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SUMMARIES

Civil Procedure

Pretrial settlement offer not invalid under §998 because it combined multiple plaintiffs’ claims (Lavin, J.)

Gonzalez v. Lew

C.A. 2nd; February 1, 2018; B271312

The Second Appellate District affirmed a trial court order. The court held that a pretrial settlement offer was not invalid under Code Civ. Proc. §998 merely because it combined the claims of two sets of plaintiffs.

Virginia Gonzalez and three-year-old Maverick Crowder died when the rental home they were living in caught fire. Virginia and Maverick were unrelated. Both decedents’ heirs sued Wayne and Maria Lew, who owned the rental home. Prior to trial, the two sets of heirs made a joint offer to settle their claims for $1.5 million. The Lews rejected the offer. The heirs prevailed at trial. The jury awarded Virginia’s heirs more than $2.2 million and Maverick’s heirs just over $357,000. Plaintiffs moved for costs under §998. The trial court granted the motion.

The Lews appealed, arguing that plaintiffs’ settlement offer was not a valid offer under §998 because the offer concerned two independent wrongful death claims and did not allow them to evaluate each claim independently.

The court of appeal affirmed, holding that the §998 settlement offer was valid. The fact that the settlement offer encompassed both claims did not preclude the Lews from evaluating the offer. The Lews could have evaluated their exposure on the wrongful death claims individually and then added the figures together. If they fared better under plaintiffs’ offer, it would have been prudent to accept it. Plainly, the Lews did not anticipate that either wrongful death claim, standing alone, would exceed the settlement offer. This was thus precisely the situation in which an additional cost award under §998 is appropriate and in furtherance of the goal of encouraging parties to accept reasonable settlement offers.

Copyrights

Positioning of two dolphins underwater is not protectable element of artwork (Gould, J.)

Folkens v. Wyland Worldwide, LLC

9th Cir.; February 2, 2018; 16-15882

The court of appeals affirmed a district court judgment. The court held that the positioning of two dolphins underwater is not a protectable element of a drawing.

Peter Folkens sued Robert Wyland and related entities for copyright infringement, alleging that Wyland infringed on Folkens’ pen and ink depiction of two dolphins crossing underwater. Folkens contends that Wyland’s depiction of an underwater scene infringed on his drawing by copying the crossing dolphins, and that the similar element of two dolphins crossing underwater was protectable under copyright law, entitling him to proceed to trial on the issue of whether Wyland’s painting violates his copyright.

The court of appeal affirmed, holding that two dolphins crossing underwater was not a protectable element under the objective standard of the court’s extrinsic test for substantial similarity. The depiction of two dolphins crossing underwater was an idea that was found first in nature and was thus not a protectable element. Where, as here, the only areas of commonality between two works are elements first found in nature, expressing ideas that nature has already expressed for all, a claim of copyright infringement need not be permitted to go to a trier of fact.
Criminal Law

Arizona conviction for attempted armed robbery constitutes crime of violence (Friedland, J.)

*United States v. Molinar*

9th Cir.; November 29, 2017; 15-10430

The court of appeals affirmed a district court judgment. The court held that the defendant’s prior conviction under Arizona law for attempted armed robbery constituted a crime of violence.

Rogelio Molinar pleaded guilty to being a felon in possession of ammunition. Molinar’s prior convictions included an Arizona conviction for attempted armed robbery. Finding the prior Arizona conviction to be a crime of violence, the district court sentenced Molinar accordingly.

Molinar appealed, arguing that although *United States v. Taylor*, 529 F.3d 1232 (9th Cir. 2008) found the Arizona crime of attempted armed robbery to be a crime of violence, that decision was clearly irreconcilable with the Supreme Court’s intervening decision in *Johnson v. United States*, 559 U.S. 133 (2010), such that *Taylor* had to be deemed “effectively overruled.”

The court of appeals affirmed, holding that there was no sentencing error. Molinar’s analysis of *Johnson* was correct. Under *Johnson*, an Arizona conviction for attempted armed robbery cannot be deemed a crime of violence under §4B1.2’s force clause. It can, however, be deemed a crime of violence under §4B1.2’s enumerated felonies clause. Robbery under Arizona law is a categorical match to generic robbery, the court found. Attempt under Arizona law is also equivalent to generic attempt. Molinar’s conviction thus constituted a crime of violence for purposes of §4B1.2. Judge W. Fletcher dissented, finding that Arizona’s definition of robbery is much broader than the generic definition and thus not a categorical match.

Criminal Law

Robberies under California and Alabama law did not qualify as violent felonies for purposes of sentencing under ACCA (Rakoff, J.)

*United States v. Walton*

9th Cir.; February 1, 2018; 15-50358

The court of appeals vacated a judgment of sentence and remanded. The court held that robberies under California and Alabama law did not qualify as violent felonies for purposes of sentencing under the Armed Career Criminal Act (ACCA).

Donnie Walton pleaded guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g). At the time, he had previously been convicted of four felonies: (1) assault with a deadly weapon, in violation of California Penal Code § 245(a)(1); (2) second-degree robbery, in violation of California Penal Code § 211; (3) first-degree robbery in violation of Alabama Criminal Code § 13A-8-41; and (4) attempted murder, in violation of Alabama Criminal Code §§ 13A-4-2 and 13A-6-2.

The sentencing court found that all four of these convictions were violent felonies for purposes of sentencing under the ACCA and sentenced Walton accordingly.

The court of appeals vacated the judgment of sentence and remanded, holding that two of Walton’s four prior convictions were not violent felonies under ACCA’s force clause. Robbery under Alabama law can be committed through the use of minimal force, such as that required to snatch a purse. It is thus not the “violent force” or “force capable of causing physical pain or injury to another person” required under the ACCA’s force clause. Similarly, a conviction for robbery under California law will be upheld even where the application of force is merely negligent or accidental. This also does not qualify under the ACCA’s force clause. The district court accordingly erred in finding Walton subject to ACCA’s fifteen-year mandatory minimum sentence, which requires at least three previous convictions of violent felonies.
**Environmental Law**

Clean Water Act prohibits indirect discharge of pollutants into Pacific Ocean (D.W. Nelson, J.)

**Hawai’i Wildlife Fund v. County of Maui**

9th Cir.; February 1, 2018; 15-17447

The court of appeals affirmed a district court judgment. The court held that the Clean Water Act (CWA) prohibits both the direct and the indirect discharge of pollutants into the Pacific Ocean.

The County of Maui operates four wells at the Lahaina Wastewater Reclamation Facility (LWRF). The wells serve as the county’s primary means of effluent disposal into groundwater and the Pacific Ocean. The county injects some 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells, at least some of which reaches the Pacific Ocean. Hawai’i Wildlife Fund and others sued the county for violation of the CWA.

The district court granted summary judgment in favor of plaintiffs, finding it undisputed that the county was discharging effluents into navigable waters in violation of the CWA.

The court of appeals affirmed, holding that the county’s indirect discharge of pollutants into the ocean, by way of groundwater, was just as much a violation of the CWA as would have been the case had the county dumped the pollutants directly into the ocean. The county could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without a National Pollutant Discharge Elimination System (NPDES) permit. It could not avoid CWA liability by doing so indirectly. To hold otherwise would make a mockery of the CWA’s prohibitions. Under the circumstances of this case, the district court properly concluded that the county discharged pollutants from its wells into the Pacific Ocean, in violation of the CWA. The district court also properly found that the county had fair notice of what was prohibited.

**Family Law**

Not in minors’ best interests to be placed with relative who had deliberately starved them (Aaron, J.)

**In re J.G.**

C.A. 4th; February 2, 2018; D072293

The Fourth Appellate District reversed dependency court orders. The court held that the dependency court abused its discretion in ordering dependent minors’ continued placement in a home where they had been starved.

Dependent minors N.C., P.G., J.G., and D.G. were placed in the care of their paternal aunt in February 2015. At the time of the placement, the three younger siblings were 22-month old P.G. and 10-month old twins J.G. and D.G. At the time of the placement, all three of the younger children were at or near an appropriate weight for their age. In October 2016, all three of the younger children were diagnosed with nonorganic failure to thrive. P.G. was hospitalized due to severe malnutrition. The county removed the minors from their aunt’s home and placed them in foster care. The children gained weight after being removed from their aunt’s care. By March 2017, the younger children were once again at an appropriate weight for their age. Upon seeing the minors in this condition, their aunt insisted they were obese and had been overfed. At the minors’ dispositional hearing in April 2017, a psychiatrist testified that the minors’ aunt posed a risk to their wellbeing because she steadfastly denied any wrongdoing with respect to their diagnoses of failure to thrive and insisted she was feeding them appropriately.

Finding no evidence of intentional harm to the minors, the dependency court ordered that they be returned to their aunt’s care. Upon being advised that the minors could not be returned to their aunt’s care because, due to her prior treatment of the minors, she had been listed on the Child Abuse Central Index and her home had been delicensed, the court directed that the minors be placed with her as soon as the county relicensed her home.

The court of appeal reversed, holding that the dependency court abused its discretion in ordering the minors returned to their aunt’s care. A home in which they almost starved was not a safe home. The record clearly showed that the minors’ aunt intentionally limited the children’s food portions, resulting in their diagnoses of severe malnutrition and nonorganic failure to thrive. That she may have lacked the intent to harm the children did not mitigate her failure to provide them adequate food.
Family Law

Child’s mere physical presence in petitioner’s home insufficient to show child was “received” into home (Premo, Acting P.J.)

W.S. v. S.T.

C.A. 6th; February 1, 2018; H042611

The Sixth Appellate District affirmed a family court order. The court held that receiving a child into one’s home for purposes of presumed parent status under Family Code §7611(d) requires more than a mere showing that the child was, at times, physically present in the petitioner’s home.

While separated from her husband, S.T. had a relationship with W.S. that resulted in her pregnancy. By the time their daughter was born, S.T. had reconciled with her husband. She nonetheless allowed W.S. regular visits with his daughter, bringing her to see him once or twice a week. She occasionally allowed their daughter to spend the night. When their daughter was about five years old, W.S. filed a petition to establish a parental relationship with his daughter. W.S. alleged he was her biological father and requested joint legal and physical custody and equal visitation.

The family court denied the petition, concluding that W.S. did not qualify as a presumed father under Family Code §7611(d).

The court of appeal affirmed, holding that the child’s mere physical presence in W.S.’s home was insufficient to qualify W.S. as having “received her into his home,” as required under §7611(d) for presumed parent status. A parent seeking presumed parent status under §7611(d) must show not only that the child was, at times, physically present in the petitioner’s home, but also that the petitioner assumed parental obligations and duties, demonstrated a commitment to the child, and provided support for the child. The family court here did not abuse its discretion in finding that W.S. failed to make such a showing.
Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 1189

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROGELIO SANCHEZ MOLINAR, Defendant-Appellant.


Robert Lally Miskell (argued), Appellate Chief; United States Attorney’s Office, Tucson, Arizona; for Plaintiff-Appellee.

ORDER The opinion filed on November 29, 2017, and appearing at 876 F.3d 953, is hereby amended as follows: On page 960, note 8, the citation “Commonwealth v. Zangari, 42 Mass. App.Ct. 931, 677 N.E.2d 702, 703 (1997) (“[W]here the snatching or sudden taking of property from a victim is sufficient to produce awareness, there is sufficient evidence of force to permit a finding of robbery.”) (quoting Commonwealth v. Davis, 7 Mass.App.Ct. 9,385 N.E.2d 278, 279 (1979)).” is deleted. In addition, on page 964, in the dissent, “see also United States v. Parnell, 818 F.3d 974, 982 (9th Cir. 2016) (Watford, J., concurring) (noting that at common law, “[t]o commit robbery, the defendant also had to use violence or intimidation to coerce the victim into parting with his property”)” is added after “Santiesteban-Hernandez, 469 F.3d at 830 (“The immediate danger element is what makes robbery deserving of great punishment than that provided for larceny.” (internal quotation marks omitted)).”

With the foregoing amendments, Judge Friedland and Judge Christen vote to deny the petitions for panel rehearing and rehearing en banc, and Judge Fletcher votes to grant the petitions. Appellant’s petition for panel rehearing, filed December 12, 2017, is DENIED. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed the same date, is DENIED. No future petitions shall be entertained.

OPINION FRIEDLAND, Circuit Judge:

Rogelio Sanchez Molinar challenges the district court’s imposition of a sentencing enhancement based on his prior Arizona conviction for attempted armed robbery, which the court treated as a “crime of violence” under the U.S. Sentencing Guidelines Manual (“USSG” or “Guidelines”). We previously decided in United States v. Taylor, 529 F.3d 1232 (9th Cir. 2008), that Arizona attempted armed robbery should be considered a crime of violence under the relevant Guidelines provision. Id. at 1238. But we must now reexamine that holding in light of the Supreme Court’s decision in Johnson v. United States, 559 U.S. 133 (2010), which construed a similarly worded crime-of-violence provision in the Armed Career Criminal Act (“ACCA”). Id. at 140. Although Johnson does require us to depart from some of our analysis in Taylor, we conclude that Arizona attempted armed robbery nonetheless qualifies as a crime of violence for reasons other than those relied upon in Taylor. Accordingly, we affirm.1

I. BACKGROUND

Molinar pled guilty to federal charges for being a felon in possession of ammunition. Among other prior felonies, Molinar had previously been convicted of attempted armed robbery under Arizona law.

In sentencing Molinar for the ammunition convictions, the district court applied the firearms guideline, which included an enhancement if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence.” U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(A) (U.S. SENTENCING COMM’N 2014).2 The guideline defined “crime of violence” by cross-referencing Section 4B1.2(a) and Application Note

1. We resolve Molinar’s other challenges to his sentence in a concurrently filed memorandum disposition.

2. The 2014 version of the Guidelines was in effect at the time of Molinar’s sentencing. Accordingly, all references to the Guidelines are to the 2014 version unless otherwise stated.
1 of the Commentary to Section 4B1.2. USSG § 2K2.1 cmt. n.1. At the time, Section 4B1.2(a) read as follows:

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another [known as the “force clause” or the “elements clause”], or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives [known as the “enumerated felonies clause”], or otherwise involves conduct that presents a serious potential risk of physical injury to another [known as the “residual clause”].

Id. § 4B1.2(a).

Application Note 1 to Section 4B1.2 (“Note 1”) stated that “[c]rime of violence’ includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling,” as well as “attempting to commit” a crime of violence. USSG § 4B1.2 cmt. n.1.

The district court held that Molinar’s prior Arizona conviction for attempted armed robbery qualified as a crime of violence, triggering the enhancement in Section 2K2.1(a)(4)(A). The resulting sentencing range was 46 to 57 months, and the district court imposed a sentence of 44 months. Without the crime of violence enhancement, Molinar’s sentencing range would have been 27 to 33 months.

Molinar appealed, arguing that the district court erred in treating his Arizona conviction as a crime of violence.

II. ANALYSIS

We use the categorical approach to determine whether a state crime qualifies as a crime of violence for Guidelines purposes. See United States v. Rendon-Duarte, 490 F.3d 1142, 1146 (9th Cir. 2007). Under that approach, we look “only to the fact of conviction and the statutory definition of the prior offense,” not to the defendant’s actions underlying the conviction. United States v. Gomez-Hernandez, 680 F.3d 1171, 1174 (9th Cir. 2012) (quoting United States v. Espinoza-Can, 456 F.3d 1126, 1131 (9th Cir. 2006)). “State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because ‘we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized.”’ United States v. Strickland, 860 F.3d 1224, 1226–27 (9th Cir. 2017) (alterations in original) (quoting Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013)). Applying the categorical approach here, we conclude that Arizona attempted armed robbery is a crime of violence, but for reasons different than those we relied upon in United States v. Taylor, 529 F.3d 1232 (9th Cir. 2008).

A. Effect of Johnson on Taylor’s “Crime of Violence” Holding

We held in Taylor that Arizona attempted armed robbery was a crime of violence for Guidelines purposes. Id. at 1237–38. Based solely on the text of Arizona’s armed robbery statute, we concluded that “[a]rmed robbery under Arizona law involves the threat or use of force; therefore, that offense is a crime of violence pursuant to” the force clause of Section 4B1.2(a)(1). Id. at 1237. Molinar contends that the Supreme Court’s intervening decision in Johnson v. United States, 559 U.S. 133 (2010), is clearly irreconcilable with our crime of violence holding in Taylor and urges us to treat Taylor as “effectively overruled.” See Miller v. Gammie, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). We thus evaluate whether Taylor’s determination that Arizona attempted armed robbery is a crime of violence under Section 4B1.2’s force clause survived Johnson. We hold that it did not.

The Supreme Court in Johnson analyzed the ACCA’s “violent felony” definition. The Court evaluated whether the term “physical force” in that definition was synonymous with the understanding of “force” under the common law and held that it was not. For common-law battery, the force element is “satisfied by even the slightest offensive touching.” See Johnson, 559 U.S. at 138–41. By contrast, the Court “th[ought] it clear that in the context of a statutory definition of ‘violent felony,’ the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person.” Id. at 140; see also id. (discussing similar conclusion reached in Leocal v. Ashcroft, 543 U.S. 1 (2004), about the statutory definition of “crime of violence” in 18 U.S.C. § 16).

We have applied Johnson’s definition of force in analyzing whether an offense constitutes a crime of violence under the force clause of Section 4B1.2 of the Guidelines. See United States v. Tucker, 641 F.3d 1110, 1117, 1124 (9th Cir. 2011); accord Johnson, 559 U.S. at 140 (discussing “crime of violence” and “violent felony” as equivalent terms). Thus, to qualify as a crime of violence under the force clause, an offense under state law—as interpreted by that state’s courts—must punish only conduct involving violent force as defined in Johnson.

In light of Johnson, we must assess whether Arizona courts apply the armed robbery statute to punish conduct

3. Recent Supreme Court decisions striking down the ACCA’s residual clause, see Johnson v. United States, 135 S. Ct. 2551, 2557 (2015), but upholding the Guidelines’ residual clause, see Beckles v. United States, 137 S. Ct. 886, 892 (2017), together with an amendment to the Guidelines’ enumerated felonies clause, see infra section II.B.1, have resulted in material differences between the two definitions that will likely limit our ability to treat the two as interchangeable in future cases. Those differences are not relevant to Molinar’s arguments about whether Taylor remains good law after Johnson, however, because the force clauses in the ACCA and the Guidelines remain identical.
that does not involve violent force. Arizona’s armed robbery statute provides:

A person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person or an accomplice:

1. Is armed with a deadly weapon or a simulated deadly weapon; or

2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

Ariz. Rev. Stat. § 13-1904(A). On its face, this statute does not require that the robber actually use or even threaten to use a weapon. Arizona courts have not imposed further requirements. See State v. Snyder, 311 P.3d 656, 659 (Ariz. Ct. App. 2013) (“[Section] 13-1904(A)(1) does not require the use or threatened use of the weapon, only that a defendant is ‘armed with a deadly weapon’ during the commission of the crime.”). Thus, merely possessing a fake gun during the commission of a robbery, even without mentioning it or brandishing it, would constitute armed robbery in Arizona.

Under the categorical approach, “we must presume that [Molinar’s] conviction rested upon [nothing] more than the least of the acts criminalized.” Strickland, 860 F.3d at 1226-27 (second and third alterations in original) (quoting Moncrieffe, 133 S. Ct. at 1684). Because merely possessing a fake gun during a robbery is no more violent within the meaning of Johnson than robbery itself, armed robbery is indistinguishable from robbery for the purposes of the categorical analysis under the force clause. See United States v. Parnell, 818 F.3d 974, 978–80 (9th Cir. 2016). Our analysis therefore turns on whether Arizona robbery involves sufficient force under Johnson.

Arizona’s robbery statute provides that “[a] person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.” Ariz. Rev. Stat. § 13-1902(A). The statute defines “force” as “any physical act directed against a person as a means of gaining control of property.” Ariz. Rev. Stat. § 13-1901(1). This broad statutory definition of “force” has not been narrowed by Arizona courts, other than by clarifying that the force must be “intended to overpower the party robbed.” State v. Bishop, 698 P.2d 1240, 1243 (Ariz. 1985); see also State v. Garza Rodriguez, 791 P.2d 633, 637 (Ariz. 1990).

Arizona courts have not required this “overpowering” force to be violent in the sense discussed by the Supreme Court in Johnson. In Lear v. State, 6 P.2d 426 (Ariz. 1931), a foundational robbery case, the Arizona Supreme Court held that simply snatching an article from a person’s hand or “surreptitiously tak[ing] from another’s pocket” is not robbery.4 Id. at 427 (quoting State v. Parsons, 87 P. 349, 350 (Wash. 1906)). But the court observed that “if the article is so attached to the person or clothes as to create resistance however slight,” the offense becomes robbery. Id. (quoting JOEL PRENTISS BISHOP, 2 BISHOP ON CRIMINAL LAW 864 § 1167 (John M. Zane & Carl Zollmann, eds., 9th ed. 1923)); see also id. (“The snatching [of] a thing is not considered a taking by force, but if there be a struggle to keep it, . . . the taking is robbery . . . .” (quoting FRANCIS WHARTON, 2 A TREATISE ON CRIMINAL LAW 1297 § 1089 (11th ed. 1912))).

Consistent with Lear’s analysis of force, in State v. Moore, No. 1 CA-CR 13-0649, 2014 WL 4103951 (Ariz. Ct. App. Aug. 14, 2014) (unpublished), the Arizona Court of Appeals affirmed a robbery conviction that involved only a minor struggle. In that case, the defendant reached through a car window to grab the wallet of the driver, who was an undercover police officer. Id. at *1. “The officer resisted and tightened his grip on the wallet, but [the defendant] wrested control of it away from him. As a result of what the officer called a ‘struggle,’ the officer’s arm ‘flew back.’” Id. The officer testified that the defendant had to “yank” and “pull” to take the wallet from his hand. Id. at *2. Citing Lear, the Arizona Court of Appeals held that “although the force [the defendant] used was not extreme or particularly violent, it was sufficient to constitute a ‘physical act directed against [the officer] as a means of gaining control of [the wallet].’” Id. (second and third alterations in original) (quoting Ariz. Rev. Stat. § 13-1901(1) and citing Bauer v. State, 43 P.2d 203, 205 (1935) (“[E]ven though the snatching of a thing is not looked upon as a taking by force, it is otherwise where there is a struggle to keep it.”)).

It is clear from these cases that Arizona punishes as robbery conduct that does not involve violent force. The level of force involved in grabbing the wallet in Moore, where the victim was not harmed, is similar to the level of force we have considered insufficiently violent to qualify as force under Johnson. In United States v. Dominguez-Maroyoqui, 748 F.3d 918 (9th Cir. 2014), for example, we explained that bumping into or jolting someone, grabbing a jacket, or spitting in a victim’s face did not rise to the Johnson level of violent force. Id. at 921. Similarly, in United States v. Flores-Cordero, 723 F.3d 1085 (9th Cir. 2013), we held that a “minor scuffle” during which a defendant jerked her arms, kicked, and struggled to keep officers from placing her arms behind her back during an arrest was not Johnson-level violent force. Id. at 1087–88 (citing State v. Lee, 176 P.3d 712

(Ariz. Ct. App. 2008)). Under these precedents, a conviction for robbery—or armed robbery—in Arizona does not require the threat or use of Johnson-level force.

As a result, our conclusion in Taylor that Arizona armed robbery is a crime of violence under Section 4B1.2’s force clause, see 529 F.3d at 1237, is clearly irreconcilable with the Supreme Court’s decision in Johnson. We therefore treat this part of Taylor “as having been effectively overruled.” See Miller, 335 F.3d at 900. And we hold that Arizona armed robbery can no longer be considered a categorical crime of violence under Section 4B1.2’s force clause.

B. Enumerated Crimes of Violence Under the Guidelines

Having concluded that Arizona armed robbery is not a crime of violence under Section 4B1.2’s force clause, we now turn to whether it qualifies as a crime of violence under a different clause. At the time Molinar was sentenced, robbery was enumerated in the commentary to Section 4B1.2. We have held that robbery is an enumerated crime of violence. See United States v. Barragan, 871 F.3d 689, 713–14 (9th Cir. 2017) (citing the commentary to Section 4B1.2). We must now determine whether a conviction for robbery under Arizona law is equivalent to generic robbery, such that Arizona Robbery is a crime of violence under the enumerated felonies clause. We conclude that Arizona Robbery (and thus armed robbery) is a categorical match to generic robbery, and that Arizona attempt is equivalent to generic attempt, so Molinar’s conviction does constitute a crime of violence for purposes of Section 4B1.2.

Under the categorical approach, when an offense is enumerated, we “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—i.e., the offense as commonly understood.” Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). The state crime is a match only if its “elements are the same as, or narrower than, those of the generic offense.” Id.

We have defined generic robbery as “aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person.” United States v. Becerril-Lopez, 541 F.3d 881, 891 (9th Cir. 2008) (quoting United States v. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir. 2013) (en banc); see also United States v. House, 825 F.3d 381, 387 (8th Cir. 2016) (adopting same generic definition). We have not previously examined the meaning of “immediate danger to the person” in depth, so we must do so now.

Our precedent dictates that in interpreting generic definitions of common-law crimes such as robbery, we adopt the “contemporary meaning employed by most states, guided by scholarly commentary.” See United States v. Esparza-Herrera, 557 F.3d 1019, 1023 (9th Cir. 2009) (quoting United States v. Gomez-Leon, 545 F.3d 777, 790 (9th Cir. 2008)). The majority of states implement the notion of immediate danger to the person by “requir[ing] property to be taken from a person or a person’s presence by means of force or putting in fear.” See Santiesteban-Hernandez, 469 F.3d at 380 (collecting state statutes and citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 (2d ed. 2003)). Thus, we hold that for a state crime to be equivalent to generic robbery, it must require property to be taken from a person or a person’s presence by means of force or putting in fear.

As to how much force is needed to comport with this definition, we have held that force sufficient “to compel acquiescence to the taking of or escaping with the property” satisfies the generic definition of robbery, regardless of what degree of force that is in a particular instance. United States v. Harris, 572 F.3d 1065, 1066 (9th Cir. 2009) (quoting Nev. Rev. Stat. § 200.380) (holding that a statute stating “[t]he degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property” satisfied the generic definition of robbery). This accords with the defini...
nition of robbery in a majority of states, which require no more force than the jostling of the victim.⁸ See LAFAVE, supra, at § 20.3(d)(1) (explaining that pickpocketing or sudden snatching of a purse where the victim does not have the chance to resist is not robbery, but if the victim struggles for control of the purse or if the robber “jostles” or renders the victim “helpless by more subtle means,” then the force is sufficient for robbery); CHARLES E. TORCIA, 4 WHAR-TON’S CRIMINAL LAW § 464 (15th ed.) (“It is likewise robbery to pick a person’s pocket while scuffling with him, or while jostling, pushing, or crowding him.” (footnotes omitted)). There is no indication that the Supreme Court’s definition of “violent force” in Johnson—a product of specific statutory interpretation—should apply to the understanding of “force” in the definition of generic robbery. See United States v. Mendoza-Padilla, 833 F.3d 1156, 1158–59 (9th Cir. 2016) (analyzing elements of an enumerated offense without discussing Johnson). Indeed, enumerated offenses are crimes of violence even when their elements do not include the threat or use of violent force; this must be so, or the enumerated felonies clause would be surplusage. See United States v. Pereira-Salmeron, 337 F.3d 1148, 1152 (9th Cir. 2003).

As to the meaning of “feare” within the generic definition, a leading treatise teaches:

"[T]he word ‘fear’ in connection with robbery does not so much mean ‘fright’ as it means ‘apprehension’; one too brave to be frightened may yet be apprehensive of bodily harm. The victim who is not apprehensive of harm from the robber so long as he does what the robber tells him to do, though he does expect harm if he refus-es, is nevertheless ‘put in fear’ for purposes of robbery."

LAFAVE, supra, at § 20.3(d)(2) (footnotes omitted); accord TORCIA, supra, at § 462. Thus, “actual fright by the victim, without regard to the defendant’s behavior calculated to produce such a reaction, is [not] alone determinative.” LAFAVE, supra, at § 20.3(d)(2) (internal quotation marks omitted).

And the defendant need not verbally threaten the victim with harm to put the victim in fear.

Intimidation for purposes of a robbery statute may occur where a defendant approaches a victim and, using a threatening tone or threatening body language, makes demands of the victim. That is, the putting in fear may be sustained by evidence of acts, words, or circumstances reasonably calculated to effect that result.


Applying those generic definitions of force and fear here, we conclude that Arizona robbery is coextensive with generic robbery. Again, the generic definition of robbery encompasses not only de minimis force sufficient to compel acquiescence to the taking of or escaping with property,⁹ but also the implied threat of force. Although we think it is a close question, we do not understand Arizona’s application of its robbery statute to sweep more broadly than that. To explain why, we turn again to Moore, as well as to two other cases, State v. Yarbrough, 638 P.2d 737 (Ariz. Ct. App. 1981), and State v. Stevens, 909 P.2d 478 (Ariz. Ct. App. 1995). These cases appear to represent the outer bounds of what conduct is considered robbery, whether accomplished by force or putting in fear, in Arizona.

In Moore, the defendant used enough force to wrest the officer’s wallet away from him despite his resistance. See Moore, 2014 WL 4103951, at *1–2. Force sufficient to overcome resistance is enough to satisfy the generic definition of robbery. See LAFAVE, supra, at § 20.3(d)(1). We are therefore satisfied that the defendant’s actions in Moore fell within that definition.

In Yarbrough, the defendant entered a convenience store at night with a stocking over his head, ran behind the counter, and demanded money from the clerk with his left hand out of view. 638 P.2d at 738, 740. Even though no physical force was used or expressly threatened, taken together, the defendant’s actions were reasonably calculated to, and in fact did, put the victim in fear. The conduct was therefore consistent with generic robbery. See GUSTAFSON & SHAMPO, supra, at § 31.

In Stevens, the defendant approached a stopped car, opened its door, and accused the driver of nearly hitting him. The driver did not recall any near accidents. The defendant’s movements and words made the driver afraid that he might hurt her. He then bent down over the back of her seat, grabbed her purse from the rear seat, and fled. 909 P.2d at 479–80. The Arizona Court of Appeals held that “the jury could and did reasonably conclude [the defendant] intended to cause

⁸ See, e.g., Thomas v. State, 737 A.2d 622, 639 (Md. Ct. Spec. App. 1999) (affirming conviction for attempted robbery where officer “felt a tugging on his holster” and “was required to use force to prevent appellant from taking the gun.”); People v. Davis, 935 P.2d 79, 84-85 (Colo. App. 1996) (“[R]obbery includes the snatching of an object attached to the person of another if the force used to tear or break the attachment”)

⁹ The dissent contends that we treat all de minimis force as necessarily satisfying the definition of immediate danger to the person. We do not. Rather, we consider only de minimis force that is sufficient to compel acquiescence to the taking of or escaping with property.
her to be so fearful and threatened that she would not, at the
very least, resist his efforts to take her purse.” Id. at 480.

It is a close question whether the conduct in Stevens satisfies
the generic definition of robbery because the defendant never verbally threatened the victim and there was no struggle
over the purse. But the defendant’s conduct, including
entering the confined space of the car, created the sort of
face-to-face confrontation that inherently presents a risk of
violence.10 See United States v. Prince, 772 F.3d 1173, 1178
(9th Cir. 2014); United States v. Lewis, 405 F.3d 511, 514 (7th
Cir. 2005); United States v. Hawkins, 69 F.3d 11, 12–13 (5th
Cir. 1995); United States v. McVicar, 907 F.2d 1, 2 (1st Cir.
1990), abrogated on other grounds as recognized in United
States v. Castro-Vasquez, 802 F.3d 28 (1st Cir. 2015). That
leads us to conclude that the defendant’s conduct was rea-
sonably calculated to put the victim in fear and thus satis-
fies the generic definition of robbery. See GUSTAFSON &
SHAMPO, supra, at § 31.

Having considered these boundary cases, we conclude that
Arizona robbery is coextensive with generic robbery and is
thus a crime of violence under Section 4B1.2’s enumerated
felonies clause. And, of course, armed robbery includes
all the elements of robbery plus the additional element of
being armed. Ariz. Rev. Stat. § 13-1904. Thus, anyone who
has been convicted of armed robbery in Arizona will have
been convicted of all of the elements of generic robbery. As
a result, we hold that Arizona armed robbery qualifies as a
crime of violence under Section 4B1.2’s enumerated felonies
clause.

The only question that remains is whether Arizona at-
ttempted armed robbery also constitutes a crime of violence.
“An attempt to commit a crime of violence is itself a crime of
violence.” United States v. Wenner, 351 F.3d 969, 971–72
(9th Cir. 2003) (citing USSG § 4B1.2 cmt. n.1). And we have
already held in Taylor that Arizona attempt is coextensive
with generic attempt. See Taylor, 529 F.3d at 1238. We are
not persuaded that the state court cases Molinar cites regard-
ing Arizona’s definition of attempt compel a different result.
We thus remain bound by Taylor’s holding that Arizona at-
tempt is a categorical match to generic attempt. See Gomez-
Hernandez, 680 F.3d at 1175 (“[W]e are not aware of any
subsequent Arizona decision deviating from the generic de-
finite of attempt.”); see also United States v. Quintero-Junco,
754 F.3d 746, 750 n.1 (9th Cir. 2014) (adhering to Taylor’s
holding on attempt); United States v. Gomez, 757 F.3d 885,
899 n.10 (9th Cir. 2014) (same).

We therefore hold that Arizona attempted armed robbery
qualifies as a crime of violence under Section 4B1.2’s enu-
merated felonies clause.

C. Molinar’s Remaining Arguments

Molinar’s remaining arguments against treating his prior
conviction as a crime of violence are unavailing.

First, Molinar argues that because Arizona has abolished
the “claim of right” defense to robbery, and because the de-
fense is still available for the generic crime, Arizona “broadly
penalizes conduct that would not constitute generic robbery.”
In United States v. Velasquez-Bosque, 601 F.3d 955 (9th Cir.
2010), we rejected this precise argument. Id. at 963. We rea-
soned that “[t]he availability of an affirmative defense [like
the claim of right doctrine] is not relevant to the categorical
analysis,” because that analysis looks at the elements of the
crimes being compared (here, the elements of Arizona rob-
bery as compared to generic robbery), not the defenses to
either. Id.

Second, Molinar argues that Arizona’s statutory definition
of “property” sweeps more broadly than the generic under-
standing of property because Arizona’s property definition
includes intangible things of value, whereas the generic de-
definition does not. But a person commits Arizona robbery only
“if in the course of taking any property of another from his
person or immediate presence and against his will, such per-
son threatens or uses force against any person.” Ariz. Rev.
Stat. § 13-1902(A) (emphasis added). Molinar points to no
case in which an Arizona robbery conviction was based on
the taking of an intangible object, and given the elements
of Arizona robbery, the very concept seems implausible.
(holding that there must be “a realistic probability, not a theo-
retical possibility, that the State would apply its statute to
crimes that falls outside the generic definition” to conclude
that a state crime is overbroad). Accordingly, we conclude
that Arizona’s definition of property does not change the re-
sult of our categorical analysis of attempted armed robbery.

III. CONCLUSION

For the foregoing reasons, we hold that an Arizona con-
viction for attempted armed robbery is a crime of violence
under Section 4B1.2’s enumerated felonies clause. We there-
fore affirm the district court’s imposition of the sentencing
enhancement.

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting:

I respectfully dissent.
The majority concludes that “Arizona Robbery (and thus
armed robbery) is a categorical match to generic robbery.”

10. We note that the court in Stevens also stated that the victim be-
lieved the defendant “looked like an abusive person” and that this was
part of what made her fearful. 909 P.2d at 479-80. To whatever extent
the court treated as relevant a purely subjective reaction to the defen-
dant’s appearance, we do not rely on that reaction in our assessment of
whether the conduct amounted to generic robbery. The defendant’s ac-
tions were sufficient to create an objectively reasonable fear of harm,
making it a match to generic robbery.
Under the law of our circuit, generic robbery requires that deprivation of property take place “under circumstances involving immediate danger to the person.” United States v. Becerril-Lopez, 541 F.3d 881, 891 (9th Cir. 2008) (quoting United States v. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006) (quoting 3 Wayne R. LaFave, Substantive Criminal Law § 20.3 intro., (d)(2) (2d ed. 2003) (brackets omitted and emphasis added))). Under Arizona law, a robbery occurred when an unarmed defendant reached through the open driver’s-side window of a parked car and grabbed a wallet from the hand of a seated undercover police officer. State v. Moore, 2014 WL 4103951, ¶ 8 (Ariz. Ct. App.). There was a brief struggle for control of the wallet, and the arm of the officer “flew back” when the wallet was taken from his hand. Id. ¶ 2. Under a plain-meaning understanding of the phrase “immediate danger to the person,” the circumstances in Moore did not involve such danger. Arizona’s definition of robbery is therefore broader than the generic definition and is not a categorical match.

The majority defines generic robbery as requiring only force or fear. The majority writes, “Thus, we hold that for a state crime to be equivalent to generic robbery, it must require property to be taken from a person or a person’s presence by means of force or putting in fear.” Maj. Op. at 14. Citing the Fifth Circuit’s opinion in Santiesteban-Hernandez, the majority contends that its definition of generic robbery matches the definition of robbery in most states. Id. at 14 (quoting Santiesteban-Hernandez, 469 F.3d at 380). But Santiesteban-Hernandez does not support the majority. The Fifth Circuit did indeed survey the definitions of robbery in most states. But its definition of generic robbery does not match the majority’s, for its definition does not include “force” as a required element. The Texas statute at issue in Santiesteban-Hernandez did not require the use of force or threat of force, but that did not matter to the Fifth Circuit. What mattered was that there be immediate danger. See Tex. Pen. Code Ann. § 29.02 (Vernon 2006) (requiring “bodily injury” or “fear of imminent bodily injury or death”); Santiesteban-Hernandez, 469 F.3d at 380 (“The immediate danger element is what makes robbery deserving of greater punishment than that provided for larceny.” (internal quotation marks omitted))); see also United States v. Parnell, 818 F.3d 974, 982 (9th Cir. 2016) (Watford, J., concurring) (noting that at common law, “[t]o commit robbery, the defendant also had to use violence or intimidation to coerce the victim into parting with his property”). The Fifth Circuit held that there was a categorical match because “both [Texas and generic robbery] involve theft and immediate danger to a person.” 469 F.3d at 381.

We have taken the “immediate danger” requirement even more seriously than the Fifth Circuit. In United States v. Tellez-Martinez, 517 F.3d 813 (5th Cir. 2008) (per curiam), a post-Santiesteban-Hernandez case, the Fifth Circuit held that California robbery is a categorical match to generic robbery, even though the California statute defines robbery as including theft accomplished by “fear of an immediate and unlawful injury to the . . . property of anyone in the company of the person robbed.” Id. at 815 (emphasis added). Despite fear of injury to property being a sufficient basis for a robbery conviction, the Fifth Circuit concluded that “danger is inherent in the criminal act” because the statute required the crime be committed “(1) directly against the victim or in his presence; and (2) against his will.” Id. In Becerril-Lopez, we interpreted the very same California robbery statute and disagreed with the Fifth Circuit. We held that California robbery is not a categorical match for generic robbery because we were “unconvinced that a taking by threat to property necessarily entails dangers to the person.” Becerril-Lopez, 541 F.3d at 891 n.8.

The majority uses “force” and “fear” in the disjunctive—that is, in its view there is generic robbery if property is taken by either force or fear. If either word, as defined by the majority, does not necessarily entail circumstances involving “immediate danger to the person,” the majority’s definition of generic robbery is broader than our definition of generic robbery in Becerril-Lopez. According to the majority, the words “force” and “fear” both “implement the notion of immediate danger.” Maj. Op. at 14. As the majority defines the two words, this is not true.

The majority defines “force” by relying on our two-paragraph per curiam opinion in United States v. Harris, 572 F.3d 1065 (9th Cir. 2009). Citing Harris, the majority writes, “[W]e have held that force sufficient ‘to compel acquiescence to the taking of or escaping with the property’ satisfies the generic definition of robbery, regardless of what degree of force that is in a particular instance.” Maj. Op. at 15. Our opinion in Harris, despite its brevity, states the law of the circuit. But it is not at all clear what Harris held with respect to force and generic robbery.

The question in Harris was whether, using the categorical approach, Nevada’s robbery statute was a “crime of violence” within the meaning of U.S.S.G. § 4B1.2. We had held in Becerril-Lopez, using the categorical approach, that California’s robbery statute was a crime of violence. Generic robbery and generic extortion are both crimes of violence. The California statute was broader than either generic robbery or generic extortion considered alone, but was no broader than the combined elements of those two generic crimes. Becerril-Lopez, 541 F.3d at 890–893. We used the same approach in Harris to conclude that the Nevada robbery statute was a crime of violence, based on the combined elements of generic robbery and extortion. In the only sentence in which we addressed force, we wrote:

The Nevada statute’s statement that “[t]he degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property” also does not distinguish it from the California statute analyzed in Becerril-Lopez.

Harris, 572 F.3d at 1066.
This single sentence in *Harris* is, to say the least, opaque. It is hardly a holding with respect to the degree of force required for generic robbery. It is even less a holding that a slight degree of force is enough to satisfy *Becerril-Lopez*’s “immediate danger” requirement for generic robbery. The three-judge panel in *Harris* was without authority to abandon or modify the immediate danger requirement of *Becerril-Lopez*, and the panel did not purport to do so. See *United States v. Velasquez-Bosque*, 601 F.3d 955, 959, 963 (9th Cir. 2010) (describing *Harris* as “relying on *Becerril-Lopez*” and holding that *Becerril-Lopez* still “controls our decision”). Indeed, the panel in *Harris* nowhere mentioned the immediate danger requirement.

According to the majority, even “de minimis force sufficient to compel acquiescence to the taking of or escaping with property” is enough “force” to satisfy the definition of generic robbery. Maj. Op. at 18. That is, in the view of the majority, de minimis force always necessarily entails circumstances involving the “immediate danger to the person” that is required by *Becerril-Lopez*. This is not true, as may be seen in *Moore*. De minimis force is even less than the force required to grab the wallet in *Moore*, and there was no “immediate danger” entailed by the circumstances involving the degree of force used in *Moore*. It follows that “immediate danger” is not necessarily created by the lesser degree of force that would satisfy the majority’s definition. For the majority, even “jostling” is sufficient. *Id.* at 16.

Under any plain-meaning understanding of the word, “jostling” does not necessarily entail circumstances involving “immediate danger to the person.”

The majority defines “fear” by quoting from the second edition of Professor LaFave’s treatise on criminal law. The majority writes:

> As to the meaning of “fear” within the generic definition, a leading treatise teaches:

> [T]he word ‘fear’ in connection with robbery does not so much mean ‘fright’ as it means ‘apprehension’; one too brave to be frightened may yet be apprehensive of bodily harm. The victim who is not apprehensive of harm from the robber so long as he does what the robber tells him to do, though he does expect harm if he refuses, is nevertheless ’put in fear’ for purposes of the robbery.

LaFave, [*Substantive Criminal Law*], at § 20.3(d)(2) (footnotes omitted).

Maj. Op. at 17. So far as it goes, and for the purpose intended by Professor LaFave, this is a perfectly adequate definition of fear. But “fear,” thus defined, does not necessarily entail circumstances involving “immediate danger to the person.”

Elsewhere in his treatise, in passages separate from his definition of fear, Professor LaFave insists that danger is a required element of robbery. Based on these passages, the Fifth Circuit required “immediate danger.” It wrote in *Santiesteban-Hernandez*:

> Although the precise state definitions vary, the generic form of robbery “may be thought of as aggravated larceny,” containing at least the elements of “misappropriation of property under circumstances involving [immediate] danger to the person.” Wayne R. LaFave, *Substantive Criminal Law* § 20.3 intro., (d)(2) (2d ed. 2003).

469 F.3d at 380 (emphasis added). The Fifth Circuit’s quotation from Professor LaFave is an amalgam. The word “immediate” does not appear in the sentence written by Professor LaFave. The Fifth Circuit took that word from § 20.3(d)(2) and inserted it into the sentence that appears in the introduction to § 20.3. In *Becerril-Lopez*, we then took the phrase “immediate danger to the person,” dropped the brackets around “immediate,” and made it the law of our circuit.

For the majority to be right that the elements of generic robbery are satisfied if property is taken through either “force” or “fear,” both words, as defined by the majority, must necessarily entail “circumstances involving immediate danger to the person.” The majority has defined force and fear so broadly that neither word necessarily entails such circumstances. “Force,” for the majority, includes de minimis force and “jostling.” “Fear,” for the majority, includes the “apprehension” of harm, but only if the victim fails to cooperate. Neither word, so defined, necessarily entails “circumstances involving immediate danger to the person.”

The majority effectively reads “immediate danger to the person” out of the definition of generic robbery. *Becerril-Lopez*, the source of the immediate danger requirement, may have been wrongly decided (though I do not think so). If so, the proper course for the panel is not to abandon it, but to make a *sua sponte* call for reconsideration by an en banc panel.
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OPINION

D.W. NELSON, Senior Circuit Judge:

The County of Maui (“County”) appeals the district court’s summary judgment rulings finding the County violated the Clean Water Act (“CWA”) when it discharged pollutants from its wells into the Pacific Ocean, and further finding it had fair notice of its violations. Hawai‘i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association (“Associations”) urge us to uphold these rulings. For the reasons set forth below, we affirm the district court.

BACKGROUND

1. The Lahaina Wells and the Effluent Injections

The County owns and operates four wells at the Lahaina Wastewater Reclamation Facility (“LWRF”), the principal municipal wastewater treatment plant for West Maui. Wells 1 and 2 were installed in 1979 as part of the original 1975 plant design, and Wells 3 and 4 were added in 1985 as part of an expansion project. Although constructed initially to serve as a backup disposal method for water reclamation, the wells have since become the County’s primary means of effluent disposal into groundwater and the Pacific Ocean.

The LWRF receives approximately 4 million gallons of sewage per day from a collection system serving approximately 40,000 people. That sewage is treated at the Facility and then either sold to customers for irrigation purposes or injected into the wells for disposal. The County disposes of almost all the sewage it receives—it injects approximately 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells.

That some of the treated effluent then reaches the Pacific Ocean is undisputed. The County expressly conceded below and its expert confirmed that wastewater injected into Wells 1 and 2 enters the Pacific Ocean. The Associations submitted various studies and expert declarations establishing a connection between Wells 3 and 4 and the ocean. Although the County quibbles with how much effluent enters the ocean and by what paths the pollutants travel to get there, it concedes that effluent from all four wells reaches the ocean.

The County has known this since the Facility’s inception. The record establishes the County considered building an ocean outfall to dispose of effluent directly into the ocean but decided against it because it would be too harmful to the coastal waters. It opted instead for injection wells it knew
would affect these waters indirectly. When the Facility underwent environmental review in February 1973, the County’s consultant—Dr. Michael Chun—stated effluent that was not used for reclamation purposes would be injected into the wells and that these pollutants would then enter the ocean some distance from the shore. The County further confirmed this in its reassessment of the Facility in 1991.

According to the County’s expert, when the wells inject 2.8 million gallons of effluent per day, the flow of effluent into the ocean is about 3,456 gallons per meter of coastline per day—roughly the equivalent of installing a permanently-running garden hose at every meter along the 800 meters of coastline. About one out of every seven gallons of groundwater entering the ocean near the LWRF is comprised of effluent from the wells.

2. The Tracer Dye Study

In June 2013, the U.S. Environmental Protection Agency (“EPA”), the Hawaii Department of Health (“HDOH”), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study (the “Tracer Dye Study” or “Study”) on Wells 2, 3, and 4 to gather data on, among other things, the “hydrological connections between the injected treated wastewater effluent and the coastal waters.” The Study involved placing tracer dye into Wells 2, 3, and 4, and monitoring the submarine seeps off Kahekili Beach to see if and when the dye would appear in the ocean.

The Study concluded “a hydrogeologic connection exists between . . . Wells 3 and 4 and the nearby coastal waters of West Maui.” Eighty-four days after injection, tracer dye introduced to Wells 3 and 4 began to emerge “from very nearshore seafloor along North Kaanapali Beach,” near Kahekili Beach Park, about a half-mile southwest of the LWRF. According to the Study, the effluent travels in this southwesterly path “due to geologic controls that include a hydraulic barrier created by valley fills to the northwest.” The Study found “64 percent of the treated wastewater injected into [Wells 3 and 4] currently discharges [into the ocean].” It further concluded “[t]he major discharge areas are confined to two clusters, only several meters wide, with very little discharge [occurring] in between and around them.”

Tracer dye from Well 2 was not detected in the ocean. But this was because Wells 3 and 4—located between Well 2 and the areas in the ocean where the wastewater discharges—“inject the majority of effluent,” which likely diverted the injected wastewater from Well 2 into taking “a different path other than directly towards the submarine springs” where the wastewater from Wells 3 and 4 discharges. If Well 2 were to receive most of the effluent at the Facility, that effluent would also take the southwesterly path taken by the wastewater from Wells 3 and 4. And “[b]ecause Well 1 is located in very close proximity to Well 2, . . . the [T]racer [S]tudy’s predictions for the fate of effluent from Well 2 can be used to predict the fate of effluent from Well 1,” according to the Associations’ expert Dr. Jean Moran.

3. The District Court’s Summary Judgment Rulings

The County appeals three of the district court’s summary judgment rulings. In the first, the district court found the County liable as to Wells 3 and 4 for discharging effluent through groundwater and into the ocean without the National Pollutant Discharge Elimination System (“NPDES”) permit required by the CWA. Haw. Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980, 1005 (D. Haw. 2014). The court based its decision on three independent grounds: (1) the County “indirectly discharg[ed] a pollutant into the ocean through a groundwater conduit,” (2) the groundwater is a “point source” under the CWA, and (3) the groundwater is a “navigable water” under the Act. Id. at 993, 999, 1005.

In its second order, the district court held the County liable as to Wells 1 and 2 based largely on the same reasons it found the County liable on Wells 3 and 4. Haw. Wildlife Fund v. Cty. of Maui, Civil No. 12-00198 SOM/BMK, 2015 WL 328227, at *5–6 (D. Haw. Jan. 23, 2015). The court acknowledged that no study confirms the “point of entry into the ocean of flow from [W]ells 1 and 2.” Id. at *2. But it nonetheless held against the County after “repeatedly confirm[ing] at [the summary judgment] hearing . . . that the County was expressly conceding that pollutants introduced by the County into [W]ells 1 and 2 were making their way to the ocean.” Id.

Finally, the district court found the County could not claim a due process violation because it had fair notice under the plain language of the CWA that it could not discharge effluent via groundwater into the ocean.

This appeal followed.

STANDARD OF REVIEW

The Ninth Circuit “review[s] the district court’s grant or denial of motions for summary judgment de novo.” Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 988 (9th Cir. 2016) (citation and internal quotation marks omitted). “Thus, on appellate review, [the] [Court] employ[s] the same standard used by the trial court under Federal Rule of Civil Procedure 56(c).” Id. “As required by that standard, [the Court] view[s] the evidence in the light most favorable to the nonmoving party, determine[s] whether there are any genuine issues of material fact, and decide[s] whether the district court correctly applied the relevant substantive law.” Id. at 989 (citation omitted).

DISCUSSION

The Clean Water Act is designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the “discharge of any pollutant by any person,” id. § 1311(a), and defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from
any point source,” id. § 1362(12) (internal quotation marks omitted). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged.” Id. § 1362(14) (internal quotation marks omitted). A party who obtains an NPDES permit is exempt from the general prohibition on point source pollution. Id. §§ 1311(a), 1342(a) (1). Under these provisions, a party violates the CWA when it does not obtain such a permit and “(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source.” Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001) (citation omitted).

1. Liability under the CWA

The County argues the district court erred in concluding it was liable under the CWA as to all four of its wells. We disagree.

a. Point Source Discharges

Neither side here disputes that each of the four wells constitutes a “point source” under the CWA. Given the wells here are “discernible, confined and discrete conveyance[s] . . . from which pollutants are . . . discharged,” and the plain language of the statute expressly includes a “well” as an example of a “point source,” the County could not plausibly deny the wells are “point source[s]” under the statute. § 1362(14) (internal quotation marks omitted). The record further establishes that from these point sources the County discharges “pollutants” in the form of treated effluent into groundwater, through which the pollutants then enter a “navigable water[]” to the Pacific Ocean. See id. §§ 1362(7)–(8), (12), (14). As the pollutants here enter navigable waters and can be “traced [back] to . . . identifiable point[s] of discharge,” “[the wells] are subject to NPDES regulation, as are all point sources” under the plain language of the CWA. Trs. for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984) (citations omitted).

That the County’s activities constitute “point source” discharges becomes clearer once we consider our jurisprudence on “nonpoint source pollution”: “[Such] pollution . . . arises from many dispersed activities over large areas,” “is not traceable to any single discrete source,” and due to its “diffuse” nature, “is very difficult to regulate through individual permits.” Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 508 (9th Cir. 2013) (citations omitted). “The most common example of nonpoint source pollution is the residue left on roadways by automobiles” which rainwater “wash[es] off . . . the streets and . . . carry[es] along by runoff in a polluted soup to [to] creeks, rivers, bays, and the ocean.” Id. Our cases have consistently held that such runoff constitutes nonpoint source pollution unless it is later collected, channeled, and discharged through a point source. See, e.g., id. (citations omitted); Envtl. Def. Ctr., Inc. v. U.S. E.P.A., 344 F.3d 832, 841 n.8 (9th Cir. 2003) (citation omitted). Applying these principles in Ecological Rights, we held that rainwater runoff carrying pollutants from the defendants’ utility poles to navigable waters constituted nonpoint source pollution under the CWA. 713 F.3d at 509 (citations omitted).

Ours is a different case entirely. Unlike the “millions of cars” discussed in Ecological Rights, here we have four “discrete” wells that have been identified and can be “regulated[d] through individual permits.” Id. at 508 (citations omitted). Furthermore, the automobiles and the utility poles discussed in Ecological Rights did nothing themselves to “discretely collect[] and convey[]” the pollutants to a navigable water, and hence could not constitute “point source[s]” under § 1362(14). Id. at 508–10 (citations omitted). The Lahaina Wells, by contrast, collect and inject pollutants in four discrete wells into groundwater connected to the Pacific Ocean, thereby “discretely collect[ing] and convey[ing]” pollutants to a navigable water. Id. at 509 (citations omitted); § 1362(14). The Tracer Dye Study confirms this connection as to Wells 3 and 4, and the County conceded as much as to Wells 1 and 2. Given the County knew of these effects well before the LWRF’s inception, the record further establishes it “constructed [the wells] for the express purpose of storing pollutants [and] moving them from [the Lahaina Facility] to [the Pacific Ocean].” Ecological Rights, 713 F.3d at 509 (citations omitted).1 This is simply not a case of “nonpoint source pollution . . . caused primarily by rainfall activities that employ or create pollutants,” where the resulting “runoff [can] not be traced to any identifiable point of discharge.” Alaska, 749 F.2d at 558 (citing United States v. Earth Scis., Inc., 599 F.2d 368, 373 (10th Cir. 1979)). As the “[County’s] activities release[d] pollutants from . . . discernible conveyance[s]” to navigable waters, the County is liable under the CWA. Id. (citations omitted).

b. Indirect Discharges

The County contends, however, that under the CWA, it is not sufficient to focus exclusively on the original pollutant source to determine whether an NPDES permit is needed and that how pollutants travel from the original point source to navigable waters matters. More specifically, the County contends the point source itself must convey the pollutants directly into the navigable water under the CWA. As the wells here discharge into groundwater, and then indirectly into the Pacific Ocean, the County asserts they do not come within the ambit of the statute.2

1. We do not mean to suggest that a CWA violation requires some form of intent. It does not. See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993) (recognizing CWA “categorically prohibits any discharge of a pollutant from a point source without a permit” (citations omitted)); accord Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 284 (6th Cir. 2015) (recognizing “regime of strict liability” under the CWA (citation and internal quotation marks omitted)); Piney Run Pres. Ass’n v. Cty. Comm’r’s of Carroll Cty., 268 F.3d 255, 265 (4th Cir. 2001) (same). But the County’s purpose in constructing the wells certainly informs whether they are “conveyance[s]” under the CWA, § 1362(14), and hence, regulable point sources under the statute. See Ecological Rights, 713 F.3d at 509 (citations omitted).

2. We assume without deciding the groundwater here is neither a
The County first cites Alaska, where we held that point source pollution occurs when “the pollution reaches the water through a confined, discrete conveyance,” regardless of “the kind of pollution” at issue or “the activity causing [it].” Id. at 558 (citation omitted). As the effluent here reached the Pacific Ocean “through” groundwater—a nonpoint source—the County contends it is not liable under the CWA. The County reads Alaska out of context. First, we never addressed in Alaska whether a polluter may be liable under the CWA for indirect discharges because the issue was not before us. See id. Furthermore, when we stated the “pollution [must] reach[] the water through a confined, discrete conveyance,” we were merely stating the pollution must come “from a discernible conveyance” as opposed to some “[un]identifiable point of discharge.” Id. (emphasis added) (citations omitted). As the “discharge water [there] [was] released from a sluice box, a confined channel within the statutory definition,” the activity came within the ambit of the CWA. Id. (emphasis added). This case is no different—the effluent comes “from” the four wells and travels “through” them before entering navigable waters. Id. It just also travels through groundwater before entering the Pacific Ocean.

A more recent case Greater Yellowstone Coalition v. Lewis supports the Associations’ contention that the CWA governs indirect discharges. We held there that precipitation flowing into pits containing “newly extracted waste rock,” “filter[ed]” hundreds of feet underground, and “eventually entering the surface water” did not constitute point source pollution under the CWA. 628 F.3d 1143, 1147, 1153 (9th Cir. 2010) (citation omitted). The “pits that collect[ed] the waste rock [did] not constitute point sources” because “there [was] no confinement or containment of the [polluted] water” before it entered navigable waters, as prohibited by the statute. Id. We also concluded, however, that precipitation flowing into a “stormwater drain system” before “enter[ing] the ground and, eventually, surface water” constituted a point source discharge—the “stormwater system [was] exactly the type of collection or channeling contemplated by the CWA.” Id. at 1152.

The wells here are more akin to the stormwater drain system in Greater Yellowstone than they are to the pits that collected the waste rock. Unlike the pits that “[did] not constitute points sources within the meaning of the CWA,” the wells here “confine[,] [and] contain[,] . . . the [effluent]” before discharging it “into the ground and, eventually, surface water.” Id. at 1152–53. And it was of no import to us in Greater Yellowstone that the pollutants—as here—had to travel through the ground before “eventually, enter[ing] surface water.” Id. at 1152. The Court was only concerned with whether there was a point source from which the defendant discharged the pollutants. As the stormwater drain system constituted this point source, the Court concluded the defendant was required to “obtain[,] the requisite . . . certification for that system.” Id. at 1153. As the County also discharges its pollutants from a point source, it, too, must obtain an NPDES permit under the CWA.

Our sister circuits agree that an indirect discharge from a point source to a navigable water suffices for CWA liability to attach. In Concerned Area Residents for Environment v. Southview Farm, the Second Circuit held “[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law.” 34 F.3d 114, 119 (2d Cir. 1994). Regardless of whether the field itself was a point source, the court concluded there was a “point source discharge[]” under the CWA because (1) the pollutant itself was released from the tanker, a point source, and (2) there was a “direct[]” connection between the field and the navigable water. See id. Both elements are present here. The wells are point sources under the statute, § 1362(14), and the Tracer Dye Study along with the County’s concessions establish an undeniable connection between the wells and the Pacific Ocean. The Study establishes effluent injected into the wells travels a southwesterly path from the Facility, appearing in submarine springs only a half-mile away.

Furthermore, in Sierra Club v. Abston Construction, the Fifth Circuit recognized that the “ultimate question [as to CWA liability] is whether pollutants [are] discharged from ‘discernible, confined, and discrete conveyances’—either by gravitational or nongravitational means.” 620 F.2d 41, 45 (5th Cir. 1980). It went on to hold that “[s]ediment basins dig by the miners and designed to collect sediment are . . . point sources . . . even though the materials [are] carried away from the basins by gravity flow of rainwater.” Id. (emphasis added). “Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials.” Id. (emphasis added). That is what occurred here. The County “initially collected [and] channeled” the pollutants in its wells and injected them into the ground, where they were “carried away from the [wells] by the gravity flow of [ground]water.” Id. And based on the overwhelming evidence in this case establishing a connection between the wells and the Pacific Ocean, it cannot be disputed the wells are “reasonably likely to be the means by which [the] [effluent] [is] ultimately deposited into a navigable body of water.” Id. Indeed, the County has known since the LWRF’s inception that effluent from the wells would eventually reach the ocean some distance from the shore. That the groundwater plays a role in delivering the pollutants from the wells to the navigable water does not preclude liability under the statute. See id.

The Second Circuit further recognized the indirect discharge theory in Peconic Baykeeper, Inc. v. Suffolk County, where it rejected the district court’s conclusion that “because the trucks and helicopters discharged pesticides into the air, any discharge was indirect, and thus not from a point source.” 600 F.3d 180, 188 (2d Cir. 2010). As the pesticides
there were “discharged ‘from’ the source, and not from the air,” the court concluded the “spray apparatus . . . attached to [the] trucks and helicopters” constituted a point source under the CWA. Id. at 188–89 (emphasis added). The Ninth Circuit has similarly held discharges through the air can constitute “point source pollution” under the statute. League of Wilderness Def./Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1185, 1192–93 (9th Cir. 2002).

But accepting the County’s position—that pollutants must “travel via a ‘confined and discrete conveyance’” to navigable waters for CWA liability to attach—would necessarily preclude liability in cases such as Peconic Baykeeper and League of Wilderness. The pollutants in both cases traveled to navigable waters via the air, and not via the point sources from which they were released. See Peconic Baykeeper, 600 F.3d at 188; League of Wilderness, 309 F.3d at 1185. Taken to its logical conclusion, the County’s theory would only support liability in cases where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch. That the circuits have recognized CWA liability where such a direct connection does not exist counsels against accepting the County’s theory.

Indeed, writing for the plurality in Rapanos v. United States, Justice Scalia recognized the CWA does not forbid the “‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’” 547 U.S. 715, 743 (2006) (plurality opinion) (emphasis in original) (quoting §§ 1311(a), 1362(12)(A)). He further recognized that “from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” Id. (emphasis in original) (citations omitted). In support of his “‘indirect discharge’ rationale,” Justice Scalia cited Concerned Area Residents, where, as described above, the Second Circuit held the discharge of manure from point sources onto fields (which were not necessarily point sources themselves) and eventually into navigable waters constituted point source discharges under the CWA. Id. at 744.

Although the Court in Rapanos splintered on other issues, no Justice disagreed with the plurality opinion that the CWA holds liable those who discharge a pollutant from a defined point source to the ocean. Justice Kennedy’s opinion concurring in the judgment objected only to the plurality opinion’s creation of certain limitations on the Executive Branch’s authority to enforce the CWA’s environmental purpose and statutory mandate. Id. at 778. Similarly, the four-Justice dissent cited the CWA’s prohibition of “any addition of any pollutant to navigable waters from any point source” as strong evidence of the law’s wide sweep, and disagreed with the plurality opinion’s creation of two limitations on CWA enforcement. Id. at 800–06 (Stevens, J., dissenting).

In past cases, we have recognized Justice Kennedy’s concurrence in Rapanos, not Justice Scalia’s plurality opinion, as controlling. But we have only done so in the context of “determin[ing] whether a wetland that is not adjacent to and does not contain a navigable-in-fact water is subject to the CWA.” United States v. Robertson, 875 F.3d 1281, 1288–89 (9th Cir. 2017) (citations omitted); see also N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007). As this is not a case about wetlands, and we do not decide whether groundwater is a “navigable water” under the statute, we do not apply Justice Kennedy’s concurrence here, and consider Justice Scalia’s plurality opinion only for its persuasive value, United States v. Brobst, 558 F.3d 982, 991 (9th Cir. 2009) (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987)) (internal quotation marks omitted). See S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 707 (9th Cir. 2007) (“No Justice [in Rapanos], even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.”).

Justice Scalia’s plurality opinion demonstrates the County is reading into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged “directly” to navigable waters from a point source. As “the plain language of a statute should be enforced according to its terms,” we therefore reject the County’s reading of the CWA and affirm the district court’s rulings finding the County liable under the Act. ASARCO, LLC v. Celanese Chem. Co., 792 F.3d 1203, 1210 (9th Cir. 2015) (citations omitted).

We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis.3 The second point in particular is an important one. We therefore disagree with the district court that “liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of how they get there.” Haw. Wildlife, 24 F. Supp. 3d at 1000 (emphasis added). Here, the Tracer Dye Study and the County’s concessions clearly connect all four wells’ discharges to the consistently-emerging pollutants in the ocean. We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.

3. The EPA as amicus curiae proposes a liability rule requiring a “direct hydrological connection” between the point source and the navigable water. Regardless of whether that standard is entitled to any deference, it reads two words into the CWA (“direct” and “hydrological”) that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a “fairly traceable” connection, consistent with Article III standing principles. See, e.g., Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).
c. Disposals of Pollutants into Wells

Finally, the County contends its effluent injections are not discharges into navigable waters but “disposal[s] of pollutants into wells,” and that the Act categorically excludes well disposals from the permitting requirements of § 1342. See, e.g., § 1342(b)(1)(D). As the County urges a “construction that the statute on its face does not permit,” we “reject” it here. Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 881 (9th Cir. 2001) (citation and internal quotation marks omitted).

The County first relies on § 1342(b), which permits the EPA to delegate CWA authority to “each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction.” So long as the State “submit[s] to the Administrator a full and complete description of [its] program” and “a statement . . . that the laws of [the] State . . . provide adequate authority to carry out the described program,” the State may “issue [NPDES] permits which[,] [among other things] control the disposal of pollutants into wells.” § 1342(b)(1)(D) (emphasis added). The County contends based on this language the NPDES permitting requirements do not apply at all to well disposals. Not so. The plain language of the statute clearly permits States to issue NPDES permits for well disposals, and such permits are required only for “discharges into navigable waters.” Id. § 1342(b); see also id. § 1342(a)(1). The provision furthermore makes no judgment about whether a “disposal” always constitutes a “discharge” requiring a NPDES permit. Indeed, only when a “disposal” is also a “discharge” is a permit required. See Inland Steel Co. v. E.P.A., 901 F.2d 1419, 1422 (7th Cir. 1990) (noting § 1342(b)(1)(D) “was not intended to authorize [States to] regulat[e . . . all] wells used to dispose of pollutants, regardless of absence of any effects on navigable waters” (emphasis in original)).

The County also argues that under § 1342(b)(1)(D), only the State, not the EPA, has authority to regulate well disposals. This Court, however, has already conclusively adopted the Act does not “expressly grant[] to the EPA or [the administering] state agency the exclusive authority to decide whether [there is a CWA violation],” even while recognizing § 1342 “suspend[s] the availability of federal NPDES permits once a state-permitting program has been submitted and approved by the EPA.” Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1010–12 (9th Cir. 2002) (citing § 1342(c)(1)). That the administering state agency, HDOH, has “cho[sen] to sit on the sidelines . . . is not a barrier to a citizen’s otherwise proper federal suit to enforce the Clean Water Act” and does not somehow “divest [this Court] of jurisdiction” over this case. Id. at 1012; see also Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943, 949–50 (9th Cir. 2002) (“Under the CWA[,] private citizens may sue any person alleged to be in violation of the conditions of an effluent standard or limitation under the Act or of an order issued with respect to such a standard or limitation by the Administrator of the [EPA] or any state.” (citation omitted)).

The County next relies on § 1314(f)(2)(D), which “directs the [EPA] to give States information on the evaluation and control of [nonpoint source] ‘pollution resulting from . . . [the disposal of pollutants in wells],’” S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 106 (2004) (citing and quoting § 1314(f)(2)). According to the County, § 1314(f)(2)(D) affirmatively establishes disposals into wells constitute nonpoint source pollution and that it need not obtain NPDES permits under the CWA. But the Supreme Court itself acknowledged in South Florida that while § 1314(f)(2) listed a variety of circumstances constituting “nonpoint source[] pollution”—including well disposals—the provision “does not explicitly exempt these nonpoint pollution sources from the NPDES program if they also fall within the ‘point source’ definition.” Id. (emphasis added). Consistent with our reading of § 1342(b)(1)(D), the implication here is that well disposals do not always constitute nonpoint source pollution. If pollutants from those wells are discharged into a navigable water from a discrete source, that is point source pollution, and the polluter must obtain an NPDES permit if it wants to avoid liability under the CWA. See §§ 1311(a), 1342(a)(1).

The CWA’s definition of “pollutant” also supports this reading. See § 1362(6)(B). Under the Act, “[t]his term [excludes] . . . water derived in association with oil or gas production and disposed of in a well, if [1] the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and [2] such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.” Id. (emphasis added). By contrast, pollutants “disposed of in . . . well[s]” that “alter the water quality” of “surface water[s]” are “subject to NPDES permitting requirements.” N. Plains Res. Council v. Fid. Expl. & Dev. Co., 325 F.3d 1155, 1161–62 (9th Cir. 2003) (citing § 1362(6)(B)). Section 1362(6)(B), therefore, confirms that contrary to the County’s contentions, the CWA does not categorically exempt all well disposals from the NPDES requirements. “Were we to conclude otherwise,” and create out of whole cloth a categorical exemption for well disposals, we would improperly amend the statute and “undermine the integrity of [the CWA’s] prohibitions.” Id. at 1162 (citation and internal quotation marks omitted). We decline to do so here.

2. Fair Notice

“Due process requires that [a statute] provide fair notice of what conduct is prohibited before a sanction can be imposed.” United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008) (citation and internal quotation marks omitted). “To provide sufficient notice, a statute . . . must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.” Id. (citing Grayned v. City
of Rockford, 408 U.S. 104, 108 (1972)) (internal quotation marks omitted). If the “[p]lain [l]anguage of the [s]tatute” is “sufficiently clear to warn a party about what is expected,” a court may find the party had “fair notice” under the due process clause. Id.; see also Garvey v. Nat’l Transp. Safety Bd., 190 F.3d 571, 584 (D.C. Cir. 1999) (finding the defendant had “fair notice” based on “plain language” of regulation).

In determining whether there has been fair notice, this Court must “first look to the language of the statute itself.” Shark Fins, 520 F.3d at 980 (citation omitted). Here, the Clean Water Act prohibits the “discharge of any pollutant by any person.” § 1311(a). The Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” Id. § 1362(12) (internal quotation marks omitted). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged.” Id. § 1362(14) (internal quotation marks omitted).

Finally, there is an exception to the general prohibition on point source pollution if a party obtains an NPDES permit. Id. §§ 1311(a), 1342(a)(1).

It is undisputed the County “add[s] . . . pollutants”—treated effluent—“to navigable waters”—the Pacific Ocean—from . . . point source[s]”—its four injection wells. See id. §§ 1362(6), (12), (14). As its actions fall squarely within the “[p]lain [l]anguage of the [s]tatute,” we conclude the County had “fair notice” its actions violated the CWA. See Shark Fins, 520 F.3d at 980; Garvey, 190 F.3d at 584; Lee v. Enter. Leasing Co.-West, LLC, 30 F. Supp. 3d 1002, 1012 (D. Nev. 2014) (finding “reasonable reading of the statute . . . afforded [the] [d]efendants fair notice that their conduct was at risk”).

But the County contends it did not have “fair notice” because the statutory text can be fairly read to exclude the wells from the NPDES permit requirements. It argues again that pollution via its wells and the groundwater is nonpoint source pollution not subject to the CWA’s prohibitions. Even so, “due process does not demand unattainable feats of statutory clarity.” Planned Parenthood of Cent. and N. Ariz. v. State of Ariz., 718 F.2d 938, 948 (9th Cir. 1983) (citation and internal quotation marks omitted). That there is a “difference[] of opinion” on “the precise meaning of [the CWA]” is “[n]ot . . . . enough to render [it]” violative of the due process clause. Id.

The County further contends it did not have “fair notice” because HDOH—the state agency tasked with administering the NPDES permit program—has maintained an NPDES permit is unnecessary for the wells. The County does not describe HDOH’s position accurately. As late as April 2014, HDOH stated in a letter to the County it was still “in the process of determining if an NPDES permit is applicable” to the wells. That HDOH has not solidified its position on the issue does not affirmatively demonstrate it believes the permits are unnecessary, as the County contends. And the fact that the County “has been unable to receive an interpretation of the [CWA] from . . . [HDOH] officials administering the program” is also “[n]ot . . . enough to render [enforcement of the CWA]” unconstitutional. Id. As a “reasonable person would [have] underst[ood] the [CWA]” as prohibiting the discharges here, enforcement of the statute does not violate the due process clause. Id. at 948–49; see also Shark Fins, 520 F.3d at 980 (holding liability would attach if “regulation is . . . sufficiently clear to warn a party about what is expected of it” (citation and internal quotation marks omitted)).

CONCLUSION

At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA’s prohibitions. Under the circumstances of this case, we therefore affirm the district court’s summary judgment rulings finding the County discharged pollutants from its wells into the Pacific Ocean, in violation of the CWA, and further finding the County had fair notice of what was prohibited.

AFFIRMED.
COUNSEL


L. Ashley Aull (argued), Chief; Michael Anthony Brown, Assistant United States Attorney; Sandra R. Brown, Acting United States Attorney; Criminal Appeals Section, United States Attorney’s Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

RAKOFF, Senior District Judge:

Defendant-Appellant Donnie Lee Walton challenges the district court’s imposition of a sentencing enhancement under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1). ACCA imposes a mandatory minimum sentence of fifteen years of imprisonment on a person who both violates Section 922(g) and has three previous convictions for either a “serious drug offense,” or a “violent felony,” or some combination of the two. Id.

When Walton pleaded guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g), he had previously been convicted of (1) assault with a deadly weapon, in violation of California Penal Code § 245(a)(1); (2) second-degree robbery, in violation of California Penal Code § 211; (3) first-degree robbery in violation of

Alabama Criminal Code § 13A-8-41; and (4) attempted murder, in violation of Alabama Criminal Code §§ 13A-4-2 and 13A-6-2. The sentencing court found that all four of these convictions were for violent felonies under ACCA.

Walton argues on appeal that the district court erred as to each of these previous convictions. We hold that neither first-degree robbery under Alabama law nor second-degree robbery under California law is a violent felony under ACCA. Since at least two of his four prior non-drug convictions did not qualify as violent felonies, Walton should not have been subject to ACCA’s mandatory sentencing provision. It is therefore unnecessary to decide whether Walton’s attempted murder and assault with a deadly weapon convictions are violent felonies. We reverse and remand.

I.

This court generally reviews de novo whether a state conviction qualifies under ACCA’s definition of “violent felony.” United States v. Dixon, 805 F.3d 1193, 1195 (9th Cir. 2015). The Government nevertheless argues for plain error review because Walton failed to raise the claims advanced in his opening brief before the district court. This is incorrect. Walton argued below that he did not have the required number of violent felonies necessary for enhancement under ACCA, and while he did not make the precise arguments that he makes on this appeal, “it is claims that are deemed waived or forfeited, not arguments.” United States v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004). Moreover, we are not limited to plain error review when, as here, “we are presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court.” United States v. Evans-Martinez, 611 F.3d 635, 642 (9th Cir. 2010) (quoting United States v. Saavedra-Velazquez, 578 F.3d 1103, 1106 (9th Cir. 2009)). The Government expressly argued in its brief before the sentencing court that Walton’s prior convictions were all violent felonies under ACCA, and its arguments on this purely legal question have been squarely presented at length before this court. We therefore review de novo whether Walton’s prior convictions qualify as violent felonies under ACCA.

II.

ACCA defines a “violent felony” as any crime punishable by imprisonment for a term exceeding one year that: “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives[,] or [(iii)] otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e) (2)(B). These three clauses are known as the “force clause,” the “enumerated clause,” and the “residual clause,” respectively. The Government does not argue that Walton’s convictions qualify under the enumerated clause, and the Supreme Court has held that the residual clause is unconstitutionally

Counterintuitive though it may seem, to determine whether a defendant’s conviction under a state criminal statute qualifies as a violent felony under the force clause, we do not look to the underlying facts of the defendant’s actual conviction. *See Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). Rather, established Supreme Court precedent requires that we employ a so-called “categorical” approach, looking “only to the fact of conviction and the statutory definition of the prior offense” to determine whether the state statute under which the defendant was convicted criminalizes only conduct that is a violent felony under ACCA. *Taylor v. United States*, 495 U.S. 575, 602 (1990); *see also United States v. Grisel*, 488 F.3d 844, 847 (9th Cir. 2007) (en banc). Under this approach, “even the least egregious conduct the statute covers must qualify” as a violent felony for a defendant’s conviction under that statute to count toward ACCA’s mandatory sentence. *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006). 1

“State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because ‘we must presume that the conviction rested upon nothing more than the least of the acts criminalized’” by that statute. *United States v. Strickland*, 860 F.3d 1224, 1226–27 (9th Cir. 2017) (alterations omitted) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)). If a state’s highest court has not ruled on the level of force required to support a conviction, we are bound by reasoned intermediate court rulings. *See Poblon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017) (citing *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940)). If a statute is “divisible” – that is, if it “lists alternative sets of elements, in essence several different crimes” – we apply the “modified categorical approach,” under which we “consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction,” and then apply the categorical approach to the subdivision under which the defendant was convicted. *United States v. Werle*, 815 F.3d 614, 619 (9th Cir. 2016) (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)). If the government fails to produce those documents, courts determine whether the “least of [the] acts” described in the statute can serve as a predicate offense. *Johnson v. United States* ("*Johnson I*"), 559 U.S. 133, 137 (2010).

A.

We turn first to evaluating whether Walton’s conviction for first-degree robbery under Alabama law qualifies as a violent felony under ACCA. A person commits first-degree robbery in Alabama if he commits third-degree robbery and “[i]s armed with a deadly weapon or dangerous instrument” or “[c]auses serious physical injury to another.” *Alabama Code* § 13A-8-41(a). In turn, a person commits third-degree robbery in Alabama if, “in the course of committing a theft,” she either

1. *Lopez-Solis* dealt with interpretation of a sentencing enhancement under § 2L1.2(b)(3)(E) of the United States Sentencing Guidelines. *Id.* at 1203. The commentary to that provision defines a “crime of violence” as any crime “that has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S. Sentencing Guidelines Manual § 2L1.2, cmt. n.2 (U.S. Sentencing Comm’n 2014). Similarly, both 18 U.S.C. § 16(a) and the career offender sentencing guideline, U.S.S.G. § 4B1.2(a)(1), define a “crime of violence” to include any offense that “has as an element the use, attempted use, or threatened use of physical force” against the person of another. Cases interpreting these similar provisions are relevant to interpretation of ACCA’s force clause. *See United States v. Molinar*, 876 F.3d 953, 956 n.3 (9th Cir. 2017) ("[T]he force clauses in the ACCA and the Guidelines remain identical."); *see also United States v. Benally*, 843 F.3d 350, 354 (9th Cir. 2016) (“[B]ecause the wording of [18 U.S.C. § 924(c)(3) and 18 U.S.C. § 16] is virtually identical, we interpret their plain language in the same manner." (footnote omitted)).
“strong.” *Id.* In support of this holding, the Court in *Johnson I* favorably quoted the definition of “violent felony” from Black’s Law Dictionary: “a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon.” *Id.* at 140–41 (alteration omitted)

Thereafter, the Supreme Court, in *United States v. Castleman*, 134 S. Ct. 1405 (2014), further explained the need for substantial force for a conviction to qualify as a violent felony under ACCA’s force clause. See *id.* at 1411–12. In that case, the Court distinguished “minor uses of force” that suffice for a “misdemeanor crime of domestic violence,” such as squeezing an arm hard enough to leave a bruise, from the “substantial degree of force” required for violent felonies under ACCA. *Id.* As the Court noted, minor uses of force are insufficient both because they are not “violent” in the generic sense and because it would be anomalous “to apply the Armed Career Criminal Act to ‘crimes which, though dangerous, are not typically committed by those whom one normally labels armed career criminals.’” *Id.* at 1412 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008), abrogated on other grounds by *Johnson II*, 135 S. Ct. 2563).

Alabama courts have affirmed robbery convictions under the “use of force prong” where the “force” used was not violent under *Johnson I*. For example, the victim in *Jackson v. State*, 969 So. 2d 930 (Ala. Crim. App. 2007) testified that “the appellant rushed toward her, tugged her purse a couple of times, yanked her purse off of her arm, and ran away.” *Id.* at 931. The Court of Criminal Appeals held this “clearly supported a conviction” of third-degree robbery. *Id.* at 933. Similarly, the Court of Criminal Appeals affirmed another conviction where the only force used was a push that the victim testified was “just enough to knock me off balance. You know, get me out of the way.” *Wright v. State*, 487 So. 2d 962, 964 (Ala. Crim. App. 1985). When asked, “How far over did he knock you?” the victim replied, “Just over the counter. I caught myself on the counter.” *Id.* at 965. The Alabama court held that this was sufficient evidence of force to satisfy Alabama’s third-degree robbery statute. *Id.* And in another case, the Alabama Court of Criminal Appeals affirmed a conviction for second-degree robbery—which, like first-degree robbery, also requires the commission of third-degree robbery—finding in relevant part that the crime “constituted robbery in the third degree” based on the victim’s testimony that “the defendant pushed or shoved him ‘back into a corner’ to effect an immediate escape.” *Wright v. State*, 432 So. 2d 510, 512 (Ala. Crim. App. 1983).

We have previously held that several other crimes are not violent felonies under the force clauses of ACCA and the Sentencing Guidelines because they can be committed by using minimal levels of force. For example, in *Molinari*, we held that Arizona armed robbery was not a crime of violence under the force clause of the Sentencing Guidelines in light of an Arizona Supreme Court case holding that, although snatching an article from a person’s hand is insufficient, “‘if the article is so attached to the person or clothes as to create resistance however slight,’ the offense becomes robbery.” *Molinari*, 876 F.3d at 957 (quoting *Lear v. State*, 6 P.2d 426, 427 (1931)); see also *United States v. Jones*, 877 F.3d 884, 887–88 (9th Cir. 2017) (applying *Molinari* to Arizona armed robbery under ACCA).

Several other circuits have also held that robbery statutes that can be violated by such minor uses of force are not violent under ACCA or similar statutes. See, e.g., *United States v. Bell*, 840 F.3d 963, 966 (8th Cir. 2016) (Missouri robbery not a violent crime because it had been committed by a defendant who “bumped” the victim’s shoulder and “yanked” her purse away); *United States v. Winston*, 850 F.3d 677, 685 (4th Cir. 2017) (Virginia robbery not a violent felony because a conviction was affirmed when “the victim was carrying her purse tucked under her arm when the defendant approached the victim from behind, tapped her on the shoulder, and jerked her around by pulling her shoulder, took her purse, and ran” (quoting *Jones v. Commonwealth*, 496 S.E.2d 668, 669 (Va. Ct. App. 1998))). This is plainly analogous to the minor force found sufficient under the Alabama robbery statute in the *Jackson* case.

We have also held that resisting arrest under Arizona law is not a crime of violence under the Sentencing Guidelines because the Arizona Court of Appeals has affirmed the conviction of a defendant who, while trying to keep from being handcuffed, “kicked the officers trying to control her,” causing a “minor scuffle.” *United States v. Flores-Cordero*, 723 F.3d 1085, 1087–88 (9th Cir. 2013) (quoting State v. Lee, 176 P.3d 712, 713 (Ariz. Ct. App. 2008)), as amended (Oct. 3, 2013); see also *United States v. Lee*, 701 F. App’x 697, 701 (10th Cir. 2017) (Florida resisting arrest offense not a violent felony where it had been violated by “wiggling and struggling” and “scuffling” (quoting *State v. Green*, 400 So.2d 1322, 1323–24 (Fla. Dist. Ct. App. 1981)). Shoves that merely cause others to briefly lose their balance or step backward, as in the two *Wright* cases from Alabama cited above, are no more violent than these minor scuffles. The force required to support a conviction for third-degree robbery in Alabama is therefore not sufficiently violent to render that crime a violent felony under ACCA. 2 Because the Government has

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2. Although several district courts in the Eleventh Circuit have held that Alabama robbery is a crime of violence under ACCA or similar statutes, none of these opinions actually engaged in the analysis required under *Johnson I*. See *United States v. Freeman*, No. 11-0303-W, 2016 WL 4394172, at *2 (S.D. Ala. Aug. 15, 2016) (summarily holding that second-degree robbery “qualifies as a violent felony under the ACCA’s elements clause because it has as an element the use, attempted use, or threatened use of physical force against the person of another” and citing pre-*Johnson I* precedent); *United States v. Dees*, No. 05-0225-WS-B, 2014 WL 2885481, *2* (S.D. Ala. June 25, 2014) (same); *Levert v. United States*, No. 2:13-CR-119-VEH, 2016 WL 4070147, at *4 (N.D. Ala. July 29, 2016) (addressing only the argument that the residual clause in the Sentencing Guidelines is not void for vagueness). In one case, the court even looked to the specific facts of the underlying conviction rather than employing the required cat-
not argued that the statute is divisible, any such argument is waived. See Parnell, 818 F.3d at 981 (declining to conduct a modified categorical analysis because “the government [did] not argue [that the defendant’s] conviction [fell] under § 924(e)(2)(B)(ii) or that the modified categorical approach applied”). Accordingly, we conclude that Walton’s conviction for Alabama armed robbery cannot support an enhancement under ACCA.

B.

Turning to Walton’s conviction for second-degree robbery under California law, California’s robbery statute prohibits “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” Cal. Penal Code § 211. At the time of Walton’s sentencing, we had held that California robbery was a violent felony under ACCA’s residual clause. See United States v. Prince, 772 F.3d 1173, 1176–77 (9th Cir. 2014). However, after the Supreme Court struck down the residual clause in Johnson II, we revisited that decision and held that California robbery is not a violent felony under ACCA’s force clause because it can be committed where force is only negligently used and because the statute is indivisible. See Dixon, 805 F.3d at 1197–98. The Dixon court relied on People v. Anderson, in which the California Supreme Court affirmed the conviction of a man who, while stealing a car, accidentally ran over its owner as he sped away. 252 P.3d 968, 972 (Cal. 2011) (“It was robbery even if, as he claims, he did not intend to strike [the owner], but did so accidentally.”).

Dixon is dispositive as far as Walton’s conviction for second-degree robbery under California law is concerned. Indeed, the Government offers no counter-argument to Dixon’s application here beyond simply citing to two cases that predate Johnson I and so applied the incorrect analysis and that, moreover, involved different statutes. See Nieves-Medrano v. Holder, 590 F.3d 1057 (9th Cir. 2010); United States v. David H., 29 F.3d 489 (9th Cir. 1994). We therefore hold that Walton’s conviction for second-degree robbery under California law, like his conviction for first-degree robbery under Alabama law, does not qualify as a “violent felony” under ACCA’s force clause.

III.

Because two of Walton’s four prior convictions are not violent felonies under ACCA’s force clause, Walton should not have been subject to ACCA’s fifteen-year mandatory minimum sentence, which requires at least three previous convictions of violent felonies. 18 U.S.C. § 924(e)(1). Accordingly, Walton’s sentence must be vacated, and we need not reach his arguments regarding his convictions for attempted murder and assault with a deadly weapon.

The sentence is hereby VACATED and the case is remanded to the district court for resentencing.
PIETER A. FOLKENS, DBA A Higher Porpoise Design Group, Plaintiff-Appellant, v. WYLAND WORLDWIDE, LLC, a California Corporation; WYLAND GALLERIES, INC., a California Corporation; SIGNATURE GALLERY GROUP, INC., DBA Wyland Galleries, a Nevada Corporation; (NFN)WYLAND, AKA Robert Thomas Wyland, Defendants-Appellees.

No. 16-15882
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-02197-JAM-CKD
Appeal from the United States District Court for the Eastern District of California
John A. Mendez, District Judge, Presiding
Argued and Submitted November 14, 2017
San Francisco, California
Filed February 2, 2018
Before: Ronald M. Gould and Mary H. Murguia, Circuit Judges, and James E. Gritzner,* District Judge.
Opinion by Judge Gould

* The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

COUNSEL
Geoffrey Wm. Steele (argued), Karl Folkens, Scott D. Reep, and Stephen Gizzi, Gizzi Reep Foley, Benicia, California, for Plaintiff-Appellant.
Marc Dale Risman (argued), Henderson, Nevada, for Defendants-Appellees.

OPINION
GOULD, Circuit Judge:

Plaintiff Peter A. Folkens (“Folkens”) alleges that Defendant Robert T. Wyland (“Wyland”) infringed on his pen and ink depiction of two dolphins crossing underwater. Folkens contends that Wyland’s depiction of an underwater scene infringes on his drawing by copying the crossing dolphins, and that the similar element of two dolphins crossing underwater is protectable under copyright law, entitling him to proceed to trial on the issue of whether Wyland’s painting violates his copyright. We consider whether two dolphins crossing underwater is a protectable element under the objective standard of this Court’s extrinsic test for substantial similarity. We hold that the depiction of two dolphins crossing underwater in this case is an idea that is found first in nature and is not a protectable element. We note, as we did in Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003), that a collection of unprotectable elements—pose, attitude, gesture, muscle structure, facial expression, coat, and texture—may earn “thin copyright” protection that extends to situations where many parts of the work are present in another work. But when, as here, the only areas of commonality are elements first found in nature, expressing ideas that nature has already expressed for all, a court need not permit the case to go to a trier of fact. We affirm the district court.

I

A

Folkens states he is a “world-renowned wildlife artist, illustrator, photographer, researcher, and author best known for his work in the field of marine mammals.” He is the author and copyright owner of a pen and ink illustration titled “Two Tursiops Truncatus” also known as “Two Dolphins,” which he created in 1979. Two Dolphins is a black and white depiction of two dolphins crossing each other, one swimming vertically and the other swimming horizontally. No other subjects appear in the pen and ink illustration. The illustration has at least one copyright registration, VA 31-890. Folkens alleges that in 2011 Wyland created an unauthorized copy of Two Dolphins in a painting titled “Life in the Living Sea.” Wyland’s “Life in the Living Sea” painting is a color depiction of an underwater scene consisting of three dolphins, two of which are crossing, various fish, and aquatic plants. Folkens alleges that in total Defendants created enough prints to make $4,195,250 from sales of Life in the Living Sea. Folkens further alleges that Defendants have created other unauthorized copies of Two Dolphins for use in advertising on the internet. Folkens alleges that Defendants currently display the infringing works at galleries around the country. Folkens states that he found out about the infringement in October 2013, and that he informed Defendants about their infringing works on or about September 18, 2014. This lawsuit followed.

B

The district court granted summary judgment for Defendants after applying the Ninth Circuit’s extrinsic test of substantial similarity to assess whether the Defendants’ work infringed Folkens’s copyright. Copyright protection only extends to original works and the district court had to first dissect the works, Two Dolphins and Life in the Living Sea, to

1. Folkens also filed a claim for infringement based on Defendants’ sculpture known as the Wyland Dolphin, but the grant of summary judgment in favor of Defendants on that claim is not at issue on this appeal.

Life in the Living Sea is a mere enlargement of Two Dolphins, and Folkens contends that Defendants offered no evidence that the crossing of two dolphins in this way occurs in nature. Folkens contends that Defendants offer other arguments that are not relevant to the main issue and this Court’s decision in this case. Folkens contends that the dolphins were posed by professional animal trainers in an enclosed environment. Folkens contends that the dolphins are a protectable element. The district court concluded, that it was a naturally occurring idea of a dolphin swimming underwater, with one swimming upright and the other crossing horizontally. The district court also found that “the cross-dolphin pose featured in both works results from dolphin physiology and behavior since dolphins are social animals, they live and travel in groups, and for these reasons, [dolphins] are commonly depicted swimming close together.” The district court further found that Folkens had not identified any elements of his work that are not commonplace or dictated by the idea of two swimming dolphins. The district court concluded that no reasonable juror could find substantial similarity between the two works because the element of similarity between Two Dolphins and Life in the Living Sea was not a protectable element.

II

We review a district court’s decision to grant summary judgment de novo. L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012), as amended on denial of rehe’g and rehe’g en banc (June 13, 2012). Summary judgment is appropriate if “there is no genuine dispute of material fact” viewing the evidence in the light most favorable to the nonmoving party. Id. (citing Fed. R. Civ. P. 56(a)). A genuine dispute of a material fact is “one that could reasonably be resolved in favor of either party.” Ellison v. Robertson, 357 F.3d 1072, 1075 (9th Cir. 2004).

III

Folkens concedes that the idea of dolphins swimming underwater is not protected, but argues that his unique expression of that idea is protected. Folkens contends that the dolphins here do not exhibit behavior shown in nature because the dolphins in the photos that Two Dolphins was based upon were posed by professional animal trainers in an enclosed environment. Folkens contends that Defendants offered no evidence that the crossing of two dolphins in this way occurs in nature, and that fact alone should have precluded summary judgment.3

Defendants argue that the district court correctly concluded that scenes found in nature, such as dolphins crossing in the wild, are not protected by copyright laws and that there were no protectable elements that were similar based on the shared subject matter. Defendants further argue that Folkens’s reliance on the fact that the dolphins were posed is a red herring because animal trainers can pose animals to capture positions that naturally occur in the wild.

To prove copyright infringement, a plaintiff must show: “(1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.” Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). The parties do not dispute that Folkens owns a valid copyright, but instead focus on element two—whether Wyland copied constituent elements of the work that are original.

Because direct evidence of copying is often not available, a plaintiff can establish copying by showing (1) that the defendant had access to the plaintiff’s work and (2) that the two works are substantially similar. L.A. Printex Indus., Inc., 676 F.3d at 846. Defendants do not contest access to the works, but argue, among other things, that “as a matter of law, there is no substantial similarity” between Two Dolphins and Life in the Living Sea. We must determine whether the two works are substantially similar.

Summary judgment is “not highly favored” on questions of substantial similarity, but it is appropriate if we can conclude that “no reasonable juror could find substantial similarity of ideas and expression.” Shaw v. Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990). To determine whether works are substantially similar, we apply a two-part test: an extrinsic test and an intrinsic test. L.A. Printex Indus., Inc., 676 F.3d at 848. On summary judgment, we consider only the extrinsic test—an objective comparison of specific expressive elements focusing on articulable similarities between the two works. Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996). Analytic dissection of a work and expert testimony are appropriate for the extrinsic test. Id. “Where a high degree of access is shown, we require a lower standard of proof of substantial similarity.” Swirsky v. Carey, 376 F.3d 841, 844 (9th Cir. 2004), as amended on denial of rehe’g (Aug. 24, 2004). However, “[b]ecause the requirement is one of substantial similarity to protected elements of the copyrighted work, it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.” Id. at 845. “The key question always is: Are the works substantially similar beyond the fact that they depict the same idea?” Mattel, Inc. v. MGA Entm’t, Inc., 616 F.3d 904, 917 (9th Cir. 2010), as amended on denial of rehe’g (Oct. 21, 2010).

The parties agree that the element of similarity is the two dolphins crossing. The key inquiry is whether the crossing dolphins are a protectable element. Swirsky, 376 F.3d at 845. Folkens contends that his expression of two dolphins crossing is a protectable element, while Defendants argue, and the district court concluded, that it was a naturally occurring element and therefore not protectable under copyright law.

First, we observe that the fact that a pose can be achieved with the assistance of animal trainers does not in itself dic-
tate whether the pose can be found in nature. For example, an animal trainer may be used to get a dog to sit still while a photograph is taken or a painting is done, but no one would argue that the position of a dog sitting was not an idea first expressed in nature. In that case, the trainer’s purpose was not to create a novel pose, but to induce the dog to hold that pose for a period of time. Similarly, here, the dolphin trainer got one dolphin to swim upwards while its photo was taken, and got another to swim horizontally while its picture was taken. Neither of these swimming postures was novel. The positioning of the dolphins by a trainer does not entitle Folkens to survive summary judgment.

Further, we have held that ideas, “first expressed in nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them.” Satava, 323 F.3d at 813. We reaffirm that basic principle. An artist may obtain a copyright by varying the background, lighting, perspective, animal pose, animal attitude, and animal coat and texture, but that will earn the artist only a narrow degree of copyright protection. Id. There is no question that the other aspects of Two Dolphins and Life in the Living Sea, beyond the two dolphins crossing, are different—Life in the Living Sea is in color, includes a third dolphin, has different lighting, and includes several species of fish and marine plants.

In Satava, we considered a case where a plaintiff attempted to assert a copyright infringement claim for glass-in-glass sculptures of jellyfish rising in the ocean. Id. at 807. The sculpture was described as a “vertically oriented, colorful, fanciful jellyfish with tendril-like tentacles and a rounded bell encased in an outer layer of rounded clear glass that is bulbous at the top and tapering toward the bottom to form a roughly bullet shape;” the jellyfish appeared “lifelike.” Id. We were asked to determine whether the district court erred in enjoining the defendant from making sculptures similar to the plaintiff’s jellyfish. Id. at 809–10. We reasoned that the plaintiff could not prevent others from depicting jellyfish within a clear outer layer of glass because that was an appropriate setting for an aquatic animal and he could not prevent others from depicting jellyfish with tendril-like tentacles or rounded bells because many jellyfish possess those parts. Id. at 811. More generally, we held that no artist may use copyright law to prevent others from depicting ideas first expressed by nature, but cautioned that this did not mean that no realistic depiction of live animals can be protected by copyright. Id. at 812–13. We indicated that an artist can protect the “original expression he or she contributes to these ideas” and “may earn copyright protection,” but that “the scope of [his or her] copyright is narrow.” Id. at 813.

We make a similar distinction today. We conclude that a depiction of two dolphins crossing under sea, one in a vertical posture and the other in a horizontal posture, is an idea first expressed in nature and as such is within the common heritage of humankind. See id. No artist may use copyright law to prevent others from depicting this ecological idea. See id.; see also George S. Chen Corp. v. Cadena Intern., Inc., 266 F. App’x 523, 524 (9th Cir. 2008) (holding that an ornament of a dolphin with “an open mouth and an uplifted, twisted tail” follows from the idea of a swimming dolphin and is not protectable). Folkens’s Two Dolphins arises from the fact that dolphins are social animals, often depicted swimming in groups—as they are found in nature. Two Dolphins also represents dolphins swimming vertically and horizontally, ideas requiring no stretch of the average person’s imagination because dolphins do this in nature. Nature provides us with numerous iconic depictions of animals: ants marching in a straight line; geese flying in a “V” as they migrate; a mother duck being followed by her ducklings out of a pond; a hummingbird hovering as it sucks nectar from a flower; and bats hanging upside down from a cave ceiling, to name a few illustrative examples. As a general rule, under our copyright law, an artist may not use copyright law to prevent others from depicting such ideas first expressed by nature. See Satava, 323 F.3d at 813. The basic idea of copyright law is to protect unique expression, and thereby to encourage expression; it is not to give to the first artist showing what has been depicted by nature a monopoly power to bar others from depicting such a natural scene.

Folkens holds a thin copyright in his expression of the two dolphins in dark water, with ripples of light on one dolphin, in black and white, but that copyright is narrow. See id. The protectable elements that form Folkens’s thin copyright in Two Dolphins are not substantially similar to Wyland’s crossing dolphins in Life in the Living Sea. Wyland’s dolphins are in color, do not show light ripples off the body of a dolphin, and the dolphins cross at different angles. Based on our careful consideration of the total circumstances presented, we conclude that Folkens’s thin copyright is not infringed by Wyland’s picture.

While Folkens tries to make the argument that Wyland copied his expression of two dolphins swimming, it is clear from precedent that protectable expression must be more specific than just the natural element of crossing dolphins; here, it necessarily includes their exact positioning, the stippled light, the black and white depiction, and other specific and unique elements of expression. See id. (recognizing that an artist “may, however, protect the original expression he or she contributes to these ideas” including “the pose, attitude, gesture, muscle structure, facial expression, coat, or texture of [the] animal . . . and the background, lighting, or perspective”); cf. Mattel, Inc., 616 F.3d at 915–16 (concluding that the concept of depicting a young, fashionable female with exaggerated features is unoriginal and an unprotected idea while particular expressions including hair, eye, and skin color, outfit, and shoes may be protectable).

We hold that under the circumstance of this case, the district court did not err by granting summary judgment for Defendants because the similar element of Two Dolphins and Life in the Living Sea, two dolphins crossing one another, one vertical and the other horizontal, is not protectable and
the other particularities of the scene depicted are not the same.

IV

When determining whether a copyright infringement claim will survive summary judgment, the court must analyze whether there is substantial similarity between the works under the extrinsic test. The extrinsic test considers only the protectable elements of a work. In *Satava*, we made clear that those protectable elements could not be ideas expressed in nature subject to a thin copyright that may extend only to the pose, attitude, gesture, muscle structure, facial expression, coat, or texture of the animal. Because the depictions of two dolphins crossing here share no similarities other than in their non-protectable elements of the dolphins crossing, we affirm the judgment of the district court.

AFFIRMED.
INTRODUCTION

Code of Civil Procedure section 998 is a cost-shifting statute designed to encourage parties to settle their lawsuits prior to trial by punishing a party that refuses a reasonable settlement offer. In order to trigger section 998, a settlement offer must be clear, in that it must allow the party receiving the offer to evaluate whether the party making the offer is likely to obtain a more favorable verdict at trial.

In this wrongful death case, two people (Virginia Gonzalez and Maverick Crowder) died after a fire engulfed the rented home in which they were living. Both sets of the decedents’ heirs (plaintiffs) sued the owners of the rented home, Wayne Lew and Maria Lew, and plaintiffs subsequently made a joint offer to settle both claims for $1.5 million. The Lews rejected the offer and plaintiffs prevailed at trial; the jury awarded Virginia, the deceased’s heirs, $2,254,300 to Juan, $357,100 for the death of Maverick, and $357,100 for the death of Maverick’s son, Maverick. The jury attributed 15 percent of the fault to Juan, leaving the Lews responsible for the remaining 85 percent. In subsequent proceedings, the court allocated the damages among the decedents’ heirs. The court also reduced Juan’s economic damages by 15 percent under Proposition 51.

As to that issue, the court denied the Lews’ motion. After examining the text of section 998, the court concluded the statute “does not require the separation of claims or plaintiffs. Neither does it invalidate joint offers.” Citing the overall goal

1. All undesignated statutory references are to the Code of Civil Procedure.

2. Because all the members of the Gonzalez family have the same last name, we use their first names when we refer to them individually.

3. Plaintiffs also sued the Lews in their capacity as trustees of the Lew Family Trust. For convenience, we refer to all of the defendants collectively as the Lews.

4. The motion to tax plaintiffs’ costs contained several independent arguments. The court granted the motion in part and denied the motion in part.
of section 998—encouraging settlement—the court further stated that “joint offers should be encouraged rather than discouraged. … Where the parties are in fact attempting to settle on a joint basis, their efforts should not be impeded by judge made rules requiring the separation of parties or claims.” The court then found plaintiffs’ settlement offer was valid under section 998. The Lews timely appeal.

DISCUSSION

The Lews assert the court erred in awarding plaintiff’s expert witness fees and post-settlement-offer interest on the judgment. According to the Lews, plaintiffs’ global settlement offer was invalid under section 998 because it offered to settle both wrongful death actions and did not allocate the settlement between the two sets of decedents’ heirs. On the facts of this case, we conclude the court did not err.

1. Standard of Review

The application of section 998 to undisputed facts is a legal issue we review de novo. (See Martinez v. Brownco Construction Co. (2013) 56 Cal.4th 1014, 1018 (Martinez).)

2. The overriding purpose of section 998 is to encourage pretrial settlement of litigation.

Generally, a prevailing party in a civil case “is entitled as a matter of right to recover costs.” (§ 1032, subd. (b).) Recoverable costs do not typically include the fees of expert witnesses not ordered by the court. (§§ 1032, 1033.5, subd. (b)(1).) But expert witness fees are recoverable in some circumstances, as when a more favorable judgment for the plaintiff follows a defendant’s rejection of a valid pretrial section 998 settlement offer. (See Martinez, supra, 56 Cal.4th at pp. 1019 & 1022, fn. 4; Kahn v. The Dewey Group (2015) 240 Cal.App.4th 227, 237 (Kahn).) Section 998 establishes a procedure for shifting costs upon a party’s refusal to settle by “expand[ing] the number and type of recoverable costs and fees over and above those permitted by section 1032(b).” (Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal.4th 985, 1000.) In addition to expert witness fees, a prevailing plaintiff in a personal injury case may obtain post-offer interest on the judgment. (Civ. Code, § 3291.)

As relevant here, section 998 provides: “(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section. [¶] ... [¶] (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding ... the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff’s costs.” “To qualify for these augmented costs, the plaintiff’s offer must be in writing and conform to statutory content requirements. (§ 998, subd. (b).)” (Martinez, supra, 56 Cal.4th at p. 1019.)

Section 998 is intended to encourage the settlement of lawsuits prior to trial by penalizing a party who fails to accept a reasonable settlement offer. (T.M. Cobb Co. v. Superior Court (1984) 36 Cal.3d 273, 280.) “To effectuate this policy, section 998 provides ‘a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer.’ [Citation.] At the same time, the potential for statutory recovery of expert witness fees and other costs provides parties ‘a financial incentive to make reasonable settlement offers.’ [Citation.] Section 998 aims to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits. [Citations.]” (Martinez, supra, 56 Cal.4th at p. 1019.)

3. Joint settlement offers are not always valid under section 998.

On its face, section 998 applies to offers made by “a plaintiff” or “a defendant.” Nonetheless, our courts have applied section 998 where an offer is jointly made by or offered to more than one party. But where a settlement offer involves multiple parties on one side, it will not always trigger section 998.

3.1. Unallocated joint settlement offers made to multiple parties.

California courts uniformly recognize as invalid an unallocated offer from a defendant to multiple plaintiffs with separate claims where the offer is conditioned on acceptance by all.

In Meissner v. Paulson (1989) 212 Cal.App.3d 785 (Meissner), for example, the plaintiffs (a landlord and his insurer) sued the defendant6 (a tenant) after a fire occurred on the leased premises. The landlord sought to recover unpaid rent, attorney’s fees, and the cost of repairing the premises under both a breach of contract and a tort theory. (Id. at p. 791.) The insurer asserted a subrogation claim for the cost to repair the leased premises. (Ibid.) The defendant offered to settle the entire case in the amount of $25,001 but plaintiffs rejected the offer. Before trial, the parties stipulated the defendant owed the landlord $5,855.87 in unpaid rent; a jury later found the defendant was not negligent and the insurer recovered nothing. (Id. at p. 789.) In light of the defendant’s settlement offer, the trial court awarded the defendant additional costs under section 998. (Id. at p. 790.)

The Court of Appeal reversed the cost award. The court briefly discussed two prior cases which held an unallocated offer to multiple plaintiffs invalid under section 998 because it was impossible to tell, after trial, whether any of the plaintiffs received a better result after the trial. (Meissner, supra,

5. The tenant’s insurer joined the action during the litigation, after the tenant died.
212 Cal.App.3d at p. 790.) In one case, *Randles v. Lowry* (1970) 4 Cal.App.3d 68 (*Randles*), a defendant made a joint offer to settle a tort action with three plaintiffs, two of whom eventually recovered at trial and sought to recover costs under section 998. (*Meissner* at p. 790.) But because the settlement offer was not allocated among the three plaintiffs, it was impossible to tell whether the two prevailing plaintiffs obtained more favorable results at trial. (*Ibid.*) That court held the settlement offer invalid under section 998 because it recognized that, as a practical matter, a party receiving a joint unallocated offer may not be able to prove, as section 998 requires, that he or she obtained a more favorable result at trial—and therefore should not be subject to its cost-shifting provision.

But in *Meissner*, the court did not rest its decision on that point. There, the defendant had no difficulty establishing that the landlord’s insurer, having received nothing at trial, plainly would have fared better under the settlement offer, even after subtracting the landlord’s recovery of unpaid rent. Instead, the court focused on the fact that the defendant’s offer, to be accepted, required both plaintiffs to consent to settlement and determine between themselves the apportionment of the settlement. (*Meissner, supra,* 212 Cal.App.3d at pp. 790–791.) The court noted, as a matter of policy, that applying section 998 to the unallocated joint offer in the case before it “would introduce great uncertainty into this area of the law. Plaintiffs would be required to second-guess all joint offers to determine whether a failure to reach agreement with coplaintiffs would cause a risk of section 998 costs against them. We believe the Legislature did not intend to place this burden on offerees. To enforce the purpose of section 998, we find as a matter of law only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998.” (*Ibid.*)

Courts have applied the same reasoning where a plaintiff makes an unallocated settlement offer to multiple defendants with potentially varying liability. In *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579 (*Taing*), for instance, the plaintiff was injured when he fell from a scaffold while working for a subcontractor at a construction site. (*Id. at p. 582.*) The plaintiff later sued the general contractor, the scaffolding company, and the owner of the site (collectively, the defendants) and then offered to settle the case against all three defendants for $249,999. The defendants did not accept the offer. A jury later found the scaffolding contractor negligent and 100 percent responsible for the plaintiff’s injuries and awarded the plaintiff $492,626. The court awarded the plaintiff his expert witness fees under section 998 and prejudgment interest under Civil Code section 3291.

The Court of Appeal reversed the cost and interest award. On appeal, the scaffolding contractor argued “the joint offer unfairly burdened [the] defendants by requiring them each to second-guess whether failure to reach an agreement to settle with the other defendants would risk imposition of section 998 penalties.” (*Taing, supra,* 9 Cal.App.4th at p. 583.) The court agreed, noting with reference to *Meissner* that “an unapportioned offer by a single plaintiff to multiple defendants … requires any defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable.” (*Ibid.*) The court therefore held the plaintiff’s offer invalid under section 998 because it was not “sufficiently specific to permit the individual defendant to evaluate it and make a reasoned decision whether to accept without the additional burden of obtaining the acceptance of codefendants …” (*Id.* at p. 585.)

As the cases just discussed illustrate, settlement offers made to multiple parties present special challenges where section 998 is concerned. Nevertheless, our courts have noted some situations in which an unallocated offer made to multiple parties is valid under section 998.

For example, where several plaintiffs receiving a settlement offer have a unity of interest in the subject of the litigation, an unallocated joint settlement offer to them may be valid under section 998. At least one court has held that spouses who suffer an injury to community property have a unity of interest, i.e., a single, indivisible injury. (See, e.g., *Vick v. DaCorsi* (2003) 110 Cal.App.4th 206, 210–211.) Thus, where a husband and wife brought an action for fraud and breach of contract in connection with the purchase of a family home, an unallocated settlement offer to them was held to be valid. (*Ibid.*) In that instance, the rationales for not applying section 998—the inability of one party to settle without the consent of the other parties, and the potential difficulty of ascertaining whether the party seeking costs obtains a more favorable verdict—are not present. Where community property interests are concerned, for example, either spouse may act unilaterally on behalf of the community to accept or reject a settlement offer and whatever cost-shifting effect section 998 might have, it will affect the community as a whole. The community also suffers a single injury and obtains a single damages award, making it possible to determine with certainty whether a more favorable verdict results.

Additionally, several courts have held that in a wrongful death case, a decedent’s heirs have a unity of interest such that a settlement offer made jointly to all the heirs is valid under section 998. In *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201 (*McDaniel*), the court observed that a wrongful death cause of action is atypical, in that a decedent’s heirs may only bring a single, indivisible action for wrongful death. All heirs must join together in a single action and the jury will award a single lump sum for all recoverable dam-

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6. The courts of appeal are currently divided on this question. (See, e.g., *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 124–126 (*Gilman*) [rejecting joint offer theory because “each heir should be regarded as having a personal and separate cause of action;” lump sum award is merely a procedural element in wrongful death cases.]) But the issue in this case is not whether an unallocated offer to a decedent’s heirs is valid. Rather, we consider whether an unallocated global settlement offer from multiple plaintiffs (who, in this case, are heirs of two decedents) is valid under section 998.
ages. (Id. at p. 1206.) The recovery of the individual heirs is determined later by the court based upon the proportion each heir’s personal damage bears to the damage suffered by the others. (Ibid.) In light of these facts, the Court of Appeal determined that an unallocated joint settlement offer to a decedent’s heirs is valid under section 998. (Id. at p. 1208.) The court noted that since the jury renders a single lump sum verdict, it is simple to compare the joint offer to the verdict in order to determine whether a more favorable result was obtained at trial. (Id. at pp. 1207–1208.)

3.2. Unallocated joint settlement offers made by multiple parties.

To some extent, our courts have applied the rationale of the cases just discussed to circumstances in which an unallocated joint settlement offer is made by multiple parties. The Lews rely on two such cases, Gilman and Hurlbut v. Sonora Community Hospital (1989) 207 Cal.App.3d 388 (Hurlbut). But as we explain, that approach does not always make sense and, perhaps for that reason, our courts have not taken a uniform approach to cases in this area. (See McDaniel, supra, 214 Cal.App.4th at p. 1207 [recognizing divergent approaches].)

The Lews first cite to Hurlbut, a personal injury case arising out of injuries sustained by an infant during birth. There, the child and both parents sued the hospital where the birth took place. The parents sought emotional distress damages and the child sought damages relating to her physical injuries. (Hurlbut, supra, 207 Cal.App.3d at p. 393.) Prior to trial, the three plaintiffs made a joint, unallocated settlement offer to the hospital proposing two alternatives: a cash payment of $499,000 plus monthly payments in the amount of $17,000 for the life of the child, increasing at a rate of 4 percent per year, or a single lump sum payment in the amount of $1,900,000. (Id. at p. 407.) The jury awarded damages as follows: $11,500 per month plus $250,000 noneconomic damages to the child, $250,000 noneconomic damages to each of the parents, $350,000 to the mother representing lost earning capacity, and $14,603 reimbursement for care already provided to the child. (Id. at p. 393.) The trial court granted plaintiffs’ request for expert witness fees based on the settlement offer. (Id. at p. 394.)

The Court of Appeal reversed the award, noting that section 998 makes no mention of structured settlements and plaintiffs introduced no evidence concerning the present value of either their proposed settlement or the jury’s award. (Hurlbut, supra, 207 Cal.App.3d at pp. 408–409, 411.) Plaintiffs therefore failed to establish, as section 998 requires, they obtained a more favorable verdict: “Having failed to present evidence sufficient to establish the present value of the structured settlement offer, plaintiffs may not take advantage of the benefits offered under … section 998.” (Id. at p. 409.) The court concluded, “[a]bsent such findings, it is impossible to determine whether plaintiffs achieved a more favorable judgment at trial, making the … section 998 offer unenforceable.” (Id. at pp. 408–409.)

Hurlbut offers little guidance to us here, as we are not concerned with a structured settlement nor any other problem of valuation concerning the plaintiffs’ offer or the subsequent judgment. But the Lews rely on additional analysis by the court which is, arguably, dicta. After concluding the plaintiffs failed to establish the value of either their settlement offer or the jury’s verdict, and therefore failed to establish they obtained a more favorable judgment, the court went on to state that the joint nature of the settlement offer “precludes a determination of whether each plaintiff received a judgment more favorable than the offer.” (Hurlbut, supra, 207 Cal.App.3d at p. 409, original emphasis.) The court briefly discussed Randles, which, as already noted, involved an unallocated offer from a defendant to three plaintiffs with severable causes of action. (Ibid.) At trial, the plaintiffs received damage awards totaling less than the settlement offer. Nevertheless, the court denied the defendant’s request for costs because the unallocated offer made it impossible to determine whether any individual plaintiff received a less favorable result than he would have under the settlement offer. (Ibid.)

After noting Randles involved an offer to multiple plaintiffs, the court in Hurlbut stated the same principle should apply to an offer from multiple plaintiffs. (Hurlbut, supra, 207 Cal.App.3d at p. 409.) It therefore concluded the settlement offer in the case before it was invalid: “To consider plaintiffs’ joint settlement offer as valid would deprive defendant of the opportunity to evaluate the likelihood of each party receiving a more favorable verdict at trial. Such an offer makes it impossible to make such a determination after verdict.” (Id. at p. 410.)

Although Hurlbut is not controlling, as the Lews assert, we pause to comment on its reasoning. It is not at all apparent, as Hurlbut suggests, that the principle stated in Randles and Meissner should apply with equal force in the converse circumstance. In Randles and Meissner, the defendant chose to lump the plaintiffs together and in so doing, not only melded their separate claims together, but also required all of them to agree to the proposed settlement terms. As the court noted in Meissner, if that sort of offer were valid under section 998, a plaintiff could be liable for additional costs under section 98 through no fault of her own, as in the case where an offer is made to multiple plaintiffs and one plaintiff wants to settle but others do not. (Meissner, supra, 212 Cal.App.3d at p. 791.) No similar concern is present in the converse situation—where plaintiffs with separate claims choose to band together for the purpose of offering a global settlement to a single defendant. In that instance, the plaintiffs have presumably negotiated the allocation of any settlement to their satisfaction and they are in control of their exposure to liability under section 998. And the individual party receiving the offer does not have to obtain the consent of other parties—or risk exposure to additional costs under section 998. As a

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7. There is no horizontal stare decisis in the California Court of Appeal. (See, e.g., Jesen v. Mentor Corp. (2008) 158 Cal.App.4th 1480, 1489, fn. 10.)
practical matter, it may not be possible for any of the plaintiffs to establish they obtained a more favorable verdict—as in the case where each plaintiff later receives an amount less than the settlement offer—but that will not always be the case and would not, in any event, justify a rule that joint offers from multiple parties are always invalid.

In the other case relied upon by the Lews, Gilman, the Court of Appeal followed Hurlbut. There, multiple heirs sued a skilled nursing facility following the decedent’s death. (Gilman, supra, 231 Cal.App.3d at p. 123.) Collectively, the plaintiffs offered to settle the case for $250,000, then made a second offer to settle for $150,000. (Id. at p. 124.) The total judgment for plaintiffs was $228,379.79—more favorable than their second settlement offer. (Id. at p. 124 & fn. 4.) After taking the view that the heirs had individual, rather than indivisible, claims, the court referenced the rationale of Hurlbut: “the joint offer to compromise did not afford [the defendant] the opportunity to evaluate the separate and distinct loss suffered by each plaintiff as a result of the death” of the decedent. (Id. at p. 126.) But ultimately the court concluded that, as a practical matter, “[w]ithout an apportionment of the damages among the four plaintiffs, it is impossible to say that any one of them received a judgment more favorable than she would have received under the [settlement] offer.” (Ibid.)

Drawing on these cases, the Lews argue here that the plaintiffs’ joint settlement offer was “void ab initio.” But the idea that an offer jointly made is invalid from its inception, simply because it is jointly made, has been repeatedly rejected.

In Stallman v. Bell (1991) 235 Cal.App.3d 740 (Stallman), for example, plaintiffs’ decedent died in a car accident. The decedent’s widow sued the defendants for wrongful death and the decedent’s estate sought damages for personal injury and property damage. (Id. at p. 743.) The defendants rejected a joint settlement offer from the widow and the estate in the amount of $225,000. (Ibid.) After obtaining a less favorable judgment at trial, defendants challenged the plaintiffs’ request for costs based upon their section 998 settlement offer, arguing the “statutory offer was void from its inception because it was made jointly by both the [widow] and decedent’s estate.” (Id. at p. 745.) The court observed that although Hurlbut held a similar joint offer invalid, “[m]ore recent cases have declined to mechanically apply a rule that renders void any joint offers without first examining whether it can be determined that the party claiming costs has in fact obtained a more favorable judgment.” (Id. at p. 746.) The court concluded that in the case before it, it was possible to determine with certainty that plaintiffs obtained a more favorable judgment (even though the amount of the offer and the amount of the judgment were very close) because the jury rendered a single verdict for both plaintiffs. (Id. at p. 747.) Thus, the court could compare the joint unallocated offer to the single unallocated verdict and determine which side obtained the more favorable judgment.

The court applied similar reasoning in Fortman v. Henco, Inc. (1989) 211 Cal.App.3d 241 (Fortman). There, a toddler suffered severe injuries after she fell out of a moving car. (Id. at p. 248.) The toddler filed a personal injury claim against the manufacturer of a custom part installed on the car; her mother, the driver of the car, sought emotional distress damages. The two plaintiffs offered to settle their claims for $1 million and the defendant rejected the offer. (Id. at pp. 246–247, 249.) The mother later dismissed her claim and the case proceeded to trial only on the toddler’s claim. (Id. at p. 262.) The jury awarded the toddler more than $23 million in damages. (Id. at p. 250.)

Challenging the award of prejudgment interest to the toddler, which was based on the section 998 settlement offer, the defendant argued the plaintiffs’ offer was invalid because it was jointly made. (Fortman, supra, 211 Cal.App.3d at p. 263.) Citing cases holding that an unallocated offer to multiple plaintiffs is invalid under section 998, the defendant argued, as was argued in Hurlbut, that because the joint offer from the two plaintiffs was unallocated, it was impossible to determine whether a more favorable verdict was obtained at trial. (Ibid.)

The court rejected that argument, however, noting that a mechanical application of a rule against joint settlement offers lacked common sense. Specifically, the court concluded “it is absolutely clear that [the defendant] received a greater amount in damages after trial than she would have received had [the defendant] accepted the joint offer even if the entire amount of the offer, $1 million, is attributed to her. … [The toddler’s] $23 million-plus award leaves no doubt in anyone’s mind that her recovery far exceeded the statutory offer.” (Id. at p. 263; see also Deocampo v. Ahn (2002) 211 Cal.App.4th 758, 776 [where husband sued for injury and wife sued for loss of consortium, joint settlement offer for $1 million valid where jury awarded husband $11 million; verdict exceeded offer to such an extent it was absolutely clear husband obtained more favorable judgment].)

In another case, Johnson v. Pratt & Whitney Canada, Inc. (1994) 28 Cal.App.4th 613 (Johnson), the appellate court took a similar approach. Plaintiffs’ decedent, a Marine Corps pilot, died in a helicopter crash. The surviving spouse and children of the decedent sued the manufacturer of the helicopter engine contending it used defective fuel nozzles in the engine. (Id. at p. 615.) The manufacturer rejected plaintiffs’ $1 million unallocated joint settlement offer; the jury subsequently awarded the three plaintiffs $2.1 million in economic damages and awarded the decedent’s spouse $1.3 million in noneconomic damages. (Id. at p. 628.) The trial court awarded plaintiffs additional costs, including expert witness fees, based on their section 998 offer. The defendant argued the joint offer was invalid because (as the Lews argue here) “it could not evaluate the joint offer with respect to each plaintiff at the time the offer was made and it is now impossible to tell what portion of the combined verdict the jury assigned to each plaintiff. … [I]t cannot be determined if the award
was more favorable than the terms of the offer; and the court should have denied plaintiffs’ motion for prejudgment interest and expert fees.” (Ibid.)

Following the reasoning of Stallman, the appellate court affirmed the cost award. The court emphasized, as a matter of “common sense,” that plaintiffs made a joint offer of $1 million and received verdicts of $2.1 million (for all three heirs) and $1.3 million (for the decedent’s spouse). (Johnson, supra, 28 Cal.App.4th at p. 630.) “Compelling logic leads to the conclusion that these plaintiffs recovered more than the amount of their section 998 offer.” (Ibid.)

These courts rejected the rule that an unallocated joint offer is always invalid, even though such an offer might theoretically render it impossible to determine later whether a party claiming costs obtained a more favorable verdict and is therefore entitled to costs under section 998. In Fortman, for example, the $1 million joint offer from the plaintiffs could have made it impossible for one of the plaintiffs to prove she obtained a more favorable verdict. Had the toddler received $800,000 at trial, for example, it would be impossible to know whether she fared better under the verdict or under the unallocated joint offer of $1 million. But where the verdict in favor of one plaintiff exceeds the offer that was jointly made, as was the case in Fortman where two plaintiffs offered to settle for $1 million and one plaintiff later received a $23 million verdict, that plaintiff can establish with certainty, as section 998 requires, that she obtained a more favorable verdict.

These decisions impliedly, though not explicitly, reject the argument (made by the Lews here) that an unallocated joint offer from multiple parties should always be invalid because it precludes the receiving party from evaluating the claims of the offering parties separately. And this notion, drawn from cases such as Meissner where the parties receiving an unallocated joint offer must all agree to settle or risk exposure to additional costs under section 998, does not readily apply in reverse. As we have said, if an unallocated offer from one party to multiple opposing parties were valid, the party making the offer would effectively force the opposing parties to work together and would, where those parties cannot agree, subject even parties who wish to settle to the punitive effect of section 998. As our courts have observed, although the Legislature enacted section 998 to encourage settlement of litigation, it did not intend the cost-shifting provisions to apply to parties who wish to settle but cannot do so through no fault of their own. But where, as here, multiple parties choose to band together and offer a global settlement, that concern is simply not present.

At least one court has directly criticized the sort of argument advanced by the Lews in this case. In Persson v. Smart Inventions, Inc. (2005) 125 Cal.App.4th 1141 (Persson), the plaintiff and defendant Nokes were founders and shareholders of Smart Inventions, Inc. (Id. at p. 1146.) The plaintiff sued Nokes and Smart Inventions (collectively, the defendants) for fraud and breach of fiduciary duty. (Ibid.) The defendants jointly offered to settle the case for $500,000; Persson refused and later obtained a judgment for $306,000 plus attorney’s fees. (Id. at pp. 1146, 1169.) After trial, the defendants sought an award of attorney’s fees based on their joint settlement offer. (Id. at p. 1169.) The trial court found the defendants’ settlement offer invalid under section 998 because the offer was unallocated as between the defendants. The court noted that a joint offer from defendants may be valid under section 998 where the defendants are jointly and severally liable. (Ibid.) But in the case before it, the defendants’ liability was not coextensive: the court had already ruled, at the time of the offer, that Smart Inventions did not owe the plaintiff any fiduciary duty. (Ibid.) On that basis, the court denied the defendants’ fee request, stating: “Because the section 998 offer ‘was a joint and several offer for multiple defendants and did not separate out and distinguish between them and the separate causes of action applicable to each,’ [the plaintiff] ‘was not in a position to evaluate the offer.’ ” (Ibid.)

In reversing the order, the appellate court rejected the trial court’s notion that the offer needed to separate the offers as between the defendants, observing that “[a] joint offer by two defendants that judgment in a stated amount may be taken against each one of them, jointly and severally, even though one defendant has no potential liability on one of plaintiff’s claims, is not uncertain. The offer in no way prevents the plaintiff from assessing his chances of obtaining a better judgment against either defendant after trial. Moreover, such an offer does not present any difficulty in determining whether the subsequent judgment is more favorable than the offer. Consequently, no reason exists for its invalidation.” (Persson, supra, 125 Cal.App.4th at p. 1170.) The court pointedly dismissed the plaintiff’s argument that the joint offer placed him in an untenable position because it deprived him of the opportunity to assess the chance of prevailing against each defendant in an amount in excess of the offer. “It is comprehensible why a plaintiff would be unable to evaluate an offer in which each defendant offers to have judgment taken against him, jointly and severally, in a stated amount . . . . The plaintiff need only assess the chances of recovery on each of his claims, no matter which defendant is liable, and add them together. If the joint offer exceeds that amount, the plaintiff should accept it.” (Ibid.)

4. The plaintiffs’ joint settlement offer was not invalid.

Applying the rationale of Fortman and the other cases just discussed, we conclude the court properly awarded plaintiffs’ costs under section 998. Plaintiffs offered to settle both wrongful death claims for $1.5 million and collectively recovered more than $2.6 million. And Virginia’s heirs plainly obtained a more favorable verdict at trial, inasmuch as the jury awarded them more than $2.2 million. Thus, the present case is similar to Fortman, where the mother and toddler asserted separate claims for emotional distress and personal injury, respectively, and the toddler later obtained a verdict
of $23 million—an amount far in excess of the joint unallocated settlement offer of $1 million. Here, as there, even if the entire amount of the settlement offer is attributed to the wrongful death claim of Virginia’s heirs, it is plain they obtained a more favorable result at trial.8

Relying on *Hurlbut* and *Gilman*, the Lews argue that plaintiffs’ joint offer to settle both wrongful death actions was invalid “ab initio” because it “deprived [them] of the opportunity to evaluate the likelihood that a jury would award damages to Virginia Gonzalez’s heirs in excess of the $1.5 million 998 offer, but award Maverick Crowder’s heirs less than the 998 offer.” As we have said, this argument has been rejected by a number of courts in circumstances where it is plain that one of the parties offering joint settlement later obtains a verdict that exceeds the joint offer. Moreover, as the court pointed out in *Persson*, it is “incomprehensible” that the Lews could not evaluate the risk of refusing the settlement offer because it was not allocated between the two sets of heirs. The Lews could have evaluated their exposure on the wrongful death claims individually and then added the figures together. If they fared better under plaintiffs’ offer, it would have been prudent to accept it. Plainly, the Lews did not anticipate that either wrongful death claim, standing alone, would exceed the settlement offer. And this is precisely the situation in which an additional cost award under section 998 is appropriate and in furtherance of the goal of encouraging parties to accept reasonable settlement offers. (See, e.g., *Hurlbut*, supra, 207 Cal.App.3d at p. 408 (“‘As a general rule, the reasonableness of a defendant’s offer … represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial.’”.)

The Lews also assert “[t]here was no single, indivisible injury to evaluate for settlement purposes.” Although we agree plaintiffs did not suffer a single, indivisible injury because they are the heirs of two different and unrelated decedents, we conclude that fact does not preclude the application of section 998 here. In several of the cases discussed ante, the parties offering settlement had different claims stemming from different types of injuries: *Stallman* involved claims by both the estate and the wife of a decedent, *Fortman* involved a personal injury claim by a toddler and an emotional distress claim by the toddler’s mother, and *Deocampo* involved a personal injury claim by a husband and loss of consortium by his wife. (*Stallman*, supra, 235 Cal.App.3d at p. 743; *Fortman*, supra, 211 Cal.App.3d at p. 249; *Deocampo*, supra, 101 Cal. App.4th at p. 766.) In each of those cases, the courts awarded additional costs under section 998, notwithstanding the absence of a single, indivisible injury.

In evaluating the application of section 998 in various factual contexts, we are guided by the overarching policies in favor of encouraging reasonable settlements, compensating injured parties, and avoiding the injection of uncertainty into the 998 process—a result certain to encourage gamesmanship and other actions incompatible with the goal of resolving, rather than creating, legal disputes. (See *Martinez*, supra, 56 Cal.4th at pp. 1020–1021; *Kahn*, supra, 240 Cal.App.4th at pp. 242–244.) If plaintiffs with disparate claims want to make a global settlement offer which would put an end to the litigation at hand (and work out the details among themselves), they should be encouraged to do so.

**DISPOSITION**

The order denying in part and granting in part the motion to tax costs is affirmed. Respondents to recover their costs on appeal.

**CERTIFIED FOR PUBLICATION**

**LAVIN, J.**

WE CONCUR: EDMON, P. J., DHANDIDINA, J.*

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

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8. It is not clear that Maverick’s heirs fared better at trial. But it is significant that the focus of trial was on the cause of the fire that killed both plaintiffs’ decedents, and all the plaintiffs were represented by the same counsel below, apparently proceeding as a unit. After trial, plaintiffs submitted a joint cost bill. The Lews have not requested any reduction in or allocation of the cost award, only that it be reversed in its entirety, and we therefore do not consider that issue.
In re J.G. et al., Persons Coming Under the Juvenile Court Law.

IMPERIAL COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent,

v.

M.G., Defendant and Respondent;

J.G. et al., Appellants.

No. D072293
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. JJP03219-22)
APPEAL from orders of the Superior Court of Imperial County, William D. Quan, Judge. Reversed.
Filed February 2, 2018

COUNSEL

Henderson and Ranasinghe and Kelly Ranasinghe for Plaintiff and Respondent.
Neale B. Gold, under appointment by the Court of Appeal, for Appellants, Minors.

OPINION

Minors N.C., P.G., J.G., and D.G. appeal from orders denying the Imperial County Department of Social Services’ petition to remove them from the care of their paternal aunt under Welfare and Institutions Code sections 387 and 361.3. Minors contend that in view of the court’s finding that the three youngest children were diagnosed with nonorganic failure to thrive while in their aunt’s care, the court erred in determining that continued placement with their aunt was appropriate and in their best interests. We agree and conclude that the court abused its discretion in ordering the children to remain with a caregiver who failed to provide adequate food to them, causing serious injury to the health and well-being of the three youngest children. We therefore reverse the findings and orders of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2014, the Imperial County Department of Social Services (the Department) detained N.C., P.G., J.G., and D.G. (collectively, the children) in protective custody after their father, Jose G., ran over their mother, D.H., with his car when she tried to prevent him from leaving with the children. The children were present and witnessed this incident. N.C. was four years old, P.G. was 22 months old, and twins J.G. and D.G. were 10 months old. D.H. died from her injuries a few days later. Jose was sentenced to seven years in prison.

Jose’s sister, M.G. (Aunt), who had adult children and grandchildren of her own, immediately requested placement of all four children. The three youngest children were placed with Aunt in February 2015. N.C. was initially placed with her maternal relatives but joined her siblings in Aunt’s home approximately six months later. One of Aunt’s daughters, U.W., lived with her and helped care for the children. The court ordered a monthly weekend visit for the children with their maternal relatives.

At the beginning of the case, the social worker was concerned about four-year-old N.C.’s emotional stability. N.C. described the events leading to her mother’s fatal injury and other incidents in which Jose had hit her mother and all of the children. The social worker referred N.C. to therapeutic services. There were no other concerns about her health or development.

P.G. had Down syndrome. She had low muscle tone and was not yet walking. Her immune system was fragile and she was susceptible to respiratory illnesses. In March 2015, shortly after she was placed in Aunt’s care, P.G. measured close to the 90th percentile for weight on a pediatric growth chart for Down syndrome children.

J.G. and D.G. were diagnosed with developmental delays but there were no concerns about their physical health. At a pediatric checkup in December 2014, when the boys were 10 months old, the doctor noted that D.G. was overweight at 23.3 pounds. J.G. weighed 26.8 pounds. At a medical checkup in August 2015, the service provider noted that J.G. was overweight. He weighed 24 pounds.

In September 2015, at a hearing, the children’s maternal grandmother told the court that the children were thin and malnourished in Aunt’s care. Aunt complained that the maternal relatives were improperly feeding the children by allowing them to eat too much food and junk food. The social worker addressed the issue with the maternal relatives.

P.G. continued to suffer from respiratory problems, including pneumonia. In June 2016, she was determined to have severe pharyngeal phase deficits and was aspirating thin liquids.
liquids. Doctors recommended that Aunt give only thickened liquids to P.G., to prevent aspiration. Aunt did not follow this medical advice. At a physical therapy session, Aunt complained that P.G. had gained four pounds in a 48-hour visit with her maternal relatives and that her stomach was “very extended,” saying, “food is a part of her addiction.” Aunt took P.G. to the emergency room for treatment for constipation.

In July 2016, the court terminated parental rights. Aunt wanted to adopt the children and initiated a home study. The social worker reported that P.G., D.G., and J.G. (collectively, the younger children) were making developmental progress. Aunt was attentive and proactive, and she had obtained needed services for the children.

In September 2016, the Department reported that P.G. had more control over her movements and was walking. She continued to have respiratory problems. Aunt had been diligent in securing needed services for P.G., including teaching her how to swallow without aspirating food and liquid into her lungs. Aunt closely monitored P.G. during meals. The other three children were in good health. D.G. and J.G. were making developmental progress. The social worker said that the children showed signs of having secure and positive attachments to Aunt. After the court terminated parental rights, Aunt had stopped the children’s visits with their maternal relatives.

On October 17, 2016, a San Bernardino County social worker and public health nurse (PHN) investigated a child abuse referral that alleged that P.G. had bruises on her forehead, rib, and lower back, and that her right knee was pink and swollen. Aunt and teachers at P.G.’s day care reported that P.G. frequently fell down. A bus driver confirmed Aunt’s report that P.G. fell on the morning of October 17 when she stepped off the curb to board the school bus. On examination, P.G.’s abdomen was determined to be grossly distended. Her arms, legs, and ribs were visibly bony, and the skin on her buttocks was sagging. She was very lethargic. P.G. was hospitalized to evaluate the cause of her apparent failure to thrive.

The social worker and PHN examined the other children. D.G. was thin but not bony. Both D.G. and J.G. were nonverbal. Six-year-old N.C. said that they ate chicken, rice, beans, and eggs, and that there was always food in the home. Nevertheless, D.G. weighed only a pound more than he had weighed at age 10 months, almost two years earlier, and J.G. weighed less than he had weighed at 10 months. A preschool teacher reported that Aunt had restricted P.G.’s diet at preschool to mainly fruits and vegetables, and had limited the number of goldfish crackers that P.G. could have as a reward. The attending physician reported that during her hospitalization, P.G. had a vigorous appetite and consumed 100 percent of the food that was offered to her. She was gaining weight. This suggested that she had not been receiving an adequate number of calories prior to admission.

The Department reported that N.C., D.G., and J.G. were initially placed with U.W. in Aunt’s home. They were removed from that placement and, after another failed placement, were living together and doing well in a foster care home. P.G. was in a different foster care home. The children were healthy and had gained weight and length since they were removed from Aunt’s home and detained in foster care. P.G. was walking and moving. She no longer appeared to be lethargic. By March 2017, P.G. was in the 95th percentile for weight, and her health had improved. D.G. and J.G. were also in the 95th percentile for weight. The social worker said that Aunt continued to insist that the children were obese at their current weights and that Aunt did not understand the severity of the failure to thrive diagnoses.

In March 2017, the Department notified Aunt that her home no longer qualified for relative placement and that she would have to reinitiate the process for home approval if the court were to order the children to remain in her care. The social worker reported that an interstate evaluation of the home of maternal relatives was pending. The maternal relatives, who were licensed foster care parents with an approved adoptive home study, had visited the children and wanted to adopt them.

Dr. Young testified that she is board certified in child abuse pediatrics. In October 2016, P.G. was admitted to Loma Linda Hospital for an evaluation of the conditions contributing to her failure to thrive. There was little subcutaneous fat on P.G.’s body. Her backbone and ribs were prominent, her abdomen was distended, and her bowels were impacted. She
had wasting of muscle and fat. There was lanugo (fine hair) everywhere on P.G.’s skin, which was caused by a stress response to malnutrition. Dr. Young said that P.G. had dropped from the 90th percentile in weight in March 2015 to below the fifth percentile in weight at the time of her hospital admission. The drop from the 90th percentile to the fifth percentile was an extreme case of failure to thrive. P.G. was dehydrated and suffering from protein malnutrition, which was measured by the low level of albumin in her blood. Her distended abdomen was a symptom of both calorie and protein deficiency. P.G. was “fairly weak” when she was first hospitalized. Her strength began to improve with proper nutrition.

During her 12-day stay in the hospital, P.G. gained 5.5 pounds. Dr. Young said that this was extraordinary weight gain and pointed to inadequate nutrition as the cause of P.G.’s failure to thrive. Failure to thrive at P.G.’s age was especially pernicious because it occurred during a period of significant brain development and rapid brain growth. In addition, heart issues could be exacerbated by malnutrition. Like many Down syndrome children, P.G. has a heart murmur.

By the end of her hospital stay, P.G. was approaching the 50th percentile in weight. After her release from the hospital, P.G. lost weight because her caregiver at that time, U.W., was controlling her food portions. At a meeting, U.W. agreed to not control the amount of food that P.G. was permitted to eat. However, after speaking with Aunt, U.W.’s demeanor changed and she said that she was going to continue giving small portions to the children to control the amount of food that they ate.

Dr. Young diagnosed D.G. and J.G. with nonorganic failure to thrive. At 33 months, J.G. weighed less than he had weighed at 10 months of age. D.G. weighed a pound more than he had weighed at 10 months. They had fallen off the growth curve and were now in the fifth percentile in weight. D.G. and J.G. both had postgrowth arrest lines on their bones, which happens when the body stops building bone in response to the stress of disease or malnutrition. In addition, D.G. and J.G. both displayed food insecurity. They were desperate to hold snacks. They cried the minute they finished eating or if someone would try to briefly hold their snack. They ate food that had fallen on the floor. By February 2017, J.G. had gained 10 pounds in foster care. However, he had not yet caught up in height to where he had been on the growth chart at 10 months. D.G.’s height and weight had returned to the normal range.

Dr. Young testified that P.G., D.G., and J.G. were suffering from severe malnutrition caused by poor diet, specifically, insufficient calories and protein. In layman’s terms, this meant that they were starving. Their growth had essentially stopped. Dr. Young said, “this case definitely stands out as a more severe case [of failure to thrive], particularly given that all three children had such significant loss in growth potential.”

Social worker Therese Vogel was assigned to the children’s cases in August 2016. She had no concerns about Aunt’s home or the children’s conditions. Vogel saw the children every month. In October, she went to see P.G. at preschool. P.G. was very lethargic. Aunt said that she had noticed that P.G. had lost weight and that she had started to give protein shakes to her. Vogel believed that Aunt would benefit from nutrition training. However, services were not offered to Aunt because the Department decided not to return the children to her care.

Social worker Luis Castro testified that there were guidelines for P.G.’s diet because she was aspirating her food, leading to respiratory infections. Aunt was upset with P.G.’s daycare. She believed that the food that they were giving to her was too high in carbohydrates. Aunt was concerned that the diet at daycare would cause P.G. to become overweight. Aunt worried about the children’s diet during their weekend visits with their maternal relatives. Aunt constantly asked to stop the visits because of her concerns about the children’s diet. She complained that the maternal relatives gave the children birthday cake, chips, and soda. The maternal relatives believed that the children were losing weight and that Aunt was not providing proper nourishment to them.

Castro observed the children eating lunch at Aunt’s home. They had peanut butter sandwiches, milk, and grapes. J.G. appeared to be very anxious to eat. Castro said that the children “were very measured as far as bites they would take and the amount of time they would take to eat . . . it’s just not something I observe usually with children of that age. . . . It stuck in my mind how proud they were as far as taking each little bite and chewing and drinking a little bit of milk, very proper.”

Jason Kornberg, M.D., performed a psychiatric evaluation of Aunt. He testified that Aunt had an adjustment disorder. He opined that Aunt posed a risk to the children because she denied any wrongdoing with respect to their diagnoses of failure to thrive. Dr. Kornberg concluded that psychiatric treatment was not likely to be of much benefit. Aunt minimized the children’s symptoms and lacked insight into the significance of the children’s weight loss.

Stephanie Fisher provided infant education services to P.G., D.G., and J.G. Fisher taught gross motor skills and language skills to P.G. twice a week from March 2015 until P.G. aged out of the program in January 2016, at age three. Fisher provided language skills to D.G. and J.G. from the summer of 2015 to January 2016. She also worked with the younger children on eating skills. P.G. was very good with utensils. Fisher often saw the younger children at breakfast. They ate cereal, eggs, and fruit. Aunt fed snacks such as Cheerios or cut up vegetables to them. The refrigerator and cupboards were full of food.

The parties stipulated that if the children’s babysitter were called to testify, she would testify that she was in Aunt’s home four days a week and that the children were always well-fed.

Jeffrey Warren, Ph.D., conducted a psychological assessment of Aunt. Dr. Warren had a doctorate in clinical psychology, with specialized training in child abuse identification and treatment. He interviewed Aunt, administered standard
psychological testing, reviewed case reports and the children’s medical records, and spoke with Aunt’s treating psychologist. Dr. Warren concluded that Aunt was an extremely well-adjusted person in view of the number of stressors in her life. She did not have any personality issues and was highly functional.

Dr. Warren said that Aunt was well bonded to the children. She had obtained medical care and services for four challenging children. When the children were placed with Aunt, they were largely obese. Aunt worked to bring the children’s weight down by feeding healthy foods to them. She took full responsibility for, and was proud of, reducing the children’s weight. Aunt did not believe that she had made any mistakes with the children’s diets. She had intended to significantly reduce the children’s weight.

Aunt testified that when the children were placed with her, P.G. was two years old. She was not able to stand and had no communication skills. P.G. was not eating solid food. Her stomach was distended and she struggled with constipation. Aunt accessed WIC [The Special Supplemental Nutrition Program for Women, Infants, and Children]4 services and closely followed WIC guidelines in feeding the children.

The children were in day-long daycare until February 2016, when Aunt stayed home to recover from a work-related injury. P.G. started attending an early childhood special education program in the mornings. N.C. was in school. D.G. and J.G. were at home. Aunt was responsible for all the children’s meals, except for P.G.’s breakfast, which was provided to her at her special education program, and N.C.’s school meals. Aunt fed fresh fruit and vegetables, preferably organic, to the children. Everything was cooked from scratch. She did not give them processed food. Snacks included frosted mini-wheats, fruit, milk, and string cheese. Aunt said that her goal was to provide a healthy diet to the children, not to cause them to lose weight. If anyone had told her to give more food to the children, she would have done so. A pediatrician who examined P.G. on September 15, 2016, did not express any concerns about her weight. In August 2016, Aunt felt that P.G.’s weight was low and started giving her plant based protein shakes. Aunt testified that the children’s weight loss was not intentional. She was just following WIC guidelines. She wished someone would have told her that the children were losing too much weight.

The court found that there was no doubt that P.G., D.G., and J.G. were diagnosed with nonorganic failure to thrive. Although Aunt had issues in providing proper and effective care to the children and facilitating visitation with relatives, the other factors listed in section 361.3 were favorable to her. Those factors included the placement of the siblings in the same home, Aunt’s good moral character, the nature and duration of the children’s relationships with her, her ability to obtain needed services for them, her willingness to adopt the children, and her ability to arrange for child care. There was no evidence of intentional harm to the children sufficient to cause the court to believe that the children could not be returned to Aunt with appropriate services. The court found that it was in the children’s best interests to remain in Aunt’s care with appropriate services to mitigate risk, including monthly visits by the social worker, monthly pediatric check-ups for the children, and psychotherapy for Aunt.

County Counsel advised the court that the children could not be returned to Aunt’s care until the Department relicensed her home, and that, due to the children’s near starvation while in her care, Aunt was registered on the child abuse index. The court stated, “The Court’s order is I do not find that . . . the children should be removed from the placement. However, if the children cannot be placed there because of a licensing issue, then [Aunt] needs to get through that process first.”

DISCUSSION

Appellant Minors assert that the court erred when it determined that continued placement with Aunt was appropriate and in their best interests. They argue that a home in which they almost starved is not a safe home. Minors contend that the court’s findings under section 361.3 are not supported by substantial evidence because: Aunt is a child abuser who is listed on the Child Abuse Central Index (CACI); the evidence is uncontroverted that she was unable to provide a safe home, proper and effective care to the children; and her home was unsafe and is no longer licensed as a placement option. Minors also contend that the court erred when it determined that there are reasonable means to protect the children in Aunt’s care. They argue that this standard applies only to a child’s removal from his or her parent under section 361, subdivision (c), and does not apply to removal from a relative pursuant to section 387.

The Department joins with the Minors’ arguments that the court erred when it continued the children’s placement with Aunt. The Department emphasizes that the court made an uncontested true finding at the jurisdictional hearing that the younger children were diagnosed with nonorganic failure to thrive, and maintains that the court’s order continuing the children’s placement with Aunt does not accurately account for the severity of the malnutrition that the three younger children suffered in her care. The Department argues that provision of services is not likely to make Aunt’s home safe for the children in view of her insistence that she did nothing wrong with respect to the children’s diets. In addition, the Department contends that the court did not have the authority to order the children’s continued placement with a person who is registered on CACI.

Aunt contends that there is substantial evidence to support the court’s findings. Aunt notes that the record shows that she frequently took the children to medical appointments and did not try to hide them from anyone. She also points to Dr.

4. WIC provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant and postpartum women, and to infants and children up to the age of five who are found to be at nutritional risk. (See <https://www.fns.usda.gov/wic/women-infants-and-children-wic>, as of 02/02/2018.)
Warren’s testimony which, she argues, provides substantial evidence to show that Aunt is psychologically fit and able to safely parent the children, as well as to the social workers’ testimonies that the children were thriving in Aunt’s care and were bonded to her, and that she secured services to address their many special needs. Aunt argues that the evidence does not show that she intentionally deprived the children of a nutritionally sound diet. On the contrary, she maintains, there is substantial evidence to show that she wanted to ensure that the children had healthy diets but that her good intentions resulted in unintended consequences for the children. Aunt argues that the lack of licensing of her home, and her listing on CACI, which she is currently litigating, do not prevent the court from ordering the continued placement of the children in her care.

A

Applicable Legal Principles

When the Agency seeks to change the placement of a dependent child from relative care to a more restrictive placement, such as foster care, it must file a supplemental petition under section 387. A supplemental petition “shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child or, in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in [section] 361.3.” (§ 387, subd. (b).) The Agency has the burden to show by a preponderance of the evidence that the factual allegations in the petition are true. If the court finds that the factual allegations are true, the court holds a dispositional hearing on the need to remove the children from their current level of placement. (In re Jeanier G. (2006) 137 Cal.App.4th 453, 460.) Bifurcating the jurisdictional and dispositional hearings under section 387 is discretionary. (In re Miguel E. (2004) 120 Cal.App.4th 521, 542 (Miguel E.).)

In the case of removal from a relative caregiver, the court considers the factors listed in section 361.3, subdivision (a). As relevant here, these factors include, but are not limited to: the child’s best interest; the wishes of the relative and child; placement of siblings in the same home; the good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has been responsible for acts of child abuse or neglect; the nature and duration of the child/relative relationship; and the relative’s desire to care for the child and provide permanency. (§ 361.3, subd. (a)(1)-(6).) The court also assesses the relative’s ability to provide a safe, secure, and stable environment for the child; exercise proper and effective care and control of the child; provide a home and the necessities of life to the child; facilitate visitation with the child’s other relatives; provide legal permanence; and arrange for appropriate and safe child care. (§ 361.3, subd. (a)(7)-(I).)

The court must also consider the safety of the relative’s home. (§ 361.3, subd. (a)(8); see §§ 361.2, subd. (e), 361.4, 16519.5 [home approval requirements].) Child safety and well-being are not achieved merely by ensuring the home is free from physical hazards and persons with disqualifying criminal and child abuse records. They are also dependent on the family’s psychosocial history, which includes consideration of physical and mental health, substance abuse, violence, and experience caring for children. (§ 16519, subd. (c).)

B

Standard of Review


We conclude that the appropriate standard of review of relative placement orders under section 361.3 is abuse of discretion. First, the abuse of discretion standard has long applied to review of parental custody and visitation orders in family law and dependency cases. (See, e.g., Foster v. Foster (1937) 8 Cal.2d 719, 730; Ellis v. Lyons (2016) 2 Cal.App.5th 404, 415.) In addition, in dependency cases, our judicial district has long reviewed a finding of the child’s best interest under the abuse of discretion standard. (In re Kimberly F. (1997) 56 Cal.App.4th 519, 535 (Kimberly F.).)

In concluding that abuse of discretion was the appropriate standard of review for a relative placement order under section 361.3, the Robert L. court stated, “[i]t would seem obvious that, if there were no evidence to support the decision, there would be an abuse of discretion. But we do not think that it follows that there can be no abuse of discretion if there be any evidence to support the decision. It is certainly true that there could be a case where the decision is obviously not for the best interests of the child, even though there is some evidence to support it.” (Robert L., supra, 21 Cal.App.4th at pp. 1065-1067.) We agree with this reasoning.

Under the abuse of discretion standard, the court is given wide discretion and its determination will not be disturbed
absent a manifest showing of abuse. (Sabrina H., supra, 149 Cal.App.4th at pp. 1420-1421.) “Broad deference must be shown to the trial judge.” (Robert L., supra, 21 Cal.App.4th at p. 1067.) However, “[t]hat deference comes with two related caveats.” (Williams v. Superior Court (2017) 3 Cal.5th 531, 540 (Williams).) First, the scope of discretion lies in the particular law to be applied. “ ‘Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion.’ “ (Ibid.) Second, “[a]n order that implicitly or explicitly rests on an erroneous reading of the law necessarily is an abuse of discretion.” (Ibid.)

Here, the particular law to be applied is an assessment of specific statutory factors under section 361.3, including a determination of the child’s best interests. The best interests of the child standard is not a simple concept. The court must assess a number of factors, including the seriousness of the reason for child’s removal from his or her home, and the strength of the child’s relationships with family members and caregivers. (Kimberly F., supra, 56 Cal.App.4th at pp. 530-531.) In reviewing a finding that a change of placement is in the child’s best interests, we keep in mind the Legislature’s mandate to “provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.” (§ 300.2.)

C

The Court Abused Its Discretion in Determining That the Children’s Placement with Aunt Is in Their Best Interests

Aunt correctly states there is substantial evidence to support the court’s findings that she secured appropriate services for the children’s special needs and that the children were bonded to her. The evidence shows that Aunt took the children for medical care and sent N.C. and P.G. to school. Aunt is also correct that the current lack of licensing of her home6 or the existence of a child protective history7 do not prevent the court from considering the children’s placement with her under section 361.3. Further, although there is ample evidence in the record to the contrary, we do not dispute Aunt’s claim that there is substantial evidence to support a finding that Aunt did not have any significant psychological issues that would prevent her from properly caring for the children. The evidence also shows that Aunt is willing to adopt the children.

Nevertheless, we are not persuaded by Aunt’s argument that the court did not err when it ordered the children’s continued placement in her care. The court is required to consider the ability of the relative to provide a safe environment for the child, exercise proper and effective care of the child, and provide the necessities of life for the child. (§ 361.3, subd. (a)(7).) We reject the court’s findings that the children could be safely maintained in Aunt’s care and that there is not sufficient evidence to show that Aunt intentionally harmed them.

Under section 300, subdivision (b), the willful or negligent failure to provide the child with adequate food is a ground for dependency jurisdiction. In enacting the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), the Legislature criminalized “the negligent treatment or the maltreatment of a child by a person responsible for the child’s welfare under circumstances indicating harm or threatened harm to the child’s health or welfare.” (Pen. Code, § 11165.2, subd. (a).) The term “neglect” includes both acts and omissions on the part of the responsible person. (Ibid.; see In re Ethan C. (2012) 54 Cal.4th 610, 627-629 [defining neglect in dependency cases].) The noun “neglect” is alternately described as “[t]he omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding,” “or ‘[t]he failure to give proper attention, supervision, or necessities, esp. to a child, to such an extent that harm results or is likely to result.’ “ (In re Ethan C., at pp. 627-628, citing Black’s Law Dictionary (8th ed. 2004), p. 1061, col. 1.) In addition, the Legislature defines “severe neglect” as “the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive.” (Pen. Code, § 11165.2, subd. (a).)

The record clearly shows that Aunt failed to provide P.G., D.G., and J.G. with adequate food and that she intentionally limited the children’s food portions. As a result, the younger children were diagnosed with nonorganic failure to thrive. P.G. was severely malnourished, dehydrated, and lethargic, and had to be hospitalized for almost two weeks. D.G. and J.G. were also severely malnourished. They had postgrowth arrest lines on their bones, which occurs when the body stops building bone in response to malnutrition. D.G. and J.G. displayed food insecurity. Dr. Young testified that P.G., D.G., and J.G. essentially stopped growing. In addition, she believed that malnourishment may have affected their brain development. Dr. Young said that the younger children all had significant loss in growth potential. She characterized Aunt’s treatment of them as “starvation.”

The record shows that Aunt willfully failed to provide the younger children with adequate food and nutrition, resulting in their diagnoses of severe malnutrition and nonorganic fail-

5. This court has held that an agency’s withdrawal of approval of a relative’s home “does not constitute substantial evidence that the previous disposition was not effective or that the placement was not appropriate under the criteria in section 361.3.” (Miguel E., supra, 120 Cal.App.4th at p. 547.) Agency approval of the home is just one of the factors that the court considers. (Ibid.)

6. This court and our colleagues in Division Three have held that a prior child protective history does not bar a relative from being evaluated and considered for placement of a dependent child under section 361.3. (In re Anthony G. (2007) 159 Cal.App.4th 369, 378; Cesar v. Superior Court (2001) 91 Cal.App.4th 1023, 1033.)

7. We do not suggest that any of the juvenile court’s findings in this case meets the standard of proof required in criminal cases.
ure to thrive. That Aunt may have lacked the intent to harm the children does not mitigate her failure to provide adequate food to them. (§ 300, subd. (b).) We therefore conclude that the court erred in determining that it was safe for the children to remain in Aunt’s care because she did not intend to starve them.

In addition, we conclude that the court abused its discretion in finding that additional services would mitigate the risk of harm to the children. Immediately after the children were diagnosed with nonorganic failure to thrive, the record shows that Aunt thwarted Dr. Young’s instructions to their caregiver not to limit the children’s food portions. P.G. started to lose the weight that she had gained in the hospital. Six months after the children were diagnosed with nonorganic failure to thrive, Aunt still insisted that the younger children were obese at their current weights. Aunt’s concerns about the children’s weight caused her to impede the children’s relationships with their maternal relatives and ultimately, to end their visits. In denying the request to remove the children from Aunt’s care, the court ordered the Department to provide services to the children and Aunt, including monthly visits by the social worker, monthly pediatric checkups for the children, and therapeutic services for Aunt. Although we are not persuaded by the Minors’ argument that these services are reunification services that are available only to a parent, the record shows that those or similar services were in place for most, if not all, of the time that the children were in Aunt’s care, and that they were ineffective in preventing serious physical harm to the younger children. A suitable caregiver does not require therapeutic intervention to become willing to accept medical advice and to provide adequate food to a child in his or her care. Similarly, an otherwise healthy dependent child should not have to endure monthly pediatric checkups to ensure that he or she is receiving adequate food in what should be a safe, stable, nurturing, and protective placement.

Not all reasons for juvenile court intervention are equal from the point of view of a child’s interests. (Cf. Kimberly F., supra, 56 Cal.App.4th at p. 530.) Adequate nutrition and food security is an essential need for any person, particularly a young child whose proper growth and development depends on such sustenance, and in turn, on the caregiver to provide it. Here, the uncontroverted evidence shows that Aunt failed to provide the younger children with a fundamental necessity of life—adequate food, and that she failed to appreciate the impact of her actions on their health. Further, there was no indication that Aunt was able or willing to alter her behavior in this regard. The impact of malnutrition on the children’s growth and development, and well-being, out-

8. Federal law authorizes the provision of family preservation services to adoptive and extended families at risk or in crisis for the purposes of promoting the safety and well-being of children and families, and to increase the strength and stability of families, including adoptive, foster, and extended families. (42 U.S.C. § 629a(a)(1)-(2).) In order to receive federal funding, states must meet federal requirements for provision of services to at-risk families and children. (Id., §§ 621, 622.)

We conclude that the court abused its discretion in determining that continued placement in Aunt’s care was in the children’s best interests.

**DISPOSITION**

The findings and orders of the juvenile court are reversed.

AARON, J.

WE CONCUR: McCONNELL, P. J., BENKE, J.
Cite as 18 C.D.O.S. 1226

W.S., Plaintiff and Appellant, v. S.T., Defendant and Respondent.

No. H042611
In The Court of Appeal of the State of California Sixth Appellate District
(Santa Clara County Super. Ct. No. 1-14-CP021742)
APPEAL from an order of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.
Filed February 1, 2018

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Counsel for Respondent: S.T., Dominion Law Group, Kevin S. Hutchinson

OPINION
In 2014, appellant W.S. filed a petition to establish a parental relationship with his daughter (daughter). W.S. alleged he was daughter’s biological father. He claimed he had a relationship with S.T., daughter’s mother, while she was married to her husband, Martin T. W.S. requested joint legal and physical custody, equal time visitation, and mediation to work out a parenting plan. He also requested daughter’s last name be changed. The trial court denied W.S.’s requests, finding he was not a presumed parent within the meaning of Family Code section 7611, subdivision (d).

On appeal, W.S. argues the trial court applied an incorrect legal standard when it found he was not a presumed parent under section 7611, subdivision (d). Furthermore, he claims the court failed to exercise its discretion to order him visitation as an interested party. He also argues California’s statutory scheme is unconstitutional, violating the principles of due process and equal protection. Lastly, he claims the trial court’s decision on the matter may have been the result of bias. For the reasons set forth below, we affirm.

BACKGROUND
1. Statement of Facts
a. Daughter’s Birth

In 2002, S.T. married Martin and had their son Frank. In 2006, S.T. and Martin separated for approximately 18 months. During their separation, they did not live together. S.T. filed for divorce from Martin in 2006. She met W.S. sometime in 2007 or 2008 while working at a car dealership.

The two began a relationship. At the time, W.S. believed S.T. was divorced and lived with her mother.

In 2008, S.T. became pregnant with daughter. By that time, S.T. said she had reconciled with Martin and was living with him. She told W.S. he was not daughter’s father, and W.S. did not press her for details. During S.T.’s pregnancy, Martin attended prenatal classes with her. He drove her to the hospital when she was in labor and took several weeks off work so he could help afterwards. Martin was in the room during daughter’s birth and cut her umbilical cord. His name was put on daughter’s birth certificate. According to Martin, S.T. breastfed daughter when she was a baby, and daughter would wake up every two hours. Martin helped S.T. take care of daughter. He changed daughter’s diaper, washed her laundry, and rocked her to sleep. When daughter started drinking formula, Martin would prepare bottles for her. Daughter slept with S.T. and Martin in their bed until she was approximately four and a half years old.

Shortly after daughter’s birth, S.T. suspected W.S. was daughter’s father based on her features. Her suspicions were confirmed by a DNA test. Martin remained unaware that daughter was not his biological daughter.

S.T. believed W.S. first saw daughter several weeks after she was born. The visit was brief, lasting only several minutes. W.S. lived with his mother at the time, and he did not initially tell his mother that daughter was his daughter.

b. W.S.’s Account of His Relationship with Daughter

W.S., S.T., and Martin provided conflicting accounts of W.S.’s relationship with daughter. Between 2009 and 2010, W.S. said he saw daughter almost every day, and she spent the night at his apartment approximately once or twice a week. Daughter would often stay overnight by herself, because S.T. had to be at home to take care of Frank. W.S. believed S.T. and daughter lived with S.T.’s mother.

Daughter did not have her own room at W.S.’s apartment, which he shared with his mother. W.S. said his apartment was full of daughter’s toys and artwork. He had purchased a crib for daughter, but she did not use it. Daughter slept in W.S.’s bed if she spent the night. W.S. made bottles for her if she woke up by putting a scoop of formula in a bottle with warm water. Daughter started eating solid foods between six and nine months. W.S. said S.T. would cut up cooked pieces of vegetables, like broccoli, to feed to daughter.

According to W.S., S.T. began limiting the amount of time daughter spent at his apartment as she got older and began attending daycare. W.S. did not participate in activities at daycare, because S.T.’s mother knew people at the school. W.S. did not want to cause embarrassment for S.T., daughter, or Frank if people at the daycare found out that Martin was

1. Unspecified statutory references are to the Family Code.

2. W.S. and S.T. used a DNA testing kit purchased at a drugstore. The blood DNA test was not court-ordered.

3. W.S.’s friend testified at the hearing that he saw daughter at W.S.’s home only five or six times.
not daughter’s father. Daughter did not spend the night at his apartment as often after she started daycare.

In 2013, daughter began attending preschool. She was enrolled using W.S.’s last name. W.S. paid for daughter’s tuition for approximately a year, and he frequently picked her up at the preschool. Daughter’s teacher at preschool confirmed that W.S. and S.T. often picked daughter up at school together. Daughter would run to W.S. when he came to get her. W.S. participated in school activities and parent-teacher conferences. The teacher recalled that daughter called W.S. “Pa” or “Daddy.” Daughter’s teacher believed W.S. and S.T. were a couple in a “[n]ormal relationship.” She could not recall seeing Martin at the school.

W.S. held birthday parties for daughter when she turned three, four, and five. W.S. and S.T. took daughter on trips, including a trip to Six Flags for her birthday. Daughter made drawings for W.S., including a drawing with a heart and the word “Pa.” W.S. said the photo symbolized “Pa’s heart.” W.S. posted daughter’s artwork around his apartment. He celebrated Valentine’s Day, Christmas, Thanksgiving, and Halloween with daughter. W.S. had many nicknames for daughter.

W.S. did not know the name of daughter’s dentist or doctor. He had never attended daughter’s medical appointments, and daughter was not on his health insurance. However, he did pay for S.T.’s cell phone bill. He also occasionally gave S.T. money.

c. S.T.’s Account of W.S.’s Relationship with Daughter

According to S.T., W.S. exaggerated the closeness of his relationship with daughter. S.T. brought daughter to visit W.S. approximately once or twice a week during her first year. However, she described daughter’s typical visits with W.S. as brief. S.T. allowed daughter to stay overnight at W.S.’s home only when she was an infant. S.T. found being separated from daughter too painful to allow more overnight visits.

S.T. refuted W.S.’s claims about daughter’s feeding. S.T. said daughter was breastfed for the first few months. S.T. insisted she would not have permitted daughter to drink bottles made with warm water that was not boiled first, as described by W.S. She also explained that daughter started eating solid foods between one and two years of age, not between six and nine months. Daughter began eating purees, not diced vegetables.

When daughter started daycare, S.T. would occasionally take her to visit W.S. The visits were short, lasting maybe one or two hours. Daughter spent weekends at home with S.T., Martin, and Frank. When daughter was enrolled at preschool, S.T. allowed W.S. to pay for half of daughter’s tuition. S.T. deposited money into W.S.’s bank account to pay for the other half of the tuition. She acknowledged that W.S. frequently went with her to pick up and drop off daughter at the school.

Occasionally, daughter went to W.S.’s apartment to play after preschool ended.

S.T. could only remember daughter staying overnight at W.S.’s apartment a total of three or four times. W.S., however, had text messages that seemed to indicate daughter stayed overnight with him at least 10 or more times. When questioned about the messages, S.T. said she could not recall sending the messages and could not remember daughter spending the night so frequently. S.T. described her relationship with W.S. as “verbally abusive.” She also claimed she was often present when daughter visited W.S. W.S. would hide daughter’s toys when she was not there, because not all of his relatives knew daughter was his daughter.

On daughter’s birthdays, S.T. would take daughter to W.S.’s house in the morning. She also brought daughter to W.S.’s house if he had presents for her on Christmas. On Halloween, she would bring daughter over for trick or treating. S.T. acknowledged she had gone on trips with daughter, W.S., and W.S.’s mother. They had visited the Jelly Belly factory for daughter’s second birthday. S.T., W.S., and daughter had also gone to Six Flags for daughter’s fourth birthday.

d. Martin’s Relationship with Daughter

Martin could only recall a few occasions where daughter was not home at night. He did not believe daughter could have spent so many nights at W.S.’s apartment, because he would have noticed she was not at home. Martin described that as daughter got older, he continued to be very involved in her life. He cleaned up for her, cooked for her, and used to pick her up at daycare. When it was time for daughter to sleep, Martin would put her to bed by either reading to her or putting on a movie.

Martin could not recall the name of daughter’s preschool. He did not pick her up or drop her off at preschool and did not participate in any of the school activities. He believed S.T. was the one paying for the preschool.

Daughter was on Martin’s health insurance. Martin scheduled daughter’s dentist appointments and knew the name of daughter’s doctor. Martin did not attend her appointments.

e. End of W.S. and S.T.’s Relationship

S.T. described her relationship with W.S. as tumultuous. She said they “ended” their relationship numerous times throughout the years. In July 2014, S.T. told Martin about her relationship with W.S. Martin was upset and initiated divorce proceedings. However, by the time W.S. filed his petition to establish a parental relationship, Martin and S.T. were in the process of reconciling. Martin and S.T. said they were working on their marriage and were not proceeding further with the divorce.

2. Petition to Establish Parental Relationship

On August 22, 2014, W.S. filed a petition to establish a parental relationship with daughter. W.S. alleged he was daugh-

4. A friend who coordinated pickups with S.T. confirmed that she picked daughter up at W.S.’s home once or twice a week.
ter’s biological father and requested joint legal and physical custody and equal visitation. W.S. also requested daughter’s last name be changed.

On August 25, 2014, S.T. filed a response asserting that daughter was not W.S’s daughter. S.T. declared that she had a relationship with W.S. before she became pregnant with daughter. Daughter, however, was born during her marriage to Martin while they were living together. Thus, Martin was daughter’s father. On August 26, 2014, Martin moved for joinder. Martin argued that he was a necessary party to the action, since there was conclusive presumption he was daughter’s father under section 7540.

Before the hearing, all parties submitted briefs, arguments, and evidence for the trial court to consider. W.S. argued the presumption of paternity under section 7540 should not apply to Martin, because S.T. had filed for divorce from Martin in 2006. Thus, he claimed that S.T. and Martin were not cohabitating at the time daughter was conceived. W.S., however, conceded that even if Martin was not a conclusive father under section 7540, he met the requirements of a presumed father under section 7611. W.S. argued he also met the requirements of a presumed father under section 7611. He then argued his presumption of fatherhood should prevail over Martin’s presumption under section 7612, subdivision (b), which provides that when two competing presumptions for paternity exist the presumption upon “which on the facts is founded on the weightier considerations of policy and logic controls.”

S.T. filed a declaration asserting that she was cohabitating with Martin at the time daughter was conceived. She also filed a brief claiming the marital presumption of paternity under section 7540 has precedence over the presumption set forth under section 7611.

3. The Hearing and Trial

On October 21, 2014, the trial court held a hearing and found there was a conclusive presumption that Martin was daughter’s father, because he was married to and cohabitating with S.T. when daughter was conceived pursuant to section 7540. Thereafter, it found Martin was a necessary party to the action and granted his motion for joinder. Subsequently, the trial court continued the hearing, focusing on whether W.S. was presumptively daughter’s father under section 7611.

The court heard testimony from W.S., S.T., Martin, and several family members and friends. After hearing argument from the parties, the court took the matter under submission. On March 19, 2015, the trial court issued a written statement of decision denying W.S.’s request for visitation and joint legal and physical custody of daughter. The trial court concluded W.S. had not received daughter into his home, because he had not satisfied the standard of “‘regular visitation,'” which included “assumption of parent-type obligations and duties . . . .” Thus, he could not qualify as a presumed parent within the meaning of section 7611, subdivision (d).

DISCUSSION

On appeal, W.S. argues the trial court erred when it denied his request to establish a parental relationship. He argues (1) the trial court applied an incorrect legal standard to determine if he received daughter into his home under section 7611, subdivision (d), (2) the trial court erred when it failed to grant him visitation with daughter, (3) the trial court’s decision erroneously considered the timeliness of his petition when there is no statute of limitations to bring an action to establish a parental relationship, (4) California’s statutory scheme is unconstitutional, because it deprives him of due process and explicitly prefers mothers over fathers and requires fathers to take affirmative steps before recognizing their equal right to custody, and (5) a reasonable person may entertain doubts as to whether the trial court’s decision on his petition was the result of bias. For the reasons set forth below, we affirm.

1. Receipt into the Home

On appeal, W.S. argues the trial court misinterpreted the receiving requirement set forth under section 7611, subdivision (d). Section 7611, subdivision (d) provides that a person is a presumed parent if he or she “receives the child into his or her home and openly holds out the child as his or her natural child.” The statute does not expressly define what actions constitute receiving a child into a home. In its statement of decision, the trial court expressed the view that receiving daughter into his home required W.S. to prove regular visitation and the assumption of parent-type obligations and duties such as feeding, bathing, putting daughter to bed, changing her clothes, disciplining her, and other similar tasks. W.S. argues section 7611, subdivision (d) only required him to physically take daughter inside his home, and the trial court’s additional requirements were superfluous and not within the meaning of the statute. As we explain below, we reject W.S.’s claim.

a. Overview and Standard of Review

W.S. questions the trial court’s interpretation of section 7611, subdivision (d). The interpretation of a statute is a question of law, which we review de novo. (People ex rel. Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 432.) When construing a statute, we ascertain the Legislature’s intent in order to carry out the purpose of the law. (Cuminins, Inc. v. Superior Court (2005) 36 Cal.4th 478, 487.) We first examine the language of the statute. If the language is not ambiguous, “we presume the Legislature meant what it said, and the plain meaning of the statute governs.” (Hunt v. Superior Court (1999) 21 Cal.4th 984, 1000.) However, “if the statutory language permits more than one reasonable

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5. The first day of the trial was held on October 21, 2014. The trial continued on to December 9 and 15, 2014.

6. The parties did not dispute that W.S. held daughter out as his own child. They only disputed whether W.S. received daughter into his home within the meaning of section 7611, subdivision (d).
b. “Receiving” Requirement

W.S. argues the receiving requirement set forth under section 7611, subdivision (d) is satisfied by a parent physically taking a child into his or her home. Thus, he argues the trial court erred when it concluded he did not receive daughter into his home. For the reasons set forth below, we disagree.

The Uniform Parentage Act (§ 7600 et seq.) (UPA) distinguishes presumed fathers from biological and alleged fathers. (In re J.L. (2008) 159 Cal.App.4th 1010, 1018.) Biology is not determinative of presumed fatherhood. (In re T.R. (2005) 132 Cal.App.4th 1202, 1209 (T.R.).) Mothers and presumed fathers have far greater rights. (Adoption of Kelsey S. (1992) 1 Cal.4th 816, 824 (Kelsey S.).) A father is not elevated to presumed father status unless he has demonstrated a “commitment to the child and the child’s welfare . . . regardless of whether he is biologically the father.” (T.R., supra, at p. 1212.)

Section 7611 sets forth several rebuttable presumptions of paternity. “The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.” (T.R., supra, 132 Cal.App.4th at p. 1209.)

Section 7611, subdivision (d) creates a rebuttable presumption of presumed fatherhood if “[t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.”

Section 7611, subdivision (d) does not provide an express definition of what constitutes receipt of a child into a parent’s home. However, several courts have analyzed the roots of the “receiving” element. In Charisma R. v. Kristina S. (2009) 175 Cal.App.4th 361, 369 (Charisma R.), disapproved on another point in Reid v. Google, Inc. (2010) 50 Cal.4th 512, 532, the court noted “receives” as used in section 7611, subdivision (d), came from former Civil Code section 230, which pre-dated the UPA and codified the concept of legitimacy. (Charisma R., supra, at p. 371.) At that time, former Civil Code section 230 provided: “The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereafter deemed for all purposes legitimate from the time of its birth.” (Former Civ. Code, § 230, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.) In 1975, the Legislature enacted the UPA, which abolished the concept of legitimacy or illegitimacy and replaced it with the concept of parentage. (Kelsey S., supra, 1 Cal.4th at p. 828.) Former Civil Code section 230 was replaced by section 7611, subdivision (d). (Kelsey S., supra, at pp. 827-828; Charisma R., supra, at p. 371.)

Prior to the enactment of the UPA, courts liberally interpreted what constituted “receipt” into the home. (In re Richard M. (1975) 14 Cal.3d 783, 794.) In Richard M., the Supreme Court concluded “[t]he requirement [was] satisfied by evidence that the father accepted the child as his own, usually demonstrated by an actual physical acceptance of the child into the father’s home to the extent possible under the particular circumstances of the case. Thus the father receive[d] the child into his family when he temporarily reside[d] with the mother and child, even for a brief period.” (Ibid.) “The statutory receipt requirement [was] also fulfilled by the father’s acceptance of the child into his home for occasional temporary visits.” (Id. at p. 795.) Additionally, in Estate of Peterson (1963) 214 Cal.App.2d 258, the court found the father received the daughter into his home when she visited briefly once and spent two weekends at the home of the father and his wife. (Id. at pp. 263-264.)

W.S. correctly asserts that there is no requirement that a child live with a parent for the parent to achieve presumed parent status. (See In re A.A. (2003) 114 Cal.App.4th 771, 784 (A.A.) [finding presumed father status when child never lived with presumed father].) W.S., however, broadly interprets section 7611, subdivision (d) to require only that daughter was physically present inside his home. W.S. relies on cases like Richard M. and Peterson and their liberal interpretation of the receiving requirement to support this claim. However, a review of cases analyzing the receiving requirement post-UPA compels us to reject his argument. “Section 7611, subdivision (d) . . . requires something more than a man’s being the mother’s casual friend or long-term boyfriend; he must be ‘someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child’s well-being’ regardless of his relationship with the mother.” (In re D.M. (2012) 210 Cal. App.4th 541, 553.) In other words, the child’s physical presence within the alleged father’s home is, by itself, insufficient under section 7611, subdivision (d).

In Kelsey S., our Supreme Court acknowledged that historically under cases like Richard M., there was a liberal interpretation of the receiving requirement, and even constructive receipt was potentially sufficient. (Kelsey S., supra, 1 Cal.4th at p. 828.) However, cases pre-dating the UPA like Richard M. were decided in a much different statutory context. When Richard M. was decided, “the determination was whether the child had been legitimated by the father.” (Ibid., italics added.) There was stigma and unfavorable legal treatment attached to a classification of a child as illegitimate. (Ibid.) An illegitimate child had no legal father. In contrast, after the enactment of the UPA and the replacement of the concept of legitimacy with parentage, children will end up with a father,
whether it be a biological father that is granted presumed father status or an adoptive father. (Id. at pp. 828-829.) Thus, Kelsey S. held that the child must be physically received into the home, and constructive receipt is insufficient. (Id. at pp. 826830.)

Following Kelsey S., courts have found that the receiving requirement was met if the “receipt of the child into the home [was] sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship . . . .” (Charisma R., supra, 175 Cal.App.4th at p. 374.) A father does not need to receive the child into his home for a specific period of time, although cohabitation for an extended period of time may strengthen a claim for presumed parent status. (Ibid.) However, to receive a child into his or her home, a parent must “demonstrate a parental relationship, however imperfect.” (Jason P. v. Danielle S. (2017) 9 Cal.App.5th 1000, 1023 (Jason P.).) “Presumed parent status is afforded only to a person with a fully developed parental relationship with the child.” (R.M. v. T.A. (2015) 233 Cal.App.4th 760, 776.)

There are no specific factors that a trial court must consider before it determines that a parent has “received” a child into the home and has established a parental relationship.

“In determining whether a man has ‘receive[d] a child into his home and openly h[e]ld out the child’ as his own [citation], courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental.” (T.R., supra, 132 Cal.App.4th at p. 1211.)

In Charisma R., the appellate court found substantial evidence supported the presumed parent finding when the parent attended the birth of the child, shared parenting responsibilities for the first six weeks of the child’s life, cared for the child full time for the following seven weeks, and held herself out as the child’s mother in various ways. (Charisma R., supra, 175 Cal.App.4th at pp. 374-375.)

In Jason P., the appellate court upheld the trial court’s conclusion that the father had sufficiently “received” his son at his apartment in New York, noting that the child spent time at the father’s apartment in New York, the father made arrangements with his assistant to accommodate the child while he was there, he took the child to the park when he was not working, he fed, played music for, and read to the child, he arranged for an allergist to see the child, he obtained a baby gate for the child to prevent him from falling down the stairs in his apartment, and he gave the child his own room in the apartment. (Jason P., supra, 9 Cal.App.5th at p. 1022.)

These acts “unambiguously demonstrated a parental relationship” between father and child during his visits to his father’s New York apartment. (Id. at p. 1023.)

In S.Y. v. S.B. (2011) 201 Cal.App.4th 1023, the appellate court held there was substantial evidence that a mother in a same-sex relationship had received their children into her home. (Id. at p. 1032.) While in a relationship with her former partner, the mother maintained a separate residence but regularly spent three or four nights a week at her former partner’s home and helped take care of their first child. She also stopped by after work to see the child and assisted in his care. (Ibid.) When the second child was born, the mother was no longer in a relationship with her former partner. However, she continued to go to her former partner’s home on weekdays and weeknights to spend time with and take care of both children. (Ibid.) When the parties reconciled, the mother resumed spending three or four nights a week at her former partner’s home, assisting with the children’s care. (Ibid.)

In its statement of decision, the trial court relied on A.A., supra, 114 Cal.App.4th 771. In A.A., the appellate court found there was insufficient evidence the child was received into the respondent’s home within the meaning of section 7611, subdivision (d). (A.A., supra, at pp. 786-787.) The respondent (biological father) asserted he visited the child “‘on a fairly regular basis’ ” during the first year of her life and visited the child every other weekend for the next three years. (Id. at p. 786.) The visits did not take place in the respondent’s home. Absent an explanation for not having the visits take place in his home, the court concluded “such visitation can be seen as a matter of convenience for respondent.” (Ibid.) Visiting the child at other homes allowed the respondent to “avoid the constant parental-type tasks that come with having the child in his own home—such as feeding and cleaning up after the minor, changing her clothing, bathing her, seeing to her naps, putting her to bed, taking her for outings, playing games with her, disciplining her, and otherwise focusing on the child.” (Id. at pp. 786-787.) In fact, there was no indication of what the respondent did with the child during her visits. (Id. at p. 787.)

In contrast, the A.A. court found there was sufficient evidence the appellant (not the biological father) met the requirements to achieve presumed father status under section 7611, subdivision (d). (A.A., supra, 114 Cal.App.4th at p. 784.) Although the child did not live with appellant on a full-time basis, he was regularly involved with the child since her birth. (Ibid.) The appellant also provided financial support for the child, buying her clothes, toys and food, and other essentials. (Ibid.)

The trial court also relied on In re Cheyenne B. (2012) 203 Cal.App.4th 1361, 1369 (Cheyenne B.). In Cheyenne B., the father was incarcerated when the child was born and sporadically visited her several times. (Ibid.) Sometimes he would meet her at a local Wal-Mart when he drove through the town where she lived. (Ibid.) The appellate court concluded substantial evidence supported the trial court’s determination
that the father’s visits with the child were too inconsistent and irregular to satisfy the requirement that he received the child into his home. (Id. at p. 1380.)

Cheyenne B. characterized A.A. as requiring “regular visitation” in order to satisfy receipt under section 7611, subdivision (d). (Cheyenne B., supra, 203 Cal.App.4th at p. 1379.) The trial court referenced this “‘regular visitation’” standard in its statement of decision, explaining that the receiving element could be satisfied by showing “‘regular visitation,’” which included “assumption of parent-type obligations and duties . . . .” This statement demonstrates the trial court understood that to become a presumed parent, one must show a parental, family-child relationship. (R.M. v. T.A., supra, 233 Cal.App.4th at p. 776.) We find this to be an accurate representation of the law. The common thread between the cases we have discussed is that the parent seeking presumed parent status could show the existence of a parent-child relationship based on assuming parental responsibilities, demonstrating commitment to the child, and providing support. That is the standard the trial court applied in W.S.’s case.

W.S. argues that cases like A.A. and Cheyenne B. limit their holdings to dependency proceedings. Principally, W.S. relies on In re Jerry P. (2002) 95 Cal.App.4th 793 (Jerry P.). The Jerry P. court explained that in dependency proceedings the purpose of section 7611, subdivision (d) is not to establish parenthood but “to determine whether the alleged father has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights not afforded to natural fathers—the rights to reunification services and custody of the child.” (Jerry P., supra, at p. 804.) Thus, Jerry P. held that in the dependency context, the term “‘presumed father’” does not denote a presumption of fatherhood in the evidentiary sense and presumed father status is not rebutted by evidence someone else is the natural father.” (Ibid.)

Nothing in Jerry P. suggests that we must interpret section 7611, subdivision (d) differently depending upon whether it is applied in the dependency context or in some other proceeding. As explained in Jerry P., the purpose served by determining presumed parent status in a dependency proceeding is different than in a proceeding to determine a parental relationship. In a dependency proceeding, the presumed parent status entitles one to services not available to a natural parent who has not attained that status. However, it would make little sense to apply one definition of “receiving” as used in section 7611 to dependency actions while applying another definition to all other proceedings. Section 7611 should be subject to only one interpretation, regardless of the type of action in which it is used.

W.S. also argues the trial court impermissibly evaluated him using the factors set forth in Kelsey S., supra, 1 Cal.4th 816. Under Kelsey S., certain fathers may acquire the rights of a presumed father without meeting the requirements of any of the statutory presumptions, including the presumption set forth under section 7611. Under Kelsey S., “‘an unwed biological father who comes forward at the first opportunity to assert his paternal rights after learning of his child’s existence, but has been prevented from becoming a statutorily presumed father under section 7611 by the unilateral conduct of the child’s mother or a third party’s interference’ acquires a status ‘equivalent to presumed parent status under section 7611.’” (In re D.A. (2012) 204 Cal.App.4th 811, 824.) Kelsey S. held that a father who promptly steps forward and assumes parental responsibilities cannot have his parental rights terminated absent a showing of his unfitness as a parent even if he does not meet the statutory requirements of section 7611. (Kelsey S., supra, at p. 849.)

There is some overlap in the factors used to determine whether a man is a presumed father under section 7611 and whether he is a father within the meaning of Kelsey S. (See In re Elijah V. (2005) 127 Cal.App.4th 576, 582.) The trial court’s consideration of certain factors that are also relevant to the Kelsey S. analysis does not demonstrate a misunderstanding of the receiving element under section 7611. As we have explained, a father “receives” the child into his home if he unambiguously demonstrates a parental relationship. (Charisma R., supra, 175 Cal.App.4th at p. 374; Jason P., supra, 9 Cal.App.5th at p. 1023.) Demonstrating a parental relationship requires W.S. prove more than the fact that daughter has been inside his home. Thus, the trial court correctly considered whether W.S. assumed parental responsibilities and took on the role of a parent in daughter’s life. 7

2. Visitation Rights

Next, W.S. argues that as daughter’s biological father, he has a right to visitation under section 3100. He insists the provision regarding visitation found in section 3100 operates notwithstanding his failure to achieve status as a presumed parent. Alternatively, he claims that even if he was not a presumed parent, the court had the discretion to grant visitation rights to nonparents, and it failed to exercise this discretion.

First, we find that section 3100 is inapplicable in the context of this case. Section 3100, subdivision (a) begins by specifying that it applies when the court makes “an order pursuant to Chapter 4 (commencing with Section 3080)” of the Family Code, which discusses joint custody orders. (§ 3100, subd. (a).) Here, W.S. requested joint custody of daughter. However, since he failed to establish parentage under the UPA, the court did not make any joint custody orders. Thus, it did not make “an order pursuant to Chapter 4” of the Family Code, and section 3100’s provisions providing for visitation (both for parents and for interested parties) are inapplicable here. (See Ed H. v. Ashley C. (2017) 14 Cal.App.5th 899, 912 (“section 3100 applies only when a joint custody order is involved”).) Accordingly, the trial court did not err when

7. In addition to addressing W.S.’s arguments, S.T. argues in her respondent’s brief that sufficient evidence supported the trial court’s conclusion that W.S. did not achieve presumed parent status. We decline to address this argument. W.S. did not raise this claim in his opening brief. Issues not raised in the appellant’s opening brief are deemed waived or abandoned. (Aptos Council v. County of Santa Cruz (2017) 10 Cal.App.5th 266, 296, fn. 7.)
it did not order visitation for W.S., either as a parent or as an interested non-parent.

Second, W.S.’s argument that section 3100’s provision providing for parental visitation applies to him fails as a matter of law. W.S. argues that a “parent” under section 3100 is not limited to presumptive parents as defined under the UPA. W.S.’s claim is a question of law that we review de novo. (People ex rel. Lockyer v. Shamrock Foods Co., supra, 24 Cal.4th at p. 432.)

“Division 8, part 2 of the Family Code governs the right to custody of a minor child. Part 2 applies not only to dissolution, nullity and legal separation proceedings and actions for exclusive custody, but also to proceedings to determine custody or visitation in actions brought under the . . . UPA. (§ 3021, added by Stats. 1993, ch. 219, § 116.11.) The Law Revision Commission comments to this section are particularly pertinent: ‘This section expands the application of this part to proceedings in which custody or visitation is determined in an action pursuant to . . . the [UPA] . . . ’” (Barkaloff v. Woodward (1996) 47 Cal.App.4th 393, 397-398.) Section 3100, subdivision (a), which is found in division 8, part 2 of the Family Code, provides in pertinent part: “In making an order pursuant to Chapter 4 (commencing with Section 3080), the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child.”

Section 3100 does not expressly define the term “parent.” W.S., however, brought an action under the UPA to determine the existence of a parental relationship. The UPA determines parentage—the “parent and child relationship”—as “the legal relationship existing between a child and the child’s natural or adoptive parents . . . . The term includes the mother and child relationship and the father and child relationship.” (§ 7601, subd. (b), italics added.) The UPA further provides that the “parent and child relationship may be established as follows: (a) Between a child and the natural parent, it may be established by proof of having given birth to the child, or under this part.” (§ 7610, subd. (a), italics added.) This “part” includes section 7611. As we have previously discussed, section 7611, subdivision (d) provides that a person is a presumed parent if he or she “receives the child into his or her home and openly holds out the child as his or her natural child.”

Thus, one way for W.S. to establish he is a natural parent under the UPA is to prove he meets the statutory elements of the presumption set forth under section 7611, subdivision (d). Here the trial court found W.S. did not meet the elements of the presumption. In other words, although W.S. is daughter’s biological father, he is not a “natural parent” as defined under the UPA. Therefore, he does not have a parent-child relationship with daughter, and the trial court did not err by declining to award him visitation under section 3100 as a “parent.”

Lastly, we find W.S.’s reliance on Camacho v. Camacho (1985) 173 Cal.App.3d 214 to be unavailing. He argues Camacho held that a biological father has a right to visitation. Camacho does not aid W.S. The father in Camacho filed a suit to establish paternity and obtain visitation, and the trial court adjudicated him the child’s natural father. (Id. at p. 217.) Unlike the father in Camacho, W.S. was unsuccessful in establishing parentage.

3. Constitutionality of the Statutory Scheme

W.S. raises several constitutional challenges to the statutory scheme of the UPA and the Family Code. He argues he has a liberty interest, protected as a matter of substantive due process, in his relationship with daughter. He also argues section 3010 violates equal protection principles, because it automatically grants custody to biological mothers while requiring fathers to establish “presumed” parenthood under section 7611. He argues California law further divides fathers into various subclasses based on their marital status, readily granting married fathers presumed parenthood status while requiring unmarried fathers to additionally prove receipt of the child into the home and acknowledgement of the child as his own.

Preliminarily, we find W.S.’s constitutional arguments are waived for failure to raise them to the trial court. “Typically, constitutional issues not raised in earlier civil proceedings are waived on appeal.” (Neil S. v. Mary L. (2011) 199 Cal.App.4th 240, 254 (Neil S.).) W.S. did not discuss these constitutional issues in either his trial brief or his original petition to establish a parental relationship.

Furthermore, even if we were to consider W.S.’s arguments as pure questions of law presented by undisputed facts, we would reject them. First, we find Kelsey S., supra, 1 Cal.4th 816 instructive on whether W.S. had a protected liberty interest in establishing a parental relationship with daughter and whether his rights were entitled to equal protection as to a mother’s rights. The Kelsey S. court construed former section 7004, which has since been renumbered to section 7611. The court noted that an unwed father has a constitutional due process right to establish a parental relationship with his child only if he “promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise . . . .” (Kelsey S., supra, at p. 849.)

“A court should consider all factors relevant to that determination. The father’s conduct both before and after the child’s birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate ‘a willingness himself to assume full custody of the child—not merely to block adoption by others.’ [Citation.] A court should also consider the father’s public acknowledgment of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the
child.” (Kelsey S., supra, 1 Cal.4th at p. 849, fn. omitted.) Thus, the statutory presumption set forth in section 7611 violates due process and equal protection principles only if it is applied to an “unwed father who has sufficiently and timely demonstrated a full commitment to his parental responsibilities.” (Kelsey S., supra, at p. 849.) “Absent such a showing, the child’s well-being is presumptively best served by continuation of the father’s parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother.” (In re Ariel H. (1999) 73 Cal.App.4th 70, 73.)

Here the trial court expressly found that W.S. did not take prompt legal action to obtain custody, did not assist S.T. in prenatal care or pay for birth expenses, was not involved in daughter’s healthcare, and did not give daughter parental-type care when she visited. In short, W.S. did not demonstrate a full commitment to his parental responsibilities. Absent such a demonstrated commitment, W.S. did not have a protected liberty interest in establishing a parental relationship with daughter and his parental rights were not entitled to equal protection as to those of a mother. (Kelsey S., supra, 1 Cal.4th at pp. 849-850; In re Ariel H., supra, 73 Cal.App.4th at pp. 72-74.)

Second, W.S.’s claim that the statute unconstitutionally prefers married fathers over unmarried fathers in violation of equal protection principles is undeveloped on appeal. “ ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’ ” (Walgreen Co. v. City and County of San Francisco (2010) 185 Cal.App.4th 424, 434.) “There is no constitutional requirement of uniform treatment. [Citations.] Legislative classification is permissible when made for a lawful state purpose and when the classification bears a rational relationship to that purpose. [Citations.] ‘Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. . . . ’ ” (Estate oforman (1971) 5 Cal.3d 62, 75.) “When legislation involves a suspect classification such as classifications based on race, nationality or alienage, or the disparate treatment has a real and appreciable impact on a fundamental interest or right, a heightened standard of scrutiny is applied. [Citations.] In such cases, legislation will be upheld only if it is shown the state ‘ “has a compelling interest [that] justifies the law” ’ and ‘ “that distinctions drawn by the law are necessary to further its purpose.” ’ ” (Neil S., supra, 199 Cal. App.4th at p. 254.)

In his opening brief, W.S. does not explain how or why unmarried fathers and married fathers are similarly situated to each other. Nor does he explain or make arguments pertaining to what level of scrutiny should apply if the two groups are similarly situated to each other. Having failed to support his conclusory equal protection claim with reasoned legal analysis and citations to the law, we consider it waived. (Benach v. County of Los Angeles (2007) 149 Cal.App.4th 836, 852.)

4. Timeliness of W.S.’s Request to Establish a Parental Relationship

W.S. argues the trial court erred when it determined his petition to establish a paternal relationship was untimely. He argues the trial court’s statement of decision is replete with references to his failure to take earlier legal action to establish his parental rights, which it should not have taken into consideration.

W.S. is correct that there is no statute of limitations for requesting custody or visitation of one’s child. Under section 7630, subdivision (b), “[a]ny interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the parent and child relationship presumed under subdivision (d) or (f) of section 7611.”

W.S., however, is incorrect that the trial court found his request to be untimely. At no point did the trial court indicate in its statement of decision that it believed W.S.’s petition was barred by the statute of limitations. Rather, the trial court referenced the timeliness of his petition when it examined whether W.S. promptly stepped forward and assumed parental responsibilities, a factor it properly considered when considering if he achieved presumed parent status. (T.R., supra, 132 Cal.App.4th at p. 1211 [whether father promptly took legal action to obtain custody of child is a factor courts have considered when determining whether father received child into home].) The court’s statements about W.S.’s timeliness did not demonstrate a misunderstanding of the law.

5. Bias

Lastly, W.S. argues the trial court’s ruling on his petition raises doubts as to whether its decision was the product of bias. He argues bias can be inferred, because the trial court found S.T. to be credible despite her lack of candor during her testimony, in her trial briefs, and in her pleadings.

W.S.’s argument has no merit. “A party has the right to an objective decision maker and to a decision maker who appears to be fair and impartial.” (Wechsler v. Superior Court (2014) 224 Cal.App.4th 384, 390.) As the trier of fact, the trial court must evaluate the credibility of witnesses and make determinations when conflicting evidence is presented. The trial court’s “reliance on certain witnesses and rejection of others cannot be evidence of bias no matter how consistently

8. We briefly discussed the Kelsey S. factors earlier in our opinion, when we evaluated W.S.’s claim that he qualified as a presumed parent under section 7611.

9. It is also a factor that is properly considered when determining if W.S. had a protected due process right to establish a relationship with daughter, as we previously discussed.
the [trial court] rejects or doubts the testimony produced by one of the adversaries. . . . “total rejection of an opposed view cannot by itself impugn the integrity or competence of a trier of fact.”” (Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 796.) We cannot find prejudice merely because the trial court found some witnesses, such as S.T., to be credible.

DISPOSITION

The order is affirmed. S.T. is entitled to her costs on appeal.

Premo, Acting P.J.

WE CONCUR: Bamattre-Manoukian, J., Grover, J.