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Driver who caused catastrophic collision acted with “wanton disregard” for safety of others (Lavin, Acting P.J.)

People v. Escarcega

C.A. 2nd; February 20, 2019; B284215

The Second Appellate District affirmed a judgment of conviction and sentence. In the published portion of its opinion, the court held that ample evidence supported a finding that defendant acted with “wanton disregard” for the safety of others when he caused a catastrophic collision while attempting to pass two vehicles on a two-lane road at night.

The evidence at trial showed that Marco Escarcega attempted to pass the two vehicles without being able to see if there were any vehicles in front of them or approaching in the oncoming lane. When the driver of the first vehicle saw the victim’s headlights approaching and made room for Escarcega to return to the lane, he made no attempt to do so. He instead continued his attempt to pass the second vehicle, accelerating towards the victim at more than 70 miles per hour until seconds before the collision. The jury found Escarcega guilty of reckless driving, and found true specific injury and great bodily injury allegations, respectively, as to the two victims injured in the collision.

Escarcega appealed, challenging (1) the sufficiency of the evidence to support a finding of “wanton disregard” and (2) the imposition of a great bodily injury enhancement.

The court of appeal affirmed, holding that substantial evidence supported Escarcega’s conviction. To convict Escarcega of reckless driving, the prosecution needed to prove, among other things, that he intentionally drove with “wanton disregard” for the safety of persons or property. A person acts with wanton disregard for safety when “(1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he or she intentionally ignores that risk.” Here, substantial evidence supported such a finding. Escarcega acknowledged that a delivery truck two cars ahead of him blocked his view of the traffic ahead and in the oncoming lane. He nonetheless attempted to pass both of the two vehicles immediately in front of him. When provided the opportunity to return to his lane after seeing the victim’s headlights, he declined to do so. On these facts, the jury could reasonably have concluded that Escarcega’s conduct went beyond mere carelessness and demonstrated a “wanton disregard” for the safety of the other drivers on the road. Further, imposition of the great bodily injury enhancement did not violate §12022.7(g). Under §12022.7(g), such enhancement may attach only to those crimes in which great bodily injury is not an element of the offense. Because great bodily injury is not an element of the substantive offense of reckless driving under §23103, this prohibition did not apply.

Criminal Law

Defendant entitled to hearing on issue of trial court’s exercise of discretion to strike enhancement under newly enacted law (Collins, J.)

People v. Rocha

C.A. 2nd; February 19, 2019; B290779

The Second Appellate District reversed a trial court order and remanded. The court held that defendant was entitled to a hearing on the issue of the trial court’s exercise of its discretion under Senate Bill No. 620 to strike or dismiss a firearm use enhancement.

Armando Rocha was convicted of first degree murder. Firearm use and prior serious felony allegations, among others, were found true, and Rocha was sentenced accordingly. The court of appeal affirmed the judgment of conviction, but remanded to the trial court to exercise its discretion under SB 620 to strike or dismiss the firearm use enhancement.

Without holding a hearing, the trial court issued a written statement declining to strike the firearm enhancement.

The court of appeal reversed, holding that Rocha should have been given the opportunity to be present with counsel at a hearing on remand. The court found it manifestly unfair to permit the trial court to decide how to exercise its new discretion under Penal Code §12022.53(h) without affording defendant and his counsel the opportunity to make an argument if they so desire. Even under the Watson standard, reversal was required if it was reasonably probable that the defendant would have obtained a more favorable result absent the error. That standard was met here: it was reasonably probable that the defendant would have obtained a more favorable result absent the error. That standard was met here: it was reasonably probable that input from defendant and his counsel would have led to a more favorable exercise of the court’s discretion. On remand, the trial court should also exercise its discretion under §§667 and 1385, as recently amended by Senate Bill No. 1393, to strike or dismiss Rocha’s five-year prior serious felony enhancement.

Criminal Law

Eighth Amendment’s Excessive Fines Clause applies to states under Fourteenth Amendment’s Due Process Clause (Ginsburg, J.)

Timbs v. Indiana

U.S.Sup.Ct.; February 20, 2019; No. 17–1091
Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs’s arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs’s vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State’s request. The vehicle’s forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs’s offense, and therefore unconstitutional under the Eighth Amendment’s Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

Held: The Eighth Amendment’s Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment’s Due Process Clause. Pp. 2–9.

(a) The Fourteenth Amendment’s Due Process Clause incorporates and renders applicable to the States Bill of Rights protections “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.” McDonald v. Chicago, 561 U. S. 742, 767 (alterations omitted). If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. Pp. 2–3.

(b) The prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day. Protection against excessive fines has been a constant shield throughout Anglo-American history for good reason: Such fines undermine other liberties. They can be used, e.g., to retaliate against or chill the speech of political enemies. They can also be employed, not in service of penal purposes, but as a source of revenue. The historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is indeed overwhelming. Pp. 3–7.

(c) Indiana argues that the Clause does not apply to its use of civil in rem forfeitures, but this Court held in Austin v. United States, 509 U. S. 602, that such forfeitures fall within the Clause’s protection when they are at least partially punitive. Indiana cannot prevail unless the Court overrules Austin or holds that, in light of Austin, the Excessive Fines Clause is not incorporated because its application to civil in rem forfeitures is neither fundamental nor deeply rooted.

The first argument, overturning Austin, is not properly before this Court. The Indiana Supreme Court held only that the Excessive Fines Clause did not apply to the States. The court did not address the Clause’s application to civil in rem forfeitures, nor did the State ask it to do so. Timbs thus sought this Court’s review only of the question whether the Excessive Fines Clause is incorporated by the Fourteenth Amendment.

Indiana attempted to reformulate the question to ask whether the Clause restricted States’ use of civil in rem forfeitures and argued on the merits that Austin was wrongly decided. Respondents’ “right, … to restate the questions presented,” however, “does not give them the power to expand [those] questions,” Bray v. Alexandria Women’s Health Clinic, 506 U. S. 263, 279, n. 10 (emphasis deleted), particularly where the proposed reformulation would lead the Court to address a question neither pressed nor passed upon below, cf. Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7.

The second argument, that the Excessive Fines Clause cannot be incorporated if it applies to civil in rem forfeitures, misapprehends the nature of the incorporation inquiry. In considering whether the Fourteenth Amendment incorporates a Bill of Rights protection, this Court asks whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. To suggest otherwise is inconsistent with the approach taken in cases concerning novel applications of rights already deemed incorporated. See, e.g., Packingham v. North Carolina, 582 U. S. ___, ___. The Excessive Fines Clause is thus incorporated regardless of whether application of the Clause to civil in rem forfeitures is itself fundamental or deeply rooted. Pp. 7–9.

84 N. E. 3d 1179, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.

Insurance Litigation

California law does not bar public entity’s insurer from seeking indemnification from employees’ insurer (M.D. Smith, J.)

Westport Insurance Corporation v. California Casualty Management Company

9th Cir.; February 20, 2019; 17-15924

The court of appeals affirmed a district court judgment. The court held that California law did not bar a judgment compelling the insurer for public school employees to indemnify the school district’s insurer for its payment of a settlement in actions brought against both the employees and the district.

Three former students sued Moraga School District and three of its school administrators alleging they had been sexually abused by a district teacher when they were in middle school. The students alleged that the administrators had received warnings about the teacher, but had failed to take any
action. The district tendered defense of the actions to both the district’s insurer, Westport Insurance Corporation, and the insurer for the administrators, California Casualty Management Company. Westport eventually settled the students’ claims for $15.8 million. After unsuccessfully seeking repayment from California Casualty, it filed suit.

On cross-motions for summary judgment, the district court rendered judgment in favor if Westport in the amount of $2.6 million plus $755,637.20 in prejudgment interest.

The court of appeals affirmed, holding that California Casualty was properly found liable for indemnification. Looking to California case law, the court rejected California Casualty’s claim that Cal. Gov. Code §825.4, which prohibits public entities from seeking indemnification from their employees, barred indemnification in the circumstances presented here. In several cases, the California courts expressly permitted the employees’ personal insurance to pay the entirety or majority of a settlement, even though the courts first found that the public entities were liable under §825. Another case held that an employee’s insurer could contribute to settlement costs if the language of the employee’s insurance policy also covered the public entity’s obligation. The court found that California case law differentiates between the employee and his insurer, holding that an insurer may be held liable for indemnification where none of the employees had personally contributed to the settlement costs. Further, where the employee’s policy is available to the public entity as an insured, contribution to the defense and settlement costs may be permitted. Here, the district furnished primary and excess insurance to its administrators through Westport. There was no evidence that any of the administrators personally contributed to the settlement. In addition, California Casualty’s policy was limited to claims arising in the course of employment. That it was now being called upon to provide its excess coverage did not violate the intent behind §825.4 indemnification.

Tax

West Virginia tax statute unlawfully discriminates against former federal law enforcement employees (Gorsuch, J.)

Dawson v. Steager

U.S.Sup.Ct.; February 20, 2019; No. 17–419

After petitioner James Dawson retired from the U. S. Marshals Service, his home State of West Virginia taxed his federal pension benefits as it does all former federal employees. The pension benefits of certain former state and local law enforcement employees, however, are exempt from state taxation. See W. Va. Code Ann. §11–21–12(c)(6). Mr. Dawson sued, alleging that the state statute violates the intergovernmental tax immunity doctrine as codified at 4 U. S. C. §111. Under that statute, the United States consents to state taxation of the pay or compensation of federal employees, but only if the state tax does not discriminate on the basis of the source of the pay or compensation. A West Virginia trial court found no significant differences between Mr. Dawson’s job duties as a federal marshal and those of the state and local law enforcement officers exempted from taxation and held that the state statute violates §111’s antidiscrimination provision. Reversing, the West Virginia Supreme Court of Appeals emphasized that the state tax exemption applies only to a narrow class of state retirees and was never intended to discriminate against former federal marshals.

Held: The West Virginia statute unlawfully discriminates against Mr. Dawson as §111 forbids. A State violates §111 when it treats retired state employees more favorably than retired federal employees and no “significant differences between the two classes” justify the differential treatment. Davis v. Michigan Dept. of Treasury, 489 U. S. 803, 814–816. Here, West Virginia expressly affords state law enforcement retirees a tax benefit that federal retirees cannot receive, and there are no “significant differences” between Mr. Dawson’s former job responsibilities and those of the tax-exempt state law enforcement retirees.

The narrow preference should be permitted, the State argues, because it affects too few people to meaningfully interfere with federal government operations. Section 111, however, disallows any state tax that discriminates against a federal officer or employee—not just those that seem especially cumbersome. And in Davis the Court refused a similar invitation to add unwritten qualifications to §111. That is not to say that the narrowness of a state tax exemption is irrelevant. If a State exempts only a narrow subset of state retirees, it can comply with §111 by exempting only the comparable class of federal retirees. The State also argues that the statute is not intended to harm federal retirees but to help certain state retirees. The “State’s interest in adopting the discriminatory tax,” however, “is simply irrelevant.” Davis, 489 U. S., at 816.

For reasons other than job responsibilities, the State insists, retired U. S. Marshals and tax-exempt state law enforcement retirees are not “similarly situated.” But the State’s statute does not draw any such lines. It singles out for preferential treatment retirement plans associated with particular state law enforcement officers. The distinguishing characteristic of the retirement plans is the nature of the jobs previously held by retirees who may participate in them. The state trial court found no “significant differences” between Mr. Dawson’s former job responsibilities as a U. S. Marshal and those of the state law enforcement retirees who qualify for the tax exemption, and the West Virginia Supreme Court of Appeals did not upset that finding. By submitting that Mr. Dawson’s former job responsibilities are also similar to those of other state law enforcement retirees who do not qualify for a tax exemption, the State mistakes the nature of the inquiry. The relevant question under §111 is not whether federal retirees are similarly situated to state retirees who do not receive a tax
break; it is whether they are similarly situated to those who do. Finally, the State says that the real distinction may not be based on job duties at all but on the relative generosity of pension benefits. The statute as enacted, however, does not classify persons or groups on that basis. And an implicit but lawful distinction cannot save an express and unlawful one. See, e.g., id., at 817. Pp. 3–8.

Reversed and remanded.

GORSUCH, J., delivered the opinion for a unanimous Court.
United States Supreme Court

Cite as 19 C.D.O.S. 1556

JAMES DAWSON, ET UX., PETITIONERS

v.

DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

No. 17–419
In the Supreme Court of the United States
On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia
Argued December 3, 2018
Filed February 20, 2019

JUSTICE GORSUCH delivered the opinion of the Court.

If you spent your career as a state law enforcement officer in West Virginia, you’re likely to be eligible for a generous tax exemption when you retire. But if you served in federal law enforcement, West Virginia will deny you the same benefit. The question we face is whether a State may discriminate against federal retirees in that way.

For most of his career, James Dawson worked in the U. S. Marshals Service. After he retired, he began looking into the tax treatment of his pension. It turns out that his home State, West Virginia, doesn’t tax the pension benefits of certain former state law enforcement employees. But it does tax the benefits of all former federal employees. So Mr. Dawson brought this lawsuit alleging that West Virginia violated §111. In that statute, the United States has consented to state taxation of the “pay or compensation” of “officer[s] or employee[s] of the United States,” but only if the “taxation does not discriminate against the officer or employee because of the source of the pay or compensation.” §111(a).

Section 111 codifies a legal doctrine almost as old as the Nation. In McCulloch v. Maryland, 4 Wheat. 316 (1819), this Court invoked the Constitution’s Supremacy Clause to invalidate Maryland’s effort to levy a tax on the Bank of the United States. Chief Justice Marshall explained that “the power to tax involves the power to destroy,” and he reasoned that if States could tax the Bank they could “defeat” the federal legislative policy establishing it. Id., at 431–432. For the next few decades, this Court interpreted McCulloch “to bar most taxation by one sovereign of the employees of another.” Davis v. Michigan Dept. of Treasury, 489 U. S. 803, 810 (1989).

In time, though, the Court softened its stance and upheld neutral income taxes—those that treated federal and state employees with an even hand. See Helvering v. Gerhardt, 304 U. S. 405 (1938); Graves v. New York ex rel. O’Keefe, 306 U. S. 466 (1939). So eventually the intergovernmental tax immunity doctrine came to be understood to bar only discriminatory taxes. It was this understanding that Congress “consciously … drew upon” when adopting §111 in 1939. Davis, 489 U. S., at 813.

It is this understanding, too, that has animated our application of §111. Since the statute’s adoption, we have upheld an Alabama income tax that did not discriminate on the basis of the source of the employees’ compensation. Jefferson County v. Acker, 527 U. S. 423 (1999). But we have invalidated a Michigan tax that discriminated “in favor of retired state employees and against retired federal employees.” Davis, 489 U. S., at 814. We have struck down a Kansas law that taxed the retirement benefits of federal military personnel at a higher rate than state and local government retirement benefits. Barker v. Kansas, 503 U. S. 594, 599 (1992). And we have rejected a Texas scheme that imposed a property tax on a private company operating on land leased from the federal government, but a “less burdensome” tax on property leased from the State. Phillips Chemical Co. v. Dumas Independent School Dist., 361 U. S. 376, 378, 380 (1960).

Mr. Dawson’s own attempt to invoke §111 met with mixed success. A West Virginia trial court found it “undisputed” that “there are no significant differences between Mr. Dawson’s powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers” that West Virginia exempts from income tax. App. to Pet. for Cert. 22a. In the trial court’s judgment, the State’s statute thus represented “precisely the type of favoritism” §111 prohibits. Id., at 23a. But the West Virginia Supreme Court of Appeals saw it differently. In reversing, the court emphasized that relatively few state employees receive the tax break denied Mr. Dawson. The court stressed, too, that the statute’s “intent … was to give a benefit to a narrow class of state retirees,” not to harm federal retirees. Id., at 15a. Because cases in this field have yielded inconsistent results, much as this one has, we granted certiorari to afford additional guidance. 585 U. S. ___ (2018).

We believe the state trial court had it right. A State violates §111 when it treats retired state employees more favorably than retired federal employees and no “significant differences between the two classes” justify the differential treatment. Davis, 489 U. S., at 814–816 (1989) (internal quotation marks omitted); Phillips Chemical Co., 361 U. S., at 383. Here, West Virginia expressly affords state law enforcement retirees a tax benefit that federal retirees cannot receive. And before us everyone accepts the trial court’s factual finding that there aren’t any “significant differences” between Mr. Dawson’s former job responsibilities and those of the tax-exempt state law enforcement retirees. Given all this, we have little difficulty concluding that West Virginia’s law unconstitutionally “discriminate[s]” against Mr. Dawson “because of the source of [his] pay or compensation,” just as §111 forbids.
The State offers this ambitious rejoinder. Even if its statute favors some state law enforcement retirees, the favored class is very small. Most state retirees are treated no better than Mr. Dawson. And this narrow preference, the State suggests, should be permitted because it affects so few people that it couldn’t meaningfully interfere with the operations of the federal government.

We are unpersuaded. Section 111 disallows any state tax that discriminates against a federal officer or employee—not just those that seem to us especially cumbersome. Nor are we inclined to accept West Virginia’s invitation to adorn §111 with a new and judicially manufactured qualification that cannot be found in its text. In fact, we have already refused an almost identical request. In Davis, we rejected Michigan’s suggestion that a discriminatory state income tax should be allowed to stand so long as it treats federal employees or retirees the same as “the vast majority of voters in the State.” 489 U. S., at 815, n. 4. We rejected, too, any suggestion that a discriminatory tax is permissible so long as it “does not interfere with the Federal Government’s ability to perform its governmental functions.” Id., at 814. In fact, as long ago as McCulloch, Chief Justice Marshall warned against enmeshing courts in the “perplexing” business, “so unfit for the judicial department,” of attempting to delineate “what degree of taxation is the legitimate use, and what degree may amount to the abuse of power.” 4 Wheat., at 430.

That’s not to say the breadth or narrowness of a state tax exemption is irrelevant. Under §111, the scope of a State’s tax exemption may affect the scope of its resulting duties. So if a State exempts from taxation all state employees, it must likewise exempt all federal employees. Conversely, if the State decides to exempt only a narrow subset of state retirees, the State can comply with §111 by exempting only the comparable class of federal retirees. But the narrowness of a discriminatory state tax law has never been enough to render it necessarily lawful.

With its primary argument lost, the State now proceeds more modestly. Echoing the West Virginia Supreme Court of Appeals, the State argues that we should uphold its statute because it isn’t intended to harm federal retirees, only to help certain state retirees. But under the terms of §111, the “State’s interest in adopting the discriminatory tax, only matter how substantial, is simply irrelevant.” Davis, 489 U. S., at 816. We can safely assume that discriminatory laws like West Virginia’s are almost always enacted with the purpose of benefiting state employees rather than harming their federal counterparts. Yet that wasn’t enough to save the state statutes in Davis, Barker, or Phillips, and it can’t be enough here. Under §111 what matters isn’t the intent lurking behind the law but whether the letter of the law “treat[s] those who deal with” the federal government “as well as it treats those with whom [the State] deals itself.” Phillips Chemical Co., 361 U. S., at 385.

If treatment rather than intent is what matters, the State suggests that it should still prevail for other reasons. Section 111 prohibits “discriminat[ion],” something we’ve often described as treating similarly situated persons differently. See Davis, 489 U. S., at 815–816; Phillips Chemical Co., 361 U. S., at 383. And before us West Virginia insists that even if retired U. S. Marshals and tax-exempt state law enforcement retirees had similar job responsibilities, they aren’t “similarly situated” for other reasons. Put another way, the State contends that the difference in treatment its law commands doesn’t qualify as unlawful discrimination because it is “directly related to, and justified by,” a lawful and “significant difference” between the two classes. Davis, 489 U. S., at 816 (internal quotation marks and alteration omitted).

In approaching this argument, everyone before us agrees on at least one thing. Whether a State treats similarly situated state and federal employees differently depends on how the State has defined the favored class. See id., at 817. So if the State defines the favored class by reference to job responsibilities, a similarly situated federal worker will be one who performs comparable duties. But if the State defines the class by some other criteria, our attention should naturally turn there. If a State gives a tax benefit to all retirees over a certain age, for example, the comparable federal retiree would be someone who is also over that age.

So how has West Virginia chosen to define the favored class in this case? The state statute singles out for preferential treatment retirement plans associated with West Virginia police, firefighters, and deputy sheriffs. See W. Va. Code Ann. §11–21–12(c)(6) (Lexis 2017). The distinguishing characteristic of these plans is the nature of the jobs previously held by retirees who may participate in them; thus, a similarly situated federal retiree is someone who had similar job responsibilities to a state police officer, firefighter, or deputy sheriff. The state trial court correctly focused on this point of comparison and found no “significant differences” between Mr. Dawson’s former job responsibilities as a U. S. Marshal and those of the state law enforcement retirees who qualify for the tax exemption. App. to Pet. for Cert. 22a. Nor did the West Virginia Supreme Court of Appeals upset this factual finding. So looking to how the State has chosen to define its favored class only seems to confirm that it has treated similarly situated persons differently because of the source of their compensation.

Of course, West Virginia sees it otherwise. It accepts (for now) that its statute distinguishes between persons based on their former job duties. It accepts, too, the trial court’s finding that Mr. Dawson’s former job responsibilities are materially identical to those of state retirees who qualify for its tax exemption. But, the State submits, Mr. Dawson’s former job responsibilities are also similar to those of other state law enforcement retirees who don’t qualify for its tax exemption. And, the State insists, the fact that it treats federal retirees no worse than (some) similarly situated state employees should be enough to save its statute.

But this again mistakes the nature of our inquiry. Under §111, the relevant question isn’t whether federal retirees are
similarly situated to state retirees who don’t receive a tax benefit; the relevant question is whether they are similarly situated to those who do. So, for example, in *Phillips* we compared the class of federal lessees with the *favored* class of state lessees, even though the State urged us to focus instead on the disfavored class of private lessees. 361 U. S., at 381–382. In *Davis*, we likewise rejected the State’s effort to compare the class of federal retirees with state residents who did not benefit from the tax exemption rather than those who did. See 489 U. S., at 815, n. 4.

At this point the State is left to play its final card. Now, it says, maybe the real distinction its statute draws isn’t based on former job duties at all. Maybe its statute actually favors certain state law enforcement retirees only because their pensions are less generous than those of their federal law enforcement counterparts. At the least, the State suggests, we should remand the case to the West Virginia courts to explore this possibility.

The problem here is fundamental. While the State was free to draw whatever classifications it wished, the statute it enacted does not classify persons or groups based on the relative generosity of their pension benefits. Instead, it extends a special tax benefit to retirees who served as West Virginia police officers, firefighters, or deputy sheriffs—and it categorically denies that same benefit to retirees who served in similar federal law enforcement positions. Even if Mr. Dawson’s pension turned out to be *identical* to a state law enforcement officer’s pension, the law as written would deny him a tax exemption. West Virginia’s law thus discriminates “because of the source of … compensation or pay” in violation of §111. Whether the unlawful classification found in the text of a statute might serve as some sort of proxy for a lawful distinction hidden behind it is neither here nor there. No more than a beneficent legislative intent, an implicit but unlawful distinction cannot save an express and unlawful one.

Our precedent confirms this too. In *Davis*, Michigan argued that a state law expressly discriminating between federal and state retirees was really just distinguishing between those with more and less generous pensions. *Id.*, at 816. We rejected this attempt to rerationalize the statute, explaining that “[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits” but “would discriminate on the basis of the amount of benefits received by individual retirees.” *Id.*, at 817. The fact is, when States seek to tax the use of a fellow sovereign’s property, the Constitution and Congress have always carefully constrained their authority. *Id.*, at 810–814. And in this sensitive field it is not too much to ask that, if a State wants to draw a distinction based on the generosity of pension benefits, it enact a law that actually does that.

Because West Virginia’s statute unlawfully discriminates against Mr. Dawson, we reverse the judgment of the West Virginia Supreme Court of Appeals and remand the case for further proceedings not inconsistent with this opinion, including the determination of an appropriate remedy.

It is so ordered.
Cite as 19 C.D.O.S. 1559

TYSON TIMBS, PETITIONER
v.
INDIANA

No. 17–1091
In the Supreme Court of the United States
On Writ Of Certiorari To The Supreme Court Of Indiana
Argued November 28, 2018
Filed February 20, 2019

JUSTICE GINSBURG delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs’s arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs’s Land Rover, charging that the vehicle had been used to transport heroin. After Timbs’s guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs’s vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs’s offense, hence unconstitutional under the Eighth Amendment’s Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari.585 U. S. ___ (2018).

The question presented: Is the Eighth Amendment’s Excessive Fines Clause an “incorporated” protection applicable to the States under the Fourteenth Amendment’s Due Process Clause? Like the Eighth Amendment’s proscriptions of “cruel and unusual punishment” and “[e]xcessive bail,” the protection against excessive fines guards against abuses of government’s punitive or criminal-law-enforcement authority. This safeguard, we hold, is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in [our] history and tradition.” McDonald v. Chicago, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. Barron ex rel. Tiernan v. Mayor of Baltimore, 7 Pet. 243 (1833). “The constitutional Amendments adopted in the aftermath of the Civil War,” however, “fundamentally altered our country’s federal system.” McDonald, 561 U. S., at 754. With only “a handful” of exceptions, this Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. Id., at 764–765, and nn. 12–13. A Bill of Rights protection is incorporated, we have explained, if it is “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.” Id., at 767 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” Id., at 765 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.1

B


The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that “[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness

1. The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. Apodaca v. Oregon, 406 U. S. 404 (1972). As we have explained, that “exception to the[e] general rule … was the result of an unusual division among the Justices,” and it “does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.” McDonald, 561 U. S., at 766, n. 14.
thereof, saving to him his contenement . . . .” §20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225). As relevant here, magna carta required that economic sanctions “be proportioned to the wrong” and “not be so large as to deprive [an offender] of his livelihood.” Browning-Ferris, 492 U. S., at 271. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) (“[N]oman shall have a larger amerce- ment imposed upon him, than his circumstances or personal estate will bear . . . .”). But cf. Bajakajian, 524 U. S., at 340, n. 15 (taking no position on the question whether a person’s income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite magna carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. E.g., The Grand Remonstrance ¶¶17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); Browning-Ferris, 492 U. S., at 267. When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed magna carta’s guarantee by providing that “excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” I Wm. & Mary, ch. 2, §10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, e.g., Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed.1909) (“[A] ll fines shall be moderate, and saving men’s contenements, merchandise, or wainage.”). In 1787, the constitutions of eight States—accounting for 70% of the U. S. population—forbade excessive fines. Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines. Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States’ apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws’ provisions were draconian fines for violating broad proscriptions on “vagrancy” and other dubious offenses. See, e.g., Mississippi Vagrant Law, Laws of Miss. §2 (1865), in 1 W. Fleming, Documentary History of Reconstruction 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. E.g., id. §5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev 671, 681–685 (2003) (describing Black Codes’ use of fines and other methods to “replicate, as much as possible, a system of involuntary servitude”). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 443 (1866); id., at 1123–1124.

Today, acknowledgment of the right’s fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. Id., at 9 (citing Norris v. State, 271 Ind. 568, 576, 394 N. E. 2d 144, 150 (1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts’ critics learned several centuries ago. See Browning-Ferris, 492 U. S., at 267. Even absent a political motive, fines may be employed “in a measure out of accord with the penal goals of retribution and deterrence,” for “fines are a source of revenue,” while other forms of punishment “cost a State money.” Harmelin v. Michigan, 501 U. S. 957, 979, n. 9 (1991) (opinion of Scalia, J.) (“it makes sense to scrutinize government- al action more closely when the State stands to benefit”). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as Amici Curiae 7 (“Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.”).

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” Mc-
II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil in rem forfeitures because, the State says, the Clause’s specific application to such forfeitures is neither fundamental nor deeply rooted.

In Austin v. United States, 509 U. S. 602 (1993), however, this Court held that civil in rem forfeitures fall within the Clause’s protection when they are at least partially punitive. Austin arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies “identically to both the Federal Government and the States.” McDonald, 561 U. S., at 766, n. 14. Accordingly, to prevail, Indiana must persuade us either to overrule our decision in Austin or to hold that, in light of Austin, the Excessive Fines Clause is not incorporated because the Clause’s application to civil in rem forfeitures is neither fundamental nor deeply rooted. The first argument is not properly before us, and the second misapprehends the nature of our incorporation inquiry.

A

In the Indiana Supreme Court, the State argued that forfeiture of Timbs’s SUV would not be excessive. See Brief in Opposition 5. It never argued, however, that civil in rem forfeitures were categorically beyond the reach of the Excessive Fines Clause. The Indiana Supreme Court, for its part, held that the Clause did not apply to the States at all, and it nowhere addressed the Clause’s application to civil in rem forfeitures. See 84 N. E. 3d 1179. Accordingly, Timbs sought our review of the question “[w]hether the Eighth Amendment’s Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.” Pet. for Cert. i. In opposing review, Indiana attempted to reframe the question to ask “[w]hether the Eighth Amendment’s Excessive Fines Clause restricts States’ use of civil asset forfeitures.” Brief in Opposition i. And on the merits, Indiana has argued not only that the Clause is not incorporated, but also that Austin was wrongly decided. Respondents’ “right, in their brief in opposition, to restate the questions presented,” however, “does not give them the power to expand [those]questions.” Bray v. Alexandria Women’s Health Clinic, 506 U. S. 263, 279, n. 10 (1993) (emphasis deleted). That is particularly the case where, as here, a respondent’s reformation would lead us to address a question neither pressed nor passed upon below. Cf. Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7 (2005) (“[W]e are a court of review, not of first view …”). We thus decline the State’s invitation to reconsider our unanimous judgment in Austin that civil in rem forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.

B

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil in rem forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana’s suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in Packingham v. North Carolina, 582 U. S. ___ (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment’s Free Speech Clause was “applicable to the States under the Due Process Clause of the Fourteenth Amendment.” Id., at ___ (slip op., at 1). We did not, however, inquire whether the Free Speech Clause’s application specifically to social media websites was fundamental or deeply rooted. See also, e.g., Riley v. California, 573 U. S. 373 (2014) (holding, without separately considering incorporation, that States’ warrantless search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil in rem forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment’s Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, e.g., post, at 1–3 (THOMAS, J., concurring in judgment); McDonald v. Chicago, 561 U. S. 742, 805–858 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the “privileges or immunities of citizens of the United States” include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original
Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St.L. J. 1509 (2007); A. Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment’s prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment’s Due Process Clause to encompass a substantive right that has nothing to do with “process,” I would hold that the right to be free from excessive fines is one of the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment.

The Fourteenth Amendment provides that “[n]o States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” “On its face, this appears to grant … United States citizens a certain collection of rights—i.e., privileges or immunities—attributable to that status.” McDonald v. Chicago, 561 U. S. 742, 808 (2010) (THOMAS, J., concurring in part and concuring in judgment). But as I have previously explained, this Court “marginaliz[ed]” the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause “quite narrowly.” Id., at 808–809. Litigants seeking federal protection of substantive rights against the States thus needed “an alternative fount of such rights,” and this Court “found one in a most curious place;” id., at 809— the Fourteenth Amendment’s Due Process Clause, which prohibits “any State” from “depriv[ing] any person of life, liberty, or property, without due process of law.”

Because this Clause speaks only to “process,” the Court has “long struggled to define” what substantive rights it protects. McDonald, supra, at 810 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are “fundamental.” Ante, at 2, 3, 7, 9. Sometimes that means rights that are “deeply rooted in this Nation’s history and tradition.” Ante, at 3, 7 (quoting McDonald, supra, at 767 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of “fundamental” rights so broadly as to border on meaningless. See, e.g., Obergefell v. Hodges, 576 U. S. ___, ___, ___ (2015) (slip op., at 1–2) (“rights that allow persons, within a lawful realm, to define and express their identity”); Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”). Because the oxymoronic “substantive” “due process” doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any “guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not.” McDonald, supra, at 811 (opinion of THOMAS, J.). And because the Court’s substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court’s most notoriously incorrect decisions. E.g., Roe v. Wade, 410 U. S. 113 (1973); Dred Scott v. Sandford, 19 How. 393, 450 (1857).

The present case illustrates the incongruity of the Court’s due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to “‘proceed according to the “law of the land”—that is, according to written constitutional and statutory provisions,’” or that the State failed to provide “some baseline procedures.” Nelson v. Colorado, 581 U. S. ___, ___, n. 1 (2017) (THOMAS, J., dissenting) (slip op., at 2, n. 1). His claim has nothing to do with any “process” “due” him. I therefore decline to apply the “legal fiction” of substantive due process. McDonald, 561 U. S., at 811 (opinion of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, “the terms ‘privileges’ and ‘immunities’ had an established meaning as synonyms for ‘rights.’” Id., at 813. Those “rights” were the “inalienable rights” of citizens that had been “long recognized,” and “the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights” against interference by the States. Id., at 822, 837. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. “Consistent with their English heritage, the founding generation generally did not consider any of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution’s text.” Id., at 818.

The question here is whether the Eighth Amendment’s prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

A

The Excessive Fines Clause “was taken verbatim from the English Bill of Rights of 1689,” United States v. Bajakajian, 524 U. S. 321, 335 (1998), which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated
that “[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but according to the measure of the offence so shall he pay … .” Sources of English Legal and Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds.1984) (emphasis added). Expanding this principle, Magna Carta required that “amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood;” Bajakajian, supra, at 335:

“A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy.” Magna Carta, ch. 20 (1215), in A. Howard, Magna Carta: Text & Commentary 42 (rev. ed. 1998).

Similar clauses levying amercements “only in proportion to the measure of the offense” applied to earls, barons, and clergymen. Chs. 21–22, ibid. One historian posits that, due to the prevalence of amercements and their use in increasing the English treasury, “[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements.” Pleas of the Crown for the County of Gloucester xxxiv (F. Maitland ed. 1884).

The principle was reiterated in the First Statute of Westminster, which provided that no man should “be amerced, without reasonable cause, and according to the quantity of his Trespass.” 3 Edw. I, ch. 6 (1275). The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff “to take a moderate amerce ment proper to the magnitude and manner of the offense, according to the tenour of the Great Charter of the Liberties of England,” and the bailiff was sued for extorting “a heavier amercement.” Le Gras v. Bailiff of Bishop of Winchester, Y. B. Mich. 10 Edw. II, pl. 4 (1316), reprinted in 52 Selden Society 3, 5 (1934); see also Richard Godfrey’s Case, 11 Co. Rep. 42a, 44a, 77 Eng. Rep. 1199, 1202 (1615) (excessive fines are “against law”).

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint “in the constitutional and political struggles between the king and his parliamentary critics.” L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981) (Schwoerer). From 1629 to 1640, Charles I attempted to govern without convening Parliament, but “in the absence of parliamentary grants,” he needed other ways of raising revenue. 4 H. Walter, A History of England 135 (1834); see 1 T. Macaulay, History of England 85 (1899). He thus turned “to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law.” 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II 462 (1827) (Hallam); see 4 Walter, supra, at 135.

The Court of Star Chamber, for instance, “imposed heavy fines on the king’s enemies,” Schwoerer 91, in disregard “of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means…” 2 Hallam 46–47. “[T]he strong interest of th[is] court in these fines … had a tendency to aggravate the punishment…” 1 id., at 490. “The statute abolishing” the Star Chamber in 1641 “specifically prohibited any court thereafter from … levying … excessive fines.” Schwoerer 91.

“But towards the end of Charles II’s reign” in the 1670s and early 1680s, courts again “imposed ruinous fines on the critics of the crown.” Ibid. In 1680, a committee of the House of Commons “examined the transcripts of all the fines imposed in King’s Bench since 1677” and found that “the Court of King’s Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty’s Protestant Subjects.” Ibid.; 9 Journals of the House of Commons 692 (Dec. 23, 1680). The House of Commons determined that the actions of the judges of the King’s Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had “most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors” without “any Regard to the Nature of the Offences, or the Ability of the Persons.” Id., at 698.

Yet “[o]ver the next few years fines became even more excessive and partisan.” Schwoerer 91. The King’s Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. Id., at 93. For speaking against the Duke of York, the sheriff of London was fined £100,000 in 1682, which corresponds to well over $10 million in present-day dollars—an “amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law.” The History of England Under the House of Stuart, pt. 2, p. 801 (1840). The King’s Benchfined Sir Samuel Barnadiston £10,000 for allegedly seditious letters, a fine that was overturned by the House of Lords as “exorbitant and excessive.” 14 Journals of the House of Lords 210 (May 14, 1689). Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves “suffered heavy fines.” Schwoerer 91–92. And in 1684, judges in the case of John Hampden held that Magna Carta did not limit “fines for great offences” against the King, and imposed a £40,000 fine. Trial of Hampden, 9 State Trials 1054, 1125 (K. B. 1684); 1 J. Stephen, A History of the Criminal Law of England 490 (1883).

“Freedom from excessive fines” was considered “indisputably an ancient right of the subject,” and the Declaration of Rights’ indictment against James II “charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom.”  Schooner 90. Article 10 of the Declaration declared “[t]hat excessive Bayle ought not to be required nor excessive fynes imposed nor cruel and unusual Punishments inflicted.”  Id., at 297.

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as “excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.” Case of Earl of Devonshire, 11 State Trials 1354, 1372 (K. B. 1687). Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were “contrary to Law and ancient Practice” and violated the prohibition on “excessive Fines.” Harmelin v. Michigan, 501 U. S. 957, 971 (1991); Trial of Oates, 10 State Trials 1080, 1325 (K. B. 1685). The House of Commons passed a bill to overturn Oates’s conviction, and eventually, after a request from Parliament, the King pardoned Oates. Id., at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—“whose works constituted the preeminent authority on English law for the founding generation,” Alden v. Maine, 527 U. S. 706, 715 (1999)—explained that the prohibition on excessive fines contained in the English Bill of Rights “had a retrospect to some unprecedented proceedings in the court of king’s bench.” 4 W. Blackstone, Commentaries 372 (1769). Blackstone confirmed that this prohibition was “only declaratory … of the old constitutional law of the land,” which had long “regulated” the “discretion” of the courts in imposing fines. Ibid.

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

**B**

“As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen,” McDonald, 561 U. S., at 816 (opinion of THOMAS, J.), including the prohibition on excessive fines. E.g., J. Dummer, A Defence of the New-England Charters 16–17 (1721) (“The Subjects Abroad claim the Privilege of Magna Charta, which says that no Man shall be fin’d above the Nature of his Offence, and whatever his Miscarriage be, a Salvo Contenemento suo is to be observ’d by the Judge”). Thus, the text of the Eighth Amendment was “based directly on … the Virginia Declaration of Rights,” ‘adopted verbatim the language of the English Bill of Rights,’” Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U. S. 257, 266 (1989) (quoting Solem v. Helm, 463 U. S. 277, 285, n. 10 (1983)); see Jones v. Commonwealth, 5 Va. 555, 557 (1799) (opinion of Carrington, J.) (explaining that the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any “fine or amercement ought to be according to the degree of the fault and the estate of the defendant”).

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were “the drudge-horse of criminal justice,” “probably the most common form of punishment.” L. Friedman, Crime and Punishment in American History 38 (1993). To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition on excessive fines was essential to “the security of liberty” and was “as necessary under the general government asunder that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, … and seizing … property … as the other.” Brutus II (Nov. 1, 1787), in The Complete Bill of Rights 621 (N. Cogan ed. 1997). Similarly, during Virginia’s ratifying convention, Patrick Henry pointed to Virginia’s own prohibition on excessive fines and said that it would “depart from the genius of your country” for the Federal Constitution to omit a similar prohibition. Debate on Virginia Convention (June 14, 1788), in 3 Debates on the Federal Constitution 447 (J. Elliot 2d ed. 1854). Henry continued: “[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives” to “define punishments without this control.” Ibid.

Governor Edmund Randolph responded to Henry, arguing that Virginia’s charter was “nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects.” Id., at 466. According to Randolph, “the exclusion of excessive bail and fines … would follow of itself without a bill of rights,” for such fines would never be imposed absent “corruption in the House of Representatives, Senate, and President,” or judges acting “contrary to justice.” Id., at 467–468.

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before “it was agreed to by a considerable majority.” 1 Annals of Cong. 754 (1789).

And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.4

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Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was “adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts,” when “[e]normous fines and amercements were ... sometimes imposed.” 3 J. Story, Commentaries on the Constitution of the United States $1896, pp. 750–751 (1833). Story included the prohibition on excessive fines as a right, along with the “right to bear arms” and others protected by the Bill of Rights, that “operates, as a qualification upon powers, actually granted by the people to the government”; without such a “restrict[ion],” the government’s “exercise or abuse” of its power could be “dangerous to the people.” Id., at $1858, at 718–719.

Chancellor Kent likewise described the Eighth Amendment as part of the “right of personal security ... guarded by provisions which have been transcribed into the constitutions in this country from magna carta, and other fundamental acts of the English Parliament.” 2 J. Kent, Commentaries on American Law 9 (1827). He understood the Eighth Amendment to “guard against abuse and oppression,” and emphasized that “the constitutions of almost every state in the Union[n] contain the same declarations in substance, and nearly in the same language.” Ibid. Accordingly, “they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the ... rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright.” Ibid.; accord, W. Rawle, A View of the Constitution of the United States of America 125 (1825) (describing the prohibition on excessive fines as “founded on the plainest principles of justice”).

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions “expressly prohibited excessive fines.” Ante, at 5. Nonetheless, as the Court notes, abuses of fines continued, especially through the Black Codes adopted in several States. Ante, at 5–6. The “centerpiece” of the Codes was their “attempt to stabilize the black workforce and limit its economic options apart from plantation labor.” E. Foner, Reconstruction: America’s Unfinished Revolution 1863–1877, p. 199 (1988). Under the Codes, “the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers.” Ibid. The Codes also included “‘antienticement’ measures punishing anyone offering higher wages to an employee already under contract.” Id., at 200.

The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen’s Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the “severe penalties” inflicted by the Black Codes and similar measures, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (Sen. Trumbull), suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult “freedmen, free negroes and mulattoes” “without lawful employment” faced $50 in fines and 10 days’ imprisonment for vagrancy. Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. Exec. Doc. No. 6, 39th Cong., 2d Sess., §2, p. 192 (1867). Those convicted had five days to pay or they would be arrested and leased to “any person who will, for the shortest period of service, pay said fine and forfeiture and all costs.” §5, ibid. Members of Congress criticized such laws “for selling [black] men into slavery in punishment of crimes of the slightest magnitude.” Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (Rep. Cook); see id., at 1124 (“It is idle to say these men will be protected by the States”).

Similar examples abound. One congressman noted that Alabama’s “aristocratic and anti-republican laws, almost re-enacting slavery, among other harsh inflictions impose ... a fine of fifty dollars and six months’ imprisonment on any servant or laborer (white or black) who loiters away his time or is stubborn or refractory.” Id., at 1621 (Rep. Myers). He also noted that Florida punished vagrants with “a fine not exceeding $500 and imprisonment for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court.” Ibid. At the time, such fines would have been ruinous for laborers. Cf. id., at 443 (Sen. Howe) (“A thousand dollars! That sells a negro for his life”).

These and other examples of excessive fines from the historical record informed the Nation’s consideration of the Fourteenth Amendment. Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those “fundamental principles” “fixed” by the Constitution, including “immunity from ... excessive fines.” 2 Cong. Rec. 384–385 (1874) (Rep. Mills); see also id., at App. 241 (Sen. Norwood). And every post-1855 state constitution banned excessive fines. S. Calabresi & S. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008). The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

portionate to the offences.” Vt. Const., ch. II, §XXIX (1786), in id., at 3759. Georgia’s 1777 Constitution had an excessive fines clause, Art. LIX, but its 1789 Constitution did not. And the Northwest Ordinance provided that “[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted.” §14, Art. 2 (1787)
The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment’s prohibition on excessive fines applies in full to the States.
No. 17-15924
United States Court of Appeals for the Ninth Circuit
Appeal from the United States District Court for the Northern District of California William Horsley Orrick, District Judge, Presiding
Argued and Submitted November 15, 2018
San Francisco, California
Filed February 20, 2019
Opinion by Judge Milan D. Smith, Jr.

* The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

COUNSEL

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OPINION

M. SMITH, Circuit Judge:

This appeal involves a dispute between two insurance companies that arose after the settlement of certain claims brought against their insureds. After Westport Insurance Corporation (Westport) defended and settled claims for $15.8 million brought by three former students against Moraga School District (the District) and three of its school administrators, it sought repayment from the administrators’ insurer, California Casualty Management Company (California Casualty). The two insurers cross-moved for summary judgment, and the district court held that California Casualty owed Westport $2.6 million plus $755,637.20 in prejudgment interest. We affirm.

BACKGROUND

Westport, through a predecessor company, issued primary general liability insurance policies (Westport’s Primary policy) to the District from 1991 through 1997. From October 1, 1994 to October 1, 1997, Westport also issued a series of annual excess policies that covered the District and its employees (Westport’s Excess policy).

California Casualty issued successive annual liability policies to the Association of California School Administrators from at least July 1, 1986 to July 1, 2000. California Casualty provided excess liability to the District’s school administrators under this policy’s Coverage A plan, titled Administrators Excess Liability (California Casualty’s policy).

To provide a framework for our analysis, we first outline the claims included in the underlying lawsuits. On January 29, 2013, Doe 1 and Doe 2, two former students of the Moraga School District, filed suit in the Superior Court for Contra Costa County, California against the District and three of its school Administrators—William Walters, John Cooley, and Paul Simonin. Earlier that same month, another former student, Doe 3, also sued the three Administrators and the District. In these lawsuits, the several Does alleged that the District’s employee, Daniel Witters, sexually molested them in the mid-1990s while he was their middle school teacher. The Does alleged that the Administrators received warnings about the molestation, but the Administrators failed to act to stop Witters. When the students came forward in 1996, Witters killed himself. In their lawsuits, Doe 1 alleged that Witters molested her during policy periods 1993–94, 1994–95, and 1995–96; Doe 2 alleged that she was molested in the 1995–96 and 1996–97 periods; and Doe 3 alleged that she was molested in the 1996–97 period.

In January 2013, both Westport and California Casualty attended an unsuccessful mediation of the Does’ lawsuits. The Doe 3 lawsuit eventually settled separately for $1.8 million in August 2013, but Westport appears to have paid the settlement on July 29, 2013, prior to the signing of the settlement agreement. In June 2014, California Casualty and Westport also attended a mediation for the lawsuit brought by Does 1 and 2. At the mediation, Does 1 and 2 settled their lawsuit for $7 million each. On June 26, 2014, Westport paid Does 1 and 2. California Casualty subsequently refused to contribute to any of the Does’ settlements (the Settlements), and Westport funded the entirety of these Settlements in the aggregate sum of $15.8 million.

On July 11, 2014, Westport demanded that California Casualty pay its share of the Settlements, but received no response. Westport wrote to California Casualty three additional times, and received no response. After Westport’s October 30, 2014 demand, California Casualty finally replied and refused to reimburse Westport.
Westport then filed suit against California Casualty on April 13, 2015 in federal court. After the parties brought cross-motions for summary judgment, the district court entered summary judgment in favor of Westport for $2.6 million plus interest. A month later, the district court added $755,637.20 of prejudgment interest to the judgment. California Casualty timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review the district court’s grant or denial of summary judgment de novo. Evanston Ins. Co. v. OEA, Inc., 566 F.3d 915, 918 (9th Cir. 2009). We also review its interpretation of state law and the insurance policies de novo. Id. at 920; Stanford Ranch, Inc. v. Maryland Cas. Co., 89 F.3d 618, 624 (9th Cir. 1996). The district court’s award of prejudgment interest is reviewed for abuse of discretion. Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707, 714 (9th Cir. 1992).

ANALYSIS

I. INDEMNIFICATION PURSUANT TO CALIFORNIA GOVERNMENT CODE § 825.4

As a threshold matter, California Casualty asserts that California Government Code § 825.4 (§ 825.4), which prohibits public entities from seeking indemnification from its employees, bars Westport’s lawsuit. California Casualty contends that because the Administrators were public employees, the District must defend and pay the entire settlement fee without its contribution. The California Supreme Court has not spoken directly on this issue, so “we must determine what result the court would reach based on state appellate court opinions, statutes and treatises.” Evanston, 566 F.3d at 921 (quoting Paulson v. City of San Diego, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc)).

Section 825.4 provides:

Except as provided in Section 825.6, if a public entity pays any claim or judgment against itself or against an employee or former employee of the public entity, or any portion thereof, for an injury arising out of an act or omission of the employee or former employee of the public entity, he is not liable to indemnify the public entity.

Cal. Gov’t Code § 825.4.


Unfortunately, neither set of cases definitively addresses the factual pattern present in this case. Nevertheless, we affirm the district court’s conclusion that § 825.4 does not preclude Westport’s claim because § 825.4 does not contain a blanket ban on an employee’s insurer contributing to the employee’s defense and settlement costs. Here, the obligation to defend and indemnify still rests with the public entity and its insurer despite contribution from the employee’s insurance. We find support for our holding in the principles animating the several § 825.4 cases.

In Oxnard, the California Court of Appeal held that although the teacher-employee’s school district was “obligated to pay in full” the settlement of an automobile crash negligence action against the teacher, the school district had discharged its liability by using the teacher’s insurance as primary coverage and its own insurance as excess coverage. 99 Cal. Rptr. at 480. Oxnard’s progeny similarly involved automobile accidents committed by employees during the scope of their employment.

In the first case, the teacher-employee’s automobile insurer, GEICO, defended a negligence suit against the teacher, paid the settlement, and then sought to recoup the amount paid from the school district’s insurer. Gov’t Emps. Ins. Co. v. Gibraltar Cas. Co., 229 Cal. Rptr. 57, 60 (Ct. App. 1986). After considering the relevant portions of the automobile policy and the insurance code, the court concluded that the school district “was itself an insured under the GEICO policy,” due to the language in GEICO’s policy that defined persons insured as “any other person or organization for his or its liability because of the acts or omissions of any insured.” Id. at 64 (emphasis added). Thus, the school district satisfied its statutory obligation by availing itself of the employee’s automotive insurance policy as long as the employee remained fully covered. Id. at 65.

Similarly, in Younker v. County of San Diego, a firefighter-employee and his automobile insurer sued the county-employee to recover expenses for defending and settling a claim against the firefighter arising from an automobile crash. 285 Cal. Rptr. 319, 321 (Ct. App. 1991). The court first determined that the county was an insured pursuant to the terms of the employee’s automobile policy because it was “clearly a person or organization liable because of [the employee’s] acts or omissions” as defined under the policy. Id. at 323. The court then held that the county properly looked to the employee’s insurer to fulfill its own statutory obligation, thereby

1. The exceptions set forth in § 825.6 contemplate whether the employee or former employee “acted or failed to act because of actual fraud, corruption, or actual malice, or willfully failed or refused to conduct the defense of the claim or action in good faith.” Cal. Gov’t Code § 825.6. Neither party claims that these exceptions are at issue in this case.

2. Oxnard involved Section 825, which covers defense by a public entity, not § 825.4 specifically. Nevertheless, Oxnard’s progeny involved automobile accidents committed by employees and public entity indemnification under § 825.4.
rejecting the employee’s argument that using the proceeds of his policy for the settlement contravened § 825.4. Id. at 323–24.

In contrast, the court in Pacific Indemnity barred an insurer’s attempt for settlement cost recovery from the employee’s insurance. There, a patient sued a physician employed by the University of California (UC) for injuries caused by the physician-employee’s medical services. 105 Cal. Rptr. at 296. After the settlement, the UC’s insurer brought an action for contribution against the physician’s insurer. Id. The California Court of Appeal first noted that under § 825.4, primary liability for the expenses of the settlement lay with the UC, and thus the insurer “[c]ould only secure contribution if there is other insurance covering the obligation of the Regents.” Id. at 302. The court held that the UC’s insurer could not look to the physician’s insurer for contribution because to do so would not be consistent with California’s policy rationale of public entities indemnifying their employees. Id. at 303.3 The court distinguished Oxnard and observed it should not apply where “there is neither concession nor contract provision which renders the employee’s insurance available for the satisfaction of the public entity’s obligation to the victim or … its employee.” Id. at 305.

Several principles discernable from the Oxnard and Pacific Indemnity line of cases guide our conclusion that § 825.4 does not preclude Westport’s suit. First, indemnification pursuant to § 825.4 is not wholly inconsistent with contribution from an employee’s insurer. In Oxnard and its progeny, the courts expressly permitted the employees’ personal insurance, albeit automotive, to pay the entirety or majority of the settlement, even though the courts first found that the public entities were liable pursuant to the provisions of Section 825. Even in Pacific Indemnity, the court noted that another insurer could contribute to settlement costs if the language of that insurance policy also covered the public entity’s obligation. 105 Cal. Rptr. at 296.

Second, the employee and his employer do not occupy equivalent positions for purposes of indemnification analysis. In both Younker and Gibraltar, the courts differentiated between the employee and his insurer when considering whether Section 825’s prohibition on a public entity seeking indemnity from its employee required the entities’ insurers to reimburse the employees’ insurers. The courts rejected the employees’ insurers’ position in part because none of the employees had personally contributed to the settlement costs. Younker, 285 Cal. Rptr. at 323 (noting the employee “did not foot the bill”); Gibraltar, 229 Cal. Rptr. at 61 (noting employee “paid nothing” of the settlement).

Third, where the employee’s policy is available to the public entity as an insured, contribution to the defense and settlement costs may be permitted. Pacific Indemnity, Younker, and Gibraltar all recognized this principle either explicitly, as in Pacific Indemnity, or implicitly by first finding that the entity-employer was an insured under the employee’s policy, as in Younker and Gibraltar.

Here, policy concerns regarding the proper placement of the burden of settlement costs are assuaged. The District furnished primary and excess insurance to its Administrators through Westport. There is no evidence in the record, and neither party claims, that any of the Administrators personally contributed to the settlement. That their insurer, California Casualty, is now being called upon to provide its excess coverage to cover the employees’ settlements does not violate the intent behind § 825.4 indemnification. In addition, California Casualty’s policy is limited to claims arising in the course of employment.

Furthermore, Pacific Indemnity held that a “concession” or “contract provision which renders the employee’s insurance available for the satisfaction of the public entity’s obligation” would satisfy § 825.4. 105 Cal. Rptr. at 304. California Casualty’s policy contemplates this exact situation when it states that the underlying primary insurance must be provided under one of several sections of the Education Code, Cal. Gov’t Code §§ 825 or 825.4 or provided on behalf of the insured by any public educational entity.

For these reasons, we hold that § 825.4 does not preclude Westport’s claim against California Casualty for repayment of a portion of the Settlements.

II. INTERPRETATION OF WESTPORT’S AND CALIFORNIA CASUALTY’S POLICIES

California Casualty next claims that it is not obligated to contribute to the Settlements because its policy covers excess payments only when all other policies have been exhausted, and Westport’s Primary and Excess policies are sufficient to cover the total amount of the Settlements. Westport counters that this claim is contrary to the plain text of California Casualty’s policy. We agree with Westport.

Under California law, interpretation of insurance policies “follows the general rules of contract interpretation.” TRB Insvs., Inc. v. Fireman’s Fund Ins. Co., 145 P.3d 472, 477 (Cal. 2006). Courts construe policy provisions in their ordinary and popular senses, unless used by the parties in a technical manner or with a special meaning. Id. Insurance coverage is also construed broadly “so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are to be interpreted narrowly against the insurer.” Id.

California Casualty’s policy covers “all damages in excess of the required underlying primary collectible insurance or self-insurance.” Administrator excess liability is capped at $150,000 per occurrence per insured, over the $1 million underlying primary layer, and the policy has a $2 million aggregate limit per annual policy period. The exclusions further explain, “There shall be no insurance afforded under

3. In Pacific Indemnity, the court was particularly concerned because the employee’s personal policy did not just cover claims arising in the course of employment but any acts or omissions that were not within the scope of the employment. The court noted that this impermissibly placed the burden of insurance on the employee personally.
this policy until the required $1 million limit of liability afforded the insured by such other insurance or self-insurance is exhausted.”

These provisions clarify that California Casualty’s insurance is not “excess over all other insurance” as it claims. California Casualty’s policy is certainly an “excess” policy, but it requires only that the “underlying primary collectible insurance or self-insurance” be exhausted before its coverage begins. The policy requires the exhaustion of only “primary” or “self” insurance as opposed to “all other” insurance or “primary and excess” insurance. Comparatively, Westport’s Excess policy states, “If there is any other collectible insurance available to the insured … [this insurance] will apply in excess of other collectible insurance.” (Emphasis added.) See Carmel Dev. Co. v. RLI Ins. Co., 24 Cal. Rptr. 3d 588, 592, 598 (Ct. App. 2005) (finding insurance policy that stated it would pay “sums in excess of Primary Insurance” was triggered prior to a policy that applied in excess of other “primary, excess or excess-contingent insurance”). Accordingly, we construe California Casualty’s policy to apply upon the exhaustion of the $1 million of underlying insurance, not after exhaustion of all other insurance.

III. APPORTIONMENT OF LIABILITY

The district court allocated liability between Westport and California Casualty in the following manner. First, the court divided each Doe’s settlement equally across the policy period(s) in which she alleged she was molested. Next, the court reduced each policy period amount by 25 percent to reflect the District’s liability. Then, the court deducted $1 million from each policy period in accordance with Westport’s Primary policy limit. Finally, the court assessed liability against California Casualty up to $150,000 for each Administrator in each policy period. In total, the district court found California Casualty liable for $2.6 million of the $15.8 million paid to the Does collectively.

California Casualty contends that it should not contribute to the Settlements for the following reasons: (1) the allocation of liability among the defendants was erroneous; (2) Westport did not pay the mandatory $1 million per administrator per student per policy period; (3) California Casualty’s policy does not trigger until $1 million is paid per administrator per student for each policy period; and (4) even if California Casualty were obligated to contribute, its apportioned contributions for the Administrators should prorate along with Westport’s policies. We consider each argument in turn.

A. Allocation of Liability Among the Administrators and the District

California Casualty first argues that the district court was unable to properly apportion any liability to it. Although California Casualty’s duty to defend did not rise until exhaustion of the primary layer of coverage, it denied excess coverage in the face of settlement demands far exceeding the primary layer. As the district court noted, in United Services Automotive Association v. Alaska Insurance Co., 114 Cal. Rptr. 2d 449, 453 (Ct. App. 2001), the court held that “when an excess insurer denies excess coverage for a third party claim, it waives the right to challenge the reasonableness of the primary insurer’s settlement of the claim.” Therefore, California Casualty has waived its argument that the lack of contemporaneous allocation of liability in the Settlements precludes subsequent apportionment.

Because California Casualty is only liable for the Administrators’ liability, it next argues that the district court erroneously allocated the Settlements equally among the four underlying defendants. Under California law, trial courts have “equitable discretion to fashion a method of allocation suited to the particular facts of each case and the interests of justice, subject to appellate review for abuse of that discretion.” Golden Eagle Ins. Co. v. Ins. Co. of the West, 121 Cal. Rptr. 2d 682, 693 (Ct. App. 2002). Moreover, “there is no single method of allocating defense or indemnity costs among co-insurers.” Id.

The district court divided liability equally among the four defendants, and cited Great American Insurance Co. v. Sequoia Insurance Co., 2016 WL 844819 (C.D. Cal. Mar. 1, 2016), appeal dismissed, No. 16-56080 (9th Cir. Mar. 2, 2018), in support of its decision. In Great American, the court determined that it had the discretion to allocate liability equally between the co-defendants in a case where the settlement agreement did not specifically allocate responsibility for the amounts to the defendants and both causes of action were alleged against both defendants. 2016 WL 844819, at *12. Similarly here, Does 1 and 2’s complaint raised four causes of action against all four defendants, and the fifth cause of action against only unknown doe defendants. Doe 3’s complaint brought all claims against all defendants. The three settlement agreements released the District and the Administrators from liability and did not differentiate among the defendants. Given the blended pleadings and wording of the settlement agreements, the district court did not abuse its discretion in allocating the liability equally among the District and the three Administrators.

4. California Casualty also notes that its low premium is indicative of its position as extreme excess coverage. This argument deserves only short shrift. California Casualty does not point to any authority that premium size determines priority of coverage. Moreover, California Casualty’s corporate designee testified that the amount of the premium does not determine the policy’s order of payment.

5. To illustrate, Doe 1’s $7 million settlement was divided into three amounts of $2,333,333 for each of the policy periods 1993–94, 1994–95, and 1995–96. Next, in each of these periods, the court reduced the amount by 25 percent to $1.75 million. Then, the court deducted $1 million of Westport’s primary limit, leaving $750,000. The court then assessed $150,000 per administrator for a total of $450,000 against California Casualty.

6. California Casualty argues that it was not the primary insurer, unlike the insurer in Great American, and therefore the four defendants should not share liability evenly. However, the Great American court’s division of liability between co-defendants did not turn on the status
B. Westport’s Contribution

California Casualty challenges the district court’s finding that Westport only needed to pay $1 million per occurrence instead of $1 million per occurrence per insured, totaling $3 million. We find California Casualty’s arguments to be without merit.

Although California Casualty’s policy and Westport’s Primary policy define “occurrence” similarly, they differ on how they cover liability per occurrence. Westport’s Primary policy defines an occurrence as “an accident, including continuous or repeated exposure to conditions, which results in injury, or damage to which this insurance applies.” California Casualty’s policy defines an occurrence as “an event, including injurious exposure to conditions, which results in injuries and/or damage to one or more persons or legal entities. . . . An occurrence can involve a single sudden event or the continuous or repeated injurious exposure to conditions.” The district court held that, because under California Casualty’s policy each Administrator is an insured, California Casualty was required to pay $150,000 per Administrator per occurrence per student for each policy period. Conversely, Westport’s Primary policy contains a clause that states the policy applies to each separate insured, but “nothing herein shall operate to increase the Company’s liability . . . beyond the amount or amounts for which the Company would have been liable if only one person or interest had been named as insured.” Thus, the district court held that under Westport’s Primary policy, Westport was required to cover $1 million per occurrence per student for each policy period, but not per administrator.

California Casualty does not now challenge the district court’s decision that, under its policy, each “occurrence” requires coverage per student per administrator for each policy period. Instead, California Casualty now contends that if each occurrence is so defined, then Westport should have been required to pay $3 million per policy period because there were three Administrators, in the same manner the district court ordered California Casualty to pay up to $450,000 per policy period. This argument is unavailing.

As noted, Westport’s Primary policy contains a provision explaining that although its policy insures each individual employee separately, if multiple insureds are named, the policy operates to limit liability as “if only one person . . . had been named as insured.” This provision clearly limits Westport’s liability in the present situation wherein multiple insureds—three Administrators and the District—all allegedly failed to supervise the teacher. California Casualty’s policy contains no such limitation clause.

C. California Casualty’s Contribution

California Casualty next contends that its own obligation does not arise until $1 million is paid per insured regardless of the source—the Westport Primary policy, any other policy, or through self-insurance. California Casualty’s policy defines “the insured” as “a member of the Association of California School Administrators who is employed by a school board, board of trustees or similar governing body of an educational unit.” According to California Casualty, Westport only paid $333,333.33 per each insured; therefore, California Casualty’s policy does not trigger until some entity pays $1 million per insured. Keeping in mind that under California law insurance coverage is to be construed broadly, we find Westport’s payment of $1 million per period did trigger California Casualty’s policy.

First, California Casualty’s policy text does not support its interpretation of when its policy is triggered. California Casualty’s policy states:

At the time of an occurrence there must be underlying primary collectible insurance or self-insurance available to the insured . . . with a minimum per occurrence limit of $1,000,000.00. There shall be no insurance afforded under this policy until the required $1 million limit of liability afforded the insured by such other insurance or self-insurance is exhausted. (Emphasis added).

The phrase “such other insurance” is an antecedent phrase referring back to the previous sentence, which defines the requisite primary insurance as insurance “with a minimum per occurrence limit of $1,000,000.” Although California Casualty’s policy denotes a per occurrence limit, it does not require that the $1 million limit in the primary policy must also apply per insured, as California Casualty now suggests it should. See State Farm Mut. Auto Ins. Co. v. Partridge, 514 P.2d 123, (Cal. 1973) (holding “all ambiguities in an insurance policy are construed against the insurer-draftsman”).

Furthermore, the Administrators complied with the written requirements of California Casualty’s policy in obtaining their primary policy. The California Casualty policy requires primary collectible insurance with a “minimum per occurrence limit of $1 million” be available to the insured pursuant to the Education Code or other provisions governing insurance for public entities. Westport’s Primary policy was issued pursuant to the Education Code provisions explicitly mentioned in California Casualty’s policy and provided a per occurrence limit of $1 million. Therefore, each Administrator had the requisite $1 million of primary insurance available to him.

Second, California Casualty’s policy only requires that this underlying insurance of $1 million “afforded the insured by such other insurance or self-insurance is exhausted.” This language does not clearly require that $1 million be exhausted per insured or even for the same occurrence, just that it be exhausted. Westport’s Primary policy covering $1 million

of the insurance companies, but rather on the pleadings and settlement agreements. Great American, 2016 WL 844819, at *12. In fact, in terms of actual monetary liability, the court ordered the co-primary insurer to pay its $1 million limit, not half of the total $3 million settlement, despite its insured being apportioned “equal” liability. Id. at *13.
was exhausted according to its terms. To interpret California Casualty’s policy to require its insureds to obtain additional insurance in the event their primary insurance exhausts prior to reaching the $1 million contribution would create yet another potential layer of insurance coverage that is not required by the policy itself. On its face, California Casualty’s policy requires only the exhaustion of the underlying $1 million primary insurance before California Casualty’s coverage begins. That occurred here.

Imagine a hypothetical scenario wherein a prior settlement or series of settlements exhausts Westport’s primary insurance up to its annual aggregate limit of $3 million rendering Westport’s primary policy unable to contribute to the $1 million of underlying insurance required by California Casualty’s policy. If California Casualty’s interpretation of its policy were correct, California Casualty would then provide zero coverage—because the $1 million per insured was not reached—contrary to its policy language that it pays all damages in excess of the required underlying insurance. This hypothetical illustrates the untenable position California Casualty advances.

Given that insurance exclusions must be “interpreted narrowly against the insurer,” TRB Ins., 145 P.3d at 477, we construe the ambiguity of California Casualty’s policy against it and in favor of its insureds. In sum, we hold that California Casualty’s policy coverage began upon exhaustion of Westport’s Primary policy when Westport paid $1 million per policy period per student.

D. PRORATION OF THE POLICIES

California Casualty also contends that its coverage should prorate with Westport’s coverage. A pro rata clause “provides that if there is other valid and collectible insurance, then the insurer shall not be liable for more than his pro rata share of the loss.” Olympic Ins. Co. v. Emp’rs Surplus Lines Ins. Co., 178 Cal. Rptr. 908, 911 (Ct. App. 1981). California courts tend to prorate the loss among co-insurers with conflicting excess clauses. Id. This situation often occurs when both insurers on the same level have excess clauses that deem the policy excess to other valid and collectible insurance. See id. at 912 (prorating two primary insurers’ policies where both purported to be excess to the other).

The text of the insurance policies in this case belies California Casualty’s claim that they prorate. California Casualty’s policy plainly states that it “shall not be construed to be pro rata, concurrent or contributing with any other insurance or self-insurance which is available to the Insured.” Further, California Casualty’s policy does not occupy the same level of insurance coverage as either of Westport’s policies. As discussed, the exhaustion of Westport’s Primary policy triggers liability under California Casualty’s policy. Only when California Casualty’s policy is exhausted does Westport’s Excess policy become liable. Westport’s Excess policy clearly states, “If there is any other collectible insurance available to the insured that covers a loss that is also covered by this policy, the insurance provided by this policy will apply in excess of other collectible insurance.” Accordingly, California Casualty’s policy is sandwiched between Westport’s Primary and Excess policies. There is no conflict between California Casualty’s policy and either of Westport’s policies such that they should prorate.

IV. PREJUDGMENT INTEREST

California Casualty asserts that the district court should have awarded prejudgment interest at seven percent, running from July 11, 2014—the date of Westport’s first demand letter for payment. The district court awarded prejudgment interest at ten percent, running from the dates Westport paid each of the Settlements. We find no abuse of discretion in the district court’s determination to award prejudgment interest at ten percent from the dates Westport paid the Settlements.

State law governs prejudgment interest in a diversity action. U.S. Fid. & Guar. Co. v. Lee Invs. LLC, 641 F.3d 1126, 1139 (9th Cir. 2011). The California Constitution generally affixes the rate of prejudgment interest at seven percent per annum for judgments rendered in state courts unless specified otherwise by the legislature. Cal. Const. Art. 15, § 1. However, the California Civil Code sets prejudgment interest on contract actions at ten percent per annum if the rate is not otherwise stipulated in the contract. Cal. Civ. Code § 3289. California Casualty argues that because Westport labeled its cause of action “equitable contribution,” which is not a contract action, Westport should only receive prejudgment interest at the rate of seven percent. Westport counters that the district court correctly determined that despite the characterization, its action was one for equitable subrogation, which sounds in contract, and that the district court properly awarded prejudgment interest at ten percent.

The California Court of Appeal explained the difference between equitable contribution and equitable subrogation in Fireman’s Fund Insurance Co. v. Maryland Casualty Co., 77 Cal. Rptr. 2d 296 (Ct. App. 1998). Equitable subrogation puts the insurer in the position of the insured “to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid.” Fireman’s Fund, 77 Cal. Rptr. 2d at 302. In contrast, equitable contribution is to “apportion a loss between two or more insurers who cover the same risk, so that each pays its fair share and one does not profit at the expense of the others.” Id. at 306.

These definitions clarify that Westport incorrectly labeled its cause of action as one for “equitable contribution.” See K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc., 90 Cal. Rptr. 3d 247, 261 (Ct. App. 2009) (holding the facts, not the labels, in a pleading determine whether a plaintiff is entitled to relief). We do not interpret California Casualty’s policy and Westport’s Excess policy to “cover the same risk.” Instead, these two excess policies create stratified levels of coverage within the excess layer. Accordingly, the district court did not abuse its discretion in holding that notwithstanding the erroneous title for its claim, Westport’s...
action is one for equitable subrogation and entitled to ten percent prejudgment interest.

We similarly find meritless California Casualty’s argument regarding the date from which the prejudgment interest should run. California Civil Code § 3287(a) states in pertinent part:

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt...

California’s mediation privilege prevents disclosure of Westport’s letters it received on May 30, 2014, June 10, 2014, and October 9, 2014, and of the settlement agreements themselves, and, therefore, that damages did not become certain until July 11, 2014, as opposed to July 29, 2013 and June 26, 2014.

California’s mediation privilege prohibits any writing “prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation” to be admissible in any civil action in which testimony can be compelled to be given.” Cal. Evid. Code § 1119(b). In addition, “all communications … by and between participants in the course of a mediation” shall remain confidential. Cal. Evid. Code § 1119(c). While the district court erred in overruling California Casualty’s objection to the disclosure of these letters, this error does not affect resolution of this issue, because the damages were certain on the Settlements’ payment dates regardless of the admissibility of the demand letters.

In Continental Insurance, the court rejected the insurer’s argument that damages were uncertain because the company disputed the number of covered occurrences. 223 Cal. Rptr. 737. The court determined that this dispute posed a question of liability that did not affect the certainty of damages. Id. The appellate court then upheld the trial court’s award of mandatory prejudgment interest from the date of judgment. Id. at 720.

The present case also concerns the interpretation and prioritization of the insurance policies at issue—all legal questions. Accordingly, California Casualty is liable for prejudgment interest from the “date of settlement because that is the date that the loss is certain or capable of being made certain by calculation.” Id. at 735. We hold that the district court did not abuse its discretion in awarding prejudgment interest from the dates on which Westport paid the Settlements—July 29, 2013, and June 26, 2014. See Highlands Ins. Co. v. Cont’l Cas. Co., 64 F.3d 514, 522 (9th Cir. 1995) (finding no abuse of discretion for prejudgment interest to begin running on the insurer’s date of payment rather than the date of its complaint for reimbursement). On these dates, Westport’s primary layer of coverage was exhausted, and Westport overpaid on its Excess policy due to California Casualty’s failure to provide its coverage.

CONCLUSION

We hold that California Government Code Section 825.4 does not preclude Westport’s lawsuit against California Casualty, and we affirm the district court’s decision on all the remaining issues raised on appeal.

AFFIRMED.
OPINION

INTRODUCTION

Defendant Marco Escarcega caused a head-on collision while attempting to pass two vehicles on a two-lane road at night, resulting in catastrophic injuries to two victims. Defendant argues that there is insufficient evidence he acted with wanton disregard for safety; that he was denied his right to present a defense when the court excluded cross-examination questions about other accidents on that stretch of road; that the great-bodily-injury enhancement is unauthorized because great bodily injury is an element of the underlying offense; that the evidence did not support the court’s imposition of the high term; and that the court erred by finding defendant presumptively ineligible for probation. We affirm.

PROCEDURAL BACKGROUND

By information dated November 1, 2016, defendant was charged with one count of reckless driving (Veh. Code, § 23103, subd. (a); count 1). The information also alleged defendant had caused a specified injury to Carlos I. (§ 23105) and personally inflicted great bodily injury on Jessica S. (Pen. Code, § 12022.7, subd. (a)). Defendant pled not guilty and denied the allegations.

After a trial at which he testified in his own defense, the jury convicted defendant of count 1 and found the allegations true. The jury deliberated for just over an hour.

Defendant was sentenced to an aggregate term of six years in state prison—the high term of three years for count 1 (§ 23103/23105) plus three years for the enhancement (Pen. Code, § 12022.7, subd. (a)), to run consecutively. He filed a timely notice of appeal.

FACTUAL BACKGROUND

1. Prosecution Evidence

On July 15, 2015, at 9:20 p.m., defendant was driving a 2012 Hyundai Elantra eastbound on Palmdale Blvd. He was on his way to work at Adelanto Detention Facility. That stretch of road has one lane of traffic in each direction and is divided by a broken yellow line. There are no streetlights. The speed limit is 55 miles per hour.

As defendant approached 110th Street, he saw two vehicles ahead of him. Shannon Emery’s Chevrolet Monte Carlo sedan was directly in front of him. A large delivery box-truck was in front of Emery. Neither Emery nor defendant could see whether there were any cars in front of the delivery truck, which also blocked their view of any headlights from oncoming traffic. Defendant estimated he was driving 45 miles per hour at this point, but Emery testified that she was going 70 miles per hour.

As defendant approached 110th Street, he saw two vehicles ahead of him. Shannon Emery’s Chevrolet Monte Carlo sedan was directly in front of him. A large delivery box-truck was in front of Emery. Neither Emery nor defendant could see whether there were any cars in front of the delivery truck, which also blocked their view of any headlights from oncoming traffic. Defendant estimated he was driving 45 miles per hour at this point, but Emery testified that she was going 70 miles per hour.

Though defendant could not see beyond the truck, did not know whether there were more cars in front of it, and could not tell how much space there was between Emery and the truck, he decided to pull into the westbound lane and pass both vehicles. When defendant pulled past Emery and attempted to pass the truck, however, he discovered it was following two or three more cars.

As defendant drew parallel with the delivery truck, he saw headlights coming towards him. The headlights belonged to a Lexus sedan carrying Jessica, the driver, and her two nephews, Carlos (age five) and Gabriel I. (age four). Jessica was driving about 65 miles per hour in the westbound lane.

Emery, who by this time had seen Jessica’s headlights, eased off her gas pedal to allow defendant to pull in front of her. According to his statement to authorities, defendant

1. Unless otherwise indicated, all undesignated statutory references are to the Vehicle Code.
tried to reenter the eastbound lane in front of Emery, but there wasn’t enough room, so he slowed down to retake his original spot. By that point, however, another car had pulled behind Emery, and he couldn’t get back in. Defendant swerved onto the left shoulder. Meanwhile, Jessica had seen defendant driving towards her, had made the same decision he did, and swerved toward the same shoulder. The cars collided, and Jessica blacked out briefly at the moment of impact. Emery saw the collision and called 911.

According to California Highway Patrol Officer Nathan Parsons, who testified as an expert on collision reconstruction, defendant had continued to accelerate until two and a half seconds before the collision. Five seconds before the collision, defendant was driving 67 miles per hour. Four seconds before the collision, he was driving 71 miles per hour. Three seconds before the collision, he was driving 73 miles per hour. And though defendant first stepped on his brakes two and a half seconds before the collision, he did not hit them hard enough to engage the AntiLock Braking System until one second before impact. At the moment of impact, defendant was driving 42 miles per hour. Jessica was driving approximately 37 miles per hour.

When Jessica regained consciousness, her hands were on the steering wheel. Glass from the shattered windshield had cut her wrists. The engine was on fire. The children were screaming in the back seat. Defendant stumbled out of the passenger side of his car as Jessica tried to free herself. She yelled for help 10 to 20 times, but defendant just looked at her and walked away. Eventually, bystanders came to her aid, and Jessica and the children were transported to a hospital. Meanwhile, defendant called his fiancée to let her know he had been in an accident.

Defendant was adamant that he had reached the shoulder first and that Jessica was at fault for the crash—but CHP Officer Eduardo Alonzo, who investigated the incident, determined that unsafe passing had caused the collision. Defendant’s admission that he could not see the cars in front of the truck and “it was too dangerous” to move over strengthened that conclusion.

Nor were either Parsons or Alonzo persuaded by defendant’s theory that dips in the road had prevented him from passing the smaller car and then to pass the truck. In his experience, that stretch of Palmdale Blvd. was “very straight” and had “little ups and downs” but no “major depressions.” He did not know where the depressions were. The road was very dark at night.

As he approached 110th Street, he saw two vehicles in front of him—a pickup truck stacked with items, and a small vehicle behind that truck. Defendant was concerned about driving behind the truck because he thought its cargo looked unstable and some of the items might fall out. He planned to pass the smaller vehicle, and then to pass the truck.

Defendant could not tell whether there were any vehicles in front of the truck and the smaller car because “the truck obscured any other taillights in front of it.” When he did not see any lights coming in the opposite direction, he confirmed there was a broken line on the road and moved into the left (westbound) lane to initiate a pass. By the time he caught up to the car and was approaching the truck, however, he discovered that there were three more cars in front of the truck. Then he saw oncoming headlights appear “out of nowhere.”

Defendant tried to pull back into the right (eastbound) lane between the truck and smaller car, but there wasn’t enough room. He slowed down and tried to move back into his original position, but by then, another car had pulled closer to the smaller car and “it was too dangerous” to move over. Defendant decided to move onto the left shoulder to allow the oncoming traffic to pass. But while he was on the shoulder, the car coming toward him swerved off the road and collided into him.

2. Defense Evidence

2.1. Defendant’s Testimony

Defendant testified on his own behalf. On the evening of July 15, 2015, he was driving to work as a detention officer at the Adelanto Detention Facility. He was supposed to arrive by 10:00 p.m. He was not running late, and there was no traffic. In his experience, that stretch of Palmdale Blvd. was “very straight” and had “little ups and downs” but no “major depressions.” He did not know where the depressions were. The road was very dark at night.

As he approached 110th Street, he saw two vehicles in front of him—a pickup truck stacked with items, and a smaller vehicle behind that truck. Defendant was concerned about driving behind the truck because he thought its cargo looked unstable and some of the items might fall out. He planned to pass the smaller vehicle, and then to pass the truck.
After the collision, defendant got out of his car using the passenger door. He saw Jessica crying and thought she might have been saying something, but he couldn’t hear her through the window. He couldn’t help her because he couldn’t walk. He tried to tell a bystander to help her, but he couldn’t speak.

2.2. Expert Testimony

Brad Avrit, president of Wexco International Corporation, conducted an accident investigation. He recreated the location of each vehicle based on its speed and the location of the impact to show why the drivers did not see each other earlier. Avrit concluded that the drivers’ headlights had been at the same elevation for only three and a half to four seconds, which left the drivers only one and a half to two seconds to perceive the threat and try to avoid a crash.

Avrit prepared a video for the jury that purported to demonstrate the problem by reenacting defendant’s view of the oncoming headlights. Footage was taken by a camera placed on a stationary tripod at defendant’s approximate eye level in the Hyundai. The video demonstrated that defendant had no view of oncoming headlights for approximately eight to 13 seconds where the road dipped to the lower elevation. The same phenomenon occurred for drivers traveling in the opposite direction.

Avrit opined that it was legal to pass on that stretch of Palmdale Blvd. because there were no “do not pass” signs, and there was a dotted line on the road. But where there is a “site obstruction” without any warning signs or solid yellow lines, he opined, it is “considered a trap.”

On cross-examination, Avrit conceded that the Google Earth images on which he relied included a disclaimer that “Google makes no claims to the accuracy of coordinates in Google Earth.” He also admitted that he did not take survey measurements of the road’s elevation. Nevertheless, he testified that the Google Earth data was accurate “to a reasonable degree of engineering certainty” based on what he observed with his “own two eyes.”

3. Rebuttal Evidence

Parsons, the CHP expert, testified again on rebuttal. He explained that he did not rely on data from Google Earth because its reliability was unknown. He was concerned about the accuracy of Avrit’s measurements because Google Earth elevations are rounded to the nearest foot. And indeed, Parsons’s physical measurements of the road revealed a 200-foot error in Avrit’s calculations. The depression was 673 feet long, not 860 feet, and it was 270 feet away from the area of impact.

Parsons also had concerns about the defense video. He noted that though Avrit set the camera on a 24-inch tripod to account for defendant’s eye height, Avrit hadn’t accounted for the height of the car. Thus, the camera was set too low and the video showed less of the road than defendant would have seen. The Highway Design Manual, by contrast, conducts its visibility studies using a height of three and a half feet.

CONTENTIONS

Defendant contends: (1) there is insufficient evidence he acted with wanton or reckless disregard for safety; (2) he was denied the right to present a defense when the court would not allow him to cross-examine a CHP officer about the details of other accidents on Palmdale Blvd.; (3) the great-bodily-injury enhancement is unauthorized because great bodily injury is an element of the underlying offense; (4) the evidence does not support the court’s decision to impose the high term; and (5) the court erred by finding him presumptively ineligible for probation.

DISCUSSION

1. Substantial evidence supports defendant’s conviction.

A criminal defendant may not be convicted of any crime or enhancement unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th & 14th Amends.; see Cal. Const., art. I, §§ 7, 15; In re Winship (1970) 397 U.S. 358, 364.) “This cardinal principle of criminal jurisprudence” (People v. Tenner (1993) 6 Cal.4th 559, 566) is so fundamental to the American system of justice that criminal defendants are always “afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts” (United States v. Powell (1984) 469 U.S. 57, 67).

Defendant contends there is insufficient evidence to support the wanton disregard element of reckless driving because he was on a stretch of road that allowed passing, and since he could not see around the truck he sought to pass, and the depressions in the road blocked his view of oncoming headlights, he did not realize he couldn’t pass safely until he had already pulled into oncoming traffic. “This,” he insists, “could have happened to anyone in his situation.” We disagree.

1.1. Standard of Review

In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (People v. Zamudio (2008) 43 Cal.4th 327, 357.) “The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (Ibid.)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (People v. Kraft (2000) 23 Cal.4th 978, 1053.) We may not reweigh the evidence or resolve evidentiary conflicts. (People v. Young (2005) 34 Cal.4th 1149, 1181.) The same standard applies where the conviction rests primarily on circumstantial evidence. (People v. Thompson (2010) 49 Cal.4th 79, 113.) In short, we may
not reverse a conviction for insufficient evidence unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [it].” (People v. Bolin (1998) 18 Cal.4th 297, 331.)

1.2. Elements of Reckless Driving

To convict a defendant of reckless driving, the People must prove beyond a reasonable doubt that:

- the defendant drove a vehicle on a highway; and
- the defendant intentionally drove with wanton disregard for the safety of persons or property.

($\text{§\ 23103;}$ see CALCRIM No. 2200.) “A person acts with wanton disregard for safety when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he or she intentionally ignores that risk.” (CALCRIM No. 2200.)

1.3. There is substantial evidence defendant acted with wanton disregard for safety.

Defendant emphasizes that passing was legally permitted on that stretch of Palmdale Blvd. and insists it was proper for him to move into the left lane without being able to see beyond the delivery truck. He is mistaken.

Section 21650 provides, “Upon all highways, a vehicle shall be driven upon the right half of the roadway, except as follows: [¶] (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement.” In turn, under section 21751, “On a two-lane highway, no vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction.” Likewise, the “driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle … .” ($\text{§\ 21750, subd. (a).}$) And, “No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety … .” ($\text{§\ 22107.}$)

Taken together, these statutes make clear that a broken line on a roadway does not make passing legal: passing is only legal if it is safe. And passing is not safe unless a driver, before attempting to pass another car, can see that the left lane is free from traffic and that there is enough room in the right lane to overtake the slower vehicle without cutting it off.

That’s why the California Driver Handbook published by the Department of Motor Vehicles warns drivers to “[a]void passing other vehicles … on two-lane roads; it is dangerous. Every time you pass, you increase your chances of having a collision.” (Dept. Motor Vehicles, Cal. Driver Handbook (Aug. 2018) p. 66 <https://www.dmv.ca.gov/web/eng_pdf/dl600.pdf> [as of Feb. 14, 2019]; see, e.g., People v. Letter and Tobin (2010) 50 Cal.4th 99, 218, fn. 1 (dis. opn. of Kennard, J.) [noting that the Driver Handbook recommends motorists reduce speed by 5–10 miles per hour on wet roads]; Burg v. Municipal Court (1983) 35 Cal.3d 257, 272 [citing charts in Driver Handbook for principle that drivers know the approximate number of drinks required to exceed maximum BAC].) In particular, the Handbook cautions, “Do not pull out to pass unless you know you have enough space to pull back into your lane.” (Driver Handbook, at p. 65.) And: “Do not count on having enough time to pass several vehicles at once or that other drivers will make room for you.” (Id., at p. 66.) The Handbook also emphasizes: “Do not pass: [¶] If you are approaching a hill or curve and cannot see if other traffic is approaching.” (Id., at p. 65.) Finally, the Handbook warns: “Drive more slowly at night because you cannot see as far ahead and you will have less time to stop for a hazard.” (Id., at p. 82.) Indeed, this last point was consistent with Parsons’s testimony that it takes longer for a driver to perceive and react to hazards at night than during the day.

Here, the delivery truck blocked defendant’s view of the entire right lane and at least part of the left lane. He simply had no idea whether it would be safe to pass—and yet he nevertheless pulled into the left lane on a dark but apparently busy road and, driving 70 miles per hour, tried to pass two vehicles at once. The jurors, at least some of whom were presumably licensed drivers, were undoubtedly familiar with basic principles of traffic safety and could reasonably infer that by ignoring them, defendant acted with wanton disregard for the safety of others. (De Young v. Haywood (1956) 139 Cal. App.2d 16, 19 [“these rules of the road are merely descriptive of practices that have long been recognized throughout the country and are known to everyone of sufficient judgment and experience to act as a competent juror”].)

Furthermore, Emery testified that she made room for defendant to return to the right lane but he did not try to slow down. According to Parsons, defendant continued to accelerate until two and a half seconds before the collision. The jury could have reasonably inferred from this testimony that when defendant saw Jessica’s headlights, he still had enough time and space to return to his lane ahead of Emery but nonetheless still tried to pass the truck. Taken together, a reasonable jury could conclude from these facts that defendant’s conduct went beyond mere carelessness.

Accordingly, we conclude there is sufficient evidence defendant acted with reckless disregard for safety.

2. A highway is any place “publicly maintained and open to the use of the public for purposes of vehicular travel,” including a street. ($\text{§\ 360.}$.)

[ PART 2, See FOOTNOTE*, Ante ]
3. A great-bodily-injury enhancement may attach to felony reckless driving.

Penal Code section 12022.7 (hereafter Section 12022.7) provides for a three-year sentence enhancement when a defendant personally inflicts great bodily injury on a non-accomplice in the commission of a felony. (Pen. Code, § 12022.7, subd. (a).) But the statute specifically exempts murder, manslaughter, arson, and any crime in which “inflation of great bodily injury is an element of the offense.” (Id., subd. (g).) Defendant argues subdivision (g) bars the enhancement imposed here because great bodily injury is an element of the “offense” of reckless driving causing an enumerated injury (§ 23105) even though that “offense” named Carlos as the victim and the enhancement named Jessica.

As a matter of first impression, we conclude section 23105 is not a substantive offense because it does not define a criminal act. Instead, it is a sentencing provision that allows particularly serious forms of reckless driving to be punished as felonies rather than misdemeanors. Because great bodily injury is not an element of the substantive offense of reckless driving (§ 23103), the prohibition in Section 12022.7, subdivision (g), does not apply.3

3.1. Relevant Statutes

As discussed, to convict a defendant of reckless driving under section 23103, the prosecution must prove:

- the defendant drove a vehicle on a highway; and
- the defendant intentionally drove with wanton disregard for the safety of persons or property.

Under the statute, “except as provided in Section 23104 or 23105,” a defendant “convicted of the offense of reckless driving” may be sentenced to between five and 90 days in county jail, a fine of between $145 and $1,000, or both. (§ 23103, subd. (c).) That is, “except as provided in Section 23104 or 23105,” reckless driving is a misdemeanor.

Section 23104 lengthens a defendant’s sentence “when reckless driving of a vehicle proximately causes bodily injury to a person other than the driver … ” If the defendant is a first-time offender, he is subject to a misdemeanor term of between 30 days and six months in county jail, a fine of between $220 and $1,000, or both. (§ 23104, subd. (a).) If the defendant has previously been convicted of reckless driving, engaging in a speed contest (§ 23109), or driving under the influence (§ 23152), however, the offense becomes a wobbler.4

Finally, under section 23105, a “person convicted of reckless driving in violation of section 23103 that proximately causes one or more” enumerated serious injuries is subject to the same punishment as a recidivist offender. That is, the offense becomes a wobbler.

Here, defendant was charged with one count of reckless driving (§ 23103, subd. (a)). As to that count, the information alleged he had proximately caused an enumerated injury to Carlos, which elevated the offense to a felony under section 23105. Then, as to the same count, the information alleged that he personally inflicted great bodily injury on Jessica under Section 12022.7, subdivision (a). The jury convicted defendant of reckless driving and found both allegations true. We are asked to decide whether defendant’s subsequent sentence is authorized under Section 12022.7, subdivision (g).

3.2. Standard of Review

Section 12022.7, subdivision (g)’s application to the reckless driving statutes is an issue of “statutory interpretation that we must consider de novo.” (People v. Pranty (2015) 62 Cal.4th 59, 71.) As with any case involving statutory interpretation, our primary goal is to ascertain and effectuate the lawmakers’ intent. (People v. Park, supra, 56 Cal.4th at p. 796.) To determine intent, we “examine the ordinary meaning of the statutory language, the text of related provisions, and the overarching structure of the statutory scheme.” (Weatherford v. City of San Rafael (2017) 2 Cal.5th 1241, 1246; id. at p. 47, citing Poole v. Orange County Fire Authority (2015) 61 Cal.4th 1378, 1391 (conc. opn. of Cuéllar, J.) [“‘The statute’s structure and its surrounding provisions can reveal the semantic relationships that give more precise meaning to the specific text being interpreted, even if the text may have initially appeared to be unambiguous’.”].) Though we focus on the text itself, we “must also consider the object to be achieved and the evil to be prevented by the legislation. [Citations.]” (Horwich v. Superior Court (1999) 21 Cal.4th 272, 276.) We “must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (People v. Coronado (1995) 12 Cal.4th 145, 151.) Thus, “[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.” (Horwich, at p. 276.)

3.3. Great bodily injury is not an element of reckless driving.

By its terms, Section 12022.7, subdivision (g), applies only to murder, manslaughter, arson, or when “inflation of great bodily injury is an element of the offense.” Since defendant was not charged with murder, manslaughter, or arson, we must first determine whether great bodily injury is an “element of the offense” charged in this case. We conclude it is not. As we explain in detail below, section 23105 is a sen-
tencing provision that mandates an alternate, elevated base term for defendants convicted of particularly serious forms of reckless driving. But the relevant offense is reckless driving under section 23103—and infliction of great bodily injury is not an element of that offense. Therefore, subdivision (g) does not apply.

3.3.1. Substantive Crimes and Punishment

Statutes

“Provisions describing substantive crimes ... generally define criminal acts.” (People v. Ahmed (2011) 53 Cal.4th 156, 163.) Sentence enhancements and alternate penalty provisions, on the other hand, “increase the punishment for those acts. They focus on aspects of the criminal act that are not always present and that warrant additional punishment.” (Ibid.; People v. Dennis (1998) 17 Cal.4th 468, 500–502.) Though these statutes can resemble substantive offenses insofar as they impose additional punishment based on a factual finding that a defendant engaged in certain conduct while committing a crime, because the statutes “do not define criminal acts,” they are not separate offenses. (Ahmed, at p. 163.) A penalty provision differs from a substantive offense in that it “is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]” (People v. Bright (1996) 12 Cal.4th 652, 661, overruled on other grounds by People v. Seel (2004) 34 Cal.4th 535.)

Likewise, though sentence enhancements and penalty provisions serve similar functions, the “difference between the two is subtle but significant.” (People v. Jones (2009) 47 Cal.4th 566, 578.) A sentence enhancement is “an additional term of imprisonment added to the base term.” (Cal. Rules of Court, rule 4.405(3), italics added.) A penalty provision, on the other hand, “ ‘sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.’ [Citation.]” (Jones, at p. 578.) It usually does so either by allowing a misdemeanor to be punished as a felony under the Determinate Sentencing Law or by removing a crime from the DSL and bringing it under an alternative sentencing scheme such as the Three Strikes law. Thus, we can most easily identify a penalty provision by contrast to what it isn’t: an enhancement or a substantive offense.

3.3.2. Plain Meaning and Statutory Structure

A statute is more likely to be a sentencing provision than a substantive offense when it identifies circumstances that elevate the punishment for a crime defined in a different statute.

For example, in Robert L., the Supreme Court held that Penal Code section 186.22, subdivision (d), is an alternate penalty provision because it “provides for an alternate sentence when it is proven that the underlying offense has been committed for the benefit of, or in association with, a criminal street gang.” (Robert L. v. Superior Court (2003) 30 Cal.4th 894, 899 (Robert L.).) Though the statute “prescribes an alternate penalty when the underlying offense is committed under specified circumstances,” it is not a “substantive offense because it does not define or set forth elements of a new crime. [Citation.]” (Id. at pp. 899–900, italics added.)

Likewise, in Bouzas, the Supreme Court held that Penal Code section 666, petty theft with prior, was a sentencing provision, not a substantive offense, because it was structured to increase “the punishment for a violation of other defined crimes and not to define an offense in the first instance.” [Penal Code section 666] simply refers to other substantive offenses defined elsewhere” and states that a defendant previously convicted of one of those offenses is subject to greater punishment than a first-time thief. (People v. Bouzas (1991) 53 Cal.3d 467, 478–479.)

Section 23105 operates the same way. It states: “A person convicted of reckless driving in violation of Section 23103 that proximately causes one or more of the injuries specified in subdivision (b) to a person other than the driver, shall be punished by imprisonment” as either a felon or a misdemeanor. (§ 23105, subd. (a).) Thus, like the statutes at issue in Robert L. and Bouzas, section 23105 first references a substantive offense defined elsewhere—“reckless driving in violation of Section 23103”—then identifies conditions under which that act may be punished as a felony: when a “person ... proximately causes one or more of the injuries specified in subdivision (b) ... ” (See People v. Weathington (1991) 231 Cal.App.3d 69, 89 [holding that § 23175 (DUI with prior) is a penalty provision where it “describes the conduct that constitutes the crime as a violation of section 23152” ], cited with approval in People v. Coronado, supra, 12 Cal.4th at p. 152, fn. 5.)

The structure of the reckless driving statute itself supports this view. In section 23103, subdivision (a) defines a criminal act: “A person who drives a vehicle upon a highway in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.” Then, subdivision (c) establishes the punishment for that act: “persons convicted of the offense of reckless driving shall be punished” as misdemeanants, “except as provided in Section 23104 or 23105.” Notably, the punishment subdivision of section 23103 expressly refers to section 23105—but the subdivision defining the criminal act does not.

If statutory “ ‘language is unambiguous, there is no need for further construction.’ ” (People v. Gonzales (2017) 2 Cal.5th 858, 868.) Based on the plain meaning and structure of these statutes, section 23105 is not a substantive offense. And though section 23103 is a substantive offense, great bodily injury is not an element of that offense. Accordingly, great bodily injury cannot be “an element of the offense” in this case within the meaning of Section 12022.7, subdivision (g).

We are mindful, however, that in arguing Section 12022.7, subdivision (g), applies here, defendant relies heavily on Beltran, in which the court of appeal reversed a Section 12022.7 enhancement after concluding “great bodily injury is an ele-
ment of the felony offense of evading a pursuing peace officer.” (People v. Beltran (2000) 82 Cal.App.4th 693, 697.) As relevant to that case, section 2800.3 provided that a person convicted of evading a peace officer under section 2800.1 could be punished as a felon if he proximately caused death or serious bodily injury. Beltran focused on whether “great bodily injury” under Section 12022.7, subdivision (g), encompassed the “serious bodily injury” referred to in section 2800.3. (Beltran, at pp. 696–697.) But while it acknowledged section 2800.1 was a sentencing provision, the court did not explain why, in its view, serious bodily injury was nevertheless an “element of the offense” for enhancement purposes. (Beltran, at pp. 696–697.) Certainly, opinions are not authority for propositions not considered therein (e.g., People v. Bailey (2018) 27 Cal.App.5th 376, 385), but Beltran’s failure to address this point may also indicate some latent statutory ambiguity that isn’t apparent from the plain text.

To resolve any ambiguity, we turn to legislative history. (See People v. Bright, supra, 12 Cal.4th at pp. 662–669 [when construing a provision as a penalty provision or a substantive offense, examination of legislative intent is particularly important because of the broad consequences that follow].)

3.3.3. Legislative Purpose

Here, section 23105’s history is consistent with its plain meaning: the Legislature enacted a penalty provision. (See People v. Garcia (1998) 63 Cal.App.4th 820, 829–832 [based on legislative history, statute increasing term for second degree murder when killing is committed by shooting from a vehicle was a penalty provision, not a substantive crime]; People v. Weathington, supra, 231 Cal.App.3d at p. 89 [based on legislative history, it “is clear the purpose of the repeat offender provisions of the ‘drunk driving’ statutes historically has been to specify penalties rather than to define the crime.”].) To understand why, we must consider the problem of street racing in the early aughts.


During the 2003–2004 session, lawmakers expanded the collateral consequences of street racing again—this time by requiring the DMV to revoke offenders’ licenses (Stats. 2004, ch. 595, § 2)—but efforts to increase the penal consequences for the crime stalled. Assembly Bill No. 985 would have made street racing (§ 23109) a wobbler whenever it caused great bodily injury—even for a first-time offender. The bill died in committee amidst concerns that the new penalties would exceed those for reckless driving. (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 985 (2003–2004 Reg. Sess.) as amended Apr. 2, 2003, pp. 2, 6.) Assembly Bill Nos. 1314 and 2440, which would have increased penalties for recidivist street racers who proximately caused any injury, also died in committee. Critics felt existing penalties for reckless driving were sufficient, and they were skeptical about the need for competing penalties for a similar offense. (See Assem. Com. on Appro., Analysis of Assem. Bill No. 2440 (2003–2004 Reg. Sess.) as amended Apr. 12, 2004, p. 2.)

So, in the 2005–2006 legislative session, advocates adopted a two-step approach. First, the Legislature amended the street-racing law (§ 23109) to increase the penalties for street-racing recidivists, making the penalties equivalent to those already available for reckless driving under section 23104. (Assem. Bill No. 1325 (2005–2006 Reg. Sess.) § 1; Stats. 2005, ch. 475, § 1.) “Part of the rationale for creating the enhanced penalties on a second offense was that the concern was not with the person who gets caught reckless driving or in a speed contest on a first time bad decision situation but [rather] those who participate regularly in speed contests and other similar events. The provisions … were intended to go after those repeat offenders who continue to offend even when caught.” (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2190 (2005–2006 Reg. Sess.) as amended Apr. 20, 2006, p. 7; accord, Gov. Off. of Planning and Research, Enrolled Bill Rep. on Assem. Bill No. 1325 (2005–2006 Reg. Sess.) Sept. 19, 2005, p. 1 [“This bill would help reduce street racing by targeting repeat offenders who cannot plead ignorance about the consequences of their actions. These offenders know about the numerous crashes, injuries and fatalities yet they still choose to put themselves and others at risk with their unlawful behavior. AB 1325 will help deter repeat offenders by increasing the penalties for a second offense and will send the message to all street racers that California is serious about punishing participants in these deadly games.”].)

5. We use street racing and engaging in a speed contest synonymously.

6. As section 23105 had not yet been enacted, the maximum penalty for reckless driving then appeared in section 23104. As discussed, section 23104 increases penalties for reckless drivers who injure others. If the defendant is a first-time offender, he is subject to a longer misdemeanor sentence. (§ 23104, subd. (a).) If the defendant causes great bodily injury and has previously been convicted of reckless driving, engaging in a speed contest (§ 23109), or driving under the influence (§ 23152), however, the offense becomes a wobbler. (§ 23104, subd. (b).)
Next, once the new recidivist penalties went into effect, the broader measure was reintroduced—but this time it amended both the reckless driving law and the street-racing statute. (Assem. Bill No. 2190 (2005–2006 Reg. Sess.) as introduced Feb. 22, 2006 [hereafter A.B. 2190].) As introduced, A.B. 2190 deleted the prior-conviction requirements of sections 23104 (reckless driving wobbler) and 23109 (street racing) and provided instead that any defendant—including a first-time offender—who proximately caused any injury could be subject to a felony.

Though an Assembly amendment limited the expanded punishment to offenders who caused great bodily injury (Assem. Amend. to A.B. 2190 (2005–2006 Reg. Sess.) Apr. 20, 2006), the Senate Public Safety Committee was still not convinced that first-time reckless drivers and street racers should be eligible for felony punishment—particularly since no one knew whether the last round of statutory changes had made any impact. (Sen. Com. on Public Safety, Analysis of A.B. 2190, supra, pp. 8–10.)

To address these concerns, the Senate made several changes to the bill. First, it amended the bill to express the Legislature’s intent that “only the most egregious violations” should be charged as felonies. (Sen. Amend. to A.B. 2190 (2005–2006 Reg. Sess.) June 26, 2006.) Then, apparently concluding this expression of intent did not do enough to limit felony eligibility, the Senate rewrote the bill. (Sen. Amend. to A.B. 2190 (2005–2006 Reg. Sess.) Aug. 23, 2006.)

Rather than changing the existing statutes, the final version created two new provisions—section 23105 for reckless driving and section 29109.1 for street racing—and listed precise injuries a first-time offender needed to cause to warrant felony punishment. Not all great bodily injury would qualify. Instead, the defendant must proximately cause: loss or impairment of function of a bodily member or organ, a wound requiring extensive suturing, a serious disfigurement, brain injury, or paralysis. (§ 23105, subd. (b).)

These negotiations reveal that the Legislature was focused on increasing punishment for existing crimes and the circumstances under which such punishment would be appropriate. There is no indication that lawmakers suspected they would be creating an entirely new criminal offense.

### 3.3.4. Absurd Consequences

Nor does treating section 23105 as a sentencing provision lead to absurd consequences that the Legislature could not possibly have intended.

If section 23105 is a sentencing provision, a defendant who drives recklessly may be charged with only one count of reckless driving—regardless of how many people he injures—because he has committed only one criminal act. Yet he is also subject to a great-bodily-injury enhancement for each otherwise unaccounted-for victim. (People v. Oates (2004) 32 Cal.4th 1048.) If section 23105 is a substantive offense, on the other hand, each infliction of great bodily injury represents a distinct criminal act—so a defendant whose driving injures multiple people may be charged with as many counts of reckless driving as there are injured victims. (People v. Oates (2015) 60 Cal.4th 922, 934–937 (Cook).)

To illustrate the difference, imagine, for example, that the defendant in this case, a first-time offender, had collided with a gasoline tanker instead of a passenger sedan and had seriously injured 50 people rather than two. If section 23105 is a sentencing provision, defendant would be charged with one count of felony reckless driving—one strike offense for his one act of criminal recklessness—and 49 enhancements for the 49 other people he hurt. But if section 23105 is a substantive offense, defendant would be charged instead with 50 counts of reckless driving causing great bodily injury—50 strikes for his one act of criminal recklessness.

The Legislature plainly did not contemplate such a result. As enacted, section 23105 was conduct-focused—not victim-specific. The purpose of the bill was to “increase traffic safety by reducing the number of drivers engaging in motor vehicle speed contests and reckless driving.” (Bus., Trans., and Housing Agency, Enrolled Bill Rep. on Assem. Bill No. 2190 (2005–2006 Reg. Sess.) Sept. 5, 2006, p. 1; accord, e.g., id., at pp. 2–3 [describing penalties]; Off. of Planning and Research, Enrolled Bill Rep. on Assem. Bill No. 2190 (2005–2006 Reg. Sess.) Aug. 29, 2006, p. 2 [“Stiff penalties are crucial in order for law enforcement to curb the very dangerous problem of reckless driving and drag racing.... This bill seeks to deter this highly dangerous behavior by increasing penalties.”].)

As discussed above, the list of injuries was added to the bill to narrow its scope to address the Senate’s concerns about whether a first offense for reckless driving should ever be treated as a wobbler. As such, the injuries represented an objective measure of seriousness—a Legislative determination of the circumstances under which reckless driving is egregious enough to warrant a felony sentence for a first-time offender. Treating the provision as a substantive offense would undermine that intent by subjecting a first-time offender to multiple felonies rather than just one.

We recognize that our interpretation of section 23105 could lead to sentencing disparities wherein defendants convicted of multiple counts of vehicular manslaughter receive shorter aggregate terms than defendants convicted of a single count of reckless driving with multiple great-bodily-injury enhancements. (See Cook, supra, 60 Cal.4th at pp. 936–938.)

7. In examining vehicular manslaughter in Cook, the Supreme Court held that section 12022.7, subdivision (g), did not apply to manslaughter even if the enhancement involved injuries to a different victim than the victim of the substantive offense. (Cook, supra, 60 Cal.4th at p. 936.) Nevertheless, it found “nothing absurd in charging and punishing a defendant separately for whatever crimes that defendant committed against separate victims.” (Ibid.) Thus, the “prosecution can charge a defendant for each manslaughter the defendant committed and, if appropriate, for crimes committed against surviving victims, and the court can sentence the defendant for each crime against separate victims for which the defendant is convicted to the extent the sentencing laws permit.” (Ibid.)
Yet “it appears that no interpretation of [S]ection 12022.7, subdivision (g), is guaranteed to eliminate all possible anomalies.” (Id. at p. 938; see, e.g., Harmelin v. Michigan (1991) 501 U.S. 957, 998–1001 (conc. opn. of Kennedy, J.) [noting inevitable sentencing vagaries].) Nor is the disparity substantial enough to warrant a different statutory construction. (See California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist. (2004) 124 Cal.App.4th 574, 588 [“We must exercise caution using the ‘absurd result’ rule; otherwise, the judiciary risks acting as a ‘super-Legislature’ by rewriting statutes to find an unexpressed legislative intent.”].)

Because section 23105 is not a substantive offense and great bodily injury is not an element of section 23103, we conclude Section 12022.7, subdivision (g), does not apply. Accordingly, defendant’s sentence is authorized.

[ PARTS 4 AND 5, See FOOTNOTE*,
Ante ]

DISPOSITION
The judgment is affirmed.

LA VIN, Acting P. J.
WE CONCUR: EGERTON, J., DHANIDINA, J.

COUNSEL
Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION
We affirmed defendant Armando Rocha’s conviction for first degree murder in September 2017. On remand from the Supreme Court, we reconsidered our decision in light of then-recently enacted Senate Bill 620 (Stats. 2017, ch. 682, § 2), which amended Penal Code section 12022.53, subdivision (h) (section 12022.53(h))¹ to give the trial court discretion to strike or dismiss firearm enhancements imposed under section 12022.53. We affirmed defendant’s convictions and remanded his case to give the trial court an opportunity to exercise its discretion under section 12022.53(h). Without holding a hearing, the trial court issued a written statement declining to strike the firearm enhancement.

In this appeal, defendant contends that he should have been given the opportunity to be present with counsel at a hearing on remand. In a supplemental brief, he further contends that the matter should be remanded to give the trial court an opportunity to exercise its discretion to dismiss his five-year prior serious felony enhancement under recent revisions to sections 667 and 1385.

We agree with defendant on both points and therefore reverse the order. On remand, the court shall hold a hearing to consider whether to exercise its discretion to strike the firearm enhancement under section 12022.53(h) and the prior serious felony enhancement under sections 667 and 1385.

¹. All further statutory references are to the Penal Code unless otherwise indicated.
Defendant shall have the right to assistance of counsel, and, unless he chooses to waive it, the right to be present.

FACTUAL AND PROCEDURAL BACKGROUND

A jury found defendant guilty of first degree murder (§ 187, subd. (a)) and found true a gang enhancement (§ 186.22, subd. (b)) and a firearm use enhancement (§ 12022.53, subds. (d) & (e)). The trial court found true a prior serious felony allegation (§ 667, subd. (a)(1)) and a strike allegation (§§ 667, subds. (b)-(j), 1170.12). The trial court sentenced defendant to 80 years to life in prison, consisting of 25 years to life for the murder conviction, doubled due to the strike, 25 years to life for the firearm use enhancement, and five years for the prior serious felony.

We affirmed defendant’s conviction. He timely filed a petition for review in the Supreme Court, and subsequently filed a supplemental petition based on the newly enacted amendment to section 12022.53(h), which took effect on January 1, 2018 and gave trial courts the discretion to strike firearm enhancements imposed under section 12022.53. The Supreme Court granted defendant’s supplemental petition and transferred the matter to us with directions to vacate our decision and reconsider the matter in light of the new law.

On reconsideration, we again affirmed defendant’s conviction. We remanded the matter to the trial court for the trial court to exercise its discretion under section 12022.53, subdivision (h).”

On remand, the court called the case “for hearing on remittitur.” The prosecutor was not present, nor were defendant or defense counsel. The court issued a written statement entitled “Trial Court’s Statement of Discretion Resulting in No Change to Defendant’s Sentence.” In that statement, the court stated that it “has considered the matter and declines to exercise its discretion and strike the 12022.53 allegation.” After summarizing the facts of the case and noting defendant’s strike conviction and lengthy sentence, the court reiterated its decision not to exercise its discretion by striking the enhancement. The court stated that defendant’s “sentence remains unchanged,” and added, “Further hearing in this matter is not required.”

Defendant timely appealed.

DISCUSSION

Defendant argues that he had a constitutional right to be present with counsel when the court exercised its discretion on remand. The People disagree. They argue that the proceeding was not a “critical stage” in the criminal prosecution, and “did not bear a reasonable and substantial relation to [defendant’s] full opportunity to defend against the charges.”

Both positions are grounded in the state and federal constitutions and state statutory law. “A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States constitution and article I, section 15 of the California Constitution.” (People v. Doo-
cise his [or her] sentencing discretion in defendant's favor?" (Ibid.) If the answer is yes, then a hearing and counsel are required; if the answer is no, then the court may rule without a defendant and counsel present.

The Rodriguez Court rejected the People's contentions that answering the question affirmatively in the context of a remand for resentencing under Romero would be "superfluous" and "inefficient." (Rodriguez, supra, 17 Cal.4th at pp. 258-259.) The Court explained, "The evidence and arguments that might be presented on remand cannot justly be considered 'superfluous' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the evidence supporting a favorable exercise of discretion." (Id. at p. 258.) It further deemed "reasonable" the defendant's observation that "'[i]t would have been a waste of the court's time for [defendant] to have attempted to present evidence which might convince the court to strike a "strike" at a time when the court believed it had no discretion to do so.'" (Ibid.) The Court found that it would not be inefficient to require hearings and counsel in Romero resentencings because trial courts were unaware of their discretion to strike strikes until Romero was decided, and nothing in the record before it "exclude[d] the possibility the judge might have exercised his discretion in defendant's favor." (Id. at p. 259.) It also emphasized that requiring a hearing and counsel would place defendants whose cases were remanded on the same footing as defendants sentenced after Romero, who have the opportunity to make Romero arguments at their sentencing hearings, at which they have the right to be present with counsel. "To require defendant's presence on remand in this case merely affords him the same opportunity to invoke Romero ... as is enjoyed by all defendants sentenced after that decision." (Id. at pp. 259-260.)

The Court then returned to section 1260: "Our power to order a limited remand, as mentioned, includes the authority to direct the trial court to conduct 'such further proceedings as may be just under the circumstances.' [Citation.] Because to permit the trial court to decide how to exercise its discretion under section 1385 without affording defendant and his counsel an opportunity to address the subject would be manifestly unfair, section 1260 provides sufficient authority to require defendant's presence on remand." (Rodriguez, supra, 17 Cal.4th at p. 260.) The Court thus located the right to counsel and presence in section 1260, not the state or federal constitution. (See ibid.)

Rodriguez is indistinguishable from the present case. Defendant is within a "narrow class of defendants whose sentencing courts ... believed ... they lacked discretion to strike" section 12022.53 firearm enhancements and "whose appeals are not yet final." (Rodriguez, supra, 17 Cal.4th at p. 255.) Unlike similarly situated defendants sentenced after the amendments to section 12022.53(h) took effect, he did not have the opportunity at his sentencing hearing to argue that the firearm enhancement should be stricken. The amendments to section 12022.53(h) also rest upon section 1385, the same animating authority underlying Romero. Thus the court is required to weigh similar considerations when exercising its discretion, including the rights of the defendant, the interests of society represented by the People, and individualized considerations pertaining to the defendant and his or her offenses and background. (Romero, supra, 13 Cal.4th at p. 531.) Defendant and his counsel, as well as the People, are likely to have information on these factors that may guide the court in its exercise of discretion.

The Rodriguez Court held that it was "manifestly unfair" to permit the trial court to decide how to exercise its post-Romero discretion without input from defendants and their counsel. We arrive at the same conclusion and hold that it is "manifestly unfair" to permit the trial court to decide how to exercise its new discretion under section 12022.53(h) without affording defendant and his counsel the opportunity to make an argument if they so desire.

The Rodriguez Court eliminated the unfairness by remanding the matter to the trial court for "a hearing in the presence of defendant, his counsel, and the People to determine whether to dismiss one or more prior felony conviction findings pursuant to section 1385." (Romero, supra, 17 Cal.4th at p. 260.) It did not consider whether the error should be reviewed under Chapman v. California (1967) 386 U.S. 18, 24 (Chapman) or People v. Watson (1956) 46 Cal.2d 818, 836 (Watson). (See generally id.) Defendant argues that reversal and remand is necessary under any standard, while the People assert that the stringent Chapman standard applies, but that reversal is not required because any error was harmless beyond a reasonable doubt.

We follow the Rodriguez Court and conclude that remand is necessary. Even under the Watson standard, which applies to errors of state law, reversal is required if it is reasonably probable that the defendant would have obtained a more favorable result absent the error. (Watson, supra, 46 Cal.2d at p. 836.) That standard is met here: it is reasonably probable that input from defendant and his counsel would lead to a more favorable exercise of the court's discretion. As defendant points out in his opening brief, he was not given the opportunity "to emphasize mitigating evidence that weighed in favor of leniency." Indeed, the trial court rested its decision primarily on the facts of the underlying crime and did not consider other factors defendant and his counsel may have been able to bring to its attention. A remand is necessary to ensure proceedings that are just under the circumstances, namely, a hearing at which both the People and defendant may be present and advocate for their positions.

Defendant argues that such a hearing should also include an opportunity for the trial court to exercise its discretion under sections 667 and 1385, which were recently amended by Senate Bill 1393 (Stats. 2018, ch. 1013) to give the trial court discretion to strike or dismiss five-year prior conviction enhancements. The People concede that the new law applies to defendant "[b]ecause Senate Bill 1393 went into effect and [defendant's] judgment is not yet final." They contend,
however, that “review of the claim is barred because it is beyond the scope of the limited remand” we previously ordered in this case, and is “unwarranted” because the trial court’s refusal to exercise its discretion under section 12022.53(h) in defendant’s favor demonstrates that it would not strike the prior conviction enhancement.

We agree with defendant that the trial court should consider whether to strike the prior conviction enhancement at the remand hearing. As the People concede, the law applies to defendant. (See People v. Garcia (2018) 28 Cal.App.5th 961, 972-973.) The trial court’s order sheds no light on how it might rule on this issue, and neither the People nor defendant had an opportunity to present arguments relating to the amended provisions. The scope of our previous remand does not restrict our authority under section 1260 to remand for proceedings on this newly enacted law. In the interest of judicial economy, defendant should be permitted to raise the issue at the remand hearing. We express no opinion as to how the trial court should exercise its discretion on either enhancement.

**DISPOSITION**

The order is reversed. The case is remanded with directions to the trial court to decide, at a hearing at which defendant has the right to be present with counsel, whether it will exercise its discretion to strike the firearm enhancement under section 12022.53(h) and/or the prior conviction enhancement under section 667, subdivision (a). If the court elects to strike either or both of the enhancements, defendant shall be resentenced and the abstract of judgment amended. If the trial court elects not to strike either enhancement, defendant’s original sentence shall remain in effect.

**CERTIFIED FOR PUBLICATION**

COLLINS, J.

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