UNITED STATES SUPREME COURT

Lorenzo v. Securities and Exchange Commission

Third party’s dissemination of false or misleading statements with intent to defraud falls within scope of Rules 10b–5(a) and (c) (Breyer, J.)

NINTH CIRCUIT COURT OF APPEALS

United States v. Jauregui

Plea colloquy insufficient to establish conspiracy to import methamphetamine (Berzon, J.)

Steinle v. City and County of San Francisco

City and County of San Francisco immune from liability for refusing to inform ICE of undocumented alien’s release date (Bennett, J.)

Henderson v. United Student Aid Funds, Inc.

Creditor may be held liable for TCPA violations by collection agents hired by loan servicer to act on creditor’s behalf (Nelson, J.)

Troiano v. United States

Invalidity of only one of several counts of conviction does not mandate restructuring of entire sentence (Tallman, J.)

CALIFORNIA COURTS OF APPEAL

California Department of Finance v. City of Merced (Cardella-Presto)

Trial court properly declined to decide issues not raised by defendant in its answer (Duarte, J.)

Nieto v. Fresno Beverage Company, Inc.

Intrastate delivery of goods shipped from out-of-state constituted engagement in interstate commerce (Detjen, Acting P.J.)

Deere & Company v. Allstate Insurance Company

Order modifying opinion

Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.

Order modifying opinion

California Forms Books

- Business Litigation
- Employment Law
- Insurance Defense
- Medical Malpractice
- Products Liability

Download sample forms FREE at: http://at.law.com/books

All content in the California Daily Opinion Service is property of The Recorder and shall not be republished or photocopied without express written consent. Copyright 2019. ALM Media Properties, LLC. All rights reserved.
SUMMARIES

Civil Procedure

Trial court properly declined to decide issues not raised by defendant in its answer (Duarte, J.)

California Department of Finance v. City of Merced (Cardella-Presto)

C.A. 3rd; March 22, 2019; C085761

The Third Appellate District affirmed a judgment as modified. The court held that the parties' failure to raise certain issues in their pleadings barred the trial court's later consideration of those issues.

The City of Merced participated in the normal due diligence review (DDR) process to review what, if any, monies had to be disgorged when its former redevelopment agency (RDA) was statutorily dissolved. The city did not initiate a judicial challenge to the amounts the Department of Finance (DOF) ultimately found had to be repaid and the reasons therefor. The DOF soon filed what amounted to a collection action, seeking mandamus compelling the city to transfer certain money to the RDA's successor agency, and compelling that agency to transfer money to the relevant county's auditor-controller. The city answered with a general denial and boilerplate affirmative defenses. The city then tried to challenge the merits of the DOF's DDR determinations, and later filed a belated cross-petition seeking to challenge the merits.

The trial court struck the cross-complaint, declined to consider the city's challenges to the merits of the disputed issues, and ordered a writ compelling the monetary transfers. The city appealed.

The court of appeal affirmed, holding that the trial court properly declined to reach that issue. The court directed the trial court to modify the judgment to specify the exact dollar amount that the city and RDA's successor agency needed to transfer and affirmed the judgment as modified.

Consumer Protection

Creditor may be held liable for TCPA violations by collection agents hired by loan servicer to act on creditor's behalf (Nelson, J.)

Henderson v. United Student Aid Funds, Inc.

9th Cir.; March 22, 2019; 17-55373

The court of appeals reversed a district court judgment and remanded. The court held that a creditor could be held liable, under a theory of common law agency, for the alleged unlawful conduct of debt collectors hired by a loan servicer to act on the creditor’s behalf.

Shyriaa Henderson stopped making payments on her student loans. Loan servicer Navient Solutions, Inc. hired debt collectors to collect on the loans on behalf of creditor United Student Aid Funds, Inc. (USA Funds). Five different debt collection companies began calling Henderson about the unpaid loans. Henderson received pre-recorded messages many times in short intervals on a phone number she neither provided in connection with her student loans nor consented to be called on. Henderson sued USA Funds for violating the Telephone Consumer Protection Act (TCPA), arguing that the pattern of calls she received showed that the debt collectors were combining the use of skip tracers and auto dialers.

The district court granted summary judgment in favor of USA Funds, finding a reasonable jury could not hold USA Funds vicariously liable for the debt collectors’ alleged TCPA violations.

The court of appeals reversed, holding that USA Funds could be held liable for the alleged TCPA violations based on its principal-agent relationship with the debt collectors. First, even in the absence of a prior agency relationship, a reasonable jury could find that the debt collectors purporting to act as USA Funds’ agents. The collectors told borrowers they were calling about debts owed to USA Funds. Without needing USA Funds’ approval, the collectors negotiated, deferred, and took payments on USA Funds’ behalf. Further, a reasonable jury could find that USA Funds ratified the debt collectors’ calling practices by remaining silent and continuing to accept the benefits of the collectors’ tortious conduct despite knowing what the collectors were doing or, at the very least, knowing of facts that would have led a reasonable person to investigate further. Judge Bybee dissented, finding insufficient evidence to create a genuine issue of material fact that USA funds knew or willfully ignored TCPA violations, or granted implied actual authority to the debt collectors to violate the TCPA.

Criminal Law

Invalidity of only one of several counts of conviction does not mandate restructuring of entire sentence (Tallman, J.)
**Troiano v. United States**

9th Cir.; March 22, 2019; 18-15183

The court of appeals affirmed a district court order. The court held that the decision to restructure a defendant’s entire sentence when only one of several counts of conviction is found to be invalid rests within the sound discretion of the district court.

James Troiano participated in a convenience store robbery in which he brandished pistol, took $12,000 from an ATM, and injured the store clerk. A jury found him guilty of conspiracy to obstruct commerce by robbery (count 1), obstructing commerce by robbery (count 2—Hobbs Act robbery), use of a firearm in obstructing commerce by robbery (count 3), and being a felon in possession of a firearm (count 4). He was sentenced to a 24-year prison term. Troiano moved for relief under 28 U.S.C. §2255, arguing (1) he was no longer subject to a 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA) for count 4; (2) because of the Guidelines’ identically worded residual clause definition of “crime of violence,” he was not properly designated a career offender under U.S.S.G. §4B1.1; and (3) Hobbs Act robbery was not a crime of violence for purposes of 18 U.S.C. §924(c).

The district court granted relief as to Troiano’s first claim only, finding the ACCA enhancement was incorrectly applied to count 4. Because Troiano’s 17-year sentences on counts 1 and 2 and his 7-year consecutive sentence on count 3 were not altered, his overall sentence of 24 years remained unchanged. Troiano appealed, arguing the district court was required to conduct a full resentencing proceeding on all counts because removing the ACCA sentencing enhancement from count 4 necessarily impacted the court’s consideration of his full sentencing package.

The court of appeals affirmed, holding that the district court did not abuse its discretion in correcting only count 4 only, rather than conducting a full resentencing proceeding on all counts. Even assuming the four counts were grouped for sentencing—something the record did not reflect here—the decision to restructure a defendant’s entire sentence when only one of several counts of conviction is found to be invalid is discretionary and not, as Troiano suggested, mandatory. The decision to unbundle a sentencing package—that is, to conduct a full resentencing on all remaining counts of conviction when one or more counts of a multi-count conviction are undone—rests within the sound discretion of the district court.

---

**Criminal Law**

Plea colloquy insufficient to establish conspiracy to import methamphetamine (Berzon, J.)

**United States v. Jauregui**

9th Cir.; March 22, 2019; 16-50429

The court of appeals vacated a judgment of sentence and remanded. The court held that because defendant’s plea colloquy was insufficient to establish the existence of a conspiracy to import anything other than marijuana, the district court committed plain error in imposing sentence based on a conspiracy to import methamphetamine.

Martin Jauregui attempted unsuccessfully to cross the U.S.-Mexico border into California with over six kilograms of methamphetamine concealed in his car. Jauregui pleaded guilty to one count of conspiracy to import methamphetamine, in exchange for the dismissal of other charges. At Jauregui’s plea colloquy, his attorney stated that Jauregui “believed he was agreeing to import marijuana, but it was reasonably foreseeable that the substance would be methamphetamine.”

The district court sentenced Jauregui in accordance with the Sentencing Guidelines for a conspiracy to import methamphetamine.

The court of appeals vacated the judgment of sentence and remanded, holding that Jauregui’s plea colloquy was insufficient to support application of the Sentencing Guidelines for methamphetamine. Under United States v. Banuelos, 322 F.3d 700 (9th Cir. 2003), two findings are necessary to hold a defendant liable for conspiracy involving a particular drug type or quantity. First, the district court must find the existence of a conspiracy distributed a particular type and quantity of drugs. Second, the district court must find that the type and quantity were either within the scope of the defendant’s agreement with his coconspirators or were reasonably foreseeable to the defendant. Here, Jauregui admitted it was reasonably foreseeable that the controlled substance he would transport would be methamphetamine—thereby satisfying the second prong of the Banuelos inquiry. Nothing Jauregui admitted during his plea colloquy, however, even hinted at Banuelos’s first prong—“that the conspiracy distributed a particular type and quantity of drugs.” Jauregui never admitted either the existence of a conspiracy to import methamphetamine or that the substance found in his vehicle was, in fact, methamphetamine. Because Jauregui’s admissions did not establish the existence of a conspiracy to import methamphetamine, the district court plainly erred in imposing a sentence in excess of the statutory maximum for conspiracy to import marijuana, the only controlled substance admitted by Jauregui. Judge Berzon wrote separately to note the confusion wrought by Banuelos, and to urge the court to reconsider Banuelos en banc. Judge Castel dissented, finding no plain error in sentencing Jauregui for participation in a conspiracy to import methamphetamine, but opining that if there was plain error, then the judgment needed to be vacated in its entirety and the parties returned to the position they were in at the outset of the plea proceeding because Jauregui could not lawfully be sentenced for the crime of conspiracy to import marijuana, for which he was neither charged nor convicted.
Employment Litigation

Intrastate delivery of goods shipped from out-of-state constituted engagement in interstate commerce (Detjen, Acting P.J.)

Nieto v. Fresno Beverage Company, Inc.

C.A. 5th; March 7, 2019; F074704

The Fifth Appellate District affirmed a trial court order denying a petition to compel arbitration. The court held that a delivery driver’s participation in the final, and intrastate, phase of a product’s interstate shipment constituted engagement in interstate commerce.

Delivery driver Daniel Nieto filed a class action lawsuit against former employer Fresno Beverage Company, Inc., alleging wage and hour violations. Fresno petitioned to compel arbitration, citing an arbitration agreement executed by Nieto when he was hired. Nieto opposed, arguing that his employment at Fresno came within a statutory exemption to the Federal Arbitration Act (FAA) granted to transportation workers engaged in interstate commerce.

The trial court agreed with Nieto’s exemption argument and denied Fresno’s petition to compel arbitration.

The court of appeal affirmed, holding that the trial court properly found that Nieto was a transportation worker engaged in interstate commerce. In arguing otherwise, Fresno contended that because Nieto’s delivery routes did not cross state lines, but were merely intrastate, the exemption could not apply to him. Fresno failed, however, to cite any clear or persuasive authority for the proposition that crossing of state lines is a necessary condition for the exemption to apply. Rather, as the trial court recognized, federal case law has consistently recognized that a transportation worker does not necessarily have to physically cross state lines in order to engage in the movement of goods in interstate commerce. Interstate commerce has been deemed to include not only goods that travel across state lines, but also “the intrastate transport of goods in the flow of interstate commerce.” Here, the record showed that Fresno contracts with and buys beverages from companies both nationally and internationally. These beverages are delivered from out-of-state to Fresno’s warehouse where they are held for a short period before delivery to Fresno’s customers. Nieto’s deliveries, although intrastate, were thus the last phase of the interstate journey of these beverages. Accordingly, Nieto was engaged in interstate commerce even though his delivery routes did not cross state lines.

Government

City and County of San Francisco immune from liability for refusing to inform ICE of undocumented alien’s release date (Bennett, J.)

Steinle v. City and County of San Francisco

9th Cir.; March 25, 2019; 17-16283

The court of appeals affirmed a district court judgment. The court held that California law barred a negligence claim arising from City and County of San Francisco officials’ refusal to communicate the release status of an undocumented alien to Immigration and Customs Enforcement (ICE).

In March 2015, then San Francisco Sheriff Ross Mirkarimi issued a memorandum limiting the information that sheriff’s department employees were authorized to disclose to ICE. The memo directed that information regarding the release dates of undocumented aliens was not to be disclosed absent a judicial order or the issuance of a warrant for the alien’s removal. In April 2015, the sheriff’s department, without notice to ICE, released from custody Juan Lopez-Sanchez, an undocumented alien with an extensive criminal record. In so doing, the department disregarded an ICE detainer request asking the department to notify ICE 48 hours before releasing Lopez-Sanchez and to hold him until ICE could take custody of him. Some two months after his release, Lopez-Sanchez shot and killed Kathryn Steinle. Her parents sued the City and County of San Francisco, Sheriff Mirkarimi, and others, asserting, as to the city and Mirkarimi, causes of action for negligence and negligence per se.

The district court granted the city defendants’ motion to dismiss.

The court of appeals affirmed, holding that the sheriff’s issuance of the memo was a discretionary act that is entitled to immunity under Cal. Gov. Code §820.2. The memo was plainly an example of decision-making at the “planning” level, as that term is used by the California Supreme Court, and, as such, was a discretionary act insulated from liability. The court rejected plaintiffs’ contention that 8 U.S.C. §§1373(a) and 1644 required the Sheriff’s Department to provide release date information to ICE and thus deprived him of discretion to do otherwise. The relevant parts of those sections prohibit any federal, state, or local restrictions on sending “information regarding” the “immigration status” of individuals to the Immigration and Naturalization Service. Nothing in §§1373(a) or 1644 addresses information concerning an inmate’s release date. As the district court found, no plausible reading of “information regarding...immigration status” encompasses the state or local release date of an inmate who is an alien. Finally, the court rejected plaintiff’s claim that Sheriff Mirkarimi did not have discretionary authority to issue the memo because the memo “invaded” the federal government’s authority over immigration law and frustrated ICE’s ability to detain and deport Lopez-Sanchez. Accepting as true that Sheriff Mirkarimi’s actions adversely affected ICE’s ability to do its job, that did not, without more, strip him of his discretionary authority under California law.
to institute the policy that he did. Judge Graber concurred, noting that Cal. Gov. Code §846 provides an even clearer and specific grant of immunity, granting public employees immunity from liability for any “injury caused…by the failure to retain an arrested person in custody.”

**Securities Litigation**

**Third party’s dissemination of false or misleading statements with intent to defraud falls within scope of Rules 10b–5(a) and (c) (Breyer, J.)**

**Lorenzo v. Securities and Exchange Commission**

U.S.Sup.Ct.; March 27, 2019; 17–1077

Securities and Exchange Commission Rule 10b–5 makes it unlawful to

(a) “employ any device, scheme, or artifice to defraud,” (b) “make any untrue statement of a material fact,” or (c) “engage in any act, practice, or course of business” that “operates … as a fraud or deceit” in connection with the purchase or sale of securities. In Janus Capital Group, Inc. v. First Derivative Traders, 564 U. S. 135, this Court held that to be a “maker” of a statement under subsection (b) of that Rule, one must have “ultimate authority over the statement, including its content and whether and how to communicate it.” Id., at 142 (emphasis added). On the facts of Janus, this meant that an investment adviser who had merely “participat[ed] in the drafting of a false statement” “made” by another could not be held liable in a private action under subsection (b). Id., at 145.

Petitioner Francis Lorenzo, while the director of investment banking at an SEC-registered brokerage firm, sent two e-mails to prospective investors. The content of those e-mails, which Lorenzo’s boss supplied, described a potential investment in a company with “confirmed assets” of $10 million. In fact, Lorenzo knew that the company had recently disclosed that its total assets were worth less than $400,000.

In 2015, the Commission found that Lorenzo had violated Rule 10b–5, §10(b) of the Exchange Act, and §17(a)(1) of the Securities Act by sending false and misleading statements to investors with intent to defraud. On appeal, the District of Columbia Circuit held that Lorenzo could not be held liable as a “maker” under subsection (b) of the Rule in light of Janus, but sustained the Commission’s finding with respect to subsections (a) and (c) of the Rule, as well as §10(b) and §17(a)(1).

**Held:** Dissemination of false or misleading statements with intent to defraud can fall within the scope of Rules 10b–5(a) and (c), as well as the relevant statutory provisions, even if the disseminator did not “make” the statements and consequently falls outside Rule 10b–5(b). Pp. 5–13.

(a) It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud. By sending e-mails he understood to contain material untruths, Lorenzo “employ[ed]” a “device,” “scheme,” and “artifice to defraud” within the meaning of subsection (a) of the Rule, §10(b), and§17(a)(1). By the same conduct, he “engage[d] in a[n] act, practice, or course of business” that “operate[d] … as a fraud or deceit” under subsection (c) of the Rule. As Lorenzo does not challenge the appeals court’s scienter finding, it is undisputed that he sent the e-mails with “intent to deceive, manipulate, or defraud” the recipients. Aaron v. SEC, 446 U. S. 680, 686, and n. 5. Resort to the expansive dictionary definitions of “device,” “scheme,” and “artifice” in Rule 10b–5(a) and §17(a)(1), and of “act” and “practice” in Rule 10b–5(c), only strengthens this conclusion. Under the circumstances, it is difficult to see how Lorenzo’s actions could escape the reach of these provisions. Pp. 5–7.

(b) Lorenzo counters that the only way to be liable for false statements is through those provisions of the securities laws—like Rule 10b–5(b)—that refer specifically to false statements. Holding to the contrary, he and the dissent say, would render subsection (b) “superfluous.” The premise of this argument is that each subsection governs different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. And the idea that each subsection governs a separate type of conduct is difficult to reconcile with the Rule’s language, since at least some conduct that amounts to “employ[ing] a device, scheme, or artifice to defraud” under subsection (a) also amounts to “engag[ing] in a[n] act … which operate[s] … as a fraud” under subsection (c). This Court’s conviction is strengthened by the fact that the plainly fraudulent behavior confronted here might otherwise fall outside the Rule’s scope. Using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud. Pp. 7–9.

(c) Lorenzo and the dissent make a few other important arguments. The dissent contends that applying Rules 10b–5(a) and (c) to conduct like Lorenzo’s would render Janus “a dead letter.” Post, at 9. But Janus concerned subsection (b), and it said nothing about the Rule’s application to the dissemination of false or misleading information. Thus, Janus would remain relevant (and preclude liability) where an individual neither makes nor disseminates false information—provided, of course, that the individual is not involved in some other form of fraud. Lorenzo also claims that imposing primary liability upon his conduct would erase or at least weaken the distinction between primary and secondary liability under the statute’s “aiding and abetting” provision. See 15 U. S. C. §78t(e). But the line the Court adopts today is clear: Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b–5(a) and (c), §10(b), and
§17(a)(1), even if they are secondarily liable under Rule 10b-5(b). As for Lorenzo’s suggestion that those like him ought to be held secondarily liable, this offer will, too often, prove illusory. Where a “maker” of a false statement does not violate subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the “aiding and abetting” statute. And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b-5, then such a fraud, whatever its intent or consequences, might escape liability altogether. That anomalous result is not what Congress intended.


872 F. 3d 578, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined. KAVANAUGH, J., took no part in the consideration or decision of the case.
JUSTICE BREYER delivered the opinion of the Court.

Securities and Exchange Commission Rule 10b–5 makes it unlawful:

“(a) To employ any device, scheme, or artifice to defraud, “(b) To make any untrue statement of a material fact . . . , or

“(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . . in connection with the purchase or sale of any security.”17 CFR §240.10b–5 (2018).

In Janus Capital Group, Inc. v. First Derivative Traders, 564 U. S. 135 (2011), we examined the second of these provisions, Rule 10b–5(b), which forbids the “mak[ing]” of “any untrue statement of a material fact.” We held that the “maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.” Id., at 142 (emphasis added). We said that “[w]ithout control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.” Ibid. And we illustrated our holding with an analogy: “[W]hen a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.” Id., at 143. On the facts of Janus, this meant that an investment adviser who had merely “participat[ed] in the drafting of a false statement” “made” by another could not be held liable in a private action under subsection (b) of Rule10b–5. Id., at 145.

In this case, we consider whether those who do not “make” statements (as Janus defined “make”), but who disseminate false or misleading statements to potential investors with the intent to defraud, can be found to have violated the other parts of Rule 10b–5, subsections (a) and (c), as well as related provisions of the securities laws,§10(b) of the Securities Exchange Act of 1934, 48 Stat.891, as amended, 15 U. S. C. §78j(b), and §17(a)(1) of the Securities Act of 1933, 48 Stat. 84–85, as amended, 15 U. S. C. §77q(a)(1). We believe that they can.

I

A

For our purposes, the relevant facts are not in dispute. Francis Lorenzo, the petitioner, was the director of investment banking at Charles Vista, LLC, a registered broker-dealer in Staten Island, New York. Lorenzo’s only investment banking client at the time was Waste2Energy Holdings, Inc., a company developing technology to convert “solid waste” into “clean renewable energy.”

In a June 2009 public filing, Waste2Energy stated that its total assets were worth about $14 million. This figure included intangible assets, namely, intellectual property, valued at more than $10 million. Lorenzo was skeptical of this valuation, later testifying that the intangibles were a “dead asset” because the technology “didn’t really work.”

During the summer and early fall of 2009, Waste2Energy hired Lorenzo’s firm, Charles Vista, to sellto investors $15 million worth of debentures, a form of “debt secured only by the debtor’s earning power, not by a lien on any specific asset,” Black’s Law Dictionary 486(10th ed. 2014).

In early October 2009, Waste2Energy publicly disclosed, and Lorenzo was told, that its intellectual property was worthless, that it had “‘written off … all [of its] intangible assets,’” and that its total assets (as of March31, 2009) amounted to $370,552.

Shortly thereafter, on October 14, 2009, Lorenzo sent two e-mails to prospective investors describing the debenture offering. According to later testimony by Lorenzo, he sent the e-mails at the direction of his boss, who supplied the content and “approved” the messages. The e-mails described the investment in Waste2Energy as having “3 layers of protection,” including $10 million in “confirmed assets.” The e-mails nowhere revealed the fact that Waste2Energy had publicly stated that its assets were in fact worth less than $400,000.

Lorenzo signed thee-mails with his own name, he identified himself as “Vice President—Investment Banking,” and he invited the recipients to “call with any questions.”

B

In 2013, the Securities and Exchange Commission instituted proceedings against Lorenzo (along with his boss and Charles Vista). The Commission charged that Lorenzo had violated Rule 10b–5, §10(b) of the Exchange Act, and §17(a) (1) of the Securities Act. Ultimately, the Commission found that Lorenzo had run afoul of these provisions by sending false and misleading statements to investors with intent to defraud. As a sanction, it fined Lorenzo $15,000, ordered
him to cease and desist from violating the securities laws, and barred him from working in the securities industry for life.

Lorenzo appealed, arguing primarily that in sending the emails he lacked the intent required to establish a violation of Rule 10b–5, §10(b), and §17(a)(1), which we have characterized as “a mental state embracing intent to deceive, manipulate, or defraud.” Aaron v. SEC, 446 U. S. 680, 686, and n. 5 (1980). With one judge dissenting, the Court of Appeals panel rejected Lorenzo’s lack-of-intent argument. 872 F. 3d 578, 583 (CADC 2017). Lorenzo does not challenge the panel’s scienter finding. Reply Brief 17.

Lorenzo also argued that in light of Janus, he could not be held liable under subsection (b) of Rule 10b–5. 872 F. 3d, at 586–587. The panel agreed. Because his boss “asked Lorenzo to send the emails, supplied the central content, and approved the messages for distribution,” id., at 588, it was the boss that had “ultimate authority” over the content of the statement “and whether and how to communicate it,” Janus, 563 U. S., at 142. (We took this case on the assumption that Lorenzo was not a “maker” under subsection (b) of Rule 10b–5, and do not revisit the court’s decision on this point.)

The Court of Appeals nonetheless sustained (with one judge dissenting) the Commission’s finding that, by knowingly disseminating false information to prospective investors, Lorenzo had violated other parts of Rule 10b–5, subsections (a) and (c), as well as §10(b) and §17(a)(1).

Lorenzo then filed a petition for certiorari in this Court. We granted review to resolve disagreement about whether someone who is not a “maker” of a misstatement under Janus can nevertheless be found to have violated the other subsections of Rule 10b–5 and related provisions of the securities laws, when the only conduct involved concerns a misstatement. Compare e.g., 872 F. 3d 578, with WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F. 3d 1039, 1057–1058 (CA9 2011).

II

A

At the outset, we review the relevant provisions of Rule 10b–5 and of the statutes. See Appendix, infra. As we have said, subsection (a) of the Rule makes it unlawful to “employ any device, scheme, or artifice to defraud.” Subsection (b) makes it unlawful to “make any untrue statement of a material fact.” And subsection (c) makes it unlawful to “engage in any act, practice, or course of business” that “operates … as a fraud or deceit.” See 17 CFR §240.10b–5.

There are also two statutes at issue. Section 10(b) makes it unlawful to “use or employ … any manipulative or deceptive device or contrivance” in contravention of Commission rules and regulations. 15 U. S. C. §78j(b). By its authority under that section, the Commission promulgated Rule 10b–5. The second statutory provision is §17(a), which, like Rule 10b–5, is organized into three subsections. 15 U. S. C. §77q(a). Here, however, we consider only the first subsection, §17(a)(1), for this is the only subsection that the Commission charged Lorenzo with violating. Like Rule 10b–5(a), (a)(1) makes it unlawful to “employ any device, scheme, or artifice to defraud.”

B

After examining the relevant language, precedent, and purpose, we conclude that (assuming other here-irrelevant legal requirements are met) dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b–5, as well as the relevant statutory provisions. In our view, that is so even if the disseminator did not “make” the statements and consequently falls outside subsection (b) of the Rule.

It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud. By sending emails he understood to contain material untruths, Lorenzo “employ[ed]” a “device,” “scheme,” and “artifice to defraud” within the meaning of subsection (a) of the Rule, §10(b), and §17(a)(1). By the same conduct, he “engage[d] in a[n]… practice, or course of business” that “operate[d] … as a fraud or deceit” under subsection (c) of the Rule. Recall that Lorenzo does not challenge the appeals court’s scienter finding, so we take for granted that he sent the emails with “intent to deceive, manipulate, or defraud” the recipients. Aaron, 446 U. S., at 686, n. 5. Under the circumstances, it is difficult to see how his actions could escape the reach of those provisions.

Resort to dictionary definitions only strengthens this conclusion. A “device,” “we have observed, is simply” “[t]hat which is devised, or formed by design”; a “scheme” is a “project,” “plan[,] or program of something to be done”; and an “artifice” is “an artful stratagem or trick.” Id., at 696, n. 13 (quoting Webster’s International Dictionary 713, 2234, 157 (2d ed. 1934)(Webster’s Second)). By these lights, dissemination of false or misleading material is easily an “artful stratagem” or a “plan,” “devised” to defraud an investor under subsection (a). See Rule 10b–5(a) (making it unlawful to “employ any device, scheme, or artifice to defraud”); §17(a)(1) (same). The words “act” and “practice” in subsection (c) are similarly expansive. Webster’s Second 25 (defining “act” as “a doing” or a “thing done”); id., at 1937 (defining “practice” as an “action” or “deed”); see Rule 10b–5(c) (making it unlawful to “engage in a[n]… practice, or course of business” that “operates … as a fraud or deceit”).

These provisions capture a wide range of conduct. Applying them may present difficult problems of scope in borderline cases. Purpose, precedent, and circumstance could lead to narrowing their reach in other contexts. But we see nothing borderline about this case, where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud. And while one can readily imagine other actors tangentially involved in dissemination—say, a mailroom clerk—for whom liability would typically be inappropriate, the petitioner in this case sent false statements directly to
investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company.

C

Lorenzo argues that, despite the natural meaning of these provisions, they should not reach his conduct. This is so, he says, because the only way to be liable for false statements is through those provisions that refer specifically to false statements. Other provisions, he says, concern “scheme liability claims” and are violated only when conduct other than misstatements is involved. Brief for Petitioner 4–6, 28–30. Thus, only those who “make” untrue statements under subsection (b) can violate Rule 10b–5 in connection with statements. (Similarly, §17(a)(2) would be the sole route for finding liability for statements under §17(a).) Holding to the contrary, he and the dissent insist, would render subsection (b) of Rule 10b–5 “superfluous.” See post, at 6–7 (opinion of THOMAS, J.).

The premise of this argument is that each of these provisions should be read as governing different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. See Herman & MacLean v. Huddleston, 459 U. S. 375, 383 (1983) (“[I]t is hardly a novel proposition that” different portions of the securities laws “prohibit some of the same conduct” (internal quotation marks omitted)). As we have explained, these laws marked the “first experiment in federal regulation of the securities industry.” SEC v. Capital Gains Research Bureau, Inc., 375 U. S. 180, 198 (1963). It is “understandable, therefore,” that “in declaring certain practices unlawful,” it was thought prudent “to include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against nondisclosure” even though “a specific proscription against nondisclosure” might in other circumstances be deemed “surplusage.” Id., at 198–199. “Each succeeding prohibition” was thus “meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections.” United States v. Naftalin, 441 U. S. 768, 774 (1979). We have found “no warrant for narrowing alternative provisions . . . adopted with the purpose of affording added safeguards.” Ibid. (quoting United States v. Gilliland, 312 U. S. 86, 93 (1941)); see Affiliated Ute Citizens of Utah v. United States, 406 U. S. 128, 152–153 (1972) (While “the second subparagraph of [Rule 10b–5] specifies the making of an untrue statement . . . it he first and third subparagraphs are not so restricted”). And since its earliest days, the Commission has not viewed these provisions as mutually exclusive. See, e.g., In re R. D. Bayly & Co., 19 S. E. C. 773 (1945) (finding violations of what would become Rules 10b–5(b) and (c) based on the same misrepresentations and omissions); In re Arthur Hays & Co., 5 S. E. C. 271 (1939) (finding violations of both §§17(a)(2) and (a)(3) based on false representations in stock sales).

The idea that each subsection of Rule 10b–5 governs a separate type of conduct is also difficult to reconcile with the language of subsections (a) and (c). It should go without saying that at least some conduct amounts to “employ[ing]” a “device, scheme, or artifice to defraud” under subsection (a) as well as “engag[ing]” in a[n] act . . . which operates . . . as a fraud” under subsection (c). In Affiliated Ute, for instance, we described the “defendants’ activities” as falling “within the very language of one or the other of those subparagraphs, a ‘course of business’ or a ‘device, scheme, or artifice’ that operated as a fraud.” 406 U. S., at 153. (The dissent, for its part, offers no account of how the superfluous problems that motivate its interpretation can be avoided where subsections (a) and (c) are concerned.)

Coupled with the Rule’s expansive language, which readily embraces the conduct before us, this considerable overlap suggests we should not hesitate to hold that Lorenzo’s conduct ran afoul of subsections (a) and (c), as well as the related statutory provisions. Our conviction is strengthened by the fact that we here confront behavior that, though plainly fraudulent, might otherwise fall outside the scope of the Rule. Lorenzo’s view that subsection (b), the making-false-statements provision, exclusively regulates conduct involving false or misleading statements would mean those who disseminate false statements with the intent to cheat investors might escape liability under the Rule altogether. But using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud. We do not know why Congress or the Commission would have wanted to disarm enforcement in this way. And we cannot easily reconcile Lorenzo’s approach with the basic purpose behind these laws: “to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.” Capital Gains, 375 U. S., at 186. See also, e.g., SEC v. W. J. Howey Co., 328 U. S. 293, 299 (1946) (the securities laws were designed “to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits”).

III

Lorenzo and the dissent make a few other important arguments. They contend that applying subsections (a) or (c) of Rule 10b–5 to conduct like his would render our decision in Janus (which we described at the outset, supra, at 1–2) “a dead letter,” post, at 9. But we do not see how that is so. In Janus, we considered the language in subsection (b), which prohibits the “mak[ing]” of “any untrue statement of a material fact.” See 564 U. S., at 141–143. We held that the “maker” of a “statement” is the “person or entity with ultimate authority over the statement.” Id., at 142. And we found that subsection (b) did not (under the circumstances) cover an investment adviser who helped draft misstatements issued by a different entity that controlled the statements’ content. Id., at 146–148. We said nothing about the Rule’s application to
the dissemination of false or misleading information. And we can assume that *Janus* would remain relevant (and preclude liability) where an individual neither makes nor disseminates false information—provided, of course, that the individual is not involved in some other form of fraud.

Next, Lorenzo points to the statute’s “aiding and abetting” provision. 15 U. S. C. §78t(e). This provision, enforceable only by the Commission (and not by private parties), makes it unlawful to “knowingly or recklessly … provid[e] substantial assistance to another person” who violates the Rule. *Ibid.*; see *Janus*, 564 U. S., at 143 (citing *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*), 511 U. S. 164 (1994)). Lorenzo claims that imposing primary liability upon his conduct would erase or at least weaken what is otherwise a clear distinction between primary and secondary (i.e., aiding and abetting) liability. He emphasizes that, under today’s holding, a disseminator might be a primary offender with respect to subsection (a) of Rule 10b–5 (by employing a “scheme” to “defraud”) and also secondarily liable as an aider and abettor with respect to subsection (b) (by providing substantial assistance to one who “makes” a false statement).


We do not believe, however, that our decision creates a serious anomaly or otherwise weakens the distinction between primary and secondary liability. For one thing, it is hardly unusual for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another. John, for example, might sell Bill an unregistered firearm in order to help Bill rob a bank, under circumstances that make him primarily liable for the gun sale and secondarily liable for the bank robbery.

For another, the cases to which Lorenzo refers do not help his cause. Take *Central Bank*, where we held that Rule 10b–5’s private right of action does not permit suits against secondary violators. 511 U. S., at 177. The holding of *Central Bank*, we have said, suggests the need for a “clean line” between conduct that constitutes a primary violation of Rule 10b–5 and conduct that amounts to a secondary violation. *Janus*, 564 U. S., at 143, and n. 6. Thus, in *Janus*, we sought an interpretation of “make” that could neatly divide primary violators and actors too far removed from the ultimate decision to communicate a statement. *Ibid.* (citing *Central Bank*, 511 U. S. 164). The line we adopt today is just as administrable: Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b–5(a) and (c), §10(b), and §17(a)(1), even if they are secondarily liable under Rule10b–5(b). Lorenzo suggests that classifying dissemination as a primary violation would inappropriately subject peripheral players in fraud (including him, naturally) to substantial liability. We suspect the investors who received Lorenzo’s e-mails would not view the deception so favorably. And as *Central Bank* itself made clear, even a bit participant in the securities markets “may be liable as a primary violator under [Rule] 10b–5” so long as “all of the requirements for primary liability … are met.” *Id.*, at 191.

Lorenzo’s reliance on *Stoneridge* is even further afield. There, we held that private plaintiffs could not bring suit against certain securities defendants based on undisclosed deceptions upon which the plaintiffs could not have relied. 552 U. S., at 159. But the Commission, unlike private parties, need not show reliance in its enforcement actions. And even supposing reliance were relevant here, Lorenzo’s conduct involved the direct transmission of false statements to prospective investors intended to induce reliance—far from the kind of concealed fraud at issue in *Stoneridge*.

As for Lorenzo’s suggestion that those like him ought to be held secondarily liable, this offer will, far too often, prove illusory. In instances where a “maker” of a false statement does not violate subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the “aiding and abetting” statute. That is because the statute insists that there be a primary violator to whom the secondary violator provided “substantial assistance.” 15 U. S. C. §78t(e). And the latter can be “deemed to be in violation” of the provision only “to the same extent as the person to whom such assistance is provided.” *Ibid.* In other words, if Acme Corp. could not be held liable under subsection (b) for a statement it made, then a knowing disseminator of those statements could not be held liable for aiding and abetting Acme under subsection (b). And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b–5, then such a fraud, whatever its intent or consequences, might escape liability altogether.

That is not what Congress intended. Rather, Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job.

 ***

For these reasons, the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

[APPENDIX DELETED]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U. S. 135 (2011), we drew a clear line between primary
and secondary liability in fraudulent-misstatement cases: A person does not “make” a fraudulent misstatement within the meaning of Securities and Exchange Commission (SEC) Rule 10b–5(b)—and thus is not primarily liable for the statement—if the person lacks “ultimate authority over the statement.” Id., at 142. Such a person could, however, be liable as an aider and abettor under principles of secondary liability.

Today, the Court eviscerates this distinction by holding that a person who has not “made” a fraudulent misstatement can nevertheless be primarily liable for it. Because the majority misconstrues the securities laws and flouts our precedent in a way that is likely to have far-reaching consequences, I respectfully dissent.

I

To appreciate the sweeping nature of the Court’s holding, it is helpful to begin with the facts of this case. On October 14, 2009, the owner of the firm at which petitioner Frank Lorenzo worked instructed him to send e-mails to two clients regarding a debenture offering. The owner explained that he wanted the e-mails to come from the firm’s investment-banking division, which Lorenzo directed. Lorenzo promptly addressed an e-mail to each client, “cut and pasted” the contents of each e-mail—which he received from the owner—into the body, and “sent [them] out.” App. 321. It is undisputed that Lorenzo did not draft the e-mails’ contents, though he knew that they contained false or misleading statements regarding the debenture offering. Both e-mails stated that they were sent “[a]t the request of ” the owner of the firm. Id., at 403, 405. No other allegedly fraudulent conduct is at issue.

In 2013, the SEC brought enforcement proceedings against the owner of the firm, the firm itself, and Lorenzo. Even though Lorenzo sent the e-mails at the owner’s request, the SEC did not charge Lorenzo with aiding and abetting fraud committed by the owner. See 15 U. S. C. §§77o(b), 78o(b)(4)(E), 78t(e). Instead, the SEC charged Lorenzo as a primary violator of multiple securities laws,1 including Rule 10b–5(b), which prohibits “mak[ing] any untrue statement of a material fact … in connection with the purchase or sale of any security,” 17 CFR §240.10b–5(b) (2018); see Ernst & Ernst v. Hochfelder, 425 U. S. 185, 212–214 (1976) (construing Rule 10b–5(b) to require scienter). The SEC ultimately concluded that, by “knowingly sen[ding] materially misleading language from his own email account to prospec

1. For ease of reference, I use “securities laws” to refer to both statutes and SEC regulations.

ments devised by [his boss] at [his boss’] direction.” 872 F. 3d 578, 587 (CADC 2017). The SEC has not challenged that aspect of the decision below.

The panel majority nevertheless upheld the SEC’s decision holding Lorenzo primarily liable for the same false statements under other provisions of the securities laws—specifically, §10(b) of the Securities Exchange Act of 1934(1934 Act), Rules 10b–5(a) and (c), and §17(a)(1) of the Securities Act of 1933 (1933 Act). Unlike Rule 10b–5(b), none of these provisions pertains specifically to fraudulent misstatements. I

Even though Lorenzo undisputedly did not “make” the false statements at issue in this case under Rule 10b–5(b), the Court follows the SEC in holding him primarily liable for those statements under other provisions of the securities laws. As construed by the Court, each of these more general laws completely subsumes Rule 10b–5(b) and §17(a)(2) of the 1933 Act in cases involving fraudulent misstatements, even though these provisions specifically govern false statements. The majority’s interpretation of these provisions cannot be reconciled with their text or our precedents. Thus, I am once again compelled to “disagree[e] with the SEC’s broad view” of the securities laws. Janus, supra, at 145, n. 8.

A

I begin with the text. The Court of Appeals held that Lorenzo violated §10(b) of the 1934 Act and Rules 10b–5(a) and (c). In relevant part, §10(b) makes it unlawful for a person, in connection with the purchase or sale of a security, “[t]o use or employ … any manipulative or deceptive device or contrivance” in contravention of an SEC rule. 15 U. S. C. §78j(b). Rule 10b–5 was promulgated under this statutory authority. That Rule makes it unlawful, in connection with the purchase or sale of any security,

“(a) To employ any device, scheme, or artifice to defraud,

“(b) To make any untrue statement of a material fact … , or

“(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit … .” 17 CFR §240.10b–5.

The Court of Appeals also held that Lorenzo violated §17(a) (1) of the 1933 Act. Similar to Rule 10b–5, §17(a) of the Act provides that it is unlawful, in connection with the offer or sale of a security,

“(1) to employ any device, scheme, or artifice to defraud, or “(2) to obtain money or property by means of any untrue statement of a material fact … ; or
“(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.” 15 U. S. C. §77q(a)(1).

We can quickly dispose of Rule 10b–5(a) and §17(a)(1). The act of knowingly disseminating a false statement at the behest of its maker, without more, does not amount to “employ[ing] any device, scheme, or artifice to defraud” within the meaning of those provisions. As the contemporaneous dictionary definitions cited by the majority make clear, each of these words requires some form of planning, designing, devising, or strategizing. See ante, at 6. We have previously observed that “the terms ‘device,’ ‘scheme,’ and ‘artifice’ all connote knowing or intentional practices.” Aaron v. SEC, 446 U. S. 680, 696 (1980) (emphasis added). In other words, they encompass “fraudulent scheme[s],” such as a “‘short selling’ scheme,” a wash sale, a matched order, price rigging, or similar conduct. United States v. Naftalin, 441 U. S. 768, 770, 778 (1979) (applying §17(a)(1)); see Santa Fe Industries, Inc. v. Green, 430 U. S. 462, 473 (1977) (interpreting the term “manipulative” in §10(b)).

Here, it is undisputed that Lorenzo did not engage in any conduct involving planning, scheming, designing, or strategizing, as Rule 10b–5(a) and §17(a)(1) require for a primary violation. He sent two e-mails drafted by a superior, to recipients specified by the superior, pursuant to instructions given by the superior, without collaborating on the substance of the e-mails or otherwise playing an independent role in perpetrating a fraud. That Lorenzo knew the messages contained falsities does not change the essentially administrative nature of his conduct here; he might have assisted in a scheme, but he did not himself plan, scheme, design, or strategize. In my view, the plaintext of Rule 10b–5(a) and §17(a)(1) thus does not encompass Lorenzo’s conduct as a matter of primary liability.

The remaining provision, Rule 10b–5(c), seems broader at first blush. But the scope of this conduct-based provision—and, for that matter, Rule 10b–5(a) and §17(a)(1)—must be understood in light of its codification alongside a prohibition specifically addressing primary liability for false statements. Rule 10b–5(b) imposes primary liability on the “make[r]” of a fraudulent misstatement. 17 CFR §240.10b–5(b); see Janus, 564 U. S., at 141–142. And §17(a)(2) imposes primary liability on a person who “obtain[s] money or property by means of” a false statement. 15 U. S. C. §77q(a)(2). The conduct-based provisions of Rules 10b–5(a) and (c) and §17(a)(1) must be interpreted in view of the specificity of these false-statement provisions, and therefore cannot be construed to encompass primary liability solely for false statements. This view is consistent with our previous recognition that “each subparagraph of §17(a) ‘proscribes a distinct category of misconduct’” and “‘is meant to cover additional kinds of illegalities.’” Aaron, supra, at 697 (quoting Naftalin, supra, at 774; emphasis added).

The majority disregards these express limitations. Under the Court’s rule, a person who has not “made” a fraudulent misstatement within the meaning of Rule 10b–5(b) nevertheless could be held primarily liable for facilitating that same statement; the SEC or plaintiff need only relabel the person's involvement as an “act,” “device,” “scheme,” or “artifice” that violates Rule 10b–5(a) or (c). And a person could be held liable for a fraudulent misstatement under §17(a)(1) even if the person did not obtain money or property by means of the statement. In short, Rule 10b–5(b) and §17(a)(2) are rendered entirely superfluous in fraud cases under the majority’s reading.2

This approach is in tension with “the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.” RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U. S. 639, 645 (2012) (quoting D. Ginsberg & Sons, Inc. v. Popkin, 285 U. S. 204, 208 (1932)). I would therefore apply the “old and familiar rule” that “the specific governs the general.” RadLAX, supra, at 645–646 (internal quotation marks omitted); see A. Scalia & B. Garner, Reading Law 51 (2012) (canon equally applicable to statutes and regulations). This canon of construction applies not only to resolve “contradiction[s]” between general and specific provisions, but also to avoid “the superfluity of a specific provision that is swallowed by the general one.” RadLAX, 566 U. S., at 645. Here, liability for false statements is “specifically dealt with” in Rule 10b–5(b) and §17(a)(2). Id., at 646 (quoting D. Ginsberg & Sons, supra, at 208). But Rule 10b–5 and §17(a) also contain general prohibitions that, “in [their] most comprehensive sense, would include what is embraced in” the more specific provisions. 566 U. S., at 646. I would hold that the provisions specifically addressing false statements “must be operative” as to false-statement cases, and that the more general provisions should be read to apply “only to such cases within [their] general language as are not within the” purview of the specific provisions on false statements. Ibid.

Adopting this approach to the statutory text would align with our previous admonitions that the securities laws should not be “[v]iewed in isolation” and stretched to their limits. Hochfelder, 425 U. S., at 212. In Hochfelder, for example, we concluded that the key words of §10(b) employed the “terminology of intentional wrongdoing” and thus “strongly suggest[ed] that it “proscribe[s] knowing or intentional misconduct,” even though the statute did not expressly state as much. Id., at 197, 214. We took a similar approach to §17(a) (1) of the 1933 Act. Aaron, 446 U. S., at 695–697. We have also limited the terms of Rule 10b–5 by recognizing that it was adopted pursuant to §10(b) and thus “encompasses only

2. I recognize that §17(a)(1) could be deemed narrower than §17(a)(2) in the sense that it requires scienter, whereas §17(a)(2) does not. Aaron v. SEC, 446 U. S. 680, 697 (1980). But scienter is not disputed in this case, and the specific terms of §17(a)(2) are otherwise completely subsumed within the more general terms of §17(a)(1), as interpreted by the majority.

Contrary to the suggestion of the majority, this approach does not necessarily require treating each provision of Rule 10b–5 or §17(a) as “governing different, mutually exclusive, spheres of conduct.” Ante, at 7. Nor does it prevent the securities laws from mutually reinforcing one another or overlapping to some extent. Ante, at 7–8. It simply contemplates giving full effect to the specific prohibitions on false statements in Rule 10b–5(b) and §17(a)(2) instead of rendering them superfluous.

The majority worries that this approach would allow people who disseminate false statements with the intent to defraud to escape liability under Rule 10b–5. Ante, at 9. That is not so. If a person’s only role is transmitting fraudulent misstatements at the behest of the statements’ maker, the person’s conduct would be appropriately assessed as a matter of secondary liability pursuant to provisions like 15 U. S. C. §§77o(b), 78t(e), and 78o(b)(4)(E). And if a person engages in other acts prohibited by the Rule, such as developing and employing a fraudulent scheme, the person would be primarily liable for that conduct.

The majority suggests that secondary liability may often prove illusory. It hypothesizes, for example, a situation in which the “maker” of a false statement does not know that it was false and thus does not violate Rule 10b–5(b), but the disseminator knows that the statement is false. Under that scenario, the majority fears that the person disseminating the statements could be “engaged in an egregious fraud,” yet would not be liable as an aider and abettor for lack of a primary violator. Ante, at 12. This concern is misplaced. As an initial matter, I note that §17(a)(2) does not require scienter, so the maker of the statement may still be liable under that provision. Aaron, supra, at 695–697. Moreover, an ongoing, “egregious” fraud is likely to independently constitute a primary violation of the conduct-based securities laws, wholly apart from the laws prohibiting fraudulent misstatements. Here, by contrast, we are concerned with the dissemination of two misstatements at the request of their maker. This type of conduct is appropriately assessed under principles of secondary liability.

The majority’s approach contradicts our precedent in two distinct ways.

First, the majority’s opinion renders Janus a dead letter. In Janus, we held that liability under Rule 10b–5(b) was limited to the “make[r]” of the statement and that “[o]ne who prepares or publishes a statement on behalf of another is not its maker” within the meaning of Rule 10b–5(b), 564 U. S., at 142 (emphasis added). It is undisputed here that Lorenzo was not the maker of the fraudulent misstatements. The majority nevertheless finds primary liability under different provisions of Rule 10b–5, without any real effort to reconcile its decision with Janus. Al-though it “assume[s] that Janus would remain relevant (and preclude liability) where an individual neither makes nor disseminates false information,” in the next breath the majority states that this would be true only if “the individual is not involved in some other form of fraud.” Ante, at 10. Given that, under the majority’s rule, administrative acts undertaken in connection with a fraudulent misstatement qualify as “other form[s] of fraud,” the majority’s supposed preservation of Janus is illusory.

Second, the majority fails to maintain a clear line between primary and secondary liability in fraudulent-misstatement cases. Maintaining this distinction is important because, as the majority notes, there is no private right of action against mere aiders and abettors. Ante, at 10; see Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U. S. 164, 191 (1994). Here, however, the majority does precisely what we declined to do in Janus: impose broad liability for fraudulent misstatements in a way that makes the category of aiders and abettors in these cases “almost nonexistent.” 564 U. S., at 143. If Lorenzo’s conduct here qualifies for primary liability under §10(b) and Rule 10b–5(a) or (c), then virtually any person who assists with the making of a fraudulent misstatement will be primarily liable and thereby subject not only to SEC enforcement, but private lawsuits.

The Court correctly notes that it is not uncommon for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another—as, for example, when someone illegally sells a gun to help another person rob a bank. Ante, at 11. But this case does not involve two distinct crimes. The majority has interpreted certain provisions of an offense so broadly as to render superfluous the more stringent, on-point requirements of a narrower provision of the same offense. Criminal laws regularly and permissibly overlap with each other in a way that allows the same conduct to constitute different crimes with different punishments. That differs significantly from interpreting provisions in a law to completely eliminate specific limitations in a neighboring provision of that very same law. The majority’s overreading of Rules 10b–5(a) and (c) and §17(a)(1) is especially problematic because the heartland of these provisions is conduct-based fraud—“employ[ing] [a] device, scheme, or artifice to defraud” or “engag[ing] in any act, practice, or course of business”—not mere misstatements.15 U. S. C. §§77q(a)(1); 17 CFR §§240.10b–5(a), (c).

The Court attempts to cabin the implications of its holding by highlighting several facts that supposedly would distinguish this case from a case involving a secretary or other person “tangentially involved in disseminat[ing]” fraudulent misstatements. Ante, at 7. None of these distinctions withstands scrutiny. The fact that Lorenzo “sent false statements directly to investors” in e-mails that “invited [investors] to follow up with questions,” ibid., puts him in precisely the same position as a secretary asked to send an identical message from her email account. And under the unduly capacious interpretation that the majority gives to the securities
laws, I do not see why it would matter whether the sender is the “vice president of an investment banking company” or a secretary, *ibid.*—if the sender knowingly sent false statements, the sender apparently would be primarily liable. To be sure, I agree with the majority that liability would be “inappropriate” for a secretary put in a situation similar to Lorenzo’s. *Ibid.* But I can discern no legal principle in the majority opinion that would preclude the secretary from being pursued for primary violations of the securities laws.

* * *

Instead of blurring the distinction between primary and secondary liability, I would hold that Lorenzo’s conduct did not amount to a primary violation of the securities laws and reverse the judgment of the Court of Appeals. Accordingly, I respectfully dissent.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v. MARTIN BRIAN JAUREGUI, Defendant-Appellant.

No. 16-50429
In the Supreme Court of the United States
D.C. No. 3:16-cr-00673-LAB-1
Appeal from the United States District Court for the Southern District of California
Larry A. Burns, District Judge, Presiding
Argued and Submitted July 10, 2018
Pasadena, California
Filed March 22, 2019
Before: Marsha S. Berzon and N. Randy Smith, Circuit Judges, and P. Kevin Castel,*District Judge.
Opinion by Judge Berzon;
Concurrence by Judge Berzon;
Dissent by Judge Castel

* The Honorable P. Kevin Castel, United States District Judge for the Southern District of New York, sitting by designation.

COUNSEL
Kimberly S. Trimble (argued), Federal Defenders of San Diego, Inc., San Diego, California, for Defendant-Appellant.
Mark R. Rehe (argued), Assistant United States Attorney; Robert S. Brewer, United States Attorney; Helen H. Hong, Assistant United States Attorney, Chief, Appellate Section, Criminal Division; Nicole Ries Fox, Assistant United States Attorney; Office of the United States Attorney, San Diego, California; for Plaintiff-Appellee.

OPINION

BERZON, Circuit Judge:

Under federal law, the statutory maximum sentence for conspiracy to import a controlled substance depends on the specific, agreed-upon controlled substance “involv[ed].” 21 U.S.C. §§ 960(b), 963. We consider whether, consistent with the Sixth Amendment’s jury trial guarantee, Martin Jauregui’s sentence for conspiracy to import methamphetamine can be sustained solely by his admission that he conspired to import marijuana but it was “reasonably foreseeable” that methamphetamine would be imported. We hold that it cannot.

In January 2016, Jauregui attempted to cross the U.S.-Mexico border into Southern California. He was foiled when border agents discovered packages containing over six kilograms of methamphetamine in his car. Jauregui was arrested and questioned by two FBI agents.

During his interrogation, Jauregui told the agents he did not know there were drugs in the car, and went on to give the agents the following account: He had previously agreed with a man named Victor to smuggle marijuana into the United States. As the plan progressed, Victor gave Jauregui a car with the drugs loaded inside. At an uncle’s urging, however, Jauregui decided not to go through with the marijuana smuggling and returned the car to Victor.

Later that day, Jauregui, wanting to visit his aunt near San Diego, asked Victor to borrow the car he had just returned. According to Jauregui, Victor told him that the drugs had been removed from the car. Throughout his interrogation, Jauregui repeatedly maintained that, at the time he crossed the border, he was unaware that drugs of any kind were hidden inside the car.


At the plea colloquy, Jauregui’s attorney at first provided the following factual basis for his plea:

Beginning on a date unknown and continuing up to January 31st, 2016, Mr. Jauregui was in agreement with at least two other persons to commit a crime of importing a schedule I or schedule II controlled substance under federal law. He became a member of the conspiracy knowing of its object to import a controlled substance and intending to help accomplish that object. And it was reasonably foreseeable that the controlled substance may be methamphetamine.

For clarification, the district court asked Jauregui’s attorney, “[W]hat was the point about it being whether he knew it was methamphetamine or some other drug?” The attorney explained that Jauregui “believed he was agreeing to import marijuana, but it was reasonably foreseeable that the substance would be methamphetamine under the Pinkerton case,” referring to the Supreme Court’s decision in Pinkerton v. United States, 328 U.S. 640 (1946).

The district court then asked the government:

[D]o you agree with that factual basis on the conspiracy to import methamphetamine? Because he’s pleading
guilty to count one which is conspiracy to import methamphetamine, and a conspiracy is an agreement to do an illegal act. And if the illegal act is to import methamphetamine, then it’s not to import some other prohibited drug. So if that is what he’s pleading guilty to, then his factual basis is not adequate to satisfy count one unless the government is modifying the importation of methamphetamine to be a conspiracy to import methamphetamine or some other prohibited drug.

And if that’s the case, what guidelines apply, the methamphetamine guidelines or the marijuana guidelines?1

The prosecutor answered that “it’s going to be [the government’s] position in sentencing that the methamphetamine guidelines apply” and “that he knowingly imported the drugs.” The district court pointed out that “unlike an importation charge, a conspiracy charge [requires] a mens rea to do the object of a conspiracy.” So, the court explained, “if the object of the conspiracy is to import methamphetamine, then you would have to know it was methamphetamine.”

In response, the prosecutor said, “I think that he has to know that there was a possibility. I think he has to know that it was reasonably foreseeable that it could have been methamphetamine instead of marijuana.” Apparently convinced, the district court noted that Jauregui had already “admitted that,” and the prosecutor agreed. Thus, “[b]ased on the Pinkerton theory and [Jauregui’s] agreement that it was reasonably foreseeable that the drugs … he thought he was bringing in could have been methamphetamine,” the district court concluded that there was a factual basis for Jauregui’s plea.

C

A few months later, the district court held a sentencing hearing. In determining whether to apply a “minor role” sentencing reduction,2 the district court questioned Jauregui’s version of events, noting that his story—that he had initially agreed to smuggle drugs across the border but had changed his mind—seemed “farfetched.” The prosecutor responded that it had “pushed him very hard on that” but that Jauregui, whom the prosecutor called “very simple, very naïve,” nonetheless “kept to his story.” The court, however, disbelieved Jauregui’s story and rejected Jauregui’s request for a minor role reduction.

Jauregui’s attorney asked the district court to apply the Sentencing Guidelines for marijuana, because “[t]he way that [Jauregui] pleaded was that the agreement was for marijuana, although it was reasonably foreseeable it could be methamphetamine by the time it happened.” The district court disagreed and so applied the Guidelines for methamphetamine. The court ultimately sentenced Jauregui to seventy-one months’ incarceration. Jauregui did not object to the imposed sentence. This timely appeal followed.

II

The Sixth Amendment’s jury trial guarantee limits the judiciary’s power to sentence criminal defendants. To impose a sentence above a statutory maximum, a court may not rely on any fact (other than a prior conviction) not found by a jury or admitted by the defendant. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); United States v. Guerrero-Jasso, 752 F.3d 1186, 1190 (9th Cir. 2014).3

Jauregui’s present challenge to his sentence was not raised before the district court, so we review for plain error. See United States v. Chavez, 611 F.3d 1006, 1009 (9th Cir. 2010) (per curiam); see also Fed. R. Crim. P. 52(b). Under that standard, relief is warranted if (1) there was error, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Depue, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc).

Federal drug crime statutes specify offenses covering all “controlled substances,” not certain drug types or quantities. The permissible sentencing ranges, however, vary based on the drug type and quantity involved. See, e.g., 21 U.S.C. §§ 841(b), 960(b); see also United States v. Buckland, 289 F.3d 558, 565–66 (9th Cir. 2002) (en banc). For purposes of Apprendi, because drug type and quantity determine the applicable statutory maximum, those factors must be found by a jury or admitted by the defendant before the defendant can be sentenced to more than the relevant maximum for the generic crime. Buckland, 289 F.3d at 568.

Here, the generic crime is 21 U.S.C. § 963, conspiracy to import a controlled substance. The penalties for importation and conspiracy to import are the same. Id. The penalties for importing a controlled substance are set forth in 21 U.S.C. § 960(b), which lists the sentencing ranges for various drug types and quantities. Jauregui’s indictment did not specify the quantity of drugs, so the relevant statutory penalties turned only on drug type. For an unspecified amount of methamphetamine, the applicable statutory maximum is twenty years. Id. § 960(b)(3); see also United States v. Thomas, 355 F.3d 1191, 1201 (9th Cir. 2004). For an unspecified amount of marijuana, on the other hand, the applicable statutory maximum is five years. See 21 U.S.C. §§ 841(b)(1)(D), 960(b)(4). Where drug type and quantity are not proven, the relevant statutory maximum is one year. See id. §§ 841(b)(3), 960(b)(7); see also United States v. Hunt, 656 F.3d 906, 916 (9th Cir. 2011).

1. Actually, as we shall explain, the pivotal question is not which guidelines apply, but which penalty provision of the relevant statute, 21 U.S.C. § 960(b), apply, and so what the maximum penalty is.


3. For this reason, the district court’s disbelief of Jauregui’s story at sentencing is immaterial to our inquiry here, which pertains to the permissible penalty range. See Apprendi, 530 U.S. at 490.
Applying § 960(b), the district court sentenced Jauregui to seventy-one months of incarceration, less than the statutory maximum for methamphetamine but more than the statutory maximum for marijuana. Whether that sentence is permissible turns on whether, in the course of pleading guilty, Jauregui admitted to conspiring to import methamphetamine.

A

“In assessing the scope of the facts established beyond a reasonable doubt by a guilty plea, we must look at what the defendant actually agreed to—that is, what was actually established beyond a reasonable doubt.” United States v. Banuelos, 322 F.3d 700, 707 (9th Cir. 2003). Our analysis thus depends on what facts Jauregui admitted when he entered his guilty plea. When sentencing results from a guilty plea, “[t]he government has the burden ‘at the plea colloquy to seek an explicit admission of any unlawful conduct which it seeks to attribute to the defendant’” at sentencing. Thomas, 355 F.3d at 1199 (quoting United States v. Cazares, 121 F.3d 1241, 1248 (9th Cir. 1997)).

The government does not attempt to rely on Jauregui’s indictment to establish his admission of conspiracy to import methamphetamine, for good reason. In the indictment, the government alleged that Jauregui “did knowingly and intentionally conspire with other persons known and unknown … to import methamphetamine, a Schedule II Controlled Substance, into the United States,” thereby violating 21 U.S.C. §§ 952, 960, and 963 (emphasis added). “A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.” United States v. Broce, 488 U.S. 563, 569 (1989) (emphasis added). A guilty plea does not, however, inevitably constitute an admission of all facts alleged in the indictment, as “allegations not necessary to be proved for a conviction … are not admitted by a plea.” Cazares, 121 F.3d at 1247. Applying this principle, our court held in Thomas that a guilty plea for possession with intent to distribute under 21 U.S.C. § 841(a)(1) was not an admission of the drug quantity alleged in the indictment, “as drug type and quantity are not elements of the offense under § 841.” 355 F.3d at 1195–96.

Here, Jauregui’s guilty plea surely constituted an admission of the requisite elements to sustain his conviction for the crime of conspiracy to import a controlled substance, itself triggering a maximum sentence of one year. See 21 U.S.C. §§ 841(b)(3); 960(b)(7). But his plea did not, on its own, establish an admission that the substance he conspired to import was methamphetamine, a crime subject to a twenty-year maximum sentence. See id. § 960(b)(3). Drug type is not a necessary element of a possession offense under 21 U.S.C. § 841, see Thomas, 355 F.3d at 1195–96; we see no reason why the same would not be true for an importation offense under § 960. Because drug type is “not necessary to be proved for a conviction,” Cazares, 121 F.3d at 1247, Jauregui’s guilty plea did not constitute an admission that he

conspired to import the drug type alleged in the indictment—that is, methamphetamine.

The government instead relies solely on Jauregui’s factual basis admissions during the plea colloquy. A review of that colloquy establishes that Jauregui never admitted to conspiring to import methamphetamine.

Instead, he specifically asserted that he had agreed to import only marijuana, not methamphetamine. In accordance with this limited admission, Jauregui’s consistent account, as the prosecution explained at the sentencing hearing, was that he had, in fact, withdrawn from the marijuana importation agreement before undertaking the drive across the border and had no knowledge of the methamphetamine found in his car until the FBI agents told him of it.

Jauregui did, however, admit during his plea colloquy that “[h]e became a member of the conspiracy knowing of its object to import a controlled substance and intending to help accomplish that object” and also that “it was reasonably foreseeable that the controlled substance may be methamphetamine” (emphasis added). It is this “reasonably foreseeable” statement that the government contends was sufficient to support Jauregui’s sentence for conspiracy to import methamphetamine.4

B

Our question, then, is whether Jauregui’s admission—that “it was reasonably foreseeable that the controlled substance may be methamphetamine”—was sufficient under Apprendi to expose Jauregui to sentencing under the statutory maximum for conspiracy to import methamphetamine. The applicable test is provided by our decision in Banuelos.

Under Banuelos, two findings are necessary to hold a defendant liable for conspiracy involving a particular drug type or quantity. First, the district court must find “that the conspiracy distributed a particular type and quantity of drugs”—that is, the existence of a conspiracy involving the particular drug type and quantity. Banuelos, 322 F.3d at 704. And second, the district court must also make a determination about the defendant’s personal responsibility—that the type and quantity were either within the scope of [the defendant’s] agreement with his coconspirators or that the type and quantity were reasonably foreseeable to [the defendant].” Id. (emphasis added).

4. At oral argument, the government argued for the first time that Jauregui’s sentence could be sustained based on his attorney’s statement that “the agreement was either for marijuana or methamphetamine.” Oral Argument at 16:51, United States v. Jauregui, No. 16-50429 (9th Cir. July 10, 2018), https://www.ca9.uscourts.gov/ media/view_video.php?pk_vid=0000013997. But the district court immediately requested clarification of that statement. Jauregui’s attorney explained that Jauregui “believed he was agreeing to import marijuana, but it was reasonably foreseeable that the substance would be methamphetamine under the Pinkerton case.” Thus, we do not understand the statement that “the agreement was either for marijuana or methamphetamine” to constitute an admission distinct from the one discussed in the text.
As to the second prong of Banuelos, Jauregui did not admit that importing methamphetamine was within the scope of his agreement with his coconspirators. But he did admit that “it was reasonably foreseeable that the controlled substance” he would transport “would be methamphetamine under the Pinkerton case.” Under Banuelos, this admission was sufficient to satisfy this prong and potentially to expose Jauregui to liability for a federal drug conspiracy to import that methamphetamine.

Nothing Jauregui admitted during his plea colloquy, however, even hints at Banuelos’s first prong—“that the conspiracy distributed a particular type and quantity of drugs.” Id. Jauregui never admitted that there was in fact a conspiracy whose object was importing methamphetamine, nor did he ever admit that the substance found in his vehicle was, in fact, methamphetamine.5

To be sure, there was likely evidence available that might have supported the conclusion that there was, in fact, a methamphetamine conspiracy. This issue perhaps “could easily have been avoided had the district court or the prosecutor been more precise during the plea colloquy.” Hunt, 656 F.3d at 916. But Apprendi prohibits a court from relying on evidence that could support imposing a sentence essential to determining the statutory maximum unless the essential fact has been admitted or found beyond a reasonable doubt. See 530 U.S. at 490. As Jauregui’s admissions did not establish the existence of a conspiracy to import methamphetamine, he could not properly be sentenced for conspiracy to import methamphetamine.

The government’s argument—that Jauregui may be held liable for a conspiracy involving methamphetamine even though he never admitted the existence of such a conspiracy—would expand Banuelos, potentially holding a defendant liable for all reasonably foreseeable objects of a conspiracy even if those objects were never agreed upon by any of the coconspirators. Given that “attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecution” are disfavored, Grunewald v. United States, 335 U.S. 391, 404 (1957), we decline to adopt the government’s sweeping interpretation of Banuelos.

In sum, Jauregui’s admission that “it was reasonably foreseeable that the controlled substance may be methamphetamine” did not permit the district court to sentence him for conspiracy to import methamphetamine. The district court therefore erred in imposing a sentence exceeding the statutory maximum for conspiracy to import marijuana.

III

Although the district court erred, relief is not warranted unless the error satisfies the plain error standard. We conclude that, under plain error review, reversal is warranted.

First, the error was plain. As already discussed, under Banuelos’s standard, it is clear that Jauregui never admitted to any facts establishing that “the conspiracy distributed [the] particular type and quantity of drugs”—that is, methamphetamine, for which he was sentenced. 322 F.3d at 704.

Second, this error resulted in a sentence eleven months longer than the appropriate statutory maximum and so affected Jauregui’s substantial rights. See United States v. Anderson, 201 F.3d 1145, 1152 (9th Cir. 2000) (“An error that results in a longer sentence undoubtedly affects substantial rights.”). The evidence was certainly not “overwhelming” with respect to whether Jauregui participated in a methamphetamine conspiracy. See United States v. Ornelas, 906 F.3d 1138, 1146 (9th Cir. 2018) (holding that a defendant’s substantial rights were affected by a “plain instructional error” where “the evidence was not ‘overwhelming’ as to the omitted element”). Jauregui did not so admit, and again, in the plea context, the only relevant evidence is what the defendant admitted, not what might have well been established in a trial.6 And contrary to the dissent’s assertions, the record actually indicates that Jauregui would not have admitted this fact, as he repeatedly maintained—during his interrogation, plea colloquy, and sentencing—that the object of the conspiracy he joined was to import marijuana and that he withdrew from that conspiracy. The portions of Jauregui’s interrogation quoted by the dissent discuss a conspiracy to import only marijuana, not methamphetamine. Dissent Op. at 30–31.

Third and finally, the error would seriously undermine the fairness and integrity of the judicial proceedings. Normally, “the possibility of additional jail time … warrants serious consideration in a determination whether to exercise discretion under Rule 52(b),” especially where the district

5. We recognize that, owing to the ambiguity of the word “conspiracy,” Banuelos’s statement that “the district court was required to find … that the conspiracy distributed a particular type and quantity of drugs,” 322 F.3d at 704 (emphasis added), could be interpreted to mean that the district court was required to find that Jauregui’s coconspirators actually “distributed a particular type and quantity of drugs,” not that they agreed to do so. See Conspiracy, Merriam-Webster, https://www.merriam-webster.com/dictionary/conspiracy (last visited Jan. 17, 2019) (defining “conspiracy” as both “the act of conspiring together” and “a group of conspirators”). Even under this alternative interpretation, however, the first prong of Banuelos is not satisfied. Jauregui never admitted that his coconspirators in fact distributed methamphetamine, just that it was reasonably foreseeable that someone might do so. Cf. 322 F.3d at 705 (“On the basis of Banuelos’ own admission, the district court found beyond a reasonable doubt that the conspiracy distributed more than 1000 kilograms of marijuana.”).

6. The dissent argues that the presentence investigation report’s discussion of the methamphetamine found in Jauregui’s car strongly suggests the existence of a methamphetamine conspiracy. Dissent Op. at 30. Although we have previously considered “undisputed evidence” found in a presentence investigation report for purposes of plain error analysis, United States v. Valensia, 299 F.3d 1068, 1076 (9th Cir. 2002), the presentence report in this case is inapposite. Here, Jauregui consistently maintained that he did not know that there were any drugs in his car, let alone over six kilograms of methamphetamine. Moreover, it is conceivable that there was no such conspiracy. For example, one person, acting alone, may have conceived a scheme to put the methamphetamine in Jauregui’s car. Alternatively, the conspirators could have been mistaken as to the drug type placed in the car.
court plays a significant role in determining the appropriate sentence. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018); see also id. at 1908 (“The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error.”).

Moreover, as already noted, the Supreme Court has expressly admonished courts to “view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.” *Grunewald*, 353 U.S. at 404. Conspiracy is frequently prosecuted, see 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.1(b) (3d ed. 2017), and “prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge,” *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990). Yet, as noted above, the government’s position here would extend—beyond the already-expansive *Banuelos* standard—the scope of traditional conspiracy law.

“The requirement that the government prove facts supporting a greater sentence beyond a reasonable doubt, or that the defendant admit such facts, … is not an irrelevant technicality.” *Hunt*, 656 F.3d at 916. To the contrary, the jury trial right, guaranteed by the Sixth Amendment, involves “constitutional protections of surpassing importance.” *Apprendi*, 530 U.S. at 476. Under the circumstances here, the district court’s fundamental error warrants reversal.

IV

The dissent contends that, in light of our conclusion that Jauregui did not admit the facts necessary to establish his eligibility to be sentenced for conspiracy to import methamphetamine under *Banuelos*, the district court plainly erred in imposing a sentence in excess of the statutory maximum for conspiracy to import marijuana, the only controlled substance admitted by Jauregui. We therefore vacate Jauregui’s sentence and remand for resentencing in accordance with this opinion.

**VACATED and REMANDED.**

**BERZON, Circuit Judge, concurring:**

I write separately to emphasize the confusion that *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003), has wrought, both in our criminal law doctrine and in our case law more generally, and to suggest that this court should reconsider *Banuelos* en banc.

I

For conviction of the crime of conspiracy, “two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.” *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978). This latter intent—the intent to achieve a particular objective—is sometimes referred to as “specific intent.” 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(c)(2) (3d ed. 2017). Because this specific intent is a predicate to liability for conspiracy, “individuals who have together committed a certain crime have not necessarily participated in a conspiracy to commit that crime.” *Id.* One treatise provides an illustrative example:

[A]ssume that two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion. If they do destroy the building and persons are killed, they are guilty of murder, but this is because murder may be committed other than with an intent-to-kill mental state. Their plan constitutes a conspiracy to destroy the building, but not a conspiracy to kill the inhabitants, for they did not intend the latter result.

*Id.* (footnotes omitted).

By contrast, under what is referred to as *Pinkerton* liability, the law “makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy.” *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002) (per curiam) (emphasis added) (citing *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946)). Thus, in the building destruction illustration above, a coconspirator who does not in fact detonate the bomb can, under *Pinkeri-
ton, be held liable for killing its inhabitants, even though he
would not be guilty of conspiracy to do so. See 2 LaFave,
\textit{supra}, § 12.2(c)(2).

The distinction between liability for the crime of conspiracy
and \textit{Pinkerton} liability for substantive crimes in further-
ance of the conspiracy derives from two basic principles of
traditional conspiracy law—that “conspiracy is a distinct of-
fense from the completed object of the conspiracy,” \textit{Garrett
v. United States}, 471 U.S. 773, 778 (1985), and that “the
conspiracy to commit an offense and the subsequent commission
of that crime normally do not merge into a single punishable
our precedents concerning sentencing for conspiracy drug
offenses under both the U.S. Sentencing Guidelines and con-
sspiracy statutes have muddled these waters.

\textit{United States v. Becerra}, 992 F.2d 960 (9th Cir. 1993)
as an early case addressing sentencing for conspiracy drug
offenses. \textit{Becerra} held that, under the then-applicable U.S.
Sentencing Guidelines, “each conspirator may be sentenced
only for the quantity of drugs that he reasonably foresaw
would be distributed or that fell within the scope of his own
agreement with his co-conspirators.” \textit{Id.} at 966. Applying
this standard, \textit{Becerra} reversed the sentence of a defendant
who had distributed only two of the twenty-five kilograms
of cocaine involved in the crime, concluding that there were
“no facts on which the court could have based a finding that
[he] knew about or could reasonably foresee the 25-kilogram
transaction.” \textit{Id.} at 967.

\textit{Becerra} relied upon the 1991 Guidelines,\textsuperscript{7} which provided
that relevant conduct in determining the Guidelines range
should include “all acts and omissions committed or aided
and abetted by the defendant, or for which the defendant
would be otherwise accountable.” U.S. Sentencing Guide-
lines Manual § 1B1.3(a)(1) (U.S. Sentencing Comm’n 1991)
[hereinafter 1991 U.S.S.G.] (emphasis added). The corre-
sponding commentary explained that, “[i]n the case of crim-
nal activity undertaken in concert with others, whether or not
charged as a conspiracy, the conduct for which the defendant
‘would be otherwise accountable’ also includes conduct of
others in furtherance of the execution of the jointly-undertak-
en criminal activity \textit{that was reasonably foreseeable} by the
defendant.” \textit{Id.} § 1B1.3 cmt. 1 (emphasis added). \textit{Becerra}’s
interpretation of the relevant Guideline was premised on this
commentary. See 992 F.2d at 966.

The “reasonably foreseeable” language in the Guidelines
commentary states \textit{Pinkerton}’s test for substantive crimes
committed by a conspiracy verbatim, adopting that test re-
garding the “conduct of others” for purposes of the Guide-
U.S.S.G. § 1B1.3 cmt. 1. That adoption made sense, as sub-
stantive crimes in furtherance of a conspiracy and reasonably
foreseeable to the defendant are, as the Guidelines suggest,
conduct “for which … the defendant would be otherwise ac-
countable,” and so are relevant conduct for sentencing pur-
poses. 1991 U.S.S.G § 1B1.3(a)(1).

In a footnote, \textit{Becerra} indicated that the standard applying
to sentencing “under the statutory mandatory minimums”
was no more expansive. 992 F.2d at 967 n.2.\textsuperscript{8} In so suggest-
ing, \textit{Becerra} did not mention the distinction between the
specific intent of members of a conspiracy required for the
conviction for the crime of conspiracy and a \textit{Pinkerton}-the-
ory conviction for substantive crimes foreseeable in commis-
sion in furtherance of a conspiracy. \textit{Becerra} had no reason to be
so precise, as the statutory provision at issue—21 U.S.C. §
841(b)—applies to both conspiracy convictions and substan-
tive crimes committed in furtherance of a conspiracy.

\textit{Banuelos}, the next case concerning sentencing and drug
crime conspiracy, directly concerned the application of the
statutory penalty provisions to a conviction for drug conspir-
acy. See 322 F.3d at 703. \textit{Banuelos} took up \textit{Becerra}’s terse
suggestion as to the equivalency between the Guidelines’
related conduct provision and the statutory penalty provision
and held that, “to sentence [the defendant] pursuant to … any
penalty provision tied to a particular type or quantity of drug”
for a drug conspiracy, “the district court [is] required to find
not only that the conspiracy distributed a particular type and
quantity of drugs, but also that the type and quantity were ei-
ther within the scope of [the defendant’s] agreement with his
coconspirators or that the type and quantity were reasonably
foreseeable to [the defendant].” \textit{Banuelos}, 322 F.3d at 704.
\textit{Banuelos} specifically noted that “[t]his rule is well-settled as
a matter of sentencing under the Guidelines, but we have also
applied it to sentencing under the statute of offense.” \textit{Id.} (cit-
ing \textit{Becerra}, 992 F.2d at 966-67, 967 n.2). In so concluding,
\textit{Banuelos} erroneously imported the Guidelines standards for
determining related substantive conduct into the standards
for conviction for conspiracy under the federal drug statutes.

Following these twists and turns, it appears that \textit{Banuelos}
unwittingly imported the test for \textit{Pinkerton} liability for
substantive crimes in furtherance of a conspiracy into the
determination of whether a defendant can be held liable for
the crime of conspiracy itself, thereby conflating liability for
the crime of conspiracy and for substantive crimes commit-
ted by the conspiracy.\textsuperscript{9}

\textsuperscript{7} \textit{Becerra} cited two earlier cases discussing the 1991 Guidelines.
See \textit{United States v. Petty}, 982 F.2d 1374, 1376 (9th Cir.), amended and superseeded, 992 F.2d 887 (9th Cir. 1993); \textit{United States v. Navar-
ros}, 979 F.2d 786, 788 (9th Cir. 1992); \textit{see also United States v. Torres},
869 F.3d 1089, 1096 n.8 (9th Cir. 2017) (“It appears that \textit{Becerra} re-
lied on the 1991 version of the Guidelines, which was in effect before
the Guidelines were amended in November 1992.”).

\textsuperscript{8} This footnote was a response to the government’s argument
“that the language of 21 U.S.C. § 841(b) allows a court to sentence a
defendant based on the amount of cocaine ‘involved’ in an offense,
rather than assessing an individual defendant’s level of responsibility.”
\textit{Becerra}, 992 F.2d at 967 n.2. \textit{Section 841(b) imposes a minimum sen-
tence for crimes ‘involving’ certain quantities of drugs for defendants,
like the defendants in \textit{Becerra}, with a prior felony drug conviction.}
\textit{Id.} (quoting 21 U.S.C. § 841(b)(1)(A)). Thus, the government’s argu-
ment—which \textit{Becerra} rejected—was that the statutory minimum
applied even if the defendant had no individual responsibility under
the Guidelines. \textit{See id.}

\textsuperscript{9} I am not the first to voice concern about \textit{Banuelos}’s importa-
II

In doing so, Banuelos muddied an already-confusing area of law. “Although the crime of conspiracy is ‘predominantly mental in composition,’ there has nonetheless always existed considerable confusion and uncertainty about precisely what mental state is required for this crime.” 2 LaFave, § 12.2(c) (footnote omitted) (quoting Albert J. Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624, 632 (1941)). It is telling that, were we dealing with the traditional crime of conspiracy, our inquiry here would be simpler.

In the plea colloquy, Jauregui admitted that he agreed to import marijuana and so intended to accomplish that result. But Jauregui never acknowledged that he agreed with his coconspirators to import methamphetamine. Thus, he never admitted that he intended to achieve that result.

That Jauregui admitted that “it was reasonably foreseeable that the controlled substance may be methamphetamine” would not, under traditional conspiracy law, establish that he knowingly joined a conspiracy whose object was importing methamphetamine. Although Jauregui’s lack of awareness regarding his coconspirators’ involvement of methamphetamine may have been negligent, “[o]ne cannot negligently enter into a conspiracy.” United States v. Ganji, 880 F.3d 760, 776 (5th Cir. 2018). As the building destruction illustration discussed above demonstrates, coconspirators who plan to bomb a building can reasonably foresee that people will die as a result of a building’s destruction but not intend for that result. See 2 LaFave, supra, § 12.2(c)(2). Under those circumstances, they could perhaps be liable for reckless murder, negligent homicide, or felony murder. See id. But that reasonable foreseeability alone does not give rise to liability for conspiracy to commit a homicide.

To be sure, under Pinkerton, Jauregui’s admission that “it was reasonably foreseeable that the controlled substance may be methamphetamine” could establish his liability for the substantive crime of importation of methamphetamine—if the government had in fact alleged and proven that Jauregui’s coconspirators were guilty of importing methamphetamine and that the importation of methamphetamine was in furtherance of the conspiracy. But Pinkerton applies only to substantive offenses, not the underlying crime of conspiracy. Here, the charge of importation of methamphetamine was dismissed; the only crime for which Jauregui was convicted is conspiracy to import a controlled substance. And as to that conspiracy, Jauregui never admitted the alleged objective—that is, the importation of methamphetamine. The foreseeability of that objective is not enough under ordinary conspiracy law to establish the conspiracy’s actual objective, or Jauregui’s knowledge of it.

I also note that Banuelos appears to have departed from our earlier case law. In United States v. Umagat, 998 F.2d 770 (9th Cir. 1993), a group of defendants convicted of conspiracy to smuggle marijuana argued that there was insufficient evidence to support their convictions. Id. at 771. In considering their arguments, Umagat recognized that “a defendant cannot be legally bound to a conspiracy unless his understanding with co-conspirators ‘was of sufficient scope to warrant the conclusion that he embraced the common purpose of the conspiracy.’” Id. at 772–73 (quoting United States v. Bibbero, 749 F.2d 581, 587 (9th Cir. 1984)). “Indicative of a defendant’s understanding are the degree of his knowledge, actual or constructive, of the scope of the overall conspiracy, and the extent to which his own benefits depended on the success of the entire venture.” Id. at 773. Applying this standard, Umagat reversed the convictions of two of the defendants who played only a minor role in the conspiracy, concluding that “[n]either the evidence adduced at trial nor the scope of their own actions suggests either that they possessed actual knowledge of the breadth of the overall conspiracy, or that we may attribute such knowledge to them.” Id.

In setting forth its test for liability for a drug conspiracy, Banuelos did not discuss Umagat or explain why traditional principles of conspiracy would not apply. In Jauregui’s case, there is no admission to support his participation in a drug conspiracy whose object was so broad as to include both marijuana and methamphetamine. That should have been the end of the inquiry.

III

The government’s position in this case would seriously aggravate the tension Banuelos has already created with traditional conspiracy law. In the building destruction illustration discussed above, for example, the government’s position would hold all the conspirators liable for conspiracy to commit murder—even though they never agreed to murder anyone and also never in fact destroyed the building—because murder was reasonably foreseeable to them if the object of the conspiracy were carried out. Cf. 2 LaFave, supra, § 12.2(c)(2).

Although the principal opinion reaches the correct result, it should not have needed to thread its way through Banuelos’s revamping of traditional conspiracy law to do so. Banuelos should be revisited.10

CASTEL, District Judge, dissenting:

10. As noted earlier, a panel of this court has already recognized that Banuelos should be reconsidered, albeit for different reasons. See supra note 3.
I respectfully dissent.

I am of the view that there was no plain error in sentencing Martin Jauregui for participation in a conspiracy to import methamphetamine, and that his sentence and judgment of conviction should be affirmed. But my disagreement with the majority does not end here. On this record I do not believe Jauregui can be sentenced lawfully for the crime of conspiracy to import marijuana, a crime for which he has been neither charged nor convicted. Swapping in a specific uncharged drug type—even at the request of a defendant—is wholly unlike permitting a lawful sentence to be imposed on a lesser-included quantity. If, as the majority holds, the district court committed plain error in sentencing Jauregui for conspiracy to import methamphetamine, I would vacate the judgment and return the parties to the position they were in at the outset of the plea proceeding because the asserted error would have infected both the sentence and the underlying guilty plea.11

I. THERE WAS NO PLAIN ERROR IN FINDING AN ADEQUATE FACTUAL BASIS FOR THE EXISTENCE OF A CONSPIRACY TO IMPORT METHAMPHETAMINE.

I agree with the majority that under this Court’s precedents, in order to sentence Jauregui for a methamphetamine conspiracy, it was necessary for Jauregui to admit (1) the existence of a conspiracy to import methamphetamine; and (2) that he participated in that conspiracy, either with knowledge that its unlawful object was the importation of methamphetamine or that it was reasonably foreseeable to him that importation of methamphetamine was its unlawful object. United States v. Banuelos, 322 F.3d 700, 704 (9th Cir. 2003). I also agree with the majority that, at the plea colloquy, his admission of the first prong of the Banuelos test was inadequate but I disagree that this error, which was never raised in the district court, satisfies plain-error review.

There appears to be an odd disparity between the level of proof which a judge is required to find before accepting a guilty plea and that which the judge must find before imposing a sentence dependent on drug type or quantity. A constitutionally valid plea proceeding is not the opportunity to prove the defendant’s guilt beyond a reasonable doubt; it waives the government’s requirement to do so. Florida v. Nixon, 543 U.S. 175, 187 (2004). For a valid guilty plea to a crime, a factual basis for the plea must be established at any time “[b]efore entering judgment on a guilty plea ....” Fed R. Crim. P. 11(b)(3). A defendant’s admission is one of the “many different ways” that a factual basis is properly established. United States v. Gaither, 245 F.3d 1064, 1068 (9th Cir. 2001). The district court “may rely on presentence reports in determining the factual basis for a plea, notwithstanding the fact that presentence reports commonly include hearsay.” United States v. Reyna-Tapia, 328 F.3d 1114, 1120 n.5 (9th Cir. 2003) (internal citation omitted). “There is no requirement of an express finding of a factual basis during the plea colloquy ....” Rather, it must be established on the record that there is sufficient evidence to support the conclusion that the defendant is guilty, and the court must make the determination before entering judgment.” In re Ellis, 356 F.3d 1198, 1205 (9th Cir. 2004) (en banc) (quotation marks, internal citation and alteration omitted); see also Advisory Committee Notes to 1974 Amendments to Fed. R. Crim. P. 11 (predecessor subdivision f).12

But in the specific context of the adequacy of a finding of drug quantity and type for the purposes of sentencing, this Court has held that “[i]n assessing the scope of the facts established beyond a reasonable doubt by a guilty plea, we must look at what the defendant actually agreed to – that is, what was actually established beyond a reasonable doubt.” United States v. Thomas, 355 F.3d 1191, 1199 (9th Cir. 2004) (quoting Banuelos, 322 F.3d at 707); accord United States v. Hunt, 656 F.3d 906, 912 (9th Cir. 2011). This Court appears to require an admission by defendant that meets a beyond-a-reasonable-doubt standard. Accepting this Court’s precedent imposing a higher standard than Rule 11(b)(3) on statutory sentencing enhancement factors, I agree that the allocation by Jauregui on the first prong of the Banuelos test does not meet this high standard.

I agree with the majority that the error here is subject to plain-error review, but I differ with its conclusion upon such review. As a starting point, plain-error review may appropriately look at the presentence report and other reliable sources of information before the district court. United States v. Valensia, 299 F.3d 1068, 1076 (9th Cir. 2002) (presentence report considered in reaching the conclusion that the failure to obtain an admission of drug quantity was not plain error). The presentence report and the translated and transcribed debriefing of Jauregui by border agents were before the district court in the pre-judgment sentencing proceeding.

There was significant and uncontroversial evidence before the district court that a conspiracy existed, it included multiple participants in addition to Jauregui, and the objective of these other participants, as demonstrated by their actions, was to import into the United States methamphetamine and not some other drug. Conspiracies, their participants and their objectives may be proven by circumstantial evidence. United States v. Minhoff, 574 F.3d 1186, 1192 (9th Cir. 2009). “[T]he nature of a conspiracy is such that it can rarely be proved in any other way.” United States v. Perez, 491 F.2d 167, 171 (9th Cir. 1974).

Methamphetamine was unquestionably imported by Jauregui into the United States.13 Strong circumstantial evidence

---

11. While Jauregui’s brief does not challenge his count of conviction, his notice of appeal is from the judgment of conviction and not merely the sentence.

12. On its face, Fed. R. Crim. P. 11(b)(3) would apply, for example, to a crime carrying a mandatory life term. 18 U.S.C. § 1111 (murder within the territorial jurisdiction of the United States).

13. I do not suggest that the actual importation of methamphet-
supports the conclusion that Victor, his recruiter and handler, who had a car registered in Jauregui’s name and gave the car to Jauregui knowing that he would drive it across the border, had conspired with others (excluding Jauregui) to import methamphetamine. Jauregui told the agents that he used methamphetamine daily, and that on the day of his arrest, he went to Victor’s residence to purchase methamphetamine for personal use, at which time he received permission to borrow the car in order to visit his aunt in the United States. The firewall of the vehicle carried eight packages of methamphetamine of 97.3% purity totaling 6,485 kilograms. The sentencing court noted that the quantity would support “60 to 65,000 individual hits of methamphetamine . . . .” The street value of the methamphetamine, using the border agent’s estimate of $10,000 to $15,000 per pound, is between approximately $142,000 and $214,000.

Jauregui told the interviewing agents that “they said they were going to tell me when, when they were going to load it, when they were going to unload it,” “[t]hat they were going to tell me where to go and that they were going to unload it,” that “[t]hey had to get the car to unload it,” and that “they were going to tell me what day they were going to load -, they were going to load it, everything, everything, everything.” (emphasis added.) Referring to Victor and the car, Jauregui stated, “And why did he lend it to me? Because they hadn’t taken anything out.”

Jauregui told the agents that Victor gave him an in-person introduction to at least one other member of the conspiracy: “[H]e took me over there with him and he’d told me… what he was going to pay me when I was going to cross and all that.” The agent then asked, “[T]he man Victor introduced you to… He was going to pay you?” To which Jauregui responded, “Supposedly.” Jauregui also made reference to Victor having bosses: “[Q.] Do you think that vehicle belonged to Victor? [A.] Uh hm, I think so. I thought it belonged to his bosses but well, Victor was the one who’d make the arrangements for me.” Earlier, Jauregui was asked whether Victor was “a representative from a cartel, yes or no?” He responded, “Well, yes.” Explaining why he was fearful of declining to transport narcotics as instructed, Jauregui told the agents, “I know those people are powerful.” He described Victor as “just a servant,” and stated, “The same way they used me, he’s also a servant.”

The existence of other actors, besides Victor and Jauregui, who were intent on moving drugs into the United States proved the existence of a conspiracy to import drugs. The totality of the quantity of the methamphetamine, its street value in excess of six figures, its placement in the firewall of the car, the need to plan ahead for its removal from the car once it crossed into the United States and its actual importation into the United States was circumstantial evidence that proved that at least two persons other than Jauregui agreed that the object of the conspiracy was to import methamphetamine.

There was no plain error in light of the record’s extensive evidence that the importation of methamphetamine was the object of a conspiracy with two or more members other than Jauregui. United States v. Cotton, 535 U.S. 625, 632–33 (2002) (where the evidence of drug quantity was “overwhelming” and ‘essentially uncontroverted,’” the failure to charge quantity in the indictment did not “seriously affect the fairness, integrity, or public reputation of judicial proceedings.”); Valencia, 299 F.3d at 1076–77 (failure to establish drug quantity at plea colloquy was not plain error in light of attorney statements and facts contained in presentence report); United States v. Minore, 292 F.3d 1109, 1117–20 (9th Cir. 2002) (district court’s failure to advise defendant of government’s burden as to drug quantity was not plain error in light of the record’s “overwhelming evidence” of quantity).

Cotton teaches that on a plain-error review the question whether the error affected substantial rights, as it did here by enhancing the sentence, is distinct from whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings. 535 U.S. 632–33 (declining to reach the third prong of inquiry on plain error review because the fourth prong could not be met). The observation of a unanimous Court in that case, speaking of a rejected plain-error claim, comes to mind: “The real threat then to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.” 535 U.S. at 634 (quoting Johnson v. United States, 520 U.S. 461, 470 (1997)).

II. JAUREGUI CANNOT BE CONVICTED OR SENTENCED FOR CONSPIRACY TO IMPORT MARIJUANA.

Jauregui was never charged with and never entered a plea of guilty to a conspiracy to import marijuana. At the change-of-plea hearing, Jauregui responded unambiguously and unequivocally that he was pleading “guilty” to “conspiracy to import methamphetamine . . . .” The written judgment against Jauregui records a conviction for a single count of “Conspiracy to Import Methamphetamine.” I submit that he cannot be sentenced for a conspiracy to import some other drug as long as his guilty plea and conviction for conspiracy to import methamphetamine stands.

14. I respectfully submit that reaching and remanding on this unpreserved error, which the government did not have the opportunity to address head-on in the district court, impairs rather enhances “the public reputation of judicial proceedings.” Cotton, 535 U.S. 632–33. I agree with the majority that “To be sure, there was likely evidence available that might have supported the conclusion that there was, in fact, a methamphetamine conspiracy.”
There is no disagreement that a person cannot be sentenced for a particular drug type unless proven beyond a reasonable doubt at trial or based on a valid admission of type. United States v. Buckland, 289 F.3d 558, 568 (9th Cir. 2002) (en banc); Banuelos, 322 F.3d at 702. But I find no support for the proposition that a different, specific drug may be substituted for the purposes of conviction or sentencing.

Drug quantity, which is not an issue on this appeal, is different than drug type. If the quantity is not proven or encompassed within a plea, then the defendant lawfully may be sentenced for the lowest proven quantity of that drug. See, e.g., Thomas, 355 F.3d at 1202. But an indictment for a specific quantity of a particular drug necessarily subsumes lesser quantities of that drug. That is an inherent characteristic of drug quantity that does not exist for drug type. This physical-world principle of lesser-included quantities does not apply to drugs of a single, specific type. Marijuana is not subsumed within methamphetamine. True, this Court has endorsed “resentencing within the lower statutory sentencing range supported by a generic conviction.” United States v. Vera, 770 F.3d 1232, 1250 (9th Cir. 2014); see also Hunt, 656 F.3d at 909–11. But that is not what the majority proposes here.

A conviction for conspiracy to import some controlled substance would result in a maximum sentence of one year. 21 U.S.C. §§ 841(b)(3), 960(b)(7). A conspiracy to import marijuana carries a maximum sentence of five years. 21 U.S.C. §§ 841(b)(1)(D), 960(b)(4). I find no holding of this Court that a defendant who has been indicted for one drug type may have his plea reconstrued at his request into a plea of guilty to some other specific drug not charged in the indictment and not just resentencing. True, this Court has endorsed “resentencing within the lower statutory sentencing range supported by a generic conviction.” United States v. Vera, 770 F.3d 1232, 1250 (9th Cir. 2014); see also Hunt, 656 F.3d at 909–11. But that is not what the majority proposes here.

A conviction for conspiracy to import some controlled substance would result in a maximum sentence of one year. 21 U.S.C. §§ 841(b)(3), 960(b)(7). A conspiracy to import marijuana carries a maximum sentence of five years. 21 U.S.C. §§ 841(b)(1)(D), 960(b)(4). I find no holding of this Court that a defendant who has been indicted for one drug type may have his plea reconstrued at his request into a plea of guilty to some other specific drug not charged in the indictment and to which no plea of guilty was entered.

I would affirm the judgment. But if I agreed with the majority that on plain-error review there was not an adequate factual basis for a sentence for the crime of conspiracy to import methamphetamine, the error would infect both the sentence and the count of conviction. When a plea of guilty is entered without an adequate factual basis, the proper remedy is to vacate judgment and remand for further proceedings, and not just resentencing. See, e.g., United States v. Monzon, 429 F.3d 1268, 1273–74 (9th Cir. 2005). It would be beyond anomalous to conclude that there was a valid basis for a guilty plea to conspiracy to import methamphetamine but not for the sentence for that crime.

In my view, in the event of a remand, the government and Jauregui should be free to proceed to trial on both counts of the indictment: conspiracy to import methamphetamine and the substantive crime of importation. If Jauregui wishes to plead guilty to participation in a marijuana conspiracy and the government wishes to accept that plea in satisfaction of all charges, it is a simple matter for Jauregui to waive indictment and enter a guilty plea to an information charging such a conspiracy. The district court could then dismiss the open counts of the indictment at sentencing.
February 2015, then San Francisco Sheriff Mirkarimi, through a meeting with the U.S. Department of Homeland Security Deputy Director, informed the United States that the Sheriff’s Department would not honor Immigration and Customs Enforcement (“ICE”) detainer requests or notify ICE of the pending release of any undocumented alien unless a judicial order or warrant was issued for the alien’s removal. Shortly thereafter, Sheriff Mirkarimi issued a memorandum, dated March 13, 2015 (the “Memo”) to all Sheriff’s Department employees.

The Memo established protocols and parameters for communications between Sheriff’s Department employees and ICE representatives. It stated that employees “shall not provide” “non-public” information to ICE, including “release dates or times,” but that employees were authorized to provide certain “public” information to ICE. Disclosure of any information beyond the public information explicitly authorized by the Memo would require consultation with the Sheriff’s Department’s legal counsel, confirmation by counsel that disclosure was required by court order or law, and authorization by Sheriff Mirkarimi. The Memo changed the “longstanding policy and procedure” of the Sheriff’s Department “to freely provide information to ICE regarding undocumented immigrant felons in custody.”

The Memo referenced Chapter 12H of the San Francisco Administrative Code, which is commonly referred to as the “Sanctuary City Law,” and other relevant laws and regulations, including the California Public Records Act and the San Francisco Sunshine Ordinance of 1999. While the Sanctuary City Law limits information that San Francisco and its officers and employees share with federal immigration officials, it includes an exception for cooperation as required by state or federal law. It also allows, but does not require, communication and cooperation with federal authorities regarding individuals previously convicted of felonies. The Memo, however, contained no exception regarding individuals previously convicted of felonies.

From 1993 to 2011, Lopez-Sanchez was convicted of “at least seven felonies” related either to controlled substances or to illegal reentry after deportation. He also was removed to Mexico at least five times during that time period. After completing a 46-month sentence in federal prison, Lopez-Sanchez was released to the custody of the Sheriff’s Department on March 26, 2015, to face felony charges for selling marijuana. The charges against him were dropped on March 27, 2015, and on that same day, ICE sent a detainer request asking the Sheriff’s Department to notify ICE 48 hours before releasing Lopez-Sanchez and to hold him until ICE could take custody of him. The Sheriff’s Department did not respond to the detainer request or otherwise communicate with ICE, and Lopez-Sanchez was released on April 15, 2015, without notification to ICE. After his release, Lopez-Sanchez acquired a government-issued handgun belonging to a U.S. Bureau of Land Management ranger. The handgun had been stolen from a vehicle on June 27, 2015.

On July 1, 2015, four days after the handgun had been stolen and approximately two and one-half months after Lopez-Sanchez had been released by the Sheriff’s Department, he shot and killed Steinle near Pier 14 of the San Francisco Embarcadero. Steinle was shot “in the chest, piercing her aorta.” There is no allegation that Lopez-Sanchez knew Steinle. After the shooting, ICE stated: “If the local authorities had merely notified [U.S. Immigration and Customs Enforcement] that they were about to release this individual into the community, ICE could have taken custody of him and had him removed from the country — thus preventing this terrible tragedy.”

Plaintiffs filed a complaint against the United States, City Defendants, and Lopez-Sanchez, alleging claims for negligence per se, general negligence, and deprivation of civil rights under 42 U.S.C. § 1983. City Defendants and the United States moved to dismiss all claims against them under Federal Rule of Civil Procedure 12(b)(6). The district court granted City Defendants’ motion and granted in part and denied in part the United States’s motion. The claims against City Defendants were dismissed without leave to amend, based on futility.

Final judgment on the dismissed claims was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and Plaintiffs timely appealed. On appeal, Plaintiffs challenged only the dismissal of their general negligence claim against City Defendants. The district court dismissed that claim.

1. The following facts are taken from Plaintiffs’ complaint and are assumed true for purposes of our review. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

2. Plaintiffs characterize the Memo as a “no contact” policy. This label is not precisely accurate because, as noted, the Memo authorized Sheriff’s Department employees to provide certain public information to ICE. The Memo also allowed other information to be provided to ICE if its request was supported or required by a warrant, court order or decision, or federal or state statute or regulation, and was confirmed by the Sheriff’s counsel and approved by the Sheriff.

3. Plaintiffs voluntarily dismissed all claims against Lopez-Sanchez.

4. The district court dismissed, with prejudice, the claims against the United States premised on its failure to detain or remove Lopez-Sanchez before the shooting, but it declined to dismiss the claims against the United States premised on the ranger’s alleged failure to properly secure the handgun that Lopez-Sanchez used to shoot Steinle. Plaintiffs do not appeal the district court’s decision regarding their claims against the United States.
claim pursuant to California Government Code sections 820.2 and 815.2(b) because it concluded that the alleged negligent act—the issuance of the Memo—was an immune discretionary act. Plaintiffs argue that dismissal of their general negligence claim was improper because 1) the district court erred in finding immunity on a motion to dismiss, 2) the district court erred by taking judicial notice of the contents of the Memo, and 3) the Sheriff’s act of withholding Lopez-Sanchez’s release date from ICE was ministerial and thus not entitled to discretionary immunity even if entitlement to immunity could be determined on a motion to dismiss. Plaintiffs also make various arguments in support of their contention that Sheriff Mirkarimi lacked discretionary authority to issue the Memo and, therefore, is not entitled to immunity.

**STANDARD OF REVIEW**

“We review de novo a dismissal under Rule 12(b)(6), and we can affirm on any ground supported by the record.” *Thompson v. Paul*, 547 F.3d 1055, 1058–59 (9th Cir. 2008). Further, on a motion to dismiss, “[w]e take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party.” *Parks Sch. of Bus.*, 51 F.3d at 1484.

**DISCUSSION**

I. DISCRETIONARY IMMUNITY

We agree with the district court that the issuance of the Memo was a discretionary act that is entitled to immunity under section 820.2 of the California Government Code. Section 820.2 provides, in pertinent part: “[A] public employee is not liable for an injury resulting from his act … where the act … was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.”

In applying section 820.2, the California Supreme Court has stated that “the existence of some … alternatives … does not perforce lead to a holding that the governmental unit thereby attains the status of non-liability under section 820.2.” *Johnson v. State*, 447 P.2d 352, 358 (Cal. 1968). Thus, instead of interpreting “discretionary” literally, the focus should be on the policy considerations underlying the governmental entity’s claim of immunity. *Id.* at 356–58.

[A] “workable definition” of immune discretionary acts draws the line between “planning” and “operational” functions of government. Immunity is reserved for those “basic policy decisions which have been expressly committed to coordinate branches of government,” and as to which judicial interference would thus be “unseemly.” Such “areas of quasi-legislative policy-making are sufficiently sensitive” to call for judicial abstention from interference that “might even in the first instance affect the coordinate body’s decision-making process[.]” *Caldwell v. Montoya*, 897 P.2d 1320, 1325–26 (Cal. 1995) (citations, brackets, and alterations omitted) (quoting *Johnson*, 447 P.2d at 360–61). Further, a finding of immunity “requires a showing that ‘the specific conduct giving rise to the suit’ involved an actual exercise of discretion, i.e., a ‘conscious balancing of risks and advantages.’” *Id.* at 1327 (brackets omitted) (quoting *Johnson*, 447 P.2d at 361 n.8).

Applying the principles established by the California Supreme Court, the Memo, on its face, reflects a basic policy decision that “has been committed to [a] coordinate branch[,] of government.” *Johnson*, 447 P.2d at 360. The Memo was issued by Sheriff Mirkarimi, who had the “sole and exclusive authority to keep the county jail and the prisoners in it.” Cal. Gov’t Code § 26605. And, as discussed below, no federal, state, or municipal statute or ordinance prohibited him from issuing the Memo. Thus, Sheriff Mirkarimi was vested with the authority to establish a departmental-wide policy setting forth the parameters and protocols regarding his employees’ communications with ICE.

The Memo shows that Sheriff Mirkarimi considered applicable laws and regulations, determined what information should and should not be provided to ICE, and established a process for providing information to ICE when required by law. The allegations in the complaint also demonstrate that Sheriff Mirkarimi actually exercised discretion because, by issuing the Memo, according to Plaintiffs, he consciously changed the “longstanding policy and procedure … to freely provide information to ICE.”

The decision concerning what information Sheriff’s Department employees would provide to federal immigration officials (beyond the information required by law to be provided) is an important policy decision that is “sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action.” *Johnson*, 447 P.2d at 361. Indeed, the debate over policies that severely limit cooperation with immigration officials, like those embodied in the Memo, underscores the nature of Sheriff Mirkarimi’s decision, and further supports a conclusion that judicial intervention “would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government.” *Id.* at 360. The tragic and unnecessary death of Steinle may well underscore the policy argument against Sheriff Mirkarimi’s decision to bar his employees from providing the release date of a many-times convicted felon to ICE. But that policy argument can be acted upon only by California’s state and municipal political branches of government, or perhaps by Congress—but not by federal judges applying California law as determined by the California Supreme Court.

The cases on which Plaintiffs rely are inapposite because, unlike here, they involved lower level “operational” acts that were performed after a basic policy decision had already been made. See Johnson, 447 P.2d at 361–62 (holding that, while a decision to parole is a basic policy decision, a parole officer’s subsequent decision as to what warnings to give to foster parents was “a determination at the lowest, ministerial rung of official action” and not entitled to immunity); Barner v. Leeds, 13 P.3d 704, 709, 712 (Cal. 2000) (noting that “there is no basis for immunizing lower level decisions that merely implement a basic policy already formulated,” and holding that acts of a deputy public defender in representing a client are not entitled to discretionary immunity because a deputy public defender’s “services consist of operational duties that merely implement the initial decision to provide representation and are incident to the normal functions of the office of the public defender”); McCorkle v. City of Los Angeles, 449 P.2d 453, 460 (Cal. 1969) (holding that, even if a police officer made a discretionary decision to undertake an investigation, the officer’s subsequent negligent acts in performing the investigation were not protected by discretionary immunity).

The Memo is plainly an example of decision-making at the “planning” level, as that term is used by the California Supreme Court. Thus, the issuance of the Memo was a discretionary act insulated from liability under section 820.2 of the California Government Code.6

We also conclude that the district court did not err in determining immunity on a motion to dismiss—the issue before the court was a legal one, not dependent on disputed facts, and courts routinely answer questions of immunity on a motion to dismiss. See, e.g., Gonzalez v. United States, 814 F.3d 1022, 1025 (9th Cir. 2016) (holding, on an appeal from a motion to dismiss, that discretionary immunity barred plaintiffs’ claims); Caldwell, 897 P.2d at 1323 (holding, on an appeal from a sustained demurrer by the trial court, that discretionary immunity applied).

We now turn to Plaintiffs’ remaining arguments.

II. INCORPORATION BY REFERENCE DOCTRINE

Plaintiffs argue that the district court improperly took judicial notice of the Memo’s contents. We disagree. The district court expressly stated that it considered the Memo under the incorporation by reference doctrine. This doctrine permits a court to consider a document “if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.” United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

Here, the Memo forms the very basis of Plaintiffs’ claims, and Plaintiffs referred extensively to it throughout the district court proceedings. On appeal, Plaintiffs state that they “dispute the accuracy of the contents of the memorandum, but their substantial reliance on the Memo and their failure to question its accuracy below directly belies their position. Indeed, Plaintiffs’ own legal counsel, by declaration, submitted a copy of the Memo in support of their motion for judgment below. Additionally, they did not oppose City Defendants’ request for judicial notice of the Memo below7 and, in their opposition to City Defendants’ motion to dismiss, they actually cited and relied upon the Memo that was attached to City Defendants’ request for judicial notice. Moreover, Plaintiffs fail to identify any specific part of the Memo that they claim is inaccurate, i.e., not part of the actual Memo.

In short, the district court appropriately considered the Memo under the incorporation by reference doctrine. See In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999) (rejecting party’s claim questioning the veracity of SEC filings that were considered under the incorporation by reference doctrine because the party’s “ongoing and substantial reliance” on the filings undermined her position), abrogated on other grounds by S. Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008).

III. THE SHERIFF’S DISCRETIONARY AUTHORITY

Finally, Plaintiffs argue that Sheriff Mirkarimi lacked discretionary authority to issue the Memo and, therefore, is not entitled to immunity. As set forth below, we reject that position and the various arguments offered in support.

A. 8 U.S.C. §§ 1373(a) and 1644

Plaintiffs claim that Sheriff Mirkarimi lacked discretion to issue the Memo because 8 U.S.C. §§ 1373(a) and 1644 required the Sheriff’s Department to provide release date information to ICE.8 The relevant parts of those sections prohibit any federal, state, or local restrictions on sending “information regarding” the “immigration status” of individuals to the Immigration and Naturalization Service.

Plaintiffs argue, relying on text found in different statutory sections, that “immigration status” includes whether an individual is lawfully present in the United States, and “the release date of an undocumented inmate is the date upon which he goes from lawful to unlawful presence in the United

6. Plaintiffs also claim that, even if the act of issuing the Memo was insulated from liability, the separate act of withholding the requested information from ICE was ministerial and thus not protected by discretionary immunity. We decline to view the act of issuing the Memo and the act of withholding the very information that the Memo instructed to be withheld as separate acts. To do so would allow a protected discretionary act to be converted into a non-discretionary ministerial act. Cf. Cry, of Sacramento v. Superior Court, 503 P.2d 1382, 1386–87 (Cal. 1972) (“Ministerial implementation of correctional programs, however, can hardly, in any consideration of the imposition of tort liability, be isolated from discretionary judgments made in adopting such programs.”).

7. It does not appear that the district court ruled on City Defendants’ request for judicial notice of the Memo.

8. We note that some courts have found § 1373 to be unconstitutional under the Tenth Amendment’s anti-commandeering principles. See, e.g., States of New York et al. v. Dep’t of Justice, 343 F. Supp. 3d 213, 237 (S.D.N.Y. 2018), appeal filed, No. 19-275 (2d Cir. Jan. 28, 2019). We do not reach this issue because we find that the Memo is not inconsistent with, or in violation of, § 1373.
States.” 9 Therefore, according to Plaintiffs, release date information is “information regarding” “immigration status.”

Plaintiffs also point to legislative history and contend that congressional reports relating to §§ 1373(a) and 1644 demonstrate that those sections were intended to eliminate any restrictions on the flow of immigration information between state and local entities and federal immigration officials.

Plaintiffs’ arguments ignore well-established rules of statutory interpretation. “The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” In re HP InkJet Printer Litig., 716 F.3d 1173, 1180 (9th Cir. 2013) (internal quotation marks omitted) (quoting Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009)).

Further, we turn to extrinsic materials, like legislative history, only if the statutory text is ambiguous. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

The statutory text at issue clearly does not include release-date information. It includes only “information regarding” “immigration status,” and nothing in §§ 1373(a) or 1644 addresses information concerning an inmate’s “release date.” As the district court correctly found, no plausible reading of “information regarding” “immigration status” encompasses the state or local release date of an inmate who is an alien. See also United States v. California, 314 F. Supp. 3d 1077, 1102 (E.D. Cal. 2018) (holding that § 1373(a) does not encompass release-date information).

Congress certainly could have added explicit “release date” wording to the statutes, but it did not. Accordingly, we hold that, although §§ 1373(a) and 1644 prohibit restrictions on providing certain types of information to ICE, they plainly and unambiguously do not prohibit the restriction at issue in this case regarding release-date information.10 Thus, our inquiry is at an end, irrespective of legislative history.11

9. Plaintiffs rely on 8 U.S.C. §§ 1357(g)(10)(A) and 1231(a)(4) to support their argument.

10. We note that the Memo also prohibited employees from providing “citizenship/immigration status of any inmate” to ICE. While that part of the Memo is directly contrary to the mandate of §§ 1373(a) and 1644, the operative part of the Memo on which Plaintiffs’ claims rest—the withholding of release date information—is not inconsistent with those statutes. Moreover, according to Plaintiffs, ICE was already aware of Lopez-Sanchez’s immigration status. Under the circumstances here, we see no reason, based on California law, to strip the Sheriff of his discretionary authority to promulgate the portion of the Memo directly at issue in this case because he may have lacked the authority to issue a different part of the Memo. And Plaintiffs do not make any specific arguments based on California law that would support such a holding.

11. We do note that at least some of the legislative history cited by Plaintiffs supports their argument. For example, the House Conference Report that accompanied the bill related to § 1644, states, in relevant part:

The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance,

B. Immigration Policy

Plaintiffs claim that Sheriff Mirkarimi did not have discretionary authority to issue the Memo because the Memo “invaded” the federal government’s authority over immigration law and frustrated ICE’s ability to detain and deport Lopez-Sanchez. We accept as true, as we must at this stage of the proceedings, that the issuance of the Memo interfered with ICE’s ability to detain and deport Lopez-Sanchez, and that ICE would have detained Lopez-Sanchez had ICE been provided with his release date. We also acknowledge Congress’s plenary or near plenary power over immigration issues. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977). Notwithstanding these principles, Plaintiffs fail to cite any authority that required Sheriff Mirkarimi to provide ICE with the release date. That Sheriff Mirkarimi’s actions adversely affected ICE’s ability to do its job does not, without more, strip him of the discretionary authority under California law to institute the policy that he did.

C. Legislative Act

Plaintiffs argue that the Memo was an “act of legislating” and that Sheriff Mirkarimi did not have authority to legislate. Consequently, according to Plaintiffs, the Sheriff is not entitled to immunity because he exceeded his discretionary authority in issuing the Memo.

Plaintiffs appear to believe that the Memo was a legislative act because it involved policymaking by the Sheriff. But action by a government official that involves some weighing of policy is not the equivalent of a legislative act. “Policy” is a broad term that is not synonymous with legislation.” Worthington v. City Council of Roehnert Park, 31 Cal. Rptr. 3d 59, 66 (Ct. App. 2005). To the extent that Plaintiffs intended a more specific argument, they have not provided an adequate explanation to preserve it. See Fed. R. App. P. 28(a)(8)(A) (“The appellant’s brief must contain … the argument, which must contain … appellant’s contentions and the reasons for them, with citations to the authorities[,]”) (emphasis added)); Indep. Towers of Wash. v. Washington, 350 F.3d 925, 930 (9th Cir. 2003) (“We require contents to be accompanied by reasons.”).

D. California Public Records Act

Plaintiffs claim that the failure to provide ICE with Lopez-Sanchez’s release date violated the California Public Records Act (“CPRA”) and that the Sheriff lacked discretion to contravene the CPRA.12 The CPRA concerns “a request for a

executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.


12. Plaintiffs do not explain why, even if there were such a violation, the remedy under California law would be to allow a non-re-
copy of records.” § 6253(a). There is no allegation that ICE made a request to inspect the CPRA. Plaintiffs argue that the Memo violated California Health and Safety Code section 11369, which provides: “When there is reason to believe that any person arrested for a violation of [certain laws regarding controlled substances], may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters.”

Contrary to Plaintiffs’ argument, nothing in section 11369 requires the transmission of an inmate’s release date to ICE and, as noted above, the complaint affirmatively asserts that ICE already knew that Lopez-Sanchez was not a citizen of the United States.

Further, Plaintiffs allege that the federal government transferred Lopez-Sanchez to the custody of the Sheriff’s Department after he completed a federal prison sentence. Accordingly, the district court correctly ruled, section 11369 is inapplicable here because the Sheriff’s Department was not the “arresting agency.”

F. Other Local Laws

Plaintiffs claim that other local laws prohibited Sheriff Mirkarimi from limiting cooperation with ICE. They cite section 67.24(d) of the San Francisco Administrative Code, which provides in pertinent part: “The District Attorney, Chief of Police, and Sheriff are encouraged to cooperate with the press and other members of the public in allowing access to local records pertaining to investigations, arrests, and other law enforcement activity.” By its plain text, section 67.24(d) simply “encourage[s]” cooperation; it does not mandate cooperation.

Plaintiffs also assert that San Francisco Administrative Code section 12H.2-1 prohibited Sheriff Mirkarimi from limiting cooperation with ICE. Section 12H.2-1 at all relevant times provided, in pertinent part:

Nothing in this Chapter shall preclude any City and County department, agency, commission, officer or employee from (a) reporting information to the Federal agency charged with enforcement of the Federal immigration law regarding an individual who has been booked at any county jail facility, and who has previously been convicted of a felony … ; or (b) cooperating with a request from the Federal agency charged with enforcement of the Federal immigration law for information regarding an individual who has been convicted of a felony …

However, this section does not, by express provision or implication, mandate that the Sheriff (or any other officer) provide information to ICE regarding a convicted felon—it simply makes clear that the Chapter does not prohibit the same. As the Chapter does not bar the Memo, it cannot have the effect of stripping the Sheriff of his discretionary authority.

Plaintiffs also argue that, when read together, section 6.105 of the San Francisco Charter (the “Charter”) and section 8.27 of the San Francisco Administrative Code require the Sheriff to cooperate with law enforcement authorities, including ICE. Charter section 6.105 sets forth the duties of the Sheriff and provides that, among other duties, the Sheriff “shall … [r]eceive all prisoners committed to jail by competent authorities.” Section 8.27 concerns the fixing of fees charged by the Sheriff’s Department for the care and maintenance of prisoners from other jurisdictions, for the furnishing of reports and other materials, and for the imprinting and processing of fingerprints.

13. Section 6253(b) of the CPRA provides, in pertinent part: “Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person[,]” Cal. Gov’t Code § 6253(b) (emphasis added). Section 6253(c) states, in pertinent part: “Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor.” Id. § 6253(c). These sections are distinct from separate provisions requiring agencies to keep certain records open to “inspection” during regular hours. See id. § 6253(a). There is no allegation that ICE made a request to inspect records.


15. San Francisco Administrative Code section 12H.2-1 was repealed effective July 17, 2016.
Plaintiffs appear to reason that these sections require the Sheriff to cooperate with ICE because, when receiving and caring for prisoners from other jurisdictions, the Sheriff necessarily must cooperate with other law enforcement agencies. While it is necessary for the Sheriff to cooperate with other law enforcement authorities in performing his duties, there is no text in these sections that can be construed as prohibiting the issuance of the Memo.

In summary, Plaintiffs’ arguments fail to show that Sheriff Mirkarimi lacked discretionary authority to issue the Memo. We therefore hold that the issuance of the Memo was a protected discretionary act under California Government Code section 820.2 and that City Defendants are immune from liability. See Cal. Govt’ Code § 815.2(b).

IV. LEAVE TO AMEND

During oral argument, Plaintiffs requested leave to amend the complaint to remove all references to the Memo. However, this issue is waived because Plaintiffs failed to raise it in their opening brief. See Balser v. Dep’t of Justice, Office of U.S. Tr., 327 F.3d 903, 911 (9th Cir. 2003). Even if the request had been properly raised on appeal (which would have been difficult, as Plaintiffs never made this argument below), the district court’s denial of leave to amend was proper because Plaintiffs’ claims would not be saved by any amendment; the Memo, on its face, reflects a basic policy decision entitled to discretionary immunity.  

CONCLUSION

Our holding today makes no judgment as to whether or not the policy established by the Memo was wise or prudent. That is not our job. “A federal court applying California law must apply the law as it believes the California Supreme Court would apply it.” Gravquick A/S v. Trimble Navigation Int’l Ltd., 656 F.3d 1002, 1008 (9th Cir. 2011) (“[Leave to amend] is properly denied … if amendment would be futile.”).

16. Plaintiffs requested leave to amend only if this court determined that one specific allegation in the complaint was an admission that Sheriff Mirkarimi had discretionary authority to issue the Memo. We made no such determination, and our holding does not rest on such a determination.

17. Removing references to the Memo in their complaint would be unavailing to Plaintiffs and would not assist them in overcoming the incorporation by reference doctrine, because the Memo, which established the policy of withholding release date information from ICE, forms the basis of their claims. See Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998) (stating that the policy underlying the incorporation by reference doctrine is to “[p]revent[] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based”), superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 681–82 (9th Cir. 2006) (per curiam).

protected by the statutory immunity. See Caldwell, 897 P.2d at 1327 (“Johnson does not require a strictly careful, thorough, formal, or correct evaluation. Such a standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy.”)

AFFIRMED.

GRABER, Circuit Judge, concurring:

I join the opinion, which relies on the general discretionary-immunity statute, California Government Code section 820.2, in full. I write separately to add that the California legislature has provided an even clearer, specific grant of immunity to Defendants in the present circumstances.

California Government Code section 845.8(a) immunizes public employees from “[a]ny injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.” California Government Code section 846 immunizes public employees from any “injury caused … by the failure to retain an arrested person in custody.”

As recognized by the California courts, the legislature intended those grants of immunity to be specific applications of the general discretionary-immunity statute. E.g., Whitcombe v. County of Yolo, 141 Cal. Rptr. 189, 195 & n.10 ( Ct. App. 1977). Moreover, when those specific immunity statutes apply, we need not determine whether the underlying acts were “discretionary” or “ministerial” because the legislature “has already concluded that all conduct within [the statutes’] terms is entitled to immunity.” Id. at 197 & n.15. “[A] specific legislative mandate of immunity effectively places beyond the pale of liability both discretionary decisions themselves and their ministerial implementations.” Id. at 198. Here, as in Whitcombe, “we need not resort to the general discretionary immunity section,” because Defendants are immune under the specific immunity statutes. Id. at 197; see also Carmack v. Reynolds, 391 P.3d 625, 632 (Cal. 2017) (“A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.” (quoting Miller v. Superior Court, 986 P.2d 170, 177 (Cal. 1999)).

The specific immunity statutes apply here because Plaintiffs’ entire claim rests on the manner in which a prisoner was released (he was released without notifying federal authorities). Even adopting Plaintiffs’ view that the Memo, and not the release, caused the harm, the California courts have construed sections 845.8(a) and 846 broadly to encompass all “policy decisions … made prior to and as an integral part of the ultimate basic decision to release.” County of Santa Barbara v. Superior Court, 93 Cal. Rptr. 406, 410 (Cal. Ct. App. 1971).
As the main opinion properly acknowledges, the events underlying this case are tragic. And some of Plaintiffs’ claims remain to be litigated in the district court. We hold only that, under California law, the state officials are immune from suit.

SHYRIA HENDERSON, on behalf of herself, and all others similarly situated, Plaintiff-Appellant,
v.
UNITED STUDENT AID FUNDS, INC., DBA USA Funds, Defendant-Appellee.

No. 17-55373
In the Supreme Court of the United States
D.C. No. 3:13-cv-01845-JLS-BLM
Appeal from the United States District Court for the Southern District of California
Janis L. Sammartino, District Judge, Presiding
Argued and Submitted October 10, 2018
San Francisco, California
Filed March 22, 2019
Opinion by Judge D.W. Nelson;
Dissent by Judge Bybee

COUNSEL
Lisa Marie Simonetti (argued), Vedder Price (CA) LLP, Los Angeles, California; Bryan K. Clark, Vedder Price P.C., Chicago, Illinois; for Defendant-Appellee.

OPINION
D.W. NELSON, Circuit Judge:

OVERVIEW
Shyria Henderson appeals the district’s order granting summary judgment in favor of Defendant-Appellee United Student Aids Funds, Inc. (USA Funds). The district court incorrectly held that a reasonable jury could not hold USA Funds vicariously liable for the debt collectors’ alleged Telephone Consumer Protection Act (TCPA) violations.
Accordingly, we REVERSE and REMAND.

BACKGROUND
Henderson applied for and received a loan to attend university through the Federal Family Education Loan Program (FFELP). After experiencing some financial difficulty, she stopped paying back her loans. Then, five different debt collection companies started calling her about the money she
had not paid back. Henderson received pre-recorded messages many times in short intervals on a phone number she neither provided in connection with her student loans nor consented to be called on. Henderson contends this pattern shows that the companies were combining the use of skip tracers and auto dialers.

Navient Solutions, Inc., a servicer of student loans, hired these debt collectors to collect on unpaid loans on behalf of USA Funds, which owned Henderson’s loans. USA Funds operates under a government program by which it guarantees student loans made by private lenders and then takes ownership of those loans if a student-borrower defaults.

Although USA Funds owns billions of dollars in student loan debt, it does not interact with the borrowers directly once they stop paying back their loans. Instead, it hires companies, like Navient, to service its loans, including debt collection. In turn, Navient hires debt collectors to collect on defaulted loans. The debt collectors handle many aspects of collecting and repayment, including making calls to borrowers, setting up payment plans, granting temporary delays, and accepting loan payments.

While USA Funds did not have a contractual relationship with the debt collectors or any day-to-day dealings with them, USA Funds had access to Navient’s daily, weekly, and monthly reports tracking the debt collectors’ performance. Similarly, USA Funds could, and did, review debt collectors’ calling notes when it had “an issue” with a debt collector’s calling practices. USA Funds also regularly reviewed Navient’s operations and performance, including its regulatory compliance, or lack thereof. Though USA Funds’ service agreement with Navient did not give USA Funds the ability to fire debt collectors, USA Funds could ask Navient to replace underperforming collectors and could have fired Navient if it did not comply.

USA Funds also conducted an annual audit of the debt collectors. The audit focused on the various repayment programs that borrowers had a right to use in the FFELP. TCPA compliance was not one of the FFELP audit parameters. However, during each of USA Funds’ audits from 2000, 2009, and 2010, debt collectors called borrowers on phone numbers that they did not consent to be called on, prompting USA Funds to note “improper collection practices” and to recommend “corrective action.” Navient, however, continued to use these debt collectors, and USA Funds did not object when the same debt collectors were used in the following years. Moreover, USA Funds was aware that debt collectors handling USA Funds’ loans had been sued regarding their calling practices but USA Funds did nothing to ensure TCPA compliance.

Henderson sued USA Funds for alleged TCPA violations related to the collection of her student loan debt. Though Henderson also sued Navient and several debt collectors, those defendants were dismissed for lack of personal jurisdiction.

### STANDARD OF REVIEW

We “review a district court’s grant of summary judgment de novo” to determine “whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” Oklevueha Native Am. Church Of Haw., Inc. v. Lynch, 828 F.3d 1012, 1015 (9th Cir. 2016). We view the facts “as a whole and in the light most favorable to the party opposing the motion.” Pavoni v. Chrysler Grp., LLC, 789 F.3d 1095, 1098 (9th Cir. 2015). “An issue of material fact is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

### DISCUSSION

Henderson challenges the district court order granting USA Funds’ summary judgment motion on two grounds. First, Henderson argues that under an FCC order, USA Funds is per se vicariously liable for the debt collectors’ TCPA violations. Second, she argues that USA Funds is similarly liable under the federal common law agency principles of ratification and implied actual authority. Henderson’s theory of liability is that USA Funds has a principal-agent relationship with the debt collectors and that a court may hold it liable for their TCPA violations. We agree. We, therefore, reverse the district court’s summary judgment order because there are “genuine issues of material fact” as to whether USA Funds ratified the debt collectors calling practices. We remand for further proceedings.

### I. TCPA LIABILITY

Under the TCPA, it is unlawful to “to make any call (other than … with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice … to any telephone number assigned to a cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). Telemarketers, debt collectors, and others obtain phone numbers consumers did not consent to be called on through skip tracing.1 Because consumers did provide these callers with their phone numbers, the consumers have not given “prior express consent” to be called on those numbers. Therefore, if the numbers were also auto dialed, the calls violated the TCPA. 47 U.S.C. § 227(b)(1)(A)(iii).

Debt collectors that auto dialed Henderson on a phone number she did not provide in connection with her student loan would be liable under this section. For USA Funds to be liable under this section, Henderson must show that there is an agency relationship between USA Funds and these liable debt collectors.

---

1. Skip tracing is the process of obtaining previously-unknown phone numbers associated with the name on an account, such as by contracting with “third-party database services” or by “calling an individual’s relatives [and] known acquaintances.” (Deposition of Mark A. Verbrugge, senior director of operations within portfolio management at Navient).
II. FCC ORDERS DO NOT CREATE PER SE TCPA LIABILITY

Henderson argues that USA Funds is per se vicariously liable for the debt collectors’ alleged TCPA violations. She bases this conclusion on her analysis of In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 565 (2008) (“2008 FCC Order”), which states, “[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.” Because Congress has not acted directly on this issue and because the 2008 FCC Order is a fully adjudicated declaratory ruling, the panel must afford it Chevron deference. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). Though the 2008 FCC Order implies a creditor could be liable for a debt collector’s TCPA violations, the Order does not make such liability per se or automatic, as Henderson argues. To the contrary, in a 2013 order, the FCC clarified that a court should determine whether a defendant is vicariously liable for the TCPA violations of a third-party caller by using federal common law agency principles. In re Joint Petition Filed by Dish Network, LLC, 28 F.C.C. Rcd. 6574, 6574 (2013) (“2013 FCC Order”).

Henderson’s per se liability argument also ignores Gomez v. Campbell-Ewald Co., which held that “a defendant may be vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller.” 768 F.3d 871, 879 (9th Cir. 2014), aff’d, 136 S. Ct. 663 (2016), as revised (Feb. 9, 2016). To reach this conclusion, Gomez interpreted the 2013 FCC Order. Id. at 878.

Gomez makes clear that a court may not automatically attribute a third-party caller’s TCPA violations to a defendant. Id. In other words, there is no per se liability. A plaintiff, according to Gomez, must show that there is an agency relationship between a defendant and a third-party caller for there to be vicarious liability for TCPA violations. Id. Accordingly, under both FCC Orders and our precedent, the per se liability argument fails.

III. FEDERAL COMMON LAW AGENCY PRINCIPLES

A court may hold lenders, like USA Funds, vicariously liable for the TCPA violations of third party callers, like the debt collectors, “where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and [the] third-party caller.” Gomez, 768 F.3d at 879. We rely on the Restatement (Third) of Agency for common law agency principles. See, e.g., Mavrix Photographs, LLC v. LiveJournal, Inc., 873 F.3d 1045, 1054 (9th Cir. 2017). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement § 1.01. There are several ways to establish an agency relationship, including actual authority and ratification. Restatement §§ 2.01, 01.

Whether an agency relationship exists is for a court to decide based on an assessment of the facts of the relationship and not based on how the parties define their relationship. Restatement § 1.02; see also U.S. v. Milovanovic, 678 F.3d 713, 725 (9th Cir 2012) (finding an agency relationship even though the parties’ agreements labeled them as independent contractors). Thus, it is not dispositive, as USA Funds argues, that the agreements between USA Funds, Navient, and the debt collectors define their relationships as independent contractors.

Moreover, it is appropriate to consider whether the parties are trying to limit or prevent liability by characterizing their relationship as something other than an agency relationship. Restatement § 1.02 cmt. b. Henderson argues that USA Funds is doing just that. More specifically, she argues that USA Funds, Navient, and the debt collectors had a “wink-and-a-nudge” agreement to use unlawful calling practices notwithstanding their independent contractor agreements.

Finally, Henderson has the burden of establishing that an agency relationship exists. Restatement § 1.02 cmt. d.; see also, e.g., Romak USA, Inc. v. Rich, 384 F.3d 979, 985 (8th Cir. 2004); Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347, 356 (5th Cir. 2003); E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 198 (3d Cir. 2001). Henderson advances two agency principles that she believes makes USA Funds liable for the debt collectors’ TCPA violations—ratification and implied actual authority.

A. Ratification

“Ratification is the affirmation of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.” Restatement § 4.01. Ratification is both an act and a set of effects. Restatement § 4.01 cmt. b. As an act, ratification is the principal’s assent (or conduct that justifies a reasonable assumption of assent) to be bound by the prior action of another person or entity. Restatement § 4.01. As a set of effects, ratification creates consequences of actual authority, including, in some circumstances, creating an agency relationship when none existed before. Restatement § 4.01 cmt. b.

There are two ways to ratify a third party’s acts. The first is by a “knowing acceptance of the benefit.” To prove this form of the ratification, there must be “an objectively or externally observable indication … that the principal has exercised choice and has consented” to the acts of the purported agent. Restatement § 401 cmt. d. That means that the principal must have “knowledge of material facts,” also described as “actual knowledge.” Restatement § 4.06. The second way a principal can ratify the acts of a third party is through “willful ignorance.” Under the “willful ignorance” theory, the principal may not know the material facts, but has “ratified with awareness that such knowledge was lacking.” Restatement
§ 4.01 cmt. b. In effect, the principal can ratify the act of a third party—thereby making the third party the principal’s agent—even if it does not know all the material facts, but it must be aware that it does not know the material facts and ratify anyway.

1. Ratification May Create An Agency Relationship When None Existed Before

USA Funds argues it could not have ratified the actions of the debt collectors because there is no agency relationship between it and the debt collectors. We disagree. Restatement § 4.01 cmt. b makes clear that, in most jurisdictions, ratification may create an agency relationship when none existed before if the acts are “done by an actor … who is not an agent but pretends to be.”

Kristensen v. Credit Payment Servs. Inc. is the only case in our circuit, or any circuit, that analyzes in what circumstances ratification may create an agency relationship when none existed before as described in the Restatement (Third) of Agency. 879 F.3d 1010 (9th Cir. 2018). It also happens to be a TCPA case. In Kristensen, Plaintiff Kristensen received a text message from a texting publisher, AC Referral, on his cell phone without his prior consent. 

Id. at 1012. AC Referral sent the text messages as part of a marketing campaign for payday lenders. 

Id.

Kristensen brought a TCPA class action against the lenders and marketing companies but not AC Referral, the entity that sent the texts. 

Id. at 1013. The district court granted summary judgment in favor of the defendants, rejecting Kristensen’s theories of vicarious liability, including his theory that the defendants ratified AC Referral’s unlawful texting campaign by accepting customer leads while knowing that AC Referral was using texts to generate those leads. 

Id. We affirmed the district court’s grant of summary judgment, holding that “[b]ecause AC Referral (which is not a party to the suit) was neither the agent nor purported agent [ ] of the defendants, they could not have ratified AC Referral’s acts.”

Id. at 1012.

Unlike the texting publisher in Kristensen, here, a reasonable jury could find that the debt collectors pretended and demonstrably assumed to act as USA Funds’ agents. See Restatement § 4.01 cmt b. As previously described, the debt collectors collected on unpaid loans by calling the student-borrowers. The collectors told the borrowers that they were calling about a loan owned by USA Funds. Without needing USA Funds’ approval, the collectors negotiated, deferred, and took payments on USA Funds’ behalf. In Kristensen, the texting publisher did not pretend to be the lenders’ agent because the publisher did not identify itself in the text message. 

Id. at 1012. Rather, the text message simply included a link to the lenders’ website. 

Id. Before the litigation, none of the text message recipients knew that AC Referral had sent the text messages. 

Kristensen v. Credit Payment Servs. Inc., 12 F. Supp. 3d 1292, 1297 (D. Nev. 2014). Because here, unlike in Kristensen, the debt collectors did purport to act as agents of USA Funds, Kristensen’s material facts are distinguishable from the facts in this case, and therefore, its holding is not binding here.

2. USA Funds May Have Ratified The Debt Collectors’ Calling Practices

Because Kristensen’s holding does not apply in this case, we must resolve whether a triable issue of fact exists as to whether USA Funds’ conduct “justifies a reasonable assumption” that it assented to the debt collectors’ allegedly unlawful calling practices. Restatement § 4.01. Comment d explains the kind of conduct that constitutes ratification, including “conduct justifiable only on the assumption that [a] person consents to be bound by [an] act’s legal consequences.” § 4.01 cmt. d. The illustration to comment d illuminates this point.

In the illustration, a used car dealer (the principal) employs a retail salesperson (the agent) not authorized to make public statements for the dealer. When the salesperson defames the dealer’s competitor on TV, and the dealer congratulates the salesperson’s TV appearance, the dealer ratified the salesperson’s tortious conduct. To constitute ratification, therefore, a principal need not explicitly communicate consent to an agent. Similarly, failure to object to or repudiate an action may indicate approval when an agent is likely to draw such an inference from a principal’s silence. § 4.01 cmt. f. The focal point of ratification is an observable indication that a principal has exercised an explicit or implicit choice to consent to the purported agent’s acts. § 4.01 cmt. d.

For example, “[a] person may ratify an act … by receiving or retaining benefits it generates if the person has knowledge of material facts.” § 4.01 cmt. g. Here, a reasonable jury could conclude that USA Funds accepted the benefits—loan payments—of the collectors’ calls while knowing some of the calls may have violated the TCPA. If a jury concluded that USA Funds also had “knowledge of material facts,” USA Funds’ acceptance of the benefits of the collector’s unlawful practices would constitute ratification.

Restatement § 4.06 requires that a principal knows of the material facts involved in the act it is ratifying. This knowledge requirement is met if the principal either has “actual knowledge” or “choose[s] to affirm without knowing the material facts.” § 4.06 cmt. b. Comment d adds that “a factfinder may conclude that a principal has made such a choice when the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation.” § 4.06 cmt. d. This can also be described as “willful ignorance.”

Here, there is evidence that USA Funds communicated consent to the debt collectors through acquiescence in their calling practices that allegedly violated the TCPA. In other words, a reasonable jury could find that USA Funds ratified the debt collectors’ calling practices by remaining silent and continuing to accept the benefits of the collectors’ tortious conduct despite knowing what the collectors were doing or,
at the very least, knowing of facts that would have led a reasonable person to investigate further.

i. Actual Knowledge

There is evidence in the record that USA Funds had actual knowledge of the debt collectors’ allegedly unlawful calling practices. “The fact that the principal had knowledge may be inferred” by circumstantial evidence. Restatement § 4.06 cmt. b. Henderson claims that starting in 2009, debt collectors called her every 30 to 40 minutes on a number she did not provide in connection with her student loans. The calling practice described by Henderson is consistent with several of USA Funds’ audit findings and its general understanding of the debt collection industry.

USA Funds does not dispute that it knew that some of the debt collectors used auto dialers. Evidence in the record shows that USA Funds knew that both auto dialing and skip tracing are ubiquitous in the debt collection industry. While collectors may legally use each method separately, several of USA Funds’ audits found that its debt collectors might have violated the TCPA by combining these methods. Despite these findings, USA Funds made no effort to end its relationship with any of these debt collectors or to ensure future TCPA compliance. Instead, it continued to accept the benefits of the collectors’ conduct. Under these circumstances, the debt collectors were “likely to draw the inference” that USA Funds’ silence manifested its assent to these practices. § 4.01 cmt. f.

Hodgin v. UTC is the only circuit case, other than Kris-tensen, to apply ratification in the TCPA context. 885 F.3d 243 (4th Cir. 2018). In Hodgin, home security system manufacturers entered into sales agreements with retailers through distributors. Id. at 246–48. When the manufacturers received multiple complaints about their retailers’ telemarketing practices from consumers, including practices that allegedly violated the TCPA, the manufacturers investigated those complaints and ultimately terminated the sales agreements with the offending retailers. Id. Unlike the defendant in Hodgin, which fired the retailers that had allegedly violated the TCPA, USA Funds did not direct Navient to fire the debt collectors it knew were using calling practices that allegedly violated the TCPA despite having directed Navient to fire underperforming debt collectors. Nor did USA Funds terminate its contract with Navient. USA Funds’ objective was clear—collect as much money as possible.

This evidence suggests that USA Funds consented to the debt collectors’ legal obligations under the TCPA. USA Funds at a minimum “had knowledge of facts that would have led a reasonable person to investigate further.” § 4.06 cmt. d. USA Funds’ audit findings combined with its knowledge about common practices in the industry should have alerted USA Funds that it needed to investigate further. Instead, USA Funds continued to accept the benefits of the debt collectors’ violations and to remain silent about the collectors’ legal obligations under the TCPA.

Indeed, the record suggests that USA Funds’ set up the collection structure between itself, Navient, and the debt collectors to remain willfully ignorant and avoid liability. For example, USA Funds directions to Navient and the debt collectors were general and open-ended. USA Funds did not set performance or operational standards for Navient or the debt collectors. Nor did USA Funds or Navient have policies or procedures in place to ensure their debt collectors’ calling practices complied with the TCPA. USA Funds did not receive information about the debt collectors’ calling practices, and it did not monitor the debt collectors’ skip tracing activities. USA Funds forwarded all consumer complaints about the debt collectors to Navient, including alleged TCPA violations. Triable issues of fact exist, therefore, as to whether USA Funds ratified the debt collectors’ actions through willful ignorance.

Accordingly, based on the evidence in the record, we hold that a reasonable jury could find that USA Funds ratified the debt collectors’ calling practices that allegedly violated the TCPA. We, therefore, need not address whether the debt collectors acted with implied actual authority.

CONCLUSION

For the preceding reasons, we REVERSE the district court’s grant of summary judgment in favor of Defendant-Appellee USA Funds and REMAND for further proceedings.

BYBEE, Circuit Judge, dissenting:

I agree with the majority that FCC Orders do not create per se liability under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Maj. Op. at 7; Gomez v. Campbell-Ewald Co., 768 F.3d 871, 879 (9th Cir. 2014), aff’d, 136 S. Ct. 663 (2016). I am also willing to assume for purposes of this case that ratification may create an agency relationship when none existed before. Maj. Op. at 10; Restatement (Third) of Agency § 4.01 cmt. b (2006). I disagree with the majority, however, that there is a material issue of fact as to whether USA Funds ratified the debt collectors’ conduct or whether USA Funds granted the debt collectors implied actual authority to violate the TCPA. I would affirm the judgment of the district court.

I

Under the TCPA, it is unlawful “to make any call (other than … with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice … to any telephone number assigned
to a … cellular telephone service.” 47 U.S.C. § 227(b)(1) (A)(iii). Any debt collector who autodialed Henderson in this case would be liable under this section, because she was called on a phone number she had not provided in connection with her loan. However, we are not addressing the liability of the debt collectors, nor that of Navient Solutions, Inc., the company that contracted with the debt collectors. Instead, this case concerns USA Funds alone, which acquired Henderson’s student loan debt from the Department of Education and contracted with Navient to hire and manage the debt collectors. Henderson would have had a much stronger case against the debt collector that called her, and, perhaps, even against Navient. But because that issue is outside the scope of our review, Henderson has to show that USA Funds either (1) ratified practices that violated the TCPA or (2) granted the debt collectors authority to violate the TCPA. I can’t get to either proposition from the evidence Henderson has mustered. Before addressing the merits of Henderson’s arguments, however, let’s start with what we know about skip-tracing and autodialing. First, skip-tracing is the “[t]he action or practice of locating people who are missing or have defaulted on a debt,” typically through online resources. Skip-tracing, Oxford Dictionary (2019). It is a perfectly lawful means of obtaining debtors’ additional phone numbers that they did not provide to the lender. Indeed, Department of Education regulations not only approve the practice, they require it. The relevant provision states that “within 10 days of its receipt of information indicating that it does not know the borrower’s current address, the lender must begin to diligently attempt to locate the borrower through the use of effective commercial skip-tracing techniques.” 34 C.F.R. § 682.411(h)(1) (emphasis added). Autodialing refers to the process by which a mechanical device or software dials telephone numbers automatically. When the recipient answers the call, the device or software plays a recorded message or connects the recipient to a real person. As anyone who has received these automated calls can attest, autodialing can be an obnoxious practice. That said, it is not, in and of itself, unlawful. Autodialing to collect a debt does not violate the TCPA if the phone number is one that the debtor provided. In fact, the TCPA specifically authorizes autodialed calls if the call “is made solely to collect a debt owed to or guaranteed by the United States.” 47 U.S.C. § 227(b)(1)(A)(iii); see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd. 9074, 9082–83 & n.54 (2016) (limiting the provision to debts owed to or guaranteed by the United States). The TCPA thus prohibits an autodialer from calling a phone number that the debtor did not provide—for example, a number obtained through skip-tracing.

Henderson alleges that debt collectors used skip-tracing to obtain a phone number she did not provide and then repeatedly autodialed her on that number. She argues that USA Funds is liable for these violations because it (1) ratified the debt collectors’ TCPA violations or (2) gave the debt collectors implied actual authority to violate the TCPA. The majority addressed the first question alone; I am going to address both.

A. Ratification

Under the Restatement of Agency, “[a] person ratifies an act by … conduct that justifies a reasonable assumption that the person so consents.” Restatement (Third) of Agency § 4.01(2)(b). There are two ways to ratify a third party’s acts. The first is by a “knowing acceptance of a benefit,” which requires “an objectively or externally observable indication … that the principal has exercised choice and has consented.” Id. § 401 cmt. d. This means that the principal must have “knowledge of material facts.” Id. § 4.06. The second is through a form of “willful ignorance.” Under this theory, the principal may not know the material facts but “ratified [the conduct] with awareness that such knowledge was lacking.” Id. § 4.01 cmt. b. In other words, the principal is aware that it does not know the material facts, and yet it ratifies the conduct anyway.

The majority concludes that Henderson put forth sufficient facts, that if accepted by a jury, prove either theory of ratification: “USA Funds ratified the debt collectors’ calling practices by remaining silent and continuing to accept the benefits of the collectors’ tortious conduct despite knowing what the collectors were doing or, at the very least, knowing of facts that would have led a reasonable person to investigate further.” Maj. Op. at 14. I will address each theory of ratification in turn.

1. Actual Knowledge

The majority first holds that there are sufficient facts in the record on summary judgment to prove that “USA Funds had actual knowledge of the debt collectors’ allegedly unlawful calling practices.” Id. at 14 (emphasis added). The majority recites two facts: “USA Funds knew that both auto dialing and skip tracing are ubiquitous in the debt collection industry” and “USA Funds’ audits found that its debt collectors might have violated the TCPA.” Id. at 14–15. From these two claims, the majority deduces that USA Funds knew that debt collectors “violated the TCPA by combining [skip-tracing and autodialing]” and “assent[ed] to these practices.” Id. There is no support in the record for this conclusion. As I have pointed out (and the majority concedes), skip-tracing and autodialing are lawful collection techniques, so their ubiquity is not surprising. It is only when they are used in tandem that the practice violates the TCPA. There is some evidence that USA Funds knew that debt collectors employed by Navient had used improper practices, but scant evidence they knew the debt collectors used skip-tracing and autodialing in combination. And there is no evidence whatsoever that USA Funds approved of such practices. In fact, the only evidence in the record is to the contrary: when USA Funds learned of wrongful practices, it reported them to Navient and asked Navient to correct the problem.
Here is what the record shows us. USA Funds’ agreement with Navient required that Navient and its vendors comply with all federal regulations. For its part, USA Funds maintains an 800-number to receive customer complaints and has an email on its website for complaints or inquiries. USA Funds also conducts regular audits of its accounts, as required by statute and regulation. See 20 U.S.C. § 1094(c)(1)(C)(i); 34 C.F.R. § 682.410(b)(1). When USA Funds learns of possible TCPA violations through an audit or customer complaint, it reports them to Navient, and asks Navient to take corrective action. All of the information we have on USA Funds’ audits comes from the deposition of one USA Funds employee—Kevin Tharp, the manager of the delinquency and default management section, who had been employed at USA Funds for thirty-seven years and had been the section head for twenty years. Under the audit guidelines, USA Funds examines at least 150 randomly selected accounts for compliance with repayment programs, such as loan rehabilitation and wage garnishment. In the process of reviewing the selected accounts, USA Funds reviews collection efforts and, in particular, skip-tracing, because it is required by Department of Education regulations. 34 C.F.R. § 682.411(h)(1).

Tharp explained that USA Funds has no contractual relationship with the debt collectors and no authority to hire, fire, or discipline them. What USA Funds did when it learned of potential violations was “recommend corrective action” to Navient. This corrective action might range from Navient directing the debt collector to remove the phone number from the autodialer to withholding payment from the debt collector. Tharp was asked if he knew of any instance in which a debtor complained to USA Funds of being autodialed or even called on a number he or she did not consent to be called on. Here is the exchange:

Q: “Has USA Funds ever received a complaint from a borrower … about the borrower being called on a cellular telephone that they hadn’t consented to being called on by a collections agent calling about a USA Funds’ guaranteed loan?”

A: “Not that I’m aware of.”

He was then asked about auto-dialing:

Q: “Do you know whether USA Funds has ever received a complaint from a borrower relating to the use of a dialer on a USA Funds’ guaranteed loan?”

A: “None that I’m aware of [aside from this case].”

The only examples of “improper” efforts that Tharp was questioned about do not reveal any information about the use of skip-tracing and autodialing. The first was a 2010 audit by USA Funds, which identified what was described as the “calling of an incorrect phone number.” Although the majority assumes the worst, Tharp was never asked whether the phone number was obtained through skip-tracing. In fact, there is no evidence that the “incorrect phone number” was even another phone number of the debtor’s or was just a wrong number entirely. The only other “improper collection effort[]” identified in the deposition reflects the same lack of information. A 2000 audit revealed that a phone “not associated with the borrower was repeatedly called.” However, again, it is unclear whether it was a number the debtor did not consent to or just a wrong number. The questioning, in fact, suggests that it was not even an additional number of the debtors’: “the repeat finding was that there had been a number called that wasn’t the borrower.” This questioning of Tharp yielded no evidence that numbers were obtained through skip-tracing or called with autodialers. There is simply no support for the majority’s conclusion that USA Funds knew that the collectors were using autodialers in combination with skip-tracing and approved of the practice.

Henderson also deposed Mark Verbrugge, senior director of operations for Navient, but his answers don’t help her either. Verbrugge testified that Navient conducts its own audits. It monitors whether the debt collectors were autodialing or manually dialing phone numbers through on-site visits. Navient also reviews customer complaints, including those made directly to Navient, or through an ombudsman or an agency, such as the Better Business Bureau. Navient has taken corrective action, including directing the debt collector to change its collection methods and cease all contact.

Verbrugge also testified that Navient did not typically inform USA Funds of what dialers the debt collectors used, and he did not know of any instances where Navient informed USA Funds that autodialers were used to call skip-traced numbers. Nor did he know whether USA Funds was able to obtain that information through its own audits.

Nothing here shows that USA Funds ratified “improper collection efforts.” The sum of Henderson’s evidence regarding USA Funds’ ratification of improper dialing consists of USA Funds’ own audit that shows that it disapproved of general TCPA violations and took affirmative steps to discourage it. That is not ratification under any fair reading of the Restatement of Agency. The whole point of the audits by USA Funds and Navient to ensure compliance with federal law. Both Tharp and Verbrugge testified that when their audits disclosed improper collection efforts, Navient—sometimes on its own initiative and sometimes at the direction of USA Funds—took corrective action, such as withholding payment, suspending a debt collector, or reducing its placements with the collector. The only record evidence shows that USA Funds took steps to ameliorate any TCPA violations, not to ratify them. The majority’s claim that “USA Funds made no effort to end its relationship with any of these debt collectors or to ensure future TCPA compliance” is thus contrary to all the evidence in the record. Maj. Op. at 14–15. In the end, the only evidence Henderson has of an unlawful practice is her own testimony that she was autodialed on a phone number
she didn’t provide to her lender. That might be sufficient to show that someone violated the TCPA, but it doesn’t prove a thing about USA Funds’ complicity any violations. But under the majority’s theory of ratification, if a debt guarantor like USA Funds knows that there are violations “in the debt collection industry,” it is liable for the debt collectors’ actions, even if USA Funds has taken corrective action. That is not a theory of ratification—it is strict liability, and nothing in the TCPA authorizes such a broad theory.

2. Willful Ignorance

The majority holds, in the alternative, that “[e]ven if the facts are insufficient to infer actual knowledge by USA Funds that the debt collectors were violating the TCPA, USA Funds at a minimum ‘had knowledge of facts that would have led a reasonable person to investigate further.’” Id. at 15–16 (quoting Restatement (Third) of Agency § 4.06 cmt. d). It states that “USA Funds’ audit findings combined with its knowledge about common practices in the industry should have alerted USA Funds that it needed to investigate further,” but it willfully chose not to. Id. Once again, the record does not support this holding.

As discussed above, the only evidence in the record shows that when USA Funds discovered TCPA violations through an audit or customer complaint, it reported the complaint to Navient and recommended corrective action—it did not “willfully ignore” anything. The debt collectors were not USA Funds’ vendors to hire and fire; they were hired and supervised by Navient. It was then Navient’s responsibility to ensure the offending debt collector corrected its actions. Henderson provided no evidence that Navient failed to follow up on USA Funds’ requests for action, or that USA Funds made these requests and then looked the other way. The majority emphasizes that USA Funds did not “terminate its contact with Navient,” id. at 15; however, there is no evidence in the record that USA believed—or even had reason to believe—that Navient was mishandling the complaints or ignoring USA Funds’ recommended corrective action. To the contrary, the undisputed testimony from the only Navient witness (Verbrugge) is that Navient took USA Funds’ requests “under strong consideration.”

The majority asserts that because USA Funds did not instruct Navient to fire the collectors and “made no effort . . . to ensure future TCPA compliance,” the debt collectors were “likely to draw [the] inference” that USA Funds’ silence manifested its assent” to the TCPA violations. Id. at 14–15 (quoting Restatement of Agency § 4.01 cmt. f). But USA Funds had no contractual relationship with the debt collectors—it could not fire them because it never hired them in the first place. Rather, it reported any complaints to Navient and gave Navient full authority to handle them—including the authority to fire offending debt collectors without USA Funds’ interference. But in any event, the majority’s minor premise—that USA Funds “made no effort”—is contrary to the only evidence in the record, and its conclusion—that debt collectors would “infer[] . . . assent”—is pure speculation, because Henderson did not sue, or even depose, any debt collector. Id. I simply do not see how USA Funds can be deemed to have willfully ignored wrongful practices if the only evidence provided shows that it consistently tried to correct them.

Lastly, the majority asserts that the “collection structure” between USA Funds and Navient allowed USA Funds “to remain willfully ignorant and avoid liability.” Id. at 16. I am not naive about what is going on here, and the majority may have a broader point to make. The way that USA Funds structured its collection efforts—hiring Navient to manage the hiring of collection agencies—may suggest that USA Funds is trying to shield itself from the dark underbelly of the debt-collection business. But unless we are prepared to indict the entire industry and hold everyone involved responsible based solely on general industry violations and collection structures (which likely would include the Department of Education itself), I do not see the evidence to satisfy agency principles. I repeat that the majority’s holding sounds in strict liability, and I think this decision will send shudders through the industry. Maybe that is a good thing, but I don’t see our mandate in the TCPA to cause such disruption. It is better for the Department of Education, the FCC, or Congress to address the matter.

B. Implied Actual Authority

Because I find that Henderson did not create a genuine issue of material fact that USA Funds ratified the debt collectors’ actions, I must also briefly address her claim that USA Funds gave the debt collectors implied actual authority to violate the TCPA. This argument fails for much the same reasons as her ratification theory. “The legal consequences of an agent’s actions may be attributed to a principal when the agent has actual authority (express or implied) or apparent authority.” Salyers v. Metro. Life Ins. Co., 871 F.3d 934, 940 (9th Cir. 2017) (citing Restatement (Third) of Agency § 2 intro. note). “Implied actual authority comes from a general statement of what the agent is supposed to do; an agent is said to have the implied authority to do acts consistent with that direction.” NLRB v. Dist. Council of Iron Workers of Cal. & Vicinity, 124 F.3d 1094, 1098 (9th Cir. 1997).

Henderson argues that the debt collectors acted with implied actual authority from USA Funds because they “reasonably believed, based on USA Funds’ manifestations and actions, that they had authority to act as USA Funds’ agent in all aspects of the transactions with debtors.” We have no evidence in this record from any debt collector as to what the debt collector believed about USA Funds or why that belief was reasonable. Henderson’s speculative assertions are insufficient to create a genuine issue of material fact that the debt collectors reasonably believed that USA Funds approved of their TCPA violations—particularly when the only evidence in the record is that Navient would withhold payment or cease working with the debt collectors if TCPA violations
occurred. Any debt collector who believed that USA Funds approved of TCPA violations would do so unreasonably. See Restatement (Third) of Agency § 2.01 (requiring the agent’s belief be reasonable); see id. cmt. c (“The focal point for determining whether an agent acted with actual authority is the agent’s reasonable understanding at the time the agent takes action.”).

Although a “smoking gun may not be needed” to overcome a motion for summary judgment, Ms. Henderson still must provide “something more than speculative, conclusory allegations.” Towers v. Iger, 912 F.3d 523, 532 (9th Cir. 2018).

II

Henderson has not provided sufficient evidence to create a genuine issue of material fact that USA funds knew or willfully ignored TCPA violations, nor that it granted implied actual authority to the debt collectors to violate the TCPA. For these reasons, I respectfully dissent. I would affirm the judgment of the district court.
Felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). These charges stemmed from the robbery of a convenience store in Waialua, Hawaii, carried out by Troiano and others. During the robbery Troiano branched a Colt .45 semi-automatic pistol, took $12,000 from an ATM, and injured the store clerk.

At sentencing, the government introduced certified copies of Troiano’s prior Hawaii state convictions, including, as relevant here, two 1991 and two 1998 convictions for burglary in the first degree. The Presentence Investigation Report (“PSR”) noted that Troiano was subject to the career offender sentencing enhancement under U.S.S.G. § 4B1.1,1 because he was over 18 at the time of the instant offense, the offense was a crime of violence, and he had at least two predicate felony convictions for crimes of violence (the 1991 and 1998 Hawaii first-degree burglaries). The PSR also explained that Troiano faced a mandatory 7-year consecutive sentence on Count 3 under 18 U.S.C. § 924(c)(1)(A)(ii), for brandishing a firearm during and in relation to a crime of violence. Further, the PSR noted that Troiano faced a mandatory minimum term of 15 years on Count 4 under 18 U.S.C. § 924(c)(1), because, under the ACCA, Troiano had three previous convictions “for a violent felony … committed on occasions different from one another[.]”

For the purpose of calculating Troiano’s Sentencing Guidelines range, the PSR explained that Counts 1 and 2 were grouped under U.S.S.G. § 3D1.2(b), because Count 2 charged a substantive offense that was the subject of the conspiracy charged in Count 1. Count 3 was not grouped with any other count because of the mandatory 7-year consecutive sentence it carried. Count 4 also was not grouped because the mandatory consecutive sentence for Count 3 already accounted for the firearm possessed in connection with the robbery counts.2 Ultimately, due to his career offender status, Troiano’s Guidelines range on Counts 1 and 2, as well as on Count 4, was 360 months to life. The PSR referenced U.S.S.G. § 5G1.2(e), stating that in cases involving career offenders, “to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that … the [84-month] sentence to be imposed on the 18 U.S.C. § 924(c) … count shall be imposed to run consecutively to any other count.”

At sentencing, the district court adopted the PSR, including the calculation of Troiano’s Guidelines range. The court then varied below the range and imposed a total sentence of 24 years, stating:

I believe that an appropriate sentence as to counts 1, 2, and 4 is 17 years. As to count 3, I am giving you seven years. And so that is a total of 24 years. And the sentence of 17 years on counts 1, 2, and 4 run concurrently. The sentence as to count 3 runs consecutively, and that is how, when you total it up, it becomes 24 years, which is vastly different than 360 months to life. And it is my hope that you will look at that as an opportunity to pay for your crimes but still have some life left at the end of that.

Troiano’s conviction and sentence were affirmed on direct appeal, and his first motion under 28 U.S.C. § 2255, alleging ineffective assistance of counsel, was denied. See United States v. Troiano, 258 F. App’x 983 (9th Cir. 2007). In 2016, following the Supreme Court’s decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which struck down as unconstitutionally vague the ACCA’s residual clause definition of “crime of violence,” Troiano was permitted to file a second section 2255 motion. In that motion, Troiano argued: first, that post-Johnson, he was no longer subject to a 15-year mandatory minimum sentence under the ACCA for Count 4; second, that because of the Guidelines’ identically worded residual clause definition of “crime of violence” he was not properly designated a career offender under U.S.S.G. § 4B1.1; and third, that Hobbs Act robbery was not a crime of violence for purposes of 18 U.S.C. § 924(c).

Acknowledging Johnson, the district court granted relief on Troiano’s claim that the ACCA enhancement was incorrectly applied to Count 4, but it denied his Guidelines challenge in light of Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding that the Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause). It also denied relief on Troiano’s section 924(c) claim. The court then ordered the parties to file memoranda “addressing their positions as to the procedure for post-2255 proceedings in this case,” including “the need for a revised Presentence Investigation Report, the need for a resentencing hearing, and the need for [Troiano] to be present at a resentencing hearing.”

After full briefing, the court issued its order correcting Troiano’s sentence. Noting its “wide discretion in choosing the proper scope of post-2255 proceedings,” the court opted not to conduct a full resentencing as to all four counts of conviction, and instead corrected Troiano’s sentence on Count 4 to 10 years—the maximum sentence permitted without the ACCA enhancement. Because Troiano’s 17-year sentences on Counts 1 and 2 and his 7-year consecutive sentence on Count 3 were not altered, his overall sentence of 24 years remained unchanged.

The district court issued Troiano a Certificate of Appealability (“COA”) to challenge the procedure by which it corrected his sentence, but denied COAs to challenge his career offender designation and whether Hobbs Act robbery constitutes a crime of violence for purposes of 18 U.S.C. § 924(c). We also declined to certify the latter two issues, but

1. All references herein are to the 2005 version of the United States Sentencing Guidelines, under which Troiano was sentenced, and to then-current versions of relevant statutes.

2. The PSR made clear, however, that Troiano was an Armed Career Criminal because he was subject to an enhanced sentence on Count 4 under the provisions of 18 U.S.C. § 924(e).
did so without prejudice to Troiano raising them in his opening brief.

II

We have not explicitly stated in a published opinion which standard of review applies to a district court’s determination of the appropriate remedy in a 28 U.S.C. § 2255 proceeding. We take the occasion to do so here, and hold that the standard is abuse of discretion.

Citing our cases discussing the standard of review for decisions to grant or deny section 2255 motions, Troiano urges us to apply de novo review. See, e.g., United States v. Swisher, 811 F.3d 299, 306 (9th Cir. 2016) (en banc) (“We review de novo a district court’s denial of relief to a federal prisoner under 28 U.S.C. § 2255.”); United States v. Navarro, 160 F.3d 1254, 1255 (9th Cir. 1998) (“We review the grant of a § 2255 motion de novo.”). Those cases, however, do not discuss which standard we are to apply when reviewing the district court’s choice of remedial action in response to a successful—or, as here, a partially successful—section 2255 motion.

We have already declared in Loher v. Thomas, 825 F.3d 1103, 1111 (9th Cir. 2016), a case brought under 28 U.S.C. § 2254, that “review [of] the district court’s determination of the appropriate remedy for a constitutional violation on a habeas petition [is] for abuse of discretion.” Section 2255 is “intended to mirror § 2254 in operative effect.” United States v. Winkles, 795 F.3d 1134, 1141 (9th Cir. 2015), and we see no reason to distinguish between those sections when it comes to reviewing the district court’s choice of remedy after it grants habeas relief.

Moreover, the deferential abuse of discretion standard accords with the “broad and flexible power” conferred upon district courts under section 2255. United States v. Handa, 122 F.3d 690, 691 (9th Cir. 1997). See also United States v. Jones, 114 F.3d 896, 897 (9th Cir. 1997) (noting that the statute “gives district judges wide berth in choosing the proper scope of post-2255 proceedings”). Additionally, at least four of our sister circuits have explicitly applied the abuse of discretion standard to remedial decisions under section 2255. See United States v. Brown, 879 F.3d 1231, 1235 (11th Cir. 2018) (adopting abuse of discretion standard when reviewing a district court’s “choice of § 2255 remedy” and citing to section 2255 cases from the First, Second, and Fourth Circuits applying that standard). Accordingly, we follow our precedent from the section 2254 context and adopt the approach of our sister circuits in reviewing the district court’s decision to correct Troiano’s sentence for abuse of discretion.

III

The district court did not abuse its discretion when it declined to conduct a full resentencing and instead corrected Troiano’s sentence only as to the count of conviction affected by Johnson. Troiano argues that the district court grouped his counts of conviction to fashion a sentencing package and that the so-called “sentencing package doctrine” requires that he be resentsented on all four counts. Even were we to conclude that the counts were grouped for sentencing—something the record does not reflect here—the decision to restructure a defendant’s entire sentence when only one of the counts of conviction is found to be invalid is discretionary and not, as Troiano suggests, mandatory.

Troiano relies primarily on our decision in Handa, which discussed a “likelihood that the sentencing judge will have attempted to impose an overall punishment [in a multi-count conviction] taking into account the nature of the crimes and certain characteristics of the criminal.” 122 F.3d at 692. We there stated that under such circumstances, if one count of conviction is undone “the district court is free to put together a new package reflecting its considered judgment as to the punishment the defendant deserves for the crimes of which he is still convicted.” Id. (emphasis added). But we did not state that the district court must do so. To the extent it was not made clear in Handa, we now clarify that the decision to unbundle a sentencing package—that is, to conduct a full resentencing on all remaining counts of conviction when one or more counts of a multi-count conviction are undone—rests within the sound discretion of the district court. Cf. United States v. Evans-Martinez, 611 F.3d 635, 645 (9th Cir. 2010) (in the direct appeal context, where counts are grouped for sentencing, “a district court may resentence a defendant on each count remanded by the appellate court, even if the district court made no error with respect to a particular count,” but that “this rule is phrased in the permissive; it is not a requirement”).

In any event, it is evident from the record in this case that Troiano’s counts of conviction were not actually grouped for sentencing in any material way that might have led the district court, in its discretion, to unbundle them for resentencing. As the district court itself explained, Troiano’s “sentence as to Count 4 was not grouped with either Counts 1, 2, or 3, for sentencing guideline calculations … [and] the sentencing guidelines for Counts 1, 2, and 3, were unaffected by [his] conviction for Count 4.” In other words, Troiano’s Guidelines range would have remained 360 months to life even if he had never been convicted of Count 4. There is simply no reason

3. Neither did the Seventh Circuit in either of the two cases upon which we primarily relied in Handa. See United States v. Binford, 108 F.3d 723, 728 (7th Cir. 1997) (explaining that “when part of a sentence is vacated … the district court may ‘rebundle’ the package by resentencing the defendant” (emphasis added)); United States v. Smith, 103 F.3d 531, 535 (7th Cir. 1996) (concluding that “the entire sentence can be revisited”).

4. Troiano nevertheless insists that Count 4 informed the district court’s sentencing decision because it carried the highest mandatory minimum and therefore set the sentencing floor as to the total sentence the court could select. While it is true that with the ACCA enhancement the district court could not impose a sentence less than 15 years for Count 4, it does not follow that without that floor the district court would have chosen a sentence lower than 17 years for Counts 1 and 2, because the Guidelines range on those counts, independent from Count 4, was 30 years on the low end. See Gall v. United States, 552 U.S. 38, 49 (2007) (declaring that “the Guidelines should be the starting point and the initial benchmark” for a sentence); see also Evans-Martinez,
to conclude on this record that removing the sentencing enhancement on Count 4 had any impact on the sentences for the unaffected counts, let alone that the district court abused its discretion by not “unbundling” and conducting a full resentencing proceeding on all counts.

IV

Troiano is entitled to a COA on his two remaining issues only if he can demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citation and internal quotations omitted). *See also* 28 U.S.C. § 2253(c)(2) (“A certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right.”). Troiano has not made that showing here.

Jurists of reason would not disagree with the district court’s conclusion that *Beckles* forecloses Troiano’s due process challenge to his career offender designation under the Sentencing Guidelines. In *Beckles*, the Supreme Court held that “the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)’s residual clause is not void for vagueness.” 137 S. Ct. at 895. Accordingly, we do not reach Troiano’s challenge to his career offender designation.

We likewise do not reach Troiano’s claim that Hobbs Act robbery is not a crime of violence as defined under 18 U.S.C. § 924(c)(3)(A), otherwise known as the “force clause.”

V

We hold that we review for abuse of discretion a district court’s determination of the appropriate remedy in a 28 U.S.C. § 2255 proceeding. The district court did not abuse its discretion by correcting Troiano’s sentence only as to the affected count of his multi-count conviction. Troiano’s arguments concerning his two uncertified issues are treated as a motion to expand the certificate of appealability, which is denied. *See* 9th Cir. R. 22-1(e).

AFFIRMED in part; DENIED in part.

---

611 F.3d at 637 (explaining that although “a mandatory minimum sentence becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range[,] all other counts … are sentenced based on the Guidelines sentencing range, regardless [of] the mandatory minimum sentences that apply to other counts”). Given the Guidelines range for Counts 1 and 2, the violence involved in the instant offenses, and Troiano’s extensive criminal history, we do not think it likely that the district court would have varied even lower than its already-significant 156-month downward variance if the ACCA enhancement to Count 4 had been eliminated. The district court hinted as much at a status conference it held before correcting Troiano’s sentence.
California Courts of Appeal

Cite as 19 C.D.O.S. 2667

CALIFORNIA DEPARTMENT OF FINANCE, Plaintiff and Respondent, v. CITY OF MERCED et al., Defendants and Appellants; LISA CARDELLA-PRESTO, as Auditor-Controller, etc. Real Party in Interest.

No. C085761
In The Court of Appeal of the State of California Third Appellate District (Sacramento)
(Super. Ct. No. 34-2016-80002485CU-WM-GDS)
APPEAL from a judgment of the Superior Court of Sacramento County, Michael P. Kenny, Judge. Affirmed as modified.
Filed March 22, 2019

COUNSEL

Xavier Becerra, Attorney General, Thomas S. Patterson, Senior Assistant Attorney General, R. Matthew Wise, Deputy Attorney General, for Plaintiff and Respondent. Best, Best & Krieger, Iris P. Yang, T. Brent Hawkins for Defendants and Appellants.

OPINION

This is an unusual “Great Dissolution” case (see City of Brentwood v. Campbell (2015) 237 Cal.App.4th 488, 491) that turns on basic civil procedure questions.1 The City of Merced (City) participated in the normal due diligence review (DDR) process to review what, if any, monies had to be disgorged when its former RDA was statutorily dissolved. The City did not initiate a judicial challenge to the amounts the Department of Finance (DOF) ultimately found had to be repaid and the reasons therefor. The DOF soon filed what amounted to a collection action, seeking mandamus compelling the City to transfer certain money to the RDA’s successor agency, and compelling that agency to transfer money to the relevant county’s auditor-controller. The City answered with a general denial and boilerplate affirmative defenses. The City then tried to challenge the merits of the DDR determinations, and later filed a belated cross-petition seeking to challenge the merits.

The trial court struck the cross-complaint, declined to consider the City’s challenges to the merits of the disputed amounts, and ordered a writ compelling the monetary transfers. The City timely filed this appeal.

We hold the trial court properly declined to consider the merits of the dispute, but we will direct the trial court to modify the judgment to clarify a particular monetary amount and affirm the judgment as modified.

BACKGROUND

The City had an RDA; the relevant successor entity is the Merced Designated Local Authority (Authority), consisting of three gubernatorial appointees vested with the powers and duties of a typical successor agency. (See Health & Safety Code, § 34173, subd. (d)(3)(A).)2

During the DDR process, as is typical, DOF reviewed various transactions to determine which, if any, were “enforceable obligations,” a term of art in dissolution cases. (See, e.g., Grass Valley, supra, 17 Cal.App.5th at pp. 574-575.) The Authority was late in submitting the two required reviews to DOF. DOF made determinations regarding the funds and initially determined some $13 million was owed. After a meet-and-confer process and additional correspondence, DOF agreed some of that money had already been paid, and on August 25, 2016, sent a letter stating $10,020,210.83 was owed and providing 60 days to pay the money or agree to a payment plan. The money was not paid, no payment plan was reached, and as the trial court phrased it: “Further, Respondents did not seek judicial review of DOF’s DDR determinations.”

On November 15, 2016, DOF filed the instant petition for traditional mandamus against the City and the Authority, naming the Merced County Auditor-Controller (Auditor) as the real party in interest. It alleged the Authority filed its DD Rs in 2015—one for a housing fund and one for everything else—long past the statutory deadlines. (Cf. § 34179.6, subd. (a) [each was due in 2012].) “Respondents have not contested DOF’s DDR determinations but have neither made the required transfers of funds nor reached an agreement” on a payment plan. DOF alleged the City and the Authority had a present statutory duty to turn over the money. (See §§ 34179.6, 34179.9.)

The Authority and City each answered with a general denial and boilerplate affirmative defenses.3

1. “Given the many RDA [Redevelopment Agency] cases this court has decided, due to the designation of Sacramento County as the venue for such disputes [citations], its basic implementing mechanisms are well understood by the parties.” (City of Grass Valley v. Cohen (2017) 17 Cal.App.5th 567, 573, fn. omitted (Grass Valley.) Thus, we decline to elaborate on history and nomenclature except as necessary.

2. Further undesignated statutory references are to the Health and Safety Code.

3. Real party Auditor advised this court that she has no direct interest in the appeal and filed no brief. The Authority’s position was that it never held the money at issue and it, too, should have been deemed a real party rather than a respondent. DOF disagreed, as did the trial court, on the theory that once the City paid over the money it owed, the Authority would have a legal duty to distribute it in accordance with the dissolution statutes.
DOF’s memorandum in support of the petition described the process leading to its final DDR determinations, and emphasized that no challenges to its final determinations had been made. It claimed a ministerial duty on the part of the City and the Authority to comply with those findings, relying on statutes giving it the power to sue to enforce the dissolution statutes (§ 34177, subd. (a)(2)) and providing a five-day period for the successor agency to comply once DOF has given notification of its determinations. (See § 34179.6, subd. (f).)

The City’s opposition partly claimed documents purportedly damaged by flooding as well as its own decision not to become the successor agency for its former RDA were factors outside its control, causing the delays and impairing its ability to contest some claims. The City argued, on the merits, that a particular housing project was an enforceable obligation ($5,688,500) and that certain bond proceeds ($491,815 transferred by the former RDA to the Authority and $280,359 of “pre-2011 bond proceeds that were used” pre-dissolution) could not be disbursed to taxing entities. 3

DOF’s reply repeated there had been no legal challenge to the approximately $10 million determined to be owed via the DDR process. DOF objected that this lawsuit was not an appropriate vehicle for the City to seek review of the DDR determinations, because this petition merely sought transfer of the money pursuant to statutes so providing. DOF conceded $491,815 in bond proceeds had already been transferred to the Authority and therefore DOF “no longer seeks the return” of that money, but pointed out that its DDR review had already disallowed the City’s claim regarding the $280,359 in previously spent bond money, consisting “of unencumbered bond proceeds that must be transferred” under the dissolution statutes. DOF pointed out the City was not contesting about $3.5 million of the total determined due by the DDR review.

Confusingly, DOF also defended the merits of its determinations.

On June 15, 2017, the trial court issued a tentative ruling for DOF, partly finding that the City had never properly challenged the DDR determinations.

At the first of four hearings, held on June 16, 2017, the City claimed that based on ongoing negotiations with DOF, as well as other issues, the City had not had time to file a petition to challenge the DDR results, and sought a continuance so it could file a petition. When the court pointed out that seven months had passed during this litigation (filed November 15, 2016), the City replied that it had been busy preparing the record and so forth, and thought its issues could be consolidated “for the Court’s consideration.” DOF replied that the original submissions had been late and it was too late to challenge the DDR determinations.

Under questioning by the court, the City explicitly conceded it was not challenging that it owed approximately $3.5 million. The court proposed continuing the matter “contingent” on the City paying the undisputed amount, so the parties could continue to discuss the still-disputed amount. The court characterized the case as a “transfer” petition rather than a “substantive” case.

The trial court continued the case for the parties to “look into the issue and if they want to file anything, they can then file it. And it would probably result in a related case determination if the case would then come back here and we can put the cases together. [¶] I’m going to make that contingent on the transfer of the 3 and a half million dollars. I don’t see any reason why that shouldn’t be transferred, unless the parties can identify something. It seems to me that there is no dispute with regard to that amount.” The court indicated that if the parties could not agree on a payment plan for the undisputed amount, the court would order the City to pay it in full.

The parties agreed on an order continuing the matter to August 4, 2017, so that they could meet and confer about how the City would pay the agreed amount, either by transfer or a payment schedule.

After no payment plan was reached, DOF sought an order for immediate payment of the full amount agreed. The record contains a proposed order by which the court would have ordered the City to pay the “undisputed portion” ($3,559,536.83) to the Authority within five business days, without impairing the ability of DOF to agree to a payment plan with the City.

On August 1, 2017--without seeking leave of the court—the City filed a cross-petition purporting to challenge the DDR findings on the merits. The City did not explain why those findings had not been challenged before. The petition sought traditional (rather than administrative) mandamus, and alleged DOF’s DDR determinations were “arbitrary, capricious, an abuse of discretion and unsupported by law or the facts,” DOF had a duty “to recognize” that $5,968,859 “was properly expended on enforceable obligations,” $491,815.28 of bond proceeds were already held by the Authority, and DOF was mistaken about the $280,359 in pre-dissolution bond proceeds, thereby reducing the City’s liability to the approximate $3.5 million it had conceded. The petition does not allege that the City had ever filed any other challenge to DOF’s final DDR findings.

At the second hearing, on August 4, 2017, the City argued it could not agree to a payment plan on even the agreed amount until it knew its total liability. The City claimed that because it had filed the cross-petition, everything would have to be decided first, otherwise there would be a violation of the one final judgment rule. 5 DOF pointed out that at the prior hearing the City had not indicated that it was disputing the total

4. Procedurally, the City claimed mandamus was unavailable because DOF had an adequate remedy at law, purportedly a “full trial” on the merits of DOF’s claims. In City of Bellflower v Cohen (2016) 245 Cal.App.4th 438, 453 and footnote 10 we explained that “injunctive or other appropriate relief” could be sought by statute. (See § 34177, subd. (a)(2).) Traditional mandamus was therefore available to compel compliance with ministerial duties defined by statute, as DOF contended.

5. As DOF pointed out in the trial court, the one final judgment rule is an appellate rule under which “a judgment that fails to dispose of all the causes of action pending between the parties is generally not
hearing the court “was indicating that filing a Cross-Petition would be contingent on the payment of the 3.5 million not in dispute. [¶] THE COURT: I recall that.” The court expressed a concern that the City appeared to be engaging in dilatory tactics. The City, conceding the $3.5 million amount not disputed, insisted it could not agree to any payment plan without knowing its total eventual liability. The court agreed to continue the matter again, stating the parties had to resolve the undisputed amount, which they were supposed to have done “a month and a half ago.”

By the third hearing (August 25, 2017), no payment plan had been agreed upon and DOF asked the court to order the money transferred, as provided by statute. DOF also suggested that if any later challenge on the merits succeeded “funds can be reversed at that point.” When DOF reminded the court that the continuance for a cross-petition had been contingent on the City’s payment of the undisputed funds, the court concurred, and also pointed out that the City had not sought leave to file the cross-complaint. When the City claimed it assumed the court would grant the leave to amend, the court replied, “I never saw the request,” and if the City had filed a request for leave to amend DOF would have had a due process right to oppose the request; further, “there is also a statutory issue.” The court ordered one more continuance to resolve the issues, emphasizing that the approximately $3.5 million amount “hasn’t been in dispute for months.” The court suggested that it could sign an order regarding that money, regardless of other issues.

On August 29, 2017, DOF answered the cross-petition, in part arguing it was untimely and had not been filed with leave of the court.

On August 30, 2017, the City filed an objection, contending in part that it should not have to pay even the undisputed amount, on the theory that this would violate the one final judgment rule because the cross-petition contested that other money was owed. It reiterated the earlier excuses for its purported inability to timely challenge DOF’s claims.

At the fourth and final hearing on September 1, 2017, the trial court summarized some of the history, including that the undisputed amount had not yet been paid and the City had filed a cross-petition without leave of court, but that in any event the court was not going to assume the burden of working out a payment schedule for the parties. Instead the court proposed striking the cross-petition and affirming the original tentative decision (issued June 15, before the multiple continuances). When the City explained it was still not contesting the $3.5 million, the court replied, “Well, but you are in a different manner” by insisting on a convenient payment schedule and resolution of other issues. The court also pointed out that the City had “essentially disregarded the condition” the court had set for the filing of a cross-petition, viz., paying the undisputed money.

After further discussion the court stated: “I have pleadings that have been filed inappropriately, and I strike them. I have a tentative ruling which I issued three months ago, and I affirm it. And if you [i.e., the City] wish to basically file additional pleadings in a new case you can do so.” The court later reiterated that the cross-petition had not been properly accompanied by notice and a request for leave to amend, “It was simply filed.” The Authority argued that the City could appeal from the judgment issuing the writ and then file an attack (a new petition) on the disputed portion, dragging the Authority into an appeal and a second lawsuit. The court thought that might be procedurally correct; and “[a]t least that is clean. All of the parties know what procedures they are following, that is simple.”

Although there had been talk of a December hearing on the cross-petition regarding the disputed amounts, the court struck the cross-petition and answer thereto and affirmed its original (June 15, 2017) tentative ruling.

The writ (incorporating two prior minute orders, the June 15, 2017 tentative ruling and September 1, 2017 minute order affirming the same and striking the cross-petition and answer thereto) commands the City to “transfer the entirety of the $10,020,210.83 [DDR] balance, minus any unencumbered bond proceeds already transferred,” to the Authority, and for the Authority, “upon receipt” of such funds from the City, to transfer such funds to the Auditor.

The City timely filed this appeal from the judgment issuing the writ.

DISCUSSION

I

The Pledged Issues

The City contends the correctness of DOF’s DDR determinations about enforceable obligations were placed at issue in this case by its answer, thus the trial court should have addressed the merits of its claims. We disagree. The City’s answer generally denied the allegations of DOF’s petition and raised boilerplate defenses. But DOF’s petition did not put in issue the validity of its findings. And because the City’s answer did not allege that it had challenged DOF’s final determinations, neither did the answer.

First, the City’s general denial put in issue only whether DOF made the findings it made, not the adequacy of the findings themselves. Contrary to the City’s view, the possibility that DOF made mistakes does not change the fact that DOF’s findings were made (and went unchallenged). The City does not dispute that the dissolution statutes set forth a mechanism to compel compliance with DOF’s findings.

Further, as we have explained in a different case:

“Under general rules of civil procedure, an answer must contain ’[t]he general or specific denial of the material allegations of the complaint controverted by the defendant’ and

 appealable.” (Kurwa v. Kislinger (2013) 57 Cal.4th 1097, 1100.) The City never explained how an interim order that it pay what it agreed it owed would violate this rule or impair the trial court’s ability to proceed regarding any amounts still in dispute.
But the City never moved to amend its answer. [Citation.] The phrase “new matter” refers to something relied on by a defendant which is not put in issue by the plaintiff. [Citation.] Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as “new matter.” [Citation.]

“Such ‘new matter’ is also known as ‘an affirmative defense.’ [Citation.] Affirmative defenses must not be pled as ‘terse legal conclusions,’ but rather as facts ‘averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.’ [Citation.] A party who fails to plead affirmative defenses waives them.’ [Citation.]” (Quantification Settlement Agreement Cases (2011) 201 Cal.App.4th 758, 812-813.)

But none of the City’s (or the Authority’s) pleaded affirmative defenses challenged the fact that DOF had found specific amounts were due after the DDR process. Nor, in the moving and opposing papers on DOF’s petition, did the City ever dispute what DOF found during the DDR review, instead the City tried to dispute the correctness of those findings, an issue neither raised by DOF’s petition nor by the answers. The trial court repeatedly pointed this out to the City’s counsel, that is, that DOF’s findings had never been judicially challenged. The court also characterized the action as a “transfer” action (effectively, a collection action) by DOF, pursuant to the statutes on which the petition rests. As the City’s counsel, that is, that DOF’s findings had never been judicially challenged. The court also characterized the action as a “transfer” action (effectively, a collection action) by DOF, pursuant to the statutes on which the petition rests. As the City stated at the last hearing, it was the City that “wished to essentially interject different issues”--what the City called a “merits hearing”--into the case, long after the court issued its tentative ruling in favor of DOF.

As we have said in the context of summary judgment proceedings, the pleadings outline the perimeter of materiality, that is, they delimit the scope of the issues that are pertinent to resolution of the case. (See Couch v. San Juan Unified School Dist. (1995) 33 Cal.App.4th 1491, 1499; FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 381-382.) The pleadings in this case, properly construed, did not challenge the validity of the DDR findings. Therefore, the trial court properly declined to reach them.

6. The affirmative defenses, some evidently taken from a different lawsuit and therefore not entirely sensible, were: (1) the City was a separate entity from the Authority and not responsible for liabilities of its former RDA; (2) lack of standing; (3) waiver; (4) laches (referencing a different city); (5) unclean hands; (6) failure to do equity; (7) interference with the City’s lawful exercise of its discretion; (8) the City acted in good faith and did not abuse its discretion; (9) “the City’s actions were justified pursuant to its proper powers;” and (10) failure to join indispensable parties. An eleventh pleaded affirmative defense purported to reserve the right to raise other affirmative defenses later. But the City never moved to amend its answer.

II

Striking the Cross-Petition

The City contends the trial court should not have stricken its cross-petition. We find the court acted well within its discretion for multiple reasons.

If a party does not file a cross-complaint against its opponent “before or at the same time as the answer” (Code Civ. Proc., § 428.50, subd. (a)), that party “shall obtain leave of court” to file one (id., subd. (c)). (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1168, pp. 599-601.) The City neither filed its cross-petition timely nor asked for leave to file it, in violation of these rules, as well as in blatant violation of the trial court’s precondition that the City arrange to pay the undisputed amount owed. The court struck the cross-complaint for these reasons.

A court’s refusal of leave to file a belated cross-complaint is reviewed for an abuse of discretion. (See Crocker Nat. Bank v. Emerald (1990) 221 Cal.App.3d 852, 864; City of Sacramento v. Superior Court (1962) 205 Cal.App.2d 398, 401.) Given that the City did not even seek leave to file the cross-complaint (far less comply with the preconditions set by the trial court), the court quite properly struck it. (See Loney v. Superior Court (1984) 160 Cal.App.3d 719, 724 [“the cross-complaint of petitioners was properly stricken because leave of court was not obtained prior to its being filed.”])

The City’s claim that the trial court “invited” the filing, which the City thought was unnecessary because its answer sufficiently put into issue the relevant questions, is unpersuasive. First, the court suggested any challenge to the merits was conditional on payment of the undisputed $3.5 million or agreement on a payment plan therefor, which did not occur. Second, the court never suggested that the City could file a cross-petition without following required procedures, which the court pointed out both violated the relevant statute and deprived DOF of the opportunity to be heard on the question of leave to file. Nor did the court prevent the City from filing a request for leave, as the City suggests; it was the City that failed to follow appropriate procedures.

Accordingly, the trial court did not err in striking the cross-petition.

III

Validity of the DDR Determinations

The City claims we should review the merits of the disputed findings on appeal, because purely legal issues are presented and the relevant documents are in the record. DOF does not agree, but prophylactically defends the DDR findings in the event we choose to review the merits.

We reject the City’s claim that we should review the disputed issues on appeal. The outcome of a DDR process may be challenged by a mandamus action, resolution of which may then be appealed. As we have explained, the pleadings in this case do not properly raise any issues about the correct-
ness of the DDR determinations. Further, in other RDA cases we have rebuffed invitations to adjudicate similar claims in the first instance. (See Grass Valley, supra, 17 Cal.App.5th at p. 582 & fn. 9; City of Pasadena v. Cohen (2014) 228 Cal. App.4th 1461, 1467-1468.) We see no reason to depart from our role as a reviewing court in this case.

IV

Clarifying the Judgment (and Writ)

The parties agree that the amount to be transferred should not include approximately half a million dollars in bond proceeds ($491,815). The judgment is not inconsistent with this view because it directs the issuance of a writ stating the total amount due (from the City to the Authority, and thence from the Authority to the Auditor) with the caveat that it is “minus any unencumbered bond proceeds,” and the writ also contains this caveat.

The City suggests the judgment should state the dollar amount of the bond proceeds. DOF contends the relevant figure is undisputed and readily determined by reference to the record.

We shall direct the trial court to recall the writ and modify the judgment to issue a new writ specifying the exact dollar amount that the City and the Authority must transfer. This will eliminate any future claims of uncertainty.

DISPOSITION

The trial court is directed to recall the writ and modify the judgment so that it commands issuance of a writ consistent with this opinion. As modified, the judgment is affirmed. The City of Merced shall pay the Department of Finance’s costs of this appeal. (See Cal. Rules of Court, rule 8.278(a)(3).)

Duarte, J.

We concur: Raye, P. J., Robie, J.

Cite as 19 C.D.O.S. 2671

DANIEL NIETO, Plaintiff and Respondent, v. FRESNO BEVERAGE COMPANY, INC., Defendant and Appellant.

No. F074704
In The Court of Appeal of the State of California Fifth Appellate District (Super. Ct. No. 16CECG02614) APPEAL from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge. Filed March 7, 2019 Pub. order March 22, 2019

COUNSEL

Morgan, Lewis & Bockius, Thomas M. Peterson, Brian C. Rocca, and Kathryn T. McGuigan for Defendant and Appellant.

ORDER GRANTING REQUEST FOR PUBLICATION

As the nonpublished opinion filed on March 7, 2019, in the above entitled matter hereby meets the standards for publication specified in the California Rules of Court, rule 8.1105(c), it is ordered that the opinion be certified for publication in the Official Reports.

DETJEN, Acting P.J. WE CONCUR: FRANSON, J., DESANTOS, J.

OPINION

Plaintiff Daniel Nieto was employed for many years as a delivery driver for defendant Fresno Beverage Company, Inc., doing business as Valley Wide Beverage Company (VWB). After being terminated from his employment, Nieto filed a class action lawsuit against VWB alleging various wage and hour violations under California labor law. VWB responded by filing a petition to compel arbitration, since Nieto had signed a written arbitration agreement when he was hired. VWB argued that under the Federal Arbitration Act (9 U.S.C. § 1 et seq., the FAA) Nieto must be ordered to arbitrate the dispute in accordance with the terms of the parties’ arbitration agreement. Nieto opposed the petition, primarily arguing that his employment at VWB came within a statutory exemption to the FAA granted to transportation workers en-
gaged in interstate commerce. Nieto reasoned that since the FAA did not apply, a California law allowing court actions on wage claims notwithstanding the existence of an arbitration agreement (i.e., Lab. Code, § 229) was not preempted by the FAA, meaning the lawsuit may proceed in court. The trial court agreed with Nieto’s exemption argument and denied the petition to compel arbitration. VWB appealed from that order. We conclude the trial court correctly found that Nieto’s employment came within the FAA exemption. Accordingly, the trial court’s order denying the petition to compel arbitration is affirmed.

FACTS AND PROCEDURAL BACKGROUND

Nieto was employed by VWB as a delivery driver from April 1, 2008, to February 24, 2014. Shortly after his employment commenced, Nieto executed various documents pertaining to his employment, including an employee handbook and the arbitration agreement. The arbitration agreement provided among other things that arbitration was to be the exclusive remedy for all employment disputes, including disputes related to wage and hour issues. For reasons that are not disclosed in the record, Nieto’s employment was terminated on February 24, 2014.

On August 12, 2016, Nieto filed a class action complaint in the trial court against VWB for alleged violations of California wage and hour laws. The class action complaint sought, on behalf of Nieto and the class of other similarly situated current and former employees of VWB, meal period and rest break wages, minimum and overtime wages, and other wages and penalties allegedly due. The causes of action consisted of the following: (1) first cause of action for violation of Labor Code sections 226.7 and 512 (regarding meal period and rest break wages); (2) second cause of action for violation of Labor Code sections 510 and 1194 (regarding minimum and overtime wages); (3) third cause of action for violation of Labor Code section 203 (regarding waiting time penalties); (4) fourth cause of action for violation of Labor Code section 226 (regarding record keeping); (5) fifth cause of action for unfair business practices under Business and Professions Code section 17200 (premised on the Labor Code violations of the preceding causes of action).

On September 14, 2016, VWB filed its petition to compel arbitration. The petition asserted that the arbitration agreement was not preempted by the FAA. (See Perry v. Thomas (1987) 482 U.S. 483, 484, 492 [holding].)

In support of its petition to compel arbitration, VWB submitted a declaration specifically describing VWB’s involvement in interstate commerce. Among other things, the supporting declaration asserted that VWB is a beverage distributor, contracting nationally and internationally, buying beer, wine and other beverages manufactured in other states and countries, and after such beverages are transported to VWB’s warehouse, they are delivered to VWB customers in California. Thus, as acknowledged in VWB’s petition, “[t]he products delivered by VWB’s drivers are part of a continuous stream of interstate travel.” Consequently, according to VWB, its economic activity plainly involved interstate commerce and the parties’ arbitration agreement was and is governed by the FAA.

On or about October 4, 2016, Nieto filed his opposition to the petition to compel arbitration. Nieto’s opposition asserted that as a delivery truck driver engaged in interstate commerce, his employment was excluded from the FAA’s coverage based on the statutory exemption for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” (9 U.S.C. § 1, or section 1.) Thus, according to Nieto’s opposition, the FAA was not applicable, no preemption applied, and all issues were to be resolved under California law. Nieto’s opposition claimed that, under California law, specifically Labor Code section 229, he was entitled to have his wage claims heard in court notwithstanding the existence of the arbitration agreement. In any event, it was further argued that the arbitration agreement was entirely unenforceable because of several purportedly unconscionable provisions.

On October 11, 2016, VWB filed its reply in support of the petition to compel arbitration. VWB’s reply contended that the FAA exemption did not apply to Nieto since he only delivered products within California and did not cross state lines. Further, VWB insisted that Nieto had failed to show any of the provisions of the arbitration agreement were substantively unconscionable.

The hearing on the petition was held on October 26, 2016. On October 27, 2016, the trial court denied the petition to compel arbitration, with the tentative ruling becoming the order of the court. The trial court’s ruling found that the arbitration agreement was not substantively unconscionable, and therefore was enforceable. However, the trial court’s ruling went on to explain that Nieto’s employment came within the FAA’s exemption provided to transportation workers engaged in the movement of interstate commerce. The trial court noted that Nieto’s work qualified for the exemption even though his deliveries did not cross state lines, explaining as follows: “[VWB’s] general business activities involve[d] receiving shipments from other states and countries, storing same for a short period, then tasking employees such as [Nieto] with delivery of the goods to in-state customers. . . .
[As] [Nieto’s] employment involved transporting goods received from out of state, the transportation worker exemption to the FAA applied.

Furthermore, the trial court held that because Nieto was a transportation worker exempt from the FAA, Labor Code section 229 governed, which section “provides that an action for wage and hour claims may be maintained despite an agreement to arbitrate.” The trial court then concluded: “[Nieto’s] complaint is, in its entirety, an action for wage and hour violations. [Nieto’s] action may thus be maintained, regardless of the arbitration provision in the employment contract between [Nieto] and [VWB].” Accordingly, VWB’s petition to compel arbitration was denied.

On November 8, 2016, VWB timely filed its notice of appeal from the trial court’s order denying the petition to compel arbitration.

**DISCUSSION**

I. STANDARD OF REVIEW

“‘There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court’s order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court’s denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]’” (Avila v. Southern California Specialty Care, Inc. (2018) 20 Cal.App.5th 835, 839-840.) Here, as the facts appear to be undisputed, we review de novo the legal question of whether Nieto was a transportation worker exempt from the FAA. (See Muro v. Cornerstone Staffing Solutions, Inc. (2018) 20 Cal.App.5th 784, 790; Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 959.)

II. THE TRIAL COURT CORRECTLY RULED THE FAA DID NOT APPLY

A. The FAA Exemption

The FAA was enacted in 1925 to remedy the general hostility of American courts to the enforcement of arbitration agreements; and to effectuate that purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements. (Circuit City, supra, 532 U.S. at p. 111.) Section 2 of the FAA, the basic coverage provision of the FAA, makes the law applicable to contracts evidencing a transaction “involving commerce” (9 U.S.C. § 2), which language reflects that Congress intended the law’s coverage to extend to the full reach of its commerce clause power. (Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 277; Perry v. Thomas (1987) 482 U.S. 483, 490.)

Section 1 of the FAA provides a limited exemption from the law’s coverage to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” (9 U.S.C. § 1.) In Circuit City, the United States Supreme Court defined the catchall phrase “‘any other class of workers engaged in . . . interstate commerce’ ” to mean “transportation workers” (Circuit City, supra, at pp. 119, 121), which the court understood as “those workers ‘actually engaged in the movement of goods in interstate commerce.’” (Id. at p. 112.)

In Circuit City, the Supreme Court reversed the Ninth Circuit Court of Appeal’s decision that sections 1 and 2 of the FAA should be construed to exclude all employment contracts from the reach of the FAA. (Circuit City, supra, 532 U.S. at pp. 109, 112, 124.) In rejecting that view, the Supreme Court held that the plain meaning of “engaged in” interstate commerce in section 1 is narrower in scope than the open-ended formulation “involving” commerce in section 2 (Circuit City, supra, at p. 118), and the court explained further that this narrower construction of the section 1 exemption is consistent with the statutory purpose and context. (Circuit City, supra, at p. 118; see id. at pp. 119-124.) Applying this narrower construction, the Supreme Court concluded that the section 1 exemption, rather than exempting all employment contracts from the FAA, was limited to transportation workers. (Circuit City, supra, at pp. 119, 121.)

The Circuit City case elucidated Congress’ presumed intent in adopting the section 1 exemption: “It is reasonable to assume that Congress excluded ‘seamen’ and ‘railroad employees’ from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers. [¶] As for the residual exclusion of ‘any other class of workers engaged in foreign or interstate commerce,’ Congress’ demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence.” (Circuit City, supra, 532 U.S. at p. 121.)

Having briefly introduced the nature of the FAA exemption, we turn to VWB’s contentions on appeal. In challenging the trial court’s ruling that Nieto came within the FAA exemption, VWB argues that (i) the trial court applied the wrong standard, and (ii) Nieto was not a transportation worker engaged in interstate commerce. We disagree with both contentions.

B. The Trial Court Applied the Correct Standard

VWB first argues the trial court applied the wrong standard in evaluating whether Nieto qualified for the FAA exemption. As summarized above, while the basic coverage provision of the FAA (9 U.S.C. § 2) uses the broadly-inclusive “involving commerce” standard, the scope of the transportation worker exemption (9 U.S.C. § 1) is limited by the narrower “engaged in” interstate commerce standard. VWB contends that the trial court confused the two tests and failed to apply the narrower “engaged in” interstate commerce standard in decid-

1. As the Supreme Court noted in Citizens Bank v. Alafabco, Inc. (2003) 539 U.S. 52, at page 56, the term “involving commerce” in the FAA is “the functional equivalent of the more familiar term ‘affecting commerce’ – words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.”
ing that Nieto qualified for the exemption. VWB has failed to demonstrate that the trial court made such an error. The trial court’s ruling clearly and explicitly delineated the two standards, explaining that the FAA has general application to contracts “involving commerce,” but noting further “there is a narrow exemption” applied to transportation workers engaged in foreign or interstate commerce, which the trial court noted has been defined as “workers ‘actually engaged in the movement of goods in interstate commerce.’” The trial court then proceeded to analyze the merits of Nieto’s contention that he was “a driver engaged in interstate commerce, and . . . thus expressly exempt from the FAA.”

The trial court understood and applied the correct standard when it analyzed the issue of whether Nieto was exempt from the FAA.

C. Nieto Was a Transportation Worker Engaged in Interstate Commerce

Next, VWB contends that Nieto’s employment as a delivery truck driver did not meet the criteria for being considered a transportation worker engaged in interstate commerce. The crux of VWB’s argument is that because Nieto’s delivery routes did not cross state lines, but were merely intrastate, the exemption cannot apply to him. The trial court held otherwise, and on the facts of this case, the trial court is correct.

As decided in Circuit City, the section 1 exemption is applicable to “transportation workers,” defined as “workers ‘actually engaged in the movement of goods in interstate commerce.’” (Circuit City, supra, 532 U.S. at p. 112.) Leaving aside for the moment the question of whether it was necessary for Nieto to personally transport goods across state lines to qualify for the exemption, we note at the outset that delivery truck drivers whose primary purpose is to physically transport interstate goods are consistently held to be transportation workers under section 1 of the FAA. (See, e.g., Lenz v. Yellow Transp., Inc. (8th Cir. 2005) 431 F.3d 348, 351 [“Indisputably, if Lenz were a truck driver, he would be considered a transportation worker under § 1 of the FAA”]; Paleko v. Airborne Express, Inc. (3d Cir. 2004) 372 F.3d 588, 590, 593-594 (Paleko) [analysis of issue assumed that since truck drivers delivering interstate packages to customers in Philadelphia area would be within the residuum exemption, the plaintiff whose job was to closely manage, oversee and monitor those drivers would also be exempt]; Harden v. Roadway Package Systems, Inc. (9th Cir. 2001) 249 F.3d 1137, 1140 [finding that a delivery driver of interstate packages came within the exemption].) As one federal district court put it: “If there is one area of clear common ground among the federal courts to address this question, it is that truck drivers — that is, drivers actually involved in the interstate transportation of physical goods — have been found to be ‘transportation workers’ for purposes of the residuary exemption in Section 1 of the FAA.” (Kowalewski v. Samandarov (S.D.N.Y. 2008) 590 F.Supp.2d 477, 482-483; see Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC (7th Cir. 2012) 702 F.3d 954, 957 [holding truckers are transportation workers to the extent they are engaged in the movement of goods in interstate commerce].)

The key question here is whether Nieto came within the scope of the exemption even though his deliveries were exclusively to destinations within California. As indicated by the basic definition of a transportation worker in the Circuit City case, merely being a delivery truck driver, by itself, would not be enough since a transportation worker must also be “‘actually engaged in the movement of goods in interstate commerce’.” (Circuit City, supra, 532 U.S. at p. 112.) According to VWB, a delivery truck driver who does not personally cross state lines is not “engaged in interstate commerce” or engaged in the movement of interstate commerce for purposes of section 1 of the FAA, and therefore cannot qualify for the exemption. That assertion is overbroad, at least in the particular case and context before us. While it is true that a number of courts have held that if a delivery truck driver does cross state lines to make deliveries, that driver would obviously qualify for the exemption (see, e.g., Garrido v. Air Liquide Industrial U.S. LP (2015) 241 Cal. App.4th 833, 840; Veliz v. Cintas Corp. (N.D.Cal. 2004) 2004 U.S.Dist. LEXIS 32208, *18), VWB has not cited any clear or persuasive authority for the proposition that crossing of state lines is a necessary condition for the exemption to apply.2

Rather, as the trial court recognized, a transportation worker does not necessarily have to physically cross state lines in order to engage in the movement of goods in interstate commerce. In Christie v. Loomis Armored US, Inc. (D.Colo. 2011) 2011 U.S.Dist. LEXIS 141994, *7 (Christie), the court expressly rejected the argument that a worker may only qualify for the section 1 exemption if he or she delivered goods across state lines: “[A]n employee need not actually transport goods across state lines to be part of a class of employees engaged in interstate commerce. ‘Interstate commerce’ includes not only goods that travel across state lines

2. A few federal courts have attempted to synthesize the case law into a list of nonexclusive factors to assist in determining whether an employee fits within the section 1 exemption. Significantly, however, such attempts at distilling the case law have not indicated that the crossing of state lines by the employee is a requirement, but rather those courts have simply listed a number of factors to be considered, such as the following enumeration: “[F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee’s job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).” (Lenz v. Yellow Transp., Inc., supra, 431 F.3d at p. 352; see Veliz v. Cintas Corp., supra, 2004 U.S.Dist. LEXIS 32208 at pp. *23-*24.)
but also ‘the intrastate transport of goods in the flow of interstate commerce.'” (quoting *Siller v. L&F Distributors, Ltd.* (5th Cir. 1997) 109 F.3d 765 [1997 U.S.App. LEXIS 42893, *3*].) In *Christie*, although there was no evidence the driver personally delivered goods across state lines, the goods she delivered intrastate were deemed to be in the stream of interstate commerce, and therefore she belonged to the class of workers engaged in interstate commerce and the exemption applied. (*Christie, supra*, 2011 U.S. Dist. LEXIS 141994 at p. *8*; accord, *Diaz v. Michigan Logistics, Inc.* (E.D.N.Y. 2016) 167 F.Supp.3d 375, 380, fn. 3 [holding “Plaintiffs . . . were engaged in interstate transportation, notwithstanding that they did not actually drive across state lines, as Plaintiffs were directly responsible for transporting and handling automotive parts that allegedly moved in interstate commerce”].)

Similarly, in *Palcko, supra*, 372 F.3d 588, the transportation worker in question (Palcko) was not an actual delivery driver, but the exemption was held to apply to her because her work involved closely monitoring and directing the drivers who physically delivered interstate packages from the Airborne Express facility near the Philadelphia airport to their ultimate destinations within the Philadelphia area. (*Id.* at pp. 590, 593-594.) There was nothing in the record to suggest that the drivers under Palcko’s supervision delivered the packages across state lines or otherwise went beyond the Philadelphia area. Thus, in *Palcko*, not only did the drivers apparently not cross state lines in their deliveries, but the exemption was extended to someone who was not a driver—namely, their supervisor.

In *Levin v. Caviar, Inc.* (N.D.Cal. 2015) 146 F.Supp.3d 1146, 1154, the court acknowledged that guidance regarding the “‘engaged in commerce’” standard for the FAA’s transportation worker exemption may be found in cases discussing an exemption to another federal law, the Fair Labor Standards Act (see 29 U.S.C. § 201 et seq., FLSA). One such case, *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, observed the following well-established principle: “Intrastate deliveries of goods are considered to be part of interstate commerce if the deliveries are merely a continuation of an interstate journey. [Citations.] Goods arriving from out of state that are unloaded and held in a warehouse before being loaded onto trucks and delivered to customers do not terminate their interstate journey if ‘there is a practical continuity of movement of the goods until they reach the customers for whom they are intended.’” (*Id.* at p. 77, quoting *Walling v. Jacksonville Paper Co.* (1943) 317 U.S. 564, 568; accord, *Klitzke v. Steiner Corp.* (9th Cir. 1997) 110 F.3d 1465, 1467-1470 [same facts as *Bell*; goods retained interstate character and FLSA exemption applied]; see *Walters v. Am. Coach Lines of Miami, Inc.* (11th Cir. 2009) 575 F.3d 1221, 1226-1229 [after noting the FLSA exemption includes a requirement that carrier was engaged in interstate commerce, the court articulated same rule as *Bell* case].) Although the *Levin* court acknowledged the above principle quoted in *Bell*, the court found that it did not assist the plaintiff in the FAA case before it, which case involved the local delivery of meals prepared in local restaurants. The court held that even if ingredients for the food prepared in the restaurants may have been part of the stream of interstate commerce, the ingredients’ interstate journey ended when those goods reached the restaurants. (*Levin, supra*, 146 F.Supp.3d at p. 1154.)

Applying the law outlined above to the instant case, we conclude that Nieto was engaged in interstate commerce during his employment as a delivery driver for VWB. The following facts were admitted by VWB in the declaration filed in support of its petition to compel arbitration: “VWB is a beverage distributor located in Fresno, California. It sells and distributes beer, wine, and other related beverages and products throughout Central California. While VWB’s principal place of business is in California, it contracts with and buys from companies nationally and internationally. It sells beer, wine, and other beverages manufactured in the United States, including states outside of California, and countries worldwide. These beverages are delivered from out-of-state to VWB’s warehouse where they are held for a short period before delivery to VWB’s customers. . . . VWB and its drivers, including [Nieto], are subject to and must comply with federal Department of Transportation regulations, and other federal laws and regulations governing motor vehicle safety. VWB drivers traverse interstate highways and roads.” As VWB acknowledged in its points and authorities filed in support of its petition: “Even if the drivers are not transporting goods across state lines, their transportation is part of a ‘practical continuity of movement’ in the flow of interstate commerce. [Citations.]” It is apparent from the above information and concessions that Nieto’s deliveries, although intrastate, were essentially the last phase of a continuous journey of the interstate commerce (i.e., beer and other beverages delivered to VWB’s warehouse from out-of-state) being transported until reaching its destination(s) to VWB’s customers. Accordingly, as a delivery truck driver for VWB, Nieto was engaged in interstate commerce through his participation in the continuation of the movement of interstate goods to their destinations. Therefore, the trial court did not err in concluding that Nieto was employed as a transportation worker engaged in interstate commerce to whom the exemption of section 1 of the FAA was applicable.

Because we have concluded that the trial court correctly found Nieto was exempt from the FAA, it is unnecessary for

---

3. Prior to oral argument, VWB informed this court of additional federal district court cases (i.e., *Magana v. DoorDash, Inc.* (N.D.Cal. 2018) 343 F.Supp.3d 891; *Lee v. Postmates Inc.* (N.D.Cal., Oct. 15, 2018, No. 18-cv-03421-JCS) 2018 U.S.Dist. LEXIS 176965, and *Lee v. Postmates Inc.* (N.D.Cal., Dec. 17, 2018, No. 18-cv-03421-JCS) 2018 U.S.Dist. LEXIS 212209). These cases appear to involve purely local deliveries of goods from local restaurants or merchants to local customers. As such, they are distinguishable from the present case in which, as explained hereinabove, the employee worked for a company in the business of distributing beer and other beverages brought in from out of state to be delivered to destinations or customers in the Central Valley, where the employee’s transportation work was clearly part of the continuation of the flow of interstate commerce.
us to address Nieto’s alternative argument that the arbitration agreement was entirely unenforceable based on allegedly unconscionable provisions.

III. ISSUE RAISED IN THE REPLY BRIEF.

The trial court held that because Nieto was “a transportation worker and thus exempt from the FAA,” Labor Code section 2294 governed, which the trial court explained “provides that an action for wage and hour claims may be maintained despite an agreement to arbitrate.” The trial court then concluded: “[Nieto’s] complaint is, in its entirety, an action for wage and hour violations. [Nieto’s] action may thus be maintained, regardless of the arbitration provision in the employment contract between [Nieto] and [VWB].” Accordingly, VWB’s petition to compel arbitration was denied.

In its reply brief herein, VWB argues for the first time that the trial court may have erred in concluding that all of Nieto’s causes of action were subject to Labor Code section 229. We decline to consider that issue here. An appellant’s failure to raise an issue in his or her opening brief is ordinarily treated as a waiver of that issue (Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 685), and consequently, points raised in the reply brief for the first time will generally not be considered on appeal. (Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 894-895, fn. 10.)

DISPOSITION

The order of the trial court is affirmed. Costs on appeal are awarded to plaintiff Daniel Nieto.

DETJEN, Acting P.J.
WE CONCUR: FRANSON, J., DESANTOS, J.
Nothing in the plain language of the excess policies requires a determination that Deere must pay damages (as opposed to obtaining a dismissal without payment) before the insurers are obligated to pay the litigation expenses associated with Deere’s defense of the underlying asbestos actions.

The remainder of the second full paragraph shall continue without change.

There is no change in the judgment.

Appellant’s petition for rehearing is denied.

Acting P.J.
CERTIFIED FOR PUBLICATION.
CHANNEY, Acting P. J., BENDIX, J., WEINGART, J.*

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