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SUMMARIES

Civil Rights

District court must apply 25% of prisoner’s civil rights judgment toward attorney fees before seeking balance from defendants (Gorsuch, J.)

Murphy v. Smith

U.S. Sup. Ct.; February 21, 2018; 16–1067

Petitioner Charles Murphy was awarded a judgment in his federal civil rights suit against two of his prison guards, including an award of attorney’s fees. Pursuant to 42 U. S. C. §1997e(d)(2), which provides that in such cases “a portion of the [prisoner’s] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant,” the district court ordered Mr. Murphy to pay 10% of his judgment toward the fee award, leaving defendants responsible for the remainder. The Seventh Circuit reversed, holding that §1997e(d)(2) required the district court to exhaust 25% of the prisoner’s judgment before demanding payment from the defendants.

Held: In cases governed by §1997e(d), district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney’s fees. The specific statutory language supports the Seventh Circuit’s interpretation. First, the mandatory phrase “shall be applied” suggests that the district court has some nondiscretionary duty to perform. Second, the infinitival phrase “to satisfy the amount of attorney’s fees awarded” specifies the purpose or aim of the preceding verb’s nondiscretionary duty. Third, “to satisfy” an obligation, especially a financial obligation, usually means to discharge the obligation in full. Together, these three clues suggest that a district court (1) must act (2) with the purpose of (3) fully discharging the fee award. And the district court must use as much of the judgment as necessary to satisfy the fee award without exceeding the 25% cap. Contrary to Mr. Murphy’s suggestion, the district court does not have wide discretion to pick any “portion” that does not exceed the 25% cap. The larger statutory scheme supports the Seventh Circuit’s interpretation. The previously governing provision, 42 U. S. C. §1988(b), granted district courts discretion to award fees in unambiguous terms. It is doubtful that Congress, had it wished to confer the same sort of discretion in §1997e(d), would have bothered to write a new law for prisoner civil rights suits alone; omit all of the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones. This conclusion is reinforced by §1997e(d)’s surrounding provisions, which limit the discretion under §1988(b). See, e.g., §§1997e(d)(1)(A) and (B)(ii). The discretion urged by Mr. Murphy is exactly the sort of unguided and freewheeling choice that this Court has sought to expunge from practice under §1988. And his suggested cure for rudderless discretion—to have district courts apportion fees in proportion to the defendant’s culpability—has no basis in the statutory text or roots in the law. Pp. 2–9.

844 F. 3d 653, affirmed.

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

Consumer Protection

Merchant’s failure to redact customer’s credit card expiration date from receipt did not result in concrete injury (McKeown, J.)

Bassett v. ABM Parking Services, Inc.

9th Cir.; February 21, 2018; 16-35933

The court of appeals affirmed a judgment. The court held that a merchant’s failure to redact a customer’s credit card expiration date from a receipt did not result in a concrete injury.

Steven Bassett used his credit card at a parking garage operated by ABM Parking Services, Inc. He received a receipt displaying his card’s full expiration date—a violation of the requirement set forth in the Fair Credit Reporting Act (FCRA) and Fair and Accurate Credit Transactions Act of 2003 (FACTA) that businesses redact certain credit card information from printed receipts. Bassett sued ABM for violation of the FCRA and FACTA, but alleged only a statutory violation and a potential for exposure to actual injury.

The district court granted ABM’s motion to dismiss the complaint because Bassett failed to allege a sufficiently concrete injury. The court found Bassett alleged no more than a “possible risk” of identity theft, which was insufficient to constitute the concrete injury required for standing.

The court of appeals affirmed, holding that the mere risk of injury was insufficient to confer standing. The Credit and Debit Card Receipt Clarification Act, which reiterated that the FCRA prohibits the printing of receipts bearing a card’s expiration date, also provided a temporary safe harbor period for merchants who printed an expiration date on a receipt, but otherwise complied with card number truncation requirements, stating that such merchants did not willfully violate the FCRA. In enacting the Clarification Act, Congress expressly found that the failure to remove a card’s expiration date from a receipt, where the card number itself was properly truncated, posed no tangible risk to the cardholder because the truncation itself prevented “a potential fraudster from perpetrating identity theft or credit card fraud.” Although that Clarification Act’s safe harbor period had long since expired by the time ABM issued Bassett the receipt at issue here, the Act’s finding that a disclosed expiration date...
by itself poses minimal risk and the law’s temporary elimination of liability for such violations counseled that Bassett did not allege a concrete injury.

Criminal Appeals

Guilty plea does not bar federal criminal appellant from challenging constitutionality of statute of conviction (Breyer, J.)

Class v. United States

U.S. Sup. Ct.; February 21, 2018; 16–424

A federal grand jury indicted petitioner, Rodney Class, for possessing firearms in his locked jeep, which was parked on the grounds of the United States Capitol in Washington, D. C. See 40 U. S. C. §5104(e)(1) (“An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm”). Appearing pro se, Class asked the District Court to dismiss the indictment. He alleged that the statute, §5104(e), violates the Second Amendment and the Due Process Clause. After the District Court dismissed both claims, Class pleaded guilty to “Possession of a Firearm on U. S. Capitol Grounds, in violation of 40 U. S. C. §5104(e).” App. 30. A written plea agreement set forth the terms of Class’ guilty plea, including several categories of rights that he agreed to waive. The agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute of conviction. After conducting a hearing pursuant to Rule 11(b) of the Federal Rules of Criminal Procedure, the District Court accepted Class’ guilty plea and sentenced him. Soon thereafter, Class sought to raise his constitutional claims on direct appeal. The Court of Appeals held that Class could not do so because, by pleading guilty, he had waived his constitutional claims.

Held: A guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. Pp. 3–11.

(a) This holding flows directly from this Court’s prior decisions. Fifty years ago, in Haynes v. United States, the Court addressed a similar claim challenging the constitutionality of a criminal statute. Justice Harlan’s opinion for the Court stated that the defendant’s “plea of guilty did not, of course, waive his previous [constitutional] claim.” 390 U. S. 85, 87, n. 2. That clear statement reflects an understanding of the nature of guilty pleas that stretches, in broad outline, nearly 150 years. Subsequent decisions have elaborated upon it. In Blackledge v. Perry, 417 U. S. 21, the Court recognized that a guilty plea bars some “‘antecedent constitutional violations,’ ” related to events (such as grand jury proceedings) that “‘occur[r] prior to the entry of the guilty plea.’ ” Id., at 30 (quoting Tollett v. Henderson, 411 U. S. 258, 266–267). However, where the claim implicates “the very power of the State” to prosecute the defendant, a guilty plea cannot by itself bar it. 417 U. S., at 30. Likewise, in Menna v. New York, 423 U. S. 61, the Court held that because the defendant’s claim was that “the State may not convict [him] no matter how validly his factual guilt is established,” his “guilty plea, therefore, [did] not bar the claim.” Id., at 63, n. 2. In more recent years, the Court has reaffirmed the Menna-Blackledge doctrine’s basic teaching that “‘a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.’ ” United States v. Broce, 488 U. S. 563, 575 (quoting Menna, supra, at 63, n. 2). Pp. 3–7.

(b) In this case, Class neither expressly nor implicitly waived his constitutional claims by pleading guilty. As this Court understands them, the claims at issue here do not contravene the terms of the indictment or the written plea agreement and they can be resolved “on the basis of the existing record.” Broce, supra, at 575. Class challenges the Government’s power to criminalize his (admitted) conduct and thereby calls into question the Government’s power to “‘constitutionally prosecute’ ” him. Ibid. (quoting Menna, supra, at 61–62, n. 2). A guilty plea does not bar a direct appeal in these circumstances. Pp. 7–8.

(c) Federal Rule of Criminal Procedure 11(a)(2), which governs “conditional” guilty pleas, cannot resolve this case. By its own terms, the Rule does not say whether it sets forth the exclusive procedure for a defendant to preserve a constitutional claim following a guilty plea. And the Rule’s drafters acknowledged that the “Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty” and specifically stated that Rule 11(a)(2) “has no application” to the “kinds of constitutional objections” that may be raised under the “Menna-Blackledge doctrine.” Advisory Committee’s Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 912. Because the applicability of the Menna-Blackledge doctrine is at issue here, Rule 11(a)(2) cannot resolve this case. Pp. 8–10.

Reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, KAGAN, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined.
Education Law

Substantial evidence supported school district’s finding that student had sexually abused and harassed fellow student (Bamattre-Manoukian, J.)

M.N. v. Morgan Hill Unified School District

C.A. 6th; January 24, 2018; H043343

The Sixth Appellate District affirmed a judgment. The court held that substantial evidence supported a school district’s decision to expel a student for sexually abusing a fellow student.

Following an evidentiary hearing, the Morgan Hill Unified School District expelled 13-year old M.N. for one calendar year based on its finding that he had committed or attempted to commit sexual assault or sexual battery on a fellow student, and had also committed sexual harassment.

M.N. filed a petition for writ of administrative mandate challenging the district’s findings, arguing that the district had improperly relied exclusively upon hearsay evidence to prove that M.N.’s specific intent in committing the alleged acts was sexual in nature. The trial court denied the petition.

The court of appeal affirmed, holding that substantial evidence supported the district’s findings. Witnesses, including the victim, testified that M.N. repeatedly grabbed at or touched the victim’s breasts and buttocks and failed to stop even when told he was hurting her, and laughed while witnessing other male students doing the same. Although M.N. denied having any sexual intent, and claimed that he was bullied and pressured into performing these acts by the other boys involved, this claim was belied by the lack of any record that M.N., or anyone else, had ever reported the alleged bullying to the school. Further, there was ample non-hearsay evidence to support a finding of sexual intent. First, M.N. admitted that he touched victim on the buttocks, and that he did so as many as 10 times. Second, he admitted he knew what he was doing was wrong and was hurtful to victim. Third, prior to M.N. inappropriately touching victim, he had witnessed multiple acts of sexual battery upon victim by other boys on the bus. He knew that their actions were wrong, but did nothing to stop them and did not report the actions to anyone. Fourth, M.N. admitted laughing during the incidents in which either he or other boys inappropriately touched victim. Fifth, although M.N. testified that he never heard victim tell the other boys or him to stop touching her, the testimony was equivocal. Finally, and perhaps most significantly, the school principal testified that M.N., in her presence, admitted to the police that he has made sexual comments to the victim. A sexual purpose could reasonably be inferred from the repeated acts themselves, along with the surrounding circumstances.

Employment Litigation

Dodd-Frank Act’s anti-retaliation provision does not extend to individual who did not report securities law violation to SEC (Ginsburg, J.)

Digital Realty Trust, Inc. v. Somers

U.S. Sup. Ct.; February 21, 2018; 16–1276

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Sarbanes-Oxley applies to all “employees” who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U.S.C. §1514A(a)(1). Dodd-Frank defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. §78u–6(a)(6). A whistleblower so defined is eligible for an award if original information provided to the SEC leads to a successful enforcement action. §78u–6(b)–(g). And he or she is protected from retaliation in three situations, see §78u–6(h)(1)(A) (i)–(iii), including for “making disclosures that are required or protected under” Sarbanes-Oxley or other specified laws, §78u–6(h)(1)(A)(iii). Sarbanes-Oxley’s anti-retaliation provision contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U.S.C. §1514A(b)(1)(A), (2)(D), whereas Dodd-Frank permits a whistleblower to sue an employer directly in federal district court, with a default six-year limitation period, see §78u–6(h)(1)(B)(i), (iii)(I)(aa).

The SEC’s regulations implementing the Dodd-Frank provision contain two discrete whistleblower definitions. For purposes of the award program, Rule 21F–2 requires a whistleblower to “provide the Commission with information” relating to possible securities-law violations. 17 CFR §240.21F–2(a)(1). For purposes of the anti-retaliation protections, however, the Rule does not require SEC reporting. See §240.21F–2(b)(1)(i)–(ii).

Respondent Paul Somers alleges that petitioner Digital Realty Trust, Inc. (Digital Realty) terminated his employment shortly after he reported to senior management suspected securities-law violations by the company. Somers filed suit, alleging, inter alia, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim on the ground that Somers was not a whistle-blower under §78u–6(h) because he did not alert the SEC prior to his termination. The District Court denied the motion, and the Ninth Circuit affirmed. The Court of Appeals concluded that §78u–6(h) does not necessitate recourse to the SEC prior to gaining “whistleblower” status, and it accorded deference to

**Held:** Dodd-Frank’s anti-retaliation provision does not extend to an individual, like Somers, who has not reported a violation of the securities laws to the SEC. Pp. 9–19.

(a) A statute’s explicit definition must be followed, even if it varies from a term’s ordinary meaning. *Burgess v. United States*, 553 U. S. 124, 130. Section 78u–6(a) instructs that the statute’s definition of “whistleblower” shall apply “[i]n this section,” that is, throughout §78u–6. The Court must therefore interpret the term “whistleblower” in §78u–6(h), the anti-retaliation provision, in accordance with that definition.

The whistleblower definition operates in conjunction with the three clauses of §78u–6(h)(1)(A) to spell out the provision’s scope. The definition first describes who is eligible for protection—namely, a “whistleblower” who provides pertinent information “to the Commission.”§78u–6(a)(6). The three clauses then describe what conduct, when engaged in by a “whistleblower,” is shielded from employment discrimination. An individual who meets both measures may invoke Dodd-Frank’s protections. But an individual who falls outside the protected category of “whistleblowers” is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages. This reading is reinforced by another whistleblower protection provision in Dodd-Frank, see 12 U. S. C. §5567(b), which imposes no requirement that information be conveyed to a government agency. Pp. 9–11.

(b) The Court’s understanding is corroborated by Dodd-Frank’s purpose and design. The core objective of Dodd-Frank’s whistleblower program is to aid the Commission’s enforcement efforts by “motivat[ing] people who know of securities law violations to tell the SEC.” S. Rep. No. 111–176, p. 38 (emphasis added). To that end, Congress provided monetary awards to whistleblowers who furnish actionable information to the Commission. Congress also complemented the financial incentives for SEC reporting by heightening protection against retaliation. Pp. 11–12.

(c) Somers and the Solicitor General contend that Dodd-Frank’s “whistleblower” definition applies only to the statute’s award program and not, as the definition plainly states, to its anti-retaliation provision. Their concerns do not support a departure from the statutory text. Pp. 12–18.

(1) They claim that the Court’s reading would vitiate the protections of clause (iii) for whistleblowers who make disclosures to persons and entities other than the SEC. See §78u–6(h)(1)(A)(iii). But the plain-text reading of the statute leaves the third clause with substantial meaning by protecting a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. Pp. 13–15.

(2) Nor would the Court’s reading jettison protections for auditors, attorneys, and other employees who are required to report information within the company before making external disclosures. Such employees would be shielded as soon as they also provide relevant information to the Commission. And Congress may well have considered adequate the safeguards already afforded to such employees by Sarbanes-Oxley. Pp. 15–16.

(3) Applying the “whistleblower” definition as written, Somers and the Solicitor General further protest, will allow “identical misconduct” to “go punished or not based on the happenstance of a separate report” to the SEC. Brief for Respondent 37–38. But it is understandable that the statute’s retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve by reporting information about unlawful activity to the SEC. P. 16.

(4) The Solicitor General observes that the statute contains no apparent requirement of a “temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation.” Brief for United States as Amicus Curiae 25. The Court need not dwell on related hypotheticals, which veer far from the case at hand. Pp. 16–18.

(5) Finally, the interpretation adopted here would not undermine clause (ii) of §78u–6(h)(1)(A), which prohibits retaliation against a whistleblower for “initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon” information conveyed to the SEC by a whistleblower in accordance with the statute. The statute delegates authority to the Commission to establish the “manner” in which a whistleblower may provide information to the SEC. §78u–6(a)(6). Nothing prevents the Commission from enumerating additional means of SEC reporting, including through testimony protected by clause (ii). P. 18.

(d) Because “Congress has directly spoken to the precise question at issue,” *Chevron*, 467 U. S., at 842, deference is not accorded to the contrary view advanced by the SEC in Rule 21F–2. Pp. 18–19.

850 F. 3d 1045, reversed and remanded.

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

Individual employees’ communications on behalf of city constituted protected activity under anti-SLAPP statute (Streeter, J.)

Area 51 Productions, Inc. v. City of Alameda

C.A. 1st; February 20, 2018; A144645

The First Appellate District affirmed in part and reversed in part a trial court order denying an anti-SLAPP motion. The court held that even though a city’s conduct in allegedly breaching a contract was not protected activity, its employees’ and representatives’ communications on the city’s behalf were protected under the anti-SLAPP statute.

Area 51 Productions, Inc., an event planning company, had a long-standing licensing agreement with the City of Alameda under which Area 51 was licensed to use certain city property for events that third parties paid it to organize. PM Realty Group, L.P. assisted the city with managing the license arrangements. In mid-2014, due to various problems with events put on by Area 51, the city decided to terminate their agreement. Area 51 sued the city, PM, and various individual city and PM employees for breach of contract, tortious interference with Area 51’s third-party contracts, intentional and negligent interference with prospective economic relations, unfair competition, and negligent misrepresentation. Defendants filed a special motion to strike the complaint under the anti-SLAPP statute.

The trial court denied the motion in its entirety, finding the conduct underlying Area 51’s claims was not protected activity.

The court of appeal affirmed in part and reversed in part, holding that Area 51’s first five causes of action against the city did not arise from protected activity. At issue was the city’s alleged refusal to honor its agreement with Area 51; any surrounding communications were merely evidence of that refusal. The city’s action in allegedly breaching its agreement with Area 51 agreement here was not itself protected activity. The same could not be said for the individual city defendants and the PM defendants, however. The sole basis for asserting liability against the city employees and PM was what they did on behalf of the city. That conduct, as alleged in Area 51’s complaint, was expressive in nature; the sole basis for their alleged liability appeared to be their communications, either in saying things that formed an alleged contract with the city, or in saying things that announced the end of that contract. Their conduct at issue was thus protected activity. Finally, as to Area 51’s claim of negligent misrepresentation, which arose from defendants’ alleged misrepresentations that Area 51’s contracts would be honored, that claim was based on purely expressive conduct. Because Area 51 failed to demonstrate a probability of prevailing on any of its claims against PM and the individual defendants, or on its claim of negligent misrepresentation, the trial court erred in denying defendants’ motion to strike those claims.

International Law

Property of foreign state not automatically subject to attachment upon entry of judgment against state (Sotomayor, J.)

Rubin v. Islamic Republic of Iran

U.S. Sup. Ct.; February 21, 2018; 16–534

The Foreign Sovereign Immunities Act of 1976 (FSIA) grants foreign states and their agencies and instrumentalities immunity from suit in the United States and grants their property immunity from attachment and execution in satisfaction of judgments against them, see 28 U. S. C. §§1604, 1609, but with some exceptions. Petitioners hold a judgment against respondent Islamic Republic of Iran pursuant to an exception that applies to foreign states designated as state sponsors of terrorism with respect to claims arising out of acts of terrorism. See §1605A. To enforce that judgment, petitioners filed an action in the District Court to attach and execute against certain Iranian assets—a collection of ancient clay tablets and fragments housed at respondent University of Chicago. The District Court concluded that §1610(g)—which provides that certain property will be “subject to attachment in aid of execution, and execution, upon [a §1605A] judgment as provided in this section”—does not deprive the collection of the immunity typically afforded the property of a foreign sovereign. The Seventh Circuit affirmed.

Held: Section 1610(g) does not provide a freestanding basis for parties holding a judgment under §1605A to attach and execute against the property of a foreign state; rather, for §1610(g) to apply, the immunity of the property at issue must be rescinded under a separate provision within §1610. Pp. 4–15.

(a) Congress enacted the FSIA in an effort to codify the careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions. As a default, foreign states have immunity “from the jurisdiction of the courts of the United States and of the States,” §1604, but there are express exceptions, including the one at issue here, for state sponsors of terrorism, see §1605A(a). The FSIA similarly provides as a default that “the property in the United States of a foreign state shall be immune from attachment arrest and execution.” §1609. But §1610 outlines certain exceptions to this immunity. For example, §1610(a)(7) provides that property in the United States of a foreign state that is used for a commercial activity in the United States shall not be immune from attachment and execution where the plaintiff holds a §1605A judgment against the foreign state. Before 2008, the
FSIA did not expressly address under which circumstances a foreign state’s agencies or instrumentalities could be held liable for judgments against the state. The Court had addressed that question in First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U. S. 611, 628 (Bancec), and held that, as a default, agencies and instrumentalities of a foreign state are separate legal entities that cannot be held liable. It recognized the availability of exceptions, however, and left the lower courts to determine whether an exception applied on a case-by-case basis. The lower courts coalesced around five relevant factors (the Bancec factors) to assist in those determinations. In 2008, Congress amended the FSIA, adding §1610(g). Subparagraphs (A) through (E) incorporate almost verbatim the Bancec factors, leaving no dispute that, at a minimum, §1610(g) serves to abrogate Bancec where a §1605A judgment holder seeks to satisfy a judgment held against the foreign state. The question here is whether, in addition to abrogating Bancec, it provides a freestanding exception to property immunity in the context of a §1605A judgment. Pp. 4–8.

(b) The most natural reading of §1610(g)(1)’s phrase “as provided in this section” is that it refers to §1610 as a whole, so that §1610(g)(1) will apply to property that is exempted from the grant of immunity as provided elsewhere in §1610. Those §1610 provisions that do unambiguously revoke the immunity of a foreign state’s property employ phrases such as “shall not be immune,” see §1610(a)(7), and “[n]otwithstanding any other provision of law,” see §1610(f)(1)(A). Such textual markers are conspicuously absent from §1610(g). Thus, its phrase “as provided in this section” is best read to signal only that a judgment holder seeking to take advantage of §1610(g)(1) must identify a basis under one of §1610’s express immunity-abrogating provisions to attach and execute against a relevant property. This reading provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of Bancec. It is also consistent with the basic interpretive canon to construe a statute so as to give effect to all of its provisions, see Corley v. United States, 556 U. S. 303, 314, and with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state’s commercial acts, see Verlinden B. V. v. Central Bank of Nigeria, 461 U. S. 480, 487–488. Pp. 8–11.

(c) Petitioners’ counterarguments are unpersuasive. They assert that the phrase “as provided in this section” might refer to the procedures in §1610(f)(1), which permits §1605A judgment holders to attach and execute against property associated with certain prohibited financial transactions, but which was waived by the President before it could take effect. However, it is not logical to read the phrase as indicating a congressional intent to create §1610(g) as an alternative to §1610(f)(1), particularly since Congress knows how to make clear when it is rescinding immunity. Nor could Congress have intended “as provided in this section” to refer only to §1610(f)(2)’s instruction that the Federal Government assist in identifying assets, since that provision does not provide for attachment or execution at all. Finally, there is no basis to conclude that “this section” in §1610(g) reflects a mere drafting error.

The words “property of a foreign state,” which appear in the first substantive clause of §1610(g), are not rendered superfluous under the Court’s reading. Section 1610(g) serves to identify in one place all the categories of property that will be available to §1605A judgment holders for attachment and execution, and commands that the availability of such property will not be limited by the Bancec factors. Also, without the opening clause, §1610(g) would abrogate the Bancec presumption of separateness in all cases, not just those involving terrorism judgments under §1605A. Although petitioners contend that any uncertainty in §1610(g) should be resolved by giving full effect to the legislative purpose behind its enactment—removing obstacles to enforcing terrorism judgments—they offer no real support for their position that §1610(g) was intended to divest all property of a foreign state or its agencies or instrumentalities of immunity. Bank Markazi v. Peterson, 578 U. S. ___, ___, n. 2, distinguished. Pps. 12–15.

830 F. 3d 470, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which all other Members joined, except KAGAN, J., who took no part in the consideration or decision of the case.
JUSTICE BREYER delivered the opinion of the Court.

Does a guilty plea bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution? In our view, a guilty plea by itself does not bar that appeal.

I

In September 2013, a federal grand jury indicted petitioner Rodney Class, for possessing firearms in his locked jeep, which was parked in a lot on the grounds of the United States Capitol in Washington, D.C. See 40 U.S.C. § 5104(e)(1) (“An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm”). Soon thereafter, Class, appearing pro se, asked the Federal District Court for the District of Columbia to dismiss the indictment. As relevant here, Class alleged that the statute, §5104(e), violates the Second Amendment. App. in No. 15–3015 (CADC), pp. 32–33. He also raised a due process claim, arguing that he was denied fair notice that weapons were banned in the parking lot. Id., at 39. Following a hearing, the District Court denied both claims. App. to Pet. for Cert. 9a.


A written plea agreement set forth the terms of Class’ guilty plea, including several categories of rights that he expressly agreed to waive. Those express waivers included: (1) all defenses based upon the statute of limitations; (2) several specified trial rights; (3) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range; (4) most collateral attacks on the conviction and sentence; and (5) various rights to request or receive information concerning the investigation and prosecution of his criminal case. Id., at 38–42. At the same time, the plea agreement expressly enumerated categories of claims that Class could raise on appeal, including claims based upon (1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence reductions. Id., at 41. Finally, the plea agreement stated under the heading “Complete Agreement”:

“No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements . . . be made unless committed to writing and signed . . . .” Id., at 45.

The agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.

The District Court held a plea hearing during which it reviewed the terms of the plea agreement (with Class present and under oath) to ensure the validity of the plea. See Fed. Rule Crim. Proc. 11(b); United States v. Ruiz, 536 U.S. 622, 629 (2002) (defendant’s guilty plea must be “voluntary” and “related waivers” must be made “knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences”). After providing Class with the required information and warnings, the District Court accepted his guilty plea. Class was sentenced to 24 days imprisonment followed by 12 months of supervised release.

Several days later, Class appealed his conviction to the Court of Appeals for the District of Columbia Circuit. Class was appointed an amicus to aid him in presenting his arguments. He repeated his constitutional claims, namely, that the statute violates the Second Amendment and the Due Process Clause because it fails to give fair notice of which areas fall within the Capitol Grounds where firearms are banned. The Court of Appeals held that Class could not raise his constitutional claims because, by pleading guilty, he had waived them. App. to Pet. for Cert. 1a–5a. Class filed a petition for certiorari in this Court asking us to decide whether in pleading guilty a criminal defendant inherently waives the right to challenge the constitutionality of his statute of conviction. We agreed to do so.

II

The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. We hold that it does not. Class did not relinquish his right to appeal the District Court’s constitutional determinations simply by pleading guilty. As we shall explain, this holding flows directly from this Court’s prior decisions.

Fifty years ago this Court directly addressed a similar claim (a claim that the statute of conviction was unconstitutional). And the Court stated that a defendant’s “plea of guilty did not . . . waive his previous [constitutional] claim.” Haynes
v. United States, 390 U. S. 85, 87, n. 2 (1968). Though Justice Harlan’s opinion for the Court in Haynes offered little explanation for this statement, subsequent decisions offered a rationale that applies here.

In Blackledge v. Perry, 417 U. S. 21 (1974), North Carolina indicted and convicted Jimmy Seth Perry on a misdemeanor assault charge. When Perry exercised his right under a North Carolina statute to a de novo trial in a higher court, the State reindicted him, but this time the State charged a felony, which carried a heavier penalty, for the same conduct. Perry pleaded guilty. He then sought habeas relief on the grounds that the reindictment amounted to an unconstitutional vindictive prosecution. The State argued that Perry’s guilty plea barred him from raising his constitutional challenge. But this Court held that it did not.

The Court noted that a guilty plea bars appeal of many claims, including some “antecedent constitutional violations” related to events (say, grand jury proceedings) that had “occurred prior to the entry of the guilty plea.” Id., at 30 (quoting Tollett v. Henderson, 411 U. S. 258, 266–267 (1973)). While Tollett claims were “of constitutional dimension,” the Court explained that “the nature of the underlying constitutional infirmity is markedly different” from a claim of vindictive prosecution, which implicates “the very power of the State” to prosecute the defendant. Blackledge, 417 U. S., at 30. Accordingly, the Court wrote that “the right” Perry “asserts and that we today accept is the right not to be haled into court at all upon the felony charge” since “[t]he very initiation of the proceedings” against Perry “operated to deprive him due process of law.” Id., at 30–31.

A year and a half later, in Mennd v. New York, 423 U. S. 61 (1975) (per curiam), this Court repeated what it had said and held in Blackledge. After Menna served a 30-day jail term for refusing to testify before the grand jury on November 7, 1968, the State of New York charged him once again for (what Menna argued was) the same crime. Menna pleaded guilty, but subsequently appealed arguing that the new charge violated the Double Jeopardy Clause. U. S. Const., Amdt. 5. The lower courts held that Menna’s constitutional claim had been “waived” by his guilty plea.

This Court reversed. Citing Blackledge, supra, at 30, the Court held that “a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.” Menna, 423 U. S., at 63, and n. 2. Menna’s claim amounted to a claim that “the State may not convict” him “no matter how validly his factual guilt is established.” Ibid. Menna’s “guilty plea, therefore, [did] not bar the claim.” Ibid.

These holdings reflect an understanding of the nature of guilty pleas which, in broad outline, stretches back nearly 150 years. In 1869 Justice Ames wrote for the Supreme Judicial Court of Massachusetts:

“The plea of guilty is, of course, a confession of all the facts charged in the indictment, and also of the evil imputed to the defendant. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion. But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged.” Commonwealth v. Hinds, 101 Mass. 209, 210.

Decisions of federal and state courts throughout the 19th and 20th centuries reflect a similar view of the nature of a guilty plea. See United States v. Ury, 106 F. 2d 28 (CA2 1939) (holding the “plea of guilty did not foreclose the appellant,” who argued that a statute was unconstitutional, “from the review he now seeks” (citing earlier cases)); Hocking Valley R. Co. v. United States, 210 F. 735 (CA6 1914) (holding that a defendant may raise the claim that, because the indictment did not charge an offense no crime has been committed, for it is “the settled rule that,” despite a guilty plea, a defendant “may urge” such a contention “in the reviewing court”)); Carper v. State, 27 Ohio St. 572, 575 (1875) (same). We refer to these cases because it was against this background that Justice Harlan in his opinion for the Court made the statement to which we originally referred, namely, that a defendant’s “plea of guilty did not, of course, waive his previous [constitutional] claim.” Haynes, 390 U. S., at 87, n. 2 (citing Ury, supra, at 28).

In more recent years, we have reaffirmed the Menna-Blackledge doctrine and refined its scope. In United States v. Broce, 488 U. S. 563 (1989), the defendants pleaded guilty to two separate indictments in a single proceeding which “on their face” described two separate bid-rigging conspiracies. Id., at 576. They later sought to challenge their convictions on double jeopardy grounds, arguing that they had only admitted to one conspiracy. Citing Blackledge and Mennd, this Court repeated that a guilty plea does not bar a claim on appeal “where on the face of the record the court had no power to enter the conviction or impose the sentence.” 488 U. S., at 569. However, because the defendants could not “prove their claim by relying on those indictments and the existing record” and “without contradicting those indictments,” this Court held that their claims were “foreclosed by the admissions inherent in their guilty pleas.” Id., at 576.

Unlike the claims in Broce, Class’ constitutional claims here, as we understand them, do not contradict the terms of the indictment or the written plea agreement. They are consistent with Class’ knowing, voluntary, and intelligent admission that he did what the indictment alleged. Those claims can be “resolved without any need to venture beyond that record.” Id., at 575.

Nor do Class’ claims focus upon case-related constitutional defects that “occurred prior to the entry of the guilty plea.” Blackledge, 417 U. S., at 30. They could not, for example, “have been ‘cured’ through a new indictment by a properly selected grand jury.” Ibid. (citing Tollett, 411 U. S., at 267). Because the defendant has admitted the charges
against him, a guilty plea makes the latter kind of constitutional claim “irrelevant to the constitutional validity of the conviction.” *Haring v. Provise*, 462 U. S. 306, 321 (1983). But the cases to which we have referred make clear that a defendant’s guilty plea does not make irrelevant the kind of constitutional claim Class seeks to make.

In sum, the claims at issue here do not fall within any of the categories of claims that Class’ plea agreement forbids him to raise on direct appeal. They challenge the Government’s power to criminalize Class’ (admitted) conduct. They thereby call into question the Government’s power to “constitutionally prosecute” him. *Broce, supra*, at 575 (quoting *Menna, supra*, at 61–62, n. 2). A guilty plea does not bar a direct appeal in these circumstances.

III

We are not convinced by the three basic arguments that the Government and the dissent make in reply.

First, the Government contends that by entering a guilty plea, Class inherently relinquished his constitutional claims. The Government is correct that a guilty plea does implicitly waive some claims, including some constitutional claims. However, as we explained in Part II, *supra*, Class’ valid guilty plea does not, by itself, bar direct appeal of his constitutional claims in these circumstances.

As an initial matter, a valid guilty plea “forbids not only a fair trial, but also other accompanying constitutional guarantees.” *Ruiz*, 536 U. S., at 628–629. While those “simultaneously” relinquished rights include the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers, *McCarthy v. United States*, 394 U. S. 459, 466 (1969), they do not include “a waiver of the privileges which exist beyond the confines of the trial.” *Mitchell v. United States*, 526 U. S. 314, 324 (1999). Here, Class’ statutory right directly to appeal his conviction “cannot in any way be characterized as part of the trial.” *Lafler v. Cooper*, 566 U. S. 156, 165 (2012).

A valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered. See, e.g., *Haring, supra*, at 320 (holding a valid guilty plea “results in the defendant’s loss of any meaningful opportunity he might otherwise have had to challenge the admissibility of evidence obtained in violation of the Fourth Amendment”). Neither can the defendant later complain that the indicting grand jury was unconstitutionally selected. *Tollett, supra*, at 266. But, as we have said, those kinds of claims are not at issue here.

Finally, a valid guilty plea relinquishes any claim that would contradict the “admissions necessarily made upon entry of a voluntary plea of guilty.” *Broce, supra*, at 573–574. But the constitutional claim at issue here is consistent with Class’ admission that he engaged in the conduct alleged in the indictment. Unlike the defendants in *Broce*, Class’ challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like the defendants in *Blackledge* and *Menna*, he seeks to raise a claim which, “judged on its face” based upon the existing record, would extinguish the government’s power to “constitutionally prosecute” the defendant if the claim were successful. *Broce, supra*, at 575 (quoting *Menna*, 423 U. S., at 62–63, and n. 2).

Second, the Government and the dissent point to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, which governs “conditional” guilty pleas. The Rule states:

> “Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.”

The Government and the dissent argue that Rule 11(a)(2) means that “a defendant who pleads guilty cannot challenge his conviction on appeal on a forfeitable or waivable ground that he either failed to present to the district court or failed to reserve in writing.” Brief for United States 23; see also post, at 3–4, 17–18 (opinion of ALITO, J.). They support this argument by pointing to the notes of the Advisory Committee that drafted the text of Rule 11(a)(2). See Advisory Committee’s Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 911 (hereinafter Advisory Committee’s Notes). In particular, the dissent points to the suggestion that an unconditional guilty plea constitutes a waiver of “non-jurisdictional defects,” while the Government points to the drafter’s statement that they intended the Rule’s “conditional plea procedure . . . to conserve prosecutorial and judicial resources and advance speedy trial objectives,” while ensuring “much needed uniformity in the federal system on this matter.” *Ibid.*; see *United States v. Vonn*, 535 U. S. 55, 64, n. 6 (2002) (approving of Advisory Committee’s Notes as relevant evidence of the drafter’s intent). The Government adds that its interpretation of the Rule furthers these basic purposes. And, the argument goes, just as defendants must use Rule 11(a)(2)’s procedures to preserve, for instance, Fourth Amendment unlawful search-and-seizure claims, so must they use it to preserve the constitutional claims at issue here.

The problem with this argument is that, by its own terms, the Rule itself does not say whether it sets forth the exclusive procedure for a defendant to preserve a constitutional claim following a guilty plea. At the same time, the drafter’s notes acknowledge that the “Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty.” Advisory Committee’s Notes, at 912. The notes then specifically refer to the “*Menna-Blackledge* doctrine.” *Ibid.* They add that the Rule “should not be interpreted as either broadening or narrowing [that] doctrine or as establishing procedures for its application.” *Ibid.* And the notes state that Rule 11(a)(2) “has no application” to the “kinds of constitutional objections” that may be raised under that
doctrine. *Ibid.* The applicability of the *Menna-Blackledge* doctrine is at issue in this case. Cf. *Broce*, 488 U. S., at 569 (acknowledging *Menna* and *Blackledge* as covering claims “where on the face of the record the court had no power to enter the conviction or impose the sentence”). We therefore hold that Rule 11(a)(2) cannot resolve this case.

*Third,* the Government argues that Class “expressly waived” his right to appeal his constitutional claim. Brief for United States 15. The Government concedes that the written plea agreement, which sets forth the “Complete Agreement” between Class and the Government, see App. 45–46, does not contain this waiver. *Id.,* at 48–49. Rather, the Government relies on the fact that during the Rule 11 plea colloquy, the District Court Judge stated that, under the written plea agreement, Class was “giving up [his] right to appeal [his] conviction.” *Id.,* at 76. And Class agreed.

We do not see why the District Court Judge’s statement should bar Class’ constitutional claims. It was made to ensure Class understood “the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” Fed. Rule Crim. Proc. 11(b)(1)(N). It does not expressly refer to a waiver of the appeal right here at issue. And if it is interpreted as expressly including that appeal right, it was wrong, as the Government acknowledged at oral argument. See Tr. of Oral Arg. 35–36. Under these circumstances, Class’ acquiescence neither expressly nor implicitly waived his right to appeal his constitutional claims.

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For these reasons, we hold that Rodney Class may pursue his constitutional claims on direct appeal. The contrary judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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**JUSTICE ALITO,** with whom **JUSTICE KENNEDY** and **JUSTICE THOMAS** join, dissenting.

Roughly 95% of felony cases in the federal and state courts are resolved by guilty pleas.1 Therefore it is critically important that defendants, prosecutors, and judges understand the consequences of these pleas. In this case, the parties have asked us to identify the claims that a defendant can raise on appeal after entering an unconditional guilty plea. Regrettably, the Court provides no clear answer.

By my count, the Court identifies no fewer than five rules for ascertaining the issues that can be raised. According to the Court, a defendant who pleads guilty may assert on appeal (1) a claim that “implicates ‘the very power of the State’ to prosecute [him],” *ante,* at 4, (2) a claim that does not contradict the facts alleged in the charging document, *ante,* at 5–6, (3) a claim that “the facts alleged and admitted do not constitute a crime,” *ante,* at 5, and (4) claims other than “case-related constitutional defects that ‘occurred prior to the entry of the guilty plea,’” *ante,* at 6–7 (some internal quotation marks omitted). In addition, the Court suggests (5) that such a defendant may not be able to assert a claim that “contradict[s] the terms of . . . [a] written plea agreement,” *ante,* at 6, but whether this rule applies when the claim falls into one of the prior four categories is left unclear. How these rules fit together is anybody’s guess. And to make matters worse, the Court also fails to make clear whether its holding is based on the Constitution or some other ground.

I

There is no justification for the muddle left by today’s decision. The question at issue is not conceptually complex. In determining whether a plea of guilty prevents a defendant in federal or state court from raising a particular issue on appeal, the first question is whether the Federal Constitution precludes waiver. If the Federal Constitution permits waiver, the next question is whether some other law nevertheless bars waiver. And if no law prevents waiver, the final question is whether the defendant knowingly and intelligently waived the right to raise the claim on appeal. *McMann v. Richardson,* 397 U. S. 759, 766 (1970).

Petitioner Rodney Class was charged with violating a federal statute that forbids the carrying of firearms on the grounds of the United States Capitol. See 40 U. S. C. §5104(e) (1). After entering an unconditional guilty plea, he appealed his conviction, asserting that his conduct was protected by the Second Amendment and that the statute he violated is unconstitutionally vague. The Court of Appeals affirmed his conviction, holding that Class had relinquished his right to litigate these claims when he entered his unconditional plea.

Analyzing this case under the framework set out above, I think the Court of Appeals was clearly correct. First, the Federal Constitution does not prohibit the waiver of the rights Class asserts. We have held that most personal constitutional rights may be waived, see, e.g., *Peretz v. United States,* 501 U. S. 923, 936–937 (1991), and Class concedes that this is so with respect to the rights he is asserting, Tr. of Oral Arg. 5, 18.

Second, no federal statute or rule bars waiver. On the contrary, Rule 11 of the Federal Rules of Criminal Procedure makes it clear that, with one exception that I will discuss below, a defendant who enters an unconditional plea waives all nonjurisdictional claims. Although the Rule does not say this expressly, that is the unmistakable implication of subdivision (a)(2), which allows a defendant, “[w]ith the consent of the court and the government,” to “enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a

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specified pretrial motion.” “Where [a law] explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary . . . intent.” Andrus v. Glover Constr. Co., 446 U. S. 608, 616–617 (1980). And here, there is strong evidence confirming that other exceptions were ruled out.

The Advisory Committee’s Notes on Rule 11 make this clear, stating that an unconditional plea (with the previously mentioned exception) “constitutes a waiver of all nonjurisdictional defects.” Notes on 1983 Amendments, 18 U. S. C. App., p. 911. Advisory Committee’s Notes on a federal rule of procedure “provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed.” United States v. Vonn, 535 U. S. 55, 64, n. 6 (2002). Subdivision (a)(2) was adopted against the backdrop of decisions of this Court holding that a guilty plea generally relieves all defenses to conviction, see, e.g., Tollett v. Henderson, 411 U. S. 258, 267 (1973), and Rule 11(a)(2) creates a limited exception to that general principle. Far from prohibiting the waiver of nonjurisdictional claims, Rule 11 actually bars the raising of such claims (once again, with the previously mentioned exception).

For now, I will skip over that exception and proceed to the final question—whether class voluntarily and intelligently waived his right to raise his Second Amendment and due process challenges to his conviction (except for the claim that his plea was not voluntary and intelligent), and the prosecution could assert this forfeiture to defeat a subsequent appeal. The theory was easy to understand. As we explained in Tollett, our view was that “a guilty plea represents a break in the chain of events which has preceded it in the criminal process.” 411 U. S., at 267. The defendant’s decision to plead guilty extinguished his right to litigate whatever “possible defenses” or “constitutional plea[s] in abatement” he might have pursued at trial or on appeal. Id., at 267–268. Guilty pleas were understood to have this effect because a guilty plea comprises both factual and legal concessions. Hence, we said in Tollett, a defendant who pleads guilty is barred from contesting not only the “historical facts” but also the “constitutional significance” of those facts, even if he failed to “correctly appraise[s]” that significance at the time of his plea. Id., at 267 (emphasis added).

When Tollett declared that a guilty plea encompasses all legal and factual concessions necessary to authorize the conviction, it was simply reiterating a principle we had enunciated many times before, most recently in the so-called “Brady trilogy.” See Brady v. United States, 397 U. S. 742, 748 (1970) (“[t]he plea is more than an admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered”); McMann, 397 U. S., at 774 (a defendant who pleads guilty “assumes the risk of ordinary error in either his or his attorney’s assessment of the law and facts”); Parker v. North Carolina, 397 U. S. 790, 797 (1970) (similar). As we put it in Boykin v. Alabama, 395 U. S. 238, 242 (1969), “[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.”

On the strength of that rule, we held that defendants who pleaded guilty forfeited a variety of important constitutional claims. For instance, a defendant who pleaded guilty could not attack his conviction on the ground that the prosecution violated the Equal Protection Clause by systematically excluding African-Americans from grand juries in the county where he was indicted. Tollett, supra, at 266. Nor could he argue that the prosecution unlawfully coerced his confes-

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2. Advisory Committee’s Notes should not be equated with congressional committee reports and other items of legislative history. Advisory Committee’s Notes are adopted by the committee that drafts the rule; they are considered by the Judicial Conference when it recommends promulgation of the rule; they are before this Court when we prescribe the rule under the Rules Enabling Act, 28 U. S. C. §2072; and they are submitted to Congress together with the text of the rule under 28 U. S. C. §2074.
tion—even if the confession was the only evidence supporting the conviction. *McMann*, *supra*, at 768; *Parker*, *supra*, at 796–797. Nor could he assert that his statute of conviction employed an unconstitutional penalty provision; his consent to be punished under the statute precluded this defense. *Brady*, *supra*, at 756–757. Reflecting our general thinking, then-Judge Burger explained: “[I]f voluntarily and understandably made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law.” *Edwards v. United States*, 256 F. 2d 707, 709 (CADC 1958) (footnote omitted); see also A. Bishop, Waivers in Pleas of Guilty, 60 F. R. D. 513, 525–526 (1974) (summarizing the state of the law on the eve of *Blakledge*: “All the bulwarks of the fortress of defense are abandoned by the plea of guilty. . . . The plea of guilty surrenders all defenses whatever and all nonjurisdictional defects” (collecting cases)).

III

*Blakledge* and *Menna* diverged from these prior precedents, but neither case provided a clear or coherent explanation for the departure.

A

In *Blakledge*, the Court held that a defendant who pleaded guilty could nevertheless challenge his conviction on the ground that his right to due process was violated by a vindictive prosecution. 417 U. S., at 30–31. The Court asserted that this right was “markedly different” from the equal protection and Fifth Amendment rights at stake in *Tollett* and the *Brady* trilogy because it “went to the very power of the State to bring the defendant into court to answer the charge brought against him.” 417 U. S., at 30. The meaning of this distinction, however, is hard to grasp.

The most natural way to understand *Blakledge*’s reference to “the very power of the State” would be to say that an argument survives a guilty plea if it attacks the court’s jurisdiction. After all, that is usually what we mean when we refer to the power to adjudicate. *E.g.*, *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 514 (2006); *United States v. Cotton*, 535 U. S. 625, 630 (2002); *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 89 (1998). But that cannot be what *Blakledge* meant.

First, the defendant in *Blakledge* had been tried in state court in North Carolina for a state-law offense, and the jurisdiction of state courts to entertain such prosecutions is purely a matter of state law (unless Congress validly and affirmativelyousts their jurisdiction—something that had not happened in that case).3 Second, a rule that jurisdictional defects alone survive a guilty plea would not explain the result in *Blakledge* itself. Arguments attacking a court’s subject-matter jurisdiction can neither be waived nor forfeited. See, *e.g.*, *Wisconsin Dept. of Corrections v. Schacht*, 524 U. S. 381, 389 (1998); *Miller v. Roberts*, 212 N. C. 126, 129, 193 S. E. 286, 288 (1937). But the due process right at issue in *Blakledge* was perfectly capable of being waived or forfeited—as is just about every other right that is personal to a criminal defendant. See, *e.g.*, *Perez*, 501 U. S., at 936–937.

If the “very power to prosecute” theory does not refer to jurisdiction, what else might it mean? The only other possibility that comes to mind is that it might mean that a defendant can litigate a claim if it asserts a right not to be tried, as opposed to a right not to be convicted. But we have said that “virtually all rights of criminal defendants” are “merely . . . right[s] not to be convicted,” as distinguished from “right[s] not to be tried.” *Flanagan v. United States*, 465 U. S. 259, 267 (1984). Even when a constitutional violation requires the dismissal of an indictment, that “does not mean that [the] defendant en[joi]ed a ‘right not to be tried’” on the charges. *United States v. Mac-Donald*, 435 U. S. 850, 860, n. 7 (1978).

The rule could hardly be otherwise. Most constitutional defenses (and plenty of statutory defenses), if successfully asserted in a pretrial motion, deprive the prosecution of the “power” to proceed to trial or secure a conviction. If that remedial consequence converted them all into rights not to be prosecuted, *Blakledge* would have no discernible limit. “We have, after all, acknowledged that virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a ‘right not to stand trial.’” *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U. S. 863, 873 (1994). Indeed, “all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial.” *Van Cauwenbergh v. Biard*, 486 U. S. 517, 524 (1988).

It is true that we have spoken of a distinction between a right not to be tried and a right not to be convicted in one context: when defining the scope of the collateral order doctrine. *E.g.*, *Flanagan*, *supra*, at 265–267. That is, we have allowed defendants in federal criminal cases to take an immediate appeal from the denial of a pretrial motion when the right at issue is properly understood to be a right not to be tried. A prime example is a case in which a defendant claims that a prosecution would violate the Double Jeopardy Clause. See *Abney v. United States*, 431 U. S. 651, 662 (1977). Allowing an interlocutory appeal in that situation protects against all the harms that flow from the prolongation of a case that should never have been brought. See *id.*., at 661. But that rationale cannot justify the *Menna-Blakledge* doctrine, because allowing a defendant to appeal after a guilty plea does not cut short a prosecution that should never have been brought. On the contrary, it prolongs the litigation. So the distinction drawn in our collateral order cases makes no sense in distinguishing between the claims that should and the claims that should not survive a guilty plea.

Nor, in any event, would such a rule be consistent with the *decision* in *Blakledge*, because we have held that an unsuccessful vindictive prosecution claim may *not* be appealed be-

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3. Even for cases prosecuted in federal court, an alleged vindictive prosecution does not present a jurisdictional defect. See 18 U. S. C. §3231.
fore trial. United States v. Hollywood Motor Car Co., 458 U. S. 263, 264 (1982) (per curiam). And none of this would do any good for Class, for we have never permitted a defendant to appeal a pretrial order rejecting a constitutional challenge to the statute the defendant allegedly violated. In fact we have repudiated the very suggestion. Id., at 270.

The upshot is that the supposed “right not to be prosecuted” has no intelligible meaning in this context. And Blackledge identified no basis for this new right in the text of the Constitution or history or prior precedent. What is more, it did all this without bothering to consider the understanding of a guilty plea under the law of the State where the Blackledge defendant was convicted or anything that was said to him or that he said at the time of his plea.

B

If the thinking behind Blackledge is hard to follow, Menna may be worse. In that case, the Court held that a defendant who pleaded guilty could challenge his conviction on double jeopardy grounds. 423 U. S., at 62. The case was decided by a three-page per curiam opinion, its entire analysis confined to a single footnote. And the footnote, rather than elucidating what was said in Blackledge, substituted a different rationale. Arguing that Tollett and the other prior related cases did not preclude appellate review of the double jeopardy claim, the Court wrote:

“A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State’s imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt.” Menna, 423 U. S., at 62–63, n. 2.

The wording of the final sentence is not easy to parse, but I interpret the Court’s reasoning as follows: A defendant who pleads guilty does no more than admit that he committed the essential conduct charged in the indictment; therefore a guilty plea allows the litigation on appeal of any claim that is not inconsistent with the facts that the defendant necessarily admitted. If that is the correct meaning, the sentence would overrule many of the cases that it purported to distinguish, including Tollett, which involved an unconstitutional grand jury claim. It would contradict much that the Court had previously said about the effect of a guilty plea. See, e.g., Boykin, 395 U. S., at 242 (“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction”). And it would permit a defendant who pleads guilty to raise on appeal a whole host of claims, including, for example, the denial of motions to suppress evidence allegedly obtained in violation of the Fourth, Fifth, or Sixth Amendments. See, e.g., Linkletter v. Walker, 381 U. S. 618, 638 (1965) (most Fourth Amendment claims have “no bearing on guilt”). A holding of that scope is not what one expects to see in a footnote in a per curiam opinion, but if the Court meant less, its meaning is unclear.

C

When the Court returned to Blackledge and Menna in United States v. Broce, 488 U. S. 563 (1989), the Court essentially repudiated the theories offered in those earlier cases. (The Court terms this a “reaffirm[ation].” Ante, at 6.) Like Menna, Broce involved a defendant (actually two defendants) who pleaded guilty but then sought to attack their convictions on double jeopardy grounds. 488 U. S., at 565. This time, however, the Court held that their guilty pleas prevented them from litigating their claims. Ibid.

The Court began by specifically disavowing Menna’s suggestion that a guilty plea admits only “factual guilt,” meaning “the acts described in the indictments.” Broce, 488 U. S., at 568–569. Instead, the Court explained, an unconditional guilty plea admits “all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.” Id., at 569 (emphasis added). “By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.” Id., at 570. Such “admissions,” Broce continued, are “necessarily made upon entry of a voluntary plea of guilty.” Id., at 573–574. And invoking Tollett, the Court added that it makes no difference whether the defendant “may not have correctly appraised the constitutional significance of certain historical facts.” 488 U. S., at 572 (quoting 411 U. S., at 276). Thus, the Court concluded, a defendant’s decision to plead guilty necessarily extinguishes whatever “potential defense[s]” he might have asserted in an effort to show that it would be unlawful to hold him liable for his conduct. 488 U. S., at 573. So much for Menna.

As for Blackledge, by holding that the defendants’ double jeopardy rights were extinguished by their pleas, Broce necessarily rejected the idea that a right not to be tried survives an unconditional guilty plea. See Abney, 431 U. S., at 662 (holding for collateral-order-doctrine purposes that the Double Jeopardy Clause confers a right not to be tried).

While Broce thus rejected the reasoning in Blackledge and Menna, the Court was content to distinguish those cases on the ground that they involved defendants who could succeed on appeal without going beyond “the existing record,” whereas the defendants in Broce would have to present new evidence. Broce, supra, at 575.4

4. The majority asserts that, unlike the defendants in Broce, Class can make out his constitutional arguments without needing to undertake any factual development. Ante, at 6. It is difficult to see how that can be true. Class’s Second Amendment argument is that banning firearms in the Maryland Avenue parking lot of the Capitol Building goes too far, at least as applied to him specifically. As his court-appointed amicus presented it to the Court of Appeals, this argument depends on Class’s own personal characteristics, including his record of mental health and law abidingness, as well as characteristics specific to the
IV

A

This is where the Menna-Blackledge doctrine stood when we heard this case. Now, instead of clarifying the law, the Court sows new confusion by reiterating with seeming approval a string of catchphrases. The Court repeats the line that an argument survives if it “implicates ‘the very power of the State’ to prosecute the defendant,” ante, at 4 (quoting Blackledge, 417 U. S., at 30), but this shibboleth is no more intelligible now than it was when first incanted in Blackledge. The Court also parrots the rule set out in the Menna footnote—that the only arguments waived by a guilty plea are those that contradict the facts alleged in the charging document, see ante, at 5–6, even though that rule is inconsistent with Tollett, the Brady trilogy, and Broce—and even though this reading would permit a defendant who pleads guilty to raise an uncertain assortment of claims never before thought to survive a guilty plea.

For example, would this rule permit a defendant to argue that his prosecution is barred by a statute of limitations or by the Speedy Trial Act? Presumably the answer is yes. By admitting commission of the acts alleged in an indictment or complaint, a defendant would not concede that the charge was timely. What about the argument that a defendant’s alleged conduct does not violate the statute of conviction? Here again, the rule barring only those claims inconsistent with the facts alleged in the indictment or complaint would appear to permit the issue to be raised on appeal, but the Court says that a defendant who pleads guilty “has admitted the charges against him.” Ante, at 7. What does this mean, exactly? The majority is coy, but “admit[ting] the charges against him” would appear to mean admitting that his conduct satisfies each element of the statute he is charged with violating. It must mean that because we have held that if a defendant does not understand that he is admitting his conduct satisfies each element of the crime, his guilty plea is involuntary and unintelligent and therefore invalid. Henderson v. Morgan, 426 U. S. 637, 644–645 (1976). So if a defendant who pleads guilty “admit[s] the charges against him,” and if he does not claim that his plea was involuntary or unintelligent, his plea must be taken as an admission that he did everything the statute forbids.

But if that is so, then what about the rule suggested by the old Massachusetts opinion the Court touts? There, Justice Ames wrote that a guilty plea does not waive the right to argue that “‘the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth.’” Ante, at 5 (quoting Commonwealth v. Hinds, 101 Mass. 209, 210 (1869)). Does the Court agree with Justice Ames, or not?

Approaching the question from the opposite direction, the Court says that a guilty plea precludes a defendant from litigating “the constitutionality of case-related government conduct that takes place before the plea is entered.” Ante, at 8. This category is most mysterious. I thought Class was arguing that the Government violated the Constitution at the moment when it initiated his prosecution. That sounds like he is trying to attack “the constitutionality of case-related government conduct that[look] place before the plea [was] entered.” Yet the Court holds that he may proceed. Why?

Finally, the majority instructs that “a valid guilty plea relinquishes any claim that would contradict the ‘admissions necessarily made upon entry of a voluntary plea of guilty.’” Ibid. (quoting Broce, 488 U. S., at 573–574). I agree with that statement of the rule, but what the Court fails to acknowledge is that the scope of this rule depends on the law of the particular jurisdiction in question. If a defendant in federal court is told that under Rule 11 an unconditional guilty plea waives all nonjurisdictional claims (or as Broce put it, admits “all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence,” id., at 569), then that is the scope of the admissions implicit in the plea.

B

Perhaps sensing the incoherence of its effort, the majority seeks refuge in history, asserting that today’s holding “flows directly from this Court’s prior decisions.” Ante, at 3. But this history cannot prop up the Court’s decision. Start with Haynes v. United States, 390 U. S. 85, 87, n. 2 (1968), in which the Court reached the merits of a defendant’s constitutional challenge to his conviction despite the fact that he had pleaded guilty, Ante, at 3–4. A moment’s glance reveals that this decision is irrelevant for present purposes (which presumably explains why it was not even cited in Blackledge, Menna, Tollett, the Brady trilogy, or Broce).

In Haynes, the Government did not argue that the defendant’s guilty plea barred him from pressing his constitutional challenge on appeal. In fact, the Government conceded that he would be entitled to relief if his argument had merit. 390 U. S., at 100–101. No one has suggested that a defendant’s guilty plea strips an appellate court of jurisdiction to entertain a constitutional challenge to his conviction, so of course a reviewing court need not dismiss an appeal sua sponte if the Government does not assert the plea as a bar. But that tells us nothing about what ought to happen when, as in this case, the Government does argue that the defendant relinquished

Maryland Avenue parking lot, including, inter alia, its distance from the Capitol Building, the extent to which it is unsecured, the extent to which it is publicly accessible, what business typically occurs there, who regularly congregates there, and the nature of security screening visitors must pass through upon entering. See Opening Brief of Court-Appointed Amicus Curiae in Support of Appellant in No. 15–3015(CADC), pp. 34–35, 41–45. Similarly, Class’s due process argument requires an assessment of how difficult it would be for an average person to determine that the Maryland Avenue lot is part of the Capitol Grounds, which turns on the extent to which the lot is publicly accessible, how heavily trafficked it is and by what types of vehicles, whether there are signs indicating it is part of the Capitol Grounds or that guns are prohibited and where such signs are located, and whether there are security gates or checkpoints nearby. See id., at 51, 53. These arguments require facts. I understand the majority opinion to preclude Class from gathering any of them that are not already in the District Court record.
his right to litigate his constitutional argument when he opted to plead guilty.

One must squint even harder to figure out why the majority has dusted off Commonwealth v. Hinds, an 1869 decision of the Supreme Judicial Court of Massachusetts. Ante, at 5. Hinds involved a state-law motion (“arrest of judgment”) to set aside a conviction for a state-law crime (common law forgery), in a state-court proceeding after the defendant pleaded guilty. 101 Mass., at 210. One might already be wondering what relevance the effect of a guilty plea in state court, under state law, could have with respect to the effect of a guilty plea in federal court, under federal law. But in any event, what Hinds says about guilty pleas is not helpful to Class at all. In Massachusetts at that time, motions to arrest a judgment could be maintained only on the ground that the court that rendered the judgment lacked jurisdiction. Mass. Gen. Stat. §79 (1860); Commonwealth v. Eagan, 103 Mass. 71, 72 (1860); 3 F. Wharton, Criminal Law §3202, p. 177 (7th rev. ed. 1874). And Massachusetts, like all the other States, can define the jurisdiction of its courts as it pleases (except insofar as federal law validly prevents).

Thus, to the extent Hinds “reflect[s] an understanding of the nature of guilty pleas,” ante, at 5, it reflects nothing more than the idea that a defendant can assert jurisdictional defects even after pleading guilty. That rule is utterly unremarkable and of no help to Class. Today—as well as at the time of the founding—federal courts have jurisdiction over cases charging federal crimes. See 18 U. S. C. §3231; §9, 1 Stat. 76–77. And as early as 1830, the Court rejected the suggestion that a federal court is deprived of jurisdiction if “the indictment charges an offence not punishable criminally according to the law of the land.” Ex parte Watkins, 3 Pet. 193, 203. We have repeatedly reaffirmed that proposition. See, e.g., Lamar v. United States, 240 U. S. 60, 64 (1916) (court not deprived of jurisdiction even if “the indictment does not charge a crime against the United States”); United States v. Williams, 341 U. S. 58, 68–69 (1951) (same, even if “the statute is wholly unconstitutional, or . . . the facts stated in the indictment do not constitute a crime”); Cotton, 535 U. S., at 630–631. And although a handful of our “post–1867 cases” suggested that a criminal court lacked jurisdiction if “the statute under which [the defendant] had been convicted was unconstitutional,” those suggestions “reflected a ‘softening’ of the concept of jurisdiction” rather than that concept’s originally understood—and modern—meaning. Danforth v. Minnesota, 552 U. S. 264, 272, n. 6 (2008).

***

In sum, the governing law in the present case is Rule 11 of the Federal Rules of Criminal Procedure. Under that Rule, an unconditional guilty plea waives all nonjurisdictional claims with the possible exception of the “Menna-Blackledge doctrine” created years ago by this Court. That doctrine is vacuous, has no sound foundation, and produces nothing but confusion. At a minimum, I would limit the doctrine to the particular types of claims involved in those cases. I certainly would not expand its reach.

I fear that today’s decision will bedevil the lower courts. I respectfully dissent.
The Foreign Sovereign Immunities Act of 1976 (FSIA) grants foreign states and their agencies and instrumentalities immunity from suit in the United States (called jurisdictional immunity) and grants their property immunity from attachment and execution in satisfaction of judgments against them. See 28 U. S. C. §§1604, 1609. But those grants of immunity are subject to exception.

Petitioners hold a judgment against respondent Islamic Republic of Iran pursuant to one such exception to jurisdictional immunity, which applies where the foreign state is designated as a state sponsor of terrorism and the claims arise out of acts of terrorism. See §1605A. The issue presented in this case is whether certain property of Iran, specifically, a collection of antiquities owned by Iran but in the possession of respondent University of Chicago, is subject to attachment and execution by petitioners in satisfaction of that judgment. Petitioners contend that the property is stripped of its immunity by another provision of the FSIA, §1610(g), which they maintain provides a blanket exception to the immunity typically afforded to the property of a foreign state where the party seeking to attach and execute holds a §1605A judgment.

We disagree. Section 1610(g) serves to identify property that will be available for attachment and execution in satisfaction of a §1605A judgment, but it does not in itself divest property of immunity. Rather, the provision’s language “as provided in this section” shows that §1610(g) operates only when the property at issue is exempt from immunity as provided elsewhere in §1610. Petitioners cannot invoke §1610(g) to attach and execute against the antiquities at issue here, which petitioners have not established are exempt from immunity under any other provision in §1610.

I

A

On September 4, 1997, Hamas carried out three suicide bombings on a crowded pedestrian mall in Jerusalem, resulting in the deaths of 5 people and injuring nearly 200 others. Petitioners are United States citizens who were either wounded in the attack or are the close relatives of those who were injured. In an attempt to recover for their harm, petitioners sued Iran in the District Court for the District of Columbia, alleging that Iran was responsible for the bombing because it provided material support and training to Hamas. At the time of that action, Iran was subject to the jurisdiction of the federal courts pursuant to 28 U. S. C. §1605(a)(7) (1994 ed., Supp. II), which rescinded the immunity of foreign states designated as state sponsors of terrorism with respect to claims arising out of acts of terrorism. Iran did not appear in the action, and the District Court entered a default judgment in favor of petitioners in the amount of $71.5 million.

When Iran did not pay the judgment, petitioners brought this action in the District Court for the Northern District of Illinois to attach and execute against certain Iranian assets located in the United States in satisfaction of their judgment. Those assets—a collection of approximately 30,000 clay tablets and fragments containing ancient writings, known as the Persepolis Collection—are in the possession of the University of Chicago, housed at its Oriental Institute. University archeologists recovered the artifacts during an excavation of the old city of Persepolis in the 1930’s. In 1937, Iran loaned the collection to the Oriental Institute for research, translation, and cataloging.

Petitioners maintained in the District Court, inter alia, that §1610(g) of the FSIA renders the Persepolis Collection subject to attachment and execution. The District Court concluded otherwise and held that §1610(g) does not deprive the Persepolis Collection of the immunity typically afforded the property of a foreign sovereign. The Court of Appeals for the Seventh Circuit affirmed. 830 F. 3d 470 (2016). As relevant, the Seventh Circuit held that the text of §1610(g) demonstrates that the provision serves to identify the property of a foreign state or its agencies or instrumentalities that are subject to attachment and execution, but it does not in itself divest that property of immunity. The Court granted certiorari to resolve a split among the Courts of Appeals regarding the effect of §1610(g). 582 U. S. ___ (2017). We agree with the conclusion of the Seventh Circuit, and therefore affirm.
We start with a brief review of the historical development of foreign sovereign immunity law and the statutory framework at issue here, as it provides a helpful guide to our decision. This Court consistently has recognized that foreign sovereign immunity “is a matter of grace and comity on the part of the United States.” Verlinden B. V. v. Central Bank of Nigeria, 461 U. S. 480, 486 (1983); Schooner Exchange v. McFadden, 7 Cranch 116, 136 (1812). In determining whether to exercise jurisdiction over suits against foreign sovereigns, courts traditionally “deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns.” Verlinden, 461 U. S., at 486.

Prior to 1952, the State Department generally held the position that foreign states enjoyed absolute immunity from all actions in the United States. See ibid. But, as foreign states became more involved in commercial activity in the United States, the State Department recognized that such participation “makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.” J. Tate, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 Dept. State Bull. 984, 985 (1952). The Department began to follow the “restrictive” theory of foreign sovereign immunity in advising courts whether they should take jurisdiction in any given case. Immunity typically was afforded in cases involving a foreign sovereign’s public acts, but not in “cases arising out of a foreign state’s strictly commercial acts.” Verlinden, 461 U. S., at 487.

In 1976, Congress enacted the FSIA in an effort to codify this careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions. 90 Stat. 2891, as amended, 28 U. S. C. §1602 et seq. “For the most part, the Act” tracks “the restrictive theory of sovereign immunity.” Verlinden, 461 U. S., at 488. As a default, foreign states enjoy immunity “from the jurisdiction of the courts of the United States and of the States.” §1604. But this immunity is subject to certain express exceptions. For example, subsection (a) expressly provides that property “shall not be immune” from attachment and execution where, inter alia, it is “used for a commercial activity in the United States” and the “judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.” §1610(a)(7).

Prior to 2008, the FSIA did not address expressly under what circumstances, if any, the agencies or instrumentalities of a foreign state could be held liable for judgments against the state. Faced with that question in First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U. S. 611 (1983) (Bancec), this Court held that “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.” Id., at 626–627. Thus, as a default, those agencies and instrumentalities of a foreign state were to be considered separate legal entities that cannot be held liable for acts of the foreign state. See id., at 628.

Nevertheless, the Court recognized that such a stringent rule should not be without exceptions. The Court suggested that liability would be warranted, for example, “where a corporate entity is so extensively controlled by [the state] that a relationship of principal and agent is created,” id., at 629, or where recognizing the state and its agency or instrumentality as distinct entities “would work fraud or injustice,” ibid. (internal quotation marks omitted). See id., at 630. But the Court declined to develop a “mechanical formula for determining” when these exceptions should apply, id., at 633, leaving lower courts with the task of assessing the availability of exceptions on a case-by-case basis. Over time, the Courts of Appeals coalesced around the following five factors (referred to as the Bancec factors) to aid in this analysis:

“(1) the level of economic control by the government;

“(2) whether the entity’s profits go to the government;

“(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

“(4) whether the government is the real beneficiary of the entity’s conduct; and

“(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.” Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F. 2d 1375, 1380, n. 7 (CA5 1992); see also Flatow v. Islamic Republic of Iran, 308 F. 3d 1065, 1071, n. 9 (CA9 2002).
In 2008, Congress amended the FSIA and added §1610(g). See NDAA §1083(b)(3)(D), 122 Stat. 341–342. Section 1610(g)(1) provides:

“(g) Property in Certain Actions.—

“(1) In general. The property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

“(A) the level of economic control over the property by the government of the foreign state; “(B) whether the profits of the property go to that government;

“(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

“(D) whether that government is the sole beneficiary in interest of the property; or

“(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.”

Subparagraphs (A) through (E) incorporate almost verbatim the five Bancec factors, leaving no dispute that, at a minimum, §1610(g) serves to abrogate Bancec with respect to the liability of agencies and instrumentality of a foreign state. A judgment holder seeks to satisfy a judgment against the foreign state. The issue at hand is whether §1610(g) does something more; whether, like the commercial activity exception in §1610(a)(7), it provides an independent exception to immunity so that it allows a §1605A judgment holder to attach and execute against any property of the foreign state, regardless of whether the property is deprived of immunity elsewhere in §1610.

II

We turn first to the text of the statute. Section 1610(g)(1) provides that certain property will be “subject to attachment in aid of execution, and execution, upon [a §1605A] judgment as provided in this section.” (Emphasis added.) The most natural reading is that “this section” refers to §1610 as a whole, so that §1610(g)(1) will govern the attachment and execution of property that is exempted from the grant of immunity as provided elsewhere in §1610. Cf. Reno v. American-Arab Anti-Discrimination Comm., 525 U. S. 471, 487 (1999) (noting that the phrase “[e]xcept as provided in this section” in one subsection serves to incorporate “the rest of” the section in which the subsection appears).

Other provisions of §1610 unambiguously revoke the immunity of property of a foreign state, including specifically where a plaintiff holds a judgment under §1605A, provided certain express conditions are satisfied. For example, subsection (a) provides that “a commercial activity in the United States . . . shall not be immune” from attachment and execution in seven enumerated circumstances, including when “the judgment relates to a claim for which the foreign state is not immune under section 1605A . . . .” §1610(a)(7). Subsections (b), (d), and (e) similarly set out circumstances in which certain property of a foreign state “shall not be immune.” And two other provisions within §1610 specifically allow §1605A judgment holders to attach and execute against property of a foreign state, “notwithstanding any other provision of law,” including those provisions otherwise granting immunity, but only with respect to assets associated with certain regulated and prohibited financial transactions. See §1610(f)(1)(A); Terrorism Risk Insurance Act of 2002 (TRIA), §201(a), 116 Stat. 2337, note following 28 U. S. C. §1610.

Section 1610(g) conspicuously lacks the textual markers, “shall not be immune” or “notwithstanding any other provision of law,” that would have shown that it serves as an independent avenue for abrogation of immunity. In fact, its use of the phrase “as provided in this section” signals the opposite: A judgment holder seeking to take advantage of §1610(g)(1) must identify a basis under one of §1610’s express immunity-abrogating provisions to attach and execute against a relevant property.

Reading §1610(g) in this way still provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of this Court’s decision in Bancec. Suppose, for instance, that plaintiffs obtain a §1605A judgment against a foreign state and seek to collect against the assets located in the United States of a state-owned telecommunications company. Cf. Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F. 3d 1277 (CA11 1999). Prior to the enactment of §1610(g), the plaintiffs would have had to establish that the Bancec factors favor holding the agency or instrumentality liable for the foreign state’s misconduct. With §1610(g), however, the plaintiffs could attach and execute against the property of the state-owned entity regardless of the Bancec factors, so long as the plaintiffs can establish that the property is otherwise not immune (e.g., pursuant to §1610(a)(7) because it is used in commercial activity in the United States).

4. Section 1610(b), for example, provides that “any property . . . of [the]agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune” from attachment and execution in satisfaction of a judgment on a claim for which the agency or instrumentality is not immune under §1605A. §1610(b)(5).
Moreover, our reading of §1610(g)(1) is consistent “with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U. S. 303, 314 (2009) (internal quotation marks omitted). Section 1610 expressly references §1605A judgments in its immunity-abrogating provisions, such as 28 U. S. C. §§1610(a)(7), (b)(3), (f)(1), and §201 of the TRIA, showing that those provisions extend to §1605A judgment holders’ ability to attach and execute against property. If the Court were to conclude that §1610(g) establishes a basis for the withdrawal of property immunity any time a plaintiff holds a judgment under §1605A, each of those provisions would be rendered superfluous because a judgment holder could always turn to §1610(g), regardless of whether the conditions of any other provision were met. 5

The Court’s interpretation of §1610(g) is also consistent with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state’s commercial acts. See *Verlinden*, 461 U. S., at 487–488. Indeed, the FSIA expressly provides in its findings and declaration of purpose that

> “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.” §1602.

This focus of the FSIA is reflected within §1610, as subsections (a), (b), and (d) all outline exceptions to immunity of property when that property is used for commercial activity. The Court’s reading of §1610(g) means that individuals with §1605A judgments against a foreign state must primarily invoke other provisions revoking the grant of immunity for property related to commercial activity, including §1610(a)(7), unless the property is expressly carved out in an exception that applies “[n]ot withstanding any other provision of law,” §1610(f)(1)(A); §201(a) of the TRIA. That result is consistent with the history and structure of the FSIA.

Throughout the FSIA, special avenues of relief to victims of terrorism exist, even absent a nexus to commercial activity. Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism-related judgments, however, it does so expressly. See §§1605A, 1610(a)(7), (b)(3), (f)(1)(A); §201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for §1605A judgment holders absent a clearer indication of Congress’ intent.

### III

#### A

Petitioners resist that the phrase “as provided in this section” refers to §1610 as a whole and contend that Congress more likely was referencing a specific provision within §1610 or a section in the NDAA. That explanation is unpersuasive.

Petitioners first assert that “this section” might refer to procedures contained in §1610(f). Section 1610(f) permits §1605A judgment holders to attach and execute against property associated with certain regulated and prohibited financial transactions, §1610(f)(1), and it provides that the United States Secretary of State and Secretary of the Treasury will make every effort to assist in “identifying, locating, and executing against the property of [a] foreign state or any agency or instrumentality of such state,” §1610(f)(2). Petitioners point out that paragraph (1) of subsection (f) has never come into effect because it was immediately waived by the President after it was enacted, pursuant to §1610(f)(3). 6 So, the argument goes, it would make sense that Congress created §1610(g) as an alternative mechanism to achieve a similar result. 7

This is a strained and unnatural reading of the phrase “as provided in this section.” In enacting §201(a) of the TRIA, which, similar to 28 U. S. C. §1610(f), permits attachment and execution against blocked assets, Congress signaled that it was rescinding immunity by permitting attachment and execution “[n]ot withstanding any other provision of law.” See §201(a) of the TRIA. Had Congress likewise intended §1610(g) to have such an effect, it knew how to say so. Cf. *Bank Markazi v. Peterson*, 578 U. S. ___, ___, n. 2 (2016) (slip op., at 4, n. 2) (noting that “[s]ection 1610(g) does not take precedence over ‘any other provision of law,’ as the TRIA does”).

Petitioners fare no better in arguing that Congress may have intended “this section” to refer only to the instruction in §1610(f)(2) that the United States Government assist in identifying assets. Section 1610(f)(2) does not provide for attachment or execution at all, so petitioners’ argument does not account for the lack of textual indicators that exist in provisions like §§1610(a)(7) and (f)(1) that unambiguously abrogate immunity and permit attachment and execution.

Finally, petitioners assert that “this section” could possibly reflect a drafting error that was intended to actually refer to §1083 of the NDAA, the Public Law in which §1610(g) was enacted. This interpretation would require not only a

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5. To the extent petitioners suggest that those references to §1605A were inadvertent, see Brief for Petitioners 41–44, the statutory history further supports the conclusion that §1610(a)(7) applies to §1605A judgment holders, as the reference to §1605A was added to §1610(a)(7) in the same Act that created §§1605A and 1610(g). See NDAA §§1083(a), (b)(3), 122 Stat. 338–342.


7. Petitioners reference the decision of the Court of Appeals for the Ninth Circuit in *Bennett*, 825 F. 3d 949, in support of this position.
stark deviation from the plain text of §1610(g), but also a departure from the clear text of the NDAA. Section 1083(b) (3) of the NDAA provides that “Section 1610 of title 28, United States Code, is amended . . . by adding at the end” the new subsection “(g).” 122 Stat. 341. The language “this section” within (g), then, clearly and expressly incorporates the NDAA’s reference to “Section 1610” as a whole. There is no basis to conclude that Congress’ failure to change “this section” in §1610(g) was the result of a mere drafting error.

B

In an effort to show that §1610(g) does much more than simply abrogate the Bancee factors, petitioners argue that the words “property of a foreign state,” which appear in the first substantive clause of §1610(g), would otherwise be rendered superfluous because the property of a foreign state will never be subject to a Bancee inquiry. By its plain text, §1610(g) (1) permits enforcement of a §1605A judgment against both the property of a foreign state and the property of the agencies or instrumentalities of that foreign state. Because the Bancee factors would never have applied to the property of a foreign state, petitioners contend, those words must signal something else: that §1610(g) provides an independent basis for the withdrawal of immunity.

The words “property of a foreign state” accomplish at least two things, however, that are consistent with the Court’s understanding of the effect of §1610(g). First, §1610(g) serves to identify in one place all the categories of property that will be available to §1605A judgment holders for attachment and execution, whether it is “property of the foreign state” or property of its agencies or instrumentalities, and commands that the availability of such property will not be limited by the Bancee factors. So long as the property is deprived of its immunity “as provided in §1610,” all of the types of property identified in §1610(g) will be available to §1605A judgment holders.

Second, in the context of the entire phrase, “the property of a foreign state against which a judgment is entered under section 1605A,” the words “foreign state” identify the type of judgment that will invoke application of §1610(g); specifically, a judgment held against a foreign state and entered under §1605A. Without this opening phrase, §1610(g) would abrogate the Bancee presumption of separateness in all cases, not just those involving terrorism judgments under §1605A. The words, “property of a foreign state,” thus, are not rendered superfluous under the Court’s reading because they do not merely identify a category of property that is subject to §1610(g) but also help inform when §1610(g) will apply in the first place. Indeed, §1610(g) would make no sense if those words were removed.

C

All else aside, petitioners contend that any uncertainty in §1610(g) should be resolved by giving full effect to the legislative purpose behind its enactment. Petitioners posit that Congress enacted §1610(g) “with the specific purpose of removing the remaining obstacles to terrorism judgment enforcement.” Brief for Petitioners 26. In support of that position, they reference a brief discussion of §1610(g) in a footnote to the Court’s decision in Bank Markazi, 578 U. S. ___, that notes that Congress “expand[ed] the availability of assets for postjudgment execution” when it added §1610(g) by making “available for execution the property (whether or not blocked) of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state.” Id., at ___, n. 2 (slip op., at 4, n. 2). But Bank Markazi’s characterization of §1610(g) simply mirrors the text of §1610(g) and is entirely consistent with the Court’s holding today that §1610(g) expands the assets available for attachment and execution by abrogating this Court’s decision in Bancee with respect to judgments held under §1605A. Beyond their citation to Bank Markazi, petitioners have not directed us to any evidence that supports their position that §1610(g) was intended to divest all property of a foreign state or its agencies or instrumentalities of immunity.

IV

For the foregoing reasons, we conclude that 28 U. S. C.§1610(g) does not provide a freestanding basis for parties holding a judgment under §1605A to attach and execute against the property of a foreign state, where the immunity of the property is not otherwise rescinded under a separate provision within §1610. The judgment of the Seventh Circuit is affirmed.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.
CITE AS 18 C.D.O.S. 1622

CHARLES MURPHY, PETITIONER
v.
ROBERT SMITH, ET AL.

No. 16–1067
In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals
For The Seventh Circuit
Argued December 6, 2017
Filed February 21, 2018

JUSTICE GORSUCH delivered the opinion of the Court.

This is a case about how much prevailing prisoners must pay their lawyers. When a prisoner wins a civil rights suit and the district court awards fees to the prisoner’s attorney, a federal statute says that “a portion of the [prisoner’s] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.” 42 U. S. C. §1997e(d)(2). Whatever else you might make of this, the first sentence pretty clearly tells us that the prisoner has to pay some part of the attorney’s fee award before financial responsibility shifts to the defendant. But how much is enough? Does the first sentence allow the district court discretion to take any amount it wishes from the plaintiff’s judgment to pay the attorney, from 25% down to a penny? Or does the first sentence instead mean that the court must pay the attorney’s entire fee award from the prisoner’s judgment until it reaches the 25% cap and only then turn to the defendant?

The facts of our case illustrate the problem we face. After a jury trial, the district court entered judgment for Charles Murphy in the amount of $307,733.82 against two of his prison guards, Officer Robert Smith and Lieutenant Gregory Fulk. The court also awarded Mr. Murphy’s attorney $108,446.54 in fees. So far, so good. But then came the question who should pay what portion of the fee award. The defendants argued that, under the statute’s terms, the court had to take 25% (or about $77,000) from Mr. Murphy’s judgment before taxing them for the balance of the fee award. The court, however, refused that request. Instead, it ordered that Mr. Murphy “shall pay 10% of [his] judgment” (or about $31,000) toward the fee award, with the defendants responsible for the rest. In support of this allocation, the district court explained that it commonly varied the amount prisoners pay, though the court offered no explanation for choosing 10% instead of some other number. On appeal, a unanimous panel reversed, explaining its view that the language of §1997e(d)(2) requires a district court to exhaust 25% of the prisoner’s judgment before demanding payment from the defendants. 844 F. 3d 653, 660 (CA7 2016). So there we have both sides of the debate, and our question, in a nutshell: did the district court have latitude to apply 10% (or some other discretionary amount) of the plaintiff’s judgment to his attorney’s fee award instead of 25%? See 582 U. S. ___ (2017) (granting certiorari to resolve this question).

As always, we start with the specific statutory language in dispute. That language (again) says “a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded.” §1997e(d)(2). And we think this much tells us a few things. First, the word “shall” usually creates a mandate, not a liberty, so the verb phrase “shall be applied” tells us that the district court has some nondiscretionary duty to perform. See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U. S. 26, 35 (1998) (“[T]he mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion”). Second, immediately following the verb we find an infinitival phrase (“to satisfy the amount of attorney’s fees awarded”) that specifies the purpose or aim of the verb’s non-discretionary duty. Cf. R. Huddleston & G. Pullum, Cambridge Grammar of the English Language, ch. 8, §§1, 12.2, pp. 669, 729–730 (2002). Third, we know that when you purposefully seek or aim “to satisfy” an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full. Together, then, these three clues suggest that the court (1) must apply judgment funds toward the fee award (2) with the purpose of (3) fully discharging the fee award. And to meet that duty, a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap. If Congress had wished to afford the judge more discretion in this area, it could have easily substituted “may” for “shall.” And if Congress had wished to prescribe a different purpose for the judge to pursue, it could have easily replaced the infinitival phrase “to satisfy . . .” with “to reduce . . .” or “against . . .”. But Congress didn’t choose those other words. And respect for Congress’s prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.

Mr. Murphy’s reply does more to hurt than help his cause. Consider, he says, college math credits that the college prospectus says shall be “applied to satisfy” a chemistry degree. No one, the argument goes, would understand that phrase to mean you intend to discharge the obligation in full. Moreover, the argument continues, if the infinitival phrase were nothing more than a declarative sentence, “any” amount it wishes from the plaintiff’s judgment to pay the attorney is meaningless. But Congress didn’t choose any. It chose the like; . . . to pay off”).

1. See Black’s Law Dictionary 1543 (10th ed. 2014) (defining “satisfaction” as “[t]he fulfillment of an obligation; esp., the payment in full of a debt); 14 Oxford English Dictionary 504 (2d ed. 1989) (defining “satisfy” as “[t]o pay off or discharge fully; to liquidate (a debt); to fulfill completely (an obligation), comply with (a demand)”; Webster’s New International Dictionary 2220 (2d ed. 1950) (defining “satisfy” as “1. In general, to fill up to the measure of a want of (a person or a thing); hence, to gratify fully the desire of . . . 2. a. To pay to the extent of claims or deserts; to give what is due to; b. To satisfy a creditor. b To answer or discharge, as a claim, debt, legal demand, or the like; . . . to pay off”).
point. In Mr. Murphy’s example, as in our statute, the word “satisfy” does not suggest some hidden empirical judgment about how often a math class will satisfy a chemistry degree. Instead it serves to tell the college registrar what purpose he must pursue when handed the student’s transcript: the registrar must, without discretion, apply those credits toward the satisfaction or discharge of the student’s credit obligations. No doubt a college student needing three credits to graduate who took a three-credit math course would be bewildered to learn the registrar thought he had discretion to count only two of those credits toward her degree. So too here. It doesn’t matter how many fee awards will be fully satisfied from a judgment without breaking the 25% cap, or whether any particular fee award could be. The statute’s point is to instruct the judge about the purpose he must pursue—to discharge the fee award using judgment funds to the extent possible, subject to the 25% cap.

Retreating now, Mr. Murphy contends that whatever the verb and the infinitival phrase mean, the subject of the sentence—“a portion of the judgment (not to exceed 25 percent)”—necessarily suggests wide judicial discretion. This language, he observes, anticipates a range of amounts (some “portion” up to 25%) that can be taken from his judgment. And the existence of the range, Mr. Murphy contends, necessarily means that the district court must enjoy discretion to pick any “portion” so long as it doesn’t exceed the 25% cap. But that does not logically follow. Under either side’s reading of the statute the portion of fees taken from the plaintiff’s judgment will vary over a range—whether because of the district court’s discretionary choice (as Mr. Murphy contends), or because of the variance in the size of fee awards themselves, which sometimes will be less than 25% of the judgment (as Officer Smith and Lieutenant Fulk suggest). If the police have two suspects in a robbery committed with a red getaway car, the fact that one suspect drives a red sedan proves nothing if the other does too. The fact that the statute contemplates a range of possible “portion[s]” to be paid out of the judgment, thus, just doesn’t help identify which of the two proposed interpretations we should adopt for both bear that feature.

Nor does the word “portion” necessarily denote unfettered discretion. If someone told you to follow a written recipe but double the portion of sugar, you would know precisely how much sugar to put in—twice whatever’s on the page. And Congress has certainly used the word “portion” in just that way. Take 16 U. S. C. §673b, which defines the National Elk Refuge to include the “entire portion now in Jackson Hole National Monument except that portion in section 2 lying west of the east right-of-way line of United States Highway Numbered 187,” among other similar plots—descriptions sufficiently determinate that the statute itself can later give the total number of acres of covered land (“six thousand three hundred and seventy-six acres, more or less”). So the question is how has Congress used the word “portion” in this statute? And as we have explained, the text persuades us that, subject to the 25% cap, the size of the relevant “portion” here is fixed by reference to the size of the attorney’s fee award, not left to a district court’s unguided choice.

Even if the interpretive race in this case seems close at this point, close races still have winners. Besides, stepping back to take in the larger statutory scheme surrounding the specific language before us reveals that this case isn’t quite as close as it might first appear. In 1976, Congress enacted what is now 42 U. S. C. §1988(b) to authorize discretionary fee shifting in civil rights suits. Civil Rights Attorney’s Fees Awards Act, 90 Stat. 2641. For years that statute governed the award of attorney’s fees in a large variety of civil rights actions, including prisoner civil rights lawsuits like this one. But in the Prison Litigation Reform Act of 1995, Congress reentered the field and adopted §1997e’s new and specialized fee shifting rule for prisoner civil rights suits alone. See 110 Stat. 1321–71.

Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties’ positions. Section 1988(b) confers discretion on district courts in unambiguous terms: “[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs” against the defendant. (Emphasis added.) Meanwhile, §1997e(d) expressly qualifies the usual operation of §1988(b) in prisoner cases. See §1997e(d)(1) (providing that “[i]n any action brought by a prisoner . . . in which attorney’s fees are authorized under section 1988 . . . such fees shall not be awarded, except” under certain conditions). And as we’ve seen §1997e(d)(2) proceeds to use very different language to describe the district court’s job in awarding fees. It does not say “may,” it does not say “reasonable,” and it certainly does not say anything about “discretion.” If Congress had wished to confer the same discretion in §1997e(d) that it conferred in §1988(b), we very much doubt it would have bothered to write a new law; omit all the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones. See Russello v. United States, 464 U. S. 16, 23 (1983) (refusing to conclude that “the differing language” in two statutory provisions “has the same meaning in each”).

The surrounding statutory structure of §1997e(d) reinforces this conclusion. Like paragraph (2), the other provisions of §1997e(d) also limit the district court’s preexisting discretion under §1988(b). These provisions limit the fees that would otherwise be available under §1988 to cover only certain kinds of lawyerly tasks, see §§1997e(d)(1)(A) and (B)(ii); they require proportionality between fee awards and the relief ordered, see §1997e(d)(1)(B)(i); and they restrict the hourly rate of the prisoner’s lawyer, see §1997e(d)(3). All this suggests a statute that seeks to restrain, rather than replicate, the discretion found in §1988(b).

Notably, too, the discretion Mr. Murphy would have us introduce into §1997e doesn’t even sit easily with our precedent under §1988. Our cases interpreting §1988 establish “a strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a
‘reasonable’ fee.” Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U. S. 546, 565 (1986). To be sure, before the lodestar became “the guiding light of our fee shifting jurisprudence,” Burlington v. Dague, 505 U. S. 557, 562 (1992), many lower courts used one of your classic 12-factor balancing tests. See Delaware Valley, 478 U. S., at 562, and n. 7. Ultimately, though, this Court rejected undue reliance on the 12-factor test because it “gave very little actual guidance to district courts[,] . . . placed unlimited discretion in trial judges[,] and produced disparate results.” Id., at 563. Yet, despite this guidance, Mr. Murphy effectively seeks to rewrite §1997e(d)(2) to introduce into §1997e(d)(2) exactly the sort of unguided and freewheeling choice—and the disparate results that come with it—that this Court has sought to expunge from practice under §1988. And he seeks to achieve all this on the basis of considerably less helpful statutory language. To state the suggestion is to reveal its defect.

Nor does Mr. Murphy’s proposed cure solve his problem. To avoid reading §1997e(d)(2) as affording entirely unbridled discretion, Mr. Murphy contends that district courts should apportion fees in proportion to the defendant’s culpability. When a defendant has acted egregiously, he says, the court should lower the plaintiff’s responsibility for the fee award and increase the defendant’s—even if that means applying only a “nominal” amount of the plaintiff’s judgment toward the fee. But precisely none of this appears in §1997e(d)(2) or, for that matter, enjoys any analogue in §1988’s lodestar analysis or even the old 12 factor approach. Whatever you might have to say about Mr. Murphy’s culpability formula as a matter of policy, it has no roots in the law. Nor is it clear, for what it’s worth, that the culpability approach would even help him. The district court never cited the defendants’ culpability (or any other reason) to justify taking only 10% rather than 25% from Mr. Murphy’s judgment. And it’s tough to see what the choice of 10% might have had to do with the defendant’s culpability in this case. The district court actually remitted the jury’s punitive damages award—suggesting that, if anything, the defendants’ culpability had been already amply addressed.

At the end of the day, what may have begun as a close race turns out to have a clear winner. Now with a view of the full field of textual, contextual, and precedential evidence, we think the interpretation the court of appeals adopted prevails. In cases governed by §1997e(d), we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney’s fees.2

2. Even for those of us who might be inclined to entertain it, Mr. Murphy’s legislative history argument fails to overcome the textual, contextual, and precedential evidence before us. He points to an early draft of §1997e(d)(2) that read: “Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.” Prison Litigation Reform Act of 1995, S. 1279, 104th Cong., 1st Sess., §3(d), p. 16 (1995) (emphasis added).

The judgment is Affirmed.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, dissenting.

The Court concludes that the attorney’s fee apportionment provision of the Prison Litigation Reform Act of 1995(PLRA), 42 U. S. C. §1997e(d)(2), requires that a district court endeavor to fulfill the entirety of an attorney’s fee award from the monetary judgment awarded to a prevailing prisoner-plaintiff, and only if 25 percent of the judgment is inadequate to cover the fee award can the court require contribution from the defendant. Ante, at 8. I cannot agree. The text of §1997e(d)(2)—“a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant”—and its statutory context make clear that the provision permits district courts to exercise discretion in choosing the portion of a prisoner-plaintiff’s monetary judgment that must be applied toward an attorney’s fee award, so long as that portion is not greater than 25 percent. I therefore respectfully dissent.

I

In approaching this case, it helps to understand the background of the fee award at issue. On July 25, 2011, petitioner Charles Murphy, a prisoner at the Vandalia Correctional Center in Illinois, reported that his assigned seat at mealtime had food and water on it, which resulted in Murphy being handcuffed and escorted to a segregation building. Once there, Murphy taunted respondent Correctional Officer Robert Smith, who responded by hitting Murphy in the eye and applying a choke hold, causing Murphy to lose consciousness. When Murphy woke up, Officer Smith and respondent Lieu-
tenant Gregory Fulk were pushing him into a cell. His hands were still cuffed behind his back and he fell face-first into the cell and hit his head on a metal toilet. Officer Smith and Lieutenant Fulk then stripped Murphy of his clothes, removed his handcuffs, and left him in the cell without checking his condition. Thirty or forty minutes passed until a nurse arrived to attend to Murphy, who was sent to a hospital. Part of his eye socket had been crushed and required surgery. Despite the procedure, Murphy did not fully recover; almost five years later, his vision remained doubled and blurred.

Murphy sued respondents under 42 U. S. C. §1983 and state-law causes of action. After trial, a jury found Officer Smith liable for state-law battery and unconstitutional use of force under the Eighth Amendment, and found Lieutenant Fulk liable for deliberate indifference to a serious medical need in violation of the Eighth Amendment. The jury awarded Murphy $409,750.00 in compensatory and punitive damages, which the District Court reduced to $307,733.82. The District Court also awarded Murphy’s attorney $108,446.54 in fees for the several hundred hours he spent on the case and, pursuant to §1997e(d)(2), ordered Murphy to contribute 10 percent of his money judgment toward the attorney’s fee award and respondents to pay the rest.

Respondents appealed, arguing that §1997e(d)(2) required Murphy to contribute 25 percent of his judgment toward payment of the attorney’s fee award. The Court of Appeals for the Seventh Circuit agreed and reversed. In so doing, it acknowledged that its interpretation of §1997e(d)(2) was at odds with that of all the other Courts of Appeals to have considered the question. See 844 F. 3d 653, 660 (2016) (citing Boesing v. Spiess, 540 F. 3d 886, 892 (CA8 2008); Parker v. Conway, 581 F. 3d 198, 205 (CA3 2009)).

II

A

The relevant provision in the PLRA provides:

“Whenever a monetary judgment is awarded in [a civil rights action brought by a prisoner], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.” 42 U. S. C. §1997e(d)(2).

The crux of the majority’s reasoning is its definition of the infinitive “to satisfy.” The majority contends that “when you purposefully seek or aim ‘to satisfy’ an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full.” Ante, at 3. To meet its duty to act with the purpose of fully discharging the fee award, the majority reasons, “a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap.” Ibid.

But the phrase “to satisfy” as it is used in §1997e(d)(2) does not bear the weight the majority places on it. Its neighboring text and the realities of prisoner-civil-rights litigation rebut the conclusion that “to satisfy” compels a district court always to maximize the amount of the prisoner-plaintiff’s judgment to be contributed to the fee award, and instead indicate that the only work “to satisfy” does in the statute is to direct a district court to contribute some amount of the judgment toward payment of the fee award.

Beginning with the neighboring text, it may well be that, standing alone, “to satisfy” is often used to mean “to completely fulfill an obligation.” But the statutory provision here does not simply say “to satisfy”; it says “applied to satisfy.” As a matter of everyday usage, the phrase “applied to satisfy” often means “applied toward the satisfaction of,” rather than “applied in complete fulfillment of.” Thus, whereas an action undertaken “to satisfy” an obligation might, as the majority suggests, naturally be understood as an effort to discharge the obligation in full, ante, at 3, a contribution that is “applied to satisfy” an obligation need not be intended to discharge the obligation in full.

Take a few examples: A consumer makes a payment on her credit card, which her agreement with the card company provides shall be “applied to satisfy” her debt. A student enrolls in a particular type of math class, the credits from which her university registrar earlier announced shall be “applied to satisfy” the requirements of a physics degree. And a law firm associate contributes hours to a pro bono matter that her firm has provided maybe “applied to satisfy” the firm’s overall billable-hours requirement. In each case, pursuant to the relevant agreement, the payment, credits, and hours are applied toward the satisfaction of a larger obligation, but the inference is not that the consumer, student, or associate had to contribute or even necessarily did contribute the maximum possible credit card payment, classroom credits, or hours toward the fulfillment of those obligations. The consumer may have chosen to make the minimum credit card payment because she preferred to allocate other funds elsewhere; the student may have chosen the four-credit version of the math course over the six-credit one because the former had a better instructor; and the associate may have been judicious about the hours she dedicated to the pro bono matter because she knew her firm more highly valued paid over pro bono work. So, too, here. Section 1997e(d)(2), like the credit card agreement, university registrar announcement, and law firm policy, sets out the relevant rule—“a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy” the fee award—and the district court, like the consumer, student, and law firm associate, decides how much of the judgment to apply.

As a practical matter, moreover, a district court will almost never be able to discharge fully a fee award from 25 percent of a prisoner-plaintiff’s judgment. In the vast majority of prisoner-civil-rights cases, the attorney’s fee award exceeds the monetary judgment awarded to the prevailing prisoner-
plaintiff. In fiscal year 2012, for instance, the median damages award in a prisoner-civil rights action litigated to victory (i.e., not settled or decided against the prisoner) was a mere $4,185. See Schlanger, Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 U. C. Irvine L. Rev. 153, 168 (2015) (Table 7)(Trends in Prisoner Litigation). Therefore, in 2012, the maximum amount (25 percent) of the median judgment that could be applied toward an attorney’s fee award was $1,046.25. The PLRA caps the hourly rate that may be awarded to a prisoner-plaintiff’s attorney at 150 percent of the rate for court-appointed counsel under 18 U. S. C. §3006A, which in 2012 was $125. 42 U. S. C. §1997e(d)(3); App. to Pet. for Cert. 21a. Thus, a prisoner’s attorney was entitled to up to $187.50 per hour worked. Even if a district court were to apply an hourly rate of just $100, well below the cap, unless the attorney put in fewer than 10.5 hours in the ordinary case—a virtually unimaginable scenario—25 percent of the judgment will not come close to discharging fully the attorney’s fee award. 5

Such low judgments are not a new phenomenon in prisoner-civil-rights suits; they were the norm even before Congress enacted the PLRA. In fiscal year 1993, for example, the median damages award for prisoner-plaintiffs in cases won at trial was $1,000. See Trends in Prisoner Litigation 167; Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1602–1603, and Table II.C (2003). 4

Given the very small judgment awards in successfully litigated prisoner-civil-rights cases, it is hard to believe, as the majority contends, that Congress used “applied to satisfy” to command an effort by district courts to “discharge . . . in full,” ante, at 3, when in most cases, full discharge will never be possible. 5 Rather, taking into account both the realities of prisoner-civil-rights litigation and the most natural reading of “applied to satisfy,” the more logical inference is that §1997e(d)(2) simply requires that a portion of the prevailing prisoner-plaintiff’s judgment be applied toward the satisfaction of the attorney’s fee award. 6 It does not, however, demand that the district court always order the prisoner-plaintiff to pay the maximum possible portion of the judgment (up to 25 percent) needed to discharge fully the fee award. Under that interpretation, applying any amount of Murphy’s judgment toward payment of his attorney’s fee award complies with §1997e(d)(2), whether that amount is 10 percent of the judgment as ordered by the District Court or 25 percent as ordered by the Court of Appeals.

B

The majority suggests that if Congress had wanted to permit judges to pursue something other than full discharge of the fee award from the judgment, it could have replaced “to satisfy” with “to reduce” or “against.” Ante, at 3. But the majority ignores that Congress also easily could have written §1997e(d)(2) to more clearly express the meaning it and respondents champion. The statute, for example, simply could have said: “Twenty-five percent of the plaintiff’s judgment shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.”

In fact, Congress considered and rejected language prior to enacting the current attorney’s fee apportionment provision that would have done just what the majority claims. An earlier version of §1997e(d)(2) provided:

Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.”

The italicized clause plainly expressed what the majority contends the current provision means, i.e., that a defendant’s liability for the attorney’s fee award begins only if any portion of the award remains unpaid after the prevailing prisoner-plaintiff has contributed 25 percent of the judgment. But Congress removed this clause before finalizing the bill, thus electing to keep the 25-percent ceiling for the prisoner-plaintiff’s contribution to the fee award and rejecting a 25-percent floor for the defendant’s contribution. See H. R. Conf. Rep. No. 104–378, p. 71 (1995).

The italicized clause plainly expressed what the majority contends the current provision means, i.e., that a defendant’s liability for the attorney’s fee award begins only if any portion of the award remains unpaid after the prevailing prisoner-plaintiff has contributed 25 percent of the judgment. But Congress removed this clause before finalizing the bill, thus electing to keep the 25-percent ceiling for the prisoner-plaintiff’s contribution to the fee award and rejecting a 25-percent floor for the defendant’s contribution. See H. R. Conf. Rep. No. 104–378, p. 71 (1995).

The majority alternatively disclaims the ability to discern what motivated the deletion and pronounces that “[i]t shows that, at some stage of the bill’s consideration, its proponents likely shared [the majority’s] understanding” of how the first sentence works. Ante, at 8–9, n. 2. In the majority’s view, it is more likely that Congress drafted two redundant sentences than two conflicting ones. Ibid. That supposition, however, is purely speculative. Here is what is known for certain: Congress had before it language that would have accomplished exactly the statutory function the majority today endorses and Congress chose to excise that language from the text. Our precedent instructs that “[w]here Congress includes lim-

3. A similar conclusion obtains if one considers the average, rather than the median, damages award in a prisoner-civil-rights action litigated to victory, which in 2012 was $20,815. See Trends in Prisoner Litigation 168 (Table 7).

4. The average such award in 1993, excluding one extreme outlier of $6,5 million, was $18,800. See Trends in Prisoner Litigation 167; Schlanger, 116 Harv. L. Rev. at 1603.

5. In fact, even here, where the monetary judgment awarded to Murphy was well above the average award in prisoner-civil-rights cases, 25 percent of the judgment cannot fully discharge the fees awarded to his attorney.

6. Irrespective of what portion of the judgment the district court ultimately requires the prisoner-plaintiff to contribute to the fee award, the award will always be satisfied, i.e., paid in full, for once the prisoner-plaintiff provides his contribution from the judgment, the defendant will be called upon to contribute the remainder.
iting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.” Russell v. United States, 464 U. S. 16, 23–24 (1983). See also INS v. Cardoza-Fonseca, 480 U. S. 421, 442–443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language").

C

The rest of the statutory text confirms that district courts have discretion to choose the amount of the judgment that must be applied toward the attorney’s fee award. Specifically, that grant of discretion is evident from Congress’ use of two discretion-conferring terms, “portion” and “not to exceed.”

The first word, “portion,” is defined as “[a] share or allotted part (as of an estate).” Black’s Law Dictionary 1182 (7th ed. 1999). “Portion” thus inherently conveys an indeterminate amount. Take, for instance, the following sentence: “My dinner host has requested a portion of apple pie for dessert.”

How much is a “portion” of pie? For a marathon runner, a “portion” might mean a hearty serving, perhaps an eighth of a whole pie; for someone on a diet, however, a “portion” might mean a tiny sliver. The dinner host can figure it out based on the circumstances. Similarly, in this context, referencing a “portion” of the judgment tells us that some amount of the judgment up to 25 percent of the whole is to be applied to the attorney’s fee award, but not exactly what amount. That decision is left to the sound discretion of the district court, depending again on the circumstances.

The majority dismisses as insignificant Congress’ use of this discretion-conferring term, arguing that under either side’s reading of the statute, the “portion” of fees taken from the prisoner-plaintiff’s judgment will vary. See ante, at 5. True enough, but that fact does not justify the majority’s brush off. Congress’ deliberate choice to use the indeterminate, discretion-conferring term “portion” in §1997e(d)(2) reveals much about the statute’s meaning.

To illustrate the significance of Congress’ use of the word “portion,” imagine that §1997e(d)(2) contained no qualifying “not to exceed” parenthetical, and instead provided only that “a portion of the judgment shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.” As applied to the typical scenario, i.e., where the attorney’s fee award exceeds the prisoner-plaintiff’s money judgment, the most natural reading of the statute absent the limiting parenthetical is that the amount of the judgment applied to the fee award must be more than zero and less than 100 percent. That is because, as explained above, “portion” means something less than the whole but does not have a fixed value. If the majority were correct in its reading of “to satisfy,” how-ever—that it requires the district court to endeavor to discharge fully the attorney’s fee award from the prisoner-plaintiff’s judgment before turning to the defendant for a contribution—then, in the typical case, absent the parenthetical, we would have to conclude that “a portion of the judgment” always means “all of the judgment” or perhaps “all of the judgment save a nominal amount.” I do not think it reasonable to conclude that Congress intended to ascribe such a strained meaning to “portion.” That the majority’s reading of one term—“to satisfy”—forces an implausible reading of another term—“portion”—strongly suggests that its reading is incorrect.

Congress’ use of the word “portion,” therefore, does not merely instruct that there are a range of possible portions that can be paid out of the judgment. “Portion” makes evident that the district court is afforded the discretion to choose the amount of the judgment to be paid toward the fee award. The addition of the “not to exceed 25 percent” parenthetical only enhances this conclusion. The phrase “not to exceed,” which is itself discretion conferring, sets an upper, but not a lower, limit and thus cabins, but does not eliminate, the exercise of discretion that “portion” confers.

D

The distinction between cabining and eliminating discretion is also key to understanding the relationship between §1997e(d) and 42 U. S. C. §1988(b), as well as between §1997e(d)(2) and its surrounding statutory provisions.

Section 1988(b), the Civil Rights Attorney’s Fees Awards Act of 1976, authorizes a district court to award “a reasonable attorney’s fee” to a prevailing party in an action to enforce one or more of several federal civil rights laws. Section 1997e(d) in turn imposes limits on the attorney’s fees available under §1988(b) when the prevailing plaintiff in one of the specified civil-rights actions is a prisoner. In particular, the district court may award attorney’s fees to the prisoner only if “the fee was directly and reasonably incurred in proving an actual violation of the plaintiff’s rights protected by a statute pursuant to which a fee maybe awarded under section 1988,” and “the amount of the fee is proportionately related to the court ordered relief for the violation” or “the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.” §1997e(d)(1). In addition, as noted supra, at 5, the district court may not base an award of attorney’s

8. Of course, “portion” can gain a more determinate meaning by its surrounding context, as the majority’s examples illustrate. See ante, at 5. But §1997e(d)(2) is not like the recipe that quantifies the initial portion of sugar to be doubled or the statutory provision that describes with geographic precision the lands to be made part of the National Elk Refuge. “[T]o satisfy” simply instructs that some portion of the prisoner plaintiff’s judgment “not to exceed 25 percent” be applied toward the satisfaction of the fee award. See supra, at 6. Section 1997e(d)(2) therefore lacks the clarifying details present in the majority’s examples that would give fixed meaning to the word “portion.”
fees “on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. §3006A] for payment of court-appointed counsel” and, if the prisoner-plaintiff was awarded damages, may not award attorney’s fees in excess of 150 percent of the monetary judgment. §§1997e(d)(2)–(3).

These provisions, of course, do not eliminate a district court’s discretion when it comes to the award of attorney’s fees to a prevailing prisoner-plaintiff; they merely compress the range of permissible options. A district court still has the discretion to decide whether to award attorney’s fees, just as it ordinarily would under §1988(b); it simply must first ensure that the threshold conditions set out in §1997e(d)(1) are satisfied. A district court likewise still has the discretion to determine what constitutes a reasonable amount of fees to award; it simply must abide by the two 150-percent caps in doing so.

Just as these surrounding statutory provisions in §1997e(d) set outward bounds on a district court’s exercise of discretion while still preserving the exercise of discretion within those bounds, so, too, does §1997e(d)(2). A district court is not free to require the defendant to pay the entire attorney’s fee award, nor is it free to require the prisoner-plaintiff to give up more than 25 percent of his judgment to pay the fee award. But within those boundaries, the district court is free to decide which party should pay what portion of the fee award.

The majority suggests that affording discretion to district courts when it comes to the apportionment of attorney’s fee awards is in tension with our adoption of the lodestar method as the presumptive means of calculating a reasonable fee award under §1988. Ante, at 7. Prior to the lodestar’s development, several lower courts utilized 12 “sometimes subjective factors.” Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U. S. 546, 563 (1986). Because that method “placed unlimited discretion in trial judges and produced disparate results,” ibid., this Court endorsed the lodestar approach, pursuant to which a court multiplies “the number of hours reasonably expended on the litigation times a reasonable hourly rate,” Blum v. Stenson, 465 U. S. 886, 888 (1984), and then considers whether to make adjustments to that amount, see id., at 898–901; Hensley v. Eckerhart, 461 U. S. 424, 435 (1983). The majority asserts that adopting Murphy’s reading of §1997e(d)(2) would lead to “exactly the sort of unguided and freewheeling choice” this Court sought to leave behind when it sanctioned the lodestar approach. Ante, at 7. That analogy, however, is inapt.

First, the question before us is whether §1997e(d)(2) affords district courts any discretion in the apportionment of responsibility for payment of an attorney’s fee award, not how district courts reasonably should exercise that discretion. When this Court embraced the lodestar approach, it did so to provide guideposts to district courts as they exercised the discretion granted to them by §1988(b) to “allow the prevailing party . . . a reasonable attorney’s fee.” By no means did this Court eliminate that exercise of discretion. Rather, the Court has “reemphasize[d] that the district court has discretion in determining the amount of a fee award.” Hensley, 461 U. S., at 437; see also Blum, 465 U. S., at 902, n. 19 (“A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness”); id., at 896 (explaining that the proper standard of review of an attorney’s fee award is abuse of discretion).

As was the case for the District Court here, that exercise of discretion can include, for example, whether a defendant is entitled to a reduction in hours where a plaintiff did not succeed on all his claims, and whether certain claimed expenses are reasonable. See App. to Pet. for Cert. 22a–26a.

If the majority is concerned that district courts are exercising the apportionment discretion afforded to them by §1997e(d)(2) in an uneven and unguided manner, the solution is not to read the conferral of discretion out of the statute entirely. Instead, as occurred in the §1988(b) context, the Court could endorse a method for apportioning attorney’s fee awards that can consistently be applied across cases.9 Just as courts ultimately were capable, through trial-and-error, of discerning an appropriate formula for assessing the reasonableness of a given fee award, see Delaware Valley, 478 U. S., at 562–565, so, too, are they capable of determining a sound approach to the apportionment decision envisioned by §1997e(d)(2).10

Second, even absent an equivalent method to the lodestar inquiry, §1997e(d)(2) does not, unlike the old 12-factor analysis for calculating fee awards, afford unlimited discretion. Congress provided express bounds on a district court’s apportionment discretion, requiring that it order the prevailing prisoner-plaintiff to contribute at least some part of his monetary judgment to the fee award but no more than 25 percent.

Finally, it is not obvious that the need for a more regimented approach with respect to calculating the amount of an attorney’s fee award under §1988(b) should dictate the need for a similarly regimented approach with respect to the apportionment of responsibility for that award under §1997e(d)(2).

The two decisions involve fundamentally different inquiries: The first is focused on the prevailing-plaintiff’s attorney and is concerned with determining a reasonable value for services rendered in pursuing the action, and the second is focused on the parties and is concerned with assessing the extent to which each party should bear responsibility for payment of those services (within the bounds set by Congress). In light of these distinctions, the Court should hesitate to extrapolate wholesale from the considerations that drove the adoption of

9. Such an apportionment method could, for example, account for a defendant’s conduct during the litigation, just as the lodestar method considers the prevailing-plaintiff’s conduct in prosecuting the action. A defendant that acts in ways that unnecessarily prolong or complicate the litigation so as to increase the plaintiff’s fees reasonably could be asked to bear a greater share of that expense.

10. Relatedly, the majority indicates concern with the District Court’s lack of explanation for its choice of 10 percent. See ante, at 8. That procedural failure can easily be remedied by requiring district courts to explain their apportionment decisions so as to facilitate meaningful appellate review.
the lodestar rule to constrain the apportionment discretion afforded by §1997e(d)(2).

III

On my reading of the plain text of §1997e(d)(2) and its surrounding statutory provisions and context, the proper interpretation of the provision is clear: District courts may exercise discretion in choosing the portion of the prisoner-plaintiff ’s monetary judgment that must go toward the attorney’s fee award, so long as that choice is not greater than 25 percent of the judgment. Because the majority holds that a prevailing prisoner-plaintiff must always yield 25 percent of his monetary judgment or, if less, the full amount of the fee award in every case, I respectfully dissent.
1. Sarbanes-Oxley also prohibits retaliation against an “employee” who “file[s], . . . testif[y], participate[s] in, or otherwise assist[s] in a proceeding filed or about to be filed . . . relating to an alleged violation of” the same provisions of federal law addressed in 18 U. S. C. §1514A(a)(1). See §1514A(a)(2).

2. Section 1513(e) provides: “Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.”

3. Section 78u–6(h)(1)(A) reads in full: “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under” either Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation prohibition at 18 U. S. C. §1513(e), or “any other law, rule, or regulation subject to the jurisdiction of the Commission,” §78u–6(h)(1)(A)(ii); and third, “in making disclosures that are required or protected under” either Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation prohibition at 18 U. S. C. §1513(e), or “any other law, rule, or regulation subject to the jurisdiction of the Commission,” §78u–6(h)(1)(A)(iii). Clause (iii), by cross-referencing Sarbanes-Oxley and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC. For example, the clause shields an employee’s reports of wrongdoing to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes-Oxley. See supra, at 2–3.
The recovery procedures under the anti-retaliation provisions of Dodd-Frank and Sarbanes-Oxley differ in critical respects. First, unlike Sarbanes-Oxley, which contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. §1514A(b)(1)(A), (2)(D), Dodd-Frank permits a whistleblower to sue a current or former employer directly in federal district court, with a default limitation period of six years, see §78u–6(h)(1)(B)(ii), (iii)(I)(aa). Second, Dodd-Frank instructs a court to award to a prevailing plaintiff double back pay with interest, see §78u–6(h)(1)(C)(ii), while Sarbanes-Oxley limits recovery to actual back pay with interest, see 18 U. S. C. §1514A(c)(2)(B). Like Sarbanes-Oxley, however, Dodd-Frank authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees. Compare §78u–6(h)(1)(C)(i), (iii), with 18 U. S. C. §1514A(c)(2)(A),(C).

Congress authorized the SEC “to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [§78u–6] consistent with the purposes of this section.” §78u–6(j). Pursuant to this authority, the SEC published a notice of proposed rulemaking to “Implement[ing] the Whistleblower Provisions” of Dodd-Frank. 75 Fed. Reg. 70488 (2010). Proposed Rule 21F–2 defined a “whistleblower,” for purposes of both the award and anti-retaliation provisions of §78u–6, as one or more individuals who “provide the Commission with information relating to a potential violation of the securities laws.” Id., at 70519 (proposed 17 CFR §240.21F–2(a)). The proposed rule, the agency noted, “tracks the statutory definition of a ‘whistleblower’” by requiring information reporting to the SEC itself. 75 Fed. Reg. 70489.

In promulgating the final Rule, however, the agency changed course. Rule 21F–2, in finished form, contains two discrete “whistleblower” definitions. See 17 CFR §240.21F–2(a)–(b) (2017). For purposes of the award program, the Rule states that “[y]ou are a whistleblower if . . . you provide the Commission with information . . . relate[ing] to a possible violation of the Federal securities laws.” §240.21F–2(a)(1) (emphasis added). The information must be provided to the SEC through its website or by mailing or faxing a specified form to the SEC Office of the Whistleblower. See id.; §240.21F–9(a)(1)–(2).

“For purposes of the anti-retaliation protections,” however, the Rule states that “[y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation” and “[y]ou provide that information in a manner described in clauses (i) through (iii) of §78u–6(h)(1)(A), 17 CFR §240.21F–2(b)(1)(i)–(ii). “The anti-retaliation protections apply,” the Rule emphasizes, “whether or not you satisfy the requirements, procedures and conditions to qualify for an award.” §240.21F–2(b)(1)(iii). An individual may therefore gain anti-retaliation protection as a “whistleblower” under Rule 21F–2 without providing information to the SEC, so long as he or she provides information in a manner shielded by one of the anti-retaliation provision’s three clauses. For example, a report to a company supervisor would qualify if the report garners protection under the Sarbanes-Oxley anti-retaliation provision.

C

Petitioner Digital Realty Trust, Inc. (Digital Realty) is a real estate investment trust that owns, acquires, and develops data centers. See Brief for Petitioner 3. Digital Realty employed respondent Paul Somers as a Vice President from 2010 to 2014. See 119 F. Supp. 3d 1088, 1092 (ND Cal. 2015). Somers alleges that Digital Realty terminated him shortly after he reported to senior management suspected securities-law violations by the company. See id. Although nothing impeded him from alerting the SEC prior to his termination, he did not do so. See Tr. of Oral Arg. 45. Nor did he file an administrative complaint within 180 days of his termination, rendering him ineligible for relief under Sarbanes-Oxley. See id.; 18 U. S. C. §1514A(b)(2)(D).

Somers brought suit in the United States District Court for the Northern District of California alleging, inter alia, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim, arguing that “Somers does not qualify as a ‘whistleblower’ under [§78u–6(h)] because he did not report any alleged law violations to the SEC.” 119 F. Supp. 3d, at 1094. The District Court denied the motion. Rule 21F–2, the court observed, does not necessitate recourse to the SEC prior to gaining “whistleblower” status under Dodd-Frank. See id., at 1095–1096. Finding the statutory scheme ambiguous, the court accorded deference to the SEC’s Rule under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984). See 119 F. Supp. 3d, at 1096–1106.

On interlocutory appeal, a divided panel of the Court of Appeals for the Ninth Circuit affirmed. 850 F. 3d 1045 (2017). The majority acknowledged that Dodd-Frank’s definitional provision describes a “whistleblower” as an individual who provides information to the SEC itself. Id., at 1049. But applying that definition to the anti-retaliation provision, the majority reasoned, would narrow the third clause of §78u–6(h)(1)(A) “to the point of absurdity”: The statute would protect employees only if they “reported possible

5. In 2015, the SEC issued an interpretive rule reiterating that anti-retaliation protection is not contingent on a whistleblower’s provision of information to the Commission. See 80 Fed. Reg. 47829 (2015).
securities violations both internally and to the SEC.” *Ibid.* Such dual reporting, the majority believed, was unlikely to occur. *Ibid.* Therefore, the majority concluded, the statute should be read to protect employees who make disclosures privileged by clause (iii) of §78u–6(h)(1)(A), whether or not those employees also provide information to the SEC. *Id.*, at 1050. In any event, the majority held, the SEC’s resolution of any statutory ambiguity warranted deference. *Ibid.* Judge Owens dissented. In his view, the statutory definition of whistle-blower was clear, left no room for interpretation, and plainly governed. *Id.*, at 1051.

Two other Courts of Appeals have weighed in on the question before us. The Court of Appeals for the Fifth Circuit has held that employees must provide information to the SEC to avail themselves of Dodd-Frank’s anti-retaliation safeguard. See *Asadi v. G. E. Energy (USA)*, L. L. C., 720 F. 3d 620, 630 (2013). A divided panel of the Court of Appeals for the Second Circuit reached the opposite conclusion, over a dissent by Judge Jacobs. See *Berman v. NEO@OGILVY LLC*, 801 F. 3d 145, 155 (2013). We granted certiorari to resolve this conflict, 582 U. S. ___ (2017), and now reverse the Ninth Circuit’s judgment.

II

“When a statute includes an explicit definition, we must follow that definition,” even if it varies from a term’s ordinary meaning. *Burgess v. United States*, 553 U. S. 124, 130 (2008) (internal quotation marks omitted). This principle resolves the question before us.

A

Our charge in this review proceeding is to determine the meaning of “whistleblower” in §78u–6(h), Dodd-Frank’s anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A “whistleblower” is “any individual who provides . . . information relating to a violation of the securities laws to the Commission.” §78u–6(a)(6) (emphasis added). Leaving no doubt as to the definition’s reach, the statute instructs that the “definition[n] shall apply” “[i]n this section,” that is, throughout §78u–6. §78u–6(a)(6).

The whistleblower definition operates in conjunction with the three clauses of §78u–6(h)(1)(A) to spell out the provision’s scope. The definition first describes who is eligible for protection—namely, a whistleblower who provides pertinent information “to the Commission.” §78u–6(a)(6). The three clauses of §78u–6(h)(1)(A) then describe what conduct, when engaged in by a whistle-blower, is shielded from employment discrimination. See §78u–6(h)(1)(A)(i)–(iii). An individual who meets both measures may invoke Dodd-Frank’s protections. But an individual who falls outside the protected category of “whistleblowers” is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages.

Reinforcing our reading, another whistleblower protection provision in Dodd-Frank imposes no requirement that information be conveyed to a government agency. Title 10 of the statute, which created the Consumer Financial Protection Bureau (CFPB), prohibits discrimination against a “covered employee” who, among other things, “provide[s] . . . information to [his or her] employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to a violation of a law subject to the CFPB’s jurisdiction. 12 U. S. C. §5567(a)(1). To qualify as a “covered employee,” an individual need not provide information to the CFPB, or any other entity. See §5567(b) (“covered employee” means “any individual performing tasks related to the offering or provision of a consumer financial product or service”).

“[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning.” *Loughrin v. United States*, 573 U. S. ___, ___ (2014)(slip op., at 6) (internal quotation marks and alteration omitted). Congress placed a government-reporting requirement in §78u–6(h), but not elsewhere in the same statute. Courts are not at liberty to dispense with the condition—tell the SEC—Congress imposed.

B

Dodd-Frank’s purpose and design corroborate our comprehension of §78u–6(h)’s reporting requirement. The “core objective” of Dodd-Frank’s robust whistleblower program, as Somers acknowledges, Tr. of Oral Arg. 45, is “to motivate people who know of securities law violations to tell the SEC,” S. Rep. No. 111–176, at 38 (emphasis added). By enlisting whistleblowers to “assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws,” Congress undertook to improve SEC enforcement and facilitate the Commission’s “recover[y] [of] money for victims of financial fraud.” *Id.*, at 110. To that end, §78u–6 provides substantial monetary rewards to whistleblowers who furnish actionable information to the SEC. See *§78u–6(b).*

Financial inducements alone, Congress recognized, may be insufficient to encourage certain employees, fearful of employer retaliation, to come forward with evidence of wrongdoing. Congress therefore complemented the Dodd-Frank monetary incentives for SEC reporting by heightening protection against retaliation. While Sarbanes-Oxley contains an administrative-exhaustion requirement, a 180-day administrative complaint-filing deadline, and a remedial scheme limited to actual damages, Dodd-Frank provides for immediate access to federal court, a generous statute of limitations (at least six years), and the opportunity to recover double backpay. See *supra*, at 5–6. Dodd-Frank’s award program and anti-retaliation provision thus work synchronously to motivate individuals with knowledge of illegal activity to “tell the SEC.” S. Rep. No. 111–176, at 38.

When enacting Sarbanes-Oxley’s whistleblower regime, in comparison, Congress had a more far-reaching objective: It sought to disturb the “corporate code of silence” that
“discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally.” Lawson, 571 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). Accordingly, the Sarbanes-Oxley anti-retaliation provision covers employees who report fraud not only to the SEC, but also to any other federal agency, Congress, or an internal supervisor. See 18 U. S. C. §1514A(a)(1).

C

In sum, Dodd-Frank’s text and purpose leave no doubt that the term “whistleblower” in §78u–6(h) carries the meaning set forth in the section’s definitional provision. The disposition of this case is therefore evident: Somers did not provide information “to the Commission” before his termination, §78u–6(a)(6), so he did not qualify as a “whistleblower” at the time of the alleged retaliation. He is therefore ineligible to seek relief under §78u–6(h).

III

Somers and the Solicitor General tender a different view of Dodd-Frank’s compass. The whistleblower definition, as they see it, applies only to the statute’s award program, not to its anti-retaliation provision, and thus not, as the definition plainly states, throughout “this section,” §78u–6(a). See Brief for Respondent 30; Brief for United States as Amicus Curiae 10–11. For purposes of the anti-retaliation provision alone, they urge us to construe the term “whistleblower” in its “ordinary sense,” i.e., without any SEC-reporting requirement. Brief for Respondent 18.

Doing so, Somers and the Solicitor General contend, would align with our precedent, specifically Lawson v. Suwannee Fruit & S. S. Co., 336 U. S. 198 (1949), and Utility Air Regulatory Group v. EPA, 573 U. S. ___ (2014). In those decisions, we declined to apply a statutory definition that ostensibly governed where doing so would have been “incompatible with . . . Congress’ regulatory scheme,” id., at ___ (slip op., at 18) (internal quotation marks omitted), or would have “destroy[ed] one of the [statute’s] major purposes,” Suwannee Fruit, 336 U. S., at 201.

This case is of a piece, Somers and the Solicitor General maintain. Applying the statutory definition here, they variably charge, would create obvious incongruities;” Brief for United States as Amicus Curiae 19 (internal quotation marks omitted), “produce anomalous results,” id., at 22, “vitiate much of the [statute’s] protection,” id., at 20 (internal quotation marks omitted), and, as the Court of Appeals put it, narrow clause (iii) of §78u–6(h)(1)(A) “to the point of absurdity,” Brief for Respondent 35 (quoting 850 F. 3d, at 1049). We next address these concerns and explain why they do not lead us to depart from the statutory text.

A

It would gut “much of the protection afforded by” the third clause of §78u–6(h)(1)(a), Somers and the Solicitor General urge most strenuously, to apply the whistleblower definition to the anti-retaliation provision. Brief for United States as Amicus Curiae 20 (internal quotation marks omitted); Brief for Respondent 28–29. As earlier noted, see supra, at 4–5, clause (iii) prohibits retaliation against a “whistleblower” for “making disclosures” to various persons and entities, including but not limited to the SEC, to the extent those disclosures are “required or protected under” various laws other than Dodd-Frank. §78u–6(h)(1)(A)(iii). Applying the statutory definition of whistleblower, however, would limit clause (iii)’s protection to “only those individuals who report to the Commission.” Brief for United States as Amicus Curiae 22.

The plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alternative proffered by Somers and the Solicitor General. But we do not agree that this consequence “vitiates[ ] clause (iii)’s protection, id., at 20 (internal quotation marks omitted), or ranks as “absurd[ ],” Brief for Respondent 35 (internal quotation marks omitted).6 In fact, our reading leaves the third clause with “substantial meaning.” Brief for Petitioner 32.

With the statutory definition incorporated, clause (iii) protects a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is un- aware that the employee has alerted the SEC. In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee “because of” the SEC reporting. §78u–6(h)(1)(A). More-over, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

While the Solicitor General asserts that limiting the protections of clause (iii) to dual reporters would “shrink to insignificance the [clause’s] ban on retaliation,” Brief for United States as Amicus Curiae 22 (internal quotation marks omitted), he offers scant evidence to support that assertion. Tugging in the opposite direction, he reports that approximately 80 percent of the whistleblowers who received awards in 2016 “reported internally before reporting to the Commission.” Id., at 23. And Digital Realty cites real-world examples of dual reporters seeking Dodd-Frank or Sarbanes-Oxley recovery for alleged retaliation. See Brief for Petitioner 33, and n. 4 (collecting cases). Overlooked by Somers and the Solicitor General, in dual-reporting cases, retaliation not prompted by SEC disclosures (and thus unaddressed by clause (i)) is likely commonplace: The SEC is required to protect the identity of whistleblowers, see §78u–6(h)(2)(A), so employers

6. The Solicitor General, unlike Somers, acknowledges that it would not be absurd to apply the “whistleblower” definition to the anti-retaliation provision. Tr. of Oral Arg. 52.
will often be unaware that an employee has reported to the Commission. In any event, even if the number of individuals qualifying for protection under clause (iii) is relatively limited, “[i]t is our function to give the statute the effect its language suggests, however modest that may be.” *Morrison v. National Australia Bank Ltd.*, 561 U. S. 247, 270 (2010).

B

Somers and the Solicitor General express concern that our reading would jettison protection for auditors, attorneys, and other employees subject to internal-reporting requirements. See Brief for Respondent 25: Brief for United States as *Amicus Curiae* 21. Sarbanes-Oxley, for example, requires auditors and attorneys to report certain information within the company before making disclosures externally. See 15 U. S. C. §§78j–1(b), 7245; 17 CFR §205.3. If the whistleblower definition applies, Somers and the Solicitor General fear, these professionals will be “le[ft] . . . vulnerable to discharge or other retaliatory action for complying with” their internal-reporting obligations. Brief for United States as *Amicus Curiae* 22 (internal quotation marks omitted).

Our reading shields employees in these circumstances, however, as soon as they also provide relevant information to the Commission. True, such employees will remain ineligible for Dodd-Frank’s protection until they tell the SEC, but this result is consistent with Congress’ aim to encourage SEC disclosures. See S. Rep. No. 111–176, at 38; supra, at 3–4, 11. Somers worries that lawyers and auditors will face retaliation quickly, before they have a chance to report to the SEC. Brief for Respondent 35–36. But he offers nothing to show that Congress had this concern in mind when it enacted §78u–6(h). Indeed, Congress may well have considered adequate the safeguards already afforded by Sarbanes-Oxley, protections specifically designed to shield lawyers, accountants, and similar professionals. See *Lawson*, 571 U. S., at __ (slip op., at 17).

C

Applying the whistleblower definition as written, Somers and the Solicitor General further protest, will create “an incredibly unusual statutory scheme”: “[I]dentical misconduct”—i.e., retaliating against an employee for internal reporting—will “go punished or not based on the happenstance of a separate report” to the SEC, of which the wrongdoer may “not even be aware.” Brief for Respondent 37–38. See also Brief for United States as *Amicus Curiae* 24. The upshot, the Solicitor General warns, “would be substantially diminish[ed] Dodd-Frank deterrent effect.” *Ibid.*

Overlooked in this protest is Dodd-Frank’s core objective: to prompt reporting to the Commission. *Supra*, at 3–4, 11. In view of that precise aim, it is understandable that the statute’s retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve, *i.e.*, they have placed information about unlawful activity before the Commission to aid its enforcement efforts.

D

Pointing to another purported anomaly attending the reading we adopt today, the Solicitor General observes that neither the whistleblower definition nor §78u–6(h) contains any requirement of a “temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation.” Brief for United States as *Amicus Curiae* 25. It is therefore possible, the Solicitor General posits, that “an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under [§78u–6(h)] if he had reported an insider-trading violation by his previous employer to the Commission in 2012.” *Ibid.* For its part, Digital Realty agrees that this scenario could arise, but does not see it as a cause for concern: “Congress,” it states, “could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures.” Reply Brief 11.

We need not dwell on the situation hypothesized by the Solicitor General, for it veers far from the case before us. We note, however, that the interpretation offered by Somers and the Solicitor General—*i.e.*, ignoring the statutory definition when construing the anti-retaliation provision—raises an even thornier question about the law’s scope. Their view, which would not require an employee to provide information relating to a securities-law violation to the SEC, could afford Dodd-Frank protection to an employee who reports information bearing no relationship whatever to the securities laws. That prospect could be imagined based on the broad array of federal statutes and regulations cross-referenced by clause (iii) of the anti-retaliation provision. *E.g.*, 18 U. S. C. §1513(e) (criminalizing retaliation for “providing to a law enforcement officer any truthful information relating to the commission . . . of any Federal offense” (emphasis added)); see *supra*, at 5, and n. 2. For example, an employee fired for reporting a coworker’s drug dealing to the Federal Bureau of Investigation might be protected. Brief for Petitioner 38. It would make scant sense, however, to rank an FBI drug-trafficking informant a whistleblower under Dodd-Frank, a law concerned only with encouraging the reporting of “*securities* law violations.” S. Rep. No. 111–176, at 38 (emphasis added).

E

Finally, the interpretation we adopt, the Solicitor General adds, would undermine not just clause (iii) of §78u–6(h)(1)(A), but clause (ii) as well. Clause (ii) prohibits retaliation against a whistleblower for “initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon” information conveyed to the SEC by a whistleblower in accordance with the statute. §78u–6(h)(1)(A)(ii). If the whistleblower definition is applied to §78u–6(h), the Solicitor General states, “an employer could fire an employee for giving . . . testimony [to the SEC] if the employee had
not previously reported to the Commission online or through the specified written form”—i.e., the methods currently prescribed by Rule 21F–9 for a whistle-blower to provide information to the Commission. Brief for United States as Amicus Curiae 20–21 (citing 17 CFR §240.21F–9(a)(1)–(2)).

But the statute expressly delegates authority to the SEC to establish the “manner” in which information may be provided to the Commission by a whistleblower. See §78u–6(a)(6). Nothing in today’s opinion prevents the agency from enumerating additional means of SEC reporting—including through testimony protected by clause (ii).

IV

For the foregoing reasons, we find the statute’s definition of “whistleblower” clear and conclusive. Because “Congress has directly spoken to the precise question at issue,” Chevron, 467 U. S., at 842, we do not accord deference to the contrary view advanced by the SEC in Rule 21F–2. See 17 CFR §240.21F–2(b)(1); supra, at 6–7. The statute’s unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term. See Burgess, 553 U. S., at 130.

***

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring.

I join the Court’s opinion in full. I write separately only to note my disagreement with the suggestion in my colleague’s concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute.

Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.

Committee reports, like the Senate Report the Court discusses here, see ante, at 3–4, 11–12, 16–18, are a particularly reliable source to which we can look to ensure our fidelity to Congress’ intended meaning. See Garcia v. United States, 469 U. S. 70, 76 (1984) (“In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represent[] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation’” (quoting Zuber v. Allen, 396 U. S. 168, 186 (1969))). Bills presented to Congress for consideration are generally accompanied by a committee report.

Such reports are typically circulated at least two days before a bill is to be considered on the floor and provide Members of Congress and their staffs with information about “a bill’s context, purposes, policy implications, and details,” along with information on its supporters and opponents. R. Katzmann, Judging Statutes 20, and n. 62 (2014) (citing A. LaRue, Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, S. Doc. No. 107–1, p. 17 (2001)). These materials “have long been important means of informing the whole chamber about proposed legislation.” Katzmann, Judging Statutes, at 19, a point Members themselves have emphasized over the years.7 It is thus no surprise that legislative staffers view committee and conference reports as the most reliable type of legislative history. See Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 977 (2013).

Legislative history can be particularly helpful when a statute is ambiguous or deals with especially complex matters. But even when, as here, a statute’s meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text. See, e.g., Tapia v. United States, 564 U. S. 319, 331–332 (2011); Carr v. United States, 560 U. S. 438, 457–458 (2010). Moreover, confirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government. See Katzmann, Judging Statutes, at 35–36.

For these reasons, I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, concurring in part and concurring in the judgment.

7. See, e.g., Hearings on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 65–66 (1986) (Sen. Charles E. Grassley) (“[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent”); Mikva, Reading and Writing Statutes, 28 S. Tex. L. Rev. 181, 184 (1986) (“The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute”); Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response? 93 Mich. L. Rev. 1, 28 (1994) (compiling the views of former Members on “the central importance of committee reports to their own understanding of statutory text”). In fact, some Members “are more likely to vote . . . based on a reading of the legislative history than on a reading of the statute itself.” Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 968 (2013).
I join the Court’s opinion only to the extent it relies on the text of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. The question in this case is whether the term “whistleblower” in Dodd-Frank’s antiretaliation provision, 15 U. S. C. §78u–6(h)(1), includes a person who does not report information to the Securities and Exchange Commission. The answer is in the definitions section of the statute, which states that the term “whistleblower” means a person who provides “information relating to a violation of the securities laws to the Commission.” §78u–6(a)(6). As the Court observes, this statutory definition “resolves the question before us.” *Ante*, at 9. The Court goes on, however, to discuss the supposed “purpose” of the statute, which it primarily derives from a single Senate Report. See *Ante*, at 3–4, 11–12, 16–18. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, “we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.”*# Lawson v. FMR LLC*, 571 U. S. 429, ___ (2014) (Scalia, J., concurring in part and concurring in judgment) (slip op., at 1). And “it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute.” *Harrison v. PPG Industries, Inc.*, 446 U. S. 578, 592 (1980). For these reasons, I am unable to join the portions of the Court’s opinion that venture beyond the statutory text.

8. *For what it is worth, I seriously doubt that a committee report is a ‘particularly reliable source’ for discerning ‘Congress’ intended meaning.’ *Ante*, at 1 (SOTOMAYOR, J., concurring). The following exchange on the Senate floor is telling:

“Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

“Mr. DOLE. Did I write the committee report?

“Mr. ARMSTRONG. Yes.

“Mr. DOLE. No; the Senator from Kansas did not write the committee report.

“Mr. ARMSTRONG. Did any Senator write the committee report?

“Mr. DOLE. I have to check.

“Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

“Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written. I might say, and worked carefully with the staff as they worked.

“Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

“Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.

“Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

“Mr. DOLE. No.

“Mr. ARMSTRONG. . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate . . . If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report . . . [L]et me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.” *Hirschey v. FERC*, 777 F. 2d 1, 7–8, n. 1 (CADC 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. 16918–16919 (1982)). See also Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 317–318 (2017) (describing his experience as a Senate staffer who drafted legislative history “like being a teenager at home while your parents are away for the weekend: there was no supervision. I was able to write more or less what I pleased. . . . [M]ost members of Congress . . . have no idea at all about what is in the legislative history for a particular bill”).
STEVEN BASSETT, Plaintiff-Appellant,
v. 
ABM PARKING SERVICES, INC.,
DBA ABM Onsite Services - West,
DBA AMPCO System Parking; ABM
ONSITE SERVICES - WEST, INC.;
ABM INDUSTRIES, INC., Defendants-
Appellees.

No. 16-35933
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:16-cv-00947-TSZ
Appeal from the United States District Court for the Western
District of Washington
Thomas S. Zilly, Senior District Judge, Presiding
Submitted December 5, 2017*
Seattle, Washington
Filed February 21, 2018
Before: Michael Daly Hawkins, M. Margaret McKeown, and
Morgan Christen, Circuit Judges.
Opinion by Judge McKeown

* The panel unanimously concludes this case is suitable
for decision without oral argument. See Fed. R. App. P.
34(a)(2).

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OPINION
McKEOWN, Circuit Judge:

Today we answer a question that would certainly sound
exotic to our nation’s founders: Is receiving an overly re-
vealing credit card receipt—unseen by others and unused
by identity thieves—a sufficient injury to confer Article III
standing?

In response to growing credit card fraud and identity theft,
Congress enacted a series of protective laws. When Steven
Bassett used his credit card at an ABM parking garage, he
received a receipt displaying the card’s full expiration date—
a violation of the requirement that businesses redact certain
credit card information on printed receipts. 15 U.S.C. §
1681c(g). Bassett sued but alleged only a statutory violation
and a potential for exposure to actual injury. Like the district
court, we conclude that Bassett failed to allege a concrete
injury sufficient to give him standing. In doing so, we join
the Second and Seventh Circuits in affirming dismissal un-
der identical circumstances. See Crupar-Weinmann v. Paris
Baguette Am., Inc., 861 F.3d 76 (2d Cir. 2017); Meyers v.
Nicolet Rest. of De Pere, LLC, 843 F.3d 724 (7th Cir. 2016).

BACKGROUND

The legislative backdrop for this case centers on FACTA
and FCRA. The Fair and Accurate Credit Transactions Act
amended the Fair Credit Reporting Act (“FCRA”) to limit
the information printed on receipts: “[N]o person that accepts
credit cards or debit cards for the transaction of business shall
print more than the last 5 digits of the card number or the
expiration date upon any receipt provided to the cardholder
at the point of the sale or transaction.” 15 U.S.C. § 1681c(g).
The statute provides that “[a]ny person who willfully fails to
comply with [that requirement] with respect to any consumer
is liable to that consumer” for statutory damages of between
$100 and $1,000 per violation or the expiration date upon any receipt provided to the cardholder
at the point of the sale or transaction.”’ 15 U.S.C. § 1681n.
The Act grants a temporary reprieve for merchants: “[A]
yone who printed an expiration date on any receipt . . .
between December 4, 2004, and [June 3, 2008],” but otherwise complied with the
card number truncation requirements, did not willfully vio-
late the FCRA.

Following the passage of FACTA, consumers filed a spate
of lawsuits against merchants who printed receipts show-
ing credit card expiration dates. In response, Congress en-
acted the Credit and Debit Card Receipt Clarification Act
1565 (2008). The Clarification Act reiterated that the FCRA
prohibits the printing of receipts bearing a card’s expiration
date. Id. at 1566. But the congressional findings also noted
that “hundreds of lawsuits were filed alleging that the failure
to remove the expiration date was a willful violation of the
[FCRA] even where the account number was properly trun-
cated,” and “[n]one of these lawsuits contained an allegation
of harm to any consumer’s identity.” Id. at 1566. But the congressional
findings also noted that

1. We use “FCRA” where “FCRA” or “FACTA” could be used
interchangeably.
When Bassett paid for parking at an ABM garage in 2016, he was issued a receipt bearing his credit card expiration date. Bassett filed a putative class action lawsuit against ABM Services, Inc.; ABM Onsite Services – West; and ABM Industries, Inc. (collectively “ABM”) alleging willful violations of the FCRA. Bassett’s claimed injury was “exposure . . . to identity theft and credit/debit fraud,” because he was at “imminent risk” that his “property would be stolen and/or misused by identity thieves.” He did not allege that a second receipt existed, that his receipt was lost or stolen, or that he was the victim of identity theft. Rather, he claimed that “the risk of harm created in printing the expiration date on the receipt” was a “sufficiently concrete” injury to confer Article III standing.

The district court granted ABM’s motion to dismiss the complaint because Bassett failed to allege a sufficiently concrete injury. In dismissing the case with prejudice, the court concluded that Bassett alleged nothing more than a “possible risk of [identity] theft.” Citing the Supreme Court’s watershed decision on standing, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), the district court emphasized that “[s]omething more is necessary” to allege a concrete injury in fact, because “not every procedural violation gives rise to standing.”

**ANALYSIS**

**I. SPOKEO AND DECISIONS OF OUR SISTER CIRCUITS**

At its core, standing is “an essential and unchanging part of the case-or-controversy requirement of Article III.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Our analysis of this threshold issue begins with Spokeo. 136 S. Ct. 1540. To have standing, Bassett must allege that he “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of [ABM], and (3) that is likely to be redressed by a favorable judicial decision.” Id. at 1547. An injury in fact is “an invasion of a legally protected interest that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” Id. at 1548 (quoting Lujan, 504 U.S. at 560).

This appeal turns on whether Bassett alleged a concrete injury in fact. Spokeo, like this case, involved a putative consumer class action alleging willful violations of the FCRA. Robins claimed that Spokeo, a consumer reporting agency, published inaccurate credit report information about him, in violation of the FCRA. Id. at 1545–46. The district court dismissed the complaint for lack of standing, but we reversed. Id. at 1546. Because Robins alleged that “Spokeo violated his statutory rights, not just the statutory rights of other people,” and Robins’s “personal interests in the handling of his credit information are individualized rather than collective,” we concluded that Robins’s “alleged violations of [his] statutory rights were sufficient to satisfy the injury-in-fact requirement of Article III.” Id. (quoting 742 F.3d 409, 413–14 (9th Cir. 2014)). Finding this analysis “incomplete,” the Supreme Court vacated and remanded to consider whether Robins alleged a concrete injury in fact. Id. at 1545.

The Court emphasized that “Article III standing requires a concrete injury even in the context of a statutory violation.” Id. at 1549. A plaintiff must show that a concrete injury “actually exist[s]”; in other words, it is “real, and not abstract.” Id. at 1548 (internal quotation marks omitted). Intangible harms and a “risk of real harm” can be sufficiently concrete. Id. at 1549–50. But “a bare procedural violation, divorced from any concrete harm,” cannot “satisfy the injury-in-fact requirement of Article III.” Id. at 1549. Importantly, the Court noted that “[a] violation of one of the FCRA’s procedural requirements may result in no harm”—for example, “[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.” Id. at 1550. The Court remanded to determine “whether the particular procedural violations alleged . . . entail a degree of risk sufficient to meet the concreteness requirement.” Id.

Following Spokeo, two of our sister circuits dismissed for lack of standing identical consumer class actions to the one presented in this appeal—alleged violations of the FCRA’s credit card expiration date redaction requirement. In Meyers v. Nicolet Restaurant of De Pere, the Seventh Circuit held that “Spokeo compels the conclusion that Meyers’[s] allegations are insufficient to satisfy the injury-in-fact requirement for Article III standing.” 843 F.3d at 727. The court also observed that in the Clarification Act, Congress was “quite concerned” about abusive FCRA lawsuits where a consumer does not suffer actual harm, and “specifically declared that failure to truncate a card’s expiration date, without more, does not heighten the risk of identity theft.” Id. at 727–28. Hence, “without a showing of injury apart from the statutory violation, the failure to truncate a credit card’s expiration date is insufficient to confer Article III standing.” Id. at 728–29.

The Second Circuit reached the same conclusion in Crupar-Weinmann v. Paris Baguette America, Inc. In holding that the alleged “bare procedural violation” did not “present[] a material risk of harm to the underlying concrete interest Congress sought to protect in passing FACTA”—preventing identity theft and credit card fraud—the court viewed as “dispositive” Congress’s findings in the Clarification Act. 861 F.3d at 81. Specifically, the court pointed to Congress’s finding that “[e]xperts in the field agree that proper truncation
of the card number, . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud.” Id. (alteration in original) (quoting 122 Stat. at 1565). That statement “ma[de] clear that Congress did not think that the inclusion of a credit card expiration date on a receipt increases the risk of material harm of identity theft,” particularly in light of Congress’s concern about “abusive” FCRA lawsuits. Id.

II. BASSETT’S ABSENCE OF INJURY

We think our sister circuits are correct. History and congressional judgment “play important roles” in our analysis of whether an injury is concrete. See Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (quoting Spokeo, 136 S. Ct. at 1549). Both factors counsel that Bassett did not allege a concrete injury.

A. NO HISTORICAL PREDICATE

We look to history because “the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice.” Spokeo, 136 S. Ct. at 1549. Bassett’s theory of injury is not supported by historical practice. Indeed, his claimed “exposure” to identity theft—caused by ABM’s printing of his credit card expiration date on a receipt that he alone viewed—does not have “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” Id.

Bassett urges us to look to the “close” historical relationship between his alleged injury and privacy-based torts centered on wrongful disclosures of information. But even assuming that “unauthorized disclosures of information” are legally cognizable, ABM did not disclose Bassett’s information to anyone but Bassett. See In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 636 (3d Cir. 2017). Without disclosure of private information to a third party, it hardly matters that “[a]ctions to remedy . . . invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states.” Van Patten, 847 F.3d at 1043.

It is important to distinguish the alleged harm here from cases where we have recognized a privacy-based injury, such as Van Patten. There, we held that a consumer who received unsolicited text messages in violation of the Telephone Consumer Protection Act alleged a sufficiently concrete injury because “unrestricted telemarketing can be an intrusive invasion of privacy and [is] a nuisance.” Id. (quoting Pub. L. 102-243, § 2, 105 Stat. 2394 (1991))). Bassett’s case is likewise dissimilar from Syed v. M-I, LLC, in which we determined that an employee sufficiently alleged a concrete injury where a prospective employer unlawfully obtained a consumer report about him without his consent, in violation of the employee’s “right to information” and “right to privacy” secured by the FCRA. 853 F.3d 492, 499–500 (9th Cir. 2017). Where-as an undisclosed receipt may not “cause harm or present any material risk of harm,” Spokeo, 136 S. Ct. at 1550, unconsented text messages and consumer reports divulged to one’s employer necessarily infringe privacy interests and present harm. Van Patten, 847 F.3d at 1043; Syed, 853 F.3d at 499.

B. CONGRESSIONAL JUDGMENT

In adopting the FCRA’s credit card expiration date requirement, Congress did not “elevate[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.” Lujan, 504 U.S. at 578. We look to Congress because “Congress is well positioned to identify intangible harms that meet minimum Article III requirements.” Spokeo, 136 S. Ct. at 1549. But Congress’s creation of a prohibition “does not mean that a plaintiff automatically satisfies the injury-in-fact requirement” just because “a statute grants [him] a statutory right and purports to authorize [him] to sue to vindicate that right.” Id. Bassett cannot, therefore, “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.” Id.

Spokeo laid to rest the notion that because the FCRA authorizes citizen suits and statutory damages, it must mean that allegations of a statutory violation meet the standing requirement. The statute does not eliminate this constitutional floor. As the Supreme Court emphasized, “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” Id. at 1547–48 (quoting Raines v. Byrd, 521 U.S. 811, 820, n.3 (1997)). Spokeo rejected our conclusion that a FCRA plaintiff need only invoke a FCRA violation and seek statutory damages to allege a concrete injury. Id. at 1546, 1549. In doing so, the Court cast aside our prior dictum that “[a]llowing consumers to recover statutory damages further[s] the FCRA’s purpose by deterring businesses from willfully making consumer financial data available, even where no actual harm results.” Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 718 (9th Cir. 2010) (emphasis added).

Far from “elevating” expiration date violations, the Clarification Act suggests that alleged injuries like Bassett’s are not concrete. Bassett’s suit replicates those addressed in the statute: it “alleg[es] that the failure to remove the expiration date was a willful violation of the [FCRA] even where the account number was properly truncated,” and does not “contain[] an allegation of harm to any consumer’s identity.” 122 Stat. at 1565. Congress stressed that “proper truncation of the card number, by itself as required by the [FCRA], regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud.” Id. Distinguishing between “consumers suffering from any actual harm to their credit or identity” and those pursuing “abusive lawsuits,” Congress clarified that printing the expiration date on a receipt was not a willful violation of the FCRA during a temporary safe-harbor period. Id. at 1566 (emphasis added).
Of course, Congress did not eliminate the FCRA’s expiration date requirement in the Clarification Act. But both the Clarification Act’s finding that a disclosed expiration date by itself poses minimal risk and the law’s temporary elimination of liability for such violations counsel that Bassett did not allege a concrete injury. On balance, congressional judgment weighs against Bassett.

III. BASSETT’S STATUTORY THEORIES OF INJURY

On remand from the Supreme Court in Spokeo, we acknowledged that “while [plaintiffs] may not show an injury-in-fact merely by pointing to a statutory cause of action, the Supreme Court also recognized that some statutory violations, alone, do establish concrete harm.” Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017).

Bassett offers two alternative statutory theories of injury regarding the FCRA’s expiration date requirement. At maximum, Bassett asserts, the FCRA creates a “substantive right,” the invasion of which is an injury that confers standing. See Eichenberger v. ESPN, Inc., 876 F.3d 979, 982–84 (9th Cir. 2017). At minimum, the law establishes a procedural right, the violation of which creates a material risk of harm sufficient to confer standing. See Robins, 867 F.3d at 1114–17.2 Neither theory is persuasive in this context.

Bassett’s argument that Congress “created a substantive right that is invaded by a statutory violation” is unconvincing because it depends entirely on the framing of the right. One could fairly characterize the “right” granted to Bassett by the FCRA (from most abstract to most specific) as “the right to be free from identity theft,” “the right to be free from disclosure to others of his full credit card information,” or “the right to be free from receiving a receipt showing his credit card expiration date.”3 Only the last “right” was violated in this case. Such a framing-dependent exercise is arbitrary, and thus bears minimally on whether Bassett suffered a concrete injury in fact.

To the extent the FCRA arguably creates a “substantive right,” it rests on nondisclosure of a consumer’s private financial information to identity thieves. See Bateman, 623 F.3d at 717 (describing the FCRA’s card number redaction requirement as “an effort to combat identity theft”). We recently held, for example, that a statute barring video service providers from disclosing knowingly and without consent a consumer’s “personally identifiable information” to third parties establishes a “substantive right to privacy.” See Eichenberger, 876 F.3d at 982–84. But here, Bassett’s private information was not disclosed to anyone but himself, and therefore no such substantive right was invaded. See id. at 983–84 (noting that whereas “the FCRA outlines procedural obligations that sometimes protect individual interests, the [Video Privacy Protection Act] identifies a substantive right to privacy that suffers any time a video service provider discloses otherwise private information” to a third party).

Bassett’s allegations of FCRA procedural violations also do not “entail a degree of risk sufficient to meet the concreteness requirement.” Spokeo, 136 S. Ct. at 1550. In assessing violations of procedural statutory rights, we consider whether “the specific procedural violations alleged . . . actually harm, or present a material risk of harm to [Bassett’s] interests.” Robins, 867 F.3d at 1113. Bassett did not allege that another copy of the receipt existed, that his receipt was lost or stolen, that he was the victim of identity theft, or even that another person apart from his lawyers viewed the receipt. See Meyers, 843 F.3d at 727. Nor did he allege that any risk of harm is real, “not conjectural or hypothetical,” given that he could shred the offending receipt along with any remaining risk of disclosure. Lujan, 504 U.S. at 560.

Like the dissemination of an incorrect zip code, it is difficult to see how issuing a receipt to only the card owner and with only the expiration date, “without more, could work any concrete harm.” Spokeo, 136 S. Ct. at 1550. Indeed, Congress found that receipts like Bassett’s that truncate the credit card number but reveal the expiration date “prevent[] a potential fraudster from perpetrating identity theft or credit card fraud.” 122 Stat. at 1565. Bassett’s theory of “exposure” to identity theft is therefore “too speculative for Article III purposes.” See Missouri ex rel. Koster v. Harris, 847 F.3d 646, 654 (9th Cir. 2017) (quoting Lujan, 504 U.S. at 564 n.2); see also Clapper v. Amnesty Int’l USA, 568 U.S. 398, 409 (2013) (a “threatened injury must be certainly impending to constitute injury in fact” (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).4

We need not answer whether a tree falling in the forest makes a sound when no one is there to hear it. But when this receipt fell into Bassett’s hands in a parking garage and no identity thief was there to snatch it, it did not make an injury.

AFFIRMED.

2. We note that the distinction between a “substantive” statutory violation that alone creates standing, and a “procedural” statutory violation that may cause harm or a material risk of harm sufficient for standing, can be a murky one. In assessing constitutional standing, we must always analyze whether the alleged harm is concrete, with an eye toward history and congressional judgment (as we explained in Section II). The “substantive” and “procedural” analyses that have appeared in our case law are variations on that calculus.

3. A line of cases recognizes that a violation of a substantive statutory right to obtain truthful information is a sufficiently concrete injury to confer standing. See FEC v. Akins, 524 U.S. 11, 21 (1998); Havens Realty Corp. v. Coleman, 455 U.S. 363, 374–75 (1982); Syed, 853 F.3d at 499. Nevertheless, the FCRA provision challenged in this case does not confer a substantive right to obtain a receipt. See 15 U.S.C. § 1681e(g). And, in any event, Bassett’s receipt contains truthful information.

4. It is no help to Bassett that some courts have found injuries sufficiently concrete where plaintiffs alleged theft of their private information, even when that information had not yet been used against them (e.g., no fraudulent charges had been made). See Galaria v. Nationwide Mut. Ins. Co., 663 F. App’x 384, 387–89 (6th Cir. 2016); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015); Krottner v. Starbucks Corp., 628 F.3d 1139, 1142–43 (9th Cir. 2010). Bassett alleged no such theft.
I. BACKGROUND

A. Factual History

Together with the facts alleged in the complaint, the declarations submitted in support of and against the anti-SLAPP motion reveal, in substance, the following circumstances. The City has leased a substantial amount of land from the federal government since at least 2000, including, as relevant here, the former Alameda Naval Air Station, also known as Alameda Point. According to the City, it “licenses specific areas of Alameda Point for private use, including an area known as the Northwest Territories (the ‘NWT’) located on the former Naval Air Station runway.” The City established an elaborate licensing process for anyone who wants to use its property, and as part of that process has contracted with PM since 2004 to “manage[] the leasing and licensing of Alameda Point.”

For over a decade, the City has licensed the NWT and other property to Area 51, an event promotion company, for various events the company has helped plan and promote on behalf of third-party companies. Apparently, however, this long-standing relationship has been periodically fraught with disputes surrounding Area 51’s compliance with the City’s rules. For instance, the two parties have sometimes disagreed on whether Area 51 properly disclosed its intended activities in some licensing applications; and sometimes other tenants have complained about Area 51’s disturbances. Given these issues, around late 2013 the City encouraged Area 51 to work with Rock Wall, another of the City’s tenants, but one with whom it has had few if any compliance issues. Thus, in September 2013 Area 51 and Rock Wall formed a new entity, Area 51 Enterprises, LLC (Enterprises). On September 23, 2013, Enterprises entered into a one-year standing licensing agreement with the City starting October 1, 2013. The agreement provided (1) it was “fully revocable at the sole option and discretion of” the City, and (2) prohibited transfers to anyone but Enterprises and the City.

Only a few days later, on October 4, 2013, Rock Wall severed ties with Area 51 and withdrew from Enterprises. It seems no one informed the City of this development until January 2014, at which point PM notified Area 51 that “the current license agreement in place is no longer valid since
the company has made legal changes with their stakeholders and the agreement is between the City and both companies.” Before and after finding out about Rock Wall’s withdrawal from Enterprises, the City placed “soft holds” on the NWT property upon Area 51’s request, for various events from May to December 2014. In February 2014, the City reminded Area 51 by email that it would need to obtain new license agreements; otherwise, it would “be unable to utilize the Northwest Territories for the events held on the calendar.” It is unclear whether Area 51 received, acknowledged, or responded to these emails.

On March 10, 2014, Area 51 emailed PM to confirm the holds for its events later that year. The next day Elgarico replied for PM on behalf of the City, confirming the “soft holds” for the specified dates. The City then emailed Area 51 in late March to reiterate it needed to memorialize “licenses for those scheduled events,” and PM emailed Area 51 in April with a draft license agreement for its May event and clarified that PM would “do a new [l]icense agreement for each of [Area 51’s] events.” According to Area 51, this email exchange essentially serves as the communicated offer and acceptance of terms, producing a firm contractual commitment to license the NWT properties to Area 51 on the “soft hold” dates.

Defendants allegedly breached this “agreement” in May, as evidenced by a May 19, 2014 email from Mocanu to Area 51, stating “I have spoken to the City Manager” and “the City’s licensing relationship with Area 51 is over.” Nevertheless, the event in May took place as scheduled without a new license agreement, but gave rise to some compliance disputes which ultimately triggered the City’s termination of the relationship on May 19. In her May 19 email to Area 51, Mocanu pointed to these compliance issues as an example of why the City had wanted Area 51 to work “under Rock Wall.”

**B. Procedural History**

Area 51 filed a notice of claim with the City, requesting use of the property on the dates requested or damages. The City denied this request, prompting Area 51 to file its complaint, naming as defendants the City, the Individual City Defendants, and the PM Defendants, and asserting six causes of action against all of them. In the complaint, Area 51 alleged on information and belief that each Defendant was an “agent, employee or representative of each of the . . . [other] Defendants and in doing the things mentioned herein, was acting in the course and scope of such agency and employment.” Attached to the complaint were numerous documentary exhibits detailing many of the facts summarized above.

Area 51’s six causes of action were: (1) breach of contract and breach of the implied covenant of good faith and fair dealing, based on its belief that Defendants had entered into a contract with Area 51 by virtue of confirming the holds on its events “on or about March 11, 2014”; (2) tortious interference with Area 51’s third-party contracts; (3) intentional interference with prospective economic relations; (4) negligent interference with prospective economic relations; (5) unfair competition under Business and Professions Code section 17200; and (6) negligent misrepresentation, as to the “important fact . . . that their confirmed reservations of the [NWT] Property would be honored.”

The City and the Individual City Defendants timely moved to strike all six causes of action under the anti-SLAPP statute, and the PM Defendants joined the motion. Area 51 opposed it, submitting the declaration of its Chief Executive Officer, John Walker, as the sole evidentiary showing in support of its claims. Without attaching and authenticating any of the various documents supplied as exhibits to the complaint, Walker’s declaration reads, in its entirety, as follows:

1. I am the CEO of Area Productions, Inc., d/b/a Area 51 Enterprises, LLC, the Plaintiff if [sic] the above-captioned action.

2. In March of 2014 of 2014 [sic] the City and PM Realty, through its [sic] agents and employees[,] confirmed and agreed on dates for four events. Two events, one for Volkswagen and one for BMW, occurred before the natural termination of a Long Term Agreement for leasing space with the City that was set to expire in September, 2014. The remaining events, for Bridgestone and Porsche, were set to occur on October 7–12, 2014 and November 4–10 2014, respectively. PM Realty knew that the Property must be unconditionally available before I could secure Third Party Agreements and attendance insurance, as was customary in our dealings for the prior two decades.

3. Area 51 Enterprises was formerly business partners with Rock Wall Wine, Inc.

4. When Area 51 Enterprises partnered with Rock Wall Wine, Inc., it introduced Rock Wall to the Property it had used to hold its events for the prior 18 years.

5. Up until September 2014 Area 51 and the City had a Long Term License Agreement that covered all of its individual events.

6. After September 2014 Area 51 confirmed its individual events with PM Realty before entering into Third Party Agreements.

7. Contrary to Defendants’ assertion that it either (a) was ‘void 4 days after its execution’ or (b) ‘in January 2014’ when Defendant[s] allegedly became aware of potential grounds to void the Agreement, I never received any indication that the City or PM Realty prevent [sic] Area 51 from use of the Property.
“8. In fact, up until May of 2014, the City, PM Realty and the Individual Defendants continued to accept security deposits from Area 51 and never indicated that Area 51 should not enter into Third Party Agreements, after confirming their space, as they had in the 18 years prior.

“9. Although the City and PM Realty have offered a number of excuses for failure to provide the Property as required, among them: (1) heavy trucks . . . (2) change in proportional shares of Area 51 and (3) licensing issues, the Defendants have neglected their obligations due to a personal issues [sic] the Defendants have with me, unrelated to business or any agreements we have entered.

“10. Upon information and belief, the City, PM Realty, [and the] Individual Defendants conspired to force Area 51 out of the lease space and secure a more lucrative deal with Area 51’s former partner, Rock Wall.

“11. Due to the acts and omissions set forth in my Complaint, Area 51 has been sued by one of the Third Parties addressed in the Complaint. See Octagon Inc. v. Area 51 Enterprises (BC 539128) seeking $121,650.00 for ‘failing to provide the Premises or services as promised.’

“12. It was Defendants’ non-performance that occasioned Area 51’s inability to provide the Property for purposes of the BMW Event.

“13. The City and [sic] PM Realty continue to do business with Rockwall [sic], despite its claims that Rock Wall’s transfer of ownership shares resulted in some prejudice to them that allowed breach of the subject agreements.”

The trial court denied Defendants’ anti-SLAPP motion without addressing whether Area 51 showed a probability of success on any of its claims. The court concluded the conduct underlying all of Area 51’s claims is not protected activity within the meaning of the statute. (See § 425.16, subds. (b)(1), & (e)(2) & (4).) For this conclusion, it cited three cases relied upon by Area 51 (see Kajima Engineering & Const., Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921, 930–931 (Kajima); Blackburn v. Brady (2004) 116 Cal.App.4th 670, 676–677 (Blackburn); Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790, 808–809 (Wang)), and distinguished one relied on by Defendants (see City of Costa Mesa v. D’Alessio Investments, LLC (2013) 214 Cal.App.4th 358 (City of Costa Mesa)).

Along with their anti-SLAPP motion, the City and the Individual City Defendants also filed a demurrer as to all claims, which the PM Defendants joined. The court sustained the demurrer with leave to amend. Defendants appealed the denial of their anti-SLAPP motion (see §§ 425.16, subd. (i) & 904.1, subd. (a)), one day after Area 51 filed its motion for attorney fees under the statute (see § 425.16, subd. (c)(1)).

II. DISCUSSION

A. The Anti-SLAPP Statutory Scheme and the Standard of Review

A SLAPP suit—a strategic lawsuit against public participation—seeks to chill rights to free speech or petition by dragging the speaker or petitioner through the litigation process, without genuine expectation of success in the suit. The Legislature enacted section 425.16 to provide a summary disposition procedure for SLAPP claims. Toward this end, section 425.16 authorizes courts, upon motion by anyone who claims to be the target of a SLAPP suit, to probe the basis for any cause of action allegedly arising from protected communicative activities, and to strike it if the claimant cannot show minimal merit. “[T]he statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest . . . that would fall within the scope of the statute if such statements were made by a private individual or entity.” (Vargas v. City of Salinas (2009) 46 Cal.4th 1, 17.)

The heart of the anti-SLAPP statute is section 425.16, subdivision (b)(1), which provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Section 425.16, subdivision (b)(1) does not provide a form of immunity, “insulating defendants from any liability for claims arising from the protected rights of petition or speech.” (Baral v. Schnitt (2016) 1 Cal.5th 376, 384 (Baral).) Rather, the statute “only provides a procedure

5. See also San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn. (2004) 125 Cal.App.4th 343, 353 (San Ramon) (“We have no doubt that a public official or government body, just like any private litigant, may make [a special motion to strike] where appropriate.”); City of Costa Mesa, supra, 214 Cal.App.4th at pages 371, 384 (striking claims against city employees based on statements employees made to members of public concerning possibility of obtaining licenses at plaintiff’s property); Levy v. City of Santa Monica (2004) 114 Cal.App.4th 1252, 1258–1259 (striking complaint against city and city council member based on council member’s statements made to planning department about a citizen’s building permit); Bradbury v. Superior Court (1996) 49 Cal.App.4th 1108, 1116 (striking complaint against county and its employees based on statements employees made in investigatory report).

4. Defendants filed an extensive set of evidentiary objections to the Walker Declaration. After denying the anti-SLAPP motion on grounds Area 51’s complaint is not based on protected conduct, the court overruled Defendants’ evidentiary objections, concluding they were “moot.” Defendants have not challenged that ruling on this appeal.
for weeding out, at an early stage, meritless claims arising from protected activity.” (Ibid.)

Courts analyze anti-SLAPP motions using a familiar two-step analysis. In step one, “the court decides whether the defendant has made a threshold showing that the challenged cause of action is one ‘arising from’ protected activity.” (Barry v. State Bar of California (2017) 2 Cal.5th 318, 321 (Barry).) Although the anti-SLAPP statute does not actually use the term “protected activity,” that is the shorthand phrase adopted in the case law to describe speech or petitioning activities. (See, e.g., ibid.; Navellier v. Sletten (2002) 29 Cal.4th 82, 89 (Navellier) [interpreting § 425.16, subd. (b)(1), to require that the court first decide whether “the challenged cause of action is one arising from protected activity”). Four categories of “protected activity” are set forth in section 425.16, subdivision (e), which defines an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.” Two of these categories—set forth in subdivision (e)(2) and (4)—are invoked by Defendants here: “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” (§ 425.16, subd. (e)(2)), and “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest” (§ 425.16, subd. (e)(4)).

If a court concludes the activity at issue is protected by subdivision (e), it turns to the second step: “it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” (Barry, supra, 2 Cal.5th at p. 321.) “The court ‘accept[s] as true the evidence favorable to the plaintiff [citation] and evaluate[s] the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’” (Ibid.) Courts “do not resolve the merits of the overall dispute, but rather identify whether its pleaded facts fall within the statutory purpose, ‘to prevent and deter “lawsuits . . . brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”’” (Young v. Tri-City Healthcare Dist. (2012) 210 Cal.App.4th 35, 54.) The plaintiff is required to “show . . . there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment.” [Citation.] “The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence.” (City of Costa Mesa, supra, 214 Cal.App.4th at p. 376.) “Only a cause of action that satisfies both prongs of the anti-SLAPP statute . . . is a SLAPP, subject to being stricken under the statute.” (Barry, supra, 2 Cal.5th at p. 321.)

On appeal, we review the trial court’s ruling on Defendants’ anti-SLAPP motion de novo. (Flatley, supra, 39 Cal.4th at p. 325.) And in doing so, we follow the same two-step analysis (outlined above) as the trial court: “[W]e neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, . . . [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” (Id. at p. 326.)

B. The First Step of the Anti-SLAPP Analysis

In applying section 425.16, subdivision (b)(1), the mode of proceeding and the applicable analysis at the often-elusive first step have been worked out in some detail in the case law. “[T]he court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) “To determine whether a cause of action arises from protected activity, we disregard its label and instead examine its gravamen ‘by identifying “[t]he alleged wrongdoing and injurious-producing conduct . . . that provides the foundation for the claim.”’ [citation], i.e., “the acts on which liability is based,” not the damage flowing from that conduct.” (Wilson v. Cable News Network, Inc. (2016) 6 Cal.App.5th 822, 831, review granted Mar. 1, 2017, S239686 (Wilson); see Navellier, supra, 29 Cal.4th at pp. 91–95; City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78 (City of Cotati) [“the statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right of petition or free speech”).

“A claim arises from protected activity when that activity underlies or forms the basis for the claim.” (Park v. Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1062 (Park).) “Critically, ‘the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right of petition or free speech.’” [Citations.] “The focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” (Id. at pp. 1062–1063.) “If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute.” (Hyton v. Frank E. Rogozinski, Inc. (2009) 177 Cal.App.4th 1264, 1272; see City of Colton v. Singletary (2012) 206 Cal.App.4th 751, 767 (Singletary) [“the question is whether the protected activity is merely an incidental part of the cause of action”).

Essentially, the “court must ‘distinguish between (1) speech or petitioning activity that is mere evidence related to

6. See Schaffer v. City and County of San Francisco (2008) 168 Cal.App.4th 992, 1004 (Anti-SLAPP statute “merely attempts to insulate [defendants] from having to litigate plainly unmeritorious lawsuits . . . . If, in fact, there is merit to the plaintiff’s cause of action, the plaintiff can avoid dismissal simply by establishing a probability of prevailing.”); Flatley v. Mauro (2006) 39 Cal.4th 299, 312 (Flatley) (Section 425.16 “establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early state of the litigation.”).
liability and (2) liability that is based on speech or petitioning activity. Prelitigation communications . . . may provide evidentiary support for the complaint without being a basis of liability.’ [Citation.] ‘[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.’” (Wilson, supra, 6 Cal.App.5th at p. 832, rev. granted; see Navellier, supra, 29 Cal.4th at p. 89.) The most recent guidance provided by our Supreme Court is that, in teasing out whether we are dealing with protected conduct under section 425.16, subdivision (b), “courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.” (Park, supra, 2 Cal.5th at p. 1063.)

Sometimes, a challenged cause of action or causes of action will arise from both protected and unprotected activity. Under Baral, “[w]hen relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at [the first step of the anti-SLAPP analysis]. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.” (Baral, supra, 1 Cal.5th at p. 396.)7

7. Defendants take the position that Baral marks a sharp doctrinal break in which the California Supreme Court has disavowed the “gravamen” test and replaced it with an analysis focusing exclusively on whether the alleged protected conduct is merely of “evidentiary,” significance and therefore may be said to be “‘merely incidental’ or ‘collateral’” to the unprotected conduct.” (Shelley v. Harrop (2017) 9 Cal.App.5th 1147, 1167, 1169-1170.) In recent years, our Supreme Court has continued to refine its approach to drawing the critical “distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity . . . .” (See Park, supra, 2 Cal.5th at p. 1064 [denial of faculty tenure case where oral and written communications preceding tenure decision did not form the basis of alleged liability for discrimination]; Baral, supra, 1 Cal.5th at p. 395 [disapproving use of “primary right” theory of liability to determine whether a cause of action is based on protected activity].) We do not see in the continuing evolution of the law on this point any fundamental shift in the nature of the “gravamen” test as it has been applied since Navellier and City of Cotati. (See Gaynor v. Bulen (2018) 19 Cal.App.5th 864, 886 [“under Park and Baral, a court must continue to analyze whether the alleged protected activity within each claim are incidental or whether the principal thrust of the claim triggers anti-SLAPP protection”]; Okorie v. Los Angeles Unified School Dist. (2017) 14 Cal.App.5th 574, 588-590 [at least in some circumstances, “the principal thrust/gravamen analysis remains a viable tool by which to assess whether a plaintiff’s claim arises out of protected activity”].)

8. Complaint, § 35 (“Defendants failed to reserve the Property for Plaintiff, and further, refused to license or make the Property available during the confirmed reservation dates.”).

9. Complaint, § 47 (“Defendants acted intentionally to disrupt and frustrate Plaintiff’s relationship with Third Parties.”), id., § 55 (“Defendants engaged in wrongful conduct through misrepresentation, interference with economic and contractual relations, breach of contract, and violation of the Business and Professions Code.”).

10. In an effort to avoid this conclusion, the City re-characterizes Area 51’s complaint as one for anticipatory breach of contract, which it contends is a theory of liability that can only be supported by proving up a communication about future conduct. The City states: “There can be no anticipatory breach of a contract without communication by words or conduct that the breaching party will not perform.” (Italics omitted.) Putting to one side the fact that the complaint does not in terms allege anticipatory breach, we are not persuaded the City’s re-characterization of the complaint changes the analysis. Under Area 51’s theory of liability, the liability-producing conduct here was the City’s decision to end the licensing relationship (whether that decision is doctrinally categorized as a breach of contract or as an anticipatory

1. The First Through Fifth Causes of Action

a. The City

Insofar as the first through fifth causes of action are asserted against the City, we think the trial court was correct to conclude that they do not arise from protected activity. Through these five claims, Area 51 seeks to hold the City legally accountable for, in essence, an alleged breach of contract—i.e., the act of ending a long-standing arrangement to license the NWT for Area 51’s events upon confirmation of availability by “soft hold.” Although the claims are cast differently, under distinct legal theories, the act of reneging on a commitment to license the NWT is an indispensable feature in all of them. In the breach of contract claim, it is the element of breach; in the three interference claims, it is the element of disruption of a third-party contract or frustration of an economic opportunity; and in the Business and Professions Code section 17200 claim, it is the unfair competition element. In none of these five causes of action does Area 51 seek to impose liability on the City for the act of sending the May 19 email which conveyed its decision not to deal further with Area 51, or the March 11 email which Area 51 alleges created a contract to allow use of the NWT—i.e., the allegedly protected activity. The communications that led to and that followed the alleged injury-producing conduct—which is, at bottom, refusal to license to Area 51—are merely incidental to the asserted claims. (Park, supra, 2 Cal.5th at p. 1060 [“A claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrongful complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.”]; see also Shahbazian v. City of Rancho Palos Verdes (2017) 17 Cal.App.5th 823, 826 [governmental entity’s decision to issue or deny a building permit is not protected activity under § 425.16].)8

We think Defendants’ cases are distinguishable, at least to the extent Area 51’s first through fifth causes of action are asserted against the City. In King, the court found the plaintiff’s “cause of action for breach of contract [to be] based on the Kings’ submission of the High Density Tract Map to the planning commission and city council,” whereas here Area 51’s first through fifth causes of action against the City are based on an alleged act of breach of contract. (King, supra, 157 Cal.App.4th at p. 272.) In Vivian, the court held that, because the plaintiff was trying to “impose liability on [the defendant] for having made her statements to the internal affairs investigators and in her family court papers,” the plaintiff’s action was “ ‘based on’ that activity and [thus] [came] within the scope of section 425.16.” (Vivian, supra, 214 Cal.App.4th at p. 274.) Here, Area 51 is not attempting to impose liability on the City for “having made . . . statements . . . .” (Ibid.) The communicative acts by others preceding or otherwise made in connection with the City’s alleged breach of contract are merely collateral to, or evidence of that may be probative of, Area 51’s theories of liability. (See Wilson, supra, 6 Cal. App.5th at pp. 831–832, rev. granted; King, supra, 157 Cal.App.4th at p. 272.)

In Digerati Holdings, the court held the challenged cause of action arose out of “statements . . . made in anticipation of a lawsuit,” not out of a breach of an agreement, as alleged here. (See Digerati Holdings, supra, 194 Cal.App.4th at pp. 887–888.) The court in Feldman held as protected activities the defendant’s “threats [to evict the plaintiff], the service of the three-day notice, and the filing of the unlawful detainer action.” (Feldman, supra, 160 Cal.App.4th at p. 1484.) But here, Area 51 is not alleging any conduct by the City connected to the pursuit of litigation or possible litigation; rather, as stated in detail above, it is alleging the City ended an alleged agreement to license the NWT to Area 51 upon any confirmation by “soft hold,” thus interfering with Area 51’s third-party agreements. Finally, in City of Costa Mesa the court held the plaintiff was “suing for relief based on the oral statements, not challenging the underlying acts (the refusal of the City and its employees to issue licenses),” and the action thus arose from protected activity within the statute. (City of Costa Mesa, supra, 214 Cal.App.4th at p. 375.) In contrast, Area 51 is indeed challenging the City’s underlying act of refusing to license. That conduct is the gravamen of each of the first five claims it asserts against the City. And as noted above, the surrounding communications are merely evidence of its refusal.

In Vasquez, following a vote by the Montebello City Council in favor of entering a municipal waste disposal contract with a private party, it then came to light that some of those members may have had conflicts of interest due to certain financial contributions to their campaigns, among other things. (Vasquez, supra, 1 Cal.5th at pp. 413–416.) Although the district attorney declined to prosecute the members of the city council, the City of Montebello sued them along with the city administrator who helped negotiate the contract terms, alleging a single cause of action that charged unlawful conflict of interest pursuant to Government Code section 1090. (Vasquez, supra, at pp. 413–415.) The defendants met the claim with an anti-SLAPP motion, which the trial court denied. (Id. at p. 415.) After an affirmance by the Court of Appeal, the California Supreme Court reversed, holding “the council members’ votes, as well as statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as ‘any written or oral statement made before a legislative . . . proceeding.’” (§ 425.16, subd. (e)(1).) (Vasquez, supra, at pp. 422–423.) The court further held “[a]nything [the council members] or City Administrator Torres said or wrote in negotiating the contract qualifies as ‘any written or oral statement or writing made in
connection with an issue under consideration or review by a legislative . . . body . . . ’ (§ 425.16, subd. (e)(2).)” (Vasquez, supra, at p. 423.) Unlike the council members’ votes or the administrator’s negotiations in Vasquez, the City’s action in allegedly breaching an agreement here was not itself protected activity under the statute. (See id. at pp. 422–423.)

b. The Individual City Defendants and the PM Defendants

The fact we can find some unprotected conduct at the root of the first through fifth causes of action does not end our step one analysis of those claims. Under the rule in Baral, we must disregard the unprotected conduct and focus on whether any non- incidental protected conduct is charged, even just in part. (Baral, supra, 1 Cal.5th at p. 396.) While we view the gravamen of the first through fifth causes of action, at bottom, as an effort to hold the City accountable for failing to make space available at NWT on dates reserved by Area 51, we reach a different conclusion with respect to the Individual City Defendants and the PM Defendants. Because we cannot say that the communicative acts alleged as liability-producing conduct by the Individual City Defendants and the PM Defendants are merely “incidental” to the claims on which they are named—to the contrary, those acts are the basis for suing them on an agency theory—we think that, as against them, the first through fifth causes of action arise from protected activity under section 425.16, subdivision (e)(2). \(^\text{12}\)

Vasquez provides some guidance here. In that case, as noted above, the Supreme Court found that the allegedly corrupted conduct (voting for a municipal waste hauling contract, in the case of city council member defendants, and negotiating it, in the case of a city administrator defendant) arose from protected activity. The Vasquez opinion draws a distinction between, on the one hand, claims seeking to impose liability against a governmental entity, and, on the other, claims seeking to impose liability for the expressive activity of officials through whom a government entity must act. In doing so, the Court noted the “distinction between action taken by a government body and the expressive conduct of individual representatives” previously recognized in San Ramon. (Vasquez, supra, 1 Cal.5th at p. 425, citing San Ramon, supra, 125 Cal. App.4th at p. 343.) In San Ramon—which found the anti-SLAPP statute inapplicable to claims against the board of a county employees’ retirement association—a public entity, the board itself, was being sued for making a pension contribution decision. Pointing out that no individuals were sued there, the Supreme Court rejected the plaintiffs’ contention that applying the anti-SLAPP statute to the allegedly corrupt conduct of the individual defendants in Vasquez would unduly insulate governmental action from legal accountability. “It is not necessary to sue government officers in their personal capacities to challenge the propriety of a government action,” the court explained. (Vasquez, supra, 1 Cal.5th at p. 426.)

We agree with the observation made in a supplemental brief filed by the City and the Individual City Defendants that Vasquez “does for claims that mix together co-defendants what Baral . . . did for causes of action that mix together protected and unprotected conduct: [i]t emphasizes that each person’s conduct is to be analyzed separately.” A party-by-party mode of analysis makes a difference here. While the thrust of the first five causes of action as against the City itself is an alleged breach of contract, Area 51 does not allege that the Individual City Defendants or the PM Defendants were themselves contracting parties; the sole basis for asserting liability against these other parties is what they did on behalf of the City, and as alleged here, that conduct is expressive in nature. For these parties—the PM Defendants via Elgarico’s March 11 email confirming reserved dates, and the Individual City Defendants via Mocanu’s May 19 email announcing that the City’s “relationship with Area 51 is over”—the sole basis of their alleged liability appears to be communication, either in saying things that formed an alleged contract with the City, or in saying things that announced the end of that contract. Under a plain language reading of the anti-SLAPP statute, all of these communicative acts qualify as “written or oral statement[s] or writing[s] . . . made in connection with an issue under consideration . . . by a[n] . . . executive . . . body.” (See § 425.16, subd. (e)(2).)

We find unpersuasive Area 51’s rejoinder that there was no “official proceeding” in play here and thus that subdivision (e)(2) of the statute has no application. Area 51 alleges that the City, acting through the Individual City Defendants and the PM Defendants, committed to issue a license to Area 51 to use space in the NWT and then refused to honor that promise. This theory of liability rests on Elgarico’s March 12 confirmation email and the discussions between Russo and Mocanu (mentioned in Mocanu’s May 19 email) that led to the end of the City’s relationship with Area 51. Given Area 51’s agency allegations, it can fairly be inferred that all of this communicative activity—of necessity—took place during the City’s “relationship with Area 51 is over”—a sole basis of their alleged liability appears to be communication, either in saying things that formed an alleged contract with the City, or in saying things that announced the end of that contract. Under a plain language reading of the anti-SLAPP statute, all of these communicative acts qualify as “written or oral statement[s] or writing[s] . . . made in connection with an issue under consideration . . . by a[n] . . . executive . . . body.” (See § 425.16, subd. (e)(2).)

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12. Having found section 425.16, subdivision (e)(2) to apply, we need not, and do not, decide whether section 425.16, subdivision (e)(4) also applies.
Defendants were not undertaken in connection with a “public issue.” This secondary line of argument is also contrary to the language of the statute, plainly read. The text of section 425.16, subdivision (e)(2) contains no “public issue” or “issue of public interest” requirement beyond a showing the communication was made in connection with an issue under consideration by an executive body. (See Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1119 [“A plain reading of subdivision (e)(1) and (2) . . . imports no additional ‘public issue’ requirement.

To satisfy the “official proceeding” language in section 425.16, subdivision (e)(2), no additional showing need be made if any written or oral statement in connection with an issue under consideration by an executive body is involved. (Briggs, supra, at pp. 1116–1117 [§ 425.16, subd. (e)(2) protects “‘free speech and petition conduct aimed at advancing self government, as well as conduct aimed at more mundane pursuits’”].) Substantive inquiry into the nature of the issue is not necessary as long as some type of official decision-making, formal or informal, is involved. Under section 425.16, subdivision (e)(2), the pendency of an issue before a government body is a proxy for its character as public in nature.

2. The Sixth Cause of Action

Our analysis of the sixth cause of action, a negligent misrepresentation claim, is more straightforward than it is for the first five because this claim is based purely on expressive conduct. In the sixth cause of action, Area 51 alleges: “Plaintiff was harmed because Defendants negligently misrepresented an important fact—namely that their confirmed reservations of the Property [in the March email] would be honored.” For the reasons explained above in section II.B.1 with respect to section 425.16, subdivision (e)(2), we conclude that the alleged misrepresentations on which the sixth cause of action is based constitute anti-SLAPP protected activity.

C. The Second Step of the Anti-SLAPP Analysis

Having concluded that all six of Area 51’s causes of action arise from protected activity—in part, or entirely—we proceed to the second step of the anti-SLAPP analysis for the first five causes of action insofar as they are pleaded against the Individual City Defendants and the PM Defendants, and for the sixth cause of action insofar as it is pleaded against all Defendants. Because we conclude that the first though fifth causes of action do not involve protected speech or actions by the City, we do not reach the second prong of the anti-SLAPP analysis of whether Area 51 can show a probability of prevailing on those claims as pleaded against it alone. (City of Alhambra v. D’Ausilio (2011) 193 Cal.App.4th 1301, 1309.)

“We . . . evaluate the defendants’ evidence only to determine if it defeats that submitted by the plaintiff as a matter of law.” (Wilson, supra, 6 Cal.App.5th at pp. 831–833, rev. granted.) “[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have ‘“stated and substantiated a legally sufficient claim.”’ [Citation.] ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”’” (Navellier, supra, 29 Cal.4th at pp. 88–89.) It was not enough simply to replead, as Area 51 did after Defendants’ demurrer was sustained. (DuPont Merck Pharmaceutical Co. v. Superior Court. (2000) 78 Cal.App.4th 562, 568.) To survive Defendants’ motion, the burden was on Area 51 to come forward with admissible evidence showing a probability of prevailing on each claim exposed to step two anti-SLAPP analysis, enough to make out a viable prima facie case at trial. That burden was not particularly high (Navellier, supra, 29 Cal.4th at p. 94 [“claims with the requisite minimal merit may proceed”]), but we conclude Area 51 failed to meet it in the following respects.

1. The First Through Fifth Causes of Action As Pleaded Against the Individual City Defendants and the PM Defendants

Area 51’s evidentiary showing in opposition to the anti-SLAPP motion is embodied in the declaration of its CEO, John Walker. The gist of the theory offered in this declaration appears to be that, following the termination of a “Long Term Agreement” between the City and Area 51 in October 2013, the course of dealing between the parties from October 2013 to May 2014 created some sort of contract or contracts under which the City was bound to provide space at NWT whenever PM Realty “confirmed” the availability of that space, but that the City reneged on this commitment due to some personal animus “the Defendants have against [him]” and a desire to do business with someone else. As pertinent to the first cause of action, the Walker declaration makes a prima facie case under a theory of breach of a contract implied from conduct, based on his sworn assertions about settled practice established by many years’ history of doing business with the City. But as noted above, Area 51 does not allege—and Walker does not suggest—that any of the Individual City Defendants or the PM Defendants was a party to such a contract and therefore liable for its breach. We see no basis in law for imposing breach of contract liability on a stranger to this alleged contract under an agency theory, and the Walker declaration does not supply such a basis in fact.13

Nor are we persuaded there is enough here to show extra-contractual liability based on the second through fifth causes of action as alleged against the Individual City Defendants or the PM Defendants. The Individual City Defendants contend that they have statutory immunity on various grounds, and all Defendants argue that Area 51 has failed even to plead the requisite elements of these claims sufficiently, as shown by the sustaining of their general demurrer. In response, Area 51

posits that no Defendant is immune from liability, but does little to support this contention or to rescue its extra-contractual claims, other than to recite claim elements from the case law, cite conclusory statements drawn from its complaint, and refer to evidence not properly brought before the trial court or this court.\textsuperscript{14} We need not canvass the applicable law with respect to each of the identified defects in Area 51’s theories of extra-contractual liability in the first through fifth causes of action and then proceed to analyze every thread of the parties’ contending positions. It suffices to say, as a matter of law, that the Walker declaration (1) fails to show any wrongful act that is sufficiently independent of the contract duty Area 51 sues upon to support the alleged interference torts, even assuming such a contract duty could be established (which defeats the second, third, and fourth causes of action);\textsuperscript{15} and (2) fails to “explain with any reasoned argument or authority how [anything alleged here was an] unlawful, unfair or fraudulent business act[.] or practice[.] within the meaning of the unfair competition law” (which defeats the fifth cause of action).\textsuperscript{16}

2. The Sixth Cause of Action

We agree with Defendants that Area 51 has not shown a prima facie case of liability on the sixth cause of action, with respect to any of them. Neither the complaint nor the showing Area 51 made in the Walker declaration demonstrates with adequate particularity that a false statement was made without reasonable grounds to believe in its truth, accompanied by justifiable reliance and resulting damages. (\textit{Intrieri v. Superior Court} (2004) 117 Cal.App.4th 72, 86 [describing required elements of negligent misrepresentation claim]; see \textit{Cadlo v. Owens-Illinois, Inc.} (2004) 125 Cal.App.4th 513, 519 [“Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged”].) While inferences about these required elements might be drawn from the facts Area 51 has shown, and while, by a series of further inferences, Area 51’s showing might support one or more of the first five causes of action as pleaded against the City alone, we decline to fill in the details necessary to support the misrepresentation claim alleged in the sixth cause of action.

\textsuperscript{14} The extra-record references are in violation of California Rules of Court, rule 8.124(b)(3). We therefore do not consider them.

\textsuperscript{15} \textit{Applied Equipment Corp. v. Litton Saudi Arabia Ltd.} (1991) 7 Cal.4th 503, 515 (“conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law”); \textit{Korea Supply Co. v. Lockheed Martin Corp.} (2003) 29 Cal.4th 1134, 1153 (“a plaintiff seeking to recover damages for interference with prospective economic advantage must pleading and prove as part of its case-in-chief that the defendant’s conduct was ‘wrongful by some legal measure other than the fact of interference itself’”).


D. Attorney Fees and Costs

Defendants argue they are entitled to attorney fees and costs as prevailing parties on their anti-SLAPP motion. Area 51 counters with its own request for attorney fees because, “[g]iven the continuous flow of unambiguous case law in the past decade, any reasonable attorney should be aware that a business dispute that simply mentions incidental protected activity is not subject to the anti-SLAPP statute.”

Subdivision (c)(1) of section 425.16 provides in full: “Except as provided in paragraph (2) [which is not relevant here], in any action subject to subdivision (b), a \textit{prevailing defendant} on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs. If the court finds that a special motion to strike is \textit{frivolous or is solely intended to cause unnecessary delay}, the court shall award costs and reasonable attorney’s fees to a \textit{plaintiff} prevailing on the motion, pursuant to Section 128.5.” (Italics added.) “A defendant that successfully moves to strike a plaintiff’s cause of action, whether on merits or non-merits grounds, has ‘prevailed’ on the motion, and therefore is entitled to attorney’s fees and costs.” (\textit{Barry, supra}, 2 Cal.5th at p. 327.) “A ‘prevailing defendant’ within the meaning of [the statute] includes a defendant whose anti-SLAPP motion was granted as to some causes of action but not others.” (\textit{Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.} (2005) 129 Cal.App.4th 1228, 1267 (\textit{Huntingdon}); see also \textit{Moran v. Endres} (2006) 135 Cal.App.4th 952, 954–956 [upholding the trial court’s denial of attorney fees to defendant after striking only one of plaintiffs’ 11 causes of action under the anti-SLAPP statute].)

“ ‘The anti-SLAPP statute reflects the Legislature’s “strong preference for awarding attorney fees to successful defendants.” ’ [Citation.] The term ‘prevailing party’ must be ‘interpreted broadly to favor an award of attorney fees to a partially successful defendant.”’ [Citation.] However, a fee award is not required when the motion, though partially successful, was of no practical effect. [Citation.] “[A] party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion. The determination whether a party prevailed on an anti-SLAPP motion lies within the broad discretion of [the] trial court.” [Citation.]” (\textit{Singletary, supra}, 206 Cal.App.4th at p. 782; see also \textit{Huntingdon, supra}, 129 Cal.App.4th at p. 1267 [“Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees.”].)

Under these standards, we conclude that, since the Individual City Defendants and the PM Defendants are the prevailing parties on all causes of action, they are entitled to awards of fees and costs reasonably allocable to achieving that result, including fees and costs incurred on appeal. With respect to the request for attorney fees and costs from the City, it too is a victorious party in part, so we conclude that it
may be entitled to an award of fees and costs reasonably allocable to achieving that victory, including appellate fees and costs. (See ComputerXpress, Inc. v. Jackson (2001) 93 Cal. App.4th 993, 1020 [partial success by defendant filing anti-SLAPP motion generally “reduces but does not eliminate the entitlement to attorney fees”]; see also Moran v. Endres, supra, 135 Cal.App.4th at pp. 954–956 [fees and costs may be denied to a partially prevailing defendant whose motion achieved little or no practical benefit].) The trial court is best positioned to determine whether to award fees and costs to the City, and to determine, as to all Defendants, the appropriate allocations and the amounts reasonably awardable. (See Huntingdon, supra, 129 Cal.App.4th at p. 1267.)

Finally, as to the fee request from Area 51, it is a prevailing party in part. But as a prevailing plaintiff, Area 51 is only entitled to fees if the City’s motion to strike was “frivolous” or “solely intended to cause unnecessary delay.” (§ 425.16, subd. (c)(1).) “A determination of frivolousness requires a finding the anti-SLAPP ‘motion is “totally and completely without merit”’ (§ 128.5, subd. (b)(2)), that is, “any reasonable attorney would agree such motion is totally devoid of merit.” ‘ (Moore v. Shaw (2004) 116 Cal.App.4th 182, 199.) In light of the developing case law surrounding the complex issues presented in the City’s motion (which we have discussed in detail above), we conclude the motion, as a matter of law, does not meet the requisite frivolousness standard: When the City filed its motion, reasonable attorneys could have disagreed as to its merits. For the same reason, we see no basis to conclude the motion was filed solely for the purpose of causing unnecessary delay. Accordingly, no award of fees to Area 51 is appropriate here.

III. DISPOSITION

The trial court’s order denying Defendants’ anti-SLAPP motion is affirmed with respect to Area 51’s first five causes of action as pleaded against the City. In all other respects, the court’s order denying the motion is reversed, and the case is remanded for consideration of attorney fees and costs awardable as set forth above.

Streeter, J.

We concur: Ruvolo, P.J., Rivera, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Counsel

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ORDER CERTIFYING OPINION FOR PUBLICATION

The opinion in the above-entitled matter filed on January 24, 2018, was not certified for publication in the Official Reports. Respondent Morgan Hill Unified School District and the California School Boards Association’s Education Legal Alliance have separately requested the opinion be certified for publication. Under California Rules of Court, rules 8.1105(c), the opinion is ordered published.

BAMATTRE-MANOUKIAN, J.

ELIA, ACTING P.J., MIHARAI, J.

OPINION

In March 2015, the principal of Martin Murphy Middle School (School) in Morgan Hill recommended that M.N. (then, a 13-year-old boy in the seventh grade) be expelled. The recommendation was based upon allegations that M.N. had committed sexual assault or sexual battery upon a 13-year-old female student (Victim) on multiple occasions while the two of them were riding on a School bus. 1

1. We use the term “Victim” to identify the girl as a matter of convenience and because her identity has not been, and should not be revealed in the record. In doing so, we do not preclude the merits of
An administrative panel of the Morgan Hill Unified School District (District) conducted an evidentiary hearing and recommended that M.N. be expelled from the District for one calendar year, finding that he had committed or attempted to commit sexual assault or committed sexual battery, and also committed sexual harassment. The District’s Governing Board (Board) adopted the panel’s recommendation. M.N.’s administrative appeal to the Santa Clara County Board of Education (County Board) was denied.

M.N. filed a petition for writ of mandate challenging the expulsion decision. On December 7, 2015, the superior court concluded there was substantial evidence to support the administrative finding that M.N. had committed sexual battery under which the District was required by statute to expel the student for one year. The court nonetheless granted a peremptory writ and remanded the case to the District to consider the sole issue of whether the evidence justified it exercising its statutory discretion to suspend the order of expulsion.

M.N.’s primary contention on appeal is that the superior court erred in finding there was substantial evidence to support the District’s finding that M.N. had committed misdemeanor sexual battery, a finding that carried with it mandatory expulsion. He asserts that the District’s sexual battery finding was unsupported by any competent evidence of the element of specific intent—i.e., that M.N.’s unwanted touching of an intimate part of Victim was “for the specific purpose of sexual arousal, sexual gratification, or sexual abuse” (Pen. Code, § 243.4, subd. (e)(1)). He contends that proof of such specific intent was based entirely upon hearsay.

We conclude that there was substantial evidence—including competent, admissible, nonhearsay evidence—to support the District’s finding that M.N. committed a sexual battery. And, as discussed below, we reject M.N.’s remaining claims of error that (1) the District’s decision cannot stand because it failed to make factual findings, and (2) the superior court’s decision upholding the District’s sexual battery finding was allegedly based on the court’s conclusion that M.N.’s awareness of the harmfulness of his actions satisfied the specific intent element of that offense. Accordingly, we will affirm the judgment.

I. PROCEDURAL BACKGROUND

A. Administrative Proceedings

On or about March 5, 2015, School Principal Heather Griffin suspended M.N. She stated in the notice of suspension that under Education Code section 48915, subdivision (c), M.N. was subject to mandatory expulsion for “[s]exual assault or sexual battery (commit or attempt to commit).” On March 6, Principal Griffin made an expulsion recommendation to the director of student services based upon M.N.’s violations of section 48915, subdivision (c)(4), and section 48900, subdivisions (k), (n), and (o)(2); she specifically stated that M.N. had committed sexual battery upon another student.

In her March 6 discipline incident report, Principal Griffin summarized that she was informed before school commenced on March 5 that a female student had been tripped by boys on the bus on March 4, and the bus driver, upon speaking with the female student, was concerned that multiple boys had touched her inappropriately. The female student, when interviewed by Griffin and a Morgan Hill Police Officer, stated she had asked the boys, including M.N., numerous times to stop touching her, but they did not comply with her requests. As further reported by Griffin in her discipline incident report, M.N. was called in as a potential suspect and admitted that on a “handful” of occasions, he had “touch[ed] the female student on her breasts and buttocks [and had made] comments of a sexual nature towards her.”

On March 9, M.N.’s parents were provided with a notice of an administrative hearing. On the same date, the District provided M.N.’s parents with, inter alia, the documents to be presented at the expulsion hearing.

The matter then proceeded to hearing on June 11 before a three-member administrative hearing panel (Panel). Both the District and M.N. were represented by counsel. Three witnesses testified in the proceedings: Principal Griffin, M.N., and M.N.’s mother. Additionally, the Panel received certain documents: the expulsion recommendation, discipline incident report, a discipline incident list and incident summary, and teacher observation checklists. On or about June 12, the Panel recommended to the District that M.N. be expelled from the District for one calendar year based upon his commission of acts of sexual battery (violation of §§ 48900 and 48915, subd. (c)(4)) and sexual harassment (violation of § 48900.2). The Board adopted the Panel’s recommendation on June 23. M.N. appealed the Board’s decision. The County Board heard the case on August 12, and it issued a written decision on August 18 denying M.N.’s appeal.

B. Court Proceedings

On September 15, M.N. filed a petition in the court below under Code of Civil Procedure section 1094.5 for writ of administrative mandamus (writ petition) against the District and County Board. He alleged that the expulsion decision was invalid because the District and County Board, in finding he had committed sexual battery, had relied exclusively upon hearsay evidence to prove that M.N.’s specific intent was sexual in nature. The finding, M.N. argued, therefore ran afoul of section 48918, subdivision (f)(2), which provides that “no evidence to expel shall be based solely upon hearsay

4. Although it was not formally introduced at the commencement of the hearing, M.N.’s counsel referred extensively to a 16-page “Incident Report” (police report) prepared by Officer Jeff Brandon of the Morgan Hill Police Department. M.N.’s counsel provided a copy of the police report to the Panel at the hearing.
II. DISCUSSION

A. Administrative Mandamus & Standard of Review

Review of an administrative decision by mandamus is appropriate where the hearing in the underlying administrative proceeding was mandatory, evidence was required to be taken in the proceeding, and there was discretion vested in the body determining the matter in deciding contested factual issues. (Code Civ. Proc., § 1094.5, subd. (a).) A court reviewing an agency’s decision under Code of Civil Procedure section 1094.5 is guided by the following: “The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subd. (b).)

A challenge to a decision that the findings are not supported by the evidence in the administrative record is reviewed by the trial court under either the substantial evidence standard or the independent judgment standard. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 32 (Strumsky); see Code Civ. Proc., § 1094.5, subd. (c).) Subdivision (c) of Code of Civil Procedure section 1094.5 does not identify the cases in which the independent judgment standard, rather than the substantial evidence standard, applies. (Fukuda v. City of Angels (1999) 20 Cal.4th 805, 811 (Fukuda).) But our high court has held that the independent judgment standard applies to cases in which “an administrative decision affects a right which has been legitimately acquired or is otherwise ‘vested,’ and when that right is of a fundamental nature from the standpoint of its economic aspect or its ‘effect . . . in human terms and the importance . . . to the individual in the life situation.’ ” (Strumsky, supra, at p. 34, quoting Bixby v. Pierno (1971) 4 Cal.3d 130, 144 (Bixby).) If the decision “substantially affect[s]” that fundamental vested right, the trial court reviews the decision for legal errors and conducts a limited trial de novo of the evidence presented in the administrative proceeding and any evidence wrongfully excluded by the agency. (Bixby, supra, at pp. 143-144 & fn. 10.)

M.N. did not assert below that the independent judgment standard applied. Nor does he make that claim on appeal.

5. Although the County Board was a respondent below, it did not elect to participate in this appeal by submitting a respondent’s brief.

6. In its appellate brief, the District explained that “[t]he parties agreed to stay and not proceed with [the superior court’s directed] limited remand unless or until final resolution of this appeal.” M.N. does not challenge this assertion in his reply brief, and we therefore accept the District’s representation of the procedural status of the case.

7. “Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.” (Code Civ. Proc., § 1094.5, subd. (c).)
The District, however, on appeal asserts that the superior court, based upon a finding that a fundamental vested right was substantially affected, exercised independent judgment to review the administrative decision. But the record does not support this contention. Rather, the court stated that in reaching its decision, it “consider[ed] whether there is substantial evidence in light of the whole record to support the [District’s] findings.” The substantial evidence standard is the appropriate standard of review here. (See Helena F. v. West Contra Costa Unified School Dist. (1996) 49 Cal.App.4th 1793, 1800 [Constitutional right to free education does not encompass right to attendance at school of pupil’s choice or the one “geographically convenient to the parent”].)

Under this standard, the trial court will affirm the administrative decision if it is supported by substantial evidence from a review of the entire record, resolving all reasonable doubts in favor of the findings and decision. (Committee to Save Hollywoodland Specific Plan v. City of Los Angeles (2008) 161 Cal.App.4th 1168, 1182 [Committee to Save Hollywoodland].) The court must “accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the [administrative decision]. [Citation.] Credibility is an issue of fact for the finder of fact to resolve [citation], and the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a finding of fact. [Citation.]” (Doe v. Regents of the University of California (2016) 5 Cal. App.5th 1055, 1074 (Doe).) Issues of law related to the administrative decision, such as interpretation of statutes and regulations, are addressed de novo by the court. (Hoitt v. Department of Rehabilitation (2012) 207 Cal.App.4th 513, 522.) Under this “deferential” standard, the court presumes the correctness of the administrative ruling. (Patterson Flying Service v. California Dept. of Pesticide Regulation (2008) 161 Cal.App.4th 411, 419 (Patterson Flying Service); see also Doe, supra, at p. 1073 [substantial evidence standard is “extremely deferential standard of review”].)

Review by the appellate court of such matters is governed by the same substantial evidence standard, irrespective of whether the controversy involves a fundamental vested right. (Fukuda, supra, 20 Cal.4th at p. 824.) Where the trial court properly applies the substantial evidence standard, “the appellate court focuses on the findings made by the agency rather than on findings made by the superior court.” [Citation.]” (MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal.App.4th 204, 218 (MHC Operating).) We will therefore—contrary to the District’s urging that the proper focus is “whether substantial evidence supports the Superior Court’s decision” (original italics)—consider whether substantial evidence supported the District’s decision.

B. Public School Disciplinary Proceedings

The rights of students and staff to a safe school environment is embedded in our state’s Constitution: “[T]he right to public safety extends to public and private primary, elemen-

tary, junior high, and senior high school, and community college, California State University, University of California, and private college and university campuses, where students and staff have the right to be safe and secure in their persons.” (Cal. Const., art. I, § 28, subd. (a)(7); see also In re William G. (1985) 40 Cal.3d 550, 563 [“school premises . . . must be safe and welcoming.”]) This constitutional provi-
sion confers a duty upon school officials “to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally.” (C.A. v. William S. Hart Union High School Dist. (2012) 53 Cal.4th 861, 870, fn. omitted; see also id. at p. 870, fn. 3.) As summarized by one court, “A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students.” (M.W. v. Panama Buena Vista Union School Dist. (2003) 110 Cal.App.4th 508, 517.) A school district thus has the power to suspend or expel students in order to maintain discipline in schools. (Abella v. Riverside Unified Sch. Dist. (1976) 65 Cal.App.3d 153, 167; see also Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education (1991) 235 Cal.App.3d 1182, 1187 [“[e]xpulsion is an administrative penalty designed to promote student safety.”].)

We provide an overview of the statutory framework governing student disciplinary proceedings in public schools, relying upon a decision of the Fourth District, Division One (with updates for statutory revisions). “The Legislature has developed a comprehensive statutory scheme governing the suspension and expulsion of students. Education Code section 48900 states a student may be ‘suspended from school or recommended for expulsion’ for committing one of [20] identified offenses. Three other statutes provide additional grounds for expulsion: section 48900.2 (‘sexual harassment’); section 48900.3 (‘hate violence’); and section 48900.4 (‘harassment, threats, or intimidation’). These three statutes, together with section 48900, establish the exclusive grounds for which a student may be suspended or expelled. [Citations.]” (T.H. v. San Diego Unified School Dist. (2004) 122 Cal.App.4th 1267, 1276, ins. omitted (T.H.).)

“Another statutory provision, section 48918, sets forth mandatory procedures that a school district must follow before the district may expel a student who has committed one of these identified expulsion offenses. . . . Every student is entitled to a hearing to be held within 30 schooldays after

8. The current version of section 48900 reads in relevant part: “A pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to any of subdivisions (a) to (t), inclusive: . . . [¶] (n) Committed or attempted to commit a sexual assault as defined in Section 266c, 266c, 266c, 269, 288, 288a, or 289 of the Penal Code or committed a sexual battery as defined in Section 243.4 of the Penal Code. . . . [¶] (s) A pupil shall not be suspended or expelled for any of the acts enumerated in this section unless the act is related to a school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district. . . .”

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the date the principal or superintendent of schools determines that the pupil has committed any of the acts’ permitting expulsion. [(§ 48918, subd. (a)(1).)] At the hearing, the school district must permit the student and parent to appear, be represented by legal counsel or a nonattorney adviser, obtain copies of all documents to be presented, [confront and question any witnesses presented at the hearing] and present oral and documentary evidence. (§ 48918, subd. (b)(5).)” (T.H., supra, 122 Cal.App.4th at pp. 1276-1277.) And “[t]he technical rules of evidence shall not apply to the hearing, but relevant evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.” (§ 48918, subd. (h)(1).) An expulsion decision must be “supported by substantial evidence showing the pupil committed any of the acts enumerated in Section 48900.” (Ibid.)

Although the governing school board is charged with conducting expulsion hearings (§ 48918, subd. (c)(1)), it may delegate this function to a panel of three or more certificated, impartial persons. (§ 48918, subd. (d).) The panel must determine within three school days after the hearing whether to recommend the expulsion of the pupil to the governing board. (§ 48918, subd. (e).)

Irrespective of whether the hearing is conducted by the governing board, a hearing officer, or an administrative panel, the expulsion of a student may occur only through final action taken in a public hearing by the governing board. (§ 48918, subd. (j).) A final notice of expulsion must include notice of the right to appeal the decision to the county board of education. (§ 48918, subd. (j)(1).) The school board’s expulsion decision “shall be based upon substantial evidence relevant to the charges adduced at the expulsion hearing,” and except as specifically provided in section 48918, “no evidence to expel shall be based alone upon hearsay evidence.” (§ 48918, subd. (f)(2).)

“[T]he Legislature [has also] specified the circumstances for triggering an expulsion hearing and the findings that must be made at these hearings. These circumstances—grouped in three primary categories—are set forth in section 48915.” (T.H., supra, 122 Cal.App.4th at p. 1277.) We are concerned here with only the first of those categories described in T.H. “With respect to certain very serious offenses, the Legislature provided that ‘[t]he principal or superintendent of schools shall . . . recommend expulsion of a pupil that he or she determines has committed any of the specified acts at school or at a school activity off school grounds.’” (Id. at pp. 1277-1278, citing § 48915, subd. (c), original italics.) One such very serious offense requiring the recommendation of expulsion is the offense charged here, namely, committing a sexual battery as defined in section 48900, subdivision (n). (§ 48915, subd. (c)(4).) The governing board is required to expel the student if there is a finding that he or she committed one of the offenses enumerated in subdivision (c). (§ 48915, subd. (d).)
(Pen. Code, § 243.4, subd. (e)(1)) was hearsay that is traditionally inadmissible in court proceedings. And M.N.’s key argument presented below was that the statutory provision that “no evidence to expel shall be based solely upon hearsay evidence” (§ 48918, subd. (f)(2)) “requires that non-hearsay [evidence] support each element of the offense.” (Footnote omitted.)

As we discuss below, there was substantial evidence supporting the Board’s decision that M.N. should be expelled for sexual battery. This evidence included both nonhearsay evidence and hearsay evidence showing that M.N. acted “for the specific purpose of . . . sexual abuse” of the victim. (Pen. Code, § 243.4, subd. (e)(1).) We will therefore reject M.N.’s sufficiency-of-the-evidence challenge, founded upon the position that the only evidence of specific intent supporting the District’s position was hearsay that would traditionally be inadmissible in court proceedings. Moreover, because we conclude there was nonhearsay evidence of specific intent, we may assume for purposes of our analysis only—but do not decide the merits of—M.N.’s claim that under subdivision (f)(2) of section 48918, there must be some nonhearsay evidence of each element of a charged offense to support an expulsion decision. (See Benach v. County of Los Angeles (2007) 149 Cal.App.4th 836, 845, fn. 5 [appellate courts will not address issues whose resolution is unnecessary to disposition of appeal].)

2. Sexual Battery

Before reviewing the evidence presented to the Board, we describe the elements of the offense at issue in this appeal that was one of the grounds for the expulsion order, namely, misdemeanor sexual battery. This review will focus upon the specific intent element contested by M.N.9

Misdemeanor sexual battery is defined as follows: “(1) Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. . . . [¶] (2) As used in this subdivision, ‘touches’ means physical contact with another person, whether accomplished directly, through

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9. The District found that M.N. violated section 48900 because he (1) committed or attempted to commit a sexual assault (as defined under several specified sections of the Penal Code), or committed a sexual battery under Penal Code 243.4, and (2) committed sexual harassment as defined under section 212.5. Unlike sexual battery, which carries with it a mandatory punishment of expulsion (see § 48915, subds. (c), (d)), sexual harassment is one for which a student may be subject to a discretionary punishment of expulsion (see §§ 48900.2, 48915, subd. (e)). M.N. challenged the entire decision in his writ petition, including the finding that he had committed sexual harassment. But the superior court in its order did not address the District’s sexual harassment finding, and M.N. does not include that District finding in his challenge on appeal. Accordingly, the District’s sexual battery finding is the only one with which we are concerned here.
842 [infliction of great bodily injury with specific “‘intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose,’” i.e., torture].

3. Evidence Presented at Administrative Hearing

a. Griffin Testimony

On March 2, Susan Becerra began driving a new bus route—one identified by witnesses as “bus route number 8.” Becerra had been warned that there was a group of students from the Diana Avenue stop who, because of their chronic misbehavior, had been instructed by the previous driver to sit in the front of the bus. On two successive days, she observed a girl, Victim, trip as she and other girls got off the bus. Thereafter, on March 5, Becerra talked to the girls as they exited the bus. After identifying Victim as the girl who had been tripped, she told Becerra that she had tripped because multiple boys, including M.N., had been touching her inappropriately.

Thereafter and immediately before class started that day at the School, Becerra approached Principal Griffin and informed her that a female student accompanying her, Victim, had been subjected to inappropriate treatment on the bus. Griffin then took Victim to her office and contacted the Morgan Hill Police Department. From Griffin’s observation, Victim was very scared; she was “shaking, sad, and withdrawn.” Victim was concerned about what would happen to her at school. Griffin testified “there were some comments at certain points that were made to her by these boys that it was not in her best interests to be telling on them.” Victim said she was afraid of the boys.

Victim told Principal Griffin that over the course of a few months, three boys, one being M.N., had touched her inappropriately while she was riding the bus. They intentionally tripped her so that they could touch her while she was on the bus floor. The boys, on some occasions when they touched her, made moaning noises. Victim said that she had asked the boys, including M.N., repeatedly to stop, saying, “It hurts me,” but they would not stop. Victim also said there were times after she exited the bus that they boys would make gestures and comments about her breasts, including comments about how “it felt so good” and they intended to touch her again. Victim said that she asked her female friends to sit next to her on the bus or walk with her to create a barrier between her and the boys.

After Principal Griffin spoke briefly with Victim and notified the police, she asked Victim to write a statement. The statement by Victim read in part: “Whenever I get on the bus, I always get grabbed by three boys [name redacted], [M.N.], and sometimes [name redacted]. [T]hey usually grab me all the time and I tell them not to and they’re always grabbing me in the boobs, or the butt and onetime [sic] one of them grabbed me or touched my private part. I always tell them to stop but they never do and sometimes when they grab me I fall or trip and I always end up [scraping] my knee[,] it hurts a lot when they do that and they just tell me ‘it feels so good’ but it hurts me and they don’t seem to really care . . . . Also it makes me feel bad because they won’t listen or stop. Yesterday, they grabbed my butt and my boobs but I don’t know which one grabbed which. They usually say ‘it’s so big’ or they say ‘it feels so good’ or they . . . make moaning noises sometimes. They knock on the window sometimes after I leave and they . . . make their hands under to show that I have big boobs. [T]hey usually look for me and say ‘is she here’ and if [I] am they say ‘[get ready!]’ . . . [T]hey start to grab me once I get off and they make . . . weird faces at me. [T]hey make hand gestures as if the[y’re] grabbing my boobs.”

Principal Griffin was also present on March 5 when the police interviewed four witnesses and when each wrote statements that day. Witness 10 said she had witnessed three boys, including M.N., touching Victim inappropriately on her buttocks and breasts. Witness 1 said the boys tried to sit next to Victim so that they could grab her, and they also grabbed her when she exited the bus. Witness 1 also stated that she had heard Victim say “no” to them, but they ignored her. Victim asked Witness 1 and another person to walk with her on the bus so that the boys could not touch her.

Witness 2 stated he had seen two boys, including M.N., grabbing Victim’s buttocks and breasts, and that they did so once or twice a week even though Victim told them to stop. Witness 2 said the boys laughed when Victim walked off the bus. Witness 2 also stated that Victim did not want to get off the bus and that she was afraid of the boys. He said a third boy had grabbed Victim’s buttocks on one occasion, on March 4.

Witness 3 stated that for a few weeks, she had witnessed three boys, including M.N., grabbing Victim’s buttocks and breasts, and laughing after doing so. Witness 3 said the boys would comment on Victim having “big boobs and a big butt” and Witness 3 said they would “squeeze [Victim’s buttocks] and . . . poke it.” Witness 3 also stated that when Victim fell down, the boys touched her again. Witness 3 said she overheard the boys planning what they were going to do when Victim got off the bus.

Witness 4 stated that since November 2014, she had witnessed students tripping Victim and grabbing her buttocks and breasts when she got off the bus. Witness 4 said she would regularly overhear the students planning to grab Victim after confirming that she was on the bus. Witness 4 noted further that the students told Victim that “she has big boobs and a big butt,” made gestures when Victim left the bus as “if [they] were grabbing her boobs,” laughed and waved at her, and commented that “this feels good” as they grabbed her breasts. Witness 4 said that Victim had asked her sometimes to walk behind her so the students wouldn’t grab Victim. Al-
though not mentioned in Witness 4’s written statement, according to Griffin’s testimony, Witness 4 told the police that M.N. was one of the students involved in the conduct toward Victim.

Principal Griffin was also present when the police interviewed the three accused boys, including M.N., on March 5. One of the boys, Boy 1, admitted having grabbed Victim’s buttocks and breasts, as well as her crotch. He also admitted laughing, having tripped and harassed Victim when she got off the bus, and having made hand gestures concerning her breasts. Boy 1 also said that M.N. had grabbed Victim’s buttocks, and that M.N. had participated in conversations when Victim got on and off the bus.

Boy 2 admitted to the police that he had tripped Victim and touched her buttocks one time. He said he had participated with M.N. in conversations about Victim’s breasts and they had laughed and made gestures when Victim left the bus. Boy 2 also said that M.N. had grabbed Victim’s buttocks.

Principal Griffin testified that when the police questioned M.N., he was not initially forthcoming. She testified “[i]t took a significant time for [M.N.] to tell the truth.” Griffin said that later in the interview after M.N. admitted having touched Victim, he tried “to justify his behavior,” and showed less remorse than the two other boys had shown. During the police interview—as Griffin confirmed later in her written discipline incident report—M.N. admitted that on a handful of occasions, he had touched Victim’s buttocks and breasts and had made sexual comments directed toward her. Griffin testified that when M.N. gave his statement to the police, he did not mention that his being bullied or teased by the other boys was the cause of his inappropriate touching of Victim.11

Principal Griffin did not personally view videotape footage from the bus obtained by the police. But Griffin was advised by School Resource Officer Brandon, who also authored the police incident report—and Griffin had heard testimony at other hearings—that the videotape footage confirmed that M.N. was a participant with other boys in laughing and joking, in tripping Victim, and in harassing her from bus windows.

Principal Griffin testified that she was familiar with Victim’s ongoing issues resulting from the incidents on the bus. Victim required a significant amount of support from the District, in addition to private therapy, and she continued to manifest fear.

**b. M.N. Testimony**

M.N. testified at the hearing that he first saw another boy on the bus touching Victim’s breasts approximately two months before March 5. He observed a second incident involving another boy about one week later. There continued to be incidents in which boys touched Victim inappropriately that occurred sometimes twice a week or every other week. M.N. knew what they were doing was wrong, but he did not report what was happening to anyone. He was uncertain whether Victim ever told any of the boys to stop.12 Victim had told him, however, sometime before the inappropriate touching began that she did not like the “Diana bus kids,” and she found them to be “really annoying.” M.N. denied that he laughed during these incidents, testifying, “Well, I was laughing, not because they were touching her. Maybe because somebody said something funny.”

Approximately one month before March 5, at the urging of other boys, M.N. touched Victim’s buttocks. “just grabbed her and slapped her . . . basically lightly touched her.” M.N. estimated that he touched Victim on no more than 10 occasions. He testified that he admitted to the police that he had touched Victim’s buttocks and one time on the breasts. (He testified he touched Victim on the breasts because another boy grabbed his hand and placed it on her.) He testified that he told the police he had touched Victim “because these boys on the bus were bullying [him] and pressuring [him] to do it.” M.N. testified that he knew what he was doing was wrong. M.N. denied that he laughed after he touched Victim because he had touched her. He admitted he laughed about what someone had said, but did not recall the substance of what was said. He testified that Victim never told M.N. to stop. But whether Victim was addressing him directly to him or not, M.N. may have heard her say something like, “Don’t touch me.” He testified that “it was something that was going through [his] head.” He explained: “But she—is going to sound offensive——but it seemed like she sort of didn’t care.”

M.N. testified that he did not touch Victim because he wanted to be sexually aroused. He said that he had had no sexual motive at all. The first time he touched Victim, he did so because he was pressured by a group of boys, who said, “Hey, so if you guys don’t do this, especially [M.N.] . . . , we’re going to call you names or beat you up after you get off the bus.” M.N. testified that the boys made these comments every time M.N. touched Victim. M.N. never reported to the bus driver or any teacher at school that he was being bullied by the boys on the bus. And none of the boys ever beat M.N. up or struck him. Sometime before M.N. began touching Victim, one or more of the boys knocked the lunch out of M.N.’s hands at School; M.N. did not report the incident.

M.N. testified at the hearing that he has arthritis in his knee, and that for his whole life, he has been teased and called names by his peers. The students who tease him include those who ride the bus with him to School. M.N.’s mother also testified that his medical condition causes him

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11. Griffin acknowledged on cross-examination by M.N.’s counsel that it was recited in the police report describing the interview with M.N. that he “admitted he had touched [Victim’s] buttocks approximately 5 times over the last couple of weeks. He said he did it because the other boys were pressuring him to do it and said they would call him a ‘chicken or pussy’ if he didn’t.” But Griffin stood by her testimony that M.N. did not tell the police he had been bullied or teased into touching Victim.

12. M.N.’s response to a panel member to his question on this issue was: “I don’t know. Maybe. I don’t know if she—not that I know of—.”
to limp, and that he has had a harder time particularly in the past school year (seventh grade) with students teasing and bullying him. Neither M.N.’s mother nor father ever reported any of this bullying to the School. Principal Griffin confirmed in her testimony that she had never received a report from M.N., his family, or other students that M.N. had been the subject of bullying.

4. Substantial Evidence Supported District’s Decision

As noted, M.N.’s challenge is limited to the finding that he committed a sexual battery within the meaning of Penal Code section 243.4, subdivision (e)(1) because he committed his admitted acts involving Victim “for the specific purpose of . . . sexual abuse.” Our focus is therefore whether, viewing the entire record, there was substantial evidence before the District that M.N. touched Victim inappropriately “for the purpose of insulting, humiliating, or intimidating [her], even if the touching [did] not result in actual physical injury.” (Shannon T., supra, 144 Cal.App.4th at p. 622, fn. omitted.) And in conducting this analysis, we address M.N.’s claim that there was only hearsay that would traditionally be inadmissible in court proceedings that supported this specific intent element.

There was a wealth of evidence—disregarding for the moment whether it was nonhearsay or hearsay—that M.N. acted “for the specific purpose of sexual abuse.” (Pen. Code § 243.4, subd. (e)(1).) Focusing first on nonhearsay evidence, we disagree with M.N. that his testimony at the hearing must be viewed exclusively as negating a finding of specific intent. To be sure, M.N. testified that he did not touch Victim for the purpose of sexual arousal or for any other sexual motive. Rather, he said he did so because he was pressured by other boys’ threats of ridicule and physical reprisal. While the District, as trier of fact, may have believed M.N., it is equally possible that it did not. M.N.’s testimony concerning the boys’ alleged threats was conclusory and provided nothing by way of specifics other than that they were made by unspecified individuals each time he inappropriately touched Victim. He never reported the threats to anyone and was in fact never beaten up or struck by anyone. Further, although M.N. testified that he told the police his actions were motivated by the boys’ pressuring and bullying, Principal Griffin disputed this testimony. She testified that when the police interviewed M.N. in her presence, he did not mention that he had inappropriately touched Victim because he had been repeatedly bullied or teased by other boys. And there was evidence that M.N. was not initially forthcoming in his interview with the police, that he attempted to justify his behavior, and he showed little remorse. The District was therefore free to discount, or even dismiss, M.N.’s testimony that in touching Victim, he did not have the requisite specific intent under Penal Code section 243.4, subdivision (e)(1) because he was motivated only by fear of ridicule or physical harm. (Doe, supra, 5 Cal.App.5th at pp. 1073, 1074 [reviewing court defers to trier of fact concerning witness credibility issues].)

There was additional nonhearsay evidence at the hearing—chiefly from M.N.’s own testimony—supporting the inferred finding that he acted “for the specific purpose of . . . sexual abuse.” (Pen. Code, § 243.4, subd. (e)(1).) First, M.N. admitted that he touched Victim on the buttocks, and that he did so as many as 10 times. Second, he admitted he knew what he was doing was wrong and was hurtful to Victim. It may be inferred from the circumstances that M.N., by touching Victim while others on the bus witnessed it, knew that his actions would be humiliating and insulting to Victim. Third, prior to M.N. inappropriately touching Victim, he had witnessed multiple acts of sexual battery upon Victim by other boys on the bus. He knew that their actions were wrong, but he did nothing to stop them and did not report the actions to anyone. Fourth, M.N. admitted laughing during the incidents in which either he or other boys inappropriately touched Victim. Although he denied that his laughter was related to the inappropriate touching, he could not identify what had caused him to laugh. Fifth, although M.N. testified that he never heard Victim tell the other boys or him to stop touching her, the testimony was equivocal. He testified that “[m]aybe” Victim told other boys to stop, and “it was something going through [his] head” that Victim may have said something like “ ‘Don’t touch me.’ ”

And perhaps most significantly, Principal Griffin testified that M.N., in her presence, admitted to the police on March 5 that in addition to touching Victim’s buttocks and breasts, he had directed sexual comments toward her. Plainly, this evidence, had it been offered in court, would have been admissible as a recognized exception to the Hearsay Rule. (See Evid. Code, § 1220.)

M.N.’s purpose was properly “inferred from the [repeated] act[s] them[sel]ves together with [their] surrounding circumstances.” (Shannon T., supra, 144 Cal.App.4th at p. 622.) Here, based solely upon the above-recited nonhearsay evidence (and evidence constituting an exception to the Hearsay Rule), there was substantial evidence from which the District could infer that M.N. committed the acts “for the specific purpose of . . . sexual abuse.” (Pen. Code, § 243.4, subd. (e)(1).) Such an inference that he had “the purpose of insulting, humiliating, or intimidating [Victim]” (Shannon T., supra, at p. 622) could be properly made from M.N.’s acts of repeatedly touching Victim’s intimate parts without her consent, and the circumstances surrounding those acts—including his

13. We note further that although there is a reference in the police report to M.N. saying that other boys told him they would call him names if he did not touch Victim, there is no indication in the report that he told the police that other boys had threatened to physically harm him.

14. “Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.” (Evid. Code, § 1220.)
knowledge that what he and the other boys were doing was wrong, his permitting the misconduct to go on for months without reporting it, his laughing while the conduct occurred, and his making sexual comments toward Victim. (See Rios, supra, 222 Cal.App.4th at pp. 567-568 [state of mind generally proved by circumstantial evidence, and therefore intent is ordinarily inferred from facts and circumstances surrounding the offense].) The additional hearsay evidence—including the statements of Victim, four witnesses, and the two other accused boys—while corroborative, was not essential to the District’s inferred finding that M.N. acted for the specific purpose of sexual abuse.

M.N. relies on John A. v. San Bernardino City Unified School District (1982) 33 Cal.3d 301 (John A.) in support of his claim that the District’s decision was based entirely upon hearsay and cannot be sustained. He urges that in John A., the Supreme Court “recognized that a school may not rely solely upon written statements from witnesses, which are hearsay and untested by cross-examination, when those witnesses are available to testify live. [Citation.]” In John A., the student was expelled based upon the allegation that he assaulted and injured without provocation two other students during an on-campus fight after a football game. (Id. at p. 304.) At the expulsion hearing, the school district presented no witnesses, but instead relied upon a school administrator’s report and signed witness statements. (Id. at p. 305.) The student denied striking either student, but admitted holding one of them, and “characterized the entire incident as ‘play boxing’ such as often took place after football practice or games.” (Ibid.) The administrative panel found that the student had committed an unprovoked attack and recommended expulsion, which recommendation the school board adopted. (Id. at p. 306.)

The Supreme Court considered whether the expulsion was improper under relevant provisions of the Education Code, specifically, what are currently subdivision (b)(5) of section 48918 (affording the student the right “to confront and question all witnesses who testify at the hearing”), and subdivision (h)(1) of the same statute (“[t]echnical rules of evidence shall not apply at the hearing, but evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs”). (John A., supra, 33 Cal.3d at p. 307.) It explained that “[t]he evidence at the hearing was in sharp dispute,” and while the student denied striking or kicking the two injured students, neither complainant testified, and the district relied solely on the administrator’s report and written witness statements. (Id. at p. 308.) The Supreme Court held that under the circumstances, the evidence did not meet the requirements of the statute that the school district show a basis “for expulsion by a preponderance of the evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.” (Id. at p. 308.) The high court reasoned: “While reasonable persons often rely on statements and reports [citation], a reasonable person in the conduct of serious affairs will not rely solely on writ-

The circumstances here are distinguishable from those addressed in John A. In this case, unlike in John A., the evidence was not “in sharp dispute.” (John A., supra, 33 Cal.3d at p. 308.) The District claimed that M.N. had engaged in multiple acts of unwanted touching of intimate parts of Victim, and M.N. admitted he had done so, both in statements to the police and at the hearing. Further, M.N. admitted at the hearing that he had observed multiple acts of inappropriate touching of Victim by other boys on the bus, knew it was wrong, and had not reported it. He also admitted at the hearing that he knew his actions were wrong, and that he laughed on occasions when both he and the other boys touched Victim inappropriately. And he admitted during the interview with the police attended by Principal Griffin that he had made comments of a sexual nature to Victim. Thus, as discussed above, the District relied upon nonhearsay evidence (and evidence subject to an exception to the Hearsay Rule), in addition to hearsay statements traditionally inadmissible in court proceedings but admissible in expulsion hearings pursuant to section 48918, subdivisions (f)(2) and (h)(1), to support its conclusion that M.N. had committed sexual battery because he had the requisite specific intent when he inappropriately touched Victim. The circumstances here are therefore in contrast to John A., where the Supreme Court held that the cause for expulsion was not based upon a preponderance of the evidence because “a reasonable person in the conduct of serious affairs will not rely solely on written statements.” (John A., supra, at p. 307, italics added.)

In reviewing a sufficiency-of-the-evidence claim, we presume that the administrative decision is correct. (Patterson Flying Service, supra, 161 Cal.App.4th at p. 419.) As the party challenging the administrative decision, it is M.N.’s burden to establish that the District abused its discretion by rendering a decision not supported by substantial evidence. (JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal.App.4th 1046, 1062) Based upon our review of the entire record, resolving doubts in favor of the respondent (see Committee to Save Hollywoodland, supra, 161 Cal. App.4th at p. 1182), we conclude there was substantial evidence to support the administrative decision of the District that M.N. committed sexual battery for which expulsion is the required statutory punishment.
D. Other Arguments Presented by M.N.

M.N. makes two additional arguments in support of his claim of error. He argues that the District’s decision was without support because the District failed to make factual findings as required by section 48918, subdivision (f)(1). M.N. contends further that the court erred in upholding the District’s finding that M.N. had committed a “sexual battery on the theory that he was aware that his actions were harmful and that this knowledge satisfied the sexual battery statute’s third intent prong for sexual abuse.” (Original italics.) M.N. cannot prevail based upon either contention.

We observe that M.N. did not raise below the argument that the District failed to make required factual findings. He did not assert it in his writ petition, the notice of motion, or in the two memoranda of points and authorities filed in support of the petition. Moreover, M.N. did not make the contention in his counsel’s lengthy argument presented at the hearing on the writ petition.

‘An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.’ [Citation.]” (Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d 180, 184-185, fn. 1, original italics (Doers); see also Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857, 863.) As stated by one court, if the forfeiture doctrine were not applied to claims unasserted at the trial level, losing parties “could attempt to embed grounds for reversal on appeal into every case by their silence.” (Saville v. Sierra College (2005) 133 Cal.App.4th 857, 873.) Appellate courts have applied the doctrine of forfeiture to a variety of challenges not raised until the time of appeal. (See, e.g., In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133-1134 [objection to ambiguities in proposed statement of decision]; K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc. (2009) 171 Cal.App.4th 939, 949-950 [objection to pretrial procedure used by trial court to dispose of claims barred by preemption]; Broden v. Marin Humane Society (1999) 70 Cal.App.4th 1212, 1226, fn. 13 [challenge to sufficiency of declaration].) Application of the forfeiture doctrine is equally appropriate in the context of an appeal taken from an order granting or denying a writ petition. (See Zubarau v. City of Palmdale (2011) 192 Cal.App.4th 289, 306 [respondent forfeited statute of limitations argument in opposition to writ petition by failing to raise it at trial level].)

As noted, M.N. failed to assert below that the District’s decision failed to meet statutory requirements for findings of fact. He has therefore forfeited the challenge on appeal. (Doers, supra, 23 Cal.3d at pp. 184-185, fn. 1.)

M.N.’s argument that the trial court erred in allegedly basing its decision on the theory that M.N. was aware that his actions were harmful also fails for two reasons. First, in asserting this position, M.N. looks to one sentence of the order, and in doing so ignores the rest of the paragraph in which the court explained there were several reasons, including M.N.’s knowledge of the conduct’s harmfulness, that the evidence supported a finding that M.N. committed the actions for the purpose of sexual abuse. In viewing the record, we do not agree with M.N. that the court based its finding upon an erroneous legal standard. Second, even were we to credit M.N.’s argument, any alleged error in reasoning by the superior court is of no consequence here. As noted, ante, our duty is to review the findings of the District to determine whether they “were based on substantial evidence in light of the entire administrative record.” (Desmond v. County of Contra Costa (1993) 21 Cal.App.4th 330, 335; see also MHC Operating, supra, 106 Cal.App.4th at p. 218.)

III. DISPOSITION

The judgment entered on the order of December 7, 2015, concerning the petition for writ of mandate, as modified and clarified by the order of February 10, 2016, is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR: ELIA, ACTING P.J., MIHARA, J.

16. The court’s order reads in part: “Here, M.N. had observed a long history of the abuse the victim had suffered at the hands of others—the taunting she had experienced and the gestures and words of others. M.N. states that before he became involved, the assaults would occur as often as twice a week for almost two months. He knew that his actions were witnessed by others so that the victim would be humiliated or insulted. It makes no difference that the actions which humiliated the victim were primarily motivated by M.N.’s avoidance of his own potential embarrassment by failing to participate in the activity. He admits that after his touching, he would join the other boys in laughing at the event. While M.N. insists that the victim appeared ‘not to care’ what was happening to her, he also admits that the only time she ever spoke to him was when she confided in him that she did not like the Diana Avenue boys. Perhaps most importantly, M.N. knew what he and the other boys were doing was wrong. In conclusion, there is substantial non-hearsay evidence of the sexual abuse element found in misdemeanor sexual battery.”