (analyzing § 922(g)(9)). We found this burden tempered, however, by exemptions from the lifetime ban for persons whose conviction “has been expunged or set aside” or who have “been pardoned or … had [their] civil rights restored.” Id. at 1130, 1138; 18 U.S.C. § 921(a)(33)(B)(ii). Thus, “we applied ‘intermediate’ rather than ‘strict’ judicial scrutiny in part because section 922(g)(9)’s ‘burden on Second Amendment rights was “lightened” by those mechanisms.” Fisher v. Kealoha, 855 F.3d 1067, 1071 n.2 (9th Cir. 2017) (citing Chovan, 735 F.3d at 1138). The burden found in § 922(g)(5) is similarly tempered, because there is nothing indicating that the prohibition on firearm possession extends beyond the time that an alien’s presence in the United States is unlawful.

The factual condition triggering the prohibition in § 922(g)(9)—that a person “has been convicted” of a domestic violence misdemeanor—is phrased in the past tense, indicating that (once that event occurs) the ban continues for life, unless one of the enumerated exceptions applies. Conversely, the factual condition triggering the prohibition in § 922(g)(5)—that a person “is illegally or unlawfully in the United States”—is phrased in the present tense, indicating that the person affected by that provision may remove himself from the prohibition by acquiring lawful immigration status. The burden imposed by § 922(g)(5) is, therefore, tempered.

B. Does § 922(g)(5) impose a permissible restriction on the Second Amendment right of an unlawful alien?

Before we can conclude whether § 922(g)(5) imposes a permissible restriction on the Second Amendment rights of aliens unlawfully present in the United States, we must first determine the appropriate level of scrutiny to apply.

1. Level of scrutiny

Although Torres argues that we should apply strict scrutiny, he acknowledges that the relevant case law has not made clear what standard is appropriate.5 We have previously concluded that laws burdening Second Amendment rights must withstand more searching scrutiny than rational basis review. Chovan, 735 F.3d at 1137. The level of scrutiny we apply “depend[s] on (1) ‘how close the law comes to the core of the Second Amendment right,’ and (2) ‘the severity of the law’s burden on the right.’” Id. at 1138 (quoting Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)). “A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny.” Silvester, 843 F.3d at 821. However, intermediate scrutiny is appropriate “if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right.” Jackson, 746 F.3d at 961.

5. Cases from other circuits considering § 922(g)(5) do not conclusively show the appropriate level of scrutiny. See Mendoza-Rodriguez, 798 F.3d at 672–73 (applying review akin to intermediate scrutiny); Carpio-Leon, 701 F.3d at 982–83 (not reaching the issue of the appropriate scrutiny under the Second Amendment but applying rational basis review to Fifth Amendment challenge, reasoning that unlawful aliens do not have a fundamental right to bear arms); Huitron-Guzar, 678 F.3d at 1169 (assuming intermediate scrutiny applies to Second Amendment claim, based on comparison to challenge made under § 922(g)(8)’s prohibition for one who is subject to a domestic violence protection order; but applying rational basis review to equal protection claim, because that is the appropriate standard under which to scrutinize “[f]ederal statutes that classify based on alienage”); see generally Flores, 663 F.3d 1022 (not reaching the question of the appropriate level of scrutiny); Portillo-Munoz, 643 F.3d 437 (same).
Because § 922(g)(5) does not implicate the core Second Amendment right, and because its burden is tempered, we proceed to apply intermediate scrutiny. See Fyock v. Sunnyvale, 779 F.3d 991, 998–99 (9th Cir. 2015) (“Intermediate scrutiny is appropriate if the regulation at issue does not implicate the core Second Amendment right or does not place a substantial burden on that right.”); Chovan, 735 F.3d at 1138.

2. Application of intermediate scrutiny

For a challenged statute to survive intermediate scrutiny, it must have (1) a “significant, substantial, or important” government objective; and (2) a reasonable fit between that objective and the conduct regulated. Chovan, 735 F.3d at 1139. A statute need not utilize “the least restrictive means of achieving its interest” in order to withstand intermediate scrutiny. Fyock, 779 F.3d at 1000. Instead, the statute simply needs to “promote[] a ‘substantial government interest that would be achieved less effectively absent the regulation.’” Id. (quoting Colacurcio v. City of Kent, 163 F.3d 545, 553 (9th Cir. 1998)).

The government argues that it has important “interests in crime control and public safety.” We agree. “The [government] has the important government interest of ensuring the safety of both the public and its police officers.” Mahoney, 871 F.3d at 882 (citing United States v. Salerno, 481 U.S. 739, 748 (1987); Jackson, 746 F.3d at 965; see also Binderup, 836 F.3d at 390 (“The stated purpose of the 1968 revision was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.”) (Fuentes, J., concurring in part and dissenting in part) (internal citations omitted)); Meza-Rodriguez, 798 F.3d at 673 (“Congress’s objective in passing § 922(g) was ‘to keep guns out of the hands of presumptively risky people’ and to ‘suppress[] armed violence.’”) (alteration in original) (quoting United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010))). These government interests are particularly applicable to those subject to removal. “[T]hose who show a willingness to defy our law are … a group that ought not be armed when authorities seek them.” Huitron-Guizar, 678 F.3d at 1170. If armed, unlawful aliens could pose a threat to immigration officers or other law enforcement who attempt to apprehend and remove them.

Further, “[u]nlawful aliens” often live “largely outside the formal system of registration, employment, and identification, [and] are harder to trace and more likely to assume a false identity.” Meza-Rodriguez, 798 F.3d at 673 (quoting Huitron-Guizar, 678 F.3d at 1170). Therefore, “the ban on the possession of firearms by [unlawful aliens] is substantially related to the statute’s general objectives because such persons are able purposefully to evade detection by law enforcement.” Id.

Finally, “the government has a[] strong interest in preventing people who already have disrespected the law (including, in addition to aliens unlawfully in the country, felons, § 922(g)(1), fugitives, § 922(g)(2), and those convicted of misdemeanor crimes of domestic violence, § 922(g)(9)) from possessing guns.” Id. Section 922(g)(5) and other concurrent additions to § 922(g) “reflect[] Congress’s judgment that persons within these categories ‘may not be trusted to possess a firearm without becoming a threat to society.’” Binderup, 836 F.3d at 390 & n.98 (Fuentes, J., concurring in part and dissenting in part) (quoting Scarborough v. United States, 431 U.S. 563, 572 (1977)). “[T]hese restrictions … disarm groups whose members Congress believes are unable or unwilling to conduct themselves in conformity with the responsibilities of citizenship.” Id. at 390–91.

In sum, the government’s interests in controlling crime and ensuring public safety are promoted by keeping firearms out of the hands of unlawful aliens—who are subject to removal, are difficult to monitor due to an inherent incentive to falsify information and evade law enforcement, and have already shown they are unable or unwilling to conform their conduct to the laws of this country. These important government interests “would be achieved less effectively” were it not for § 922(g)(5). Fyock, 779 F.3d at 1000. Accordingly, § 922(g)(5) survives intermediate scrutiny.

IV. CONCLUSION

The present state of the law leaves us unable to conclude with certainty whether aliens unlawfully present in the United States are part of “the people” to whom Second Amendment protections extend. Nonetheless, assuming that unlawful aliens do hold some degree of Second Amendment rights, those rights are not unlimited, and the restriction in § 922(g)(5) is a valid exercise of Congress’s authority.

AFFIRMED.

6. Although a prohibition applying to all unlawful aliens may be over-inclusive, a statute need not utilize “the least restrictive means of achieving its interest” in order to withstand intermediate scrutiny. Fyock, 779 F.3d at 1000; see also Huitron-Guizar, 678 F.3d at 1170 (recognizing that § 922(g)(1)’s prohibition on firearm possession by all those convicted of felonies is a valid restriction, despite the reality that “[t]he class of convicted felons, too, includes non-violent offenders”).

7. This conclusion also necessarily disposes of Torres’s derivative equal protection and due process claims. Teixeira v. Cty. of Alameda, 822 F.3d 1047, 1052 (9th Cir.), rehe’g en banc granted, 854 F.3d 1046 (9th Cir. 2016); see also Portillo-Munoz, 643 F.3d at 442 n.4 (explaining that, because the statute at issue (§ 922(g)(5)) was a federal law to which the Bill of Rights directly applied (without incorporation), the alien could pursue the right only under the Second Amendment and could not “look to the due process clause as an additional source of protection for a right to keep and bear arms” (citing Graham v. Connor, 490 U.S. 386, 394–95 (1989))).
COUNSEL

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OPINION

John Doe, formerly an undergraduate student at the University of Southern California (USC), appeals from the trial court’s denial of his petition for writ of administrative mandate, by which Doe sought to set aside his expulsion. (Code Civ. Proc., § 1094.5 (§ 1094.5).) Doe was expelled after respondents Kegan Allee, Ph.D., sued in her official capacity as Title IX Investigator for USC,¹ and, ultimately, Ainsley Carry, Ed.D., in his official capacity as USC’s Vice Provost for Student Affairs, found that Doe engaged in nonconsensual sex with another USC student, Jane Roe,² in violation of the university’s Student Conduct Code.

Doe argues that he was denied a fair hearing because respondents (principally Dr. Allee) were biased, and because USC’s student disciplinary procedure is fundamentally flawed, in that it provides no mechanism for a party accused of sexual misconduct to question witnesses before a neutral fact finder vested with power to make credibility determinations. While we conclude that Doe failed to meet his burden of proving respondents were actually biased against him, we nonetheless conclude that USC’s disciplinary procedure failed to provide a fair hearing. In that regard, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. USC’s disciplinary review process failed to provide these protections and, as a result, denied Doe a fair hearing. On that basis, we reverse.³

BACKGROUND

I. USC’S SEXUAL MISCONDUCT POLICY

USC’s Student Conduct Code (SCC),⁴ prohibits nonconsensual “sexual misconduct.”⁵ The SCC prohibits sexual activity if “[t]here is no affirmative, conscious and voluntary consent, or consent is not freely given.” (§ E.2.III.) “Affirmative consent” means a conscious and voluntary agreement to engage in sexual activity. It requires each party “to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence… . Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time… . [T]he fact of past sexual relations between [the persons involved], should never by itself be assumed to be an indicator of consent.” Finally, it is not a valid excuse that the accused believed the complainant affirmatively consented to the sexual activity if that belief “arose from the . . . recklessness of the accused,” or the accused failed to “take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.” (§ E.2.III.4.)

1. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) (Title IX), forbids sex-based discrimination in all schools, colleges and universities that receive federal funding. (See 20 U.S.C. §§ 1681–1688.) Title IX does not specifically address sexual assault, but the United States Supreme Court has held that a school may be liable for discrimination and face, among other things, a loss of federal funding, if it mishandles a student’s sexual assault claim. (See Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629, 633, 647–648.)

2. To preserve privacy, we refer to the accused and accusing students as Doe, and Roe, respectively, and to witnesses by their initials or first name.

3. Because we reverse on this ground, we do not consider Doe’s other challenges to the judgment.

4. The record contains two (slightly different) versions of pertinent disciplinary provisions of the SCC. We refer to the version contained in the administrative record.

5. Sexual misconduct is broadly defined as (1) “Engaging in any unwelcome sexual advance . . . or other unwanted . . . non-consensual sexual conduct”; (2) “Sexual touching, fondling and/or groping, including intentional contact with the intimate parts of another, causing another to touch one’s intimate parts, or disrobing or exposure of another without permission[;]” (3) “Attempted intercourse, sexual contact, sexual touching, fondling and/or groping[; and]” (4) “Non-consensual vaginal or anal penetration . . . with a body part (e.g., penis, tongue, finger, hand, etc.) or object, or oral penetration involving mouth to genital contact.”
II. INVESTIGATIONS AND DISCIPLINE IN CASES INVOLVING ALLEGATIONS OF STUDENT SEXUAL MISCONDUCT

Student sexual misconduct complaints are directed to USC’s Title IX Office. If a student chooses to proceed with an investigation, a trained Title IX investigator is assigned to investigate.

1. Investigation and Adjudication

The SCC guarantees students a “fair, thorough, neutral and impartial investigation of the incident.” Both the student who reports misconduct and the accused student have equal rights throughout the investigation and appeal process. (§§ 17.03(D), (M).) The burden of proof rests at all times with the reporting party to show, by a preponderance of evidence, a violation of the SCC. (§ 17.04(D).)

At the outset of a Title IX investigation, the accused student is given written notice that a complaint has been filed, specifying the alleged violation and the basis for the charge. (§ 17.03(A).) The investigator meets separately with the reporting student and the accused student, to explain their rights, the investigative and appeals processes, and to identify available resources. (§§ 17.02(B), 17.03(E).) At these meetings each party may present relevant information, including the names of witnesses and video or documentary evidence, and any information a party believes is relevant. (§ 17.02(C).) The parties may read the investigator’s summaries of interviews and respond to that information. (§§ 17.03(F), (G).)

Each party may bring an advisor to the meetings to serve in a solely supportive role (i.e., the advisor may not speak or disrupt the party’s meeting with the investigator). (§ 17.02(F).) The parties may provide the investigator with “supplemental information” up to the point at which the investigator’s findings have been made. They may also, upon request, inspect documents and information gathered during the investigation. (§§ 17.02(C), 17.03(F).) The investigator may conduct additional investigation and witness interviews “as appropriate,” and review available pertinent evidence. (§ 17.02(D).) No in person hearing is conducted and the accused student has no right to confront his or her accuser. (§ 17.03.) Once the investigation is complete, the Title IX investigator makes findings of fact and concludes, based on a preponderance of evidence, whether the accused student violated the SCC. If so, in consultation with the Title IX Coordinator, the investigator imposes the sanction that he or she deems appropriate. (§§ 17.02(D), 17.06(A).) Sanctions for sexual misconduct range from disciplinary warnings to suspension, expulsion or revocation of a degree. (§§ 17.06(E)(1)–(16).)

2. Appeal

Either party may appeal the result of the Title IX investigation within two weeks of receipt of the investigator’s written decision. (§ 17.07(A), (F), (I).) Appeals are reviewed by the Student Behavior Appeals Panel (SBAP), an anonymous three-member panel appointed by the Vice Provost for Student Affairs (Vice Provost), trained to hear sexual misconduct cases, at least one member of which is a faculty member. (§ 17.07(G).) The SBAP is advised by a non-voting individual trained in USC’s procedures and Title IX requirements. (§ 17.07(I).) Appeals are decided solely on the basis of documents. No oral argument is permitted. (§ 17.07(A), (E).) The SBAP may exclude from consideration any evidence it deems inadmissible, including character evidence. (§ 17.07(G).)

On appeal, the SBAP may: uphold the Title IX investigator’s decision; remand for further investigation; reverse specific factual findings which are not supported by the evidence in light of the whole record; reverse the investigator’s conclusions regarding policy violations, if not supported by the findings; or increase or decrease a sanction. If new evidence has been submitted which the SBAP determines should be considered, it may return the matter to the investigator for reconsideration in light of that evidence. If the SBAP determines that procedural errors occurred that materially impacted the fairness of the investigation, it may return the matter to the investigator with instructions to remedy the error. (§ 17.07(K).) The SBAP may not substitute its opinion as to credibility for that of the investigator, nor may it make new factual findings. (§ 17.07(L).) The SBAP may not reweigh evidence and, if the record contains substantial evidence to support a finding of fact, must defer to that finding. The SBAP may not change a sanction unless it is unsupported by the findings or grossly disproportionate to the violation committed. The SBAP may not substitute its judgment for that of the investigator because it disagrees with the investigator’s findings or the sanction imposed. (Ibid.)

Once the SBAP concludes its review, its recommendation is forwarded to the Vice Provost, who has unfettered discretion to accept or modify that recommendation based on his or her review of the record. The Vice Provost’s decision is final. (§ 17.07(H), (M).)

6. The SCC identifies four grounds for appeal: (1) new evidence has become available which is sufficient to alter the decision and which the appellant was not aware of or could not reasonably have been obtained at the time of the original review; (2) the sanction imposed is grossly disproportionate to the violation found; (3) procedural errors occurred which had a material impact on the fairness of the investigation; and (4) the conclusion and sanction are not supported by the findings, or the findings are not supported by the evidence in light of the whole record. (§ 17.07(E).) However, the “Appeal Request Cover Sheet” that Doe submitted with his appeal provided only three grounds for appeal. Two are identical to numbers (1) and (2) above. The third states: “That the investigator failed to follow university rules or regulations while reviewing the cited behavior.” (§§ 17.07D–1, 17.07D–2 & 17.07D–3.)
III. THE FACTUAL BACKGROUND

1. The October 24, 2014 Incident and Roe’s Report

Shortly after midnight on October 24, 2014, Doe, a freshman attending USC on a football scholarship, and Roe, a senior and student athletic trainer, engaged in sexual intercourse in Doe’s campus apartment. Doe believed the encounter was consensual. Roe claimed it was not. On November 5,8 Roe made a report of sexual misconduct to USC’s Title IX Office, and met with respondent Kegan Allee, Ph.D., the Title IX investigator assigned to the investigation.

Roe reported that, on the evening of October 23, she had planned to attend a party with her roommates, and had a couple of mixed drinks with a roommate. At 11:30 p.m., after plans to attend the party fell through, Roe sent Doe, an acquaintance, a text asking what he was “up to,” and agreed to go to his place to smoke marijuana. She was “tipsy” when she arrived at Doe’s place at about midnight, and she and Doe walked to a taco stand.9 Roe said Doe was “aggressively touchy,” i.e., “grabbing [her breasts] from behind [her] or grabbing at [her] crotch” over her shorts while they walked, and she “push[ed] him away.”

Roe and Doe returned to his apartment to smoke some weed. Witness D.N., Doe’s cousin and roommate, was in the living room with his girlfriend while Roe was at the apartment, although it was dark and D.N. did not believe that Roe saw him. D.N. told Dr. Allee that Roe was “in a good mood” when she and Doe returned to the apartment at about 1:00 a.m. and went into Doe’s bedroom.

Roe told Dr. Allee that she went over to Doe’s “just to smoke.” “[She] was somewhat tipsy and high, so cross–faded. [She] wasn’t hammered, but [she] was not sober. [Roe] was at the foot of the bed when [they] were smoking and [Doe] was up by the pillows. After [they] smoked [Doe] got touchy again. It’s kind of a blur. [Roe] remember[s] certain details that frighten [her]. At some point [Doe] just pulled down his sweatpants and put [Roe’s] hand on his penis. [Roe] pulled [her] hand away. [She] was really confused and disturbed. Then [Doe] grabbed onto [Roe’s] breast again and [she] couldn’t pull his hand away” because Doe is “a football player, so he’s really strong.” Roe told Dr. Allee that she “mentally gave up” when she was unable to remove Doe’s hand from her breast. Dr. Allee asked if she was “frightened” and Roe said she “had some bruising” on her breast.

Roe reported that Doe committed forcible sexual acts, including nonconsensual vaginal penetration with his penis. He ripped off her shorts (but left all her other clothes on). She tried to pull herself away by holding onto the headboard, but Doe pulled her hands down. Roe tried to push against his chest, but could not push him away. Doe pulled Roe’s hands down over her head, using one hand to hold them down. Roe told Dr. Allee that “throughout the entire thing it was easier to say ‘I can’t’ because I know I’m not allowed to for job purposes.” In response, Doe placed his hand “aggressively” over her mouth, “shush[ing]” her, and said, “[n]o one has to know.” This frightened Roe because she was not worried about people knowing, but that she did not want to be engaging in this conduct.

Doe flipped Roe over onto her stomach and continued to have sex with her from behind. He pulled her head back by the hair, which “really hurt[]” and caused her to say “Ow.” He stuck several fingers in her mouth.10 It had not hurt when Doe put his hand over her mouth, but it “wasn’t gentle.” She was unsure whether he did it to keep her quiet. He told her to suck on his fingers or maybe to get them wet. She was gagging because he was hurting her, and then his fingers were in her mouth. Doe pulled out to finish and it looked like he planned to ejaculate on her face or torso. When he let go of her, Roe “freaked out [and] went between his legs, scooting out quickly.” Doe ejaculated on the sheets.11

Afterwards, Roe quickly put on her shorts, and grabbed her phone from the floor. Doe asked why she had moved, and she said “Because I didn’t want it.” Doe told her they “should do this again or [she] should come over again soon, and [Roe] left.”

Roe told Dr. Allee that she was “just repulsed.” There had been no kissing or foreplay, and her thong underwear never came off; Doe simply pushed it aside. Doe “never bothered” to use the condom Roe had seen when she first entered his room. Roe believed that “if [the sexual encounter] was consensual, he could have taken the time to pick it up and put it on.” She said that Doe had used force: “When he yanked my hair that hurt, but even before I wasn’t able to push him off, and I was trying. I remember feeling like I was pushing a boulder. I don’t remember some parts because I was laying there in my own head sometimes asking, ‘Is this actually happening?’ I was very confused.”

Roe went to bed when she got home. That afternoon, she called K.J., whom she was dating and told him what had happened the night before.12 At first, K.J. said it was “rape and

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7. Our recitation is drawn from Dr. Allee’s Summary Administrative Report (SAR) of her investigation, her notes of interviews with Roe, Doe and witnesses, and documentary and photographic evidence collected during the investigation.

8. Unspecified date references are to calendar year 2014.

9. Roe and Doe disagree about whether she went briefly into his apartment before they walked to the taco stand.

10. Doe disputed Roe’s claim that he placed her hand on his penis against her will, or took her hands off the headboard and held them down. He acknowledged putting his hand over her mouth, but said he did it in a non–aggressive manner and because she was “moaning loud,” and he did not want to wake up D.N.’s girlfriend, asleep in the living room. Doe acknowledged having put his fingers in Roe’s mouth, and said Roe “willingly sucked on them like a penis.” He agreed he had pulled Roe’s hair during sex, and said she “moan[ed]” pleasurably in response.

11. Roe told Dr. Allee that some ejaculate landed on her shirt, which she saved as evidence. Dr. Allee told her to how to preserve the evidence. Roe did not produce the evidence during the investigation.

12. Roe did not identify this witness, and there is no indication that Dr. Allee asked her to. Doe subsequently identified him as K.J., a USC student and member of the track and field team. In a witness statement submitted on Doe’s behalf during the appeal, K.J. said he questioned the veracity of whether the incident was non–consensual
[Roe] should report it," but as the conversation went on, he changed his mind, and said her account of the sexual activity “sounded consensual.” Roe then called an ex–boyfriend, B.H. 13

Roe, who was crying and upset, told her roommates, E.C., H.M. and H.D. what had happened with Doe. H.M., took photos of “small little bruises” she saw on Roe’s thighs, chest and arm (Roe gave the photos to Dr. Allee). Roe told Dr. Allee her roommates knew she wasn’t interested in Doe. E.C. had specifically asked Roe the night before “if she’d hook up with [Doe].” Roe said “no.” The roommates teased her before she went over about hooking up with Doe. To prove that she had not, Roe texted H.M. regularly while she was with Doe, until “everything happened and [she] couldn’t text anymore.” Roe gave screenshots of those texts to Dr. Allee. None of Roe’s texts expressed discomfort about the way Doe touched her.

Dr. Allee interviewed all of Roe’s roommates. E.C. said Roe “seemed really upset” on the afternoon of October 24. Roe had told her she had gone to hang out at Doe’s apartment, and had not planned to hook up. She was “drinking and smoking weed” on the couch, when Doe “got on top of her.”14 Roe’s roommates encouraged her to report the sexual assault, but Roe was “concerned about ruining [Doe’s] life or getting him kicked off the [football] team.”15

H.M. said Roe was “rambling” and “really upset” on October 24. She told H.M. that Doe “held her down and against her will.” H.M. said, “That’s called rape.” Roe had “small little bruises” inside the thigh and on her arm. H.M. and H.D. each told Dr. Allee they would have noticed the bruises on Roe’s arm had the bruises been present on October 23. H.M. encouraged Roe to go to the hospital, “but she wasn’t ready.”

On October 28, Roe went to the Student Health Center to be tested for sexually transmitted diseases. After Roe explained what happened, medical staff contacted the Los Angeles Police Department, who wrote a report. Roe declined to participate in a criminal investigation.

13. Dr. Allee contacted B.H. as part of her investigation. In response, he sent her an email stating, “My former girlfriend [Roe] called me on October 25 for emotional support, telling me she was the victim of sexual assault. I am sorry that I have nothing further to add to your investigation.”

14. No one else told Dr. Allee that Roe drank while at Doe’s house.

15. E.C. and Roe were college roommates for three years. A redacted portion of Dr. Allee’s summary of notes from her interview with E.C. states that E.C. had asked Roe if she planned to “hook up” with Doe, because Roe had “hooked up with multiple football players,” before and been “reprimanded for unprofessional conduct.” Roe and other trainers had had to sign a contract agreeing not to “hook up” with football players.

2. Doe Is Informed of Roe’s Allegations of Sexual Misconduct and Immediately Subjected to Interim Sanctions

On November 7, Doe was notified of a report of sexual misconduct made against him regarding an incident at his apartment on October 24. As a result of that incident, Doe was alleged to have violated numerous provisions of the SCC, including prohibitions against sexual misconduct.16

Doe was instructed to meet with Dr. Allee by November 14, with or without an advisor, and told he could make a written request to review the report against him, provided he gave at least 24 hours advance notice. Also on November 7, respondent Ainsley Carry, Ed.D., USC’s Vice Provost, notified Doe that, effective immediately, USC was taking interim action against him because the allegations described conduct that endangered the safety and well being of the USC community. Doe was permitted only to attend classes in which he was enrolled and to use campus dining facilities. He was prohibited from having visitors at his housing assignment, and from attending any USC–sponsored event. Further, Doe, who was attending college on an athletic scholarship, was prohibited from any involvement with the USC football team.

16. Specifically, Doe was alleged to have violated sections:

11.32.B (Endangering Others): “Conducting oneself in a manner that endangers the health or safety of other members . . . within the university community.”

11.36.A (Physical Harm): “Caus[ing] physical harm to any person in the university community.”

11.36.B (Apprehension of Harm): “Caus[ing] reasonable apprehension of harm to any person in the university community.”

11.41 (Illegal Use of Narcotics or Paraphernalia): “Use, possession or dissemination of illegal drugs or drug-related paraphernalia in the university community.”

11.51.A (Harassing or Threatening Behavior): “Comments or actions which are individually directed and which are harassing, intimidating or threatening or interfere with work or learning, for the person at which they are directed and for a reasonable person.”

11.53.A (Sexual Misconduct 1): “Engaging in any unwelcome sexual advance, request for sexual favors, or other unwanted verbal or non-consensual sexual conduct . . . within the university community . . . when the conduct, has the effect of unreasonably interfering with an individual’s academic or work performance or creating an intimidating, hostile or offensive academic, work or student living environment.”

11.53.B (Sexual Misconduct 2): “Sexual touching, fondling and/or groping, including intentional contact with the intimate parts of another, causing another to touch one’s intimate parts, or disobeying or exposure of another without permission. Intimate parts? [sic] may include the breasts, genitals, buttocks, groin, mouth, or any other part of the body that is touched in a sexual manner.”

11.53.C (Sexual Misconduct 3): “Attempted intercourse, sexual contact, sexual touching, fondling and/or groping.”

11.53.D (Sexual Misconduct 4): “Non-consensual vaginal or anal penetration, however slight, with a body part (e.g., penis, tongue, finger, hand, etc.) or object, or oral penetration involving mouth to genital contact.”
except on the practice field and in the locker room; he could not participate in any game.

3. Doe’s First Interview with Dr. Allee
   a. The October 9 Incident

On November 11, Doe met alone with Dr. Allee. When asked if he knew what the meeting was about, Doe said “With [Roe], right?” Doe asked to read Roe’s statement, but before doing so began to describe an encounter he had with Roe on October 9. Roe and her friends had approached him on fraternity row, and she invited him to go swimming. Doe had gone with Roe to her apartment while the women changed, because he needed to charge his phone.

At Roe’s apartment, Doe went with Roe into her room to charge his phone. He “hugged [Roe] and started kissing her neck and grabbin’ on her [as she sat on his lap] and she was grabbin’ on [him].” Roe did not tell him to “stop” or move his hands away, so he kissed her neck and touched her inner thighs. Roe left for about 10 minutes, and when she returned, said they were no longer going swimming.

Doe and Roe laid down on her bed. She wore a bikini bottom and a T-shirt. He removed his shirt and pants and started “fingering”17 Roe for a couple of minutes. Roe was moaning, which made Doe believe he would “get some play.” However, when Roe abruptly said she did not feel well, Doe stopped. Roe told Doe he “could stay the night,” but he declined and left. Doe had smelled alcohol on Roe’s breath on October 9, but she had not “seem[ed] faded.” Roe sent Doe a text on October 10. She said she had “blacked” out, but had a vague memory of him being at her house, and asked “what hap...” Doe asked to read Roe’s statement, but before doing so began to describe an encounter he had with Roe on October 9.

b. The October 24 Incident

With regard to the October 24 encounter, Doe told Dr. Allee that, after the party plans fell through, Roe came over to smoke a blunt. When she arrived, D.N. and his girlfriend were in the living room, so Roe and Doe went into his room. Roe chose not to smoke. Doe smoked a little, then they walked to a taco stand. Doe had been “feelin’ [Roe],” as they walked, by which he meant grabbing her breasts and rubbing her thighs. Roe did not push his hands away.

When Doe and Roe returned to Doe’s bedroom, they lay down and talked. He removed her clothes until she was “completely naked,” then took off his clothes. Doe “[f]ingered[ed]” Roe and grabbed her breasts while she fondled his penis. He got on top of Roe, and she said “No, you don’t have a condom.” Doe stopped the sexual activity to put on a condom. He had placed a condom nearby earlier, believing he would “get hit” that night, since he and Roe had “messed around before.” As Doe retrieved the condom Roe remained naked on his bed, with her legs spread. After Doe put on the condom, he and Roe had consensual sex in different positions, including with her on top. Roe seemed to be “enjoying [herself] facially,” and was “[l]ip biting, moaning, kissing [his] neck,” and scratching his back during the sexual encounter. Doe ejaculated inside Roe while wearing a condom. Afterward, he helped Roe find her clothes, gave her a hug and she left.

Dr. Allee invited Doe to read Roe’s differing account of the October 24 sexual encounter. He did, and took issue with several points. He disputed that Roe said “no,” and said if she had done so he would “get off and leave.” The only time she said “no” was because he was not wearing a condom, and she could have left when he stopped to put one on. She did not. Doe denied that Roe had smoked any marijuana at his house, and denied pulling down his pants to place Roe’s hand on his penis. He described Roe’s report as “crazy!” As for whether he used a condom, after reading Roe’s account, Doe said “Oh, that’s right. My fault. I did take the condom off. I pulled out and took the condom off, but it wasn’t [as Roe described it].” He explained that he tried to ejaculate on her face and have her swallow it, but she moved and told him she did not want him to ejaculate on her face. They laughed about it, and “[she] wasn’t scared for her life.” According to Doe, “[i]t was a funny thing to us.”18

Doe said Roe may have held on to the bed frame, but denied taking her hands off of it or holding them down. He said she probably held on during intercourse because his bed slides. He also acknowledged placing a hand over Roe’s mouth. He had not done so aggressively, only to say “be quiet” because Roe was moaning loudly and he did not want to wake D.N. or his girlfriend, who were asleep in the living room. Doe put his fingers in Roe’s mouth, and she willingly sucked on them. He admitted pulling her hair, using it to hold her and thrust from behind. He did not flip Roe over; she willingly assumed that position. Doe did not remember her complaining of any pain or saying “ow,” only moaning and possibly saying “uh.”

When asked what Roe said or did to make him believe she wanted to have sex, Doe said, “When I was fingering her she was grabbin’ on my [penis]. I thought that was clear.” She also told him he wasn’t wearing a condom, and was kissing his neck and scratching his back. Doe also emphasized that he felt “like the last time [the two] hung out [they] were past

17. Dr. Allee did not ask Doe to clarify what he meant by “fingering,” which she defined as “digital penetration.” In his appeal, Doe denied having digitally penetrated Roe on October 9, and said Dr. Allee misconstrued his words. He also said Roe fondled his penis on that occasion, which made him believe she consented to sexual touching.

18. During a second interview on January 22, 2015, Doe explained that, although he first said he had ejaculated inside Roe, he later recalled standing on his bed after taking off the condom and throwing it away, to ejaculate on Roe’s face. Later still, after reviewing a statement in which D.N. said he had seen a used condom in Doe’s room, Doe explained that he did not know where the condom was thrown when he took it off, but was certain he wore one and that he threw it away.
Dr. Allee showed Doe a file of additional information she had gathered, which included screen shots of (1) texts between Roe and someone named “Mia.” Doe believed these texts confirmed his theory that Roe was afraid she would be fired if it became known that she had engaged in sex with him; (2) texts between Roe and someone named “Julia”; (3) texts between Roe and H.M.; (4) texts between Roe and Doe from October 21-24; (5) texts between Roe and Doe’s teammate, S.V.; (6) photographs of the police report; and (7) photographs of bruises on Roe’s legs, arm and breast. Dr. Allee asked if there were any witnesses Doe wanted her to talk to. He said “nobody was in the room[,]” but, after asking Dr. Allee for examples of people who might be helpful, indicated that she should talk to Roe’s roommates and to D.N. Doe provided Dr. Allee screenshots of his text exchanges with Roe.

4. Dr. Allee’s Subsequent Meetings With Roe and Doe

Dr. Allee had a second meeting with Roe (and an advisor) on January 15, 2015 and questioned her about the interaction with Doe on October 9. Roe told her, “I was pretty drunk. I don’t fully remember. I was leaving a party at ZBT and I ran into him and his friends on the sidewalk. Collectively we all decided to go swimming. . . . So we all go back to my apartment so the girls could get bathing suits. My memory is pretty blurry. I remember feeling sick and throwing up in my bathroom and we never went swimming.” Roe remembered Doe was at her apartment, but knew they “didn’t hook up because [she had] confirmed that the next day.” Doe told her they “‘mess[ed] around,’” which she assumed meant he “was just flirting with [her].” Roe showed Dr. Allee the same text exchange as Doe had shown the investigator.

Dr. Allee told Roe that Doe claimed to have “digitally penetrated [her] that night [October 9].” In reaction to this news, Roe’s “chest, throat, and face flushed bright red with splotches of white; her whole body started visibly shaking; she started sobbing,” and cried for several minutes. When Roe regained her composure, she told Dr. Allee she “didn’t remember any of that.” With Roe’s consent, Dr. Allee opened a second case against Doe regarding the incident on October 9.

During the January 15, 2015 meeting, Roe was adamant that Doe had not used a condom on October 24, and said she “wouldn’t have . . . had a million tests done if” he had. She denied scratching Doe’s back during sex, kissing him, grabbing his penis or being on top of him. She disputed Doe’s account that she went inside his apartment before they walked to get food, as well as his claim that she had not smoked any marijuana. She took four or five hits while in Doe’s bedroom. Roe denied sucking Doe’s fingers. Instead, she claimed he put his hand over her mouth when she said “ow,” and she “felt like [she] was gagging.” She also denied willingly flipping over. She never wanted to engage in sex in the first place, but Doe was strong and able to turn her over. Roe denied that she made up the sexual assault because she feared she would be fired. She told Dr. Allee that she knew several “trainers [who] have hooked up with athletes and are fine.”

On January 22, 2015, Doe (and an advisor) had a second and final meeting with Dr. Allee. Doe was told Roe had initiated a second case against him regarding the incident on October 9, and claimed that she had no “knowledge about that incident because she was drunk.” Doe told Dr. Allee that, when they were in Roe’s apartment on October 9, Roe was “grabb[ing] on [his] penis so of course [he] start[ed] fingering her[,]” and “got on top of her.” However, when Roe told him she felt unwell, he said “it’s cool,” got off, kissed her forehead and left.

Regarding the October 24 sexual encounter, Dr. Allee asked how Doe knew Roe wanted him to pull her hair, to which Doe responded, “I didn’t. We were in doggy position. I just assumed she’d like it.” Similarly, when asked how he knew Roe wanted to swallow his ejaculate or to have him ejaculate on her face, Doe said, “I didn’t, but if she didn’t want to she could get out of the way and she did.”

Doe reiterated that Roe did not smoke at his apartment. He first said he remembered smoking a blunt before going out for food, later said he did not smoke until he and Roe returned, and ultimately decided he smoked before going for food because he was not “sober” when walking to the taco stand.

5. Additional Witnesses

Around October 28, Roe texted a witness identified only as “Mia,” asking what might happen to an athletic trainer who reported a sexual assault perpetrated by a student athlete. Roe described her alleged sexual assault in details consistent with her report to Dr. Allee. Roe told Mia she was “afraid [Doe]’s going to tell someone we hooked up and then it’ll get back to the trainers.” Although this is not mentioned in the SAR, Roe’s text exchange with Mia also indicates that Roe was worried she might be fired, or be unable to attend graduate school, because she might be unable to get letters of recommendation if the incident became known. There is no indication that Dr. Allee tried to identify or contact Mia.

Doe also sent a text to someone identified only as “Julia,” a friend of H.M.’s who had gone through a “similar situa-
tion.” There is no indication that Dr. Allee tried to identify or contact Julia.

A few days later, Roe sent a text to S.V., a football player. She asked how he would “respond if one of [his] teammates raped someone?” and described a series of events similar to those she had described to Mia.21

On November 17, Dr. Allee interviewed D.N., who was with his girlfriend in the living room of the Doe’s apartment when the sexual activity between Doe and Roe occurred on October 24. D.N. saw Roe and Doe come into the apartment at about 1:00 a.m., and Roe appeared to be in a good mood. D.N. and his girlfriend heard Roe “moaning,” which sounded to him like “normal sex sounds,” “pleasure” and “[l]ike somebody enjoying it.” D.N.’s girlfriend had asked him if this was an “everyday thing.” D.N. told Dr. Allee that the sex and moaning went on for “a while” and, at some point he fell asleep. Later, he “woke up to go to the bathroom and heard [Roe and Doe] talking.” D.N. did not see Roe leave the apartment.

D.N. was not surprised the next day when Doe said he and Roe had had sex, because Roe had come to the apartment in the middle of the night, and the prior interactions D.N. had witnessed between the two were flirtatious and sexual in nature. Indeed, D.N. had moved his bed into the living room on October 23 because his girlfriend was spending the night and he knew Doe had a girl coming over. D.N.’s girlfriend was still at the apartment the next morning when Doe and D.N. briefly discussed Doe’s sexual encounter with Roe. D.N. saw a “nasty” used condom on Doe’s desk, and told him to throw it away. The record does not reflect that Dr. Allee asked D.N. to identify his girlfriend, or that she attempted to interview her.

Dr. Allee had brief telephonic conversations with Roe on February 9 and 10, 2015, to ask Roe “a few last questions.” At Dr. Allee’s request, Roe emailed photographs of her bathing suits. Dr. Allee contacted all individuals the parties had identified as potential witnesses, but did not attempt to contact anyone who had been mentioned during the investigation but not fully identified.

On February 10, 2015, Dr. Allee permitted the parties to view the most recent information she had gathered during the interviews on a secure portal. The investigation was closed on February 11, 2015.

6. Findings and Determinations from the Title IX Investigation

Under the university’s Sexual Misconduct Policy, the Title IX investigator alone makes findings of fact and, using a preponderance of the evidence standard, determines whether the SCC has been violated. The investigator’s written decision, and the reasons for that decision, are contained in a SAR.

In her SAR, Dr. Allee concluded, based on her investigation and review of all evidence she deemed relevant, and taking into account her determination as to the parties’ credibility, that Doe violated the SCC and “more likely than not, engaged in unwanted sexual conduct that ranged from fondling to vaginal penetration.” With respect to the October 24 incident, Dr. Allee determined that the parties’ conflicting accounts could not be reconciled, and found Roe’s account more credible for several reasons.

First, Dr. Allee found that more evidence corroborated Roe’s account of the October 24 incident. Statements made by Roe’s three roommates were largely consistent with her account, and Roe told her roommates before going to Doe’s apartment that she did not intend to have sex with him. Second, Roe lacked any memory of sexual contact with Doe on October 9, so she could not have known that Doe would assume they would have more sexual contact on October 24.22 Roe told her roommates the sex was nonconsensual. Two roommates saw bruises on Roe on October 24 that they had not seen and would have noticed the night before. Third, text messages sent by Roe to third-party witnesses corroborated her report to Dr. Allee.

Dr. Allee rejected Doe’s theory that Roe was motivated to fabricate a claim of sexual assault because she was worried she would be fired as an athletic trainer if it became known she had consensual sex with a student athlete. Dr. Allee found “nothing” to support this theory, and observed that USC “would not retaliate against a student who had experienced non-consensual sexual acts.” Dr. Allee also made the unattributed assertion that “USC Athletic Training has had knowledge of athletic trainers engaging in consensual sexual activity with athletes and trainers [who] were not fired despite their employment contract . . . prohibit[ing] fraternizing with athletes.”

Dr. Allee was struck by Roe’s demeanor and physical reaction upon hearing about the October 9 incident. That reaction “effectively convinced” Dr. Allee that Roe had not previously known about Doe’s claim to have “digitally penetrated” her,23 and “was in distress upon learning about it.”

Dr. Allee found Doe’s credibility was diminished because his statements “were inconsistent over time and he several times corrected his statements only after reviewing other

22. In the SAR, Dr. Allee did not mention that, in a series of flirtatious texts between Doe and Roe on October 23, when they were discussing whether to go and what to wear to the party, Doe told Roe, alternatively, that she “should wear nothing and come to [his] house and smoke [a] blunt,” should “come over naked,” and asked if the “night [would] end[ ] up being at [his] house.” Roe responded, “Hahaha no I’m not going over to your place naked” and said she “[c]ouldn’t guarantee anything.” After Doe told Roe “it’s late! I just wanted u before u left,” Roe responded: “You wanted me? Hahah:p,” to which Doe responded, “badly.

23. Later, in his appeal, Doe explained that, when he said he and Roe were “messing around” on October 9, he “want[ed] to be clear that [he] never digitally penetrated [Roe] as [Dr. Allee] claim[ed] [he] did. [Dr. Allee] was making assumptions, and never asked for any clarification of [his] wording.”
January 9, 2019

Dr. Allee also noted that Doe made assumptions about Roe’s sexual consent which were inconsistent with USC’s policy. Specifically, when Roe came to his house on October 24, he assumed they would have sex because of what had transpired on October 9.24 Additionally, Doe “just assumed” Roe would like him to pull her hair. Similarly, he had not asked if Roe wanted him to ejaculate on her face (or to swallow his ejaculate), but proceeded to do so anyway, saying, “if she didn’t want to she could get out of the way and she did.”

Further, although Doe described behavior that made him believe he had Roe’s affirmative consent on October 9 and 24 (e.g., lip biting, moaning, kissing and scratching him on his back), Dr. Allee found Roe more credible, and concluded it more likely than not that the sexual activity on October 24 was “forcible and non-consensual.” Dr. Allee found that Doe violated sections 11.36.B, 11.41, and 11.53.A–11.53.D of the SCC, but did not commit the other alleged violations. However, as to the incident on October 9, Dr. Allee found that Doe did not violate the SCC. Although Dr. Allee found “Roe[’s] distress upon learning of the sexual activity [on October 9]... believable,” she also found there was insufficient evidence to indicate that “[Doe] knew or should have known [Roe] lacked the capacity to consent to sexual activities.”

Dr. Allee determined that expulsion and an order prohibiting Doe from contact with Roe were appropriate sanctions. The parties were notified of Dr. Allee’s findings and conclusions, and their right to appeal.

IV. DOE’S APPEAL

On April 3, 2015, Doe submitted an appeal from the SAR. The stated grounds for his appeal were that: (1) new evidence had become available which was sufficient to alter the decision and about which Doe was not aware and could not reasonably have obtained at the time of Dr. Allee’s original investigation; (2) procedural errors were committed that materially impacted the fairness of the investigation; and (3) the investigator’s conclusions and sanctions were not supported by the findings, and were not supported by the evidence in light of the whole record.

1. New Evidence

Doe submitted or identified several items of “new evidence” in support of his appeal. The first was a signed witness statement from K.J., the USC athlete Roe was dating at the time of the October 24 incident, but had not identified to Dr. Allee. K.J. stated that when Roe told him on the afternoon of October 24 what had happened with an unnamed perpetrator, he “questioned the veracity of whether the incident was non-consensual.” K.J. thought the encounter sounded “consensual.” Consistent with Doe’s theory that Roe had a motive to lie, and potentially corroborating information that Dr. Allee had redacted from E.C.’s witness statement, K.J. represented that a previous sexual encounter between Roe and a USC athlete, was the reason “she [was] no longer doing training for the USC football team.” Doe did not specify when he learned K.J.’s identity, or why he was unable to obtain that information during the investigation.

Two items of new evidence related to the bruises on Roe’s arm, thighs and breast. First, Doe noted that, in a text exchange on October 28, Roe told S.V. her bruises were “pretty much gone.” Doe observed that four days was a surprisingly short amount of time for bruises to heal. Second, Doe submitted an unsigned “Expert Witness Statement” from a registered nurse. The nurse had 18 years of experience, but did not specify whether she had any expertise in sexual assault. The nurse had reviewed the photographs of Roe’s bruises, and opined that none was consistent with bruising one would expect to see one day after a forceful sexual assault.

Third, Doe identified L.W. as a witness he could produce. L.W. was the first person, other than D.N., to whom Doe revealed (on October 27) his sexual encounter with Roe on October 24. Doe had not previously identified this witness because he never considered the encounter nonconsensual. L.W. was being belatedly identified because comments made by Roe’s witnesses merely regurgitated what Roe told them, and were not investigated fully by Dr. Allee, who accorded them undue weight. In addition, L.W. could reaffirm what K.J. said about Roe having lost her job as a trainer for the football team after having sex with a player.

Fourth, Doe claimed that Roe purposefully had not identified two individuals whom she knew (but Doe did not) who saw her walking with Doe to the taco stand on October 23, and whom Roe tried to avoid. Doe maintained that these individuals would have seen him grope Roe, and claimed that Roe chose not to identify them as witnesses because it would have been detrimental to her story.

Finally, although the Title IX investigator had not found the sexual assault allegations as to the October 9 incident substantiated, Doe identified several items of evidence related to that incident to demonstrate that Roe was not credible, and that Dr. Allee had misconstrued his words. First, he claimed to have given Dr. Allee a detailed description of the bathing suit Roe wore on October 9. (This information is not contained in the SAR.) Although Roe purported to have given photos to Dr. Allee of all her bathing suits, Doe had discovered that, in an effort to discredit him, Roe excluded a photo of the suit he had described to Dr. Allee, and that she had worn on October 9. Doe submitted a photograph of a bathing suit bottom he claimed Roe purposefully hid.

Second, Doe explained that, when he said he and Roe were “messing around,” he “never digitally penetrated [Roe]
as [Dr. Allee] claim[ed] [he] did.” Rather, Dr. Allee misconstrued what he said and never asked for clarification.

Third, Doe took aim at Roe’s credibility, arguing she was not as incapacitated as she claimed on October 9. That was evident because E.C. came into the bedroom when Roe and Doe were “messing around,” and said “I knew it” when she saw Roe and Doe on the bed.\textsuperscript{26} Roe had quickly left the room for about 10 minutes to talk to E.C. (so she had not been “blackout” the whole time, nor as drunk as she implied). Due to the press of time, and having “just” received E.C.’s information, Doe had not had sufficient time to contact her to obtain evidence that Roe was “fine” when they spoke on October 9. Nor had Roe been asleep when Doe left. After Doe turned Roe on her side, she said “thank you” and invited him to stay. Doe also provided a statement from D.N., who was with Doe on October 9 when Roe invited them to go swimming. D.N. said Roe had not seemed “drunk or out of it.”

2. Unfair Hearing and Title IX 
Investigator’s Failure to Conduct a Thorough Investigation

Doe argued that Dr. Allee was “biased,” “determined to substantiate the most serious . . . allegations, [and had] failed to properly investigate the incident and develop the record with respect to the most critical points. This flaw infected the entire adjudication process.”

Doe also argued there were several fundamental problems with the disciplinary procedures themselves. Given the serious nature of charges levied against him and the severe consequences he faced if those charges were sustained, his case should have been be decided by an impartial panel, not by Dr. Allee as both sole investigator and decision maker. Doe had been denied any hearing or opportunity to challenge the veracity of any witness against him. Instead, Dr. Allee, who, he argued, acted more like an advocate than an impartial investigator,\textsuperscript{26} chose to credit Roe’s evidence over his, and failed to conduct a thorough investigation or contact other witnesses in an effort to ferret out the truth. Further, Dr. Allee did not record interviews, but merely took notes which she summarized in the SAR. Doe argued that Dr. Allee chose to redact potentially material information, and mischaracterized things he said, crafting the SAR to reflect “what she thought was said,” and, in that process, make Roe’s account sound more favorable. In sum, Dr. Allee had inappropriately occupied the roles of “investigator, . . . judge, jury, and executioner in conducting this investigation, assessing guilt or responsibility, and issuing sanctions in a closed [SAR] process.” Doe was “given . . . no reasonable opportunity to be heard, and never had an opportunity to examine, confront, or challenge the witnesses against [him],”

Doe also claimed he was denied equal time during the investigation, and lacked sufficient time to interview all the witnesses (particularly one unidentifiable witness he discovered just days before filing his appeal), or to investigate and rebut evidence against him. In addition, after he produced photographic evidence of the bathing suit he claimed Roe hid to discredit him, Dr. Allee never questioned Roe about that withheld evidence. Instead, Dr. Allee closed the investigation without “giving [Doe] time to respond [to] new [unidentified] evidence . . . sent to the investigator without [his] knowledge.”

3. Unfounded Findings, Conclusions and Sanctions

In support of the third basis for his appeal, Doe argued the investigator failed adequately to explore material contradictions or incongruities in Roe’s story, such as, (1) claiming she came to his house solely to smoke marijuana, but had not smoked; (2) concealing the identity of her then–boyfriend from Dr. Allee, because he was a USC athlete; (3) manufacturing text exchanges to make it appear that she had not gone to Doe’s house for sex, so she would not lose her job; (4) returning with Doe to his apartment after going for food, despite the fact that he had just engaged in an aggressive, unwelcome public groping of her; and (5) waiting an inordinate amount of time to be tested for STD’s, given her claim that Doe wore no condom. Doe also argued that he was given insufficient time to prepare a defense and had limited resources to gather materials to pursue his appeal.

V. THE SBAP AND DR. CARRY 
UPHOLD DR. ALLEE’S FINDINGS; 
DOE IS EXPELLED AND IS NOT 
SUCCESSFUL IN HIS EFFORT TO OBTAIN A WRIT OF MANDATE

On April 24, 2015, the anonymous SBAP met to review the case file, rejected Doe’s contentions, and upheld the sanction of expulsion. The panel affirmed Dr. Allee’s findings as to five of six charged SCC violations.\textsuperscript{27}

As for Doe’s contentions regarding newly discovered evidence, the SBAP agreed with Doe that Dr. Allee should have contacted at least the newly identified witness, and should have followed up with the Athletics Department to ascertain

\textsuperscript{25} E.C. denied having been present when Doe was at the apartment on October 9. A substantial portion of Dr. Allee’s notes from her interview of E.C. were redacted. That redacted material (revealed to the SBAP at an unknown time) includes E.C.’s statement regarding Roe’s sexual history with multiple football players. E.C. said that, following some “inappropriate behaviors” between student trainers and football players, the student trainers had received a group text and been or “were told” that a trainer had “a list and . . . all trainers should be aware of.”

\textsuperscript{26} Doe claimed that he sometimes felt that he was “being attacked” during meetings with Dr. Allee when he tried to question things Roe or her witnesses said.

\textsuperscript{27} As to the remaining count, the SBAP recommended that Doe not be held responsible for attempted nonconsensual intercourse, as it was “not possible to be found responsible for both an attempted act and the completed act.”
its rules and practices regarding sexual relationships between trainers and athletes. However, the SBAP also found that new evidence identified or produced was, in some instances, irrelevant to the Title IX investigation and, in others, would not have changed the result had it been considered. The panel rejected Doe’s assertions that Dr. Allee was biased, and had placed unwarranted emphasis on Roe’s statements to witnesses before and after the sexual activity on October 24. In conclusion, the SBAP found no investigatory flaw sufficient to affect the outcome of the investigation, and agreed that expulsion was the appropriate sanction.

On May 12, 2015, four days after receiving the SBAP’s recommendations, Dr. Ainsley Carry, the Vice Provost, accepted the SBAP’s recommended sanction of expulsion, and Doe was expelled, effective immediately.

Doe filed a petition seeking a writ of administrative mandate against respondents (§ 1094.5). The trial court rejected Doe’s contentions that he was denied due process, that Allee or Dr. Carry were biased, and that there was insufficient evidence to support the SAR’s findings. The petition was denied. This timely appeal followed entry of judgment.

DISCUSSION

1. A Justiciable Controversy Exists

Before we consider the merits of Doe’s challenges to the judgment, we decide a preliminary issue: whether a justiciable controversy exists. Respondents insist this matter is moot. They allege that, in January 2016, while the writ was pending, Doe was charged with committing several felonies near USC, and, in April 2016, sentenced to six years in state prison, a sentence he was serving when the petition was heard. In August 2016, Doe was expelled for independent violations of the SCC. As a result, respondents argue that, regardless of this Court’s decision, Doe is no longer eligible to return to USC. We note that the record does not contain evidence of Doe’s conviction, but does show that he was expelled in August 2016.

We agree with the trial court. The matter is not moot: “Being labeled a sex offender by a university has both an immediate and lasting impact on a student’s life. [Citation.] . . . [The student’s] personal relationships might suffer. [Citation.] And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled.” (Doe v. Baum (6th. Cir. 2018) 903 F.3d 575, 582 (Baum); Doe v. University of Cincinnati (6th Cir. 2017) 872 F.3d 393, 400 [a student’s expulsion for a sexual offense can have a lasting impact on his personal life and educational and employment opportunities] (Cincinnati).) As the trial court stated, Doe’s eligibility to return to USC is not “the only ‘effectual relief’ that [he] can obtain in this action. . . . [E] xpungement of an expulsion mark for sexual misconduct on [Doe’s] USC transcript would make it far easier for him to transfer to a different university to continue his education. Expungement could also have a tendency to restore [Doe’s] reputation, at least to some degree, in the public eye.” We proceed to consider Doe’s challenges to the judgment.

2. The Standard of Review

“The remedy of administrative mandamus … applies to private organizations that provide for a formal evidentiary hearing.” (Doe v. University of Southern California (2016) 246 Cal.App.4th 221, 237, fn. 9 (Doe v. USC(1)).) As relevant here, the question presented by a petition for writ of administrative mandate is whether there was a fair trial. (§ 1094.5, subd. (b); Doe v. Regents of University of California (Santa Barbara) (2018) 28 Cal.App.5th 44, 55 (UCSB).) “We review the fairness of the administrative proceeding de novo[,] . . . ‘because the ultimate determination of procedural fairness amounts to a question of law.’ [Citation.] . . . ‘[A] “fair trial” means . . . “a fair administrative hearing.”’ [Citations.]” (Doe v. USC(1), supra, 246 Cal.App.4th at p. 239; accord, UCSB, supra, 28 Cal.App.5th at p. 55; Doe v. Regents of University of California (San Diego) (2016) 5 Cal.App.5th 1055, 1072 (UCSD).)

“The scope of our review from a judgment on a petition for writ of mandate is the same as that of the trial court. [Citation.] “An appellate court in a case not involving a fundamental vested right reviews the agency’s decision, rather than the trial court’s decision, applying the same standard of review applicable in the trial court.” [Citation.]” (Doe v. USC(1), supra, 246 Cal.App.4th at p. 239.) This and numerous courts have applied this standard to disciplinary decisions involving sexual misconduct at private and public universities. (Ibid.; UCSB, supra, 5 Cal.App.5th at p. 1072; Doe v. Claremont McKenna College (2018) 25 Cal.App.5th 1055, 1065 (CMC); UCSB, supra, 28 Cal.App.5th at p. 56; Doe v. University of Southern California (Dec. 11, 2018) ___ Cal.App.5th ___. [2018 WL6499696] (Doe v. USC(2)).)

3. Doe Has Not Shown that Respondents Harbored Bias Against Him

Initially, Doe contends that respondents—principally Dr. Allee—were biased against him, resulting in an incomplete and unfair investigation and adjudication. Doe argues that information gleaned after the disciplinary proceeding revealed that Dr. Allee conducted extensive work as an advocate for victims of sexual assault prior to her employment by USC. According to Doe, that evidence demonstrates that Dr. Allee could not conduct a fair disciplinary investigation and was necessarily biased in favor of alleged victims of sexual assault.28

28. Prior to her employment at USC, Dr. Allee worked at the University of California, Santa Barbara (UCSB), directing outreach and services for female survivors of interpersonal violence, harassment, and for a Rape Prevention Education Program. She has made presentations on gender-based violence, focused on the rights of alleged victims, and received an award for her service as an “exemplary advocate for survivors of sexual assault.”
While we understand why Doe believes Dr. Allee might harbor an inherent bias against someone accused of sexual assault, Doe’s obligation on appeal is to demonstrate actual bias. A disciplinary decision may not be invalidated solely on the basis of an inference or appearance of bias. (See Gai v. City of Selma (1998) 68 Cal.App.4th 213, 219; cf., Breakzone Billiards v. City of Torrance (2000) 81 Cal.App.4th 1205, 1236 “[A mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty” in a hearing officer.] We agree with the trial court’s analysis: “[t]he fact that, before her employment at USC, Dr. Allee did some work as a victims’ advocate, . . . and gave presentations regarding preventing sexual assault, does not establish that Dr. Allee is likely biased against all men . . . accused of sexual assault.” Doe has not provided evidence to demonstrate that Dr. Allee’s findings and conclusions were premised on actual bias against him or generally against anyone accused of sexual assault, or that there is a high probability of such bias. Doe’s “mere belief that [a school official] acted with . . . ulterior motives is insufficient to state a claim for relief.” (Doe v. Univ. of Cincinnati (S.D. Ohio 2016) 173 F.Supp.3d 586, 602, fn. omitted (Univ. of Cincinnati).)

4. Fair Hearing Requirements

Although we conclude that Doe failed to prove actual bias in USC’s disciplinary process, we conclude on other grounds that USC’s process is fundamentally flawed. As we explain in more detail below, we hold that in a case such as Doe’s, in which a student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as means provided by technology like videoconferencing) before one or more neutral adjudicator(s) with the power independently to judge credibility and find facts. The factfinder may not be a single individual with the divided and inconsistent roles occupied here by the Title IX investigator in the USC system.

a. General Principles of Fundamental Fairness

Until recently, few cases had attempted to define “fair hearing standards for student discipline at private universities.” (Doe v. USC(1), supra, 246 Cal.App.4th at p. 245.) For practical purposes, common law requirements for a disciplinary hearing at a private university mirror the due process protections at public universities. (Id. at pp. 245–247; see CMC, supra, 25 Cal.App.5th at p. 1067, fn. 8; accord, Doe v. USC(2), supra, ___Cal.App.5th at p. ___, (2018WL6499696), fn. 25; cf., Doe v. Trustees of the University of Penn. (E.D. Pa. (2017) 270 F.Supp.3d 799, 813 [student at private university was not entitled to the same due process protections as student at a state university, but due process protections applied in contract action in which private university agreed to provide a “fundamentally fair” disciplinary process].)

Fair hearing requirements are “flexible” and entail no “rigid procedure.” (Binkley v. City of Long Beach (1993) 16 Cal.App.4th 1795, 1807; Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal.3d 541, 555 (Pinsker).) Disciplinary hearings “need not include all the safeguards and formalities of a criminal trial.” (UCSD, supra, 5 Cal. App.5th at p. 1078.) “[T]he formal rules of evidence do not apply . . . .” (UCSB, supra, 28 Cal.App.5th at p. 56; Univ. of Cincinnati, supra, 173 F.Supp.3d at p. 602 [there is “no prohibition against the use of hearsay evidence in school disciplinary hearings”].) Historically, all that was required for a student facing discipline was that he or she “be given some kind of notice and afforded some kind of hearing.” (Goss v. Lopez (1975) 419 U.S. 565, 579 (Goss); see Board of Curators of Univ. of Missouri v. Horowitz (1978) 435 U.S. 78, 85–86 (Goss requires only an informal “give and take” between the student and administrative body that, at least, gives the student an opportunity to place his conduct in what he believes is the proper context.).

Nonetheless, fundamental fairness requires that a disciplinary proceeding afford an accused student “[a] full opportunity to present his defenses.” (UCSD, supra, 5 Cal.App.5th at p. 1104; Pinsker, supra, 12 Cal.3d at p. 555 [fair hearing requires that accused be given a “meaningful opportunity to be heard in his defense”].) “[T]o comport with due process,’ the university’s procedures should ‘be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard,’ [citation] . . . to insure that they are given a meaningful opportunity to present their case.” (UCSD, supra, 5 Cal.App.5th at p. 1078.)

b. Fair Disciplinary Process in Cases Involving Sexual Misconduct, Where Determination Pivots on Witness Credibility

A spate of recent cases has attempted more clearly to delineate the contours of a “fair hearing” in university disciplinary proceedings involving allegations of sexual misconduct, where the resolution of conflicting accounts turns on witness credibility. These decisions have wrestled with

30. We acknowledge that, unlike public universities, which are “subject to federal constitutional guarantees,” (citation) . . . private college[s], generally [are] not subject to the constitutional requirements of procedural due process.” (CMC, supra, 25 Cal.App.5th at p. 1067, fn. 8.) Nevertheless, “[d]ue process jurisprudence . . . may be ‘instructive’ in cases determining fair hearing standards for student disciplinary proceedings at private schools.” (Ibid., citing Doe v. USC(1), supra, 246 Cal.App.4th at p. 245; accord, Doe v. USC(2), supra, ___Cal.App.5th at p. ___, fn. 25 [2018WL6499696].) We do not, however, necessarily conclude that the requirements for a fair hearing for a private university are identical to state and federal constitutional requirements. (See CMC, at p. 1067, fn. 8.) We need not address that question to resolve this appeal.

31. Much of this litigation arose in the wake of the so-called 2011

29. We also reject Doe’s assertion that the members of “the anonymous SBAP panel . . . were not impartial adjudicators.” Neither the SBAP itself, nor any individual panel member, is a party to this action.
the inherent quandaries in evaluating university disciplinary proceedings so as to be fair to both the accused and accusing student, without placing unnecessary burdens on academic institutions. Such situations require recognition of significant competing concerns. There is the accused student’s interest in “avoid[ing] unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. . . . Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.” (Doe v. USC (D.C. Mass. 2016) 246 Cal.App.4th at p. 240; see UCSD, supra, 5 Cal.App.5th at p. 1078; CMC, supra, 25 Cal. App.5th at p. 1066.) At the same time, it is vital that universities aim to provide safe environments for their students. “Disciplinary proceedings involving sexual misconduct must also account for the well-being of the alleged victim, who often ‘live[s], work[s], and stud[ies] on a shared college campus’ with the alleged perpetrator. [Citations.]” (CMC, supra, 25 Cal.App.5th at p. 1066.)

Further, these concerns must be addressed in light of the nature of a university and the limits of its resources. “‘A formalized hearing process would divert both resources and attention from a university’s main calling, that is education.”

Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms.” [Citation.]” (CMC, supra, 25 Cal.App.5th at p. 1066.) To comport with due process and address these concerns, university procedures must be tailored in light of the matters at issue, to ensure that parties have a meaningful opportunity to present their case. (UCSD, supra, 5 Cal.App.5th at p. 1078.)

Recent cases have grappled with these concerns in the context of an accused student’s right to confront adverse witnesses. In CMC, supra, 25 Cal.App.5th 1055, a student at a private college faced suspension after being accused of engaging in nonconsensual sex with another student. He claimed the sex was consensual. Only the two students witnessed the incident. (CMC, supra, 25 Cal.App.5th at p. 1070.) The results of an investigation conducted by an outside investigator were referred to a committee consisting of that investigator and two CMC representatives. The committee was charged with the responsibility to meet in order to evaluate the evidence, and decide by majority vote whether the accused student committed sexual misconduct. (Id. at pp. 1062–1063.) CMC’s procedures permitted, but did not require, the parties to appear at the meeting to make an oral statement. Each student submitted a written statement to the committee in advance of the hearing, but only the accused student appeared and spoke at the hearing. (Id. at p. 1063.) The committee found his accuser more credible. (Id. at p. 1064.)

Our colleagues in Division One found that CMC denied the accused student a fair hearing, given the accuser’s failure to appear at the hearing to permit the committee to assess her credibility. Fairness required that committee members hear from her directly before choosing to credit her account. (CMC, supra, 25 Cal.App.5th at pp. 1072–1073.) The court held “that where . . . [an accused student] was facing potentially severe consequences and the [review] Committee’s decision against him turned on believing [his accuser], the Committee’s procedures should have included an opportunity for the Committee to assess [the accuser’s] credibility by her appearing at the hearing in person or by videconference or similar technology, and by the Committee’s asking her appropriate questions proposed by [the accused] or the Committee itself.” (Id. at p. 1057.)

In Cincinnati, university procedures permitted an accused student to question witnesses indirectly by submitting questions to a factfinding panel at a live hearing. (Cincinnati, supra, 872 F.3d at p. 396.) However, the complaining witness chose not to appear, and the accused student had no opportunity to question her, indirectly or otherwise. (Id. at p. 397.) Nevertheless, the review panel relied on an investigator’s written report to find the accusing student’s statement that she had not consented to sex more credible than the accused’s, who claimed the sexual encounter was consensual. (Id. at pp. 402, 407.) In light of the directly conflicting claims, and an absence of corroborative evidence to either support or refute the allegations, the review panel was forced to choose whom
to believe. “[T]he panel resolved this ‘problem of credibility’ without assessing [the complainant’s] credibility. [Citation.]” (Id. at p. 402.) Indeed, “it decided [the accused student’s] fate without seeing or hearing from [the complainant] at all.” (Ibid.) That result was not merely “disturbing”; it was “a denial of due process.” (Ibid.)

In UCSB, our colleagues in Division Six similarly found that neither an accused student nor his accuser received a fair hearing in a case that “turned on the [fact finder’s] determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing … precluded a fair evaluation of the witnesses’ credibility.” (UCSB, supra, 28 Cal.App.5th at p. 61.) “In disciplining college students, the fundamental principles of fairness require, at a minimum, ‘giving the accused students notice of the charges and an opportunity to be heard in their own defense.’” (Id. at p. 56.)

In Baum, two students gave inconsistent accounts as to whether the accusing student had been so drunk she lacked the capacity to consent. (Baum, supra, 903 F.3d at pp. 578-579.) An investigator interviewed 23 witnesses: statements from female witnesses corroborated the accuser; those from male witnesses corroborated the accused’s account. (Id. at p. 579.) The court found there was a “significant risk” that the accused was denied due process because the ultimate determination turned on credibility, and the university relied on witness statements rather than receiving live testimony from the accuser, the accused or witnesses. (Id. at p. 581–582, 585.)

“A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not.” [Citation.] ‘The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause.’ [Citation.] Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, ‘cross–examination has always been considered a most effective way to ascertain truth.’ [Citations.] [¶] ‘The ability to cross–examine is most critical when the issue is the credibility of the accuser.’ [Citation.] Cross–examination takes aim at credibility like no other procedural device. [Citations.] A cross-examiner may ‘delve into the witness’ story to test the witness’ perceptions and memory.’ [Citation.] He may ‘expose testimonial infirmities such as forgetfulness, confusion, or evasion … thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.’ [Citation.] He may ‘reveal[] possible biases, prejudices, or ulterior motives’ that color the witness’s testimony. [Citation.] His strategy may also backfire, provoking the kind of ulterior motives’ that color the witness’s testimony. [Citation.] He may ‘reveal[] possible biases, prejudices, or evasion . . . thereby calling to the attention of the factfinder pose testimonial infirmities such as forgetfulness, confusion, or the witness’ perceptions and memory.’ [Citation.] He may ‘expose testimonial infirmities such as forgetfulness, confusion, or evasion . . . thereby calling to the attention of the factfinder pose testimonial infirmities such as forgetfulness, confusion, or the witness’s perceptions and memory.’ [Citation.]

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We also agree with Baum’s holding extending the right of cross-examination to the questioning of witnesses other than the complainant where their credibility is critical to the fact-finder’s determination. “[I]f a university is faced with competing narratives about potential misconduct,” some form of in-person questioning is required to enable the fact-finder to observe the witness’s demeanor under that questioning.” (Baum, supra, 903 F.3d at p. 583, fn. 3.)

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a different investigator who had actually conducted the witness interviews. (Id. at pp. *13-14.)

The court reversed and remanded the matter to permit USC to conduct a new disciplinary hearing. In the event the university chose to reopen the investigation, it was instructed that providing the “accused student . . . the opportunity indirectly to question the complainant” would be part of the investigator’s obligation to assess credibility. (Id. at p. *17.) Although USC’s procedures do not provide an accused student the right to submit questions to be asked of the complainant, the court required that the university do so. The court specifically declined to reach the question whether USC’s failure to provide a procedure to permit an accused student indirectly to question witnesses against him violated his right to a fair hearing. (Id. at p. *17, fn. 36.) In the course of its discussion, the court observed in a footnote: “Although the Title IX investigator held dual roles as the investigator and adjudicator, ‘the combination of investigative and adjudicative functions does not, without more, constitute a due process violation . . . .’” (Citations.]” (Id. at pp. *35-36, fn. 29.)

In our view, the analysis in USC v. Doe(2) did not fully consider a key question: whether the right to a fair hearing, and in particular the right to cross-examination, has any practical efficacy without structural procedural changes in a procedure such as that used by USC. It is true that an administrative procedure in which a single individual or body investigates and adjudicates does not, “without more,” violate due process. In Doe v. USC(1), supra, 246 Cal.App.4th 221, we recognized “the value of cross-examination as a means of uncovering the truth [citation], [but] reject[ed] the notion that as a matter of law every administrative appeal . . . must afford the [accused] an opportunity to confront and cross-examine witnesses.” (Id. at p. 245.) We adhere to that view. However, as we also observed, the “[s]pecific requirements for procedural due process vary depending upon the situation under consideration and the interests involved. ’[Citation.]’” (Id. at p. 244.) When credibility of witnesses is essential to a finding of sexual misconduct, the stakes at issue in the adjudication are high, the interests are significant, and the accused’s opportunity to confront adverse witnesses in the face of competing narratives is key. “Cross-examination takes aim at credibility like no other procedural device.” (Cincinnati, supra, 872 F.3d at p. 401.) Under such circumstances, the performance of this key function is simply too important to entrust to the Title IX investigator in USC’s procedure.

As we have explained, in USC’s system, no in-person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student’s right of cross-examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross-examination: adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness’ credibility. (See Baum, supra, 903 F.3d at p. 586 [“Few procedures safeguard accuracy better than adversarial questioning” through cross-examination]; cf., Whitford v. Boglino (7th Cir. 1995) 63 F.3d 527, 534 [due process forbids an officer who was substantially involved in the investigation of charges against an inmate from also serving on the adjudicating committee].) At bottom, assessing what is necessary to conduct meaningful cross-examination depends on a common sense evaluation of the procedure at issue in the context of the decision to be made. From that prospective, a right of “cross-examination” implemented by a single individual acting as investigator, prosecutor, factfinder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself.32

Moreover, the harm to fundamental fairness created by USC’s system is amplified by the limited review of the investigator’s factual findings available in the university’s appellate process. As we have explained, the SBAP’s review relies wholly on the SAR, plus any additional written materials accepted on appeal, and is limited to review for substantial evidence. The SBAP may not substitute its credibility findings for those made by the investigator, and may not make new factual findings. Because a version of events provided by a single witness (assuming it is not implausible on its face) constitutes substantial evidence, the mere fact that the complainant’s allegations of misconduct are deemed credible by the investigator constitutes substantial evidence. Thus, the SBAP will virtually never be in a position to set aside an investigator’s factual findings. Moreover, because the SBAP cannot modify a sanction imposed by the investigator unless

32. In noting that combining the roles of investigator and adjudicator does not without more violate due process, the court in USC v. Doe(2) cited several cases, none of which are inconsistent with our conclusion that USC’s system is fundamentally unfair because the Title IX investigator is incapable of effectively implementing the accused’s student’s right to cross-examine witnesses. Southern Cal. Underground Contractors, Inc. v. City of San Diego (2003) 108 Cal. App.4th 533, 548-549 stands for the proposition that a party must show actual bias on the part of a decisionmaker, not merely the appearance of bias, to establish a denial of due process. (Id. at pp. 548–549.)

In Withrow v. Larkin (1975) 421 U.S. 35, the Court observed that a licensing board’s initial determination of probable cause, and its ultimate adjudication rested on different bases and had different purposes. Thus, the fact that the same agency made them and they related to the same issues would not ordinarily constitute a procedural due process violation. (Id. at p. 58.) Similarly, Griggs v. Board of Trustees (1964) 61 Cal.2d 93, and Hongsathavij v. Queen of Angels etc. Medical Center (1998) 62 Cal.App.4th 1123, agreed that the mere combination of investigative and adjudicative functions in an agency do not necessarily constitute denial of a fair hearing. (Griggs v. Board of Trustees, supra, 61 Cal.2d at p. 98; Hongsathavij v. Queen of Angels etc. Medical Center, supra, 62 Cal.App.4th at p. 114.) However, as the Court cautioned in Withrow v. Larkin, a substantial due process question is clearly raised “if the initial view of the facts based on the evidence derived from nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision.” (Withrow v. Larkin, supra, 421 U.S. at p. 58.)
it is unsupported by the investigator’s factual findings or is grossly disproportionate to the violation shown by those findings, the sanction imposed by the investigator will rarely, if ever, be modified.

In light of these concerns, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system.

5. Doe Was Denied a Fair Hearing

The flaws in Dr. Allee’s investigation, which formed the basis of her factual findings, illustrate well the significant dangers created by USC’s system. This case turned on witness credibility. There are inconsistent accounts from Roe and Doe about whether their sexual encounter was consensual. The only physical evidence is photographs of small bruises on Roe’s arms, breast and thigh. That evidence could support either Doe’s claim of vigorous consensual sex, or Roe’s charge of sexual assault. Evaluation of the credibility of the only witnesses to the event was pivotal to a fair adjudication.

Dr. Allee had unfettered discretion to chart the course and scope of her investigation and to determine credibility, and exercised that discretion in questionable ways. In his first meeting with Dr. Allee, Doe articulated his theory that Roe had a strong motive to fabricate a charge of rape. Dr. Allee seems to have rejected that theory almost immediately, despite investigative leads—such as statements by E.C. and K.J., and Roe’s texts to Mia—that, if pursued, would lend support to Doe’s theory, and weaken Roe’s credibility. This was symptomatic of a larger problem with Dr. Allee’s investigation. She did not follow up with presumably identifiable and available witnesses (such as D.N.’s girlfriend, Mia, K.J. or the women who saw Roe and Doe walking together on October 23), who might have filled in holes in the investigation, thus providing a fuller picture from which to make the all-important credibility determination.

In addition, E.C., Roe’s long-term roommate at USC, specifically informed the investigator that Roe had been disciplined for having sex with a football player, had agreed in writing not to do so, and could lose her job if she did so again. Roe herself told Mia she was worried about her job and ability to obtain recommendations for graduate school if her sexual encounter with Doe became known. Inexplicably, Dr. Allee failed to check with the Athletic Department to determine its policies and practices regarding sexual relations between student trainers and athletes, let alone ascertain the existence of the agreement Roe purportedly signed. Instead, Dr. Allee accepted at face value Roe’s claim that she knew several “trainers [who had] hooked up with athletes and [were] fine.” Dr. Allee also made the unattributed, unequivocal pronouncement that “USC’s Athletic Training [Department] has had knowledge of athletic trainers engaging in consensual sexual activity with athletes and trainers [who] were not fired despite their employment contract . . . prohibit[ing] fraternizing with athletes.” Finally, in the SAR, Dr. Allee stated that USC “would not retaliate against a student who had experienced non-consensual sexual acts.” (Italics added.) This, of course, does not address Doe’s theory that Roe manufactured the charge against him for fear she would suffer negative consequences if her consensual sex acts with a football player became known, and suggests, at a minimum, that Dr. Allee may have been confused.

Deficiencies such as these are virtually unavoidable in USC’s system, which places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, factfinder, and sentencer. While providing a hearing at which the witnesses appear and are cross-examined before a neutral factfinder cannot ensure that such flaws do not occur, such a procedure at least provides an accused student with a fair and meaningful opportunity to confront the adverse witnesses in an attempt to expose weaknesses in the evidence. In Doe’s case, he was accused of sexual misconduct for which he faced serious disciplinary sanctions, and the credibility of witnesses was central to the adjudication of the allegations against him. In those circumstances, he was entitled to a procedure in which he could cross-examine witnesses, directly or indirectly, at a hearing at which the witnesses appeared in person or by other means before a neutral adjudicator with the power to make finding of credibility and facts. Because USC failed to provide such a procedure, the adjudication findings that he committed sexual misconduct in violation of the SCC cannot stand. (UCSD, supra, 5 Cal.App.5th at p. 1084.)

DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to grant Doe’s petition for writ of administrative mandate insofar as it seeks to set aside the findings that he violated USC’s student conduct code. Because Doe is no longer eligible for reinstatement, he is not entitled to that relief. Doe is awarded his costs on appeal.

CERTIFIED FOR PUBLICATION

WILLHITE, Acting P. J.

We concur: COLLINS, J., DUNNING, J.*

33. Although the SBAP specifically questioned Dr. Allee’s failure to follow up with the Athletic Department, and observed that she should have contacted at least one of Doe’s new witnesses, there remained sufficient (a preponderance of) evidence to sustain the SAR’s findings.
Cite as 19 C.D.O.S. 352

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848, et al., Plaintiffs and Appellants,
v.
CITY OF MONTEREY PARK, Defendant and Respondent;
FIRST TRANSIT, INC., Real Party in Interest and Respondent.

No. B282971
In The Court of Appeal of the State of California
Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. BS159367)
APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Reversed and remanded with directions.
Filed January 7, 2019

COUNSEL
Bush Gottlieb, David E. Ahdoot, Kirk M. Prestegard, Julie Gutman Dickinson and Ira L. Gottlieb for Plaintiffs and Appellants.
Reed Smith, Jesse L. Miller, James M. Neudecker and Dennis Peter Maio for Defendant and Respondent and for Real Party in Interest and Respondent.

OPINION
INTRODUCTION
The City of Monterey Park contracts with private companies to operate its municipal bus system. The City conducted a bid on the contract and gave MV Transportation, the incumbent contractor, a preference under Labor Code section 1072, which requires a public agency conducting a bid for a public transit service contract to give a 10-percent bidding preference to a contractor that, in its bid, agrees to retain the employees of the prior contractor for at least 90 days. The City also gave a 10-percent preference under section 1072 to First Transit, even though First Transit did not state in its bid it would retain the employees of MV Transportation for at least 90 days. The City awarded the contract to First Transit.

Three employees of MV Transportation and their union filed a petition for a writ of mandate and a complaint for declaratory relief, alleging the City breached its duty under section 1072 to award the bidding preference only to contractors who declare in their bids they will retain existing employees for at least 90 days. The trial court found there was no such

1. Undesignated statutory references are to the Labor Code.
duty under the statute, sustained the City’s demurrer to the petition and complaint without leave to amend, and entered judgment in favor of the City.

This appeal raises the issue whether the words “shall declare as part of the bid” in section 1072, subdivision (a), mean the bidder must state in its bid whether it will retain the employees of the prior contractor for 90 days. It also raises the issue whether, if the public agency (or “awarding authority”) gives the statutory preference to bidders who do not agree in their bids to retain the employees of the prior contractor for at least 90 days, a bidder who makes the commitment is really getting a statutory preference. We answer these questions yes and no, respectively, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of the operative second amended petition for writ of mandate and complaint for declaratory relief, which on demurrer we accept as true (Heckart v. A-1 Self Storage, Inc. (2018) 4 Cal.5th 749, 753), the City’s fixed-route bus system. Jose Baza, Ruth Villafuerte, and Isabel Martin were employed by MV Transportation as bus operators. When the City solicited new bids for the bus system contract, MV Transportation and First Transit were two of three bidders. MV Transportation stated in its bid it would retain existing employees for at least 90 days, and the City awarded MV Transportation a 10-percent bidding preference. First Transit did not state in its bid whether it would retain existing employees for at least 90 days. The City nevertheless awarded First Transit a 10-percent bidding preference under section 1072.

International Brotherhood of Teamsters, Local 848, Baza, Villafuerte, and Martin collectively, the Union) filed a petition for writ of mandate and complaint for declaratory relief against the City and First Transit. The Union alleged the City violated its mandatory duties under section 1072 when it awarded First Transit a 10-percent preference. The Union sought a peremptory writ of mandate ordering the City to rescind or set aside the contract with First Transit and to either issue a new request for bids or reevaluate the bids previously submitted. In its declaratory relief cause of action, the Union sought declarations that (1) compliance with section 1072 “requires a clear declaratory statement in any bid, which sets forth whether or not the bidder will retain the employees,” and “a substantiated factual determination by the awarding authority that any bidder granted the section 1072 [p]reference has affirmatively declared in its bid that it agrees to retain the employees of the prior contractor for a period of not less than 90 days”; (2) because First Transit failed to comply with section 1072, subdivision (a), its proposal was void and First Transit was disqualified; and (3) because the City failed to comply with section 1072, subdivision (b), its contract with First Transit “shall be rescinded and without legal effect.”

The City demurred, and the trial court sustained the demurrer without leave to amend. The court concluded the City had discretion to award the 10-percent bidding preference under section 1072 to a contractor who did not declare in the bid it would retain qualified existing employees for at least 90 days. The trial court ruled: “A bidder who fails to state in its bid that it will retain prior employees may nevertheless communicate to the City its willingness to retain some or all of the employees of the prior contractor or subcontractor. In such a situation, the City has discretion as to whether or not it will confer a 10 [percent] preference.” The trial court entered judgment in favor of the City, and the Union timely appealed.

DISCUSSION

A. Standard of Review

“On review from an order sustaining a demurrer, ‘we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose.’” (Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal.4th 32, 42; see SJJC Aviation Services, LLC v. City of San Jose (2017) 12 Cal.App.5th 1043, 1051 [“we review the petition and complaint de novo ‘to determine whether it alleges facts stating a cause of action under any legal theory’”]; Jones v. Omnitrans (2004) 125 Cal.App.4th 273, 277 [“on appeal from a dismissal entered after an order sustaining a demurrer to a petition for writ of mandate, we review the order de novo, determining independently whether the petition states a cause of action as a matter of law’’].) “We deem to be true all material facts that were properly pled, as well as all facts that may be inferred from those expressly alleged.” (Jones, at p. 277.) “[I]t is error for a . . . court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.” (Arvey v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185, 1201; see SJJC Aviation Services, at p. 1051 [“our review is governed by settled standards, which apply equally whether a demurrer challenges a complaint or a petition”]; Jones, at pp. 277 [demurrer to a petition for writ of mandate].)

B. The Bidding Preference Under Section 1072

Section 1072, subdivision (a), states: “A bidder shall declare as part of the bid for a service contract whether or not the bidder will retain the employees of the prior contractor or subcontractor for a period of not less than 90 days, as provided in this chapter, if awarded the service contract.” Section 1072, subdivision (b), states: “An awarding authority letting a service contract out to bid shall give a 10-percent preference to any bidder who agrees to retain the employees of the prior contractor or subcontractor pursuant to subdivision (a).” The successor contractor does not have to retain

2. The parties have not explained what it means to give a 10-percent preference to a bidder. It appears to mean that, for purposes of
unqualified employees. (§ 1072, subd (c)(2).) Section 1073 enforces these provisions by providing that an employee who is not offered employment or is discharged by a contractor who has agreed to retain employees for at least 90 days may file a civil action for reinstatement, back pay, and injunctive relief. An awarding agency may on its own motion, or upon request by a member of the public, terminate a service contract made pursuant to section 1072 if the contractor has substantially breached the contract. (§ 1074.)

The legislative history explains the reason for the bidding preference under section 1072. “[A]pproximately 30 percent of public transit service is provided by private companies who contract with local government agencies. Such contracts typically last for only a few years and when they are up for renewal, the contractor is typically underbid by a new contractor.” (Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 158 (2003-2004 Reg. Sess.) as amended Mar. 24, 2003, pp. 1-2.) This “revolving door” in public contracting negatively impacts existing employees who are not retained by the new contractor and harms “the economic well-being of the state as such employees often have to rely on public services just to get by.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 158 (2003-2004 Reg. Sess.) as amended Apr. 2, 2003, pp. 3, 4.) To address the “significant economic dislocation” (§ 1070, subd (a)) of employees who are not retained and the resulting burden on government services and taxpayers (§ 1070, subd. (b)), the Legislature established a bidding preference for contractors bidding on public transit service contracts who agree to retain qualified existing employees for at least 90 days. (§§ 1070, subd. (c), 1072, subd. (b).) The legislation provides a measure of job security by giving retained employees 90 days to prove their worth to the new contractor or to seek other employment. (See Enrolled Bill Rep. on Sen. Bill No. 158 (2002-2003 Reg. Sess.) prepared for Governor Gray Davis (Oct. 6, 2003.).)

The law is having its intended effect. The California Teamsters Public Affairs Council, which sponsored legislation in 2016 to extend the incentive to solid waste collection and transportation contracts, reported to the Legislature: “The current law for transit service contracts has been in effect for nearly fifteen years. It has stabilized the industry, allowing drivers to retain work. There have been no reported cases of litigation on the issue, which is a strong indication of how smoothly this law has functioned. As a practical matter, in the vast majority of cases, all of the bidders take the preference, which results in no difference in the cost to the contracting entity but avoids needless job displacement.” (Assem. Com. on Local Gov., Analysis of Assem. Bill No. 1669 (2015-2016 Reg. Sess.) as amended Mar. 8, 2016, p. 3.)

C. Statutory Construction

“Legal questions [arising at the pleading stage] include the interpretation of a statute and the application of a statutory provision to facts assumed to be true for purposes of the demurrer.” (Gutierrez v. Carmax Auto Superstores California (2018) 19 Cal.App.5th 1234, 1242; accord, Villery v. Department of Corrections & Rehabilitation (2016) 246 Cal.App.4th 407, 413; see California Building Industry Assn. v. State Water Resources Control Bd. (2018) 4 Cal.5th 1032, 1041 (“[w]e review questions of statutory construction de novo.”) “Our primary task in interpreting a statute is to determine the Legislature’s intent, giving effect to the law’s purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.” (California Building Industry Assn., at p. 1041) “‘Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.’” (Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1037; see California Building Industry Assn., at p. 1041 (“[w]e construe the statute’s words in context, harmonizing statutory provisions to avoid absurd results.”)) “We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions … to determine what interpretation best advances the Legislature’s underlying purpose.” (In re R.T. (2017) 3 Cal.5th 622, 627; accord, Los Angeles County Bd. of Supervisors v. Superior Court (2016) 2 Cal.5th 282, 293.)

D. The Trial Court Erred in Sustaining the Demurrer

“Code of Civil Procedure section 1085, providing for writs of mandate, is available to compel public agencies to perform acts required by law. [Citation.] To obtain relief, a petitioner must demonstrate (1) no ‘plain, speedy, and adequate’ alternative remedy exists [citation]; (2) ‘a clear, present, and ministerial duty on the part of the respondent’; and (3) a correlatively ‘clear, present, and beneficial right in the petitioner to the performance of that duty.’ [Citations.] A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act.” (People v. Picklesimer (2010) 48 Cal.4th 330, 339-340; see Kavanaugh v. West Sonoma County Union High School Dist. (2003) 29 Cal.4th 911, 916 (“[a] ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion determined by the legislative act.”).)
The parties agree section 1072 imposes a mandatory duty on the City, but disagree about the nature of that duty. The City argues the duty under section 1072, subdivision (b), is only to “give a 10 percent preference to any bidder who agrees to retain the employees of the prior contractor.” The City contends, however, it has discretion to award the preference under section 1072 to bidders like First Transit, even though First Transit’s bid did not include an agreement to retain MV Transportation’s qualified employees for at least 90 days. In other words, the City argues section 1072 requires the public agency to give the 10-percent preference to bidders who agree to retain qualified employees for at least 90 days, but allows the public agency, in its discretion, to give the same preference to bidders who do not. The Union contends section 1072, subdivision (b), means that only a contractor who agrees to retain employees for at least 90 days is entitled to the 10-percent preference under section 1072. The Union has the better argument.

The statutory language is unambiguous. Section 1072, subdivision (a), requires a bidder to state in its bid whether it will retain employees for at least 90 days. To be eligible for the preference, the contractor must state in its bid that it will retain the employees. Section 1072, subdivision (b), prescribes what a public agency must do when a bidder, “pursuant to subdivision (a),” agrees in its bid to retain employees for at least 90 days: award the 10-percent preference. A bidder must comply with subdivision (a) before a public agency can give the bidder the preference under subdivision (b); that is what the words “pursuant to” in subdivision (b) mean. Nothing in the statutory language authorizes a public agency to give the section 1072 preference to a bidder who did not make the declaration required by section 1072, subdivision (a), “as part of the bid.” The public agency does not have to award the contract to a bidder with the 10-percent preference under section 1072, subdivision (b), but the public agency can only give the 10-percent preference to a bidder whose bid qualifies under section 1072, subdivision (a), and First Transit’s bid did not.3 Contrary to the trial court’s ruling, the statute does not allow a public agency to award a preference under section 1072 to a contractor who communicates its willingness to retain employees other than in its bid. The trial court erred in interpreting section 1072, subdivision (b), to give the City discretion to give First Transit the preference when it did not comply with subdivision (a). (See People v. Tindall (2000) 24 Cal.4th 767, 772 [“...where the statute is clear, courts will not ‘interpret away clear language in favor of an ambiguity that does not exist’...”]; Frog Creek Partners, LLC v. Vance Brown, Inc. (2012) 206 Cal.App.4th 515, 524 [same].)

The City’s interpretation of section 1072 would undermine the Legislature’s purpose in enacting the statute. (See Gutierrez v. Carmax Auto Superstores California, supra, 19 Cal.App.5th at p. 1250 [“the court must adopt the interpretation that best effectuates the legislative intent or purpose”]; Merced Irrigation Dist. v. Superior Court (2017) 7 Cal.App.5th 916, 925 [courts must “select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute”].) Section 1072 incentivizes bidding contractors to declare they will retain existing employees for at least 90 days by giving those contractors a preference in the bidding process. To allow the City to give a preference under section 1072, subdivision (b), to contractors who do not comply with section 1072, subdivision (a), would eliminate the incentive for contractors to retain employees, exactly the opposite of the Legislature’s stated goal. A bidding contractor would have no reason to agree to retain employees for at least 90 days as part of its bid if a public agency could give the same preference to a contractor who did not make the same agreement. After all, if everyone gets a 10-percent preference, then no one is getting a 10-pecent preference.

The City also relies on the trial court’s finding that First Transit’s failure to comply with section 1072, subdivision (a), was an “inconsequential variance” that did not preclude the City from considering First Transit’s bid. The court stated the Union did not allege that First Transit’s noncompliance affected the amount of the bid or gave First Transit “a benefit not allowed other bidders” or that First Transit “would not have been awarded the contract had it been required to comply with” section 1072, subdivision (a). The trial court cited Konica Business Machines U.S.A., Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, which held that a public entity may consider a bid that deviates from bid specifications so long as the variance is inconsequential. (Id. at p. 454; see DeSilva Gates Construction, LP v. Department of Transportation (2015) 242 Cal.App.4th 1409, 1422-1423; Bay Cities Paving & Grading, Inc. v. City of San Leandro (2014) 223 Cal.App.4th 1181, 1188; Ghiolotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4th 897, 904.)

3. The trial court appears to have confused discretion to award the preference with discretion to award the contract. The court stated to counsel for the Union: “It just seems to me that the language [of the statute] doesn’t go far enough for me to agree with you that a city is prohibited from doing business with a party that’s not going to keep on the old employees or from paying a premium.” Counsel for the Union explained in response: “The statute doesn’t disqualify the City from doing business with employers who don’t want to retain the prior employees. It doesn’t even prevent the City from granting the bid[ ] to First Transit under these facts, but it does [impose] a duty on the City. . . .” The trial court was also concerned that a bidder would have to keep current employees “who have extensive records of discipline.” Section 1072, subdivision (c), however, does not require a successor contractor to retain an employee where there is “reasonable and substantiated cause” relating to the “employee’s performance or conduct while working under the prior contract or the employee’s failure of any controlled substances and alcohol test, physical examination, criminal background check required by law as a condition of employment, or other standard hiring qualification lawfully required by the successor contractor.”
A variance is inconsequential if it “cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders … .” (Ghilotti Construction, at p. 904; see DeSilva Gates Construction, at pp. 1422-1423 [“...it is well established that ‘...a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders,...’” italics omitted].)

The Union, however, did not allege First Transit’s bid deviated from the City’s specifications, substantially or otherwise. The Union alleged First Transit received a statutory preference to which it was not entitled because it did not comply with the statutory prerequisite. First Transit has not cited any cases treating a failure to comply with a statutory requirement as (or analogous to) a variance from bidding specifications. Thus, because the Union did not claim First Transit’s bid deviated from the City’s specifications, the Union did not have to allege First Transit’s noncompliance with section 1072, subdivision (a), affected the amount of the bid or gave First Transit an advantage or benefit other bidders did not receive. In any event, whether a variance is inconsequential is a question of fact, subject to review for substantial evidence, that is not properly decided on demurrer. (See MCM Construction, Inc. v. City and County of San Francisco (1998) 66 Cal.App.4th 359, 375; Ghilotti Construction, supra, 45 Cal.App.4th at pp. 903, 906; Konica Business Machines U.S.A., Inc., at pp. 453-454.)

DISPOSITION

The judgment is reversed. The matter is remanded with directions for the trial court to vacate its order sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. The Union is to recover its costs on appeal.

SEagal, J.

We concur: PERRUSS, P. J., ZELON, J.

Cite as 19 C.D.O.S. 356

O’GARA COACH COMPANY, LLC, Cross-complainant and Appellant,
v.
JOSEPH RA, Cross-defendant and Respondent.

No. B286730
In The Court of Appeal of the State of California
Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. SC125609)
APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Reversed and remanded.
Filed January 7, 2019

COUNSEL

Greines, Martin, Stein & Richland, Marc J. Poster and Jonathan H. Eisenman for O’Gara Coach Company, LLC.

OPINION

Darren Richie, the former president and chief operating officer of O’Gara Coach Company, LLC, is a principal of Richie Litigation, P.C. O’Gara Coach moved to disqualify Richie Litigation from representing its former senior executive Joseph Ra in litigation, including cross-actions between O’Gara Coach and Ra, arising from allegations by Marcelo Caraveo that O’Gara Coach and Ra had committed fraud in connection with Caraveo’s acquisition of luxury vehicles from O’Gara Coach. In support of its motion O’Gara Coach relied on evidence that, while president of O’Gara Coach, Richie had been a client contact for outside counsel investigating the charges of fraudulent conduct that ultimately led to Caraveo’s lawsuit. The trial court denied the motion. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. Caraveo’s Lawsuit, Ra’s Cross-complaint and O’Gara’s Cross-complaint

In March 2016 Caraveo and two related limited liability companies filed a complaint, and in June 2016 a first amended complaint, against O’Gara Coach, Ra and several other entities asserting causes of action for fraud, conversion and unfair business practices based on their allegedly wrongful conduct with respect to Caraveo’s acquisition of luxury vehicles from O’Gara Coach.
In October 2016 Ra filed a cross-complaint for defamation, intentional interference with contractual relations and indemnity against O’Gara Coach, its principal owner and chief executive officer Thomas O’Gara and various other individuals. Ra claimed O’Gara Coach was obligated to indemnify him because the allegations in Caraveo’s complaint arose from his actions as an employee of the company. As for his tort claims, Ra alleged, in part, that shortly after he was forced to resign from his position with O’Gara Coach in early 2016, the cross-defendants “all repeated the same thing: that Ra stole vehicles, stole money from O’Gara Coach, improperly rented O’Gara Coach’s cars and stole the revenues from those rentals, and committed other criminal acts that resulted in both the Federal Bureau of Investigation and the Los Angeles District Attorney in search of Ra for prosecution.”

In January 2017 O’Gara Coach filed its own cross-complaint, and on March 27, 2017 a first amended cross-complaint, against Caraveo, Ra, Thomas Wu, another former employee of O’Gara Coach, and others for breach of contract, fraud and related torts, and as to Ra and Wu for breach of fiduciary duties arising from employment. O’Gara Coach’s cross-complaint alleged that Caraveo and Ra were the primary architects of a multi-pronged fraudulent scheme involving the sale, leasing and financing of vehicles from unsuspecting automobile dealerships.

2. Richie’s Role at O’Gara Coach

O’Gara Coach hired Richie in September 2013 as general manager for its Westlake Village location. He was subsequently promoted to director of sales operations for the company and then in November 2014 to president and chief operating officer.

In his declaration in support of O’Gara Coach’s motion to disqualify Richie Litigation, Thomas O’Gara stated O’Gara Coach does not employ in-house lawyers and, while serving as president, Richie was a primary point of contact for the company’s outside counsel on many legal matters: “Mr. Richie would regularly engage and direct legal counsel on O’Gara Coach’s behalf, regarding day-to-day advice on a litany of subjects, the development and implementation of policies and procedures, and on all aspects of pending litigation, and pre and post-litigation functions.”

When Richie was initially hired by the company, Thomas O’Gara knew Richie had graduated from law school and had experience overseeing legal matters. (Richie graduated from law school in 2003.) According to O’Gara, it was this “legal education and professed experience that provided me comfort in assigning to him decision-making authority during his tenure, including without limitation engaging outside legal counsel and overseeing (on a companywide basis) all legal matters affecting the company.”

Richie’s employment with O’Gara Coach was terminated on February 2016. In his declaration Thomas O’Gara states O’Gara Coach and Richie executed a severance agreement in which Richie agreed not to file claims against O’Gara Coach or to assist others in bringing claims against the company. That document, which is described as subject to confidentiality provisions, was not filed with the trial court, but counsel offered to make it available to the court for in camera inspection.\(^1\)

3. Ra’s Retention of Richie Litigation; Richie’s Admission to the California Bar

When he filed his answer to Caraveo’s first amended complaint and his own cross-complaint in October 2016, Ra was represented by Ethan J. Brown of the law firm of Brown Neri Smith & Khan LLP.

Richie sat for the California bar examination in February 2017. On May 19, 2107 Richie filed articles of incorporation of a professional corporation for Richie Litigation, P.C. with the California Secretary of State. A statement of information for Richie Litigation, P.C. filed on June 26, 2017 with the Secretary of State identified Robert K. Lu as the sole officer and director, as well as the agent for service of process of the professional corporation. Richie was admitted to the State Bar in August 2017. A new statement of information for Richie Litigation, P.C., filed on September 13, 2017 with the Secretary of State, identified Richie as the sole officer, director and agent for service of process for the professional corporation.\(^2\)

On June 8, 2017, two months before Richie was admitted to practice in California, Robert Lu of Richie Litigation substituted for Ethan J. Brown as counsel of record for defendant and cross-complainant Ra in this lawsuit. Richie Litigation also appeared as counsel for Jorge Loera and Thomas Wu, two other former O’Gara Coach employees, in lawsuits they filed against O’Gara Coach.

4. The Motion To Disqualify Richie Litigation

On October 11, 2017 O’Gara Coach moved to disqualify Richie Litigation. O’Gara Coach asserted, even though Rich-
ie was not a member of the California bar while serving as president and chief operating officer of the company, given his role in coordinating legal matters for O’Gara Coach, including interfacing with outside counsel, the court should apply the rule requiring disqualification of attorneys representing adverse parties in successive representations when, as here, the matters are substantially related, as well as the rule that, when a former client’s confidential information is known to any attorney at a law firm, the entire firm must be disqualified. O’Gara alternatively argued, even if no attorney-client relationship existed between Richie and O’Gara Coach, Richie Litigation should be disqualified because Richie was privy to the company’s privileged information while employed as one of its most senior executives. As such, whether or not Richie has a continuing fiduciary obligation to O’Gara Coach, Richie Litigation is not entitled to exploit that information in litigation adverse to the company.

In support of its motion O’Gara Coach submitted the declaration of Halbert Rasmussen, who was a partner at the Arent Fox law firm when Richie was president of O’Gara Coach. Rasmussen stated he had regularly communicated with Richie in the course of his representation of O’Gara Coach “in various legal matters, as did other attorneys at Arent Fox LLP who were assisting me with the representation of O’Gara Coach.” In January 2016 Rasmussen and his firm were retained to conduct an internal investigation concerning the activities of Joseph Ra and Thomas Wu. In the course of the investigation, Rasmussen explained, he sent attorney-client communications and attorney work product to Richie through email, included Richie in phone calls and meetings during which attorney-client communications pertaining to the investigation occurred and sought Richie’s assistance in discovering the nature of Ra’s and Wu’s activities and “his view on the propriety of their conduct.” According to Rasmussen, the internal investigation uncovered facts used as the basis for O’Gara Coach’s cross-claims in this action and developed legal issues that “greatly informed O’Gara Coach’s strategy in defending the claims filed against it, and prosecuting the cross-claims in the above captioned action.”

O’Gara Coach’s motion papers also included declarations from Keith D. Kassan, who acted as outside general counsel to O’Gara Coach, and Usama Kahf of Fisher & Phillips LLP, O’Gara Coach’s labor and employment counsel. Both men described interacting with Richie on legal matters, both litigation and nonlitigation, on an ongoing basis while he was president of O’Gara Coach.

In his opposition to the motion to disqualify, Ra argued the case law regarding successive representation was inapplicable because Richie had never been an attorney while an executive of O’Gara Coach and no attorney-client relationship existed between him and the company, either while he was employed by O’Gara Coach or afterward when he became a licensed attorney. Ra also argued, even if Richie owed a continuing fiduciary duty to O’Gara Coach, a non-lawyer’s fiduciary obligation to an employer or former employer is different from a lawyer’s and cannot provide the basis for disqualifying a law firm with which that individual becomes affiliated. The opposition papers included a brief declaration from Richie establishing the basic facts regarding the timing of his employment at O’Gara Coach and his subsequent admission to the California State Bar. Richie stated he had never acted as legal counsel for O’Gara Coach or its principal Thomas O’Gara, either while employed by the company or afterward. However, Richie did not deny he had participated in discussions and received communications protected by the lawyer-client privilege while an executive at O’Gara Coach. Ra presented no evidence indicating Richie Litigation had established any internal screening procedures or “ethical walls” between Richie and the attorneys at Richie Litigation representing Ra.

The trial court denied the motion on November 14, 2017 after hearing argument from the parties. Adopting its tentative ruling as its final order, the court explained that O’Gara Coach had failed to establish there was an attorney-client relationship between it and Richie. “The fact that he might have received confidential information about O’Gara [while he] was employed there is not enough.” The court also stated, “There is no authority cited to disqualify a former employee who then becomes an attorney.”

**DISCUSSION**

1. **Standard of Review**

A trial court’s decision to grant or deny a motion to disqualify counsel is generally reviewed for abuse of discretion. ([People v. Suff](2014) 58 Cal.4th 1013, 1038; [In re Charlisse C.](2008) 45 Cal.4th 145, 159 ([Charlisse C.]); [People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.](1999) 20 Cal.4th 1135, 1143 ([SpeeDee Oil]).) “As to disputed factual issues, a reviewing court’s role is simply to determine whether substantial evidence supports the trial court’s findings of fact . . . . As to the trial court’s conclusions of law, however, review is de novo; a disposition that rests on an error of law constitutes an abuse of discretion.” ([Charlisse C.], at p. 159; see [Haraguchi v. Superior Court](2008) 43 Cal.4th 706, 711-712.) While the trial court’s “application of the law to the facts is reversible only if arbitrary and capricious” ([Charlisse C.], at p. 159), “where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law.” ([SpeeDee Oil], at p. 1144; accord, [California Self-Insurers’ Security Fund v. Superior Court](2018) 19 Cal.App.5th 1065, 1071; [Castaneda v. Superior Court](2015) 237 Cal.App.4th 1434, 1443.)

When deciding a motion to disqualify counsel, “[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process.” ([SpeeDee Oil], supra, 20 Cal.4th at
2. Governing Law

a. Protecting client confidences: disqualification based on successive representation

It is well-established that an attorney, after severing his or her relationship with a client, “may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.” (Watchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573-574; accord, People ex rel Deukmejian v. Brown (1981) 29 Cal.3d 150, 155; Fiduciary Trust Internat. of California v. Superior Court (2013) 218 Cal.App.4th 465, 485.) This prohibition is grounded in both the California State Bar Rules of Professional Conduct—rule 3-310(E) in effect until November 1, 2018, and rule 1.9, effective November 1, 2018—and governing case law. (See City National Bank v. Adams (2002) 96 Cal.App.4th 315, 323-324.)

The disqualification standards applicable in these cases of successive representation “focus on the former client’s interest ‘in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation.’” (Charlisse C., supra, 45 Cal.4th at pp. 159-160; see Neal v. Health Net, Inc. (2002) 100 Cal.App.4th 831, 840 (“at the core of California’s disqualification jurisprudence is a concern for the confidentiality of lawyer-client communications”).) Disqualification is required if the current representation involves the legal services performed by the attorney for the former client (e.g., Henriksen v. Great American Savings & Loan (1992) 11 Cal.App.4th 109, 111; Dill v. Superior Court (1984) 158 Cal.App.3d 301, 306) or, even if not the same matter, if a substantial relationship exists between the former representation and the current representation (SpeeDee Oil, supra, 20 Cal.4th at p. 1146 [“where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client’s confidential information requires that the attorney be disqualified from the second representation”]; Flatt v. Superior Court (1994) 9 Cal.4th 275, 283 [“where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney’s representation of the second client is mandatory”]; M’Guinness v. Johnson (2015) 243 Cal.App.4th 602, 614).

Through the doctrine of vicarious disqualification, the Supreme Court has extended the rules developed to protect a former client’s confidences to include the disqualified attorney’s entire law firm: “‘The rule of vicarious disqualification is based upon the doctrine of imputed knowledge,’ which posits that the knowledge of one attorney in a law firm is the knowledge of all attorneys in the firm. [Citation.] By ‘recogniz[ing] the every day reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information’ [citation], the vicarious disqualification rule ‘safeguards clients’ legitimate expectations that their attorneys will protect client confidences.’” (Charlisse C., supra, 45 Cal.4th at p. 161; accord, SpeeDee Oil, supra, 20 Cal.4th at pp. 1153-1154; see Kirk v. First American Title Ins. Co. (2010) 183 Cal.App.4th 776, 800-801 [although the presumption that knowledge of a client’s confidences should be imputed to all members of a tainted attorney’s law firm might be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case, “vicarious disqualification should be automatic in cases of a tainted attorney possessing actual confidential information from a representation, who switches sides in the same case”]; see also Castaneda v. Superior Court, supra, 237 Cal.App.4th at p. 1449 [“no ethical wall could overcome the imputation of shared knowledge when an attorney who formerly represented—and therefore possessed confidential information regarding—a party switched sides in the same case”].)

b. Protecting client confidences: disqualification based on the acquisition of an adversary’s privileged communications by means other than a prior attorney-client relationship

Attorney disqualification to support the fundamental principle of protecting client confidences is not limited to situations in which an adversary’s privileged communications have been acquired through a prior attorney-client relationship: “A law firm that hires a nonlawyer who possesses an adversary’s confidences creates a situation, similar to hiring an adversary’s attorney, which suggests that confidential information is at risk.” (In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 593 (Complex Asbestos).)

In Complex Asbestos, supra, 232 Cal.App.3d 572 the court of appeal held disqualification was proper because counsel’s newly hired paralegal had access to confidential information relating to pending litigation while working for opposing counsel. The court explained disqualification was warranted, not because the disqualified attorney had a duty to protect the adverse party’s confidences, but because the situation implicated the attorney’s ethical duty to maintain the integrity of the judicial process: “[T]he integrity of judicial proceedings was threatened not by attorney misconduct, but by employee misconduct neither sanctioned nor sought by the attorney.” (Id. at p. 592; see Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807, 818 [“[a]n attorney has an obligation not only to protect his client’s interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice’”] (Rico); see also Roush v. Seagate Technology, LLC (2007) 150 Cal.App.4th 210, 219.)
Similarly, in both Shadow Traffic Network v. Superior Court (1994) 24 Cal.App.4th 1067 and County of Los Angeles v. Superior Court (1990) 222 Cal.App.3d 647 the court held disqualification was warranted when an independent contractor (an expert witness) hired by a law firm had previously consulted with, and obtained confidential information from, opposing counsel regarding pending litigation. (See also Toyota Motor Sales, U.S.A. v. Superior Court (1996) 46 Cal.App.4th 778, 782.)

A lawyer and his or her law firm may also be disqualified for intentionally making use of an opposing party’s confidential information acquired through improper means. (Clark v. Superior Court, supra, 196 Cal.App.4th at p. 55 [“disqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed”]; Gregori v. Bank of America (1989) 207 Cal.App.3d 291, 309 [“disqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation”]; see McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083, 1120.)

In the context of inadvertently disclosed attorney-client communications, the Supreme Court in Rico, supra, 42 Cal.4th 807 adopted the rule articulated in State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644 (State Fund), holding, when a lawyer comes into possession of materials that clearly appear to be protected by the attorney-client privilege and it is reasonably apparent the materials were made available through inadvertence (that is, without the holder of the privilege having waived it), the lawyer receiving the materials must refrain from examining the materials any more than is necessary to ascertain their privileged status and then must immediately notify the party entitled to the privilege about the situation. (Rico, at pp. 816-818; see State Fund, at pp. 656-657.) Applying the State Fund rule to confidential material protected by the attorney work product doctrine, as well as the attorney-client privilege, the Rico Court held the trial court had properly disqualified counsel who not only failed to conduct himself as required under State Fund but also acted unethically in making full use of a confidential document. (Rico, at pp. 810, 819; accord, McDermott Will & Emery LLP v. Superior Court, supra, 10 Cal.App.5th at p. 1120 [“[d]isqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed”; an affirmative showing of existing injury from the misuse of privileged information is not required”]; see Clark v. Superior Court, supra, 196 Cal.App.4th at pp. 43-44, 54-55 [attorney who received opponent’s privileged documents from his own client, who had stolen them when fired, rather than through inadvertent production by opposing party or its counsel, subject to the State Fund rule; disqualification was proper prophylactic remedy based on evidence attorney had reviewed the documents more than minimally necessary to determine their privileged nature and had affirmatively used some of the substantive information in the privileged documents].)

3. Richie Could Not Act as Ra’s Counsel Because He Obtained Privileged Information Relating to the Pending Litigation as O’Gara Coach’s President and Chief Operating Officer

Because Richie never had an attorney-client relationship with O’Gara Coach while employed as its president and chief operating officer, the trial court correctly rejected O’Gara Coach’s argument for disqualification of Richie and Richie Litigation based on a theory of improper successive representation. However, the court erred in failing to consider O’Gara Coach’s alternate argument that disqualification of Richie and his law firm was required as a prophylactic measure because the firm was in possession of confidential information, protected by O’Gara Coach’s attorney-client privilege, concerning Ra’s allegedly fraudulent activities at issue in this litigation. (See, e.g., Roush v. Seagate Technology, LLC, supra, 150 Cal.App.4th at p. 219 [although the “classic disqualification case involves the attorney switching sides, … [¶] [i]n other cases, counsel may be disqualified where counsel has obtained the secrets of an adverse party in some other manner”: “[d]isqualification is warranted in these cases, not because the attorney has a duty to protect the adverse party’s confidences, but because the situation implicates the attorney’s ethical duty to maintain the integrity of the judicial process”].)

As discussed, based on the principles established by Rico, supra, 42 Cal.4th 807, Clark v. Superior Court, supra, 196 Cal.App.4th 37 and McDermott Will & Emery LLP v. Superior Court, supra, 10 Cal.App.5th 1083, if the holder of the attorney-client privilege has not waived the privilege, lawyers representing an adverse party who have received such information knowing it is privileged have an ethical duty not to use it. It does not matter whether the information has been provided deliberately or inadvertently (e.g., McDermott Will & Emery, at p. 1109 [“although the State Fund rule originated in the context of one attorney inadvertently producing his client’s privileged documents to the opponent’s attorney during litigation, neither the statement of the rule nor the policy underlying it supports limiting the scope of the rule to that one circumstance”]; see Clark, at pp. 43-44, 52 [applying State Fund rule to stolen documents]) or by an employee of the opposing party’s counsel or the opposing party itself (compare Complex Asbestos, supra, 232 Cal. App.3d at pp. 587-588 [information disclosed by opposing counsel’s nonlawyer employee] with DCH Health Services Corp. v. Waite (2002) 95 Cal.App.4th 829, 832 [foundation would have standing to seek disqualification of opposing counsel following disclosure of privileged information by former foundation board member “based on the duty of con-
fidentiality [former board member] owed to it despite the absence of attorney-client relationship between [opposing counsel] and the foundation”). Nor is it necessary for the party seeking to protect its privileged information to make an affirmative showing of existing injury from the misuse of the privileged information; the threat of such use is sufficient to justify disqualification. (McDermott Will & Emery, at p. 1120; Clark, at p. 55.)

Here, O’Gara Coach presented evidence, undisputed by Ra, that Richie, as president and chief operating officer of O’Gara Coach through February 2016, participated in meetings, phone calls and email communications with outside counsel investigating Ra’s and Thomas Wu’s activities that developed theories material to O’Gara Coach’s defense and forming the basis for its cross-claims in this litigation and that are protected by the lawyer-client privilege. The privilege belongs to O’Gara Coach. Richie, even though no longer an officer of O’Gara Coach, has no right to disclose information protected by that privilege without O’Gara Coach’s consent. (See Evid. Code, § 954; Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 730 [“[t]he attorney-client privilege, set forth at Evidence Code section 954, confers a privilege on the client ‘to refuse to disclose, and to prevent another from disclosing a confidential communication between client and lawyer . . . ’”]; see also Chubb & Son v. Superior Court (2014) 228 Cal.App.4th 1094, 1103 [“unless otherwise specified, it is the client who holds the privilege and controls disclosure of the confidential communication.”].) And now that Richie is a member of the California State Bar, O’Gara Coach is entitled to insist that he honor his ethical duty to maintain the integrity of the judicial process by refraining from representing former O’Gara Coach employees in litigation against O’Gara Coach that involve matters as to which he possesses confidential information. (See Rico, supra, 42 Cal.4th at p. 818; Complex Asbestos, supra, 232 Cal.App.3d at p. 592.)

Maruman Integrated Circuits, Inc. v. Consortium Co. (1985) 166 Cal.App.3d 443, relied upon by Ra to argue that a former employee has no duty to maintain the confidentiality of his employer’s attorney-client privileged communications, does not require a different result. Maruman involved a lawsuit by a corporation against its former president. The assistant to the corporation’s secretary, who had access to attorney-client privilege communications between the corporation and its litigation counsel, left the corporation and went to work for the former president. (Id. at pp. 445-446.) After the assistant revealed during her deposition that she had spoken to the former president’s current counsel concerning her prior conversations with the corporation’s lawyers and had delivered to them two letters between the corporation and its lawyers, the corporation moved to disqualify the former president’s law firm. (Id. at p. 446.) The trial court denied the motion, and the court of appeal affirmed, holding the corporation could not complain that the former president’s current counsel “breached its duty to maintain its confidences, where the attorney-client privilege never existed between them.” (Id. at p. 449; see Cooke v. Superior Court (1978) 83 Cal.App.3d 582, 592 [“we know of no case where disqualification of an attorney or his firm was imposed purely as a punitive or disciplinary measure, and where there was no prior representation or confidential professional relationship between the complaining party and the attorney or law firm who sought to be disqualified”] (Cooke).)

The unequivocal statements in Maruman and Cooke, echoed by the trial court in its ruling denying O’Gara Coach’s motion to disqualify Richie Litigation, that disqualification was never appropriate based on exposure to privileged information absent an attorney-client relationship between the party moving for disqualification and the attorney or firm sought to be disqualified, are simply inconsistent with more recent authority, as discussed, including Rico, supra, 42 Cal.4th 807, McDermott Will & Emery LLP v. Superior Court, supra, 10 Cal.App.5th 1083 and Clark v. Superior Court, supra, 196 Cal.App.4th 37.

Moreover, as the court of appeal in Complex Asbestos, supra, 232 Cal.App.3d 572 explained in distinguishing Maruman and Cooke, the person who had disclosed the adverse party’s attorney-client communications in those cases was the attorney’s own client or an employee of the client: “If the disclosure is made by the attorney’s own client, disqualification is neither justified nor an effective remedy. A party cannot ‘improperly’ disclose information to its own counsel in the prosecution of its own lawsuit.” (Complex Asbestos, at p. 591; but see Clark v. Superior Court, supra, 196 Cal.App.4th at pp. 54-55 [disqualifying counsel who received stolen documents from his client and affirmatively used information from the documents in the lawsuit against client’s former employer].) But, as discussed, a far different rule applies

3. In argument in the trial court and again in his appellate briefs, Ra has questioned the nature and extent of privileged information Richie obtained that is material to the pending litigation. However, in his short, six paragraph declaration in opposition to the motion to disqualify, Richie did not dispute former Arent Fox partner Halbert Rasmussen’s description of his interactions with Richie in early 2016 as they related to this matter.

4. In Cooke, supra, 83 Cal.App.3d 582 the client in a dissolution proceeding had given her attorney copies of attorney-client privileged documents belonging to her husband that had been surreptitiously copied and delivered to the wife by her husband’s butler. (Id. at p. 592.)

5. In General Dynamics Corp. v. Superior Court (1994) 7 Cal.4th 1164, 1190, the Supreme Court held an in-house counsel could sue a former employer for wrongful termination as long as confidential information was not publicly disclosed. In Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal.App.4th 294, 304, 310, this court held, based on the principles articulated in General Dynamics, that a former in-house counsel may disclose employer-client confidences to his or her own attorneys to the extent they may be relevant and necessary to the preparation and prosecution of the former counsel’s wrongful termination action against the former client-employer. Client confidences in such circumstances can be protected from unwarranted public disclosure by use of protective orders, limiting the admission of evidence, in camera proceedings and the use of sealed records. (See, e.g., General Dynamics, at p. 1191; Neal v. Health Net, Inc., supra, 100 Cal.App.4th at p. 844; see also Fox Searchlight, at pp. 309-310.)
when the confidential information comes into an attorney’s possession through a former employee of the adverse party who is now an employee (or principal) of that attorney’s law firm: “A law firm that hires a nonlawyer who possesses an adversary’s confidences creates a situation, similar to hiring an adversary’s attorney, which suggests that confidential information is at risk.” (Complex Asbestos, at p. 593.) It is this rule, which applies a presumption of shared confidences rebuttable by a showing that the tainted employee has been effectively screened from the relevant matters, that was utilized in the Complex Asbestos litigation and in Shadow Traffic Network v. Superior Court, supra, 24 Cal.App.4th 1067. Under the applicable legal standards, therefore, Richie Litigation might properly represent Richie in his ongoing litigation with O’Gara Coach, notwithstanding Richie’s possession of relevant confidential information protected by O’Gara Coach’s attorney-client privilege (an issue not presented by this appeal); but, given Richie Litigation’s failure to demonstrate any screening of Richie from other O’Gara Coach litigation matters, the firm may not continue to represent Ra in the instant matter.

4. Richie Litigation, Not Just Richie, Must Be Disqualified Under Established Rules for Vicarious Disqualification

Emphasizing that Robert Lu of Richie Litigation substituted into this lawsuit as his counsel and insisting that Richie has not been involved in the pending case at any time, Ra argues, even if Richie were disqualified, the rules of vicarious disqualification should not be applied to Richie Litigation. However, the law is now well-established that, once a showing has been made that someone at the adverse party’s law firm possesses confidential attorney-client information materially related to the proceedings before the court, a rebuttable presumption arises that the information has been used or disclosed in the current employment. (Complex Asbestos, supra, 232 Cal.App.3d at p. 596.) “The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary’s attorneys and legal staff.” (Ibid.) Moreover, “disqualification does not require evidence of an existing injury . . . .” (McDermott Will & Emery, at p. 1124.) “[D]isqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed.” (Clark v. Superior Court, supra, 196 Cal.App.4th at p. 55.)

As discussed, Ra provided no evidence in opposition to O’Gara Coach’s motion that Richie had been screened from Robert Lu or any of the several other lawyers at Richie Litigation who have worked on the pending litigation. (See Kirk v. First American Title Ins. Co., supra, 183 Cal.App.4th at p. 801 [presumption that knowledge of a client’s confidences should be imputed to all members of a tainted attorney’s law firm might be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case].) In these circumstances the doctrine of imputed knowledge requires the vicarious disqualification of the entire Richie Litigation firm. (Charlisse C., supra, 45 Cal.4th at p. 161.)

DISPOSITION

The order denying the motion to disqualify Richie Litigation is reversed. The trial court on remand shall issue a new order granting O’Gara Coach’s motion. O’Gara Coach is to recover its costs on appeal.

PERLUSS, P. J.

We concur: ZELON, J., SEGAL, J.

No. F073455, F073586
In The Court of Appeal of the State of California Fifth Appellate District
(Super. Ct. No. CV002452)
APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.
Filed January 7, 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 I, II, III, IV and V(A).

COUNSEL
Hampton Firm and Kyle A. Hampton for Plaintiff, Cross-defendant and Appellant.

OPINION

Plaintiff Berkeley Cement, Inc. (Berkeley) appeals from the judgment entered against it after a jury trial in this dispute over construction of a building on the Merced campus of the University of California. Berkeley contends the jury’s findings on the complaint and on the cross-complaint were fatally inconsistent; the trial court incorrectly instructed the jury that a particular specification in the parties’ contract was a performance specification, rather than a design specification, based on an incorrect interpretation of the contract; the trial court improperly cut off plaintiff’s cross-examination of a key witness before it was complete; the trial court improperly excluded relevant evidence on the issue of damages after holding a hearing on its admissibility; and the trial court erred in including expert witness fees and mediation fees in its award of costs to defendant. We conclude the expert witness fees were improperly included in the award of costs, but no other error in the judgment has been demonstrated. We modify the judgment to exclude the award of expert fees and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Regents of the University of California (University) requested bids for construction of a social sciences and management building (SSMB) on University’s Merced campus. Berkeley submitted the low bid for the structural concrete work and was granted the contract. To create an attractive, energy efficient, and long-lasting structure, the plans and specifications called for a cast-in-place concrete building. Because the building was designed with architecturally exposed concrete, that is, areas exposed to view where the concrete itself was the finished surface of the building, the design specifications required a high quality concrete finish. They required the use of self-consolidating concrete in the architecturally exposed elements. They specified the aggregate (rock) to be used in the concrete in order to achieve a consistent color, and set a standard requiring minimization of the “bug holes” (voids in the concrete surface created by air pockets) in the architectural concrete.

When self-consolidating concrete was used to construct walls and columns, the construction required erection of formwork into which the concrete was poured. The contract documents required Berkeley to prepare mock-ups prior to pouring the walls and columns in place, to “permit verification of workmanship and visual qualities of the final completed installation.” The architectural finish of the concrete was affected by the concrete mix, the formwork, and the placement of the concrete in the formwork.

Problems arose, delaying Berkeley’s performance. The aggregate specified in the contract documents was not immediately available, and Berkeley used a substitute, which was later approved by University. Mock-ups were rejected by University; the concrete in the mock-ups exhibited bug holes excessive in quantity and size, rock pockets, discoloration, striations or “tiger striping,” and honeycombing. Berkeley also experienced formwork “blowouts,” where the formwork broke and the wall had to be redone. There was evidence the formwork Berkeley rented from its initial supplier was not designed for the pressures exerted by the self-consolidating concrete, which were higher than those exerted on formwork by conventional concrete.

Because of these and other difficulties, the concrete work fell behind schedule. Eventually, Berkeley engaged a subcontractor to provide and install formwork, in lieu of the rented and self-installed formwork it used initially. Additionally, University permitted Berkeley to complete the project using flowable conventional concrete, with which Berkeley was more familiar, instead of the self-consolidating concrete called for in the contract. Construction of the building was completed, and University paid Berkeley the full contract price for its work.

Berkeley submitted a Claim for Equitable Adjustment against University, seeking compensation for work it performed, which it claimed was extra work outside the contract. University denied the claim. Berkeley filed this action,
alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of the implied covenant of the correctness of the plans and specifications. It sought to recover compensation for alleged extra work and delays in construction, which it blamed on defective specifications for the concrete mix and University’s alleged interference with Berkeley’s performance by improperly rejecting its proposed concrete mix design, shop drawings, and mockups. University cross-complained against Berkeley for breach of contract, alleging the architectural concrete finish of the building did not meet the contract standards for uniformity of color and lack of bug holes, and Berkeley did not perform within the contract time, causing University to incur additional expenses.

After a lengthy jury trial, the jury found University did not breach the contract or either of the implied covenants; on the cross-complaint, it found Berkeley breached the contract, but University was not harmed by the breach. Berkeley’s motion for judgment notwithstanding the verdict or for a new trial was denied. The trial court awarded costs to University. Berkeley appeals, challenging the judgment against it on its complaint and certain costs awarded.

DISCUSSION

[ PARTS I, II, III, AND IV., See FOOTNOTE*, Ante ]

V. COSTS

“The right to recover any of the costs of a civil action “is determined entirely by statute.”” (Anthony v. City of Los Angeles (2008) 166 Cal.App.4th 1011, 1014.) Generally, the prevailing party is entitled as a matter of right to recover its costs. (Code Civ. Proc., § 1032, subd. (b).) The costs that are allowable are listed in Code of Civil Procedure section 1033.5, subdivision (a). Items that are not allowable as costs, except when expressly authorized by law” are listed in subdivision (b) of that section. Items that are not listed as allowable or not allowable “may be allowed or denied in the court’s discretion.” (Code Civ. Proc., § 1033.5, subd. (c)(4).) All costs awarded must be “reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.” (Code Civ. Proc., § 1033.5, subds. (c)(2), (3).)

Generally, the standard of review of an award of costs is whether the trial court abused its discretion in making the award. (Seever v. Copley Press, Inc. (2006) 141 Cal.App.4th 1550, 1556.) However, when the issue to be determined is whether the criteria for an award of costs have been satisfied, and that issue requires statutory construction, it presents a question of law requiring de novo review. (Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal.App.4th 592, 596–597 (Baker-Hoey).)

“In ruling upon a motion to tax costs, the trial court’s first determination is whether the statute expressly allows the particular item and whether it appears proper on its face. ‘If so, the burden is on the objecting party to show [the costs] to be unnecessary or unreasonable.’ [Citation.] Where costs are not expressly allowed by the statute, the burden is on the party claiming the costs to show that the charges were reasonable and necessary. [Citation.] ‘Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion.’” (Foothill-De Anza Community College Dist. v. Emerich (2007) 158 Cal.App.4th 11, 29–30.)

Berkeley challenges two items of costs that were included in the award to University: (1) fees University paid to Berkeley’s experts for time spent taking their depositions and (2) mediation fees.

[ PART V(A), See FOOTNOTE*, Ante ]

B. Mediation fees

Mediation costs are not listed among the costs that are expressly allowable or expressly not allowable. (Code Civ. Proc., § 1033.5, subds. (a), (b).) “An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if ‘reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.’” (Ladas v. California State Auto. Assn. (1993) 19 Cal.App.4th 761, 774 (Ladas).) Consequently, mediation costs fall within the category of costs that may be awarded in the trial court’s discretion. (Code Civ. Proc., § 1033.5, subd. (c)(4).) “Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion.” (Ladas, supra, at p. 774.)

“….The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.”’ (Citations.) “The burden is on the party complaining to establish an abuse of discretion ....” [Citations.] “[T]he showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion.” (Brawley, supra, 161 Cal.App.4th at pp. 1137–1138.)

The trial court’s award of costs to University included $15,950 for fees University paid to mediators. Berkeley

2. The mediation fee award included $7,500 (University’s one-half of the $15,000 mediator’s fee) for a mediation that was canceled by Berkeley shortly before it was scheduled to take place, because Berkeley claimed it had discovered new evidence. The mediator could not fill the time slot with a replacement, and the fee became nonrefundable.
challenges this award, arguing the costs were not “reasonably necessary to the conduct of the litigation,” but were “merely convenient or beneficial to its preparation.” (Code Civ. Proc., § 1033.5, subd. (c)(2).) It contends mediation was voluntary, not court-ordered, and therefore the fees for mediation were not mandatory or necessary to the litigation.

The court-ordered mediation scheme is governed by Code of Civil Procedure sections 1775 through 1775.15. Under those statutes, “‘mediation’ means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.” (Code Civ. Proc., § 1775.1, subd. (a).) Trial courts are granted discretion to order cases to mediation as an alternative to judicial arbitration, and the costs of that mediation are borne by the court. (Code Civ. Proc., §§ 1775.2, 1775.3, 1775.4, 1775.5, 1775.8, 1141.18, 1141.28.) “The court shall not order a case into mediation where the amount in controversy exceeds fifty thousand dollars ($50,000).” (Code Civ. Proc., § 1775.5.)

“Amenability of a particular action for mediation must be determined on a case-by-case basis,” and the decision to send it to mediation “must be made by the court after consideration of the expressed views of the parties on the amenability of the case to mediation.” (Cal. Rules of Court, rule 3.891(a) (1), (b).) “Even after a case has been ordered to mediation, the mediator must inform the parties that participation in mediation is completely voluntary, refrain from coercing a party to continue its participation in the mediation and respect the right of each party to decide the extent of its participation or withdraw from the mediation.” (Jeld-Wen, Inc. v. Superior Court (2007) 146 Cal.App.4th 536, 541; Cal. Rules of Court, rule 3.853.) “Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order.” (Advisory Com. com., Deering’s Ann. Codes, Rules (2018 ed.) foll. rule 3.853.)

As a practical matter, it is unlikely a trial court will order an action to mediation if the parties do not express interest in mediation or indicate it is not likely they will be able to resolve the matter through mediation. Whether the parties mediate pursuant to a private agreement to do so or pursuant to a court order, made after consulting the parties for their views on the amenability of the case to mediation, mediation is likely to occur only if the parties believe there is a realistic potential for reaching a settlement of the litigation.

Berkeley contends the mediation fees were not reasonably necessary, and therefore were not assessable as costs, solely because the mediation was voluntary, rather than court-ordered. We decline to adopt the blanket rule Berkeley advocates: that fees incurred for mediation that is not court-ordered are categorically not “reasonably necessary to the conduct of the litigation,” and therefore are not allowable as costs as a matter of law.

Under the statutes authorizing court-ordered mediation, the parties may have significant impact on the court’s decision to order, or not order, the case to mediation, because the trial court must consider the expressed views of the parties on the amenability of the case to mediation before it makes the order. (Cal. Rules of Court, rule 3.891(a)(1).) If the trial court orders a case to mediation, we may take that as an indication of the court’s belief mediation is reasonably necessary in that case. The absence of a court order, however, is not an indication mediation is not reasonably necessary, at least when the case did not qualify for court-ordered mediation.

Adopting Berkeley’s suggested rule would amount to finding that mediation is reasonably necessary only in some cases in which the amount in controversy is $50,000 or less, and is never reasonably necessary where the amount in controversy exceeds $50,000. The fees in the latter cases would be disallowed without consideration of the circumstances of the particular case and whether, under those circumstances, mediation was a reasonably necessary means of attempting to resolve the dispute and avoid the expense of a trial. We decline to adopt such an arbitrary categorical rule.

In Gibson v. Bobroff (1996) 49 Cal.App.4th 1202 (Gibson), the court determined that an award of costs for court-ordered mediation could be made under the discretionary provision of the costs statute (Code Civ. Proc., § 1033.5, subd. (c)(4)). There, the plaintiff prevailed at trial, and was awarded costs, including his share of the mediator’s fees from a pretrial mediation. (Gibson, supra, 49 Cal.App.4th at p. 1205.) On appeal, the defendants argued the trial court abused its discretion by awarding mediation fees as costs, because they were not reasonably necessary to the conduct of the litigation. (Id. at p. 1207.) The court held “that when an unsuccessful mediation has been court-ordered, reasonably necessary expenses incident thereto may, in the sound discretion of the trial court, be awarded after trial to a prevailing party.” (Id. at p. 1209.) Although the Gibson court expressly did not “decide whether a party prevailing after a trial which is preceded by unsuccessful voluntary mediation would be entitled to such costs” (Id. at p. 1209, fn. 7), it recognized the need for mediation in litigation.

“Like the related arbitration scheme, mediation is fundamental to the conduct of litigation as it encourages the parties to settle their disputes before trial and exposes parties who fail to agree to a reasonable settlement proposal to the risk of a discretionary court determination that they should pay their opponent’s share of the failed mediation.” (Gibson, supra, 49 Cal.App.4th at p. 1209.) The court rejected the defendants’ argument that, because the aim of mediation was to avoid trial, mediation costs could not be construed to be allowable costs from cost awards, it could have easily included fees from mediation not ordered by the court in the list of costs that are not allowable (Code Civ. Proc., § 1033.5, subd. (b)).

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3. If the Legislature had intended such a categorical exclusion from cost awards, it could have easily included fees from mediation not ordered by the court in the list of costs that are not allowable (Code Civ. Proc., § 1033.5, subd. (b)).
reasonably necessary to the conduct of the litigation. (Id. at p. 1209.) The court noted the same was true of contractual and judicial arbitration, the fees for which may be awarded as costs. “Encouraging the parties to resolve lawsuits at the earliest time and before a costly and time-consuming trial, is a necessary part of litigation as conducted in this state. The award of mediation fees is no less reasonably necessary to the conduct of litigation, than the award of arbitrator’s fees …, which costs are also statutorily authorized.” (Ibid.)

We conclude mediation fees incurred for mediation that was not ordered by the court are not categorically non-recoverable as “not reasonably necessary to the conduct of litigation.” The question whether mediation fees should be awarded as costs in a particular matter must be determined based on the facts and circumstances of the particular action. Berkeley does not contend the trial court erred in assessing the facts and circumstances of this case, when it made its determination that the mediation fees should be awarded. Consequently, Berkeley has not established any reversible error in the trial court’s award of mediation fees as costs.

**DISPOSITION**

The judgment is modified to delete from the award of costs the amount of $6,486.25, which was awarded to University for deposition fees it paid to Berkeley’s expert witnesses. As so modified, the judgment is affirmed. University is entitled to its costs on appeal.

HILL, P.J.

WE CONCUR: DETJEN, J., SNAUFFER, J.

**COUNSEL**

Gibson, Dunn & Crutcher, Jesse A. Cripps, Perlette Michèle Jura, Joseph C. Hansen and Theodore M. Kider for Plaintiffs and Appellants.


Xavier Becerra, Attorney General, Thomas S. Patterson, Assistant Attorney General, Mark R. Beckington and R. Matthew Wise, Deputy Attorneys General, for Defendants and Respondents.

**OPINION**

Plaintiffs Nisei Farmers League and California Building Industry Association filed this action in the trial court challenging the constitutional validity of Labor Code section 226.2, a recently enacted law articulating wage requirements applicable where an employer uses a piece-rate method of compensating its employees. The complaint was brought against the state labor agencies and agency officials responsible for enforcing the wage law (defendants). In their complaint, plaintiffs alleged among other things that provisions of section 226.2 were so uncertain as to render the statute void for vagueness. Other constitutional challenges to the

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1. Unless otherwise indicated, all further statutory references are to the Labor Code.

2. The defendants named in the complaint are: California Labor and Workforce Development Agency; David M. Lanier, in his official capacity as Secretary of California Labor and Workforce Development Agency; Department of Industrial Relations; Christine Baker, in her official capacity as Director of the Department of Industrial Relations; Division of Labor Standards Enforcement; Julie A. Su, in her official capacity as California Labor Commissioner.
validity of section 226.2 were premised on allegations that the statute would be applied retroactively. Defendants demurred to the complaint, arguing that the wording of section 226.2 was not unconstitutionally vague and that the other constitutional challenges asserted in plaintiffs’ complaint were without merit because the statute was not retroactive. The trial court agreed with defendants’ analysis, sustained the demurrer without leave to amend, and entered a judgment of dismissal. In doing so, the trial court also declined to grant plaintiffs’ request for declaratory relief relating to an affirmative defense created by the statute. Plaintiffs appeal from the judgment.

Based on our review of the pertinent issues, we conclude that plaintiffs failed to allege an adequate basis for finding the statute to be facially unconstitutional. We also conclude that denial of the declaratory relief requested was appropriate. Thus, the demurrer was properly sustained without leave to amend. For these and other reasons more fully explained below, the judgment of the trial court is hereby affirmed.

LEGAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Represent Employers Using Piece-Rate Wage Systems

Plaintiffs are organizations that claim to represent thousands of California employers in the agricultural and construction industries. Many of plaintiffs’ member employers pay their employees on a piece-rate basis because that method of compensation creates incentives for higher productivity. Under a piece-rate system, employees are not paid by the hour, but rather are compensated based on activities, tasks, or units of production completed (see Vaquero v. Stoneledge Furniture, LLC (2017) 9 Cal.App.5th 98, 109, fn. 7; Jackpot Harvesting Co., Inc. v. Superior Court (2018) 26 Cal. App.5th 125, 135 (Jackpot Harvesting), such as the quantity of produce picked, the number of yards of carpet installed, or the number of miles driven. Plaintiffs point out there are numerous studies showing that piece-rate systems which reward employee productivity generally lead to higher pay and cost savings to consumers. Plaintiffs allege that their “members’ employees regularly earn through piece-rate compensation sums that far exceed minimum wage or what they could expect to earn through hourly compensation.” California has long recognized that wages may be paid on a piece-rate basis. (§ 200 [defining “wages” as including all amounts for labor performed by employees “whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation”].)

According to plaintiffs, the employers they represent design their piece-rate wage systems to cover all work performed by their employees throughout the work day, including rest breaks. Allegedly, these employers are careful to ensure that piece-rate compensation fully complies with minimum wage requirements. They ensure compliance with the minimum wage law at the end of each pay period “by dividing the hours worked by the payment made and making any additional payment necessary to ‘true up’ the total compensation to reach at least minimum wage.” Plaintiffs further allege this piece-rate method of paying wages (including the method used to ensure compliance with minimum wage law) was understood by employers to be in accordance with established law, was the settled practice in the industry, and was consistent with defendants’ own publications providing guidance to employers.

The 2013 Court of Appeal Decisions

In 2013, two watershed Court of Appeal decisions upended the expectations of any employers who may have assumed that a piece-rate system carried out in the manner described above would fully comply with the law. These two decisions were Gonzalez v. Downtown LA Motors, LP (2013) 215 Cal. App.4th 36 (Gonzalez) and Bluford v. Safeway Inc. (2013) 216 Cal.App.4th 864 (Bluford).

In Gonzalez, automotive service technicians were paid piece-rate compensation based on the completion of repair tasks. The plaintiffs in Gonzalez, a class of former technicians who had worked for the defendant employer, claimed that they should be paid a separate hourly minimum wage for time spent during their workshifts waiting for vehicles to repair and performing other nonrepair tasks directed by the employer, even though the employer supplemented the technicians’ compensation at the end of the pay period to cover any shortfall between the piece-rate compensation and minimum wage for all hours worked. (Gonzalez, supra, 215 Cal.App.4th at p. 40.) The Court of Appeal concluded the plaintiffs’ legal position was correct and held that they were “entitled to separate hourly compensation for time spent waiting for repair work or performing other nonrepair tasks directed by the employer during their workshifts ....” (Id. at pp. 40–41.) As explained in Gonzalez, even though the employer in that case paid its employees on a piece-rate basis rather than hourly, the employees’ nonproductive work time that was not part of the compensated piece-rate activity of repairing cars had to be separately compensated to satisfy minimum wage law, since the minimum wage law applied to each hour worked. Accordingly, the employer’s practice of averaging hourly wages at the end of the pay period (by

3. We note that California’s minimum wage requirements are set forth in a series of wage orders promulgated by the Industrial Welfare Commission. (Gonzalez, supra, 215 Cal.App.4th at p. 43; see Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1026 [wage and hour claims governed by Labor Code and wage orders].) In Gonzalez, the relevant wage order, known as Wage Order No. 4, provides: “Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” (Gonzalez, supra, at p. 44, citing Cal. Code Regs., tit. 8, § 11040, subd. 4(B).) An identically-worded wage order is in place regarding minimum wages for agricultural workers. (See Cal. Code Regs., tit. 8, § 11140, subd. 4(B).)
dividing total compensation paid by the total hours worked over the course of the pay period) was insufficient to show compliance with the law. (*Id.* at pp. 40–42, 48–49.)

In so holding, the *Gonzalez* court expressly relied on the reasoning of *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 317–324 (*Armenta*). (*Gonzalez*, *supra*, 215 Cal.App.4th at pp. 40, 45–53.) In *Armenta*, where an employer paid its employees hourly wages for specified “productive” work time only, and did not pay the employees for other “nonproductive” work time, the appellate court concluded that the employer’s minimum wage obligation could not be met by averaging wages over the total hours worked in the pay period; rather, the California minimum wage law attached to each hour worked by the employees, including the unpaid nonproductive hours. (*Armenta*, *supra*, 135 Cal.App.4th at pp. 317, 321–324.) In finding *Armenta’s* analysis of California’s minimum wage law to be persuasive, *Gonzalez* rejected the employer’s argument that *Armenta*, as an hourly wage case, should not be applied to workers who are compensated on a piece-rate basis. Instead, *Gonzalez* directly applied *Armenta* to the piece-rate compensation system before it, following *Armenta’s* rule that averaging an employee’s wages for all hours spent on the job during the pay period (where the employee’s work time included both paid/productive and unpaid/nonproductive hours) would not suffice to show compliance with the minimum wage law for each hour worked. (*Gonzalez*, *supra*, 215 Cal.App.4th at pp. 40–41, 48–49, also citing *Cardenas v. McLane Foodservices, Inc.* (C.D.Cal. 2011) 796 F.Supp.2d 1246, 1252 [holding that “a piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked”]; see also *Vaquero v. Stoneledge Furniture, LLC*, *supra*, 9 Cal.App.5th at p. 110 [noting “[a]ll of the federal courts that have considered this issue of California law have reached a similar conclusion and have held employers must separately compensate employees paid by the piece for nonproductive work hours.”]).

In *Bluford*, the second of the two 2013 decisions impacting piece-rate compensation practices, a Safeway truck driver sued Safeway for failure to pay its truck drivers for their rest periods. It was alleged that under Safeway’s piece-rate wage system, compensation was paid to truck drivers based on miles driven and the performance of certain tasks, but the system did not provide any payment for rest periods. (*Bluford*, *supra*, 216 Cal.App.4th at p. 870.) Safeway responded that payment for rest periods was indirectly provided as part of its overall piece-rate system by being subsumed in the mileage rates it paid to its drivers. (*Id.* at p. 871.) The Court of Appeal rejected Safeway’s argument, explaining as follows: “[U]nder the rule of *Armenta* [, *supra*.] 135 Cal.App.4th 314, 323 rest periods must be separately compensated in a piece-rate system. Rest periods are considered hours worked and must be compensated. [Citations.] Under the California minimum wage law, employees must be compensated for each hour worked at either the legal minimum wage or the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation. [Citations.]”

Thus, contrary to Safeway’s argument, a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law.” (*Bluford*, *supra*, 216 Cal.App.4th at p. 872.) Further, in rejecting Safeway’s argument that payment for expected rest periods was intended to be built into the mileage rates it paid, the Court of Appeal explained: “Even if that is so, it is akin to averaging pay to comply with the minimum wage law instead of separately compensating employees for their rest periods at the minimum or contractual hourly rate, and, as we have explained, it is not allowed under California labor law.” (*Ibid.*)

**Enactment of Section 226.2**

In response to the *Gonzalez* and *Bluford* decisions, the California Legislature, through Assembly Bill No. 1513, enacted section 226.2, which among other things sought to clarify the statutory requirements for piece-rate compensation by codifying the *Gonzalez* and *Bluford* decisions. (Stats. 2015, ch. 754, § 4, eff. Jan. 1, 2016; see Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 1513 (2015-2016 Reg. Sess.) Sept. 3, 2015; see also, *Jackpot Harvesting, supra*, 26 Cal.App.5th at pp. 135, 146.) The new law took effect on January 1, 2016, and not only codified the holdings of *Gonzalez* and *Bluford* by “providing for separate payment for nonproductive work time and for rest periods when employees are compensated on a piece-rate basis,” but also created certain “safe harbors” that would provide an affirmative defense to employers regarding past failures to separately pay piece-rate employees for rest periods and nonproductive time. (*Certified Tire & Auto Service Center Wage & Hour Cases* (2018) 28 Cal.App.5th 1, 12; see *Jackpot Harvesting, supra*, 26 Cal.App.5th at pp. 143–148.)

Why was the affirmative defense included in the new law? Apparently, many employers had not come to terms with the unexpected changes to piece-rate law created by the *Gonzalez* and *Bluford* decisions, and thus the affirmative defense was added to protect employers from potential statutory penalties and damages on the condition they promptly make certain payments of previously (i.e., pre-2016) unpaid rest periods and nonproductive time. (See *Jackpot Harvesting, supra*, 26 Cal.App.5th at pp. 145–146 [noting legislative committee comments on rationale for affirmative defense]; see also *Fowler Packing Company, Inc. v. Lanier* (9th Cir. 2016) 844 F.3d 809, 812 [“[t]o protect California businesses from unforeseen liability arising from *Gonzalez* and *Bluford*, … AB 1513 also created a ‘safe harbor’ that provided employers with an affirmative defense against claims alleging failure to pay previously for nonproductive work time” “so long as they pay, no later than December 15, 2016,” certain sums specified in the statute.] )
Turning to the specific language of the statute, section 226.2 subdivision (a)(1) states that piece-rate employees “shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.” The term “other nonproductive time” is defined as “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.” (§ 226.2.) Further, subdivision (a) specifies that the separate compensation for rest and recovery time must be at an hourly rate that is no less than the applicable minimum wage, and in some instances must be greater than minimum wage, depending on a statutory formula. (§ 226.2, subd. (a)(3)(A), (B).) Similarly, the separate compensation for employees’ other nonproductive time must be no less than the applicable minimum wage. (§ 226.2, subd. (a)(4).) As should be evident from our discussion above, the provisions of section 226.2 subdivision (a), comprise the Legislature’s effort to codify the Gonzalez and Bluford decisions.

The affirmative defense provided to employers of piece-rate workers regarding the employers’ past (pre-2016) failures to separately pay for rest/recovery periods and other nonproductive time is set forth in section 226.2, subdivision (b), which states in relevant part as follows:

“(b) Notwithstanding any other statute or regulation, the employer … shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, … based solely on the employer’s failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, an employer complies with all of the following:

“(1) The employer makes payments to each of its employees, except as specified in paragraph (2), for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015, inclusive, using one of the formulas specified in subparagraph (A) or (B):

“(A) The employer determines and pays the actual sums due together with accrued interest calculated in accordance with subdivision (c) of Section 98.1.

“(B) The employer pays each employee an amount equal to 4 percent of that employee’s gross earnings in pay periods in which any work was performed on a piece-rate basis from July 1, 2012, to December 31, 2015, inclusive, less amounts already paid to that employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time during the same time, provided that the amount by which the payment to each employee may be reduced for amounts already paid for other nonproductive time shall not exceed 1 percent of the employee’s gross earnings during the same time.

“[¶] … [¶]

“(3) By no later than July 1, 2016, the employer provides written notice to the department of the employer’s election to make payments to its current and former employees in accordance with the requirements of this subdivision ….

“[¶] … [¶]

“(4) The employer calculates and begins making payments to employees as soon as reasonably feasible after it provides the notice referred to in paragraph (3) and completes the payments by no later than December 15, 2016, to each employee to whom the wages are due ….”

In summary, section 226.2 subdivision (a) clarifies the statutory requirements for piece-rate compensation by confirming that, going forward from the law’s January 1, 2016 effective date, employers must compensate their piece-rate employees for rest and recovery periods and other nonproductive time “separate from any piece-rate compensation.” (§ 226.2, subd. (a)(1), italics added.) Meanwhile, section 226.2 subdivision (b) creates a safe harbor affirmative defense for those piece-rate employers who voluntarily elect to make certain payments of previously (i.e., pre-2016) unpaid compensation for rest/recovery periods and other nonproductive time. The affirmative defense would require payment by the employer to all affected employees by December 15, 2016, of “previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015,” with the amount of the employer’s payment to be calculated using one of two alternative formulas: (a) “actual sums due” plus accrued interest, or (b) a formula based on 4 percent of each affected employee’s gross earnings in the relevant pay periods. (§ 226.2, subd. (b)(1)(A) & (B).)

Additionally, to qualify for the affirmative defense, an employer was required to provide written notice to the department “no later than July 1, 2016” of the employer’s election to make the specified payments to employees in accordance with the provisions of the affirmative defense. (§ 226.2, subd. (b)(3).)
Plaintiffs’ Complaint Filed

On June 27, 2016, three days before the deadline for claiming the defense, plaintiff Nisei Farmers League filed its original complaint seeking injunctive and declaratory relief on the ground (among others) that certain material provisions of section 226.2 were unconstitutionally vague in violation of due process. Moreover, allegedly the law was so unclear that it was impossible for the employers represented by plaintiff to know what would be expected of them to comply with the terms of the affirmative defense or whether they should even make the election to commit to the requirements of the affirmative defense.

On July 25, 2016, the trial court denied Plaintiff Nisei Farmers League’s motion for preliminary injunction.

On September 15, 2016, an amended complaint was filed that named California Building Industry Association as an additional plaintiff, but otherwise made substantially the same allegations (the complaint). This was the operative pleading for purposes of the present appeal.

We briefly describe the causes of action set forth in the complaint. The first cause of action is for declaratory relief and seeks a judicial declaration that (i) the statutory phrase “other nonproductive time” is unconstitutionally void for vagueness, and that (ii) the statutory phrase “actual sums due,” the meaning of which was and is allegedly in dispute, should be construed to have the particular meaning urged by plaintiffs. The second, third and fourth causes of action similarly claim that key wording of section 226.2—e.g., “other nonproductive time”—is so vague that the statute allegedly violates constitutional due process, fails to provide adequate notice to employers of how to comply with the statute’s requirements and will result in arbitrary deprivation of property to employers. Further, the fifth, sixth and seventh causes of action allege that assuming the statutory phrase “actual sums due” in subdivision (b) of section 226.2 is interpreted to create retroactive liability and to retroactively impair past contractual relationships, the statute would violate due process, the takings clause and contracts clause of United States Constitution. Finally, the eighth cause of action for injunctive relief, which is premised on the same constitutional transgressions alleged in the preceding causes of action, seeks to enjoin the operation of the statute and/or to prevent or postpone the statutory deadlines for employers to pursue the affirmative defense set forth in section 226.2, subdivision (b).

Trial Court Sustains Defendants’ Demurrer

Defendants filed a general demurrer to the complaint. Regarding the second, third and fourth causes of action claiming section 226.2 is unconstitutionally vague, defendants argued in their demurrer that the statutory language is sufficiently clear, especially in light of existing case precedent giving context to the terminology, and in any event, plaintiffs failed to meet their heavy burden of demonstrating that the statute is facially unconstitutional. As to the fifth, sixth and sev-enth causes of action, which alleged constitutional invalidity based on section 226.2’s retroactive application, defendants persuasively argued that the statute was not retroactive, and therefore such causes of action were without merit. As to the first cause of action for declaratory relief and the eighth cause of action for injunctive relief, defendants argued in their demurrer that these causes of action were based upon the same flawed allegations as the other six causes of action—i.e., that section 226.2 is void for vagueness and imposes retroactive punishment. Because these foundational allegations were not correct, it was argued that the first cause of action and the eighth cause of action likewise failed to state a viable claim.

On November 30, 2016, the trial court heard oral argument on the demurrer. Following the hearing, the trial court issued its order sustaining the demurrer without leave to amend. The order reflected the trial court’s agreement with the reasoning presented in defendants’ demurrer.

Partial Declaratory Relief Denied

By motion filed prior to the demurrer hearing, plaintiffs requested partial declaratory relief regarding the meaning of the statutory term “actual sums due” as that term is used in subdivision (b) of section 226.2. By separate written order issued on the same day as the trial court’s demurrer ruling, the trial court denied the motion for partial declaratory relief as procedurally improper since there is no such distinct pretrial motion available for resolution of declaratory relief claims.

Plaintiffs’ Appeal

On January 27, 2017, plaintiffs filed a notice of appeal from the judgment entered by the trial court following the order sustaining demurrer without leave to amend. Plaintiffs’ appeal focuses on two core issues as to which the trial court allegedly erred and, unless corrected, allegedly make it impossible for their member employers to know if they are following the law: (i) Whether the term “other nonproductive time” is void for vagueness as was alleged in plaintiffs’ facial constitutional challenge to section 226.2, and (ii) whether declaratory relief for the purpose of clarifying the meaning of the allegedly disputed term “actual sums due” should have been granted by the trial court and/or whether this court should grant such relief.

DISCUSSION

I. STANDARD OF REVIEW

The present appeal involves questions of law to which we apply de novo review, including our consideration of issues relating to the interpretation or constitutionality of a statute (Finberg v. Manset (2014) 223 Cal.App.4th 529, 532), and our review of an order sustaining a demurrer without leave to amend (Wilson v. Hynek (2012) 207 Cal.App.4th 999, 1007). In reviewing an order sustaining a demurrer, we exercise our independent judgment on whether the complaint states a cause of action. (Palacin v. Allstate Ins. Co. (2004) 119 Cal.App.4th 855, 861.) We assume the truth of all properly
pleaded facts, but not contentions, deductions or conclusions of law or fact, and we give the complaint a reasonable interpretation. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) We also consider matters which may be judicially noticed. (Ibid.) “The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’” [Citation.] It is error, however, for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.” (Palestini v. General Dynamics Corp. (2002) 99 Cal.App.4th 80, 86.)

II. DEMURRER WAS PROPERLY SUSTAINED AS TO CONSTITUTIONAL CHALLENGES TO STATUTE

In the present appeal, plaintiffs contend the trial court erred in sustaining demurrer to the causes of action in plaintiffs’ complaint that were premised upon plaintiffs’ assertion that section 226.2 is unconstitutionally vague on its face. As explained below, we believe the trial court was correct in sustaining demurrer to the subject causes of action; that is, we conclude section 226.2 is not unconstitutionally vague.

A. Standard for Facial Constitutional Challenge

Before proceeding, we briefly summarize the standard by which we evaluate a facial constitutional challenge to the validity of a statute. In considering such a challenge, we consider only the text of the measure itself, not its actual application to the particular facts and circumstances of an individual. (Tober v. City of Santa Ana (1995) 9 Cal.4th 1069, 1084.) “In adjudicating such constitutional issues, our duty is clear: ‘We do not consider or weigh the economic or social wisdom or general propriety of the [challenged statute]. Rather, our sole function is to evaluate [it] legally in the light of established constitutional standards.’” (Califarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 814 (Califarm).) “[A]ll presumptions and intendants favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.” (Id. at p. 814.) If the validity of the measure is “‘fairly debatable,’” it must be sustained. (Id. at p. 815.) To repeat, “[i]f he courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendencies favor its validity.” (City of Los Angeles v. Superior Court (2002) 29 Cal.4th 1, 10–11, italics added.) “The standard for a facial constitutional challenge to a statute is exacting.” (Today’s Fresh Start, Inc. v. Los Angeles County Office of Education (2013) 57 Cal.4th 197, 218.) Under “the strictest requirement for establishing facial unconstitutionality,” the challenger must demonstrate that “the statute ‘inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.’” (Guardianship of Ann S. (2009) 45 Cal.4th 1110, 1126.) Where, as here, the statute is challenged on the ground that it is unconstitutionally vague, it is not enough to show the statute is ambiguous, uncertain or that it may require judicial construction or clarification: “‘Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear… In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct … a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that “the law is impossibly vague in all of its applications.”’” (Citations.) (People v. Kelly (1992) 1 Cal.4th 495, 533–534; accord, People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, 1116 (Acuna); see Rutherford v. California (1987) 188 Cal.App.3d 1267, 1276 (“statutes will be upheld unless their unconstitutionality as to vagueness clearly, positively and unmistakably appears”).)

B. Overview of Void-for-Vagueness Principles

To satisfy due process, a statute must be sufficiently clear to provide adequate notice of the prohibited or required conduct referred to therein. (In re Sheena K. (2007) 40 Cal.4th 875, 890 [a statute must be sufficiently clear to give “fair warning” or “‘adequate notice to those who must observe its strictures’”]; Schweitzer v. Westminster Investments, Inc. (2007) 157 Cal.App.4th 1195, 1206; Hall v. Bureau of Employment Agencies (1976) 64 Cal.App.3d 482, 491.) Thus, a statute will be deemed void for vagueness if it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to what is required. (In re Sheena K., supra, 40 Cal.4th at p. 890; Schweitzer v. Westminster Investments, Inc., supra, 157 Cal.App.4th at p. 1206.) Although these principles apply to both civil and criminal statutes, it is recognized that greater leeway is permitted regarding civil enactments, such as statutory regulation of economic or business matters, because the consequences of imprecision are qualitatively less severe. (Hoffman Estates v. Flipside, Hoffman Estates (1982) 455 U.S. 489, 498–499; see also Ford Dealers Assn. v. Department of Motor Vehicles (1982) 32 Cal.3d 347, 366 [standard of certainty higher for criminal statutes than civil statutes].)

At the same time, it is well established that the mere presence of some degree of ambiguity or uncertainty in the wording of a statute does not make the statute void for vagueness. “A statute is not unconstitutionally vague merely because its meaning ‘must be refined through application.’” (Cogan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 692, citing Ford Dealers Assn. v. Department of Motor Vehicles, supra, 32 Cal.3d at p. 367.) The fact that a statute contains “one or more ambiguities requiring interpretation does not make the statute unconstitutionally void on its face.” (In re Jorge M. (2000) 23 Cal.4th 866, 886.) Generally speaking, unanswered questions about particular problems of future application do not render a statute unconstitutional
on its face; rather, when such situations arise in which the statutory language must be interpreted and applied, they can be “resolved by trial and appellate courts ‘in time-honored, case-by-case fashion,’ by reference to the language and purposes of the statutory schemes as a whole.” (Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1202.)

In Acuna, supra, 14 Cal.4th 1090, the California Supreme Court set forth two core principles, endorsed by the United States Supreme Court, that are “reliable guides for applying the doctrine [of vagueness] in particular cases.” (Id. at p. 1116.) These two principles are (1) “that abstract legal commands must be applied in a specific context,” and (2) “the notion of ‘reasonable specificity’ [citation] or ‘[r]easonable certainty.’” (Id. at pp. 1116–1117.) As to the first principle, the Supreme Court noted that “[a] contextual application of otherwise unqualified legal language,” such as reading the words of the statute in light of its legislative purpose, “may supply the clue to a law’s meaning, giving facially standardless language a constitutionally sufficient concreteness.” (Id. at p. 1116.) As to the second principle, the Supreme Court reiterated the established rule that no more than a “reasonable degree of certainty” is required of statutory language, explaining that “‘few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions…. ’ [Citation.]” (Id. at p. 1117.)

Furthermore, it is important to note that a statute will be deemed to have a reasonable degree of certainty and thereby overcome a vagueness challenge “‘if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to [its legislative history or purposes].’” (Acuna, supra, 14 Cal.4th at p. 1117, quoting In re Marriage of Walton (1972) 28 Cal. App.3d 108, 116.) Thus, if the words of a statute may be made reasonably certain by reference to the common law, the legislative history of the statute involved, or the purpose of that statute, the legislation will be sustained. (Hall v. Bureau of Employment Agencies, supra, 64 Cal.App.3d at p. 494.)

“When assessing a facial challenge to a statute on vagueness grounds, courts should where possible construe the statute in favor of its validity and give it a reasonable and practical construction in accordance with the probable intent of the Legislature; a statute will not be declared void for vagueness or uncertainty if any reasonable and practical construction can be given its language. [Citation.] The statute must nevertheless be sufficiently clear to give fair warning of the prohibited or required conduct, although a statute not sufficiently clear may be made more precise by judicial construction and application of the statute in conformity with the legislative objective. [Citation.]” (Schweitzer v. Westminster Investments, Inc., supra, 157 Cal.App.4th at p. 1206.)

C. Plaintiffs’ Void-for-Vagueness Challenge Fails

Applying the principles outlined above, we conclude that the statutory phrase “other nonproductive time” in section 226.2 is not unconstitutionally vague. The statute explicitly defines “other nonproductive time” to mean “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.” (§ 226.2.) The language of the statutory definition is reasonably clear and specific and provides adequate notice of the nature of the conduct that is being described. Moreover, the concept of “other nonproductive time” did not arise in a vacuum. As we discussed previously herein at length, section 226.2, subdivision (a), was directly premised on the Gonzalez and Bluford Court of Appeal decisions relating to how piece-rate wages must be paid. In fact, section 226.2, subdivision (a), was enacted to clarify the statutory requirements for piece-rate compensation by codifying the Gonzalez and Bluford decisions. (See Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 1513 (2015-2016 Reg. Sess.) Sept. 3, 2015; see also Jackpot Harvesting, supra, 26 Cal.App.5th at pp. 135, 146.) Thus, the Gonzalez and Bluford decisions provide helpful context for understanding the meaning of section 226.2. Since Bluford addressed separate compensation for rest periods, which is not at issue in this appeal, we will focus our attention here on Gonzalez.

In Gonzalez, supra, 215 Cal.App.4th 36, where piece-rate wages were paid to automobile service technicians based on repair tasks performed, the court held that time spent by the service technicians under the employer’s control doing non-repair (i.e., nonproductive) activities, such as waiting for a vehicle to repair or performing other nonrepair functions at the employer’s direction, had to be separately compensated. (Gonzalez, supra, 215 Cal.App.4th at pp. 40–41.) In so holding, Gonzalez relied on principles set forth in Armenta, supra, 135 Cal.App.4th 314 regarding the application of the minimum wage law. (Gonzalez, supra, 215 Cal.App.4th at pp. 40, 45–49.) In Armenta, the employer classified its employees’ work hours as either productive or nonproductive, depending on whether the hours were related to maintaining utility poles in the field. Productive work hours were paid at an hourly rate, but the remaining work hours—deemed nonproductive—were not compensated. (Armenta, supra, 135 Cal.App.4th at pp. 317–318.) The employer had sought to comply with minimum wage law by means of averaging total compensation over the total number of hours worked (including productive and nonproductive time). Armenta held that to comply with California’s minimum wage law the employer was required to compensate its employees for each hour worked, including nonproductive time; thus, the employer may not simply divide the total hours worked into the amount the employee was paid for productive time to arrive at an average hourly wage. (Armenta, supra, 135 Cal.App.4th at pp. 317, 322–324.) The holding in Gonzalez, including its ap-
Application of *Armenta* in a piece-rate wage context, provided the foundation for the Legislature’s requirement in section 226.2, subdivision (a)(1), that “other nonproductive time” be separately compensated. As such, *Gonzalez* furnishes a fact-based concrete illustration of what was meant by the term “other nonproductive time,” thereby providing further clarity and certainty to the statute. (See *In re Marriage of Walton*, supra, 28 Cal.App.3d at p. 116 [statutory terms may be made reasonably certain by reference to its legislative history, purposes or other definable sources]; *Hall v. Bureau of Employment Agencies*, supra, 64 Cal.App.3d at p. 494 [case law or common law may help to render statute reasonably certain].) Thus, as the trial court correctly concluded in sustaining the demurrer in this case, the statutory language is discernable of meaning both in terms of plain English and in the context of the statutory scheme and applicable case law upon which the statute was based.

Nonetheless, plaintiffs argue the statute is unconstitutionally vague because it does not specifically define or spell out whether “other nonproductive time” that is not “directly related” to the activity being compensated includes (see § 226.2), among other things, such activities as “traveling between work sites, attending meetings, doing warm-up calisthenics, putting on protective gear, sharpening tools, waiting for additional equipment, or waiting for weather to change.” Plaintiffs’ argument fails because the constitution does not require that degree of detail in the writing of statutes. Section 226.2, like most statutes, “must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.” (*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340.) Not only is detailed specificity unnecessary, but it is recognized that the requirement of reasonable certainty “does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.” (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1400.) Thus, even though a statute’s wording is flexible and manageable brief, rather than meticulously specific, it is sufficient if it gives fair notice to those to whom it is directed. (*In re John V.* (1985) 167 Cal.App.3d 761, 768–769.) That is the case here, since, for the reasons discussed hereinafter, section 226.2 provides a reasonable degree of certainty in its definition of the term “other nonproductive activity.”

As was observed by the Supreme Court: “‘The presumptive validity of a legislative act militates against invalidating a statute merely ‘… because difficulty is found in determining whether marginal offenses fall within … [its] language.’” [Citations.] We are not obligated to ‘consider every conceivable situation which might arise under the language of the statute’ [citation], so long as it may be given ‘a reasonable and practical construction in accordance with the probable intent of the Legislature’ [citation].” (*People v. Smith* (1984) 35 Cal.3d 798, 810.)

Furthermore, although it is true that a piece-rate employer will have to implement the statutory requirement (that other nonproductive worktime be separately compensated) within the particular setting of its own employees’ work hours, job activities and the specific piece-rate wage involved, the need for reasonable and good faith application of a statutory standard is not grounds for finding it unconstitutionally vague. “A statute is not unconstitutionally vague merely because its meaning ‘must be refined through application.’” (*Cogan v. Leatherman Tool Group, Inc.*, supra, 135 Cal.App.4th 663, 692) [noting further that “[t]he replete with instances in which a person must … govern his conduct by such nonmathematical standards as ‘reasonable,’ ‘prudent,’ ‘necessary and proper,’ ‘substantial,’ and the like…’”].

Nor does the phrase “not directly related” as used within the definitional wording “time under the employer’s control … not directly related to the activity being compensated on a piece-rate basis” (§ 226.2, emphasis added) render the statute impermissibly vague. As pointed out by defendants, the term “directly related” is used in a variety of other statutes (see, e.g., Gov. Code, § 89513 [use of campaign funds must be “directly related” to a political, legislative or governmental purpose]; Ed. Code, § 35145.5 [intent of Legislature that members of the public be able to place matters “directly related” to school district business on the agenda of board meetings]), and courts have had no difficulty reasonably applying the phrase in these other contexts. (See, e.g., *Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 235–236.) In conclusion, while there may be some uncertainty as to the application of section 226.2 in some circumstances, nevertheless, we believe the statutory definition of the term “other nonproductive time” as “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis” (§ 226.2) provides an adequately discernable standard that possesses a reasonable degree of specificity. Thus, it is not unconstitutionally vague.

**D. Causes of Action Premised on Constitutional Violations Were Insufficient**

Because plaintiffs have failed to allege an adequate basis for showing that section 226.2 is unconstitutionally vague, the trial court properly sustained the demurrer to the causes of action premised upon that claim. This includes the second, third and fourth causes of action in plaintiffs’ complaint, along with a portion of the first cause of action for declaratory relief.

As to the fifth, sixth and seventh causes of action, which asserted claims for violation of due process, the takings clause and the contracts clause of the United States Constitution, each of these claims was expressly premised upon plaintiffs’ allegation that the statute would be applied retroactively. Specifically, the fifth cause of action alleged a due process violation arising from “retroactive punishment,” the sixth cause of action alleged a takings clause violation based on “severe retroactive liability,” and the seventh cause of ac-
tion alleged a contract clause violation based on substantial impairment of prior and existing contractual relationships. The crux of these claims was that, with respect to the affirmatory defense set forth in subdivision (b) of section 226.2 available to employers that are willing to pay “actual sums due” for previously (i.e., pre-2016) unpaid compensation for employees’ rest periods and “other nonproductive time,” the statute imposed new substantive requirements on employers retroactively.

However, contrary to plaintiffs’ allegations, nothing in the statutory language remotely suggests such a retroactive construction. Rather, as the trial court correctly explained: “Section 226.2 merely provides an affirmatory defense for employers who follow the specified procedures and pay amounts already owed for piece-work prior to the start date. There is nothing in the Section that revises how the amounts owed for prior work is calculated…. [¶] [Thus,] [t]he statute as written does not appear to apply retroactively. Since it does not apply retroactively, then Plaintiff has not stated a cause of action” in the fifth, sixth and seventh causes of action. We agree with the trial court’s assessment of the plain meaning of the statute on this issue. Under the statute’s clear terms, the affirmatory defense relates to “the employer’s failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015.” (§ 226.2, subd. (b).) Accordingly, for purposes of the affirmatory defense set forth in section 226.2 subdivision (b), the “actual sums due” for previously unpaid compensation would be the sums due under the existing law prior to 2016—that is, the amounts that were due under the law in effect at the time the obligation to pay the compensation accrued. Thus, plaintiffs have failed to show that section 226.2 imposed new legal requirements on employers that were made effective retroactively.

As to the fifth, sixth and seventh causes of action, plaintiffs’ appeal has failed to present any cogent argument to support the alleged claims of unconstitutional retroactivity, and only a perfunctory mention is made of these claims, which we treat as abandoned. In any event, “[A]ll presumptions and intemdsments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.’ ” (Calfarm, supra, 48 Cal.3d at p. 814.) If the validity of the measure is “fairly debatable,” it must be sustained. (Id. at p. 815.) Nothing has been alleged or argued by plaintiff to overcome the presumption of statutory validity; nor is unconstitutionality clearly or unmistakably apparent from the statute itself. From all that has been said, we conclude that plaintiffs have failed to meet the exacting standards for a facial constitutional challenge to a statute. (See Today’s Fresh Start, Inc. v. Los Angeles County Office of Education, supra, 57 Cal.4th at p. 218.) Thus, the demurrer to the fifth, sixth and seventh causes of action was properly sustained by the trial court.

Finally, the eighth cause of action for injunctive relief was based on the same defective constitutional challenges to the validity of the statute as were alleged in the preceding causes of action, and therefore the eighth cause of action was equally defective and failed to state a cause of action for injunctive relief. The demurrer to the eighth cause of action was correctly sustained. Therefore, all of the causes of action in plaintiffs’ complaint that were premised on facial unconstitutionality of the statute were properly dismissed by the trial court.

This leaves only the portion of the first cause of action for declaratory relief seeking a judicial declaration relating to the construction of the phrase “actual sums due.” We deal with this aspect of the declaratory relief cause of action below.

III. DECLARATORY RELIEF CAUSE OF ACTION

A portion of plaintiffs’ first cause of action for declaratory relief sought a judicial declaration to resolve an alleged dispute as to the meaning of the phrase “actual sums due” set forth in the affirmative defense provided to employers under section 226.2, subdivision (b). As noted previously herein, section 226.2 subdivision (b) created a safe harbor affirmatory defense for those piece-rate employers who voluntarily elect to make certain payments of previously (i.e., pre-2016) unpaid compensation for rest/recovery periods and other nonproductive time. According to the terms of the statute, the affirmatory defense would require payment to all affected employees by December 15, 2016 of “previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015,” and the particular amount of the employer’s payment was to be calculated using one of two alternative formulas: (a) “actual sums due” plus accrued interest, or (b) a formula based on 4 percent of each affected employee’s gross earnings in the relevant pay periods. (§ 226.2, subd. (b)(1)(A) & (B), italics added.)

There were two orders made by the trial court relating to the subject declaratory relief cause of action which are discussed in plaintiffs’ appeal: (i) an order denying plaintiffs’ motion for declaratory relief, and (ii) the order sustaining demurrer without leave to amend. We briefly describe both orders. Prior to the hearing on the demurrer, plaintiffs filed a motion for partial declaratory relief as a means of obtaining an expedited judicial determination of the legal dispute raised in that cause of action concerning the statutory phrase “actual sums due.” The trial court denied the motion on the procedural ground that there is no stand-alone dispositive motion for declaratory relief authorized by the Code of Civil Procedure or elsewhere, and the trial court pointed out that if plaintiffs wanted to pursue such relief by a motion procedure it should have done so under the recognized process

5. We note that the prior law in effect would obviously include, from their issuance dates in 2013, the Gonzalez and Bluford decisions.
of a motion for judgment on the pleadings and/or a motion for summary judgment or adjudication. The trial court noted further that the motion was not brought under the court’s inherent power to adopt, when necessary, any suitable method or practice in the interest of justice (see, e.g., Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 967 [discussing courts’ inherent powers]), and we think that implicit in the overall analysis of the trial court’s order was the fact that there did not appear to be any need to adopt a new procedure where existing statutory procedures were suitable and readily available. In any event, by merely declining to rule, the trial court made no disposition at that time of the declaratory relief cause of action. Thus, the declaratory relief cause of action remained intact until the trial court sustained the demurrer without leave to amend. For this reason, it appears that the trial court’s order sustaining the demurrer is the critical order for purposes of this appeal. If the demurrer was properly sustained without leave to amend, then we need not consider the ruling on the motion for declaratory relief. In its order sustaining demurrer without leave to amend, in addressing the declaratory relief cause of action relating to the statutory phrase “actual sums due,” the trial court explained that the demurrer was being sustained because the nature of the particular declaration sought by plaintiffs did not appear to be an issue or controversy which it could properly decide but would be better directed to the Court of Appeal.

In the present appeal relating to the subject declaratory relief cause of action, plaintiffs argue that the trial court erred in refusing to grant the motion for declaratory relief and erred in sustaining the demurrer. Furthermore, plaintiffs argue that we should proceed to grant the requested declaratory relief in our decision on these issues. In response, defendants argue that the purported “dispute” is not real or actual because the pre-existing law that would inform employers of the meaning of the term “actual sums due” is clear. Defendants point out that a party may not contrive a dispute simply because they disagree with a law. As will be seen in the discussion below, we agree with the trial court’s outcome of sustaining the demurrer to this cause of action without leave to amend, but we do so for somewhat different reasons. We also clarify some basic matters bearing on the allegedly disputed issues, but ultimately refrain from going beyond that because it would entail making an advisory opinion.

A. Relevant Allegations of First Cause of Action for Declaratory Relief

In the first cause of action, plaintiffs alleged that defendants were taking the position that “actual sums due” requires paying for pre-2016 piece-rate work based on broad interpretations of Bluford and Gonzalez. Plaintiffs alleged that they disagree with defendant’s position that Bluford and Gonzalez applied to all piece-rate employment systems. Allegedly, “[p]laintiffs contend, and [d]efendants dispute,” that “actual sums due” for pre-2016 piece-rate work does not require any additional or separate payment if plaintiffs’ members “compensated employees on a piece-rate basis that equaled at least the minimum wage for all hours worked.” The cause of action alleged that the disputed issues included (i) “Whether an employer can set the piece rate to cover all work performed”; (ii) “Whether ‘actual sums due’ requires payment to be determined by the law as it existed before 2016 or to be determined by the law after January 1, 2016 and based on Section 226.2’s prospective requirements”; and (iii) “Whether non-piece-rate work or ‘other nonproductive time’ from July 1, 2012 through December 31, 2015 must be paid separately and in addition to payments already made as part of ‘actual sums due,’ when employees already were compensated on a piece-rate basis that covered the time worked and equaled at least the minimum wage for all hours worked.”

Plaintiffs’ opening brief attempts to distill the issues and requests that we rule that under pre-2016 law, an employer could “design a piece rate to cover all work performed (including rest breaks), and limit, distinguish, or depart from Gonzalez and Bluford to the extent they suggest otherwise.”

B. Some Basic Issues Clarified

Preliminarily, as we recognized in our discussion above, the statutory phrase “actual sums due” for previously unpaid compensation plainly refers to the sums that were due under the preexisting law—that is, compensation due under the law in effect prior to 2016. The briefing in this appeal reflects that all parties are in agreement with this basic acknowledgement of the nature of this law.

We would also clarify one additional point. To a significant extent, the crux of the dispute as alleged by plaintiffs is the question of what the pre-2016 law was regarding piece-rate compensation, since an answer to that question would be necessary to determine the actual sums that were due at that former time. The clear answer to that question is that the piece-rate compensation law generally in effect prior to the January 1, 2016, enactment of section 226.2 was Gonzalez and Bluford, at least from the time of the issuance of those decisions in 2013. Both were premised on important minimum wage law policy articulated in Armenta, and both applied those principles to the piece-rate setting even though the employer may have attempted to satisfy minimum wage law through post-hoc averaging. (See Gonzalez, supra, 215 Cal.App.4th at pp. 40–41, 44–49; Bluford, supra, 216 Cal. App.4th at pp. 870–873.) Generally speaking, then, after Gonzalez and Bluford were final, employers would have been required to separately compensate piece-rate employees for nonproductive/uncompensated time (i.e., time spent on non-piece-rate activities directed by the employer) and for rest periods. Also, we note that this conclusion is consistent with the main point for creating the affirmative defense, which was to provide a safe harbor to employers who were caught off guard by the changes caused by the Gonzalez and Bluford decisions to the piece-rate law. (See Jackpot Harvesting, supra, 26 Cal.App.5th at pp. 145–146 [noting legislative committee comments on rationale for affirmative defense];
see also Fowler Packing Company, Inc. v. Lanier, supra, 844 F.3d at p. 812 [“[t]o protect California businesses from unforeseen liability arising from Gonzalez and Bluford, … AB 1513 also created a ‘safe harbor’ that provided employers with an affirmative defense against claims alleging failure to pay previously for nonproductive work time” “so long as they pay, no later than December 15, 2016,” certain sums specified in the statute].

C. No Cause of Action for Advisory Opinion

Plaintiffs’ declaratory relief cause of action sought a declaration of a more definitive nature than what we have clarified above. In essence, plaintiffs requested a judicial declaration that, under pre-2016 law, employers could devise and implement piece-rate systems in which Gonzalez and Bluford were distinguishable, and thus, an employer prior to 2016 could permissibly design and implement a piece-rate wage to cover all work performed, such that no separate or additional compensation for rest breaks or so-called nonproductive time would be required.

Assuming, without deciding, that was potentially the case, we believe the issue would have to be decided on a case-by-case basis, depending on the particular facts and circumstances of the employer’s piece-rate system, including among other things the nature of the piece-rate wage, the nature of the tasks required of the employees during the workday, and whether each hour was accounted for and actually compensated, including rest breaks. Thus, giving plaintiffs the benefit of the doubt on this question, we do not have enough facts to render the kind of decision requested, and to do so based on generalized hypotheticals and propositions rather than on a concrete case and controversy would be a granting of an advisory opinion, which we may not do. (“Ibid.; see Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 117.) The ‘actual controversy’ referred to in this [the declaratory relief] statute is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts.” (Ibid.)

Because the substance of the declaratory relief cause of action, to the extent that it went beyond the basic issues we have clarified hereinabove, constituted a nonjusticiable request for an advisory opinion, we conclude that it was properly dismissed. Thus, as was the case regarding the other causes of action in plaintiffs’ complaint, the trial court correctly sustained the demurrer to the declaratory relief cause of action without leave to amend.

DISPOSITION

The judgment of the trial court is affirmed. Each party to bear their own costs on appeal.

LEVY, Acting P.J.

WE CONCUR: FRANSON, J., PEÑA, J.
ORDER MODIFYING OPINION AND DENYING REHEARING
NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed December 28, 2018 be modified as follows:

1. Throughout the opinion, insert “former” before “Rule 2-100” to read as “former Rule 2-100.”

2. The language of footnote 1 on page 3 is deleted and the following language inserted in its place:

All further rule references are to the California State Bar Rules of Professional Conduct unless otherwise indicated. Those rules were revised and renumbered effective November 1, 2018. The substance of former Rule 2-100(A), at issue in this case, became Rule 4.2(a) of the revised Rules. We refer to “former Rule 2-100” throughout the opinion for purposes of this appeal.

The petition for rehearing is denied.
There is no change in judgment.

HUFFMAN, Acting P. J.

Copies to: All parties