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SUMMARY

Corporate Governance

Google shareholder lawsuit untimely filed more than three years following disclosure of Google’s “no cold call” agreements (Grover, J.)

The Police Retirement System of St. Louis v. Page

C.A. 6th; April 16, 2018; H043220

The Sixth Appellate District affirmed a judgment. The court held that a Google shareholder lawsuit was untimely filed more than three years following the widely publicized disclosure of the “no cold call” agreements entered into by Google and its competitors.

Sometime no later than 2006, Google, Inc. and several of its competitors, including Apple, entered into agreements not to “cold call”, or attempt to recruit, each others’ employees. In September 2010, the Department of Justice filed a civil antitrust action against Google and other companies that participated in the agreements, alleging the agreements illegally diminished competition for high tech employees, denying them job opportunities and suppressing wages. Google entered into a stipulated judgment in which it admitted no liability but agreed to be bound by an injunction prohibiting the no cold call arrangements. Google posted a statement online announcing the settlement of the antitrust action. Both the antitrust action and the settlement were widely reported in the news media.

In February 2014, Google shareholders sued Google executives and officers Larry Page and others, alleging that the no cold call agreements had harmed the company and caused the investors financial loss. Applying the law of Delaware, where Google was incorporated, the court granted defendants’ motion for summary judgment and dismissed the action as time-barred.

The court of appeal affirmed, holding that the action was not filed within the applicable three-year statute of limitations. Under Delaware law, a statute of limitations will be tolled only until a plaintiff has inquiry notice of the facts giving rise to the cause of action, meaning there is enough information available to prompt a reasonable person to commence an investigation that, if pursued, would lead to discovery of the harm. Here, the shareholders were on inquiry notice of potential harm from defendants’ anti-competitive agreements no later than September 2010, when the DOJ antitrust action was publicized. Although neither the DOJ’s allegations nor Google’s immediate settlement of the antitrust action necessarily meant that Google’s directors and officers were involved with the no cold call agreements, those facts gave rise to a reasonable inference that they were. The shareholders accordingly had sufficient information in 2010 to plead the claims alleged in this action.

Creditors’ and Debtors’ Rights

Collection agency’s efforts constituted meaningful participation in hospital’s attempts to collect patient debts (O’Scannlain, J.)

Echlin v. PeaceHealth

9th Cir.; April 17, 2018; 15-35324

The court of appeals affirmed a district court judgment. The court held that the record failed to support plaintiff’s claim that a collection agency was unlawfully acting as a “flat-rater.”

Michelle Echlin received treatment at PeaceHealth Southwest Medical Center in Vancouver, Washington, on two occasions, but never paid the nearly $1,000 in resulting medical bills. PeaceHealth referred her delinquent accounts to Computer Credit, Inc. (CCI) for further action. Under its contract with PeaceHealth, CCI drafted and sent collection letters, handled telephone inquiries from debtors, and reviewed mail from debtors before forwarding it on to PeaceHealth. CCI typically sent debtors two letters demanding payment. The first was sent immediately after CCI opened a new debtor account. If full payment was not remitted within two weeks, CCI sent a second letter. If no payment was received within another two to three weeks, CCI referred the debt back to PeaceHealth, which would then pursue alternate collection efforts. CCI sent Echlin two letters regarding her debt from her first visit to PeaceHealth, and received no response. It also sent Echlin two letters regarding the debt from her second visit, and received a response indicating that Echlin disputed the debt. CCI promptly referred the account back to PeaceHealth.


The court of appeal affirmed, holding that the undisputed evidence failed to support a finding of flat-rating. Flat-rating typically involves a third party’s sale of form letters to a creditor, which letters create the false impression that someone other than the creditor is “participating” in collecting the debt. In effect, flat-rating allows the creditor to use the third party’s name and letterhead for its “intimidation value.” Here, the district court rejected Echlin’s flat-rating claim based on its finding that CCI meaningfully participated in debt collections activities on behalf of PeaceHealth. The record supported that determination. CCI screened accounts for barriers to collection, sent collection letters to debtors, responded to debtor inquiries, and screened mail from debtors. These efforts were sufficient to constitute meaningful participation in PeaceHealth’s attempts to collect outstanding debts.
Criminal Law

Competency determination not supported by substantial evidence (Slough, J.)

**People v. Jackson**

C.A. 4th; April 17, 2018; E065757

The Fourth Appellate District reversed a judgment of conviction. The court held that no substantial evidence supported the trial court’s finding that defendant was competent to enter a guilty plea and accept sentence.

Patrick Johnson was charged with a lewd act against a child. After the trial court acknowledged a doubt about his competency and committed him to Patton State Hospital, numerous psychologists found him incompetent to stand trial and unlikely to be restored to competency because he suffered from a stable developmental disability—mild mental retardation—that limited his capacity for understanding and communication. After drilling Jackson until he could answer simple, concrete questions about the judicial system, hospital staff issued a new report in January 2010 finding him to be competent to stand trial. In February 2010, the trial court found Jackson competent and accepted his guilty plea. Before he could be sentenced, though, new psychological evaluations questioned the basis of the report finding him competent. In June 2010, the trial court found substantial evidence Jackson was incompetent.

Over a year later, On August 2011, and in the face of additional evaluations finding Jackson incompetent and unlikely to improve, the trial court reversed itself and again found Jackson competent. The court based the competency finding on the contents of an evaluation from December 2010 that simply copied the analysis from the early 2010 report and failed to address any of the concerns raised thereafter. The court sentenced Jackson to three years in state prison.

The court of appeal reversed, holding that neither of the trial court’s competency determinations was based on substantial evidence. First, the hearing occurred on August 29, 2011, but the court relied on an evaluation from nearly nine months earlier, in December 2010. Even if the report could be credited, in the face of almost unanimous contrary evaluations, it did not provide a sound basis for concluding Jackson retained any understanding he may had in December 2010 when he stood before the court in August 2011. Further, the analysis in the December 2010 report was even less relevant because it was simply copied from a report prepared 11 months earlier in January 2010. Finally, the report failed to provide any evidentiary basis for concluding that anything had changed since evaluators had found Jackson incompetent in June and July 2010. As the record stood in August 2011, the trial court had every reason to conclude Jackson remained incompetent, and no solid basis for concluding otherwise. It was thus error for the trial court to find Jackson competent and to accept his decision to maintain his guilty plea and accept a prison sentence.

Criminal Law

Identify theft not theft offense subject to reclassification under Prop 47 (Huffman, Acting P.J.)

**People v. Sanders**

C.A. 4th; April 17, 2018; D072875

The Fourth Appellate District affirmed a trial court order. The court held that identify theft is an offense involving false personation, not theft, and thus is not subject to reclassification under Proposition 47.

Misha Sanders used a credit card that was not her own to make various purchases totaling $174.61. She pleaded guilty to two counts of commercial burglary under Penal Code §459 and two counts of identity theft under §530.5(a). The court sentenced Sanders to a determinate term of three years eight months. Sanders later petitioned under Prop 47 to reclassify all of her convictions as misdemeanors and to dismiss the identity theft counts. The trial court granted the petition as to the burglary counts, but denied the petition as to the violations of §530.5.

Sanders appealed, arguing that because the amount of goods taken from the merchants was under $950, the §530.5 violations had to be deemed petty thefts, and thus should have been reduced to misdemeanors and dismissed.

The court of appeal affirmed, holding that the §530.5 violations were not theft offenses subject to reclassification. Even though §530.5 violations are often referred to as “identity theft,” theft is not an element of the offense. The offense is not in the theft chapter of the Penal Code, but is instead listed in the chapter dealing with false personation. The gravamen of the §530.5(a) offense is the unlawful use of a victim’s identity. Sanders received the benefit of Prop 47’s recasting of certain forms of commercial burglary. She was not, however, entitled to have her nontheft offenses of violating §530.5(a) reclassified under Prop 47.

Criminal Law

Enactment of CLOUD Act rendered moot ongoing litigation over production of email records stored abroad (per curiam)

**United States v. Microsoft Corporation**

U.S. Sup. Ct.; April 17, 2018; 17-2
The U.S. Supreme Court ordered a case dismissed as moot. The court held that the enactment of the Clarifying Lawful Overseas Use of Data (CLOUD) Act resolved the parties’ dispute, leaving nothing to adjudicate.

In December 2013, federal law enforcement agents applied to the district court for a warrant under 18 U.S.C. §2703 requiring Microsoft to disclose all emails and other information associated with the account of one of its customers. The magistrate judge issued the warrant. After service of the §2703 warrant, Microsoft determined that the account’s email contents were stored at Microsoft’s datacenter in Dublin, Ireland. Microsoft moved to quash the warrant with respect to the information stored in Ireland. The district court denied the motion and held Microsoft in contempt for refusing to comply fully with the warrant. The court of appeals reversed, holding that requiring Microsoft to disclose the electronic communications in question would be an unauthorized extraterritorial application of §2703.

On March 23, 2018, Congress enacted and the President signed into law the CLOUD Act, which amended the Stored Communications Act to mandate compliance with the provisions of the Act regardless of whether the records at issue were located “within or outside of the United States.” The government thereafter obtained a new §2703 warrant covering the same information sought in the original warrant.

Finding that no live dispute remained between the parties, the Supreme Court declared the case moot and directed that it be remanded to the court of appeals with instructions to vacate the district court’s contempt finding and its denial of Microsoft’s motion to quash, and to direct the district court to dismiss the case.

Criminal Law

Federal habeas court reviewing unexplained state-court decision should “look through” to last related state-court decision that provides relevant rationale and presume same rationale applies (Breyer, J.)

Wilson v. Sellers

U.S. Sup. Ct.; April 17, 2018; 16-6855

Petitioner Marion Wilson was convicted of murder and sentenced to death. He sought habeas relief in Georgia Superior Court, claiming that his counsel’s ineffectiveness during sentencing violated the Sixth Amendment. The court denied the petition, in relevant part, because it concluded that counsel’s performance was not deficient and had not prejudiced Wilson. The Georgia Supreme Court summarily denied his application for a certificate of probable cause to appeal. Wilson subsequently filed a federal habeas petition, raising the same ineffective-assistance claim. The District Court assumed that his counsel was deficient but deferred to the state habeas court’s conclusion that any deficiencies did not prejudice Wilson. The Eleventh Circuit affirmed. First, however, the panel concluded that the District Court was wrong to “look though” the State Supreme Court’s unexplained decision and assume that it rested on the grounds given in the state habeas court’s opinion, rather than ask what arguments “could have supported” the State Supreme Court’s summary decision. The en banc court agreed with the panel’s methodology.

Held: A federal habeas court reviewing an unexplained state-court decision on the merits should “look through” that decision to the last related state-court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning. The State may rebut the presumption by showing that the unexplained decision most likely relied on different grounds than the reasoned decision below. Pp. 5–11.

(a) In Ylst v. Nunnemaker, 501 U. S. 797, the Court held that where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same ground. In Ylst, where the last reasoned opinion on the claim explicitly imposed a procedural default, the Court presumed that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Since Ylst, every Circuit to have considered the matter, but for the Eleventh Circuit, has applied a “look through” presumption even where the state courts did not apply a procedural bar to review, and most Circuits applied the presumption prior to Ylst. The presumption is often realistic, for state higher courts often issue summary decisions when they have examined the lower court’s reasoning and found nothing significant with which they disagree. The presumption also is often more efficiently applied than a contrary approach that would require a federal court to imagine what might have been the state court’s supportive reasoning.

The State argues that Harrington v. Richter, 562 U. S. 86, controls here and that Ylst should apply, at most, where the federal habeas court is trying to determine whether a state-court decision without opinion rested on a state procedural ground or whether the state court reached the merits of a federal issue. Richter, however, did not directly concern the issue in this case—whether to “look through” the silent state higher court opinion to the lower court’s reasoned opinion in order to determine the reasons for the higher court’s decision. In Richter, there was no lower court opinion to look to. And Richter does not say that Ylst’s reasoning does not apply in the context of an unexplained decision on the merits. Indeed, this Court has “looked though” to lower court decisions in cases involving the merits. See, e.g., Precio v. Moore, 562 U. S. 115, 123–133. Pp. 5–9.

(b) The State’s further arguments are unconvincing. It points out that the “look though” presumption may not accurately identify the grounds for a higher court’s decision. But the “look through” presumption is not an absolute rule.
Additional evidence that might not be sufficient to rebut the presumption in a case like Ylst, where the lower court rested on a state-law procedural ground, would allow a federal court to conclude that counsel has rebutted the presumption in a case decided on the merits. For instance, a federal court may conclude that the presumption is rebutted where counsel identifies convincing alternative arguments for affirmation that were made to the State’s highest court, or equivalent evidence such as an alternative ground that is obvious in the state-court record. The State also argues that this Court does not necessarily presume that a federal court of appeals’ silent opinion adopts the reasoning of the court below, but that is a different context. Were there to be a “look through” approach as a general matter in that context, judges and lawyers might read those decisions as creating, through silence, binding precedent. Here, a federal court “looks through” the silent decision for a specific and narrow purpose, to identify the grounds for the higher court’s decision as the Antiterrorism and Effective Death Penalty Act requires. Nor does the “look through” approach show disrespect for the States; rather, it seeks to replicate the grounds for the higher state court’s decision. Finally, the “look through” approach is unlikely to lead state courts to write full opinions where they would have preferred to decide summarily, at least not to any significant degree. Pp. 9–11.

834 F. 3d 1227, reversed and remanded.

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

Discovery

Statutory bar against disclosure of stale complaints against police officers not applicable to personnel records not containing citizen complaints (Perluss, P.J.)

Riske v. Superior Court (City of Los Angeles)

C.A. 2nd; April 16, 2018; B283035

The Second Appellate District granted a petition for writ of mandate. The court held that a statute barring the disclosure of stale complaints against police officers does not apply to discovery of personnel records that do not contain citizen complaints.

Retired City of Los Angeles police officer Robert Riske sued the city for unlawful retaliation, alleging the police department had retaliated against him for protected whistleblower activity by repeatedly failing to assign or promote him and selecting instead less qualified candidates. He sought discovery under Evid. Code §§1043 and 1045 of the selected officers’ Training Evaluation and Management System (TEAMS) reports, which summarized the successful candidates’ history of discipline, commendations and other personnel matters throughout the officer’s employment. Following an appellate ruling in Riske’s favor on his right to discovery, the trial court ordered production of the requested personnel records in accordance with an agreed upon protective order. However, the court ordered redaction of all items concerning conduct that had occurred more than five years before Riske filed his complaint. In so ruling, the court relied on §1045(b)(1), which excludes from disclosure “information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation” in which discovery or disclosure is sought.

Riske filed a petition for writ of mandate, challenging the redaction order.

The court of appeal granted Riske’s writ petition, holding that §1045(b) did not apply. Section 1045(b) excludes only information “consisting of complaints...” It does not encompass information “relating to” complaints. It thus prohibits the disclosure only of stale complaints against police officers. The TEAMS reports at issue here are not citizen complaints and do not directly quote from complaints. Rather, they contain summaries of personnel matters on which employment-related decisions, such as assignment and promotion, are to be based. Although they may identify the nature of a complaint to explain or justify discipline that has been imposed, that information is not akin to the unfiltered complaint. Accordingly, the reports do not fall with §1045(b)’s categorical exclusion of stale complaints. Further, even if §1045(b)’s five-year disclosure bar applied, it would be measured from the date each officer was promoted—the alleged adverse employment action at issue in the litigation—and not the date Riske filed his complaint.

Employment Litigation

Staffing agency and its client were in privity with respect to workers’ wage and hour claims (Liu, P.J.)

Castillo v. Glenair, Inc.

C.A. 2nd; April 16, 2018; B278239

The Second Appellate District affirmed a judgment. The court held that because a staffing agency and its client were in privity with respect to workers’ wage and hour claims, the workers thus could not settle a lawsuit against one and thereafter bring identical claims against the other.

Temporary staffing agency GCA Services Group, Inc. hired Andrew and David Castillo to work at Glenair, Inc. Glenair recorded and reported the Castillos’ time records to GCA. The Castillos were paid by GCA. They were terminated.

Glenair recorded and reported the Castillos’ time records to GCA. They were termi-
nated in 2011 when Glenair no longer needed their services. In 2012, Judith Gomez and Ernesto Briseno filed a putative class action against GCA and related entities (not including Glenair) for wage and hour violations. That action was settled in May 2014. The settlement included a broad release of all claims by current and former employees. The Castillos did not opt out of the settlement. In 2013, while the class action was pending, an attorney filed a putative class action against Glenair, also alleging wage and hour violations. In September 2014, the Glenair complaint was amended to add the Castillos as plaintiffs.

Glenair moved for summary judgment, arguing that because the Castillos were parties to the 2014 settlement, res judicata barred them from bringing the same causes of action here. The trial court granted the motion and entered judgment in favor of Glenair.

The court of appeal affirmed, holding that the Castillos could not file the same claims against both GCA and Glenair.

Glenair is entitled to judgment as a matter of law because res judicata applies and bars the Castillos’ claims against Glenair. First, the 2014 class settlement was final and on the merits. Second, the causes of action here were the same as those at issue in that class action. Finally, GCA and Glenair were in privity with respect to the Castillos’ wage and hour claims. Both Glenair and GCA were involved in and responsible for payment of the Castillos’ wages. Glenair was authorized by GCA and responsible for recording, reviewing and transmitting the Castillos’ time records to GCA. GCA paid the Castillos based on those time records. And, by virtue of the Gomez settlement, the Castillos were compensated for any errors made in the payment of their wages. Because Glenair and GCA were in privity for purposes of the Castillos’ claims, the trial court properly granted summary judgment in favor of Glenair.

Employment Litigation

Tolling available only where circumstances make it “impossible, impracticable, or futile” to bring all claims to trial (Streeter, Acting P.J.)

Tanguilig v. Neiman Marcus Group, Inc.

C.A. 1st; April 16, 2018; A141383

The First Appellate District affirmed trial court orders. The court held that tolling due to circumstances making it “impossible, impracticable, or futile” to bring a case to trial does not apply where those circumstances impact only one or more component claims, and not the entire action.

Bernadette Tanguilig sued former employer Neiman Marcus Group, Inc. (NMG) for wrongful termination in violation of public policy and multiple violations of the California Labor Code. She additionally alleged she was entitled to civil penalties under the Private Attorney General Act of 2004 (PAGA). NMG successfully demurred to Tanguilig’s wrongful termination and related claims, and later moved to dismiss her remaining claims under Code Civ. Proc. §583.310 for failure to bring them to trial within five years.

The trial court granted the motion and dismissed the complaint, awarding prevailing party costs to NMG. Tanguilig appealed, arguing, among other things, that the trial court erred in failing to toll the five-year clock under §583.340(c) for the 351 days during which an order compelling co-plaintiff Juan Pinela to arbitration was in effect.

The court of appeal affirmed holding that §583.340(c) did not apply. Tolling is available to a party under §583.310(c) for those periods when it is “impossible, impracticable, or futile” to bring an action to trial. Such was not the case here. In denying tolling, the trial court here found Tanguilig made no factual showing that she could not have brought her claims to trial while a trial court order compelling arbitration of Pinela’s claims was in effect. Indeed, the trial court noted that Tanguilig eventually did file a motion to set her PAGA claim for trial—without Pinela’s claims. The court of appeal declined to second-guess these findings. Further, as the trial court found, §583.340(c) applies only where it is impossible to bring an entire action to trial. Where, as here, the circumstances making it “impossible, impracticable, or futile” to bring a case to trial apply only to one or more component claims, while the remaining claims can still be tried, §583.340(c) tolling does not apply.

Immigration Law

Residual clause in INA’s definition of “crime of violence” is unconstitutionally vague (Kagan, J.)

Sessions v. Dimaya

U.S. Sup. Ct.; April 17, 2018; 15–1498

The Immigration and Nationality Act (INA) virtually guarantees that any alien convicted of an “aggravated felony” after entering the United States will be deported. See 8 U. S. C. §§1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C). An aggravated felony includes “a crime of violence (as defined in [18 U.S.C. §16]) . . . ) for which the term of imprisonment [is] at least one year.” §1101(a)(43)(f). Section 16’s definition of a crime of violence is divided into two clauses—often referred to as the elements clause, §16(a), and the residual clause, §16(b). The residual clause, the provision at issue here, defines a “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” To decide whether a person’s conviction falls within the scope of that clause, courts apply the categorical approach. This approach
has courts ask not whether “the particular facts” underlying a conviction created a substantial risk, *Leocal v. Ashcroft*, 543 U. S. 1, 7, nor whether the statutory elements of a crime require the creation of such a risk in each and every case, but whether “the ordinary case” of an offense poses the requisite risk, *James v. United States*, 550 U. S. 192, 208.

Respondent James Dimaya is a lawful permanent resident of the United States with two convictions for first-degree burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a “crime of violence” under §16(b). While Dimaya’s appeal was pending in the Ninth Circuit, this Court held that a similar residual clause in the Armed Career Criminal Act (ACCA)—defining “violent felony” as any felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” 18 U. S. C. §924(e)(2)(B)—was unconstitutionally “void for vagueness” under the Fifth Amendment’s Due Process Clause. *Johnson v. United States*, 576 U. S. ___.

Relying on *Johnson*, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague. *Held*: The judgment is affirmed.

803 F. 3d 1110, affirmed.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, concluding that §16’s residual clause is unconstitutionally vague.

(a) A straightforward application of *Johnson* effectively resolves this case. Section 16(b) has the same two features as ACCA’s residual clause—an ordinary-case requirement and an ill-defined risk threshold—combined in the same constitutionally problematic way. To begin, ACCA’s residual clause created “grave uncertainty about how to estimate the risk posed by a crime” because it “tie[d] the judicial assessment of risk” to a speculative hypothesis about the crime’s “ordinary case,” but provided no guidance on how to figure out what that ordinary case was. 576 U. S., at ___. Compounding that uncertainty, ACCA’s residual clause layered an imprecise “serious potential risk” standard on top of the requisite “ordinary case” inquiry. The combination of “indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony,” *id.*, at ___, resulted in “more unpredictability and arbitrariness than the Due Process Clause tolerates,” *id.*, at ___. Section 16(b) suffers from those same two flaws. Like ACCA’s residual clause, §16(b) calls for a court to identify a crime’s “ordinary case” in order to measure the crime’s risk but “offers no reliable way” to discern what the ordinary version of any offense looks like. *Id.*, at ___. And its “substantial risk” threshold is no more determinate than ACCA’s “serious potential risk” standard. Thus, the same “[t]wo features” that “conspire[d] to make” ACCA’s residual clause unconstitutionally vague also exist in §16(b), with the same result. *Id.*, at ___.

(b) The Government identifies three textual discrepancies between ACCA’s residual clause and §16(b) that it claims make §16(b) easier to apply and thus cure the constitutional infirmity. None, however, relates to the pair of features that *Johnson* found to produce impermissible vagueness or otherwise makes the statutory inquiry more determinate. Pp. 16–24.

(1) First, the Government argues that §16(b)’s express requirement (absent from ACCA) that the risk arise from acts taken “in the course of committing the offense,” serves as a “temporal restriction”—in other words, a court applying §16(b) may not “consider risks arising after” the offense’s commission is over. Brief for Petitioner 31. But this is not a meaningful limitation: In the ordinary case of any offense, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without the temporal language, a court applying the ordinary case approach, whether in §16’s or ACCA’s residual clause, would do the same thing—ask what usually happens when a crime is committed. The phrase “in the course of” makes no difference as to either outcome or clarity and cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government says that the §16(b) inquiry, which focuses on the risk of “physical force,” “trains solely” on the conduct typically involved in a crime. Brief for Petitioner 36. In contrast, ACCA’s residual clause asked about the risk of “physical injury,” requiring a second inquiry into a speculative “chain of causation that could possibly result in a victim’s injury.” *Ibid.* However, this Court has made clear that “physical force” means “force capable of causing physical pain or injury.” *Johnson v. United States*, 559 U. S. 133, 140. So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Thus, the force/injury distinction does not clarify a court’s analysis of whether a crime qualifies as violent.

Third, the Government notes that §16(b) avoids the vagueness of ACCA’s residual clause because it is not preceded by a “confusing list of exemplar crimes.” Brief for Petitioner 38. Those enumerated crimes were in fact too varied to assist this Court in giving ACCA’s residual clause meaning. But to say that they failed to resolve the clause’s vagueness is hardly to say they caused the problem. Pp. 16–21.

(2) The Government also relies on judicial experience with §16(b), arguing that because it has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But in fact, a host of issues respecting §16(b)’s application to specific crimes divide the federal appellate courts. And while this Court has only heard oral arguments in two §16(b) cases, this Court vacated the judgments in a number of other §16(b) cases, remanding them for further consideration in light of ACCA decisions. Pp. 21–24.
JUSTICE KAGAN, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded in Parts II and IV–A:

(a) The Government argues that a more permissive form of the void-for-vagueness doctrine applies than the one Johnson employed because the removal of an alien is a civil matter rather than a criminal case. This Court’s precedent forecloses that argument. In Jordan v. De George, 341 U. S. 223, the Court considered what vagueness standard applied in removal cases and concluded that, “in view of the grave nature of deportation,” the most exacting vagueness standard must apply. Id., at 231. Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” Jae Lee v. United States, 582 U. S. ___, ___. Pp. 4–6.

(b) Section 16(b) demands a categorical, ordinary-case approach. For reasons expressed in Johnson, that approach cannot be abandoned in favor of a conduct-based approach, which asks about the specific way in which a defendant committed a crime. To begin, the Government once again “has not asked [the Court] to abandon the categorical approach in residual-clause cases,” suggesting the fact-based approach is an untenable interpretation of §16(b). 576 U. S., at ___. Moreover, a fact-based approach would generate constitutional questions. In any event, §16(b)’s text demands a categorical approach. This Court’s decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to “the statute of conviction, not to the facts of each defendant’s conduct.” Taylor v. United States, 495 U. S. 575, 601. And the words “by its nature” in §16(b) even more clearly compel an inquiry into an offense’s normal and characteristic quality—that is, what the offense ordinarily entails. Finally, given the daunting difficulties of accurately “reconstruct[ing],” often many years later, “the conduct underlying [a] conviction,” the conduct-based approach’s “utter impracticability”—and associated inequities—is as great in §16(b) as in ACCA. Johnson, 576 U. S., at ___. Pp. 12–15.

JUSTICE GORSUCH, agreeing that the Immigration and Nationality Act provision at hand is unconstitutionally vague for the reasons identified in Johnson v. United States, 576 U. S., concluded that the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution. The Government’s argument that a less-than-fair-notice standard should apply where (as here) a person faces only civil, not criminal, consequences from a statute’s operation is unavailing. In the criminal context, the law generally must afford “ordinary people . . . fair notice of the conduct it punishes,” id., at ___, and it is hard to see how the Due Process Clause might often require any less than that in the civil context. Nor is there any good reason to single out civil deportation for assessment under the fair notice stan-
United States Supreme Court

Cite as 18 C.D.O.S. 3446

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER v. JAMES GARCIA DIMAYA

No. 15–1498
In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit
Argued January 17, 2017
Reargued October 2, 2017
Filed April 17, 2018

JUSTICE KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, and an opinion with respect to Parts II and IV–A, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

Three Terms ago, in Johnson v. United States, this Court held that part of a federal law’s definition of “violent felony” was impermissibly vague. See 576 U. S. ___ (2015). The question in this case is whether a similarly worded clause in a statute’s definition of “crime of violence” suffers from the same constitutional defect. Adhering to our analysis in Johnson, we hold that it does.

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an “aggravated felony” after entering the United States. 8 U. S. C. §1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, allowing some deportable aliens to remain in the country. See §§1229b(a)(3), (b)(1)(C). Accordingly, removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here.

The INA defines “aggravated felony” by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. §1101(a)(43); see Luna Torres v. Lynch, 578 U. S. ___, ___ (2016) (slip op., at 2). According to one item on that long list, an aggravated felony includes “a crime of violence (as defined in section16 of title 18 . . . ) for which the term of imprisonment [is] at least one year.” §1101(a)(43)(F). The specified statute, 18 U. S. C. §16, provides the federal criminal code’s definition of “crime of violence.” Its two parts, often known as the elements clause and the residual clause, cover:

“(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

Section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person’s conviction “falls within the ambit” of that clause, courts use a distinctive form of what we have called the categorical approach. Leocal v. Ashcroft, 543 U. S. 1, 7 (2004). The question, we have explained, is not whether the “particular facts” underlying a conviction posed the substantial risk that §16(b) demands. Ibid. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers.1 The §16(b) inquiry instead turns on the “nature of the offense” generally speaking. Ibid. (referring to §16(b)’s “by its nature” language). More precisely, §16(b) requires a court to ask whether “the ordinary case” of an offense poses the requisite risk. James v. United States, 550 U. S. 192, 208 (2007); see infra, at 7.

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law. See Cal. Penal Code Ann. §§459, 460(a). Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a “crime of violence” under §16(b). “[B]y its nature,” the Board reasoned, the offense “carries a substantial risk of the use of force.” App. to Pet. for Cert. 46a. Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of “violent felony” in the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e). ACCA prescribes a 15-year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has three prior convictions for a “violent felony.”§924(e)(1). The definition of that statutory term goes as follows:

1. The analysis thus differs from the form of categorical approach used to determine whether a prior conviction is for a particular listed offense (say, murder or arson). In that context, courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction. See, e.g., Descamps v. United States, 570 U. S. 254, 260–261 (2013); Moncrieffe v. Holder, 569 U. S. 184, 190–191 (2013).
“any crime punishable by imprisonment for a term exceeding one year . . . that—

“(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

“(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” §924(c)(2)(B) (emphasis added).

The italicized portion of that definition (like the similar language of §16(b)) came to be known as the statute’s residual clause. In Johnson v. United States, the Court declared that clause “void for vagueness” under the Fifth Amendment’s Due Process Clause. 576 U. S., at ___–___ (slip op., at 13–14).

Relying on Johnson, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya’s favor. See Dimaya v. Lynch, 803 F. 3d 1110, 1120 (2015). Two other Circuits reached the same conclusion, but a third distinguished ACCA’s residual clause from §16’s. We granted certiorari to resolve the conflict. Lynch v. Dimaya, 579 U. S. ___ (2016).

II

“The prohibition of vagueness in criminal statutes,” our decision in Johnson explained, is an “essential” of due process, required by both “ordinary notions of fair play and the settled rules of law.” 576 U. S., at ___ (slip op., at 4) (quoting Connally v. General Constr. Co., 269 U. S. 385, 391 (1926)). The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have “fair notice” of the conduct a statute prescribes. Papachristou v. Jacksonville, 405 U. S. 156, 162 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. See Kolender v. Lawson, 461 U. S. 352, 357–358 (1983). In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf. id., at 358, n. 7 (“[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department” (internal quotation marks omitted)).

The Government argues that a less searching form of the void-for-vagueness doctrine applies here in Johnson because this is not a criminal case. See Brief for Petitioner 13–15. As the Government notes, this Court has stated that “[t]he degree of vagueness that the Constitution allows depends in part on the nature of the enactment”: In particular, the Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U. S. 489, 498–499 (1982). The removal of an alien is a civil matter. See Arizona v. United States, 567 U. S. 387, 396 (2012). Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order. See Brief for Petitioner 25–26.

But this Court’s precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In Jordan v. De George, we considered whether a provision of immigration law making an alien deportable if convicted of a “crime involving moral turpitude” was “sufficiently definite.” 341 U. S. 223, 229 (1951). That provision, we noted, “is not a criminal statute” (as §16(b) actually is). Id., at 231; supra, at 1–2. Still, we chose to test (and ultimately uphold) it “under the established criteria of the ‘void for vagueness’ doctrine” applicable to criminal laws. 341 U. S., at 231. That approach was demanded, we explained, “in view of the grave nature of deportation,” ibid.—a “drastic measure,” often amounting to lifelong “banishment or exile”; ibid. (quoting Fong Haw Tan v. Phelan, 333 U. S. 6, 10 (1948)).

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” Jae Lee v. United States, 582 U. S. ___–___ (2017) (slip op., at 11) (quoting Padilla v. Kentucky, 559 U. S. 356, 365, 368 (2010)). And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more “intimately related to the criminal process.” Chaidez v. United States, 568 U. S. 342, 352 (2013) (quoting Padilla, 559 U. S., at 365). What follows, as Jordan recognized, is the use of the same standard in the two settings.

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one Johnson employed. To salvage §16’s residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by Johnson’s analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section begins as follows: “Two features of [ACCA’s] residual clause conspire to make it unconstitutionally vague.” 576 U. S., at (slip op., at 5). The opinion then identifies each of those

2. Compare Shuti v. Lynch, 828 F. 3d 440 (CA6 2016) (finding §16(b) (unconstitutionally vague); United States v. Vivas-Ceja, 808 F. 3d 719 (CA7 2015) (same), with United States v. Gonzalez-Longoria, 831 F. 3d 670 (CA5 2016) (en banc) (upholding §16(b)).
features and explains how their joinder produced “hopeless indeterminacy,” inconsistent with due process. Id., at ___ (slip op., at 7). And with that reasoning, Johnson effectively resolved the case now before us. For §16’s residual clause has the same two features as ACCA’s, combined in the same constitutionally problematic way. Consider those two, just as Johnson described them:

“In the first place,” Johnson explained, ACCA’s residual clause created “grave uncertainty about how to estimate the risk posed by a crime” because it “tie[d] the judicial assessment of risk” to a hypothesis about the crime’s “ordinary case.” Id., at ___ (slip op., at 5). Under the clause, a court focused on neither the “real-world facts” nor the bare “statutory elements” of an offense. Ibid. Instead, a court was supposed to “imagine” an “idealized ordinary case of the crime”—or otherwise put, the court had to identify the “kind of conduct the ‘ordinary case’ of a crime involves.” Ibid. But how, Johnson asked, should a court figure that out? By using a “statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” Ibid. (internal quotation marks omitted). ACCA provided no guidance, rendering judicial accounts of the “ordinary case” wholly “speculative.” Ibid. Johnson gave as its prime example the crime of attempted burglary. One judge, contemplating the “ordinary case,” would imagine the “violent encounter” apt to ensue when a “would-be burglar [was] spotted by a police officer [or] private security guard.” Id., at ___ (slip op., at 5–6). Another judge would conclude that “any confrontation” was more “likely to consist of [an observer’s] yelling ‘Who’s there?’ . . . and the burglar’s running away.” Id., at ___ (slip op., at 6). But how could either judge really know? “The residual clause,” Johnson summarized, “offer[ed] no reliable way” to discern what the ordinary version of any offense looked like. Ibid. And without that, no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, Johnson continued, was a second: ACCA’s residual clause left unclear what threshold level of risk made any given crime a “violent felony.” See ibid. The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like “serious potential risk” (as in ACCA’s residual clause) or “substantial risk” (as in §16’s). The problem came from layering such a standard on top of the requisite “ordinary case” inquiry. As the Court explained:

“[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree[,]” The residual clause, however, requires application of the “serious potential risk” standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual . . . facts.” Id., at ___ (slip op., at 12) (some internal quotation marks, citations, and alterations omitted).

So much less predictability, in fact, that ACCA’s residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: “By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause” violates the guarantee of due process. Id., at ___ (slip op., at 6). 3

Section 16’s residual clause violates that promise in just the same way. To begin where Johnson did, §16(b) also calls for a court to identify a crime’s “ordinary case” in order to measure the crime’s risk. The Government explicitly acknowledges that point here. See Brief for Petitioner 11 (“Section 16(b), like [ACCA’s] residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense”). And indeed, the Government’s briefing in Johnson warned us about that likeness, observing that §16(b) would be “equally susceptible to an objection” that focused on the problems of positing a crime’s ordinary case. Supp. Brief for Respondent, O. T. 2014, No. 13–7120, pp. 22–23. Nothing in §16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in Johnson: How does one go about divining the conduct entailed in a crime’s ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct? See Johnson, 576 U. S., at ___ (slip op., at 5); supra, at 7; post, at 16–17 (GOR-SUCH, J., concurring in part and concurring in judgment). And we can as well reiterate Johnson’s example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See post, at 16 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the “ordinary case” remains, as Johnson described it, an excessively

3. Johnson also anticipated and rejected a significant aspect of JUSTICE THOMAS’s dissent in this case. According to JUSTICE THOMAS, a court may not invalidate a statute for vagueness if it is clear in any of its applications—as he thinks is true of completed burglary, which is the offense Dimaya committed. See post, at 16–20. But as an initial matter, Johnson explained that supposedly easy applications of the residual clause might not be “so easy after all.” 576 U. S., at ___ (slip op., at 10–11). The crime of completed burglary at issue here illustrates that point forcefully. See id., at ___ (slip op., at 6) (asking whether “an ordinary burglary invade[s] an occupied home by night or an unoccupied home by day”); Dimaya v. Lynch, 803 F. 3d 1110, 1116, n. 7 (CA9 2015) (noting that only about seven percent of burglaries actually involve violence); Cal. Penal Code Ann. §§459, 460 (West 2010) (sweeping so broadly as to cover even dishonest door-to-door salesman). And still more fundamentally, Johnson made clear that our decisions “squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” 576 U. S., at ___ (slip op., at 11).
“speculative,” essentially inscrutable thing. 576 U. S., at __ (slip op., at 5); accord post, at 27 (THOMAS, J., dissenting).4

And §16(b) also possesses the second fatal feature of ACCA’s residual clause: uncertainty about the level of risk that makes a crime “violent.” In ACCA, that threshold was “serious potential risk”; in §16(b), it is “substantial risk.” See supra, at 2, 4. But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As THE CHIEF JUSTICE’s valiant attempt to do so shows, that would be slicing the baloney mighty thin. See post, at 5–6 (dissenting opinion). And indeed, Johnson as much as equated the two phrases: Return to the block quote above, and note how Johnson—as though anticipating this case—refers to them interchangeably, as alike examples of imprecise “qualitative standard[s].” See supra, at 8; 576 U. S., at __ (slip op., at 12). Once again, the point is not that such a non-numeric standard is alone problematic: In Johnson’s words, “we do not doubt” the constitutionality of applying §16(b)’s “substantial risk [standard] to real-world conduct.” Id., at ___ (slip op., at 12) (internal quotation marks omitted). The difficulty comes, in §16’s residual clause just as in ACCA’s, from applying such a standard to “a judge-imagined abstraction”—i.e., “an idealized ordinary case of the crime.” Id., at __, ___ (slip op., at 6, 12). It is then that the standard ceases to work in a way consistent with due process.

In sum, §16(b) has the same “[two features” that “conspire[d] to make [ACCA’s residual clause] unconstitutionally vague.” Id., at ___ (slip op., at 5). It too “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents” some not-well-specified-yet-sufficiently large degree of risk. Id., at __ (slip op., at 4). The result is that §16(b) produces, just as ACCA’s residual clause did, “more unpredictability and arbitrariness than the Due Process Clause tolerates.” Id., at ___ (slip op., at 6).

IV

The Government and dissents offer two fundamentally different accounts of how §16(b) can escape unscathed from our decision in Johnson. JUSTICE THOMAS accepts that the ordinary-case inquiry makes §16(b) “impossible to apply.” Post, at 27. His solution is to overthow our historic understanding of the statute: We should now read §16(b), he says, to ask about the risk posed by a particular defendant’s particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that §16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that “distinctive textual features” of §16’s residual clause make applying it “more predictable” than its ACCA counter-part. Brief for Petitioner 28, 29. We disagree with both arguments.

A

The essentials of JUSTICE THOMAS’s position go as follows. Section 16(b), he says, cannot have one meaning, but could have one of two others. See post, at 27. The provision cannot demand an inquiry merely into the elements of a crime, because that is the province of §16(a). See supra, at 2 (setting out §16(a)’s text). But that still leaves a pair of options: the categorical, ordinary-case approach and the “underlying-conduct approach,” which asks about the specific way in which a defendant committed a crime. Post, at 25. According to JUSTICE THOMAS, each option is textually viable (although he gives a slight nod to the latter based on §16(b)’s use of the word “involves”). See post, at 24–26. What tips the scales is that only one—the conduct approach—is at all “workable.” Post, at 27. The difficulties of the ordinary-case inquiry, JUSTICE THOMAS rightly observes, underlie this Court’s view that §16(b) is too vague. So abandon that inquiry, JUSTICE THOMAS urges. After all, he reasons, it is the Court’s “plain duty,” under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems. Post, at 28–29 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 407 (1909)).

For anyone who has read Johnson, that argument will ring a bell. The dissent there issued the same invitation, based on much the same reasoning, to jettison the categorical approach in residual-clause cases. 576 U. S., at ____-___ (slip op., at 9–13) (opinion of ALITO, J.). The Court declined to do so. It first noted that the Government had not asked us to switch to a fact-based inquiry. It then observed that the Court “had good reasons” for originally adopting the categorical approach, based partly on ACCA’s text (which, by the way, uses the word “involves” identically) and partly on the “utter impracticability” of the alternative. Id., at __ (slip op., at 13) (majority opinion). “The only plausible interpretation” of ACCA’s residual clause, we concluded, “requires use of the categorical approach”—even if that approach could not in the end satisfy constitutional standards. Ibid. (internal quotation marks and alteration omitted).

The same is true here—except more so. To begin where Johnson did, the Government once again “has not asked us to abandon the categorical approach in residual-clause cases.” Ibid. To the contrary, and as already noted, the Government has conceded at every step the correctness of that statutory construction. See supra, at 9. And this time, the Government’s decision is even more noteworthy than before—precisely because the Johnson dissent laid out the opposite view, presenting it in prepackaged form for the Government to take off the shelf and use in the §16(b) context. Of course, we are

4. THE CHIEF JUSTICE’s dissent makes light of the difficulty of identifying a crime’s ordinary case. In a single footnote, THE CHIEF JUSTICE portrays that task as no big deal: Just eliminate the “atypical cases,” and (presto!) the crime’s nature and risk are revealed. See post, at 5, n. 1. That rosy view—at complete odds with Johnson—underlies his whole dissent (and especially, his analysis of how §16(b) applies to particular offenses, see post, at 7–10). In effect, THE CHIEF JUSTICE is able to conclude that §16(b) can survive Johnson only by refusing to acknowledge one of the two core insights of that decision.
not foreclosed from going down JUSTICE THOMAS’s path just because the Government has not done so. But we find it significant that the Government cannot bring itself to say that the fact-based approach JUSTICE THOMAS proposes is a tenable interpretation of §16’s residual clause.

Perhaps one reason for the Government’s reluctance is that such an approach would generate its own constitutional questions. As JUSTICE THOMAS relates, post, at 22, 28, this Court adopted the categorical approach in part to “avoid[ ] the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries.” Descamps v. United States, 570 U. S. 254, 267 (2013). JUSTICE THOMAS thinks that issue need not detain us here because “the right of trial by jury ha[s] no application in a removal proceeding.” Post, at 28 (internal quotation marks omitted). But although this particular case involves removal, §16(b) is a criminal statute, with criminal sentencing consequences. See supra, at 2. And this Court has held (it could hardly have done otherwise) that “we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.” Leocal, 543 U. S., at 12, n. 8. So JUSTICE THOMAS’s suggestion would merely ping-pong us from one constitutional issue to another. And that means the avoidance canon cannot serve, as he would like, as the interpretive tie breaker.

In any event, §16(b)’s text creates no draw: Best read, it demands a categorical approach. Our decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to “the statute of conviction, not to the facts of each defendant’s conduct.” Taylor v. United States, 495 U. S. 575, 601 (1990); see Leocal, 543 U. S., at 7 (Section 16 “directs our focus to the ‘offense’ of conviction . . . rather than to the particular facts”). Simple references to a “conviction,” “felony,” or “offense,” we have stated, are “read naturally” to denote the “crime as generally committed.” Nijhawan v. Holder, 557 U. S. 29, 34 (2009); see Leocal, 543 U. S., at 7; Johnson, 576 U. S., at ___. The words “by its nature” in §16(b) make that meaning all the clearer. The statute, recall, directs courts to consider whether an offense, by its nature, poses the requisite risk of force. An offense’s “nature” means its “normal and characteristic quality.” Webster’s Third New International Dictionary 1507 (2002). So §16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, “ordinarily”—entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is missing from §16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime’s circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. See Descamps, 570 U. S., at 267. If Congress had wanted judges to look into a felon’s actual conduct, “it presumably would have said so; other statutes, in other contexts, speak in just that way.” Id., at 267–268.

The upshot of all this textual evidence is that §16’s residual clause—like ACCA’s, except still more plainly—has no “plausible” fact-based reading. Johnson, 576 U. S., at ___ (slip op., at 13).

And finally, the “utter impracticability”—and associated inequities—of such an interpretation is as great in the one statute as in the other. Ibid. This Court has often described the daunting difficulties of accurately “ reconstruct[ing],” often many years later, “the conduct underlying [a] conviction.” Ibid.; Descamps, 570 U. S., at 270; Taylor, 495 U. S., at 601–602. According to JUSTICE THOMAS, we need not worry here because immigration judges have some special fact finding talent, or at least experience, that would mitigate the risk of error attaching to that endeavor in federal courts. See post, at 30. But we cannot see putting so much weight on the superior fact-finding prowess of (notoriously overburdened) immigration judges. And as we have said before, §16(b) is a criminal statute with applications outside the immigration context. See supra, at 2, 13. Once again, then, we have no ground for discovering a novel interpretation of §16(b) that would remove us from the dictates of Johnson.

B

Agreeing that is so, the Government (joined by THE CHIEF JUSTICE) takes a narrower path to the same desired result. It points to three textual discrepancies between ACCA’s residual clause and §16(b), and argues that they make §16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that Johnson found to produce impermissible vagueness. And none otherwise affects the determinacy of the statutory inquiry into whether a prior conviction is for a violent crime. That is why, contrary to the Government’s final argument, the experience of applying both statutes has generated confusion and division among lower courts.

J

The Government first—and foremost—relies on §16(b)’s express requirement (absent from ACCA) that the risk arise from acts taken “in the course of committing the offense.” Brief for Petitioner 31. (THE CHIEF JUSTICE echoes much of this argument. See post, at 6–7.) Because of that “temporal restriction,” a court applying §16(b) may

5. For example, in United States v. Hayes, 555 U. S. 415 (2009), this Court held that a firearms statute referring to former crimes as

“committed by” specified persons requires courts to consider underlying facts. Id., at 421. And in Nijhawan v. Holder, 557 U. S. 29 (2009), the Court similarly adopted a non-categorical interpretation of one of the aggravated felonies listed in the INA because of the phrase, appended to the named offense, “in which the loss to the victim or victims exceeds $10,000.” Id., at 34, 36 (emphasis deleted). JUSTICE THOMAS suggests that Nijhawan rejected the relevance of our ACCA precedents in interpreting the INA’s aggravated-felony list—including its incorporation of §16(b). Post, at 29–30. But that misreads the decision. In Nijhawan, we considered an item on the INA’s list that looks nothing like ACCA, and we concluded—no surprise here—that our ACCA decisions did not offer a useful guide. As to items on the INA’s list that do mirror ACCA, the opposite conclusion of course follows.
not “consider risks arising after” the offense’s commission is over. *Ibid.* In the Government’s view, §16(b)’s text thereby demands a “significantly more focused inquiry” than did ACCA’s residual clause. *Id.,* at 32.

To assess that claim, start with the meaning of §16(b)’s “in the course of” language. That phrase, understood in the normal way, includes the conduct occurring throughout a crime’s commission—not just the conduct sufficient to satisfy the offense’s formal elements. The Government agrees with that construction, explaining that the words “in the course of” sweep in everything that happens while a crime continues. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017) (illustrating that idea with reference to conspiracy, burglary, kidnapping, and escape from prison). So, for example, conspiracy may be a crime of violence under §16(b) because of the risk of force while the conspiracy is ongoing (i.e., “in the course of” the conspiracy); it is irrelevant that conspiracy’s elements are met as soon as the participants have made an agreement. See *ibid.; United States v. Doe,* 49 F. 3d 859, 866 (CA2 1995). Similarly, and closer to home, burglary may be a crime of violence under §16(b) because of the prospects of an encounter while the burglar remains in a building (i.e., “in the course of” the burglary); it does not matter that the elements of the crime are met at the precise moment of his entry. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017); *James,* 550 U. S., at 203. In other words, a court applying §16(b) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, §16(b)’s “in the course of” language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court’s ability to consider the risk that force will be used after the crime has entirely concluded—so, for example, after the conspiracy has dissolved or the burglar has left the building. We can construct law-school-type hypotheticals fitting that fact pattern—say, a burglar who constructs a booby trap that later knocks out the homeowner. But such imaginative forays cannot realistically affect a court’s view of the ordinary case of a crime, which is all that matters under the statute. See *supra,* at 2–3, 7. In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without §16(b)’s explicit temporal language, a court applying the section would do the same thing—ask what usually happens when a crime goes down.

And that is just what courts did when applying ACCA’s residual clause—and for the same reason. True, that clause lacked an express temporal limit. But not a single one of this Court’s ACCA decisions turned on conduct that might occur after a crime’s commission; instead, each hinged on the risk arising from events that could happen while the crime was ongoing. See, e.g., *Sykes v. United States,* 564 U. S. 1, 10 (2011) (assessing the risks attached to the “confrontations that initiate and terminate” vehicle flight, along with “intervening” events); *Chambers v. United States,* 555 U. S. 122, 128 (2009) (rejecting the Government’s argument that violent incidents “occur[ring] long after” a person unlawfully failed to report to prison rendered that crime a violent felony). Nor could those decisions have done otherwise, given the statute’s concern with the ordinary (rather than the outlandish) case. Once again, the riskiness of a crime in the ordinary case depends on the acts taken during—not after—its commission. Thus, the analyses under ACCA’s residual clause and §16(b) coincide.

The upshot is that the phrase “in the course of” makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA’s residual clause might equally fall within §16(b). And the difficulty of deciding whether it does so remains just as intractable. Indeed, we cannot think of a single federal crime whose treatment becomes more obvious under §16(b) than under ACCA because of the words “in the course of.” The phrase, then, cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government (and again, THE CHIEF JUSTICE’s dissent, see *post,* at 6) observes that §16(b) focuses on the risk of “physical force” whereas ACCA’s residual clause asked about the risk of “physical injury.” The §16(b) inquiry, the Government says, “trains solely” on the conduct typically involved in a crime. Brief for Petitioner 36. By contrast, the Government continues, ACCA’s residual clause required a second inquiry: After describing the ordinary criminal’s conduct, a court had to “speculate about a chain of causation that could possibly result in a victim’s injury.” *Ibid.* The Government’s conclusion is that the §16(b) inquiry is “more specific.” *Ibid.*

But once more, we struggle to see how that statutory distinction would matter. To begin with, the first of the Government’s two steps—defining the conduct in the ordinary case—is almost always the difficult part. Once that is accomplished, the assessment of consequences tends to follow as a matter of course. So, for example, if a crime is likely enough

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6. In response to repeated questioning at two oral arguments, the Government proposed one (and only one) such crime—but we disagree that §16(b)’s temporal language would aid in its analysis. According to the Government, possession of a short-barreled shotgun could count as violent under ACCA but not under §16(b) because shooting the gun is “not in the course of committing the crime of possession.” *Tr. of Oral Arg.* 59–60 (Oct. 2, 2017); see *Tr. of Oral Arg.* 6–7 (Jan. 17, 2017); Brief for Petitioner 32–34. That is just wrong: When a criminal shoots a gun, he does so while (“in the course of”) possessing it (except perhaps in some physics-defying fantasy world). What makes the offense difficult to classify as violent is something different: that while some people use the short-barreled shotguns they possess to commit murder, others merely store them in a nearby firearms cabinet—and it is hard to settle—which is the more likely scenario. Compare *Johnson,* 576 U. S., at ___ (slip op., at 19–20) (ALITO, J., dissenting) (“It is fanciful to assume that a person who [unlawfully possesses] a notoriously dangerous weapon is unlikely to use that weapon in violent ways”), with *id.,* at ___ (slip op., at 4) (THOMAS, J., concurring) (Unlawful possession of a short-barreled shotgun “takes place in a variety of ways . . . many, perhaps most, of which do not involve likely accompanying violence” (internal quotation marks omitted)). But contrary to THE CHIEF JUSTICE’s suggestion, see *post,* at 7–8 (which, again, is tied to his disregard of the ordinary-case inquiry, see *supra,* at 10, n. 4), that issue must be settled no less under §16(b) than under ACCA.
to lead to a shooting, it will also be likely enough to lead to an injury. And still more important, §16(b) involves two steps as well—and essentially the same ones. In interpreting statutes like §16(b), this Court has made clear that “physical force” means “force capable of causing physical pain or injury.” Johnson v. United States, 559 U. S. 133, 140 (2010) (defining the term for purposes of deciding what counts as a “violent” crime). So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Or said a bit differently, evaluating the risk of “physical force” itself entails considering the risk of “physical injury.” For those reasons, the force/injury distinction is unlikely to affect a court’s analysis of whether a crime qualifies as violent. All the same crimes might—or, then again, might not—satisfy both requirements. Accordingly, this variance in wording cannot make ACCA’s residual clause vague and §16(b) not.

Third, the Government briefly notes that §16(b), unlike ACCA’s residual clause, is not preceded by a “confusing list of exemplar crimes.” Brief for Petitioner 38. (THE CHIEF JUSTICE’s dissent reiterates this argument, with some additional references to our caselaw. See post, at 10–12.) Here, the Government is referring to the offenses ACCA designated as violent felonies independently of the residual clause (i.e., burglary, arson, extortion, and use of explosives). See supra, at 4. According to the Government, those crimes provided “contradictory and opaque indications” of what non-specified offenses should also count as violent. Brief for Petitioner 38. Because §16(b) lacks any such enumerated crimes, the Government concludes, it avoids the vagueness of ACCA’s residual clause.

We readily accept a part of that argument. This Court for several years looked to ACCA’s listed crimes for help in giving the residual clause meaning. See, e.g., Begay v. United States, 553 U. S. 137, 142 (2008); James, 550 U. S., at 203. But to no avail. As the Government relates (and Johnson explained), the enumerated crimes were themselves too varied to provide such assistance. See Brief for Petitioner 38–40; 576 U. S., at ___ (slip op., at 12). Trying to reconcile them with each other, and then compare them to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause’s application. See Brief for Petitioner 38–40.

But the Government’s conclusion does not follow. To say that ACCA’s listed crimes failed to resolve the residual clause’s vagueness is hardly to say they caused the problem. Had they done so, Johnson would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses. (Contrary to THE CHIEF JUSTICE’s suggestion, see post, at 12, discardng an interpretive tool once it is found not to actually aid in interpretation hardly “expand[s]” the scope of a statute.) That Johnson went so much further—invalidating a statutory provision rather than construing it independently of an-other—demonstrates that the list of crimes was not the culprit. And indeed, Johnson explicitly said as much. As described earlier, Johnson found the residual clause’s vagueness to reside in just “two” of its features: the ordinary-case requirement and a fuzzy risk standard. See 576 U. S., at ___–___ (slip op., at 5–6); supra, at 7–8. Strip away the enumerated crimes—as Congress did in §16(b)—and those dual flaws yet remain. And ditto the textual indeterminacy that flows from them.

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Faced with the two clauses’ linguistic similarity, the Government relies significantly on an argument rooted in judicial experience. Our opinion in Johnson, the Government notes, spoke of the longstanding “trouble” that this Court and others had in “making sense of [ACCA’s] residual clause.” 576 U. S., at ___ (slip op., at 9); see Brief for Petitioner 45. According to the Government, §16(b) has not produced “comparable difficulties.” Id., at 46. Lower courts, the Government claims, have divided less often about the provision’s meaning, and as a result this Court granted certiorari on “only a single Section 16(b) case” before this one. Ibid. “The most likely explanation,” the Government concludes, is that “Section 16(b) is clearer” than its ACCA counterpart. Id., at 47.

But in fact, a host of issues respecting §16(b)’s application to specific crimes divide the federal appellate courts. Does car burglary qualify as a violent felony under §16(b)? Some courts say yes, another says no.8 What of statutory rape? Once again, the Circuits part ways.9 How about evading arrest? The decisions point in different directions.10 Residential trespass? The same is true.11 Those examples do not exhaust the current catalogue of Circuit conflicts concerning §16(b)’s application. See Brief for National Immigration Project of the National Lawyers Guild et al. as Amici Curiae 7–18 (cit-

7. And, THE CHIEF JUSTICE emphasizes, we decided that one unanimously! See post, at 3 (discussing Leocal v. Ashcroft, 543 U. S. 1 (2004)). But one simple application does not clear statute make. As we put the point in Johnson: Our decisions “squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” 576 U. S., at ___ (slip op., at 11); see supra, at 9, n. 4.


10. Compare Dixon v. Attorney Gen., 768 F. 3d 1339, 1343–1346 (CA112014) (holding that one such statute falls under §16(b)), with Flores-Lopez v. Holder, 685 F. 3d 857, 863–865 (CA9 2012) (holding that another does not).

ing divided appellate decisions as to the unauthorized use of a vehicle, firearms possession, and abduction). And that roster would just expand with time, mainly because, as Johnson explained, precious few crimes (of the thousands that fill the statute books) have an obvious, non-speculative—and therefore undisputed—“ordinary case.” See 576 U. S., at ___–___ (slip op., at 5–6).

Nor does this Court’s prior handling of §16(b) cases support the Government’s argument. To be sure, we have heard oral argument in only two cases arising from §16(b) (including this one), as compared with five involving ACCA’s residual clause (including Johnson). But while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the §16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those §16(b) cases and remanded them for further consideration. That we disposed of the ACCA and §16(b) petitions in that order, rather than its opposite, provides no reason to disregard the indeterminacy that §16(b) shares with ACCA’s residual clause.

And of course, this Court’s experience in deciding ACCA cases only supports the conclusion that §16(b) is too vague. For that record reveals that a statute with all the same hallmarks as §16(b) could not be applied with the predictability the Constitution demands. See id., at ___–___ (slip op., at 6–9); supra, at 6–9. The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? “Insanity,” Justice Scalia wrote in the last ACCA residual clause case before Johnson, “is doing the same thing over and over again, but expecting different results.” Sykes, 564 U. S., at 28 (dissenting opinion). We abandoned that lunatic practice in Johnson and see no reason to start it again.

12. From all we can tell—and all the Government has told us, see Brief for Petitioner 45–52—lower courts have also decided many fewer cases involving §16(b) than ACCA’s residual clause. That disparity likely reflects the Government’s lesser need to rely on §16(b). That provision is mainly employed (as here) in the immigration context, to establish an “aggravated felony” requiring deportation. See supra, at 2. But immigration law offers many other ways to achieve that result. The INA lists 80 or so crimes that count as aggravated felonies; only if a conviction is not for one of those specified offenses need the Government resort to §16(b) (or another catch-all provision). See Luna Torres v. Lynch, 578 U. S. ___ (2016) (slip op., at 2). By contrast, ACCA enumerates only four crimes as a basis for enhancing sentences; the Government therefore had reason to use the statute’s residual clause more often.


Johnson tells us how to resolve this case. That decision held that “[t]wo features of [ACCA’s] residual clause conspire[d] to make it unconstitutionally vague.” 576 U. S., at ___ (slip op., at 5). Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily “devolv[ed] into guesswork and intuition,” invited arbitrary enforcement, and failed to provide fair notice. Id., at ___ (slip op., at 8). Section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA’s residual clause, §16(b) “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” Id., at ___ (slip op., at 6). We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

V

JUSTICE GORSUCH, concurring in part and concurring in the judgment.

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capiously construed that the mere expression of dis favored opinions could invite transportation or death. The founders cited the crown’s abuse of “pretended” crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today’s vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien’s crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law’s silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

I begin with a foundational question. Writing for the Court in Johnson v. United States, 576 U. S. ___ (2015), Justice Scalia held the residual clause of the Armed Career Criminal Act void for vagueness because it invited “more unpredictability and arbitrariness” than the Constitution allows. Id., at ___ (slip op., at 6). Because the residual clause in the statute now before us uses almost exactly the same language as
the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.

But first in *Johnson* and now again today JUSTICE THOMAS has questioned whether our vagueness doctrine can fairly claim roots in the Constitution as originally understood. See, e.g., post, at 2–6 (dissenting opinion); *Johnson*, supra, at ___–___ (opinion concurring in judgment) (slip op., at 6–18). For its part, the Court has yet to offer a reply. I believe our colleague’s challenge is a serious and thought-ful one that merits careful attention. At day’s end, though, it is a challenge to which I find my- self unable to subscribe. Respectfully, I am persuaded in- stead that void for vague-ness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.

Consider first the doctrine’s due process underpinnings. The Fifth and Fourteenth Amendments guarantee that “life, liberty, or property” may not be taken “without due process of law.” That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those “customary procedures to which freemen were entitled by the old law of England.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment) (internal quotationmarks omitted). Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government’s current laws may tolerate. *Post*, at 3, n. 1 (opinion of THOMAS, J.) (collecting authorities). But in my view the weight of the historical evidence shows that the clause sought to ensure that the people’s rights are never any less secure against governmental invasion than they were at common law. Lord Coke took this view of the English due process guarantee. 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 50 (1797). John Rutledge, our second Chief Justice, explained that Coke’s teachings were carefully studied and widely adopted by the framers, becoming “‘almost the foundations of our law.’” *Klopf v. North Carolina*, 386 U. S. 213, 225 (1967). And many more students of the Constitution besides—from Justice Story to Justice Scalia—have agreed that this view best represents the original understanding of our own Due Process Clause. See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856); 3 J. Story, *Commentaries on the Constitution of the United States* §1783, p. 661 (1833); *Pacific Mut.*, supra, at 28–29 (opinion of Scalia, J.); Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 341 (1987).

Perhaps the most basic of due process’s customary protec-tions is the demand of fair notice. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926); see also Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 543 (2009) (“From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law”). Criminal indictments at common law had to provide “precise and sufficient certainty” about the charges involved. 4 W. Blackstone, *Commentaries on the Laws of England* 301 (1769) (Blackstone). Unless an “offence [was] set forth with clearness and certainty,” the indictment risked being held void in court. *Id.*, at 302 (emphasis deleted); 2 W. Hawkins, *Pleas of the Crown*, ch. 25, §§99, 100, pp. 244–245 (2d ed. 1726) (“[I]t seems to have been always the common practice, where an indictment appeared to be [in]sufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it”).

The same held true in civil cases affecting a person’s life, liberty, or property. A civil suit began by obtaining a writ—a detailed and specific form of action asking for particular relief. *Bellia, Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 784–786 (2004); *Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Histori-cal Perspective*, 135 U. Pa. L. Rev. 909, 914–915 (1987). Because the various civil writs were clearly defined, English subjects served with one would know with particularity what legal requirement they were alleged to have violated and, accord-ingly, what would be at issue in court. *Id.*, at 917; *Moffitt, Pleadings in the Age of Settlement*, 80 Ind. L. J. 727, 731 (2005). And a writ risked being held defective if it didn’t provide fair notice. *Goldington v. Bassingburn*, Y. B. Trin. 3 Edw. II, f. 27b (1310) (explaining that it was “the law of the land” that “no one [could] be taken by surprise” by having to “answer in court for what [one] has not been warned to answer”).

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made “stealing sheep, or other cattle” a felony. 1 Blackstone 88 (emphasis deleted). Because the term “cattle” embraced a good deal more than when it was used in 1769 (includ-ing wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover—and so the court treated the term “cattle” as a nullity. *Ibid.* All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to “bulls, cows, oxen,” and more “by name.” *Ibid.*

This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F. Cas. 732 (No. 4,499) (CC NY 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied, concluding that “the court had better pass” the statutory terms by “as unintelligible and useless” rather than “put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed.” *Id.*, at 735. In *United States v. Sharp*, 27 F. Cas. 1041 (No.16,264) (CC Pa. 1815), Justice Washington confronted a statute which prohibited seamen from making a “revolt.” *Id.*, at 1043. But he was unable to determine the
meaning of this provision “by any authority . . . either in the common, admiralty, or civil law.” Ibid. As a result, he declined to “recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be.” Ibid.14

Nor was the concern with vague laws confined to the most serious offenses like capital crimes. Courts refused to apply vague laws in criminal cases involving relatively modest penalties. See, e.g., McJunkins v. State, 10 Ind. 140, 145 (1858). They applied the doctrine in civil cases too. See, e.g., Drake v. Drake, 15 N. C. 110, 115 (1833); Commonwealth v. Bank of Pennsylvania, 3 Watts & Serg. 173, 177 (Pa. 1842). As one court put it, “all laws” “ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate.” McConvill v. Mayor and Aldermen of Jersey City, 39 N. J. L. 38, 42 (1876). “It is impossible . . . to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.” Id., at 42–43.

These early cases, admittedly, often spoke in terms of construing vague laws strictly rather than declaring them void. See, e.g., post, at 4–5 (opinion of THOMAS, J.); Johnson, 576 U. S., at __–____ (opinion of THOMAS, J.) (slip op., at 8–10). But in substance void the law is often exactly what these courts did: rather than try to construe or interpret the statute before them, judges frequently held the law simply too vague to apply. Blackstone, for example, did not suggest the court in his illustration should have given a narrowing construction to the term “cattle,” but argued against giving it any effect at all. 1 Blackstone 88; see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 582 (1989) (“I doubt . . . that any modern court would go to the lengths described by Blackstone in its application of the rule that penal statutes are to be strictly construed”); Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, n. 3 (1931) (explaining that “since strict construction, in effect, nullified ambiguous provisions, it was but a short step to declaring them void ab initio”); supra, at 5, n. 1 (state courts holding vague statutory terms “void” or “null”).

What history suggests, the structure of the Constitution confirms. Many of the Constitution’s other provisions presuppose and depend on the existence of reasonably clear laws. Take the Fourth Amendment’s requirement that arrest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment’s mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn’t tell what he’s alleged to have done and what sort of witnesses he might need to rebut that charge. Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a “parchment barrier[ ]” against arbitrary power. The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison).

Although today’s vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine’s equal debt to the separation of powers. The Constitution assigns “[a]ll legislative Powers” in our federal government to Congress. Art. I, §1. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See The Federalist No. 78, at 465 (A. Hamilton) (“The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated”). Meanwhile, the Constitution assigns to judges the “judicial Power” to decide “Cases” and “Controversies.” Art. III, §2. That power does notlicense judges to craft new laws to govern future conduct, but only to “discern[ ] the course prescribed by law” as it currently exists and to “follow it” in resolving disputes between the people over past events. Osborn v. Bank of United States, 9 Wheat. 738, 866 (1824).

From this division of duties, it comes clear that legislators may not “abdicate their responsibilities for setting the standards of the criminal law,” Smith v. Goguen, 415 U. S. 566, 575 (1974), by leaving to judges the power to decide “the various crimes includable in [a] vague phrase,” Jordan v. De George, 341 U. S. 223, 242 (1951) (Jackson, J., dissenting). For “if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] [t]his would, to some extent, substitute the judicial for the legislative department of government.” Ko-

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14. Many state courts also held vague laws ineffectual. See, e.g., State v. Mann, 2 Ore. 238, 240–241 (1867) (holding that statute prohibiting “gambling devices” was “void” because “the term has no settled and definite meaning”); Drake v. Drake, 15 N. C. 110, 115 (1833) (explaining that “if the terms in which [a statute] is couched be so vague as to convey no definite meaning to those whose duty it is to operate,” it is “impossible . . . to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.”).
lender v. Lawson, 461 U. S. 352, 358, n. 7 (1983) (internal quotation marks omitted). Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions. See Grayned v. City of Rockford, 440 U. S. 104, 108–109 (1977) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis”).

These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to “condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it.” Jordan, supra, at 242 (Jackson, J., dissenting). Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies. See, e.g., A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 151 (1962) (“A vague statute delegates to administrators, prosecutors, juries, and judges the authority of ad hoc decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact”).

For just these reasons, Hamilton warned, while “liberty can have nothing to fear from the judiciary alone,” it has “everything to fear from” the union of the judicial and legislative powers. The Federalist No. 78, at 466. No doubt, too, for reasons like these this Court has held “that the more important aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement” and keep the separate branches within their proper spheres. Kolender, supra, at 358 (quoting Goguen, supra, at 575 (emphasis added)).

* * *

Persuaded that vagueness doctrine enjoys a secure footing in the original understanding of the Constitution, the next question I confront concerns the standard of review. What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague? For its part, the government argues that where (as here) a person faces only civil, not criminal, consequences from a statute’s operation, we should declare the law unconstitutional only if it is “unintelligible.” But in the criminal context this Court has generally insisted that the law must afford “ordinary people . . . fair notice of the conduct it punishes.” Johnson, 576 U. S., at ___ (slip op., at 3). And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law’s demands, as we’ve seen, is “the first essential of due process.” Connally, 269 U. S., at 391.

And as we’ve seen, too, the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law. See supra, at 2–7.

First principles aside, the government suggests that at least this Court’s precedents support adopting a less-than-fair-notice standard for civil cases. But even that much I do not see. This Court has already expressly held that a “stringent vagueness test” should apply to at least some civil laws—those abridging basic First Amendment freedoms. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U. S. 489, 499 (1982). This Court has made clear, too, that due process protections against vague laws are “not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.” Giaccio v. Pennsylvania, 382 U. S. 399, 402 (1966). So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. To be sure, this Court has also said that what qualifies as fair notice depends “in part on the nature of the enactment.” Hoffman Estates, 455 U. S., at 498. And the Court has sometimes “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” Id., at 498–499. But to acknowledge these truisms does nothing to prove that civil laws must always be subject to the government’s emaciated form of review.

In fact, if the severity of the consequences counts when deciding the standard of review, shouldn’t we also take account of the fact that today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today’s “civil” penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are “punitive civil sanctions . . . rapidly expanding,” they are “sometimes more severely punitive than the parallel criminal sanctions for the same conduct.” Mann, Punitive Civil Sanctions: The Middle ground Between Criminal and Civil Law, 101 Yale L. J. 1795, 1798 (1992) (emphasis added). Given all this, any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set above our precedent’s current threshold than to suggest the civil standard should be buried below it.

Retreating to a more modest line of argument, the government emphasizes that this case arises in the immigration context and so implicates matters of foreign relations where the Executive enjoys considerable constitutional authority. But to acknowledge that the President has broad authority to
act in this general area supplies no justification for allowing judges to give content to an impermissibly vague law.

Alternatively still, JUSTICE THOMAS suggests that, at least at the time of the founding, aliens present in this country may not have been understood as possessing any rights under the Due Process Clause. For support, he points to the Alien Friends Act of 1798. An Act Concerning Aliens §1, 1 Stat. 571; post, at 6–12 (opinion of THOMAS, J.). But the Alien Friends Act—better known as the “Alien” part of the Alien and Sedition Acts—is one of the most notorious laws in our country’s history. It was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility. See, e.g., Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int’l L. 63, 70–71 (2002). Yet even then it was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment. With this fuller view, it seems doubtful the Act tells us a great deal about aliens’ due process rights at the founding.15

Besides, none of this much matters. Whether Madison or his adversaries had the better of the debate over the constitutionality of the Alien Friends Act, Congress is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process. See, e.g., Sandin v. Conner, 515 U. S. 472, 477–478 (1995); Easterbrook, Substance and Due Process, 1982 S. Ct. Rev. 85, 88 (“If . . . the constitution, statute, or regulation creates a liberty or property interest, then the second step—determining ‘what process is due’—comes into play”). Madison made this very point, suggesting an alien’s admission in this country could in some circumstances be analogous to “the grant of land to an individual,” which “may be of favor not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away.” Madison’s Report 319. And, of course, that’s exactly what Congress eventually chose to do here. Decades ago, it enacted a law affording Mr. Dimaya lawful permanent residency in this country, extending to him a statutory liberty interest others traditionally have enjoyed to remain in and move about the country free from physical imprisonment and restraint. See Dimaya v. Lynch, 803 F. 3d 1110, 1111 (CA9 2015); 8 U. S. C. §§1101(20), 1255. No one suggests Congress had to enact statutes of this sort. And exactly what processes must attend the deprivation of a statutorily afforded liberty interest like this may pose serious and debatable questions. Cf. Murray’s Lessee, 18 How., at 277 (approving summary procedures in another context). But however summary those procedures might be, it’s hard to fathom why fair notice of the law—the most venerable of due process’s requirements—would not be among them.

Connolly, 269 U. S., at 391.16

Today, a plurality of the Court agrees that we should reject the government’s plea for a feeble standard of review, but for a different reason. Ante, at 5–6. My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Con-
gress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family’s living, or confiscate his home? I can think of no good answer.

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With the fair notice standard now in hand, all that remains is to ask how it applies to the case before us. And here at least the answer comes readily for me: to the extent it requires an “ordinary case” analysis, the portion of the Immigration and Nationality Act before us fails the fair notice test for the reasons Justice Scalia identified in Johnson and the Court recounts today.

Just like the statute in Johnson, the statute here instructs courts to impose special penalties on individuals previously “convicted of” a “crime of violence.” 8 U. S. C. §§1227(a) (2)(A)(iii), 1101(a)(43)(F). Just like the statute in Johnson, the statute here fails to specify which crimes qualify for that label. Instead, and again like the statute in Johnson, the statute here seems to require a judge to guess about the ordinary case of the crime of conviction and then guess whether a “substantial risk” of “physical force” attends its commission. 18 U. S. C. §16(b); Johnson, 576 U. S., at ___—___ (slip op., at 4–5). Johnson held that a law that asks so much of courts while offering them so little by way of guidance is constitutionally vague. And I do not see how we might reach a different judgment here.

Any lingering doubt is resolved for me by taking account of just some of the questions judges trying to apply the statute using an ordinary case analysis would have to confront. Does a conviction for witness tampering ordinarily involve a threat to the knees or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? These questions do not suggest obvious answers. Is the court supposed to hold evidentiary hearings to sort them out, entertaining experts with competing narratives and statistics, before deciding what the ordinary case of a given crime looks like and how much risk of violence it poses? What is the judge to do if there aren’t any reliable statistics available? Should (or must) the judge predict the effects of new technology on what qualifies as the ordinary case? After all, surely the risk of injury calculus for crimes like larceny can be expected to change as more thefts are committed by computer rather than by gunpoint. Or instead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? And on top of all that may be the most difficult question yet: at what level of generality is the inquiry supposed to take place? Is a court supposed to pass on the ordinary case of burglary in the relevant neighborhood or county, or should it focus on statewide or even national experience? How is a judge to know? How are the people to know?

The implacable fact is that this isn’t your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute’s text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn’t even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.

* 

Having said this much, it is important to acknowledge some limits on today’s holding too. I have proceeded on the premise that the Immigration and Nationality Act, as it incorporates §16(b) of the criminal code, commands courts to determine the risk of violence attending the ordinary case of conviction for a particular crime. I have done so because no party before us has argued for a different way to read these statutes in combination; because our precedent seemingly requires this approach; and because the government itself has conceded (repeatedly) that the law compels it. Johnson, supra, at ___ (slip op., at 13); Taylor v. United States, 495 U. S. 575, 600 (1990); Brief for Petitioner 11, 30, 32, 36, 40, 47 (conceding that an ordinary case analysis is required).

But any more than that I would not venture. In response to the problems engendered by the ordinary case analysis, JUSTICE THOMAS suggests that we should overlook the government’s concession about the propriety of that approach; reconsider our precedents endorsing it; and read the statute as requiring us to focus on the facts of the alien’s crime as committed rather than as the facts appear in the ordinary case of conviction. Post, at 20–32. But normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government. And normally, too, the crucible of adversarial testing is crucial to sound judicial decisionmaking. We rely on it to “yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.” Maslenjak v. United States, 582 U. S. ___, ___ (2017) (GORSUCH, J., concurring in part and concurring in judgment) (slip op., at 2).

While sometimes we may or even must forgo the adversarial process, I do not see the case for doing so today. Maybe especially because I am not sure JUSTICE THOMAS’s is the only available alternative reading of the statute we would have to consider, even if we did reject the government’s concession and wipe the predecendental slate clean. We might also have to consider an interpretation that would have courts ask not whether the alien’s crime of conviction ordinarily involves a risk of physical force, or whether the defendant’s particular crime involved such a risk, but whether the defendant’s crime of conviction always does so. After all, the language before us requires a conviction for an “offense . . . that, by its nature, involves a substantial risk of physical force.” 18 U.
S. C. §16(b) (emphasis added). Plausibly, anyway, the word “nature” might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. See 10 Oxford English Dictionary 247 (2d ed. 1989). While I remain open to different arguments about our precedent and the proper reading of language like this, I would address them in another case, whether involving the INA or a different statute, where the parties have a chance to be heard and we might benefit from their learning.

It’s important to note the narrowness of our decision today in another respect too. Vagueness doctrine represents a procedural, not a substantive, demand. It does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office. Our history surely bears examples of the judicial misuse of the so-called “substantive component” of due process to dictate policy on matters that belonged to the people to decide. But concerns with substantive due process should not lead us to react by withdrawing an ancient procedural protection compelled by the original meaning of the Constitution.

Today’s decision sweeps narrowly in yet one more way. By any fair estimate, Congress has largely satisfied the procedural demand of fair notice even in the INA provision before us. The statute lists a number of specific crimes that can lead to a lawful resident’s removal—for example, murder, rape, and sexual abuse of a minor. 8 U. S. C. §1101(a)(43)(A).

Our ruling today does not touch this list. We address only the statute’s “residual clause” where Congress ended its own list and asked us to begin writing our own. Just as Blackstone’s legislature passed a revised statute clarifying that “cattle” covers bulls and oxen, Congress remains free at any time to add more crimes to its list. It remains free, as well, to write a new residual clause that affords the fair notice lacking here. Congress might, for example, say that a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal. Congress has done almost exactly this in other laws. See, e.g., 18 U. S. C. §922(g). What was done there could be done here.

But those laws are not this law. And while the statute before us doesn’t rise to the level of threatening death for “pretended offences” of treason, no one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power. And, in my judgment, that foundational principle dictates today’s result. Because I understand them to be consistent with what I have said here, I join Parts I, III, IV–B, and V of the Court’s opinion and concur in the judgment.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

In Johnson v. United States, we concluded that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, given the “indeterminacy of the wide-ranging inquiry” it required. 576 U. S. ___, ___ (2015) (slip op., at 5). Today, the Court relies wholly on Johnson—but only some of Johnson—to strike down another provision, 18 U. S. C. §16(b). Because §16(b) does not give rise to the concerns that drove the Court’s decision in Johnson, I respectfully dissent.

I

The term “crime of violence” appears repeatedly throughout the Federal Criminal Code. Section 16 of Title 18 defines it to mean:

“(a) an offense that has as an element the use, at tempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

This definition of “crime of violence” is also incorporated in the definition of “aggravated felony” in the Immigration and Nationality Act. 8 U. S. C. §1101(a)(43)(F) (“aggravated felony” includes “a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year” (footnote omitted)). A conviction for an aggravated felony carries serious consequences under the immigration laws. It can serve as the basis for an alien’s removal from the United States, and can preclude cancellation of removal by the Attorney General. §§1227(a)(2)(A)(iii), 1229b(a)(3).

Those consequences came to pass in respondent James Dimaya’s case. An Immigration Judge and the Board of Immigration Appeals interpreted §16(b) to cover Dimaya’s two prior convictions for first-degree residential burglary under California law, subjecting him to removal. To stave off that result, Dimaya argued that the language of §16(b) was void for vagueness under the Due Process Clause of the Fifth Amendment.

The parties begin by disputing whether a criminal or more relaxed civil vagueness standard should apply in resolving Dimaya’s challenge. A plurality of the Court rejects the Government’s argument in favor of a civil standard, because of the “grave nature of deportation,” Jordan v. De George, 341 U. S. 223, 231 (1951); see ante, at 6 (plurality opinion); JUSTICE GORSUCH does so for broader reasons, see ante, at 10–15 (GORSUCH, J., concurring in part and concurring in judgment). I see no need to resolve which standard applies, because I would hold that §16(b) is not unconstitutionally vague even under the standard applicable to criminal laws.
II

This is not our first encounter with §16(b). In Leocal v. Ashcroft, 543 U. S. 1 (2004), we were asked to decide whether either subsection of §16 covers a particular category of state crimes, specifically DUI offenses involving no more than negligent conduct. 543 U. S., at 6. Far from finding §16(b) “hopelessly indeterminate[,]” Johnson, 576 U. S., at ___ (slip op., at 7), we considered the provision clear and unremarkable: “while §16(b) is broader than §16(a) in the sense that physical force need not actually be applied,” the provision “simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense,” Leocal, 543 U. S., at 10–11. Applying that standard to the state offense at issue, we concluded—unanimously—that §16(b) “cannot be read to include [a] conviction for DUI causing serious bodily injury under Florida law.” Id., at 11.

Leocal thus provides a model for how courts should assess whether a particular crime “by its nature” involves a risk of the use of physical force. At the outset, our opinion set forth the elements of the Florida DUI statute, which made it a felony “for a person to operate a vehicle while under the influence and, by reason of such operation, caus[e] . . . [s]erious bodily injury to another.” 543 U. S., at 7. Our §16(b) analysis, in turn, focused on those specific elements in concluding that a Florida offender’s acts would not naturally give rise to the requisite risk of force “in the course of committing the offense.” Id., at 11. “In no ‘ordinary or natural’ sense,” we explained, “can it be said that a person risks having to ‘use’ physical force against another person in the course of operating a vehicle while intoxicated and causing injury.” Ibid.

The Court holds that the same provision we had no trouble applying in Leocal is in fact incapable of reasoned application. The sole justification for this turnabout is the resemblance between the language of §16(b) and the language of the residual clause of the Armed Career Criminal Act (ACCA) that was at issue in Johnson. The latter provision defined a “violent felony” to include “any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U. S. C. §924(e)(2)(B) (ii) (emphasis added).

In Johnson, we concluded that the ACCA residual clause (the “or otherwise” language) gave rise to two forms of intractable uncertainty, which “conspire[d]” to render the provision unconstitutionally vague. 576 U. S., at ___ (slip op., at 5). First, the residual clause asked courts to gauge the “potential risk” of “physical injury” posed by the conduct involved in the crime. Ibid. That inquiry, we determined, entailed not only an evaluation of the “criminal’s behavior,” but also required courts to consider “how the idealized ordinary case of the crime subsequently plays out.” Ibid. Second, the residual clause obligated courts to compare that risk to an indeterminate standard—one that was inextricably linked to the provision’s four enumerated crimes, which presented differing kinds and degrees of risk. Id., at ___ (slip op., at 6). This murky confluence of features, each of which “may have been] tolerable in isolation,” together “ma[de] a task for us which at best could be only guesswork.” Id., at ___ (slip op., at 10).

Section 16(b) does not present the same ambiguities. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled. See James v. United States, 550 U. S. 192, 208 (2007) (this categorical inquiry asks “whether the conduct encompassed by the elements of the offense, in the ordinary case, presents” the requisite risk). 17 In the Court’s view, that effectively resolves this case. But the Court too readily dismisses the significant textual distinctions between §16(b) and the ACCA residual clause. See also ante, at 2 (opinion of Gorsuch, J.). Those differences undermine the conclusion that §16(b) shares each of the “dual flaws” of that clause. Ante, at 21 (majority opinion).

To begin, §16(b) yields far less uncertainty “about how to estimate the risk posed by a crime.” Johnson, 576 U. S., at ___ (slip op., at 5). There are three material differences between §16(b) and the ACCA residual clause in this respect. First, the ACCA clause directed the reader to consider whether the offender’s conduct presented a “potential risk” of injury. Forced to give meaning to that befuddling choice of phrase—which layered one indeterminate term on top of another—we understood the word “potential” to signify that “Congress intended to encompass possibilities even more contingent or remote than “a simple ‘risk.’” James, 550 U. S., at 207–208. As we explained in Johnson, that made for a “speculative” inquiry “detached from statutory elements.” 576 U. S., at ___ (slip op., at 5). In other words, the offense elements could not constrain the risk inquiry in the manner they do here. See Leocal, 543 U. S., at 11. The “serious potential risk” standard also forced courts to assess in an expansive way the “collateral consequences” of the perpetrator’s acts. For example, courts had to take into account the concern that others might cause injury in attempting to apprehend

17 All this “ordinary case” caveat means is that while “[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk[,]” courts should exclude those atypical cases in assessing whether the offense qualifies. James, 550 U. S., at 208. As we have explained, under that approach, it is not the case that “every conceivable factual offense covered by a statute” must pose the requisite risk “before the offense can be deemed” a crime of violence. Ibid. But the same is true of the categorical approach generally. See ibid. (using the terms just quoted to characterize both the ordinary case approach and the categorical approach for enumerated offenses set forth in Taylor v. United States, 495 U. S. 575 (1990); Moncrieffe v. Holder, 569 U. S. 184, 191 (2013); Gonzales v. Duenas-Alvarez, 549 U. S. 183, 193 (2007).
the offender. See Sykes v. United States, 564 U. S. 1, 8–9 (2011). Section 16(b), on the other hand, asks about “risk” alone, a familiar concept of everyday life. It therefore calls for a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, §16(b) focuses exclusively on the risk that the offender will “use[ ] “physical force” “against” another person or another person’s property. Thus, unlike the ACCA residual clause, “§16(b) plainly does not encompass all offenses which create a ‘substantial risk’ that injury will result from a person’s conduct.” Leocal, 543 U. S., at 10, n. 7 (emphasis added). The point is not that an inquiry into the risk of “physical force” is markedly more determinate than an inquiry into the risk of “physical injury.” But see ante, at 19–20. The difference is that §16(b) asks about the risk that the offender himself will actively employ force against person or property. That language does not sweep in all instances in which the offender’s acts, or another person’s reaction, might result in unintended or negligent harm.

Third, §16(b) has a temporal limit that the ACCA residual clause lacked: The “substantial risk” of force must arise “in the course of committing the offense.” Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime. See Leocal, 543 U. S., at 10 (“The reckless disregard in §16 relates . . . to the risk that the use of physical force against another might be required in committing a crime.”). The provision thereby excludes more attenuated harms that might arise following the completion of the crime. The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to “potential” risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done. See, e.g., United States v. Benton, 639 F. 3d 723, 732 (CA6 2011) (finding that “solicitation to commit aggravated assault” qualified under the ACCA residual clause on the theory that the solicited individual might subsequently carry out the requested act).

Why does any of this matter? Because it mattered in Johnson. More precisely, the expansive language in the ACCA residual clause contributed to our determination that the clause gave rise to “grave uncertainty about how to estimate the risk posed by a crime.” 576 U. S., at ___ (slip op., at 5). “Critically,” we said—a word that tends to mean something—“‘picturing the criminal’s behavior is not enough.” Ibid. (emphais added). Instead, measuring “potential risk” “seemingly require[d] the judge to imagine how the idealized ordinary case of the crime subsequently plays out.” Ibid. (emphasis added). Not so here. In applying §16(b), considering “the criminal’s behavior” is enough.

Those three distinctions—the unadorned reference to “risk,” the focus on the offender’s own active employment of force, and the “in the course of committing” limitation—also mean that many hard cases under ACCA are easier under §16(b). Take the firearm possession crime from Johnson itself, which had as its constituent elements (1) unlawfully (2) possessing (3) a short-barreled shotgun. None of those elements, “by its nature,” carries “a substantial risk” that the possessor will use force against another “in the course of committing the offense.” Nothing inherent in the act of firearm possession, even when it is unlawful, gives rise to a substantial risk that the owner will then shoot someone. See United States v. Serafin, 562 F. 3d 1105, 1113 (CA10 2009) (recognizing that “Leocal instructs [a court] to focus not on whether possession will likely result in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession”). Yet short-barreled shotgun possession presented a closer question under the ACCA residual clause, because the “serious potential risk” language seemingly directed us to consider “the circumstances and conduct that ordinarily attend the offense;” in addition to the offense itself. Johnson, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 17); see id., at ___ (slip op., at 19–20) (reasoning that the crime must qualify because “a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is [likely] to use that weapon in violent ways”).

Failure to report to a penal institution, the subject of Chambers v. United States, 555 U. S. 122 (2009), is another crime “whose treatment becomes more obvious under §16(b) than under ACCA;” ante, at 18. In Chambers, the Government argued that the requisite risk of injury arises not necessarily at the time the offender fails to report to prison, but instead later, when an officer attempts to recapture the fugitive. 555 U. S., at 128. The majority is correct that we ultimately “reject[ed]” the Government’s contention. Ante, at 18. But we did so after “assum[ing] for argument’s sake” its premise—that is, “the relevance of violence that may occur long after an offender fails to report.” 555 U. S., at 128; see id., at 129 (looking at 160 cases of “failure to report” and observing that “none at all involved violence . . . during the commission of the offense itself, [nor] during the offender’s later apprehension”). The Court protests that this straightforward analysis fails to take account of the crime’s ordinary case. Ante, at 18–19, n. 6. But the fact that the element of “possessions” may “take[ ] place in a variety of ways”—for instance, one may possess a firearm “in a closet, in a store room, in a car, in a pocket,” “unloaded, disassembled, or locked away,” Johnson, 576 U. S., at ___ (THOMAS, J., concurring in judgment) (slip op., at 4)—“matters very little. That is because none of the alternative ways of satisfying that element produce a substantial risk that the possessor will use physical force against the person or property of another. And no one would say that a person “possesses” a gun by firing it or threatening someone with it. Cf. id., at ___ (opinion of THOMAS, J.) (slip op., at 5) (“[T]he risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it.”). The Court’s insistence that this offense is nonetheless “difficult to classify” under §16(b), ante, at 18, n. 6, is surprising in light of our assessment, just two Terms ago, that §16 does not cover “felon-in-possession laws and other firearms offenses,” Luna Torres v. Lynch, 578 U. S. ___ (2016) (slip op., at 13).
“in the course of committing the offense” language in §16(b) helpfully forecloses that debate.

DUI offenses are yet another example. Because §16(b) asks about the risk that the offender will “use[]” “physical force,” we readily concluded in Leocal that the subsection does not cover offenses where the danger arises from the offender’s negligent or accidental conduct, including drunk driving. 543 U. S., at 11. Applying the ACCA residual clause proved more trying. When asked to decide whether the clause covered drunk driving offenses, a majority of the Court concluded that the answer was no. Begay v. United States, 553 U. S. 137 (2008). Our decision was based, however, on the inference that the clause must cover only “purposeful, ‘violent,’ and ‘aggressive’ conduct”—a test derived not from the “conduct that presents a serious potential risk of physical injury” language, but instead by reference to (what we guessed to be) the unifying characteristics of the enumerated offenses. Id., at 144–145. Four Members of the Court criticized that test, see id., at 150–153 (Scalia, J., concurring in judgment); id., at 158–160, 162–163 (ALITO, J., dissenting), though they themselves disagreed about whether DUIs were covered, see id., at 153–154 (opinion of Scalia, J.); id., at 156–158 (opinion of ALITO, J.). And the Court distanced itself from the Begay requirement only a few years later when confronting the crime of vehicular flight. See Sykes, 564 U. S., at 12–13; Johnson, 576 U. S., at ____ (slip op., at 8–9).

Which brings me to the second part of the Court’s analysis: its objection that §16(b), like the ACCA residual clause, leaves “uncertainty about the level of risk that makes a crime ‘violent.’” Ante, at 10. The “substantial risk” standard in §16(b) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses. Recall that the ACCA provision defined a “violent felony” to include a crime that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U. S. C. §924(e)(2)(B)(ii) (emphasis added). As our Court recognized early on, that “otherwise” told the reader to understand the “serious potential risk of physical injury” standard by way of the four enumerated crimes. James, 550 U. S., at 203. But how, exactly? That question dogged our residual clause cases for years, until we said no más in Johnson.

In our first foray, James, we resolved the case by asking whether the risk posed by the crime of attempted burglary was “comparable to that posed by its closest analog among the enumerated offenses,” which was completed burglary. 550 U. S., at 203. While that rule “[took] care of attempted burglary,” it “offer[ed] no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes.” Johnson, 576 U. S., at ____ (slip op., at 7). The James dissent, for its part, would have determined the requisite degree of risk from the least dangerous of the enumerated crimes, and compared the offense to that. 550 U. S., at 218–219 (opinion of Scalia, J.). But that approach also proved to be harder than it sounded. See id., at 219–227.

After James came Begay, in which we concluded that the enumerated offenses served as an independent limitation on the kind of crime that could qualify. 553 U. S., at 142; see Chambers, 555 U. S., at 128 (applying the Begay standard). As discussed, that test was short lived (though we did not purport to wholly repudiate it). See Sykes, 564 U. S., at 13. Finally, in Sykes—our penultimate residual clause case—we acknowledged the prior use of the closest-analog test in James, but instead focused on whether the risk posed by vehicular flight was “similar in degree of danger” to the listed offenses of arson and burglary. 564 U. S., at 8–10. As a result, Justice Scalia’s dissent characterized the Sykes majority as applying the test from his prior dissent in James, not James itself. See 564 U. S., at 29–30, 33. This series of precedents laid bare our “repeated inability to craft a principled test out of the statutory text.” id., at 34 (opinion of Scalia, J.), as the Court ultimately acknowledged in Johnson, 576 U. S., at ____ (slip op., at 7).

The enumerated offenses, and our Court’s failed attempts to make sense of them, were essential to Johnson’s conclusion that the residual clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” Id., at ____ (slip op., at 6). As Johnson explained, the issue was not that the statute employed a fuzzy standard. That kind of thing appears in the statute books all the time. Id., at ____, ____ (slip op., at 6, 12). In the majority’s retelling today, the difficulty inhered solely in the fact that the statute paired such a standard with the ordinary case inquiry. See ante, at 8, 10–11, 21. But that account sidesteps much of Johnson’s reasoning. See 576 U. S., at ____–____, ____–____, ____ (slip op., at 4–5, 6, 7–9, 12). Our opinion emphasized that the word “otherwise” “force[d]” courts to interpret the amorphous standard “in light of” the four enumerated crimes, which are “not much more similar to one another in kind than in degree of risk posed.” Id., at ____, ____ (slip op., at 6, 8). Or, as Johnson put it more vividly, “[t]he phrase ‘shades of red,’ standing alone, does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red’ assuredly does so.” Id., at ____ (slip op., at 12). Indeed, the author of Johnson had previously, and repeatedly, described this feature of the residual clause as the “crucial . . . respect” in which the law was problematic. See James, 550 U. S., at 230, n. 7 (opinion of Scalia, J.); Sykes, 564 U. S., at 35 (opinion of Scalia, J.).

With §16(b), by contrast, a court need simply consider the meaning of the word “substantial”—a word our Court has interpreted and applied innumerable times across a wide variety of contexts. 19 The court does not need to give that

familiar word content by reference to four different offenses with varying amounts and kinds of risk.

In its effort to recast a considerable portion of Johnson as dicta, the majority speculates that if the enumerated offenses had truly mattered to the outcome, the Court would have told lower courts to “give up on trying to interpret the clause by reference to” those offenses, rather than striking down the provision entirely. Ante, at 21. No litigant in Johnson suggested that solution, which is not surprising. Such judicial redrafting could have expanded the reach of the criminal provision—surely a job for Congress alone.

In any event, I doubt the majority’s proposal would have done the trick. And that is because the result in Johnson did not follow from the presence of one frustrating textual feature or another. Quite the opposite: The decision emphasized that it was the “sum” of the “uncertainties” in the ACCA residual clause, confirmed by years of experience, that “convince[d]” us the provision was beyond salvage. Johnson, 576 U. S., at ___ (slip op., at 10). Those failings do not characterize the provision at issue here.

III

The more constrained inquiry required under §16(b)—which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense—does not itself engender “grave uncertainty about how to estimate the risk posed by a crime.” And the provision’s use of a commonplace substantial risk standard—one not tied to a list of crimes that lack a unifying feature—does not give rise to intolerable “uncertainty about how much risk it takes for a crime to qualify.” That should be enough to reject Dimaya’s facial vagueness challenge. Because I would rely on those distinctions to uphold §16(b), the Court reproaches me for not giving sufficient weight to a “core in

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insight” of Johnson. Ante, at 10, n. 4; see ante, at 15 (opinion of GORSUCH, J.) (arguing that §16(b) runs afoul of Johnson “to the extent [§16(b)] requires an ‘ordinary case’ analysis”). But the fact that the ACCA residual clause required the ordinary case approach was not itself sufficient to doom the law. We instead took pains to clarify that our opinion should not be read to impart such an absolute rule. See Johnson, 576 U. S., at ___ (slip op., at 10). I would adhere to that careful holding and not reflexively extend the decision to a different statute whose reach is, on the whole, far more clear.

The Court does the opposite, and the ramifications of that decision are significant. First, of course, today’s holding invalidates a provision of the Immigration and Nationality Act—part of the definition of “aggravated felony”—on which the Government relies to “ensure that dangerous criminal aliens are removed from the United States.” Brief for United States 54. Contrary to the Court’s back-of-the-envelope assessment, see ante, at 23, n. 12, the Government explains that the definition is “critical” for “numerous” immigration provisions. Brief for United States 12.

In addition, §16 serves as the universal definition of “crime of violence” for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U. S. C. §§25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b). Of special concern, §16 is replicated in the definition of “crime of violence” applicable to §924(c), which prohibits using or carrying a firearm “during and in relation to any crime of violence,” or possessing a firearm “in furtherance of any such crime.” §§924(c)(1)(A), (c)(3). Though I express no view on whether §924(c) can be distinguished from the provision we consider here, the Court’s holding calls into question convictions under what the Government warns us is an “oft-prosecuted offense.” Brief for United States 12.

Because Johnson does not compel today’s result, I respectfully dissent.

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join as to Parts I–C–2, II–A–1, and II–B, dissenting.

I agree with THE CHIEF JUSTICE that 18 U. S. C. §16(b), as incorporated by the Immigration and Nationality Act(INA), is not unconstitutionally vague. Section 16(b) lacks many of the features that caused this Court to invalidate the residual clause of the Armed Career Criminal Act (ACCA) in Johnson v. United States, 576 U. S. ___(2015). ACCA’s residual clause—a provision that this Court had applied four times before Johnson—was not unconstitutionally vague either. See id., at ___ (THOMAS, J., concurring in judgment) (slip op., at 1); id., at ___ (ALITO, J., dissenting) (slip op., at 13–17). But if the Court insists on adhering to Johnson, it should at least take Johnson at its word that the residual clause was vague due to the “sum” of its specific features. Id., at ___ (majority opinion) (slip op., at 10). By ignoring this limitation, the Court jettisons Johnson’s assur-
ance that its holding would not jeopardize “dozens of federal 
and state criminal laws.” Id., at ___ (slip op., at 12).

While THE CHIEF JUSTICE persuasively explains why 
respondent cannot prevail under our precedents, I write sepa-
rate to make two additional points. First, I continue to doubt 
that our practice of striking down statutes as unconstitution-
ally vague is consistent with the original meaning of the Due 
Process Clause. See id., at ___–___ (opinion of THOMAS, 
J.) (slip op., at 7–18). Second, if the Court thinks that §16(b) 
is unconstitutionally vague because of the “categorical ap-
proach,” see ante, at 6–11, then the Court should abandon 
that approach—not insist on reading it into statutes and then 
strike them down. Accordingly, I respectfully dissent.

I

I continue to harbor doubts about whether the vagueness 
doctrine can be squared with the original meaning of the 
Due Process Clause—and those doubts are only amplified in 
the removal context. I am also skeptical that the vagueness 
doctrine can be justified as a way to prevent delegations of 
core legislative power in this context. But I need not resolve 
these questions because, if the vagueness doctrine has any 
basis in the Due Process Clause, it must be limited to cases in 
which the statute is unconstitutionally vague as applied to 
the person challenging it. That is not the case for respondent, 
whose prior convictions for first-degree residential burglary 
in California fall comfortably within the scope of §16(b).

A

The Fifth Amendment’s Due Process Clause provides 
that no person shall be “deprived of life, liberty, or property, 
without due process of law.” Section 16(b), as incorporated 
by the INA, cannot violate this Clause unless the following 
propositions are true: The Due Process Clause requires federa-
l statutes to provide certain minimal procedures, and the vague-
ness doctrine is one of those procedures, and the vagueness 
doctrine applies to statutes governing the removal of aliens. 
Although I need not resolve any of these propositions today, 
each one is questionable. I will address them in turn.

I

First, the vagueness doctrine is not legitimate unless the 
“law of the land” view of due process is incorrect. Under 
that view, due process “require[s] only that our Government 
. . . proceed . . . according to written constitutional and statu-
ory provision[s] before depriving someone of life, liberty, 
or property.” Nelson v. Colorado, 581 U. S., at ___, ___, n. 1 
(2017) (THOMAS, J., dissenting) (slip op., at 2, n. 1) (in-
ternal quotation marks omitted). More than a half century after 
the founding, the Court rejected this view of due process in 
Murray’s Lessee v. Hoboken Land & Improvement Co., 18 
How. 272 (1856). See id., at 276 (holding that the Due Pro-
cess Clause “is a restraint on the legislative as well as on the 
executive and judicial powers of the government”). But the 
textual and historical support for the law-of-the-land view is 
not insubstantial.

2

Even under Murray’s Lessee, the vagueness doctrine is 
legitimate only if it is a “settled usage[e] and mod[e] of pro-
ceeding existing in the common and statute law of England, 
before the emigration of our ancestors.” Id., at 277. That 
proposition is dubious. Until the end of the 19th century, 
“there is little indication that anyone . . . believed that courts 
had the power under the Due Process Clause[e] to nullify sta-
tutes on [vagueness] ground[s].” Johnson, supra, at ___ (opin-
iof THOMAS, J.) (slip op., at 11). That is not because Americans were unfamiliar with vague laws. Rather, early 
American courts, like their English predecessors, addressed 
vague laws through statutory construction instead of consti-
tutional law. See Note, Void for Vagueness: An Escape From 
Statutory Interpretation, 23 Ind. L. J. 272, 274–279 (1948). 
They invoked the rule of lenity and declined to apply vague 
penal statutes on a case-by-case basis. See Johnson, 576 U. 
S., at ___, ___, n. 1 (opinion of THOMAS, J.) (slip op., at 7–10); 
e.g., ante, at 5–6, and n. 1 (GORSUCH, J., concurring in part 
and concurring in judgment) (collecting cases). The modern 
vagueness doctrine, which claims the judicial authority to 
“strike down” vague legislation on its face, did not emerge 
until the turn of the 20th century. See Johnson, 576 U. S., at 
___–___ (opinion of THOMAS, J.) (slip op., at 11–13).

The difference between the traditional rule of lenity and 
the modern vagueness doctrine is not merely semantic. Most 
obviously, lenity is a tool of statutory construction, which 

21. See, e.g., In re Winship, 397 U. S. 382–384 (1970) (Black, 
J., dissenting); Rosenkranz, The Objects of the Constitution, 63 Stan. 
L. Rev. 1005, 1041–1043 (2011); Berger, “Law of the Land” Reconsider-
ated, 74 NW. U. L. Rev. 1, 2–17 (1979); Corwin, The Doctrine of 
Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368– 
373 (1911); see also 4 The Papers of Alexander Hamilton 35 (Syrett & 
Cooke eds. 1962) (“The words ‘due process’ have a precise technical 
import, and . . . can never be referred to an act of legislature”).

22. Before the 19th century, when virtually all felonies were pun-
ishable by death, English courts would sometimes go to extremes to 
find a reason to invoke the rule of lenity. See Hall, Strict or Liberal 
Construction of Penal Statutes, 48 Harv. L. Rev. 748, 751 (1935); e.g., 
ante, at 4–7 (GORSUCH, J., concurring in part and concurring in 
judgment) (citing Blackstone’s discussion of a case about “cattle”). 
As the death penalty became less common, courts on this side of the 
Atlantic tempered the rule of lenity, clarifying that the rule requires an 
“ambiguity” in the text and cannot be used “to defeat the obvious 
intention of the legislature.” United States v. Wilhberger, 5 Wheat. 76 
(1820) (Marshall, C. J.). 

Early American courts also declined to apply nonpenal statutes 
that were “unintelligible.” Johnson v. United States, 576 U. S., ___ , 
__, n. 3 (2014) (THOMAS, J., concurring in judgment) (slip op., at 
10, n. 3); e.g., ante, at 5–6, and n. 1 (opinion of GORSUCH, J.) (col-
collecting cases). Like lenity, however, this practice reflected a principle 
of statutory construction that was much narrower than the modern 
constitutional vagueness doctrine. Unintelligible statutes were consid-
ered inoperative because they were impossible to apply to individual 
cases, not because they were unconstitutional for failing to provide 
“fair notice.” See Johnson, 576 U. S., at ___, n. 3 (opinion of THOM-
AS, J.) (slip op., at 10, n. 3).
means States can abrogate it—and many have. Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 752–754 (1935); see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1989) (“Arizona, by the way, seems to have preserved a fair and free society without adopting the rule that criminal statutes are to be strictly construed”(citing Ariz. Rev. Stat. §1-211C (1989))). The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish. Lenity, moreover, applies only to “penal” statutes, 1 Blackstone, Commentaries on the Laws of England 88 (1765), but the vagueness doctrine extends to all regulations of individual conduct, both penal and nonpenal, Johnson, 576 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 6); see also Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, 163 (1931) (explaining that the modern vagueness doctrine was not merely an “extension of the rule of strict construction of penal statutes” because it “expressly include[s] civil statutes within its scope,” reflecting a “regrettable disregard” for legislatures).23 In short, early American courts were not applying the modern vagueness doctrine by another name. They were engaged in a fundamentally different enterprise.

Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due Process Clause to strike down democratically enacted laws—first in the name of the “liberty of contract,” then in the name of the “right to privacy.” See Johnson, 576 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 13–16). That the vagueness doctrine “developed on the federal level concurrently with the growth of the tool of substantive due process” does not seem like a coincidence. Note, 23 Ind. L. J., at 278. Like substantive due process, the vagueness doctrine provides courts with “open-ended authority to oversee [legislative] choices.” Kolender v. Lawson, 461 U. S. 352, 374 (1983) (White, J., dissenting). This Court, for example, has used the vagueness doctrine to invalidate anti-loitering laws, even though those laws predate the Declaration of Independence. See Johnson, supra, at ___–___ (opinion of THOMAS, J.) (slip op., at 7) (discussing Chicago v. Morales, 527 U. S. 41 (1999)).

This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process. See, e.g., Williams v. Pennsylvania, 579 U. S. ___ (2016); BMW of North America, Inc. v. Gore, 517 U. S. 559 (1996); Foucha v. Louisiana, 504 U. S. 71 (1992); cf. Montgomery v. Louisiana, 577 U. S. ___ (2016). If vagueness is another example of this practice, then that is all the more reason to doubt its legitimacy.

3

Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens. Cf. Johnson, 576 U. S., at ___–___, n. 7 (opinion of THOMAS, J.) (slip op., at 17, n. 7) (stressing the need for specificity when assessing alleged due process rights). The Founders were familiar with English law, where “the only question that ha[d] ever been made in regard to the power to expel aliens [was] whether it could be exercised by the King without the consent of Parliament.” Demore v. Kim, 538 U. S. 510, 538 (2003) (O’Connor, J., concurring in part and concurring in judgment) (quoting Fong Yue Ting v. United States, 149 U. S. 698, 709 (1893)). And, in this country, the notion that the Due Process Clause governed the removal of aliens was not announced until the 20th century.

Less than a decade after the ratification of the Bill of Rights, the founding generation had an extensive debate about the relationship between the Constitution and federal removal statutes. In 1798, the Fifth Congress enacted the Alien Acts. One of those Acts, the Alien Friends Act, gave the President unfettered discretion to expel any aliens “he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof.” An Act Concerning Aliens §1, 1 Stat. 571. This statute was modeled after the Aliens Act 1793 in England, which similarly gave the King unfettered discretion to expel aliens as he “shall think necessary for the publick Security.” 33 Geo. III, ch. 4, §18, in 39 Eng. Stat. at Large 16. Both the Fifth Congress and the States thoroughly debated the Alien Friends Act. Virginia and Kentucky enacted resolutions (anonymously drafted by Madison and Jefferson) opposing the Act, while 10 States enacted counter-resolutions condemning the views of Virginia and Kentucky. See Feldings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int’l L. 63, 85, 103 (2002).

The Jeffersonian Democratic-Republicans, who viewed the Alien Friends Act as a threat to their party and the institution of slavery,24 raised a number of constitutional objections. Some of the Jeffersonians argued that the Alien Friends Act violated the Fifth Amendment’s Due Process Clause. They complained that the Act failed to provide aliens with all the accouterments of a criminal trial. See, e.g., Kentucky Reso-

23. This distinction between penal and nonpenal statutes would be decisive here because, traditionally, civil deportation laws were not considered penal. See Bugajewitz v. Adams, 228 U. S. 585, 591 (1913); Fong Yue Ting v. United States, 149 U. S. 698, 709, 730 (1893). Although this Court has applied a kind of strict construction to civil deportation laws, that practice did not emerge until the mid-20th century. See Fong Haw Tan v. Phelan, 333 U. S. 6, 10 (1948).

24. The Jeffersonian Democratic-Republicans who opposed the Alien Friends Act primarily represented slave States, and their party’s political strength came from the South. See Feldings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int’l L. 63, 84 (2002). The Jeffersonians opposed any federal control over immigration, which their constituents feared would be used to preempt State laws that prohibited the entry of free blacks. Id., at 84–85; see also Berns, Freedom of the Press and the Alien and Sedition Laws: A Reappraisal, 1970 S. Ct. Rev. 109, 116 (“Whether pro- or anti-slavery, most southerners, including Jefferson and Madison . . . were united behind a policy of denying to the national government any competence to deal with the question of slavery”). The fear was that “mobile free Negroes would intermingle with slaves, encourage them to run away, and foment insurrection.” I. Berlin, Slaves Without Masters 92 (1974).
The Federalists gave two primary responses to this due process argument. First, the Federalists argued that the rights of aliens were governed by the law of nations, not the Constitution. See, e.g., Randolph, Debate on Virginia Resolutions, in The Virginia Report of 1799–1800, pp. 34–35 (1850) (Virginia Debates) (statement of George K. Taylor) (arguing that aliens “were not a party to the [Constitution]” and that “cases between the government and aliens . . . arise under the law of nations”); id., at 100 (statement of William Cowan) (identifying the source of rights “as to citizens, the Constitution; as to aliens, the law of nations”); A. Addison, A Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennsylvania 18 (1799) (Charge to the Grand Juries) (“[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations”); Answer to the Resolutions of the State of Kentucky, Oct. 29, 1799, in 4 Records of the Governor and Council of the State of Vermont 528 (1876) (denying “that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality”). The law of nations imposed no enforceable limits on a nation’s power to remove aliens. See, e.g., I. E. de Vattel, Law of Nations, §§230–231, pp. 108–109 (J. Chitty et al. transl. and ed. 1883).


The Federalists argued that an alien’s right to reside in this country was one such privilege. See, e.g., Virginia Debates 34 (arguing that “ordering away an alien . . . was not a matter of right, but of favour,” which did not require a jury trial); Report of the Select Committee of the House of Representatives, Made to the House of Representatives on Feb. 21, 1799, 9 Annals of Cong. 2987 (1799) (stating that aliens “remain in the country . . . merely as matter of favor and permission” and can be removed at any time without a criminal trial); Charge to the Grand Juries 11–13 (similar). According to the Minority Address of the Virginia Legislature (anonymously drafted by John Marshall), “[T]he right of remaining in our country is vested in no alien; he enters and remains by courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn” without judicial process. Address of the Minority in the Virginia Legislature to the People of that State 9–10 (1799) (Virginia Minority Address). Unlike “a grant of land,” the “[a]dmission of an alien to residence . . . is revocable, like a permission.” A. Addison, Analysis of the Report of the Committee of the Virginia Assembly 23 (1800). Removing a resident alien from the country did not affect “life, liberty, or property,” the Federalists argued, until the alien became a naturalized citizen. See id., at 23–24; Charge to the Grand Juries 11–13. That the alien’s permanent residence was conferred by statute would not have made a difference. See Nelson 571, 580–582; Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., 574 U. S. ___, ___, n. 2 (2015) (THOMAS, J., dissenting) (slip op., at 9, n. 2).

After the Alien Friends Act lapsed in 1800, Congress did not enact another removal statute for nearly a century. The States enacted their own removal statutes during this period, see G. Neuman, Strangers to the Constitution 19–43 (1996), and I am aware of no decision questioning the legality of these statutes under State due-process or law-of-the-land provisions. Beginning in the late 19th century, the Federal Government reinserted itself into the regulation of immigration. When this Court was presented with constitutional challenges to Congress’ removal laws, it initially rejected them for many of the same reasons that Marshall and the Federalists had cited in defense of the Alien Friends Act. Although the Court rejected the Federalists’ argument that resident aliens do not enjoy constitutional rights, see Wong Wing v. United States, 163 U. S. 228, 238 (1896), it agreed that civil deportation statutes do not implicate “life, liberty, or property,” see, e.g., Harisiades v. Shaughnessy, 342 U. S. 580, 584–585 (1952) (“[T]hat admission for permanent residence confers a ‘vested right’ on the alien [is] not founded in precedents of this Court”); United States ex rel. Turner v. Williams, 194 U. S. 279, 290 (1904) (“[T]he deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law”); Fong Yue Ting, 149 U. S., at 730 (“[Deportation] is but a method of enforcing the return to his own country of an alien who has not complied with[statutory] conditions . . . . He has not, therefore, been deprived of life, liberty, or property without due process of law”); id., at 713–715 (similar). Consistent with this understanding, “federal immigration laws from 1891 until 1952 made no express provision for judicial review.” Demore, 538 U. S., at 538 (opinion of O’Connor, J.).

It was not until the 20th century that this Court held that nonpenal removal statutes could violate the Due Process
Clause. See Wong Yang Sung v. McGrath, 339 U. S. 33, 49 (1950). That ruling opened the door for the Court to apply the then-nascent vagueness doctrine to immigration statutes. But the Court upheld vague standards in immigration laws that it likely would not have tolerated in criminal statutes. See, e.g., Boutilier v. INS, 387 U. S. 118, 122 (1967) (“psychopathic personality”); Jordan v. De George, 341 U. S. 223, 232 (1951) (“crime involving moral turpitude”); cf. Mahler, supra, at 40 (“undesirable residents”). Until today, this Court has never held that an immigration statute is unconstitutionally vague.

Thus, for more than a century after the founding, it was, at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness. Given this history, it is difficult to conclude that a ban on vague removal statutes is a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors” protected by the Fifth Amendment’s Due Process Clause. Murray’s Lessee, 18 How., at 277.

B

Instead of a longstanding procedure under Murray’s Lessee, perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1806 (2012) (“Vague statutes have the effect of delegating lawmakership authority to the executive”). Madison raised a similar objection to the Alien Friends Act, arguing that its expansive language effectively allowed the President to exercise legislative (and judicial) power. See Madison’s Report 369–371. And this Court’s precedents have occasionally described the vagueness doctrine in terms of nondelegation. See, e.g., Grayned v. City of Rockford, 408 U. S. 104, 108–109 (1972) (“A vague law impermissibly delegates basic policy matters”). But they have not been consistent on this front. See, e.g., Aptheker v. Secretary of State, 378 U. S. 500, 516 (1964) (“The objectionable quality of vagueness . . . does not depend upon . . . unchanneled delegation of legislative powers”); Maynard v. Cartwright, 486 U. S. 356, 361 (1988) (“Objections to vagueness under the Due Process Clause rest on the lack of notice”).

eign relations. There is in it a mixture of external policy, and of the law of nations, that justifies this disposition”). More recently, this Court recognized that “[r]emoval decisions” implicate “our customary policy of deference to the President in matters of foreign affairs” because they touch on “our relations with foreign powers and require consideration of changing political and economic circumstances.” Jama v. Immigration and Customs Enforcement, 543 U. S. 335, 348 (2005) (internal quotation marks omitted). Taken together, this evidence makes it difficult to confidently conclude that the INA, through §16(b), delegates core legislative power to the Executive.

Instead of the Executive, perhaps §16(b) impermissibly delegates power to the Judiciary, since the Courts of Appeals often review the BIA’s application of §16(b). I assume that, at some point, a statute could be so devoid of content that a court tasked with interpreting it “would simply be making up a law—that is, exercising legislative power.” Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 339 (2002); see id., at 339–340 (providing examples such as a gibberish-filled statute or a statute that requires “goodness and niceness”). But I am not confident that our modern vagueness doctrine—which focuses on whether regulations of individual conduct provide “fair warning,” are “clearly defined,” and do not encourage “arbitrary and discriminatory enforcement,” Grayned, 408 U. S., at 108; Kolender, 461 U. S., at 357—accurately demarcates the line between legislative and judicial power. The Founders understood that the interpretation of legal texts, even vague ones, remained an exercise of core judicial power. See Perez v. Mortgage Bankers Assn., 575 U. S. ___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 8–9); Hamburger, The Constitution’s Accommodation of Social Change, 88 Mich. L. Rev. 239, 303–310 (1989). Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases. See id., at 309–310; Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 526 (2003). Although early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative power. See Johnson, 576 U. S., at ____–____, and n. 3 (opinion of THOMAS, J.) (slip op., at 10–11, and n. 3).

C

I need not resolve these historical questions today, as this case can be decided on narrower grounds. If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. That is what early American courts did when they applied the rule of lenity. See id., at ____ (slip op., at 10). And that is how early American courts addressed constitutional challenges to statutes more generally. See ibid. (“[T]here is good evidence that [antebellum] courts . . . understood judicial review to consist of a refusal to give a statute effect as operative law in resolving a case,” a notion quite distinct from our modern practice of “‘stri[k]ing down’ legislation” (quoting Walsh, Partial Unconstitutional-ity, 56 N. Y. U. L. Rev. 738, 756 (2010)).

2

This Court’s precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. See Holder v. Humane-itarian Law Project, 561 U. S. 1, 18–19 (2010); United States v. Williams, 553 U. S. 285, 304 (2008); Maynard, 486 U. S., at 361; Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U. S. 489, 495, and n. 7 (1982) (collecting cases). Johnson did not overrule these precedents. While Johnson weakened the principle that a facial challenge requires a statute to be vague “in all applications,” 576 U. S., at ___ (slip op., at 11) (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA’s residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See id., at ___ (slip op., at 9).

In my view, §16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was “sufficiently forewarned . . . that the statutory consequence . . . is deportation.” De George, 341 U. S., at 232. At the time, courts had “unnanimously” concluded that residential burglary is a crime of violence, and not “a single opinion . . . ha[d] held that [it] is not.” United States v. M. C. E., 232 F. 3d 1252, 1255–1256 (CA9 2000); see also United States v. Davis, 881 F. 2d 973, 976 (CA11 1989) (explaining that treating residential burglary as a crime of violence was “[i]n accord with common law tradition and the settled law of the federal circuits”). Residential burglary “ha[d] been consid-ered a violent offense for hundreds of years . . . because of the potential for mayhem if burglar encounters resident.” United States v. Pinto, 875 F. 2d 143, 144 (CA7 1989). The Model Penal Code had recognized that risk, see ALI, Model Penal Code §211.1, Comment 3(c), p. 75 (1980); the Sentencing Commission had recognized that risk; see United States Sentencing Commission, Guidelines Manual §4B1.2(a)(2)(Nov. 2006); and this Court had repeatedly recognized that risk, see, e.g., James v. United States, 550 U. S. 192, 203 (2007); Taylor v. United States, 495 U. S. 575, 588 (1990). In Leco-ral v. Ashcroft, 543 U. S. 1 (2004), this Court unanimously agreed that burglary is the “classic example” of a crime of violence under §16(b), because it “involves a substantial risk that the burglar will use force against a victim in completing the crime.” Id., at 10.

That same risk is present with respect to respondent’s statute of conviction—first-degree residential burglary. Cal. Penal Code Ann. §§459, 460(a) (West 1999). The California Supreme Court has explained that the State’s burglary
laws recognize “the dangers to personal safety created by the usual burglary situation,” People v. Davis, 18 Cal. 4th 712, 721, 958 P. 2d 1083, 1089 (1998) (emphasis added). “The fact that a building is used as a home... increases such danger,” which is why California elevates residential burglary to a first-degree offense. People v. Rodriguez, 122 Cal. App. 4th 121, 133, 18 Cal. Rptr. 3d 550, 558 (2004); see also People v. Wilson, 208 Cal. App. 3d 611, 615, 256 Cal. Rptr. 422, 425 (1989) (“[T]he higher degree... is intended to prevent those situations which are most dangerous, most likely to cause personal injury” (emphasis deleted)). Although unlawful entry is not an element of the offense, courts “unanimous[ly]” agree that the offense still involves a substantial risk of physical force. United States v. Avila, 770 F. 3d 1100, 1106 (CA4 2014); accord, United States v. Maldonado, 696 F. 3d 1095, 1102, 1104 (CA10 2012); United States v. Scanlan, 667 F. 3d 896, 900 (CA7 2012); United States v. Echeverria–Gomez, 627 F. 3d 971, 976 (CA5 2010); United States v. Becker, 919 F. 2d 568, 573 (CA9 1990). First-degree residential burglary requires entry into an inhabited dwelling, with the intent to commit a felony, against the will of the homeowner—the key elements that create the risk of violence. See United States v. Park, 649 F. 3d 1175, 1178–1180 (CA9 2011); Avila, supra, at 1106–1107; Becker, supra, at 571, n. 5. As this Court has explained, “[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another’s property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party.” James, supra, at 203.

Drawing on Johnson and the decision below, the Court suggests that residential burglary might not be a crime of violence because “only about seven percent of burglaries actually involve violence.” Ante, at 9, n. 3 (citing Dimaya v. Lynch, 803 F. 3d 1110, 1116, n. 7 (CA9 2015)); see Bureau of Justice Statistics, S. Catalano, National Crime Victimization Survey: Victimization During Household Burglary 1 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/vdhb.pdf (as last visited Apr. 13, 2018). But this statistic—which measures actual violence against a member of the household, see id., at 1, 12—is woefully under inclusive. It excludes other potential victims besides household members—for example, “a police officer, or a bystander who comes to investigate,” James, supra, at 203. And §16(b) requires only a risk of physical force, not actual physical force, and that risk would seem to be present whenever someone is home during the burglary. Further, Johnson is not conclusive because, unlike ACCA’s residual clause, §16(b) covers offenses that involve a substantial risk of physical force “against the person or property of another.” (Emphasis added.) Surely the ordinary case of residential burglary involves at least one of these risks. According to the statistics referenced by the Court, most burglaries involve either a forcible entry (e.g., breaking a window or slashing a door screen), an attempted forcible entry, or an unlawful entry when someone is home. See Bureau of Justice Statistics, supra, at 2 (Table 1). Thus, under any metric, respondent’s convictions for first-degree residential burglary are crimes of violence under §16(b).

Finally, if facial vagueness challenges are ever appropriate, I adhere to my view that a law is not facially vague “if any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law.” Morales, 527 U. S., at 112 (THOMAS, J., dissenting) (quoting Kolender, 461 U. S., at 370–371 (White, J., dissenting)). The residual clause of ACCA had such a core. See Johnson, 576 U. S., at ___ (slip op., at 10); id., at ___—___ (ALITO, J., dissenting) (slip op., at 14–15). And §16(b) has an even wider core, as THE CHIEF JUSTICE explains. Thus, the Court should not have invalidated §16(b), either on its face or as applied to respondent.

II

Even taking the vagueness doctrine and Johnson at face value, I disagree with the Court’s decision to invalidate §16(b). The sole reason that the Court deems §16(b) unconstitutionally vague is because it reads the statute as incorporating the categorical approach—specifically, the “ordinary case” approach from ACCA’s residual clause. Although the Court mentions “[t]wo features” of §16(b) that make it vague—the ordinary-case approach and an imprecise risk standard—the Court admits that the second feature is problematic only in combination with the first. Ante, at 8. Without the ordinary-case approach, the Court “do[es] not doubt” the constitutionality of §16(b). Ante, at 10.

But if the categorical approach renders §16(b) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien’s offense presents a substantial risk of physical force, courts should ask whether the alien’s actual underlying conduct presents a substantial risk of physical force. I will briefly discuss the origins of the categorical approach and then explain why the Court should abandon it for §16(b).

A

I

The categorical approach originated with Justice Blackmun’s opinion for the Court in Taylor v. United States, 495 U. S. 575 (1990). The question in Taylor was whether ACCA’s reference to “burglary” meant burglary as defined by state law or burglary in the generic sense. After “devoting 10 pages of [its] opinion to legislative history,” id., at 603 (Scalia, J., concurring in part and concurring in judgment), and finding that Congress had made “an inadvertent casualty in [the] complex drafting process,” id., at 589–590 (majority opinion), the Court concluded that ACCA referred to burglary...
in the generic sense, *id.*, at 598. The Court then addressed how the Government would prove that a defendant was convicted of generic burglary, as opposed to another offense. *Id.*, at 599–602. *Taylor* rejected the notion that the Government could introduce evidence about the “particular facts” of the defendant’s underlying crime. *Id.*, at 600. Instead, the Court adopted a “categorical approach,” which focused primarily on the “statutory definition of the prior offense.” *Id.*, at 602.

Although *Taylor* was interpreting one of ACCA’s enumerated offenses, this Court later extended the categorical approach to ACCA’s residual clause. See *James*, 550 U. S., at 208. That extension required some reworking. Because ACCA’s enumerated-offenses clause asks whether a prior conviction “is burglary, arson, or extortion,” 18 U. S. C. §924(e)(2)(B)(ii), *Taylor* instructed courts to focus on the definition of the underlying crime. The residual clause, by contrast, asks whether a prior conviction “involves conduct that presents a serious potential risk of physical injury to another.” §924(e)(2)(B)(ii). Thus, the Court held that the categorical approach for the residual clause asks “whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” *James*, supra, at 208 (emphasis added). This “ordinary case” approach allowed courts to apply the residual clause without inquiring into the individual facts of the defendant’s prior crime.

*Taylor* gave a few reasons why the categorical approach was the correct reading of ACCA, see 495 U. S., at 600–601, but the “heart of the decision” was the Court’s concern with limiting the amount of evidence that the parties could introduce at sentencing. *Shepard v. United States*, 544 U. S. 13, 23 (2005). Specifically, the Court was worried about potential violations of the Sixth Amendment. If the parties could introduce evidence about the defendant’s underlying conduct, then sentencing proceedings might devolve into a full-blown minitrial, with factfinding by the judge instead of the jury. See *id.*, at 24–26; *Taylor*, supra, at 601. While this Court’s decision in *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), allows judges to find facts about a defendant’s prior convictions, a full-blown minitrial would look “too much like” the kind of factfinding that the Sixth Amendment requires the jury to conduct. *Shepard*, 544 U. S., at 25. By construing ACCA to require a categorical approach, then, the Court was following “[t]he rule of reading statutes to avoid serious risks of unconstitutionality.” *Ibid.*

I disagreed with the Court’s decision to extend the categorical approach to ACCA’s residual clause. See *James*, 550 U. S., at 231–232 (dissenting opinion). The categorical approach was an “‘unnecessary exercise,’” I explained, because it created the same Sixth Amendment problem that it tried to avoid. *Id.*, at 231. Absent waiver, a defendant has the right to have a jury find “every fact that is by law a basis for imposing or increasing punishment,” including the fact of a prior conviction. *Apprendi v. New Jersey*, 530 U. S. 466, 501 (2000) (THOMAS, J., concurring). The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. See *Mathis v. United States*, 579 U. S. ___, ___ (2016) (THOMAS, J., concurring) (slip op., at 1); *Shepard, supra*, at 27–28 (THOMAS, J., concurring in part and concurring in judgment). In my view, if the Government wants to enhance a defendant’s sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.26

B

My objection aside, the ordinary-case approach soon created problems of its own. The Court’s attempt to avoid the Scylla of the Sixth Amendment steered it straight into the Charybdis of the Fifth. The ordinary-case approach that was created to honor the individual right to a jury is now, according to the Court, so vague that it deprives individuals of due process.

I see no good reason for the Court to persist in reading the ordinary-case approach into §16(b). The text of §16(b) does not mandate the ordinary-case approach, the concerns that led this Court to adopt it do not apply here, and there are no prudential reasons for retaining it. In my view, we should abandon the categorical approach for §16(b).

I

The text of §16(b) does not require a categorical approach. The INA declares an alien deportable if he is “convicted of an aggravated felony” after he is admitted to the United States. 8 U. S. C. §1227(a)(2)(A)(iii). Aggravated felonies include “crime[s] of violence” as defined in §16. §1101(a)(43)(F). Section 16, in turn, defines crimes of violence as follows:

“(a) an offense that has as an element the use, at tempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

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26. The Sixth Amendment is, thus, not a reason to maintain the categorical approach in criminal cases. *Contra*, ante, at 13–14 (plurality opinion). Even if it were, the Sixth Amendment does not apply in immigration cases like this one. See Part II–B–2, *infra*. The plurality contends that, if it must contort the text of §16(b) to avoid a Sixth Amendment problem in criminal cases, then it must also contort the text of §16(b) in immigration cases, even though the Sixth Amendment problem does not arise in the immigration context. See *ante*, at 13–14, 15. But, as I have explained elsewhere, this “lowest common denominator” approach to constitutional avoidance is both a historical and illogical. See *Clark v. Martinez*, 545 U. S. 371, 395–401 (2005) (dissenting opinion).
At first glance, §16(b) is not clear about the precise question it poses. On the one hand, the statute might refer to the metaphysical “nature” of the offense and ask whether it ordinarily involves a substantial risk of physical force. On the other hand, the statute might refer to the underlying facts of the offense that the offender committed; the words “by its nature,” “substantial risk,” and “may” would mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense. The text can bear either interpretation. See Nijhawan v. Holder, 557 U. S. 29, 33–34 (2009) (“[I]n ordinary speech words such as ‘crime,’ ‘felony,’ ‘offense,’ and the like sometimes refer to a generic crime . . . . and sometimes refer to the specific acts in which an offender engaged on a specific occasion”). It is entirely natural to use words like “nature” and “offense” to refer to an offender’s actual underlying conduct.27

Although both interpretations are linguistically possible, several factors indicate that the underlying-conduct approach is the better one. To begin, §16(b) asks whether an offense “involves” a substantial risk of force. The word “involves” suggests that the offense must necessarily include a substantial risk of force. See The New Oxford Dictionary of English 962 (2001) (“include (something) as a necessary part or result”); Random House Dictionary of the English Language 1005 (2d ed. 1987) (“1. to include as a necessary circumstance, condition, or consequence”); Oxford American Dictionary 349 (1980) (“1. to contain within itself, to make necessary as a condition or result”). That condition is always satisfied if the Government must prove that the alien’s underlying conduct involves a substantial risk of force, but it is not always satisfied if the Government need only prove that the “ordinary case” involves such a risk. See Johnson, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 12). Tellingly, the other aggravated felonies in the INA that use the word “involves” employ the underlying-conduct approach. See 8 U. S. C. §1101(a)(43)(M)(i) (“an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000”); §1101(a)(3) (“any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another”). As do the similarly worded provisions of the Comprehensive Crime Control Act of 1984, the bill that contained §16(b), See, e.g., 98 Stat. 2059 (elevating the burden of proof for the release of “a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage”); id., at 2068 (establishing the sentence for drug offenses “involving” specific quantities and types of drugs); id., at 2137 (defining violent crimes in aid of racketeering to include “attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury”).

A comparison of §16(b) and §16(a) further highlights why the former likely adopts an underlying-conduct approach. Section 16(a) covers offenses that have the use, attempted use, or threatened use of physical force “as an element.” Because §16(b) covers “other” offenses and is separated from §16(a) by the disjunctive word “or,” the natural inference is that §16(b) asks a different question. In other words, §16(b) must require immigration judges to look beyond the elements of an offense to determine whether it involves a substantial risk of physical force. But if the elements are insufficient, where else should immigration judges look to determine the riskiness of an offense? Two options are possible, only one of which is workable.

The first option is to consult the underlying facts of the alien’s crime and then assess its riskiness. This approach would provide a definitive answer in every case. And courts are already familiar with this kind of inquiry. Cf. Johnson, supra, at ___ (slip op., at 12) (noting that “dozens” of similarly worded laws ask courts to assess “the riskiness of conduct in which an individual defendant engages on a particular occasion”). Nothing suggests that Congress imposed a more limited inquiry when it enacted §16(b) in 1984. At the time, Congress had not yet enacted ACCA’s residual clause, this Court had not yet created the categorical approach, and this Court had not yet recognized a Sixth Amendment limit on judicial factfinding at sentencing, see Chambers v. United

27. See, e.g., 18 U. S. C. §3553(a)(2) (directing sentencing judges to consider “the nature and circumstances of the offense”); Schware v. Board of Bar Examiners of N. M., 353 U. S. 232, 242–243 (1957) (describing “the nature of the offense” committed by a bar applicant as “recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War”); TXO Production Corp. v. Alliance Resources Corp., 509 U. S. 443, 482 (1993) (O’Connor, J., dissenting) (describing “the nature of the offense at issue” as not “involving grave physical injury” but rather as “a business dispute between two companies in the oil and gas industry”); United States v. Broce, 488 U. S. 563, 585–587 (1989) (Blackmun, J., dissenting) (describing “the nature of the charged offense” in terms of the specific facts alleged in the indictment); People v. Golba, 273 Mich. App. 603, 611, 729 N. W. 2d 916, 922 (2007) (“[T]he underlying factual basis for a conviction governs whether the offense ‘by its nature constitutes a sexual offense against an individual who is less than 18 years of age.’ ” (quoting Mich. Comp. Laws §28.722(e)(xi) (2006))); A Fix for Animal Abusers, Boston Herald, Nov. 22, 2017, p. 16 (“prosecutors were so horrified at the nature of his offense—his terror of a neighbor’s dog”); P. Ward, Attorney of Convicted Ex-Official Accuses Case’s Judge, Pittsburgh Post-Gazette, Nov. 10, 2015, p. B1 (identifying the “nature of his offense” as “taking money from an elderly, widowed client, and giving it to campaign funds”); Cross-Burning–Article Painted an Inaccurate Picture of Young Man in Question, Seattle Times, Aug. 12, 1991, p. A9 (“[T]he defendant took no steps to prevent the cross that was burned from being constructed on his family’s premises and later . . . . assisted in concealing a second cross . . . . This was the nature of his offense”); N. Libman, A Parole/Probation Officer Talks With Norma Libman, Chicago Tribune, May 29, 1988, p. C13 (describing “the nature of the offense” as “not serious” if “there was no definitive threat on life” or if “the dollar- and cents- amount was not great”); E. Walsh, District–U. S. Argument Delays Warrant for Escapee’s Arrest, Washington Post, May 29, 1986, p. C1 (describing “the nature of Murray’s alleged offenses” as “point[ing] at two officers a gun that was later found to contain one round of ammunition”).
The second option is to imagine the “ordinary case” of the alien’s crime and then assess the riskiness of that hypothetical offense. But the phrase “ordinary case” does not appear in the statute. And imagining the ordinary case, the Court reminds us, is “hopelessly indeterminate,” “wholly ‘speculative,’” and mere “guesswork.” Ante, at 7, 24 (quoting Johnson, supra, at ___ (slip op., at 5, 7)); see also Chambers, supra, at 133 (opinion of ALITO, J.) (observing that the categorical approach is “nearly impossible to apply consistently”). Because courts disfavor interpretations that make a statute impossible to apply, see A. Scalia & B. Garner, Reading Law 63 (2012), this Court should reject the ordinary-case approach for §16(b) and adopt the underlying-conduct approach instead. See Johnson, supra, at ___ (ALITO, J., dissenting) (slip op., at 10) (“When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply”).

2

That the categorical approach is not the better reading of §16(b) should not be surprising, since the categorical approach was never really about the best reading of the text. As explained, this Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting mini-trials to determine a defendant’s past conduct. But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases. “[T]he provisions of the Constitution securing the right of trial by jury have no application” in a removal proceeding. Turner, 194 U. S., at 290. And, in criminal cases, the underlying-conduct approach would be perfectly constitutional if the Government included the defendant’s prior conduct in the indictment, tried it to a jury, and proved it beyond a reasonable doubt. See Johnson, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 12). Nothing in §16(b) prohibits the Government from proceeding this way, so the plurality is wrong to suggest that the underlying-conduct approach would necessarily “ping-pong us from one constitutional issue to another.” Ante, at 14.

If constitutional avoidance applies here at all, it requires us to reject the categorical approach for §16(b). According to the Court, the categorical approach is unconstitutionally vague. And, all agree that the underlying-conduct approach would not be. See Johnson, 576 U. S., at ___ (majority opinion) (slip op., at 12) (“[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct”). Thus, if the underlying-conduct approach is a “reasonab[le]” interpretation of §16(b), it is our “plain duty” to adopt it. United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 407 (1909). And it is reasonable, as explained above.

In Johnson, the Court declined to adopt the underlying-conduct approach for ACCA’s residual clause. See 576 U. S., at ___–___ (slip op., at 12–13). The Court concluded that the categorical approach was the only reasonable reading of ACCA because the residual clause uses the word “convictions.” Id., at ___. The Court also stressed the “utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.” Ibid.

Neither of these arguments is persuasive with respect to the INA. Moreover, this Court has already rejected them. In Nijhawan, this Court unanimously concluded that one of the aggravated felonies in the INA—“an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,” §1101(a)(43)(M)(i)—applies the underlying-conduct approach, not the categorical approach. 557 U. S., at 32. Although the INA also refers to “convict[ions],” §1227(a) (2)(A)(iii), the Court was not swayed by that argument. The word “convict[ion]” means only that the defendant’s underlying conduct must “be tied to the specific counts covered by the conviction,” not “acquitted or dismissed counts or general conduct.” Id., at 42. As for the supposed practical problems with proving an alien’s prior conduct, the Court did not find that argument persuasive either. “[T]he ‘sole purpose’ of the ‘aggravated felony’ inquiry,” the Court explained, “is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.” Ibid. And because the INA places the burden on the Government to prove an alien’s conduct by clear and convincing evidence,§1229a(c)(3)(A), “uncertainties caused by the passage of time are likely to count in the alien’s favor,” id., at 42.

There are additional reasons why the practical problems identified in Johnson should not matter for §16(b)—even assuming they should have mattered for ACCA’s residual clause, see Lewis v. Chicago, 560 U. S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted”). In a removal proceeding, any difficulties with identifying an alien’s past conduct will fall on immigration judges, not federal courts. But those judges are already accustomed to finding facts about the conduct underlying an alien’s prior convictions, since some of the INA’s aggravated felonies employ the underlying-conduct approach. The BIA has instructed immigration judges to determine such conduct based on “any evidence admissible in removal proceedings,” not just the elements of the offense or the record of conviction. See Matter of Babaisakov, 24 L. & N. Dec. 306, 307 (2007). No one has submitted any evidence that the BIA’s approach has been “utter[ly] impracticable[le]” or “daunting[ly] difficul[t] in practice. Ante, at 15. And even if it were, “how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself.” Ali v. Mukasey, 521 F. 3d 737, 741 (CA7 2008). Hypothetical burdens on the BIA should not influence how this Court interprets §16(b).
In short, we should not blithely assume that the reasons why this Court adopted the categorical approach for ACCA’s residual clause also apply to the INA’s list of aggravated felonies. As Nijhawan explained, “the ‘aggravated felony’ statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.” 557 U. S., at 38. “The question” in each case is “to which category [the aggravated felony] belongs.” Ibid. As I have explained, §16(b) belongs in the underlying-conduct category. Because that is the better reading of §16(b)’s text—or at least a reasonable reading—the Court should have adopted it here.

3

I see no prudential reason for maintaining the categorical approach for §16(b). The Court notes that the Government “explicitly acknowledges” that §16(b) employs the categorical approach. Ante, at 9. But we cannot permit the Government’s concessions to dictate how we interpret a statute, much less cause us to invalidate a statute enacted by a coordinate branch. See United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U. S. 439, 446–447 (1993); Young v. United States, 315 U. S. 257, 258–259 (1942). This Court’s “traditional practice” is to “refus[e] to decide constitutional questions” when other grounds of decision are available, “whether or not they have been properly raised before us by the parties.” Neese v. Southern R. Co., 350 U. S. 77, 78 (1955) (per curiam); see also Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1948–1949 (1997) (explaining that courts commonly “decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim”). This Court has raised potential saving constructions “on our own motion” when they could avoid a ruling on constitutional vagueness grounds, even in cases where the Government was a party. United States v. L. Cohen Grocery Co., 255 U. S. 81, 88 (1921). We should have followed that established practice here.

Nor should stare decisis prevent us from rejecting the categorical approach for §16(b). This Court has never held that §16(b) incorporates the ordinary-case approach. Although Leocal held that §16(b) incorporates a version of the categorical approach, the Court must not feel bound by that decision, as it largely overrules it today. See ante, at 22, n. 7. Surely the Court cannot credibly invoke stare decisis to defend the categorical approach—the same approach it says only a “lunatic” would continue to apply. Ante, at 24. If the Court views the categorical approach that way—the same way Johnson viewed it—then it must also agree that “[s]tanding by [the categorical approach] would undermine, rather than promote, the goals that stare decisis is meant to serve.” 576 U. S., at ___ (slip op., at 15). That is especially true if the Court’s decision leads to the invalidation of scores of similarly worded state and federal statutes, which seems even more likely after today than it did after Johnson. Instead of adhering to an interpretation that it thinks unconstitutional and then using that interpretation to strike down another statute, the Court should have taken this opportunity to abandon the categorical approach for §16(b) once and for all.

* * *

The Court’s decision today is triply flawed. It unnecessarily extends our incorrect decision in Johnson. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.
Cite as 18 C.D.O.S. 3474

MARION WILSON, PETITIONER
v.
ERIC SELLERS, WARDEN

No. 16–6855
In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals
For The Eleventh Circuit
Argued October 30, 2017
Filed April 17, 2018

JUSTICE BREYER delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter “adjudicated on the merits in State court” to show that the relevant state-court “decision” (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U. S. C. §2254(d). Deciding whether a state court’s decision “involved” an unreasonable application of federal law or “was based on” an unreasonable determination of fact requires the federal habeas court to “train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims,” Hitson v. Chatman, 576 U. S. ___, ___ (2015) (GINSBURG, J., concurring in denial of certiorari) (slip op., at 1), and to give appropriate deference to that decision, Harrington v. Richter, 562 U. S. 86, 101–102 (2011).

This is a straightforward inquiry when the last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again. See, e.g., Porter v. McCollum, 558 U. S. 30, 39–44 (2009) (per curiam); Rompilla v. Beard, 545 U. S. 374, 388–392 (2005); Wiggins v. Smith, 539 U. S. 510, 523–538 (2003).

The issue before us, however, is more difficult. It concerns how a federal habeas court is to find the state court’s reasons when the relevant state-court decision on the merits, say, a state supreme court decision, does not come accompanied with those reasons. For instance, the decision may consist of a one-word order, such as “affirmed” or “denied.” What then is the federal habeas court to do? We hold that the federal court should “look through” the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court’s decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.

I


Wilson then filed a petition for habeas corpus in a state court, the Superior Court for Butts County. Among other things, he claimed that his counsel was “ineffective” during his sentencing, in violation of the Sixth Amendment. See Strickland v. Washington, 466 U. S. 668, 687 (1984) (setting forth “two components” of an ineffective-assistance-of-counsel claim: “that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense”). Wilson identified new evidence that he argued trial counsel should have introduced at sentencing, namely, testimony from various witnesses about Wilson’s childhood and the impairment of the frontal lobe of Wilson’s brain.

After a hearing, the state habeas court denied the petition in relevant part because it thought Wilson’s evidence did not show that counsel was “deficient,” and, in any event, counsel’s failure to find and present the new evidence that Wilson offered had not prejudiced Wilson. Wilson v. Terry, No. 2001–v–38 (Super. Ct. Butts Cty., Ga., Dec. 1, 2008), App. 60–61. In the court’s view, that was because the new evidence was “inadmissible on evidentiary grounds,” was “cumulative of other testimony,” or “otherwise would not have, in reasonable probability, changed the outcome of the trial.” Id., at 61.

Wilson applied to the Georgia Supreme Court for a certificate of probable cause to appeal the state habeas court’s decision. But the Georgia Supreme Court denied the application without any explanatory opinion. Wilson v. Terry, No. 2001–v–38 (May 3, 2010), App. 87, cert. denied, 562 U. S. 1093 (2010).

Wilson subsequently filed a petition for habeas corpus in the United States District Court for the Middle District of Georgia. He made what was essentially the same “ineffective assistance” claim. After a hearing, the District Court denied Wilson’s petition. Wilson v. Humphrey, No. 5:10–cv–899 (Dec. 19, 2013), App. 88–89. The court assumed that Wilson’s counsel had indeed been “deficient” in failing adequately to investigate Wilson’s background and physical condition for mitigation evidence and to present what he likely would have found at the sentencing hearing. Id., at 144. But, the court nonetheless deferred to the state habeas court’s conclusion that these deficiencies did not “prejudice” Wilson, primarily because the testimony of many witnesses was “cumulative,” and because the evidence of physical impairments did not include any physical examination or other
support that would have shown the state-court determination was “unreasonable.” Id., at 187; see Richter, 562 U. S., at 111–112.

Wilson appealed to the Court of Appeals for the Eleventh Circuit. Wilson v. Warden, 774 F. 3d 671 (2014). The panel first held that the District Court had used the wrong method for determining the reasoning of the relevant state court, namely, that of the Georgia Supreme Court (the final and highest state court to decide the merits of Wilson’s claims). Id., at 678. That state-court decision, the panel conceding, was made without an opinion. But, the federal court was wrong to “look through” that decision and assume that it rested on the grounds given in the lower court’s decision. Instead of “looking through” the decision to the state habeas court’s opinion, the federal court should have asked what arguments “could have supported” the Georgia Supreme Court’s refusal to grant permission to appeal. The panel proceeded to identify a number of bases that it believed reasonably could have supported the decision. Id., at 678–681.

The Eleventh Circuit then granted Wilson rehearing en banc so that it could consider the matter of methodology. Wilson v. Warden, 834 F. 3d 1227 (2016). Ultimately six judges (a majority) agreed with the panel and held that its “could have supported” approach was correct. Id., at 1235. Five dissenting judges believed that the District Court should have used the methodology it did use, namely, the “look through” approach. Id., at 1242–1247, 1247–1269. Wilson then sought certiorari here. Because the Eleventh Circuit’s opinion creates a split among the Circuits, we granted the petition. Compare id., at 1285 (applying “could have supported” approach), with Grueninger v. Director, Va. Dept. of Corrections, 813 F. 3d 517, 525–526 (CA4 2016) (applying “look through” presumption post-Richter), and Cannedy v. Adams, 706 F. 3d 1148, 1156–1159 (CA9 2013) (same); see also Clements v. Clarke, 592 F. 3d 45, 52 (CA1 2010) (applying “look through” presumption pre-Richter); Bond v. Beard, 539 F. 3d 256, 289–290 (CA3 2008) (same); Mark v. Ault, 498 F. 3d 775, 782–783 (CA8 2007) (same); Joseph v. Coyle, 469 F. 3d 441, 450 (CA6 2006) (same).

II

We conclude that federal habeas law employs a “look through” presumption. That conclusion has parallels in this Court’s precedent. In Ylst v. Nunnemaker, a defendant, convicted in a California state court of murder, appealed his conviction to the state appeals court where he raised a constitutional claim based on Miranda v. Arizona, 384 U. S. 436 (1966). 501 U. S. 797, 799–800 (1991). The appeals court rejected that claim, writing that “an objection based upon a Miranda violation cannot be raised for the first time on appeal.” Id., at 799. The defendant then similarly challenged his conviction in the California Supreme Court and on collateral review in several state courts (including once again the California Supreme Court). In each of these latter instances the state court denied the defendant relief (or review). In each instance the court did so without an opinion or other explanation. Id., at 799–800.

Subsequently, the defendant asked a federal habeas court to review his constitutional claim. Id., at 800. The higher state courts had given no reason for their decision. And this Court ultimately had to decide how the federal court was to find the state court’s reasoning in those circumstances. Should it have “looked through” the unreasoned decisions to the state procedural ground articulated in the appeals court or should it have used a different method?

In answering that question Justice Scalia wrote the following for the Court:

“The problem we face arises, of course, because many formulary orders are not meant to convey anything as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion fairly appears[s] to rest primarily upon federal law, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.” Id., at 803 (citation omitted).

Since Ylst, every Circuit to have considered the matter has applied this presumption, often called the “look through” presumption, but for the Eleventh Circuit—even where the state courts did not apply a procedural bar to review. See supra, at 4–5. And most Federal Circuits applied it prior to Ylst. See Ylst, supra, at 803 (citing Prithoda v. McCaughtry, 910 F. 2d 1379, 1383 (CA7 1990); Harmon v. Barton, 894 F. 2d 1268, 1272 (CA11 1990); Evans v. Thompson, 881 F. 2d 117, 123, n. 2 (CA4 1989); Ellis v. Lynaugh, 873 F. 2d 830, 838 (CA5 1989)).

That is not surprising in light of the fact that the “look through” presumption is often realistic, for state higher courts often (but certainly not always, see Redmon v. Johnson, 2018 WL 415714 (Ga., Jan. 16, 2018)) write “denied” or “affirmed” or “dismissed” when they have examined the lower court’s reasoning and found nothing significant with which they disagree.

Moreover, a “look through” presumption is often (but not always) more efficiently applied than a contrary approach—an approach, for example, that would require a federal habeas court to imagine what might have been the state court’s supportive reasoning. The latter task may prove particularly
difficult where the issue involves state law, such as state procedural rules that may constrain the scope of a reviewing court’s summary decision, a matter in which a federal judge often lacks comparative expertise. See Ylst, supra, at 805.

The State points to a later case, Harrington v. Richter, 562 U. S. 86 (2011), which, it says, controls here instead of Ylst. In its view, Ylst should apply, at most, to cases in which the federal habeas court is trying to determine whether a state-court decision without opinion rested on a state procedural ground (for example, a procedural default) or whether the state court has reached the merits of a federal issue. In support, it notes that Richter held that the state-court decisions to which AEDPA refers include summary dispositions, i.e., decisions without opinion. Richter added that “determining whether a state court’s decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court’s reasoning.” 562 U. S., at 98.

Richter then said that, where “a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” Ibid. And the Court concluded that, when “a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” Id., at 99.

In our view, however, Richter does not control here. For one thing, Richter did not directly concern the issue before us—whether to “look through” the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court’s decision. Indeed, it could not have considered that matter, for in Richter, there was no lower court opinion to look to. That is because the convicted defendant sought to raise his federal constitutional claim for the first time in the California Supreme Court (via a direct petition for habeas corpus, as California law permits). Id., at 96.

For another thing, Richter does not say the reasoning of Ylst does not apply in the context of an unexplained decision on the merits. To the contrary, the Court noted that it was setting forth a presumption, which “may be over-come when there is reason to think some other explanation for the state court’s decision is more likely.” Richter, supra, at 99–100. And it referred in support to Ylst, 501 U. S., at 803.

Further, we have “looked through” to lower court decisions in cases involving the merits. See, e.g., Premo v. Moore, 562 U. S. 115, 123–133 (2011); Sears v. Upton, 561 U. S. 945, 951–956 (2010) (per curiam). Indeed, we decided one of those cases, Premo, on the same day we decided Richter. And in our opinion in Richter we referred to Premo, 562 U. S., at 91. Had we intended Richter’s “could have supported” framework to apply even where there is a reasoned decision by a lower state court, our opinion in Premo would have looked very different. We did not even cite the reviewing state court’s summary affirmance. Instead, we focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA. 562 U. S., at 132 ("The state postconviction court’s decision involved no unreasonable application of Supreme Court precedent").

III

The State’s further arguments do not convince us. The State points out that there could be many cases in which a “look through” presumption does not accurately identify the grounds for the higher court’s decision. And we agree. We also agree that it is more likely that a state supreme court’s single word “affirm” rests upon alternative grounds where the lower state court decision is unreasonable than, e.g., where the lower court rested on a state-law procedural ground, as in Ylst. But that is why we have set forth a presumption and not an absolute rule. And the unreasonableness of the lower court’s decision itself provides some evidence that makes it less likely the state supreme court adopted the same reasoning. Thus, additional evidence that might not be sufficient to rebut the presumption in a case like Ylst would allow a federal court to conclude that counsel has rebutted the presumption in a case like this one. For instance, a federal habeas court may conclude that counsel has rebutted the presumption on the basis of convincing alternative arguments for affirmance made to the State’s highest court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State’s highest court relied on a different ground than the lower state court, such as the existence of a valid ground for affirmance that is obvious from the state-court record. The dissent argues that the Georgia Supreme Court’s recent decision in Redmond v. Johnson rebuts the presumption because that court indicated its summary decisions should not be read to adopt the lower court’s reasoning. Post, at 6–8, 10–11 (opinion of GORSUCH, J.). This misses the point. A presumption that can be rebutted by evidence of, for instance, an alternative ground that was argued or that is clear in the record was the likely basis for the decision is in accord with full and proper respect for state courts, like those in Georgia, which have well-established systems and procedures in place in order to ensure proper consideration to the arguments and contention in the many cases they must process to determine whether relief should be granted when a criminal conviction or its ensuing sentence is challenged.

The State also points out that we do not necessarily presume that a silent opinion of a federal court of appeals adopts the reasoning of the court below. The dissent similarly invokes these “traditional rules of appellate practice.” See post, at 5–6, 10. But neither the State nor the dissent provides examples of similar context. Were we to adopt a “look through” approach in respect to silent federal appeals court decisions as a general matter in other contexts, we would risk judges and lawyers reading those decisions as creating, through silence, a precedent that could be read as binding throughout the circuit—just what a silent decision may be thought not
to do. Here, however, we “look through” the silent decision for a specific and narrow purpose—to identify the grounds for the higher court’s decision, as AEDPA directs us to do. See supra, at 1–2. We see no reason why the federal court’s interpretation of the state court’s silence should be taken as binding precedent outside this context, for example, as a statewide binding interpretation of state law.

Further, the State argues that the “look through” approach shows disrespect for the States. See Brief for Respondent 39 (“Wilson’s approach to summary decisions reflects an utter lack of faith in the ability of the highest state courts to adjudicate constitutional rights”). We do not believe this is so. Rather the presumption seeks to replicate the grounds for the higher state court’s decision. Where there are convincing grounds to believe the silent court had a different basis for its decision than the analysis followed by the previous court, the federal habeas court is free, as we have said, to find to the contrary. In our view, this approach is more likely to respect what the state court actually did, and easier to apply in practice, than to ask the federal court to substitute for silence the federal court’s thought as to more supportive reasoning.

Finally, the State argues that the “look through” approach will lead state courts to believe they must write full opinions where, given the workload, they would have preferred to have decided summarily. Though the matter is empirical, given the narrowness of the context, we do not believe that they will feel compelled to do so—at least not to any significant degree. The State offers no such evidence in the many Circuits that have applied Ylst outside the procedural context. See supra, at 5.

For these reasons, we reverse the Eleventh Circuit’s judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

After a state supreme court issues a summary order sustaining a criminal conviction, should a federal habeas court reviewing that decision presume it rests only on the reasons found in a lower state court opinion? The answer is no. The statute governing federal habeas review permits no such “look through” presumption. Nor do traditional principles of appellate review. In fact, we demand the opposite presumption for our work—that telling readers that we independently review each case and that our summary affirmances may be read only as signaling agreement with a lower court’s judgment and not necessarily its reasons. Because I can discern no good reason to treat the work of our state court colleagues with less respect than we demand for our own, I would reject petitioner’s presumption and must respectfully dissent.

Even so, some good news can be found here. While the Court agrees to adopt a “look through” presumption, it does so only after making major modifications to petitioner’s proposal. The Court tells us that the presumption should count for little in cases “where the lower state court decision is unreasonable” because it is not “likely” a state supreme court would adopt unreasonable reasoning. Ante, at 9. In cases like that too, the Court explains, federal courts remain free to sustain state court convictions whenever reasonable “ground[s] for affirmance [are] obvious from the state-court record” or appear in the parties’ submissions in state court or the federal habeas proceeding. Ibid. Exactly right, and exactly what the law has always demanded. So while the Court takes us on a journey through novel presumptions and rebuttals, it happily returns us in the end very nearly to the place where we began and belonged all along.

* *

To see the problem with petitioner’s presumption, start with the statute. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs federal review of state criminal convictions. It says a federal court may not grant habeas relief overturning a state court conviction “with respect to any claim that was adjudicated on the merits in State court proceedings” unless (among other things) the petitioner can show that the state court proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.” 28 U. S. C. §2254(d)(1).

As the text and our precedent make clear, a federal habeas court must focus its review on the final state court decision on the merits, not any preceding decision by an inferior state court. See Greene v. Fisher, 565 U. S. 34, 40 (2011). Nor does it matter whether the final state court decision comes with a full opinion or in a summary order: the same deference is due all final state court decisions. Harrington v. Richter, 562 U. S. 86, 98 (2011); Cullen v. Pinholster, 563 U. S. 170, 187 (2011).

The upshot of these directions is clear. Even when the final state court decision “is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” Richter, 562 U. S., at 98 (emphasis added). And before a federal court can disregard a final summary state court decision, it “must determine what arguments or theories . . . could have supported” the state court’s decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” Id., at 102 (emphasis added). Far from suggesting federal courts should presume a state supreme court summary order rests on views expressed in a lower court’s opinion, then, AEDPA and our precedents require more nearly the opposite presumption: federal courts must presume the order rests on any reasonable basis the law and facts allow.

If this standard seems hard for a habeas petitioner to overcome, “that is because it was meant to be.” Ibid. In AEDPA, Congress rejected the notion that federal habeas review
should be “a substitute for ordinary error correction.” *Id.*, at 102–103. Instead, AEDPA “reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems.’ ” *Id.*, at 102 (emphasis added). “The reasons for this approach are familiar. ‘Federal habeas review of state convictions frustrates both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.’ It ‘disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Id.*, at 103 (citations omitted).

Petitioner and the Court today labor to distinguish these authorities, but I don’t see how they might succeed. They point to the fact that in *Richter* no state court had issued a reasoned order, while here a lower state court did. See Brief for Petitioner 28–30; *ante*, at 8. But on what account of AEDPA or *Richter* does that factual distinction make a legal difference? Both the statute and our precedent explain that federal habeas review looks to the final state court decision, not any decision preceding it. Both instruct that to dislodge the final state court decision a petitioner must prove it involved an unreasonable application of federal law. And to carry that burden in the face of a final state court summary decision, *Richter* teaches that the petitioner must show no lawful basis could have reasonably supported it. To observe that some final state court summary decisions are preceded by lower court reasoned opinions bears no more relevance to the AEDPA analysis than to say that some final state court summary decisions are issued on Mondays.¹

Unable to distinguish *Richter*, petitioner seeks to confine it by caricature. Because that case requires a federal court to “imagine” its own arguments for denying habeas relief and engage in “decision-making-by-hypothetical,” he argues it should be limited to its facts. Brief for Petitioner 28–30, 33; Reply Brief 9. But the Court today does not adopt petitioner’s characterization, and for good reason: *Richter* requires no such thing. In our adversarial system a federal court generally isn’t required to imagine or hypothesize arguments that neither the parties before it nor any lower court has presented.

To determine if a reasonable basis “could have supported” a summary denial of habeas relief under *Richter*, a federal court must look to the state lower court opinion (if there is one), any argument presented by the parties in the state proceedings, and any argument presented in the federal habeas proceeding. Of course, a federal court sometimes may consider on its own motion alternative bases for denying habeas relief apparent in the law and the record, but it does not generally bear an obligation to do so. See *Wood v. Milyard*, 566 U. S. 463, 471–473 (2012) (discussing *Day v. McDonough*, 547 U. S. 198 (2006), and *Granberry v. Greer*, 481 U. S. 129 (1987)).

Nor is that the end of the problems with petitioner’s “look through” presumption. It also defies traditional rules of appellate practice that informed Congress’s work when it adopted AEDPA and that should inform our work today. *McQuiggin v. Perkins*, 569 U. S. 383, 398, n. 3 (2013). Appellate courts usually have an independent duty to review the facts and law in the cases that come to them. Often they see errors in lower court opinions. But often, too, they may affirm on alternative bases either argued by the parties or (sometimes) apparent to them on the face of the record. See, e.g., *SEC v. Chenery Corp.*, 318 U. S. 80, 88 (1943) (noting “the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason’ ”); *Wood, supra*, at 473. And a busy appellate court sometimes may not see the profit in devoting its limited resources to explaining the error and the alternative basis for affirming when the outcome is sure to remain the same, so it issues a summary affirmance instead. To reflect these realities, this Court has traditionally warned readers against presuming our summary affirmances rest on reasons articulated in lower court opinions. *Compatter of Treasury of Md. v. Wynne*, 575 U. S. ___, ___–___ (2015) (slip op., at 16–17) (“ [A] summary affirmance is an affirmation of the judgment only,” and “the rationale of the affirmance may not be gleaned solely from the opinion below”); *Mandel v. Bradley*, 432 U. S. 173, 176 (1977) (per curiam). The courts of appeals have issued similar warnings for similar reasons about their own summary orders. See, e.g., *Rates Technology, Inc. v. Mediatrix Telecom, Inc.*, 688 F. 3d 742, 750 (CA Fed. 2012); *DeShong v. Seaboard Coast Line R. Co.*, 737 F. 2d 1520, 1523 (CA11 1984). And respect for this traditional principle of appellate practice surely weigh against presuming a state court’s summary disposition rests solely on a lower court’s opinion. On what account could we reasonably demand more respect for our summary decisions than we are willing to extend to those of our state court colleagues?

Petitioner and the Court offer only this tepid reply. They suggest that their “look through” presumption seeks to reflect “realistic[ally]” the basis on which the state summary decision rests. See Brief for Petitioner 44; *ante*, at 7. But to the extent this is a claim that their presumption comports realistically with longstanding traditions of appellate practice, it is

¹ Petitioner and the Court separately suggest that *Premo v. Moore*, 562 U. S. 115 (2011), supports their position because the Court there did not follow *Richter’s* approach. See Brief for Petitioner 40; *ante*, at 8–9. But the following sentences from *Moore* (with emphasis added) are clear proof it did: “[t]he question is whether there is any reasonable argument that counsel satisfied Strickland’s deferential standard,” *Id.*, at 123 (quoting *Richter*); “[t]o overcome the limitation imposed by §2254(d), the Court of Appeals had to conclude that both findings [i.e., no deficient performance and no prejudice] would have involved an unreasonable application of clearly established law,” *Id.* (citing *Richter*); “[t]he state court here reasonably could have determined that [no prejudice existed],” *Id.*, at 129. *Moore* simply found that a reason-able basis—provided by a state postconviction court—could (and did) support the denial of habeas relief. *Id.*, at 123. It did not rely on an unreasonable basis provided by a lower court to grant habeas relief, as petitioner seeks to have us do. *Moore* thus accords with AEDPA and our precedents, while petitioner’s presumption does not.
wrong for the reasons just laid out. In fact, applying traditional understandings of appellate practice, this Court has refused to presume that state appellate courts even read lower court opinions rather than just the briefs before them. See Baldwin v. Reese, 541 U. S. 27, 31 (2004). And surely it is a mystery how the Court might today presume state supreme courts rely on that which it traditionally presumes they do not read.

If the argument here is instead an empirical claim that the “look through” presumption comports realistically with what happened in this case and others like it, it is wrong too. Petitioner was convicted in Georgia. And during the pendency of this case in our Court, the Georgia Supreme Court issued an order confirming that lower courts in that State may not “presume[e] that when this Court summarily denies an application to appeal an order denying habeas corpus relief, we necessarily agree with everything said in that order.” Redmon v. Johnson, 809 S. E. 2d 468, 472 (Ga. 2018). The court explained that it has long followed just this rule for all the reasons you’d expect. It independently reviews the facts and law in each habeas case. If it finds something it thinks might amount to a consequential error, the court sets the case for argument and usually prepares a full opinion. But “[o]n many occasions,” the court finds only “inconsequential errors.” Id., at 471. And in these cases the court normally issues a summary affirmation because the costs associated with full treatment of the appeal outweigh the benefits of correcting what is at most harmless error, especially given the court’s heavy caseload and the need to attend to more consequential matters. Petitioner’s presumption thus does not seek to reflect reality; it seeks to deny it.

The presumption is especially unrealistic in another way. The Court and petitioner presume that a summary order by a state supreme court adopts all the specific reasons expressed by a lower state court. In doing so, they disregard a far more realistic possibility: that the state supreme court might have relied only on the same grounds for the denial of relief as did the lower court without necessarily adopting all its reasoning. Here, the lower state court denied petitioner’s Strickland claim on the grounds that counsel’s performance was not deficient and petitioner suffered no prejudice. And it gave several reasons for its conclusions: for example, the evidence petitioner sought to admit “would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial.” App. 61. In summarily denying relief, the state supreme court might have reached the same conclusions (no deficient performance and no prejudice) without resting on the exact same reasons.

While the “look through” presumption cannot be squared with AEDPA’s text, traditional rules, or Georgia’s actual practice, petitioner and the Court contend it is at least consistent with Ylst v. Nunnemaker, 501 U. S. 797 (1991). See Brief for Petitioner 38; ante, at 5–8. But it is not. In habeas review of state court convictions, federal courts may only review questions of federal law. So if a state court decision rejecting a petitioner’s federal law claim rests on a state procedural defect (say the petitioner filed too late under state rules), federal courts generally have no authority to reach the federal claim. Ylst simply teaches that, if a lower state court opinion expressly relied on an independent and adequate state ground, we should presume a later state appellate court summary disposition invoked it too. See 501 U. S., at 801, 803. The decision thus seeks to protect state court decisions from displacement and reaches a result consistent with the traditional rule that a summary order invokes all fairly presented bases for affirmation.

Neither can Ylst be reimagined today as meaning anything more. The case came years before AEDPA’s new standards for habeas review and can offer nothing useful about them. The work of interpreting AEDPA’s demands was left instead to Richter. And, as we’ve seen, Richter forecloses petitioner’s

2. In language that will sound familiar to all judges and lawyers involved in litigating habeas claims, the Georgia Supreme Court explained that “[t]here are many examples of inconsequential errors, but among the most common are the following:

• The habeas court rejects a claim both on a procedural ground and, alternatively, on the substantive merits. This Court determines that one of those rulings appears factually or legally erroneous, but the other is correct, so an appeal would result in the habeas court’s judgment being affirmed on the correct ground.

• In addressing an ineffective assistance of counsel claim under Strickland v. Washington, 466 U. S. 686 (1984), the habeas court rules that counsel did not perform deficiently as alleged. That ruling appears to be erroneous, but this Court determines based on our review of the record that no prejudice resulted from the deficient performance, so an appeal would result in affirming the habeas court’s judgment. See id., at 697; Rozier v. Caldwell, 300 Ga. 30, 31–32 (2016).

• In addressing other claims that require the petitioner to prove each element of a multi-part test, such as a claim under Brady v. Maryland, 373 U. S. 83 (1963), the habeas court makes factual or legal errors regarding the petitioner’s proof of one element but correctly concludes (or the record clearly shows) that the petitioner has not proved another required element. An appeal would result in this Court’s affirming the habeas court’s judgment.

• The habeas court misstates a legal standard in one part of its order, but recites the standard correctly elsewhere in the order, and it is clear that the judgment is correct applying the right standard.

• In addressing a habeas petition with multitudinous claims, the habeas court’s order fails to explicitly rule on a claim, but the record shows that the claim is entirely meritless. Redmon, 809 S. E. 2d, at 471 (some citations omitted).

3. “[T]he burdens of invoking the full appellate process, including writing opinions simply to point out factual or legal errors that do not affect the judgment, are significant for this Court. We issue about 350 published opinions each year, all en banc, meaning that each Justice (seven of us until 2017, nine now) must evaluate an opinion a day and author 35 to 50 majority opinions a year, with the help of only two law clerks in each chambers. Moreover, the Georgia Constitution requires this Court to issue its decision within the two terms of court after an appeal is docketed (which means within about eight months, given our three terms per year). . . . And our reasoned decisions are precedent binding on all other Georgia courts, . . . so issuing opinions where the relevant law is already well-established runs the risk of creating inconsistencies.” Redmon, 809 S. E. 2d, at 472.
presumption. Of course, and as petitioner stresses, Richter didn’t overrule Ylst. But that’s for the simple reason that Ylst continues to do important, if limited, work in the disposition of procedural default claims because “AEDPA did not change the application of pre-AEDPA procedural default principles.” B. Means, Federal Habeas Manual §9B:3 (2017).

Uncomfortable questions follow too from any effort to reimagine Ylst. If we were to take Ylst as suggesting that summary decisions presumptively rely only on the reasons found in lower court opinions, wouldn’t we have to overrule our many precedents like Wynne and Mandel that explicitly reject any such presumption? Wouldn’t circuit courts have to discard their own similar precedents? See supra, at 5–6. Consistency would seem to demand no less.

The only answer petitioner and the Court offer is no answer at all. Consistency, they suggest, is overrated. Everywhere else in the law we should retain the usual rule that a summary affirmance can’t be read as presumptively resting on the lower court’s reasons. They encourage us to use Ylst only as a tool for making a special exception for AEDPA cases: here and here alone should we adopt petitioner’s “look through” presumption. Brief for Petitioner 18, 20; ante, at 10 (stating that “we ‘look through’ the silent decision for a specific and narrow purpose’” under AEDPA). But just stating this good-for-habeas-only rule should be enough to reject it.

Summary orders that happen to arise in state habeas cases should receive no less respect than those that arise anywhere else in the law. If anything, they should receive more respect, because federal habeas review of state court decisions “intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” Richter, 562 U. S., at 103.

* *

Petitioner’s novel presumption not only lacks any provenance in the law, it promises nothing for its trouble. Consider the most obvious question it invites, one suggested by the facts of our own case: what happens when a state supreme court issues an order explaining that its summary affirmances do not necessarily adopt the reasons in lower court opinions? Should that be enough to rebut the “look through” presumption? After defending the presumption, even the dissent in the Eleventh Circuit decision under review recognized that a disclaimer along these lines should suffice to rebut it. See Wilson v. War-don, 834 F. 3d 1227, 1263 (2016) (en banc) (opinion of J. Pryor, J.) (“The Georgia Supreme Court could simply issue a one-line order denying an application for a certificate of probable cause that indicates agreement with the result the superior court reached but not the lower court’s reasons for rejecting the petitioner’s claim”). And, of course, the Georgia Supreme Court has recently responded to the dissent’s invitation by issuing just such a disclaimer. So in the end petitioner’s presumption seems likely to accomplish nothing for him and only needless work for others—inducing more state supreme courts to churn out more orders restating the obvious fact that their summary dispositions don’t necessarily rest on the reasons given by lower courts. Along the way, too, it seems federal courts will have their hands full. For while the Eleventh Circuit dissent had no difficulty acknowledging that an order like Georgia’s suffices to overcome petitioner’s presumption, the Court today refuses to supply the same obvious answer.

Consider, too, the questions that would follow in the unlikely event a general order like the one from the Georgia Supreme Court wasn’t considered enough to overcome petitioner’s presumption. Quickly federal courts would be forced to decide: does the “look through” presumption survive even when a state supreme court includes language in every summary order explaining that its decision does not necessarily adopt the reasoning below? What if the state supreme court says something slightly different but to the same effect, declaring in each case that it has independently considered the relevant law and evidence before denying relief? And if we start dictating what state court disclaimers should look like and where they should appear, what exactly is left of Congress’s direction that our review is intended to guard only against “extreme malfunctions” in state criminal justice systems? Richter, supra, at 102. Wouldn’t we be slipping into the business of “tell[ing] state courts how they must write their opinions,” something this Court has long said federal habeas courts “have no power” to do? Coleman v. Thompson, 501 U. S. 722, 739 (1991).

Apart from whether a (general or case-specific) order from a state supreme court suffices to overcome petitioner’s presumption, there’s the question what else might. Say a lower state court opinion includes an error but the legal briefs or other submissions presented to the state supreme court supply sound alternative bases for affirmance. In those circumstances, should a federal habeas court really presume that the state supreme court chose to repeat the lower court’s mistake rather than rely on the solid grounds argued to it by the parties? What if a sound alternative basis for affirmance is presented for the first time in the parties’ federal habeas submissions: are we to presume that the state supreme court was somehow less able to identify a reasonable basis for affirmance than federal habeas counsel?

Here at least the Court does offer an answer. Petitioner insists that federal courts should presume that state supreme court summary orders rest on unreasonable lower state court opinions even in the face of reasonable alternative arguments presented to the state supreme court or in federal habeas proceedings. But seeming to recognize the unreasonableness of this request, the Court opts to reshape radically petitioner’s proposed presumption before adopting it. First, the Court states that “it is more likely that a state supreme court’s single word ‘affirm’ rests upon alternative grounds where the lower state court decision is unreasonable.” Ante, at 9. Then, the Court proceeds to explain that “a federal habeas court may conclude that counsel has rebutted the presumption on the basis of convincing alternative arguments for affirmance made
to the State’s highest court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State’s highest court relied on a different ground than the lower state court, such as the existence of a valid ground for affirmance that is obvious from the state-court record.” *Ibid.*

The Court’s reshaping of petitioner’s presumption reveals just how futile this whole business really is. If, as the Court holds, the “look through” presumption can be rebutted “where the lower state court decision is unreasonable,” *ibid.*, it’s hard to see what good it does. Petitioner sought to assign unreasonable lower court opinions to final state court summary decisions. To hear now that essentially only reasonable (and so sustainable) lower state court opinions are presumptively adopted by final state court summary decisions will surely leave him sour on this journey and federal habeas courts scratching their heads about the point of it all. And if, as the Court also tells us, a federal habeas court can always deny relief on a basis that is apparent from the record or on the basis of alternative arguments presented by the parties in state or federal proceedings, then the “look through” presumption truly means nothing and we are back where we started. With the Court’s revisions to petitioner’s presumption, a federal habeas court is neither obliged to look through exclusively to the reasons given by a lower state court, nor required to presume that a summary order adopts those reasons.

All this is welcome news of a sort. The Court may promise us a future of foraging through presumptions and rebuttals. But at least at the end of it we rest knowing that what was true before remains true today: a federal habeas court should look at all the arguments presented in state and federal court and examine the state court record. And a federal habeas court should sustain a state court summary decision denying relief if those materials reveal a basis to do so reasonably consistent with this Court’s holdings. Exactly what a federal court applying the statute and requiring Microsoft to disclose all e-mails and other information associated with the account of one of its customers. Satisfied that the agents had demonstrated probable cause to believe that the account was being used to further illegal drug trafficking, a Magistrate Judge issued the requested §2703 warrant. App. 22–26. The warrant directed Microsoft to disclose to the Government the contents of a specified e-mail account and all other records or information associated with the account “[to the extent that the information . . . is within [Microsoft’s] possession, custody, or control.” *Id.*, at 24.

After service of the §2703 warrant, Microsoft determined that the account’s e-mail contents were stored in a sole location: Microsoft’s datacenter in Dublin, Ireland. *Id.*, at 34. Microsoft moved to quash the warrant with respect to the information stored in Ireland. The Magistrate Judge denied Microsoft’s motion. *In re Warrant To Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 15 F.Supp.3d 466 (SDNY 2014). The District Court, after a hearing, adopted the Magistrate Judge’s reasoning and affirmed his ruling. See *In re Warrant To Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 204–205 (CA2 2016). Soon after, acting on a stipulation submitted jointly by the parties, the District Court held Microsoft in civil contempt for refusing to comply fully with the warrant. *Id.*, at 205. On appeal, a panel of the Court of Appeals for the Second Circuit reversed the denial of the motion to quash and vacated the civil contempt finding, holding that requiring Microsoft to disclose the electronic communications in question would be an unauthorized extraterritorial application of §2703. *Id.*, at 222.
The parties now advise us that on March 23, 2018, Congress enacted and the President signed into law the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), as part of the Consolidated Appropriations Act, 2018, Pub. L. 115–141. The CLOUD Act amends the Stored Communications Act, 18 U. S. C. §2701 et seq., by adding the following provision:

“A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider’s possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States.” CLOUD Act §103(a)(1).

Soon thereafter, the Government obtained, pursuant to the new law, a new §2703 warrant covering the information requested in the §2703 warrant at issue in this case.

No live dispute remains between the parties over the issue with respect to which certiorari was granted. See Department of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto, 477 U. S. 556, 559 (1986). Further, the parties agree that the new warrant has replaced the original warrant. This case, therefore, has become moot. Following the Court’s established practice in such cases, the judgment on review is accordingly vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions first to vacate the District Court’s contempt finding and its denial of Microsoft’s motion to quash, then to direct the District Court to dismiss the case as moot.

It is so ordered.
We must decide whether, under the Fair Debt Collection Practices Act, a company that sent letters demanding that hospital patients pay their overdue medical bills meaningfully participated in the hospital’s efforts to collect debts.

I

Michelle Echlin is a former patient of PeaceHealth Southwest Medical Center (PeaceHealth) in Vancouver, Washington. Echlin received treatment at PeaceHealth on two different occasions but never paid the nearly $1,000 in medical bills she incurred as a result. After Echlin ignored multiple requests for payment, PeaceHealth referred her delinquent accounts to Computer Credit, Inc. (CCI), a purported collection agency, for further action.

A

For a number of years, CCI and PeaceHealth operated together under a “Subscriber Agreement” signed in 2004. Under the agreement, PeaceHealth would refer delinquent patient accounts to CCI and, for a fixed fee, CCI would perform various services related to the debt-collection process—primarily mailing letters demanding that the patients pay their bills. During the time that an account had been referred to CCI, PeaceHealth would suspend its in-house collection efforts.

When it referred an account to CCI, PeaceHealth would give CCI the debtor’s name and address, the name of any guarantor, the date of the service in question, and the amount owed on the account. CCI would then independently screen each account for potential collection problems (such as staleness of the claim). CCI’s screening process was mostly automated, though a CCI employee would personally review at least some of the accounts for red flags. If an account passed CCI’s screening process, CCI would then send the debtor a letter advising her that the account had been assigned to CCI for collection purposes and demanding payment.

CCI controlled the largely formulaic letter-mailing process. Although PeaceHealth was generally aware of the standard format of CCI’s letters, CCI alone controlled the content of the letters it actually sent, and CCI did not seek PeaceHealth’s approval prior to mailing. The letters were written on CCI letterhead, they were mailed from CCI’s in-house mailing center, and they listed CCI’s address and phone number (along with PeaceHealth’s contact information under a section labeled “Creditor Detail”). The letters also directed debtors to visit a website maintained by CCI, where one could see more details about his or her debt, find information about how to repay or to dispute the debt, and submit electronic documents to CCI. Like the letters, the website encouraged debtors to contact CCI by phone, fax, or mail with questions.

CCI would mail up to two collection letters for each PeaceHealth account. The first letter informed the debtor that her account had been referred to CCI, “a debt collector,” for collection and requested payment either by check, by a credit card form included in the letter, or online at PeaceHealth’s website. CCI itself had no ability to process or to negotiate payments for PeaceHealth, but it would forward to PeaceHealth any payments it received, including endorsing checks made out to CCI, as necessary. CCI typically allowed

1. CCI maintained similar arrangements with many other companies, and held hundreds of thousands of active debtor accounts at a time. At any given time, approximately 2,000 to 3,000 of those were accounts referred from PeaceHealth, for a total of 17,500 to 18,000 PeaceHealth accounts in the year preceding this lawsuit.
the debtor two weeks to respond to its first letter. If a debtor made full repayment, CCI stopped all collection activity. But if the debtor failed to pay or to respond within two weeks, CCI would send a second letter, renewing its request that the debtor settle the account. If, after another two to three weeks, the debtor still had not paid her debt, CCI would refer the debt back to PeaceHealth and CCI’s activity on the account would end.

Accounts sent back to PeaceHealth would often then be referred to another company for additional action. As PeaceHealth describes it, CCI’s activities were the first step in a series of collections processes “up to and including the point of an additional agency obtaining and executing on a court judgment.” CCI did not participate in any of the later collection steps.

CCI also handled correspondence—both in writing and over the phone—from PeaceHealth debtors. In 2013, for instance, CCI received 440 pieces of mail from PeaceHealth debtors. When it received such mail, CCI would “review, act on it, copy it,” and then forward it to PeaceHealth, though CCI would not necessarily respond directly to the debtor herself. For example, when it received written requests for debt verification, CCI would contact PeaceHealth to verify the validity of the debt and then either PeaceHealth or CCI would send a letter responding to the debtor. CCI also trained its staff personally to handle phone inquiries from debtors, and CCI’s Collections Manager estimated that CCI handled approximately 500 calls a week from debtors for all of its clients combined. CCI personnel gave a variety of information to callers, including clarifying basic details about their debts, assisting in understanding their insurance benefits, advising them to look into charity programs for assistance in paying, and explaining the distinction between a payment plan and a partial payment. CCI did not generally reach out to debtors beyond the two letters, but CCI personnel would return calls to debtors if requested, and CCI sent debtors various administrative notices, such as payment or account-closure confirmations.

In early April 2013, PeaceHealth sent Echlin’s information to CCI for assistance in collecting the debt from her first treatment at PeaceHealth. On April 4, CCI assigned Echlin’s debt a CCI account number and screened it for barriers to collection. The next day, CCI sent an initial collection letter to Echlin demanding payment. The letter was written in the form described above and stated:

> Your overdue balance with PeaceHealth . . . has been referred to [CCI] for collection. . . . This letter will serve to inform you that your account remains unpaid and we expect resolution of your obligation to [PeaceHealth].

The letter directed Echlin to remit payment in order to “prevent further collection activity by” CCI. It also instructed her to notify CCI within 30 days if she disputed the validity of the debt.

Having received no response, CCI sent a second letter to Echlin exactly two weeks later. The second letter was substantially the same as the first but included the additional notice:

> This is our FINAL NOTICE and you must take action to resolve this overdue account. Pay the amount due to discharge your debt owed to [PeaceHealth]. . . . [T]his is our LAST ATTEMPT to collect this debt . . . .

Echlin neither responded nor paid the debt, and CCI returned the account to PeaceHealth on May 5.

CCI later sent Echlin another initial collection letter, seeking payment from her second visit to PeaceHealth. This time, Echlin sent a letter to CCI disputing the debt. CCI never responded to Echlin’s letter but instead marked the account disputed, determined that all further collection activity should stop, and returned the account along with Echlin’s letter to PeaceHealth.

C

On March 11, 2014, Echlin filed a putative class action against CCI and PeaceHealth, alleging violations of the Fair Debt Collection Practices Act (FDCPA), “including but not limited to 15 U.S.C. §§ 1692e and 1692j.” Specifically, Echlin alleged that the letters she received “created a false or misleading belief that Defendant CCI was meaningfully involved in the collection of a debt prior to the debt actually being sent to collections”—a practice commonly known as flat-rating. She sought statutory damages, actual damages, and attorneys fees.

CCI and PeaceHealth moved for summary judgment. In response to CCI’s motion, Echlin continued to press her flat-rating claims but also argued that, even if such claims failed, “CCI’s practices violate the statute in other ways.” She gave one example, echoing a prohibition found in 15 U.S.C. § 1692e(5): “For instance, the FDCPA prohibits a debt collector from using any false representation or deceptive means to collect any debt and threatening to take any action that cannot legally be taken or that is not intended to be taken.” Echlin argued that CCI violated such prohibition by threatening “‘further’ action against Mrs. Echlin if she refused to pay her debt, but CCI had no actual authority to take any action against [her] outside of sending a second demand letter.”

2. It is not clear from our record how many of those calls were from PeaceHealth debtors specifically.

3. Echlin brought suit on behalf of herself and all other “consumers . . . who received collection letters from defendants CCI and PeaceHealth similar to [the letters Echlin received]” within the prior year.

4. Echlin argued that such conduct violated both § 1692e(5)’s specific prohibition against threatening to take action that is not intended or authorized and § 1692e(10)’s broader prohibition against using any false or deceptive means to attempt to collect a debt. Despite Echlin’s reference to both statutory subsections, for ease of discussion we (like
The district court granted CCI’s and PeaceHealth’s motions for summary judgment. It ruled that the undisputed evidence showed that CCI indeed did meaningfully participate in the collection of Echlin’s debt, thereby precluding any flat-rating claim. The court also struck the § 1692e(5) claim. Echlin argued at summary judgment, explaining that Echlin had not fairly raised such a claim in her complaint and thus the defendants had no notice of the claim and would have been substantially prejudiced if she were allowed to add the new claim so far into litigation. Although Echlin did not formally move to amend her complaint, the court further determined that any amendment would be futile, because at that point the new claim would have been barred by the FDCPA’s one-year statute of limitations.

D

Echlin timely appealed and challenges the district court’s rejection of both her flat-rating claims and her § 1692e(5) claim for CCI’s allegedly false threats to take further collection action against her. She also argues that she has a viable claim under § 1692e(10) for CCI’s allegedly deceptive inclusion of both its and PeaceHealth’s contact information in the letters it sent her.

II

Echlin first argues that the district court erred in granting summary judgment against her flat-rating claim and her § 1692e(5) claim for CCI’s allegedly false threats to take further collection action against her. She also argues that she has a viable claim under § 1692e(10) for CCI’s allegedly deceptive inclusion of both its and PeaceHealth’s contact information in the letters it sent her.

Specifically, § 1692j makes it unlawful to:

design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

15 U.S.C. § 1692j(a). There is no doubt that CCI furnished form letters that were used to create the belief—indeed that explicitly stated—that CCI was participating in an attempt to collect the debts Echlin owed to PeaceHealth. The question we must answer is whether there is sufficient evidence in the record to support Echlin’s contention that this impression was false—that is, whether there is any genuine issue of fact as to whether CCI actually participated in PeaceHealth’s debt-collection efforts. See id.; see also Nielsen, 307 F.3d at 640 (“The premise of liability under section 1692j . . . is that the ‘flat-rater’ is not involved in debt collection.”). 5

A

The statute does not define what it means for a person to “participate” in the collection of or in an attempt to collect a debt owed by the consumer. 15 U.S.C. § 1692j(a). A “debt,” of course, is an obligation to pay someone money. See 15 U.S.C. § 1692a(5); Ho v. ReconTrust Co., 858 F.3d 568, 571 (9th Cir. 2017). And to “collect” that debt simply means to “gather” or to “exact” it from the debtor. See Webster’s Third New International Dictionary 444 (1993); Vincent v. Money Store, 736 F.3d 88, 100 (2d Cir. 2013). But this does little to answer our question. There is no doubt that Echlin owed

5. Echlin also alleged that the same conduct violated § 1692e’s prohibition against a “debt collector” using “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” The Act defines a “debt collector” as a person who “regularly collects or attempts to collect . . . debts owed or due . . . another.” 15 U.S.C. § 1692a(6). Thus, if CCI were acting merely as a flat-rater (and not actually participating in the collection of debts), it would be liable for violations of § 1692j, but would not likely be a “debt collector” and thus not liable also for violations of § 1692e. See, e.g., Vincent v. The Money Store, 736 F.3d 88, 103 & n.16 (2d Cir. 2013).

Echlin argues, however, that PeaceHealth is itself liable for CCI’s alleged flat-rating under § 1692e. Under the so-called false-name exception, a creditor may be held liable as its own debt collector under § 1692e if, “in the process of collecting his own debts, [he] uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.” 15 U.S.C. § 1692a(6). Some courts have held that this standard is essentially the inverse of § 1692j; a creditor who deceives debtors by hiring a third-party flat-rater is the de facto debt collector and may therefore be liable for violations of § 1692e through the false-name exception. See Vincent, 736 F.3d at 103 n.16; Gutierrez v. AT&T Broadband, LLC, 382 F.3d 725, 738 (7th Cir. 2004). Thus, Echlin argues, if CCI is liable for violating § 1692j, PeaceHealth is likewise liable for violating § 1692e.

In any event, Echlin’s §§ 1692e and 1692j claims turn on the same allegation: that CCI’s letters falsely suggested that CCI was meaningfully involved in the collection of her debts. Our analysis of Echlin’s flat-rating claims under § 1692j therefore applies with equal force to her parallel claims of misleading representations under § 1692e.
a debt to PeaceHealth and that PeaceHealth was trying to collect it from her. One could “participate” in—i.e., “take part” in, *Webster’s Third New International Dictionary* 1646 (1993)—that effort in any number of ways. Arguably, CCI participated in the attempts to collect Echlin’s debts by doing so little as drafting and mailing the collection letters to herself, rather than merely supplying letterhead to PeaceHealth for mailing. See, e.g., *Vincent v. AT&T Broadband, LLC*, 382 F.3d 725, 734 (7th Cir. 2004) (“The classic ‘flat-rater’ effectively sells his letterhead to the creditor . . . so that the creditor can prepare its own delinquency letters on that letterhead.”) (quoting *Nielsen*, 307 F.3d at 633).

Echlin contends—and other federal courts have suggested—however that CCI must do more than merely mail form letters to “participate” sufficiently in debt-collection efforts. The Second Circuit, for example, has suggested that the relevant entity must “meaningfully” participate in debt collection activities rather than “merely operate[s] as a conduit for a collection process that the creditor controls.” *Vincent*, 736 F.3d at 101, 103 (internal quotation marks omitted). The court opined that this likely requires more than mailing form letters at the direction of a creditor, criticizing arguments to the contrary as a relying on a “hyper-technical” reading of the statute. See *id.* at 101. The Seventh Circuit has likewise suggested that a debt collector must “genuinely[]” participate in the collection process and wrote that § 1692j “bans the practice . . . in which an individual sends a delinquency letter to the debtor portraying himself as a debt collector, when in fact he has no real involvement in the debt collection effort.” *Nielsen*, 307 F.3d at 635, 639.

The district court found that CCI “meaningfully” participated in debt collection activities under § 1692j. The record supports that ruling.

**B**

Echlin primarily argues that CCI did not meaningfully participate in the attempts to collect her debts because CCI did not engage in many of the hallmark activities of debt collection. For example, CCI did not have authority to negotiate or to process payments from debtors, it received no proceeds from payments that were made, and it was not involved in any further action that was pursued against debtors whose accounts remained delinquent.

We are not persuaded that CCI must engage in such more central debt-collection activities in order to participate meaningfully in that process. Meaningful participation in the debt-collection process may take a variety of forms. In similar cases, for example, lower courts have applied a litany of factors related to an entity’s participation in the debt-collection process, including the amount of control the entity exercises over the collection letters it sends, the amount of contact the entity has with debtors, whether the entity invites and responds to debtor inquiries, whether the entity may receive or negotiate payments, whether the entity receives or retains full debtor files, and whether the entity is involved in further collection activities if the debts remain unpaid. See, e.g., *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 371–72 (D. Minn. 2013); *Mazzei v. Money Store*, 349 F. Supp. 2d 651, 659–60 n.6 (S.D.N.Y. 2004); *Sokolski v. Trans Union Corp.*, 53 F. Supp. 2d 307, 313 (E.D.N.Y. 1999). Such considerations are surely not exhaustive of the ways in which one might meaningfully participate in the collection process, but we agree that activities of such sorts may evidence genuine involvement in the collection process and that our inspection of an entity’s collection efforts must be holistic. The key is whether, in consideration of all that an entity does in the collection process, it genuinely contributes to an effort to collect another’s debt, or instead does little more than act as a mailing service for the creditor. See, e.g., *Vincent*, 736 F.3d at 103 (“[T]he appropriate inquiry is whether the third party . . . merely opera[tes] as a conduit for a collection process that the creditor controls.”) (internal quotation marks omitted); *Hartley*, 295 F.R.D. at 371 (flat-rater does “little more than coordinate the mailing of letters and forward responses to the creditor”); *Peters v. AT&T Corp.*, 43 F. Supp. 2d 926, 929 (N.D. Ill. 1999) (“[C]ourts have focused on whether the collection agency was hired only as a mailing service . . . .”); *see also* S. Rep. No. 95-382 (1977) (“[T]he flat-rater is not in the business of debt collection, but merely sells dunning letters.”).

Although CCI could not negotiate, process, or seek to compel repayments, it participated in the attempts to collect debts owed to PeaceHealth in a variety of other ways. Uncontested evidence in the record shows that: (1) CCI independently screened accounts for barriers to collection; (2) CCI alone drafted and mailed the collection letters, without input from PeaceHealth; (3) the letters invited debtors to contact CCI by mail or phone and CCI trained its personnel to handle such inquiries; (4) CCI in fact received approximately 500 calls a week from debtors of its various clients and received several hundred pieces of mail from PeaceHealth debtors; (5) in their conversations with debtors, CCI staff provided a variety of information about their debts and how to repay them; (6) CCI maintained a website where PeaceHealth debtors could access individualized information about their debts and submit documents to CCI; and (7) CCI sometimes received and forwarded to PeaceHealth payments it received from debtors. Certainly, CCI could have been more directly interested in the outcome of PeaceHealth’s attempts to collect on patients’ debts. Nonetheless, CCI’s assistance in facilitating those efforts went beyond acting simply as a mailing house for PeaceHealth. We are persuaded that CCI’s efforts were enough to have participated meaningfully in the attempts to collect debts like Echlin’s.
Echlin also argues that the district court’s conclusion is inconsistent with two out-of-circuit cases in which attorneys who mailed collection notices on a creditor’s behalf were deemed not to have participated meaningfully in the collection process. We disagree.

In Nielsen v. Dickerson, the Seventh Circuit considered whether certain form collection letters falsely represented that the letters came “from an attorney,” in violation of 15 U.S.C. § 1692e(3). 307 F.3d at 634–35. That question turned on whether the attorney who composed and mailed the letters in an “assembly-line fashion” was, “as a legal professional,” actually “involved in [the] debt collection process in any meaningful sense.” Id. at 635, 637 (emphasis added). The Seventh Circuit thus structured its analysis around the special requirements imposed on attorneys who purport to be participating in the collection process:

[A] debt collection letter that is issued on an attorney’s letterhead . . . conveys the notion that the attorney has “directly controlled or supervised the process through which the letter was sent”—i.e., that he has assessed the validity of the debt, is prepared to take legal action to collect on that debt, and has . . . decided that a letter should be sent to the debtor conveying that message . . . .

“If a debt collector . . . wants to take advantage of the special connotation of the word ‘attorney’ in the minds of delinquent consumer debtors[,] . . . the debt collector should at least ensure that an attorney has become professionally involved in the debtor’s file. Any other result would sanction the wholesale licensing of an attorney’s name for commercial purposes, in derogation of professional standards . . . .”

Id. at 635 (quoting Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996)).

The court recounted the “ministerial” nature of the attorney’s services in that case, id. at 635–38, and concluded that “although an unsophisticated consumer would have construed [the] letter to reflect an attorney’s professional judgment that her debt was delinquent and ripe for legal action, in fact [he] had made no such assessment.” Id. at 638 (citation omitted). Thus, “the attorney, qua attorney,” had not contributed to the collection process “in any meaningful sense,” and the letters could not fairly be said to have come from him in such capacity. Id. at 639 (emphasis added).

The court in Nielsen only briefly addressed the attorney’s potential liability as a flat-rater under § 1692j, stating that, because he did not meaningfully participate in the collection process in his professional capacity, he might “seem to be a natural candidate for flat-rating liability pursuant to section 1692j.” Id. But the court ultimately did not decide whether the attorney violated § 1692j, because any such liability would have been redundant of his liability under § 1692e(3).

In Vincent v. Money Store, the Second Circuit considered whether a creditor that hired a law firm to mail debt-collection notices could be held liable for violations of § 1692e as its own “debt collector” under the FDCPA’s false-name exception, because the law firm was not meaningfully involved in collection efforts. 736 F.3d at 91. Although Vincent did not address § 1692e(3)’s prohibition against false representations of communications “from an attorney,” the Second Circuit recounted Nielsen in detail and explicitly followed its analysis. See id. at 102–04. Ultimately, much as in Nielsen, the Vincent court concluded that “a jury could find” that collection letters mailed by the law firm “falsely implied that [the] firm was attempting to collect [the creditor’s] debts and would institute legal action against debtors,” when in fact the firm “acted as a mere conduit for a collection process [the creditor] controlled.” Id. at 104 (internal quotation marks omitted). The court purportedly did not address whether attorneys should be held to a higher standard for “meaningful participation,” id. at 104 n.17, but its conclusion drew heavily on Nielsen’s attorney-specific analysis and it reflected similar concerns regarding the unique sort of participation that is implied by letters that indicate the creditor has retained an attorney to collect its debts. See generally id. at 102–04; see also id. at 114–16 (Livingston, J., concurring in part and dissenting in part) (“As the majority notes, what is potentially deceptive about the letters . . . is their implication that Moss Codilis attorneys had been retained as attorneys to collect the plaintiffs’ debts when in reality [they had not] . . . . [C]ollecting or attempting to collect a debt in a legal capacity is not the same as collecting or attempting to collect a debt generally.” (internal quotation marks omitted)).

Moreover, CCI appears to have participated to a greater degree in collection efforts than the law firm in Vincent did. There, the plaintiffs had presented evidence that the law firm drafted the letters “jointly” with the creditor, directed debtors to send nearly “all communication about this matter” to the creditor itself, and after mailing the demand letters “per-

6. As noted above, the Second Circuit treats the § 1692a(6) false-name exception as essentially the inverse of § 1692j, and it has held that when a creditor uses the services of a flat-rater, the creditor itself can be held liable for violations of § 1692e as the de facto “collector” of its own debts. See supra n.5.
formed virtually no role in the actual debt collection process” besides verifying the existence of a debt or the identity of the creditor to those debtors who did call the firm instead of the creditor. See id. at 93–95 & n.3, 104 (internal quotation marks and alterations omitted). As explained above, CCI was far more directly involved in the process of attempting to collect debts for PeaceHealth.

D

In sum, Echlin has not pointed to any case in which a company has been held liable for flat-rating where its services include (among other things): screening referred debtors for barriers to collection, independently composing and mailing collection letters, inviting and responding to customer questions on a variety of details about the collection process, and maintaining a website that allows customers to access individualized information about their debts and to submit electronic files to the company. We agree with the district court that these activities are enough to show that CCI meaningfully participated in the attempts to collect Echlin’s debts.

III

Echlin also contends that the district court erred in striking her claim that CCI violated the FDCPA’s prohibition against “threat[ening] to take any action that cannot legally be taken or that is not intended to be taken.” 15 U.S.C. § 1692e(5). She argues both that her original complaint gave CCI adequate notice of its need to defend against such a claim, and that, even if it didn’t, she should have been given leave to amend the complaint to add an express § 1692e(5) claim.

A

“Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Pickern v. Pier 1 Imports (U.S.), Inc., 457 F.3d 963, 968 (9th Cir. 2006) (internal quotation marks omitted). As the district court recognized, Echlin’s complaint focused narrowly on her flat-rating allegations. The complaint alleged that CCI “was not acting as a debt collector . . . [but instead] was acting as a flat-rater.” It elaborated in detail, alleging that PeaceHealth instructed CCI to send the letters to create the false impression that Echlin’s debt had been “sent to collections” and that PeaceHealth “employed Defendant CCI’s letterhead and identity as a collection agency in an attempt to deceive Plaintiff” about CCI’s role in the process. The complaint cited § 1692j three times and alleged specifically that the letters “created a false or misleading belief that Defendant CCI was meaningfully involved in the collection of a debt prior to the debt actually being sent to collections in violation of 15 U.S.C. §§ 1692e and 1692j.”

By contrast, the complaint never cited § 1692e(5), nor did it mention the FDCPA’s prohibition against threatening to take an action that is not intended or legally authorized. The complaint’s only references to § 1692e at all were made in direct connection with Echlin’s § 1692j flat-rating allegations; indeed, as explained above, Echlin has throughout argued general violations of § 1692e that mirror her § 1692j allegations. See supra n.5. Although the complaint alleged that PeaceHealth was acting as a “debt collector” under the FDCPA—a necessary requirement for any claim under § 1692e, including of course a claim under § 1692e(5)—it did not allege that CCI was. In fact, the complaint expressly disavowed such a claim, alleging that CCI “was not acting as a debt collector when it sent the Letters.” This makes sense, as the complaint’s sole theory of liability was that CCI was merely a flat-rater, not a true debt collector. But it is manifestly contrary to Echlin’s suggestion that her complaint claimed that CCI’s conduct also violated § 1692e(5).

The closest the complaint comes to suggesting anything resembling Echlin’s § 1692e(5) argument is in its alleging that CCI “was not authorized to take legal action regarding the alleged debts.” Critically, however, the complaint does not allege that CCI ever threatened to take legal action despite its lack of authority to do so. In other words, the complaint does not allege the minimum facts needed to support a § 1692e(5) claim against CCI, even if one were intended. This, again, is not surprising, because Echlin’s allegation that CCI lacked authority to take legal action has consistently been cited to support her contention that CCI was merely a flat-rater.

In sum, the district court did not err in concluding that Echlin’s complaint and its focus on flat-rating failed to give CCI fair notice of her later-argued § 1692e(5) claim. Echlin’s attempt to add such a claim at the summary judgment stage is impermissible. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008); Wasco Prods., Inc. v. Southwall Techs., Inc., 435 F.3d 989, 992 (9th Cir. 2006).

B

Echlin further argues that, even if her original complaint did not raise a claim under § 1692e(5), she should have been granted leave to amend her complaint to add one. Although Echlin never filed a formal motion for leave to amend, the district court concluded that amendment would be futile, because, at that point, any such claim would have been barred by the FDCPA’s one-year statute of limitations. See 15 U.S.C. § 1692k(d). Echlin concedes that the statute of limitations would generally bar a new § 1692e(5) claim, but she contends that the amended claim should “relate back” to the date of her original complaint. Echlin failed to make such an argument to the district court, but her argument fails in any event.

Under Federal Rule of Civil Procedure 15(c), an amendment to a complaint may “relate[] back” to the date of the original complaint where it “asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. P. 15(c)(1)(B). The claims must “share a common core of operative facts such that the plaintiff will rely on the same

7. Echlin appears to raise this claim against only CCI and not PeaceHealth.
evidence to prove each claim.” Williams v. Boeing Co., 517 F.3d 1120, 1133 (9th Cir. 2008) (internal quotation marks omitted); see also id. at 1133 n.9 (relation back standard “is meant to ensure that the original pleading provided adequate notice of the claims raised in the amended pleading”). Thus, an amendment will not relate back where the amended complaint “had to include additional facts to support the [new] claim.” Id. at 1133.

Although Echlin’s § 1692e(5) claim arises from the same general transaction as her flat-rating claims, it would not rely on all the same facts and evidence. As discussed above, Echlin’s complaint failed to allege at least two facts critical to support a § 1692e(5) claim: (1) that CCI is a debt collector under the Act and (2) that CCI threatened to take any action against her that it had no authority or intention to take. As we have noted, the first point is in fact directly contradictory to the allegations of Echlin’s complaint, and thus would naturally turn on questions not presented by those original allegations. And the second point would likewise turn on different evidence than Echlin’s flat-rating claims, as it focuses on the specific representations made in the letters rather than the nature of CCI’s role in the collection process. To find in Echlin’s favor, the trier of fact would be called to interpret what, if anything, CCI’s letters threaten to do and whether CCI planned to follow through on those threats—questions that simply are not presented by Echlin’s flat-rating claims. CCI might well have called different witnesses or pursued a different litigation strategy to defend against such issues. Indeed, CCI contends that it waived certain defenses arguably available to it specifically because it understood Echlin only to be raising flat-rating claims in this lawsuit.

In short, the district court did not err in concluding that CCI would have been “substantially prejudiced by undertaking an entirely new course of defense based on these [§ 1692e(5)] allegations” so far into litigation. Any amendment to add Echlin’s materially different § 1692e(5) claim would not relate back to the date of Echlin’s original complaint, and would therefore be time-barred.

IV

Finally, Echlin argues that CCI also violated § 1692e(10), because its letters deceptively included contact information for both CCI and PeaceHealth and “fail[ed] to clarify whether she should communicate with and pay CCI or PeaceHealth.” Echlin failed to raise this argument at any point prior to this appeal. Such a claim is nowhere to be found in Echlin’s complaint, and she did not even bother to argue it when opposing the motions for summary judgment. The issue is therefore waived. See BankAmerica Pension Plan v. McMath, 206 F.3d 821, 825 (9th Cir. 2000).

V

The judgment of the district court is AFFIRMED.

8. For example, at the summary judgment stage, Echlin sought to illustrate CCI’s supposedly empty threats to take further action specifically by reference to representations made in the second and “final” letter CCI sent her on April 19, 2013, after she failed to respond to CCI’s first collection letter—yet that second letter is not mentioned at all in Echlin’s complaint.
The district court granted Sheriff Arpaio’s first request. On October 4, 2017, the district court dismissed with prejudice the action for criminal contempt. No timely notice of appeal from the dismissal order was filed. We denied a late-filed request for the appointment of counsel to “cross-appeal the District Court’s Order dismissing the charges.”

The district court denied Sheriff Arpaio’s second request. On October 19, 2017, the district court denied vacatur and refused to grant “relief beyond dismissal with prejudice.” That same day, Sheriff Arpaio filed a timely notice of appeal. In response to a request for the appointment of counsel to “defend the District Court’s Order denying Arpaio’s request for vacatur,” we ordered the United States to “file a statement indicating whether it intends to enter an appearance and file an answering brief in this appeal.”

The United States responded that it “does not intend to defend the district court’s order from October 19, 2017 . . . ; instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted.”

The United States took “no position on whether the Court should appoint counsel to make any additional arguments.”

II. DISCUSSION

Because the United States has abandoned any defense of the district court’s decision with respect to vacatur, the merits panel of our court that will decide this appeal will not receive the benefit of full briefing and argument unless we appoint a special prosecutor to defend the decision of the district court. For the reasons that follow, we will appoint a special prosecutor.

First, we conclude that we have the authority to appoint counsel under Federal Rule of Criminal Procedure 42, which prescribes procedures for dealing with criminal contempt. Rule 42(a)(2) provides:

Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

In Rule 42(a)(2)’s most common application, the district court appoints a special prosecutor to investigate and try a criminal contempt when the government declines to perform that function. See, e.g., Hollingsworth v. Perry, 570 U.S. 693, 725 (2013) (Kennedy, J., dissenting) (“Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt.”).

But the operation of Rule 42(a)(2) is not confined to investigations and trials in the district court. A private attorney appointed under the rule has the authority to act as a special prosecutor not only in the district court but also in the court of appeals. See, e.g., Young v. U.S. ex rel. Vuitton et Fils S.A.,
Thus, it is well within this Court’s authority to appoint an amicus curiae to file briefs and present oral argument in support of that judgment.” Id. at 704.

CONCLUSION

We will appoint special counsel and address all other pending motions by separate order.

SO ORDERED.

TALLMAN, Circuit Judge, dissenting:

Amici ask us to appoint a private attorney under Federal Rule of Criminal Procedure (“Rule”) 42(a)(2) to defend the district court’s Order denying Defendant/Appellant Joseph Arpaio’s request for vacatur of his criminal contempt conviction. Rule 42(a)(2) is not applicable here. Arpaio effectively conceded his guilt by accepting the pardon, and there is no need for more investigation, presentation of evidence, or further proceedings to determine if the equitable relief of vacatur is appropriate. The United States has told us it is not abdicating its responsibility to represent the Government’s interest in this appeal. Nor do amici attempt to hide the true purpose of their request—to challenge the underlying pardon. But the constitutionality of the President’s pardon is not at issue in Arpaio’s current appeal; the denial of Arpaio’s motion for vacatur of his conviction is. The request is inappropriate.

My colleagues’ decision to appoint separate counsel now is therefore ill-advised and unnecessary. I respectfully dissent.

I

Following his pardon on August 25, 2017, Arpaio moved to dismiss his criminal contempt conviction with prejudice and for vacatur of the record. On October 4, 2017, an able United States district judge found that the pardon was valid, dismissed the action for criminal contempt, entered that order on the public docket, and closed the case. The order also denied amici’s motion to appoint a Rule 42 attorney, but reserved ruling on Arpaio’s additional request for vacatur. After considering further briefing on whether to vacate, the district court denied the request for vacatur on October 19, 2017, and Arpaio timely appealed.

Amici initially wanted us to appoint a special prosecutor to both defend the October 19 vacatur order and file a notice of appeal from the district court’s earlier October 4 dismissal order. We denied amici’s motion in part, however, because under Federal Rule of Appellate Procedure 4(b)(1)(B)(ii), the time for filing an appeal to challenge the constitutionality of the pardon had run. Nov. 22 Order, Dkt. 9; see United States v. Wheeler, 952 F.2d 326, 327 (9th Cir. 1991) (“[A] district court’s order refusing to vacate an underlying contempt order is nonappealable when the ground on which vacatur is sought existed at the time the contempt order was entered and the contemnor failed to appeal timely from that order.”). In short,
the basis for our November 22 Order was that amici were too late because they missed the deadline to raise a constitutional challenge to the earlier order.

We also asked the United States to state its intentions regarding Arpaio’s separate vacatur appeal. The Government responded that it had entered an appearance and “intends to represent the government’s interests in this appeal.” The Government explained that, instead of defending the district court’s October 19 order, it “intends to argue . . . that the motion to vacate should have been granted.” That ought to have been the end of the matter.

But because the United States has chosen not to defend the vacatur order, amici now assert that the Government is declining to prosecute Arpaio’s criminal contempt conviction and that we are required to appoint special counsel. Regrettably, my colleagues in the majority agree. Sound judicial discretion instead counsels that we should deny the request and not appoint a special prosecutor at this late date in the case.

II

The request to appoint a private lawyer under Rule 42(a)(2), in place of the United States, is inappropriate now because it effectively gives interested parties an avenue to belatedly appeal the pardon’s effect on successful conviction, despite the Government’s continued participation.

A

The criminal contempt case was successfully prosecuted by the United States, which did not hesitate or decline to prosecute. No useful purpose would be served by appointing a new prosecutor now.

Rule 42(a)(2) was developed for a very different purpose than employed here. “Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt.” Hollingsworth v. Perry, 133 S. Ct. 2652, 2673 (2013) (Kennedy, J., dissenting) (emphasis added). In recognizing the power of the judiciary to appoint special prosecutors, the Court stated in Young v. U.S. ex rel. Vuitton et Fils S.A. that “[t]he prosecutor is appointed solely to pursue the public interest in vindication of the court’s authority,” 481 U.S. 787, 804 (1987) (emphasis added). Accordingly, “[a] private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.”

1. Rule 42(a)(2) states in whole, “Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.”

2. Amici do not appear disinterested. Given that the law firm serving as the primary signor for amici represented President Trump’s former political rival, Hillary Clinton, their possible opposing interests should at least preclude them from appointment as special counsel, as they requested. Young, 481 U.S. at 811 (“[A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.”).

The need for special counsel is over. The United States secured a contempt conviction at trial and any affront to the court’s authority was vindicated. We have observed that a prosecutor, as part of the prosecutorial power to punish a putative contemnor, “can gather evidence and investigate matters more thoroughly than a court can at an evidentiary hearing alone. He or she can also serve to shorten the length of trial by culling through evidence and witnesses beforehand to determine which are relevant and credible.” F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1140 (9th Cir. 2001).

But these powers of prosecution do not—and should not—extend to tangential matters of end-of-case record-keeping or vacatur of the record of a successful conviction following a pardon. This is not why Rule 42(a)(2) exists. It exists to ensure the judiciary “has a means to vindicate its own authority without complete dependence on other Branches.” Young, 481 U.S. at 796. It also applies when the government is ineligible or otherwise declines to prosecute. See, e.g., F.T.C. v. Am. Nat. Cellular, 868 F.2d 315, 318–20 (9th Cir. 1989) (analyzing factors that contribute to a party’s ineligibility to prosecute criminal contempt charges); In re Special Proceedings, 373 F.3d 37, 43 (1st Cir. 2004) (holding that the appointment of a special prosecutor was appropriate where the government attorneys were the possible source of the leak of information underlying the criminal contempt prosecution).

Here, the district court’s authority was vindicated when Arpaio was convicted of criminal contempt. Its authority will not be usurped if that conviction is vacated in light of the pardon, or if the court of appeals ultimately affirms the district court’s refusal to annul it from the defendant’s record.

B

The Government has also never declined to prosecute this case. See Fed. R. Crim. P. 42(a)(2) (“If the government declines the request [to prosecute a contempt charge], the court must appoint another attorney to prosecute the contempt.”). It maintains that it continues to represent the public (and the Executive) interest in the vacatur proceedings. Amici, however, would have us believe that because the United States supports the vacatur, such action is tantamount to the Government declining to prosecute a criminal contempt conviction. But they cite no cases for the proposition that Rule 42 requires appointing a special prosecutor where, as here, the Government has already successfully obtained a conviction, but the President has pardoned the contemnor.

Nor does “the interest of justice” mandate that the Government be precluded from continuing to act as a prosecutor so the record of Arpaio’s conviction may be maintained. Fed. R. Crim. P. 42(a)(2). And because the pardon does not erase Arpaio’s guilt or expunge the fact of the judgment, there is no underlying affront to the court’s authority stemming from criminal contempt left to vindicate. See In re North, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (“Because a pardon does not blot out guilt or expunge a judgment of conviction, one can
conclude that a pardon does not blot out probable cause of guilt or expunge an indictment.”).

Even if some future merits panel subsequently reversed the district court’s vacatur order denying Arpaio’s request, the special prosecutor would still need the Solicitor General’s approval to file a petition for writ of certiorari to the United States Supreme Court. *United States v. Providence Journal Co.*, 485 U.S. 693, 706–07 (1988). This seems highly unlikely given the Government’s current litigating position. Arpaio was convicted, pardoned, and all that remains is a matter of record-keeping as to the fact of his conviction.

Given the Government’s continued participation in this case, our appointment now of a special prosecutor to advance a litigating position different from that pursued by the United States Department of Justice makes it appear as though we are appointing another prosecutor because we have prejudged the case and disagree with the Government’s position. In light of this appearance of judicial bias, we should respect the Government’s position and remain impartial on the matter. *See Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968) (“[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”); Code of Conduct for United States Judges, 175 F.R.D. 363, 364–66 (1998).

More worrisome still is that *amici* seemingly want a special prosecutor appointed just to take another stab at attacking the pardon on constitutional grounds after they failed to timely appeal. *See Amici Curiae’s Reply to Statement of the United States, Dkt. 13, at 1 (“[T]he need for a Rule 42 attorney is particularly acute in this case given the unprecedented nature of the Pardon and the novel and important constitutional issues it raises.”)); *Brief for Amici Curiae, Dkt. 5, at 1 (“[P]roposed *amici* have a profound interest in ensuring that the constitutionality of President Trump’s extraordinary pardon of Arpaio is reviewed by this Court.”)); *Motion for Leave for Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar to Participate as Amici Curiae, Dkt. 18, at 3–23 (proposed *amici* spend three pages addressing vacatur, and nineteen subsequent pages addressing the validity of the pardon).

The Supreme Court has already ruled that the President has the power to pardon criminal contempt convictions. *Ex parte Grossman*, 267 U.S. 87, 122 (1925). And we have already ruled that *amici* missed the deadline for arguing the merits of such an appeal. It’s time *amici* let go of that issue.

III

It is an unwise use of our authority to appoint a private attorney at this late stage to (1) “prosecute” the appeal of a case the Government already won, (2) in the face of the Government’s continued willingness to participate, and (3) to countenance a surreptitious use of the vacatur appeal to pursue an untimely attack on the President’s constitutional authority to pardon. I fear the majority’s decision will be viewed as judicial imprimatur of the special prosecutor to make inappropriate, unrelated, and undoubtedly political attacks on Presidential authority. We should not be wading into that thicket.

Accordingly, I respectfully dissent.
California Courts of Appeal

Cite as 18 C.D.O.S. 3494

BERNADETTE TANGUILIG, Plaintiff and Appellant,
v. NEIMAN MARCUS GROUP, INC., Defendant and Respondent.

No. A141383
In The Court of Appeal of the State of California
First Appellate District
Division Four
(San Francisco City & County Super. Ct. No. CGC-07-466079)
Filed April 16, 2018

COUNSEL
Jackson Lewis, David S. Bradshaw, Patrick C. Mullin; Jones Day and Matthew J. Silveira for Defendant and Respondent.

OPINION

I. INTRODUCTION
Appellant Bernadette Tanguilig brought suit against her former employer, Neiman Marcus Group, Inc. (NMG), alleging a combination of individual and class claims for wrongful termination in violation of public policy and multiple violations of the California Labor Code. Early in the trial court proceedings, NMG successfully demurred to Tanguilig’s wrongful termination and related claims, and several years later, moved to dismiss the remaining claims pursuant to California’s five-year dismissal statute, Code of Civil Procedure section 583.310.¹ The trial court granted the motion and dismissed the suit. On appeal, Tanguilig urges us to overturn the five-year dismissal order, arguing primarily that the trial court erred in failing to toll the five-year clock under section 583.340, subdivision (c), for the period during which an order compelling co-plaintiff Juan Carlos Pinela to arbitration was in effect. Tanguilig also appeals an order sustaining NMG’s demurrer and an award of prevailing-party costs to NMG.

Finding no merit to any of the assigned errors, we affirm.

II. BACKGROUND
Tanguilig was employed by NMG, a Texas-headquartered luxury fashion retailer, at its San Francisco location from 2002 to 2007. At the core of this case is an arbitration agreement (the NMG Agreement or the NMG Arbitration Agreement) which NMG introduced in July 2007. NMG notified its employees that acceptance of the NMG Agreement was a mandatory condition of employment which would be implied for all employees who continued to work at any NMG location beyond July 15, 2007. Tanguilig took the view the NMG Agreement violated California public policy, objected to it, and unsuccessfully tried to negotiate with NMG over its terms. When this attempt at negotiation failed, Tanguilig chose not to return to work after July 15 to avoid being bound by the NMG Agreement, and as a result, NMG treated her failure to show up for work as a voluntary resignation.

Tanguilig sued, originally bringing this action in August 2007. She filed her First Amended Complaint (FAC) on December 19, 2007, alleging 10 causes of action against NMG: (1) wrongful termination in violation of public policy; (2) wrongful retaliation for refusing to consent to the NMG Agreement; (3) wrongfully requiring employees to agree to allegedly illegal terms in violation of Labor Code section 432.5; (4) failure to provide 10-minute rest periods in violation of Labor Code section 226.7; (5) failure to provide 30-minute meal periods in violation of Labor Code section 512; (6) failure to pay overtime wages in violation of Labor Code sections 510 and 1198; (7) failure to pay minimum wage in violation of Labor Code section 1182.11; and (8) failure to pay wages owed at the time of discharge in violation of Labor Code sections 201 and 202. Tanguilig also alleged (9) she was entitled to civil penalties pursuant to Labor Code section 2699 et seq., the Private Attorney General Act of 2004 (PAGA); and (10) NMG injured her and the general public by putting itself in an unfairly advantageous position in violation of the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq. Counts 1 through 8 were individual claims, while count 9 was a representative PAGA claim, and count 10 was something Tanguilig refers to as a “representative” claim under the UCL.

What followed was a long, complex series of procedural events over the next six years, eventually culminating in the dismissal of Tanguilig’s claims in February 2014 pursuant to section 583.310. For the sake of clarity, we divide this procedural history into four major periods.

A. Tanguilig’s Initial Suit
From August 2007 until March 2011, Tanguilig proceeded as the sole plaintiff in the action,² which was single-assigned to the Honorable Richard A. Kramer.


3. Although Tanguilig brought suit under PAGA and her Second Amended Complaint (SAC) (filed in October 2008) added class action allegations, she did not file a motion for class certification during this period.

1. All further statutory references will be to the Code of Civil Procedure unless otherwise specified.
In March 2008, NMG demurred to counts 1, 2, 3, 9, and 10 of the FAC, and moved to strike additional portions of that complaint. In June of that year, Judge Kramer granted the relief sought by NMG, sustaining the demurrer as to counts 1, 2, 3, 9, and 10 without leave to amend, and striking substantial portions of the FAC, effectively eliminating claims 4, 5, 6, and 7 subject to amendment. From June to September 2008, Tanguilig sought writ review from this court. We ultimately denied her petition.

Tanguilig filed her SAC in October 2008, adding class action allegations. The SAC revived some of the claims from the FAC, alleging seven causes of action, including a PAGA claim and several other claims she sought to pursue on behalf of a putative class: (1) violation of Labor Code sections 226.7 and 512; (2) violation of Labor Code section 226; (3) violation of Labor Code sections 510 and 1198 and IWC Wage Order 4; (4) violation of Labor Code section 1194 and IWC Wage Order 4; (5) violation of Labor Code sections 201 and 202; (6) violation of Labor Code section 2699 et seq. (PAGA); and (7) violation of Business and Professions Code section 17200 et seq.

To support her class allegations, Tanguilig sought employee records and other information through various discovery requests directed to NMG over the next two years. She says this proved difficult, as NMG was recalcitrant in responding to her discovery, although she eventually received enough information to move for class certification on June 22, 2011. Judge Kramer deferred decision on class certification, however, in part because of Tanguilig’s decision to further amend her complaint.

B. Tanguilig Adds Pinela as a Co-Plaintiff

In March 2011, Tanguilig added as a co-plaintiff Juan Carlos Pinela, an employee at NMG’s Newport Beach store from November 2007 to October 2009, who, unlike Tanguilig, had signed the NMG Agreement. Tanguilig and Pinela together filed a Third Amended Complaint (TAC), which reiterated the claims in the SAC, except it removed all references to the IWC Wage Order and added an additional claim. Thus, the final list of claims asserted by Tanguilig and Pinela encompassed seven claims they sought to pursue on behalf of a putative class, as well as the PAGA claim.

The addition of Pinela created what would become a last- ing roadblock in the case, the effects of which would be felt for years to come. Pinela was a signatory party to the NMG Agreement, and as a result, after he joined as a plaintiff, NMG filed a motion to compel him to arbitrate his claims. Refraining from hearing Tanguilig’s and Pinela’s class certification motion before resolving the motion to compel arbitration, Judge Kramer issued a ruling (the Arbitration Order) on the motion to compel in November 2011, finding the NMG Agreement enforceable. Judge Kramer thus held Pinela was bound by the terms of the NMG Agreement and could only pursue his non-PAGA claims in arbitration.

While ordering that Pinela could not go forward with his seven non-PAGA claims in superior court, Judge Kramer expressly permitted Tanguilig to proceed with her claims on behalf of the putative class except for any class members who were bound by the NMG Agreement. This caveat limited Tanguilig’s class representation to current or former NMG employees who had not signed the NMG Agreement. Consistent with that limitation, Judge Kramer also stayed the portion of the PAGA claim asserted by Tanguilig and Pinela pertaining to anyone subject to the NMG Agreement. We denied writ review of the Arbitration Order in January 2012.

C. The Reconsideration Period

Following our denial of writ relief, Tanguilig and Pinela asked Judge Kramer to reconsider the Arbitration Order. At the same time, Pinela took initial steps toward compliance with it by filing a request for arbitration with the American Arbitration Association. Before an arbitration panel was appointed, however, on November 8, 2012, Judge Kramer, proceeding on his own motion, vacated the Arbitration Order and issued a new order denying NMG’s motion to compel arbitration. NMG appealed, and we subsequently affirmed Judge Kramer’s order on reconsideration. (See Pinela v. Neiman Marcus Group, Inc. (2015) 238 Cal.App.4th 227.)

Immediately after Judge Kramer vacated the Arbitration Order, Tanguilig renewed her efforts to bring the case to trial, requesting a trial date for at least her PAGA claim because there was no dispute that it was still within the trial court’s jurisdiction. In a case management report filed on November 9, 2012, Tanguilig advised the court that the action was nearing the five-year deadline from the filing of the action (measured from the filing of the FAC, which first asserted the Labor Code and UCL claims that remained in the TAC), but took the position that under section 583.340, subdivision (c)—which provides for tolling when it is impossible, impracticable or futile to bring an action to trial—the running of the five-year dismissal statute was suspended while the Arbitration Order was in effect, and thus the actual deadline was still at least a year away. Rather than set the PAGA claim for trial immediately, Judge Kramer asked for further briefing on the request to set a trial date, and set a hearing on the matter for February 2013.

D. Reassignment to Judge Karnow

In January 2013, the case was transferred from Judge Kramer to the Honorable Curtis E.A. Karnow. Before deciding the motion to set a trial date, Judge Karnow elected first to resolve a motion for summary adjudication filed by NMG. After denying summary adjudication in September 2013, Judge Karnow issued an order in December 2013 setting Tanguilig’s PAGA claim for trial commencing April 1, 2014.

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4. This additional claim, failure to pay earned wages in violation of the Labor Code, became claim 5 in the TAC, changing claims 5, 6, and 7 in the SAC to claims 6, 7, and 8 in the TAC respectively.
In December 2013, a few months prior to the scheduled trial date on the PAGA claim, NMG moved to dismiss all of Tanguilig’s remaining claims for failing to bring them to trial within five years pursuant to section 583.310. Tanguilig opposed the motion, arguing in part that the period of time when the Arbitration Order was in effect should be excluded from the five-year period under section 583.340, subdivision (c). Following two hearings in January and February 2014, Judge Karnow dismissed all of Tanguilig’s claims—both the class claims and the PAGA claim—for her failure to bring them to trial within five years. Tanguilig appealed that ruling in March 2014.5 Her March 2014 notice of appeal also assigned as error Judge Kramer’s June 2008 order sustaining NMG’s demurrer as to some of the claims in the FAC.

Immediately following the five-year dismissal, NMG, as the prevailing party, filed a costs memorandum, to which Tanguilig responded with a motion to tax costs. In April 2014, Judge Karnow awarded costs to NMG, but taxed the award for court reporter fees from November 2011 to February 2014. Tanguilig appealed the costs order in June 2014.

III. DISCUSSION

Tanguilig contends the five-year period for bringing this action to trial under section 583.310 was tolled by a total of 842 days. In support of her tolling argument, Tanguilig claims three discrete periods should be excluded from the five-year period under section 583.340, subdivision (c): (1) the 351 days during which Judge Kramer’s Arbitration Order was in effect (i.e., from November 2011 to November 2012); (2) the 99-day period beginning in June 2008 when she sought writ review from this court following the dismissal of her FAC; and (3) the 392-day period from November 2012 to December 2013 following her request to set her PAGA trial. Adding these three periods together, Tanguilig claims a total cumulative extension of the statutory deadline for bringing her case to trial until sometime in April 2015. The dismissal of her TAC before that date, she contends, was error.

On this, the central issue presented by Tanguilig’s appeal, we reject her interpretation of section 583.340, subdivision (c), and affirm Judge Karnow’s dismissal order under section 583.310. In arriving at this disposition, we need not go beyond the first of Tanguilig’s claimed tolling periods. Because she is not entitled to tolling for the 351 days Judge Kramer’s Arbitration Order was in effect, the five-year deadline under section 583.310 for commencing trial expired in December 2012 when trial had not commenced as of that point. We conclude that Tanguilig waived her tolling contentions based on the other two periods by failing to raise them properly in the trial court.

5. Judge Karnow only dismissed Tanguilig’s claims, not Pinela’s. Because Pinela’s claims were stayed while the Arbitration Order was on appeal, the five-year period to bring his claims to trial had not expired. (NMG did not move to dismiss Pinela’s claims.)

Our ultimate conclusion on the five-year statute issue—that Judge Karnow did not abuse his discretion in dismissing Tanguilig’s claims under section 583.310—dictates the result on the next assigned error, focusing on Judge Kramer’s dismissal of certain of her claims early in the history of the case. By this appeal, Tanguilig seeks review of an order sustaining NMG’s demurrer in 2008 and dismissing her claims 1, 2, 3, 9 and 10 as originally pleaded. That ruling is moot because these claims would have been subject to dismissal under section 583.310 eventually, even had Judge Kramer overruled NMG’s demurrer and kept them in the case. Thus, the challenged rulings did not prejudice Tanguilig, and absent a showing of prejudice, there is no basis for reversal.

Finally, we decline to disturb the trial court’s award of costs to NMG. Tanguilig’s primary attack on the cost award assumes she is entitled to reversal on the five-year issue, which she is not. She also claims some allocation of costs should have been made to account for the victory Pinela ultimately achieved on appeal, but we see no basis to disturb the trial court’s adverse burden of proof determination against her on the “prevailing party” determination underlying the cost award. By the time Tanguilig’s case was dismissed in February 2014, Pinela had staved off arbitration, Judge Kramer having vacated his order compelling him to arbitrate. That issue was then on appeal, but nothing prevented Tanguilig from arguing for allocation on the ground NMG had only prevailed in part. She failed to do so.

We now turn to a fuller explanation of our reasoning, taking each of these issues in turn.

A. The Dismissal Under Section 583.310

1. Applicable Legal Principles and Standard of Review

Section 583.310 provides that “an action shall be brought to trial within five years after the action is commenced against the defendant.” “ ‘A ‘trial’ within the meaning of section 583 is the determination of an issue of law or fact which brings the action to the stage where final disposition can be made.” [Citation.] A case is brought to trial if it has been assigned to a department for trial, it is called for trial, the attorneys have answered that they are ready for trial, and proceedings begin, even if the proceeding is a motion for judgment on the pleadings.” (Bruns v. E-Commerce Exchange, Inc. (2011) 51 Cal.4th 717, 723 (Bruns).) Absent a qualifying stipulation to “extend the time within which an action must be brought to trial” under section 583.330, or tolling of the allowed five-year period, dismissal of an action that has not reached trial at the end of five years is mandatory under section 583.360. Under the press of this statutory requirement, anyone pursuing an “action” in the California courts has an affirmative obligation to do what is necessary to move the action forward to trial in timely fashion.

Normally, “[c]ommencement of an action for purposes of section 583.310 . . . is firmly established as the date of filing of the initial complaint.” (Bramley v. FDCC California,
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Tamburina v. Combined Ins. Inc. (2007) 156 Cal.App.4th 312, 318 (Brunsley), citing Kowalski v. Cohen (1967) 252 Cal.App.2d 977, 980.) But where an amended complaint alleges new causes of action which do not “(1) rest on the same general state of facts, (2) involve the same injury, and (3) refer to the same instrumentalities, as the original one” (Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 409, italics omitted), then the relation back doctrine dictates the commencement of the action for purposes of section 583.310 must be the filing date of the amended complaint. (See generally Brunsley, supra, 156 Cal.App.4th 312; see also Barrington v. A. H. Robins Co. (1985) 39 Cal.3d 146.) While Tanguilig filed her initial complaint in August 2007, her FAC alleged seven additional claims, including the PAGA claim at issue here, that the trial court assumed, in deference to her, did not relate back to the initial complaint. Thus, the court gave her the benefit of the doubt that the commencement of the five-year period here began in December 19, 2007, when she filed her FAC. Under this frame of analysis, which is not challenged on this appeal, the statutory five-year period expired on December 19, 2012.

Section 583.340 provides that, “[i]n computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] . . . [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.” Section 583.340 is construed liberally, consistent with the policy favoring trial on the merits. (Dolving v. Farmers Ins. Exchange (2012) 208 Cal.App.4th 685, 693.) Because the purpose of the dismissal statute “is to prevent avoidable delay, . . . [section 583.340, subdivision (c)] makes allowance for circumstances beyond the plaintiff’s control, in which moving the case to trial is impracticable for all practical purposes.” (De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal.App.4th 365, 371 (De Santiago).) To avoid dismissal under the section 583.340, subdivision (c) exception, a plaintiff must prove (1) a circumstance establishing impossibility, impracticability, or futility, (2) a causal connection between the circumstance and the failure to move the case to trial within the five-year period, and (3) that she was reasonably diligent in prosecuting her case at all stages in the proceedings. (Tamburina v. Combined Ins. Co. of America (2007) 147 Cal.App.4th 323, 326, 328; De Santiago, supra, 155 Cal.App.4th at pp. 372, 375–377; see Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal.App.3d 464, 471, 473.)

Courts evaluate impossibility, impracticability, or futility “‘in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.’ . . . A plaintiff’s reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility. . . . Determining whether the [section 583.340, subdivision (c)] exception applies requires a fact-sensitive inquiry and depends ‘on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff’s exercise of reasonable diligence in overcoming those obstacles.’ . . . ‘[Impracticability and futility] involve a determination of “excessive and unreasonable difficulty or expense,” in light of all the circumstances of the particular case.’” (Bruns, supra, 51 Cal.4th at pp. 730–731, italics and citations omitted.) “[S]o long as the court may conclude that there was a period of impossibility, impracticability or futility, over which the plaintiff had no control . . . , the court is required to toll that period even if there is ample time after said period of impracticability within which to go to trial.” (Chin v. Meier (1991) 235 Cal.App.3d 1473, 1478; see Hattersley v. American Nucleonics Corp. (1992) 3 Cal.App.4th 397, 402.)

Appellate review of a trial court’s determination of whether section 583.310 was tolled for impossibility, impracticability, or futility is limited. This is because trial courts are best equipped to evaluate the complicated factual matters that could support such a finding. (Bruns, supra, 51 Cal.4th at p. 731.) We therefore review a trial court’s tolling decision for abuse of discretion, giving it the usual deference accorded by that standard, and reversing only if no reasonable basis exists for the trial court’s decision. (See ibid; see also De Santiago, supra, 155 Cal.App.4th at p. 371; Sanchez v. City of Los Angeles (2003) 109 Cal.App.4th 1262, 1271.) In the absence of an abuse of discretion, we will affirm even if we would have ruled differently. (Ibid.) Of course, our review may be more searching in some circumstances. If, for example, we are called to determine whether the trial court properly interpreted section 583.310, section 583.340, subdivision (c), or some other question of law, those are matters on which we may substitute our judgment as an appellate court. In such a case, we review the trial court’s interpretation de novo. (Bruns, supra, 51 Cal.4th at p. 724; City of Los Angeles v. Superior Court (2015) 234 Cal.App.4th 275, 281; Harustak v. Wilkins (2000) 84 Cal.App.4th 208, 212.)

2. It Was Not Impossible, Impracticable or Futile to Commence Trial in the Action During the 351-Day Period the Arbitration Order Was In Effect.

Judge Karnow was within his discretion to rule that a trial of Tanguilig’s claims was not impossible, impracticable or futile during the 351-day period the Arbitration Order was in effect. In so ruling, he considered and rejected three specific circumstances that Tanguilig claimed justified tolling during this period: (1) NMG’s alleged delay in producing evidence in response to class discovery requests; (2) the alleged delay of Tanguilig’s class certification motion due to NMG’s motion to compel arbitration of Pinela’s claims; and (3) the order sending Pinela’s claims to arbitration, which allegedly blocked that portion of the case from being set for trial. With respect to the first two of these circumstances, Judge Karnow found that “time spent on those sorts of rou-
nonte activities is not excluded from the calculation of the five
year period.” With respect to the third circumstance, he
determined Tanguilig made no factual showing that she could
not have brought her claims to trial while Judge Kramer’s
order compelling Pinela’s claims to arbitration was in effect.
Indeed, he noted that Tanguilig eventually did file a motion
to set her PAGA claim for trial—without Pinela’s claims.
Because “[t]he question of impossibility, impracticability,
or futility is best resolved by the trial court, which “is in the
most advantageous position to evaluate these diverse factual
matters in the first instance” ’ ” (Gaines v. Fidelity National
Title Ins. Co. (2016) 62 Cal.4th 1081, 1100 (Gaines)), we
decline to second-guess these findings.

Apparently recognizing that our review of Judge Kar
nów’s findings on the issue of impossibility, impracticability
or futility is highly deferential, Tanguilig’s primary tolling
argument on appeal is not factual, but legal. She seeks de
novo review on the ground that Judge Karnow erred legally
by misinterpreting the scope of Judge Kramer’s Arbitration
Order. “So long as the . . . Arbitration Order—and its stay of
any PAGA claim on behalf of . . . [e]mployees [who signed
the NMG Agreement]—remained in place,” Tanguilig ar

gues, “it would have been impossible for [her] to bring to trial
a representative PAGA claim covering all of the employees
who were ‘employed by NMG in California from December
19, 2004 to the present.’ [Citation.] [?] Similarly, it would
have been impossible for Tanguilig to try, or to seek certifi
cation of, claims brought on behalf of the entire putative
class until after Judge Kramer vacated the Arbitration Order.”
In essence, she reads the statutory term “action” in section
583.310 to mean every one of her claims, in the full breadth
she pleaded them. And since some aspects of those claims—
specifically, the allegations involving employees, like Pinela,
who were signatory to the NMG Arbitration Agreement—
were subject to a stay pending arbitration, it was impossible
to try the entire action.

The argument is creative, but ultimately misguided. In
support of her reading of section 583.310, Tanguilig relies
App.3d 1294, 1298 (Nassif), where a panel of the Fourth
District Court of Appeal, Division Two, defined an action
as “the proceeding or suit and not . . . the cause of action.”
That case concerned a plaintiff who, following the dismissal
of his suit for failing to bring it to trial within three years,
tried to evade the dismissal by filing a different suit against
the same defendant alleging the same cause of action. (Id.
at pp. 1296–1297.) The defendant, in response, moved to dis
miss the second suit pursuant to section 583.310, arguing that
because the two suits alleged the same cause of action, they
should be combined to determine when section 583.310’s
five-year period expired. (Ibid.) Although reluctant to do so
in light of what it considered to be the plaintiff’s bad faith,
the Court of Appeal still found for the plaintiff, holding the
word “action” in section 583.310 refers to a suit and not a
“cause of action.” (Id. at p. 1298.) We read the Nassif/holding
as pertaining to a situation where different causes of action in
different suits are combined to determine the statute’s expira
tion date. That is not this case.

Judge Karnow, too, saw Nassif as distinguishable, observ
ing that he could find “no good authority . . . that the statute
at issue, §583.310 and its tolling provisions, apply to entire
‘actions’ and not any component claims.” He found better
guidance in Khoury v. Comprehensive Health Agency, Inc.
(1983) 140 Cal.App.3d 714 (Khoury), which involved a
suit against the insurance companies Blue Shield and Com
prehensive Health. (Id. at p. 716.) Both defendants moved
to compel arbitration, but only Blue Shield’s motion was
granted. (Ibid.) While the plaintiff was arbitrating his claim
against Blue Shield, the five-year period elapsed for the ac
tion against Comprehensive Health, which moved to dismiss
the suit pursuant to former section 583, the predecessor to
section 583.310. (Ibid.) The plaintiff argued his action against
Comprehensive Health had been tolled because it was im
possible, impracticable, or futile to bring the case against
Comprehensive Health to trial while he was arbitrating his
claim with Blue Shield. (Id. at p. 717.) The Court of Appeal
held, however, that nothing prevented a trial against Com
prehensive Health, even though the plaintiff might have to
use the same evidence and witnesses in both actions. (Id.
at pp. 717–718.) Thus, even though it was clearly impossible,
impracticable, or futile for the plaintiff to bring her entire
case to trial against both defendants together, the Court of
Appeal still affirmed the dismissal for exceeding the five-
year statutory period. We agree with Judge Karnow that that
holding applies here.

Of more significance here than either Nassif or Khoury
is the California Supreme Court’s decision in Brunz, supra,
51 Cal.4th at page 717. Tanguilig claims Brunz supports
her “entire action” argument, but we think its holding cuts
against her. There, the Supreme Court analyzed whether a
partial stay tolled the running of the five-year period under
a different subdivision of section 583.340, subdivision (b),
ultimately holding only stays of the entire action toll the
statute under that exception. (Brunz, supra, at pp. 724–730.)
Because partial stays “are governed, if at all, by subdivision
(c)” (Brunz, supra, at p. 730), the court remanded the mat
ter back to the Court of Appeal to determine whether the
trial court abused its discretion in refusing to toll the statute
under section 583.340, subdivision (c), observing that “[t]he
question of impossibility, impracticability, or futility is
best resolved by the trial court . . . .” (Id. at p. 731, citing
Bruns Constr. Co. v. Wagner (1970) 2 Cal.3d 545, 555
(Brunz).) In this case, Judge Karnow saw the Arbitration
Order as a partial stay. With the exception of PAGA claims,
he read the Arbitration Order as having stayed further litiga
tion of Pinela’s claims, but leaving Tanguilig free to pursue
her own claims. (See Dismissal Order at pp. 2–3 (”Expressly,
Judge Kramer’s order did not stay any of Tanguilig’s PAGA
claims; nor the claims of anyone not subject to an arbitration
agreement with the defendant. The only PAGA claims stayed
by Judge Kramer’s order were those of ‘all persons subject to the arbitration agreement’ but not, as I have said, PAGA claims of either Pinella or Tanguilig.”)

Under *Bruns*, Judge Karnow’s task was to “determine what [was] impossible, impracticable, or futile ‘in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves.’” (Citations.) The critical factor in applying [section 583.340] to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.” (*Bruns*, supra, 51 Cal.4th at p. 730.) As the *Bruns* court explained, “[d]etermining whether the subdivision (c) exception applies requires a fact-sensitive inquiry and depends ‘on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff’s exercise of reasonable diligence in overcoming those obstacles.’” (*Id.* at p. 731; see *Brunzell*, supra, 2 Cal.3d at p. 555 [the court must “examine the relationships between the causes of action, the expense and difficulty likely to be engendered by separate trials, the diligence and good faith efforts of the plaintiff, the prejudice or hardship to the instant defendants, or other relevant matters”].) And on this question, the plaintiff bears the burden of proof. (*Bruns*, supra, 51 Cal.4th at p. 731.)

Applying *Bruns*, was it impossible, impracticable, or futile to bring Tanguilig’s case to trial in timely fashion after Judge Kramer sent Pinela and all other signatories to the NMG Arbitration Agreement to arbitration? Judge Karnow clearly believed it was not, and we see no abuse of discretion in that determination. It was irrelevant whether, as Tanguilig contends, employees who signed the NMG Arbitration Agreement were beyond the jurisdiction of the trial court, or whether her claims were effectively “split” into claims on behalf of signatories and claims on behalf of non-signatories (much ink has been spilled on this question in the briefs before the trial court, and here again on appeal). At most, the impact of the Arbitration Order on signatory employees might have been relevant, ultimately, to the scope of the relief that could be ordered, or perhaps to who might be bound by the judgment; but nothing in it, no matter how interpreted, prevented Tanguilig from taking her claims to trial, which is what Judge Karnow focused upon. In the end, Judge Karnow concluded that Tanguilig failed to bear her burden of proof. Unlike *Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1481–1482, 1485 (*Kaye*), another case cited and relied upon by Tanguilig, where the elimination of punitive damages claims by summary adjudication on the eve of trial would have limited the scope of admissible evidence, thus justifying deferral of trial until a pending writ proceeding in the Court of Appeal was resolved, she made no effort to show that the evidentiary scope of a trial would have been affected in some fashion by Judge Kramer’s Arbitration Order. Noting the intensely practical issues involved in evaluating claims of impossibility, impracticability and futility, Judge Karnow pointed out, quite simply, “Tanguilig makes no showing on any of those issues.”

Given the fact-sensitive nature of the section 583.340, subdivision (c), inquiry, normally that would be the end of the matter on appeal, but Tanguilig’s claim of legal error and request for de novo review complicates things somewhat. As noted above, she contends Judge Karnow botched his reading of the Arbitration Order; according to her, he mistakenly thought that “none of . . . [her] . . . PAGA claims were stayed,” when, as a matter of law—at least in her reading of the Arbitration Order—she was precluded from proceeding on those portions of her claims (both her PAGA claim and her class claims) concerning employees who signed the NMG Arbitration Agreement. Whether she is right or wrong about Judge Karnow’s purported failure to recognize that portions of her claims were stayed—some of the language in the Arbitration Order is indeed ambiguous on the point—the conclusion she urges upon us, that she is entitled to tolling for impossibility, impracticability or futility while the Arbitration Order was in effect, is still unsustainable. Undergirding the line of argument Tanguilig advances about the correct interpretation of the Arbitration Order is the same flawed premise on which her “entire action” argument rests: She assumes she had a right to proceed to trial with every claim she pleaded, in its full breadth, and she seems to believe that any obstacle to trying all of those claims, as expansively as she alleged them, qualifies as a condition of “impossibility” within the meaning of section 583.340, subdivision (c). That is not so as a general matter—which is why the applicability of this exception is situational—and it is not so on this record either.

“(C)ase law” under section 583.310 has “long held that ‘[f]or the tolling provision of section 583.340, subdivision [(c)] to apply, there must be ‘a period of impossibility, impracticability or futility, over which plaintiff had no control,’ because the statute is designed to prevent avoidable delay.” (*Gaines*, supra, 62 Cal.4th at p. 1102.) The fact is Tanguilig chose, apparently as tactical matter, to include within the scope of her PAGA claim and within the putative class she sought to represent, employees who had signed an arbitration agreement. Surely she knew—at the least she should have known—the inevitable consequence: Pleading claims

6. Tanguilig cites as recent authority decided post-briefing in this case our Supreme Court’s acknowledgment in *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744 (*Mountain Air*), that an “‘action is not limited to the complaint but refers to the entire judicial proceeding at least through judgment.’” (*Id.* at p. 753, quoting *Nassif*, supra, 214 Cal.App.3d at p. 1298.) That case does not aid Tanguilig here. *Mountain Air* addresses whether the contractual term “any legal action or any other proceeding” includes the assertion of an affirmative defense to a claim, and holds that it does not. (*Mountain Air*, at pp. 753–755.) The court distinguishes *Nassif*, as we do, holding that the general proposition for which it was cited there did not apply. Among the cases cited by the Supreme Court in the course of its discussion pointing out that *Nassif* did not apply was *Bruns*. (*Id.* at p. 755.)

7. Then, as now, Civil Code section 3295, subdivision (d), provides that “[e]vidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud.”
that encompassed signatories to an arbitration agreement was bound to draw a motion to compel arbitration and potentially entangle the rest of the case in delays arising out of that motion, which is exactly what happened. Bearing in mind the employment litigation setting before us, we view any procedural complexities and delays occasioned by the Arbitration Order as not only predictable, but more importantly, invited. If entry of the Arbitration Order staying Pinela’s claims had some collateral delaying effect on the pursuit of Tanguilig’s claims, we view it as avoidable delay and thus conclude it cannot justify tolling.

Finally, Tanguilig insists that while the Arbitration Order was in effect it was, at a minimum, impossible to proceed with the motion for class certification jointly filed by Tanguilig and Pinela or to try all class claims jointly asserted by them. We see this as just a variation of the argument that any obstacle to trying every claim she pleaded, in the full breadth she pleaded it, justified tolling across the board. We reject it for the reasons outlined above, but we also think the argument, framed in this way to highlight what Tanguilig characterizes as “joint” litigation by allied parties, conflicts with Brumley, supra, 156 Cal.App.4th 312. In that case, William Brumley filed an action for asbestos-related injuries but died during the litigation. His widow and children could have filed a separate wrongful death action at that point, but instead filed an amended complaint joining their claims with the surviving claim of the estate. The trial court treated the joined claims as relating back to the original personal injury complaint, and dismissed the entire action under the five-year statute. (Id. at p. 316.) Our First District Court of Appeal, Division One, colleagues reversed, holding that the widow and children should not be penalized for having opted to join their claims (which did not relate back to the original complaint) with Brumley’s. (Id. at pp. 320–321, 325–326.) Like the widow and children in Brumley, Pinela could have filed his own separate action. Indeed, that is what another NMG employee—Sheila Monjazeb—did when she brought a related wage and hour class action against NMG alleging the same or similar claims in Monjazeb v. Neiman Marcus Group, Inc., San Francisco Superior Court Case No. CGC-10-502877, Court of Appeal, First Appellate District, No. A137491. The fact Pinela and Tanguilig saw strategic benefits to joining their claims together in a single lawsuit did not fuse their claims into an inseparable, unitary whole. To the extent Tanguilig now seeks an advantage because she and Pinela opted to join their individual actions together—giving her, in effect, an exemption from the five-year rule while Pinela was in arbitration—Brumley is to the contrary.8

8. Tanguilig suggests Brumley should be read as having created a special exception to what she claims is the general rule that the term “action” in section 583.310 means the entire action, an exception that encompasses only suits involving causes of action that do not relate back to the original complaint. We do not read the case so narrowly. The Brumley court noted that Barrington, supra, 39 Cal.3d at pages 155–156 was “willing to treat causes of action separately under the statute, even though they were part of the same action,” and “expressly rejected a similar argument made by the defendants . . . , concluding that there was no evidence the Legislature intended to preclude application of the relation-back doctrine in these circumstances.” (Brumley, supra, 156 Cal.App.4th at p. 322.) By the same token, it does not follow that when the Legislature created section 583.340’s discretionary exceptions to section 583.310 it intended to preclude the discretionary aspect of those exceptions whenever a suit could not go forward in its entirety. If that were true, the section 583.340 exceptions would be superfluous.

3. Additional Tolling Periods: The 99-Day Period and the 392-Day Period

Turning to Tanguilig’s two additional claimed tolling periods—the 99-day period beginning in June 2008 when she sought writ review from this court following the dismissal of her FAC,9 and the 392-day period from November 2012 to December 2013 following her request to set her PAGA claim for trial—we conclude that her claim to these additional tolling periods has been waived.

It is elementary that an appellant may not raise a new theory on appeal when the theory rests on facts that were either controverted or not fully developed in the trial court. (People ex rel. Totten v. Colonia Chiques (2007) 156 Cal.App.4th 31, 40.) This rule of waiver specifically applies to fact-based tolling arguments. (See Barker v. Garza (2013) 218 Cal.App.4th 1449, 1462–1463.) Tanguilig acknowledges in her reply brief that she failed to argue tolling in the trial court for the 99-day period. Her claim to tolling for that period has therefore been waived. While conceding failure to raise the 99-day period as a ground for tolling, Tanguilig sharply disputes NMG’s contention that she failed to argue the 392-day period in the trial court and even goes so far as to suggest it is a misrepresentation of the record for NMG to claim she was silent on the issue.

Upon close review of the record, we think NMG has the better of the argument concerning whether Tanguilig preserved a claim to tolling during the 392-day period. She did ask for the setting of a trial date within days of Judge Kramer’s vacatur of his Arbitration Order in November of 2012, but when faced with NMG’s motion to dismiss on five-year grounds, the only tolling argument she asserted in her brief opposing the motion was a contention the five-year statute was tolled during the 351-day period the Arbitration Order had been in effect. Nowhere in that opposition did she argue that the 392 days she spent waiting for a ruling on her request for trial setting should be excluded from the five-year calculation. If she had squarely presented the 392-day tolling issue at that point, as she does now on appeal, Judge Karnaow could have made the inherently fact-bound assessment of impossibility, impracticability, or futility for this specific period. He did not mention the issue in his February 4, 2014 order of

9. We denied Tanguilig’s writ petition on September 8, 2008. She calculates the 99-day tolling period as extending from June 30, 2008 (the date Judge Kramer entered his order as to the demurrer and motion to strike) until 30 days after this court’s denial of writ review (since Judge Kramer had set that as the deadline to file a Second Amended Complaint).
dismissal. And as we read the record, he was silent on it for a reason: He was not asked to address it.

According to Tanguilig, Judge Karnow never considered the 392-day tolling issue because, in his order of dismissal, he relied solely on what she claims was his erroneous rejection of her claim to the 351 days. (Appellant’s Reply Brief at p. 13 [“In light of his erroneous determination that entry of the Arbitration Order did not toll the statute, Judge Karnow never considered whether the 351 days tolled while the Order was in effect could have run out after Tanguilig had asked for a trial date or while a fully-briefed, trial-setting motion was pending.”].) She implies he chose not to address it, deciding to resolve the five-year issue on narrower grounds. But that is not what happened. What happened is that, after Judge Karnow dismissed the case on five-year grounds in his order of February 4, 2014, she sought clarification of the order, focusing not on the 392-day period, but rather on her contention that Judge Karnow had misread Judge Kramer’s Arbitration Order. That misinterpretation, so she claimed, led Judge Karnow to err in concluding it was not impossible, impracticable or futile for her to bring her claims to trial during the 351-day period.

Indulging Tanguilig’s request for clarification on this specific point, Judge Karnow allowed the parties to present supplemental briefs. These briefs were filed simultaneously on February 21, 2014. In the introduction to Tanguilig’s supplemental brief, she explains why she sought clarification and what relief she requested, as follows: “In its February 4, 2014 Order on Defendant’s motion to dismiss Tanguilig’s claims pursuant to C.C.P. § 583.310, this Court did not address the effect of [the Arbitration Order] . . . precluding Tanguilig from proceeding with any of her claims to the extent that they were brought on behalf of [employees who signed the NMG Arbitration Agreement]. It should do so now and should hold that—even if Judge Kramer’s decision to divide Tanguilig’s claims from Pinela’s claims does not establish a basis for tolling the five-year period of C.C.P. § 583.310—rulings subdividing and partially staying Tanguilig’s own claims made it impossible, impracticable or futile for her to bring those claims to trial until Judge Kramer’s Arbitration Order was vacated. In the alternative, the Court should limit any order of dismissal to apply only to claims brought . . . on behalf of [employees who did not sign the NMG Arbitration Agreement].”

As announced in the introduction to Tanguilig’s supplemental brief, virtually all of the discussion in her 20 pages of supplemental argument addressed the meaning of Judge Kramer’s Arbitration Order, its effect on claims she brought “on behalf of” employee signatories to the NMG Arbitration Agreement, and how that issue impacted Judge Karnow’s analysis of her claimed 351-day tolling period. Then, on page 17 of the brief, in a short passage at the end of a section of an argument discussing tolling generally, without any sub-section heading specifically flagging the 392-day period as an issue, the following contention appears as a last argument, framed in the alternative: “Whether the December 20, 201[2]10 deadline for bringing the action to trial was extended by 351 days, a greater or lesser number of days, or not at all, the deadline could not have expired while Tanguilig’s request for a trial date was pending. . . . [¶] . . . While that motion remained pending—until December 10, 2013—it necessarily was impracticable, and impossible, for Tanguilig to proceed to trial.”

Unquestionably, this alternative argument tucked at the end of Tanguilig’s supplemental brief puts forth in specific terms the 392-day tolling contention she now urges on appeal. But given the procedural posture in which the argument first surfaced, the question arises whether she did enough to preserve it for appeal. We think not.

It seems clear that Judge Karnow treated the supplemental briefing following his February 4 order as nothing more than an opportunity for the parties to provide argument on Tanguilig’s claim that he had misinterpreted Judge Kramer’s Arbitration Order, an issue that was only relevant because, as the tolling issue was framed in his order of dismissal—which tracked how the parties framed it in the briefs on the motion to dismiss—his tolling analysis turned on the 351-day period during which the Arbitration Order was in effect. After considering the supplemental briefs, and holding an additional hearing on February 26, 2014, Judge Karnow issued an “Order Clarifying Order of February 4, 2014” addressing only the interpretive issue Tanguilig had raised, and nothing more. In a footnote, Judge Karnow noted the broader scope of argument offered by Tanguilig in her supplemental brief, but said that he was “treating [Tanguilig’s] submission . . . as a request for clarification” of his February 4 order. To the extent her supplemental brief presented new arguments for tolling (i.e., the claimed 392-day tolling period), we view it as an untimely motion for reconsideration. Among other problems with raising a new issue in that fashion, it deprived NMG of a fair opportunity to respond, particularly since Judge Karnow was proceeding upon simultaneously-filed briefs. Accordingly, we conclude that Judge Karnow did not address the claimed 392-day period because Tanguilig failed to raise the issue properly. It is too late to ask us to address the issue now on appeal.

10. The actual text says “December 20, 2013,” which appears to be a typographical error. Two paragraphs earlier, when setting up the premise of this tolling section of the argument, Tanguilig states: “The five-year period of C.C.P. § 583.310 is . . . calculated from the date the FAC was filed—December 19, 2007. [Citation.] Five years from that date is December 20, 2012.”

11. We note that, when, in November 2012, Tanguilig requested a trial date, the five-year statute was about to expire in a matter of weeks, on December 19, 2012. Thus, the situation called for some urgency. But rather than raise an alarm and communicate to Judge Karnow the need to address the issue of trial-setting immediately, or to order a stay—which is what happened in Kayne, supra, 204 Cal.App.3d 1476, for example (see id. at p. 1482 [plaintiffs immediately moved for stay upon filing writ proceeding they later claimed tolled the five-year statute and then, when no stay issued, immediately moved to specially set the case for trial])—Tanguilig took the legal position that the five-year statute had been tolled during the 351 days the Arbitration Order was pending. . . .
B. The Demurrer

In addition to her attack on the five-year dismissal, Tanguilig appeals from Judge Kramer’s 2008 order sustaining NMG’s demurrer to several of the counts in the FAC, requesting she be allowed to pursue those claims along with those asserted in the TAC. As she correctly points out, a ruling on a demurrer is subject to review following an appealable order of dismissal. (Kong v. City of Hawaiian Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1032, fn. 1.) Because Judge Karnow’s dismissal of Tanguilig’s entire suit in 2014 amounts to an appealable order of dismissal, the 2008 ruling on the demurrer is now appealable.

Appealable though Judge Kramer’s 2008 ruling on demurrer may be, we need not address the merits of this aspect of Tanguilig’s appeal. To obtain reversal, she must show an asserted error by the trial court “was sufficiently prejudicial to justify a reversal.” (Kyne v. Eustice (1963) 215 Cal.App.2d 627, 635 (Kyne).) Prejudicial, in this case, means that the error “substantially affect[ed] the rights and obligations of the appellant as to result in a miscarriage of justice.” (Ibid.) If a suit would have failed or been dismissed even in the absence of an asserted error, the error is plainly not prejudicial to the appellant and thus reversal is not warranted. (Johnson Rancho County Water Dist. v. County of Yuba (1963) 223 Cal. App.2d 681, 682, 684–685; Kyne, supra, 215 Cal.App.2d. at pp. 635–636; Zeppi v. Beach (1964) 229 Cal.App.2d 152, 161.) Here, because Tanguilig failed to bring her suit to trial within the statutory five-year period, the claims at issue on demurrer would have been subject to dismissal and properly dismissed under section 583.310 even if we were to agree that the demurrer was erroneously sustained in some respect. Accordingly, this issue is moot.

C. The Costs Award

As a final matter, Tanguilig asks that we reverse the trial court’s award of costs to NMG if we reverse either the dismissal order or the order sustaining the demurrer, as NMG will then no longer be considered a prevailing party. (Acosta v. SJ Corp. (2005) 129 Cal.App.4th 1370, 1376 [the question of entitlement to costs depends on whether a party qualifies as a prevailing party] (Acosta).) Because we do not order such a reversal, the costs award is appropriate. Nothing has changed. Thus, we see no reason to disturb the trial court’s prevailing party determination.

In one last attempt at appellate relief on the costs issue, Tanguilig contends because she and Pinela jointly filed the TAC, and because Pinela can still proceed with his putative class claims against NMG, NMG cannot be considered the prevailing party as to him. When Tanguilig raised this argument below, Judge Karnow found that Tanguilig failed to meet her burden to show which costs were allocable to Pinela. (See Acosta, supra, 129 Cal.App.4th at pp. 1376, 1380 [plaintiffs have the burden to show costs are allocable to a specific plaintiff when a defendant prevails against all plaintiffs]; Howard v. American National Fire Ins. Co. (2010) 187 Cal.App.4th 498, 540 [trial court need not allocate costs among defendants if unsuccessful defendant fails to do so].) Because she offers no reason why Judge Karnow’s adverse burden of proof determination on cost allocation was incorrect, we see no reason to disturb his cost award on this ground.

IV. DISPOSITION

Affirmed.

Streeter, Acting P.J.

We concur: Reardon, J., Schulman, J.*

* Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
ANDREW CASTILLO et al., Plaintiffs and Appellants,

v.

GLENAIR, INC., Defendant and Respondent.

No. B278239
In The Court of Appeal of the State of California
Second Appellate District
Division Two
(Los Angeles County Super. Ct. No. BC505602)
APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.
Filed April 16, 2018

COUNSEL

Matern Law Group, Matthew J. Matern, Tagore Subramaniam and Andrew Sokolowski, for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, Jesse A. Cripps, Sarah Zenewicz and Elizabeth A. Dooley, for Defendant and Respondent.

OPINION

In a joint employer arrangement, can a class of workers bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work? We answer no.

This wage and hour putative class action involves the relationship between a temporary staffing company (GCA Services Group, Inc. (GCA)), its employees (appellants Andrew and David Castillo), and its client company (respondent Glenair, Inc.). The Castillos were employed and paid by GCA to perform work on site at Glenair. Glenair was authorized to and did record, review, and report the Castillos’ time records to GCA so that the Castillos could be paid. The Castillos characterize GCA and Glenair as joint employers. As explained below, the undisputed facts of this case demonstrate both that Glenair and GCA are in privity with one another for purposes of the Castillos’ wage and hour claims, and that Glenair is an agent of GCA with respect to GCA’s payment of wages to its employees who performed services at Glenair.

These findings of privity and agency are significant. While this case was pending, a separate class action brought against, among others, GCA resulted in a final, court-approved settlement agreement. (Gomez v. GCA Production Services, Inc. (Super. Ct. San Bernardino County, 2014, No. CIVRS1205657 (Gomez).) The Gomez settlement agreement contains a broad release barring settlement class members from asserting wage and hour claims such as those alleged here against GCA and its agents. The Castillos are members of the Gomez settlement class and did not opt out of that settlement.

The Castillos present claims against Glenair involve the same wage and hour claims, for the same work done, covering the same time period as the claims asserted in Gomez. Thus, because Glenair is in privity with GCA (a defendant in Gomez) and is an agent of GCA, the Gomez settlement bars the Castillos’ claims against Glenair as a matter of law.

The Castillos appeal the trial court’s grant of summary judgment. As discussed below, however, we conclude summary judgment was proper.

FACTUAL AND PROCEDURAL BACKGROUND

Unless otherwise indicated, the following facts are undisputed. Beginning on an unknown date and until sometime in 2011, the Castillos performed work for Glenair. The Castillos were placed at Glenair by GCA, a temporary staffing service that supplies workers to third party companies. Although the Castillos performed work for Glenair under Glenair’s general oversight and direction, GCA hired, fired and paid the Castillos. GCA made payments to the Castillos based on time records provided by Glenair. Glenair collected and reviewed for accuracy the Castillos’ time records for services they provided at Glenair. When Glenair no longer needed the Castillos’ services, Glenair so advised GCA and the Castillos stopped performing work for Glenair.

1. The Gomez Settled Class Action

   a. The Complaint

In July 2012, Judith Gomez and Ernesto Brisenov filed the Gomez action, a putative class action against GCA, GCA Production Services, Inc., and GCA Services Group of Texas, L.P. The Gomez complaint alleged claims for unpaid minimum wages, unpaid overtime wages, meal and rest break violations, Labor Code sections 203 and 226 violations, and unfair business practices under Business and Professions Code section 17200 et seq. Glenair was not a named defendant in Gomez.

   b. The Gomez Settlement Agreement and Release

In May 2014, the Gomez parties settled the class action and executed a stipulation of class action settlement (settlement agreement). The settlement agreement defined the settlement class as “[a]ll current and former hourly-paid, non-exempt persons employed in California by Defendants GCA Production Services, Inc., GCA Services Group, Inc., and GCA Services Group of Texas, L.P., at hourly wages during the Covered Period.” The covered period was defined as July 19, 2008 through May 5, 2014. It is undisputed the Castillos were Gomez settlement class members and did not opt out of the settlement agreement.
The settlement agreement included a broad release which provided: “in exchange for the Maximum Settlement Amount, Plaintiffs and the Settlement Class Members release the Released Parties from the Released Claims for the Covered Period. With respect to the Released Claims, the Plaintiffs and Settlement Class Members stipulate and agree that, upon the Effective Date, the Plaintiffs and Settlement Class Members shall be deemed to have, and by operation of the final judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which Section provides: [¶] A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor. [¶] Plaintiffs and the Settlement Class Members may hereafter discover facts in addition to or different from those they now know or believe to be true with respect to the subject matter of the Released Claims, but upon the Effective Date, shall be deemed to have, and by operation of the final judgment shall have, fully, finally, and forever settled and released any and all of the Released Claims, whether known or unknown, suspected or unsuspected, contingent or noncontingent, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts.”

The settlement agreement defined “Released Claims” as “all disputes, claims, and/or causes of action pleaded in the operative complaint for the Covered Period, namely: (a) failure to pay minimum wages, including Living Wage and Prevailing Wage rates; (b) failure to pay overtime wages; (c) failure to provide meal periods; (d) failure to provide rest periods; (e) breach of contract for failure to pay wages regarding (a) thru (d) above; (f) failure to timely pay all wages earned each pay period; (g) failure to timely pay final wages; (h) failure to reimburse business expenses; (i) failure to provide accurate itemized wage statements; and (j) all damages, penalties, interest and other amounts recoverable under said causes of action under California law, to the extent permissible, including but not limited to the California Labor Code, the applicable Wage Order, California Unfair Competition Law, and Private Attorneys General Act of 2004. The res judicata claim preclusion effect of any judgment pursuant to this settlement shall be the same as the claim preclusion effect of the above Release.”

And the settlement agreement defined “Released Parties” as “Defendants GCA Services Group, Inc., GCA Productions Services, Inc. and GCA Services Group of Texas, LP, together with their parent company(ies), subsidiaries, if any, together with their respective current and former officers, directors, agents, attorneys, successors, and/or assigns, and Defendants’ present and current employees who are not Class Members.”

On December 1, 2014, the trial court in Gomez entered its order of final approval of the class action settlement. In its order, the court ruled “that class members who did not timely exclude themselves from the Settlement have released their claims against Defendant [GCA] and other released parties as set forth in the Settlement Agreement.”

### 2. The Instant Action

#### a. The Complaints

On April 11, 2013, less than a year after the Gomez complaint was filed and more than a year and a half before entry of the Gomez settlement agreement, counsel for the Castillos filed the instant putative class action against Glenair. Plaintiffs’ counsel in this action was not class counsel in Gomez. At the time the original complaint was filed, however, the named plaintiff was in bankruptcy proceedings and, therefore, did not have standing to bring the lawsuit. The trial court granted leave to amend the complaint and, on February 14, 2014, counsel filed a first amended complaint naming Roxana Rojas as the new plaintiff. However, the court later granted defendants’ demurrer to the first amended complaint because Rojas lacked standing as to all but one of the alleged causes of action (because her claims were time-barred). The court again granted leave to amend and, on September 12, 2014, counsel filed a second amended complaint adding the Castillos as plaintiffs.' The parties then stipulated, and the court granted leave, to allow plaintiffs’ counsel to file a third amended complaint.

The third amended complaint was filed on January 7, 2015 (one month after final approval of the Gomez settlement agreement) and is the operable complaint (complaint). According to the complaint, the plaintiffs filed the lawsuit on behalf of themselves and all current and former non-exempt employees of Glenair (and Doe defendants 1 through 100) from April 11, 2009 through the conclusion of the lawsuit. GCA was not named as a defendant in the complaint.

Paragraph nine of the complaint (paragraph nine) alleged the defendants were the “joint employers” of the plaintiffs and class members. Paragraph nine also alleged Glenair and the Doe defendants “were the alter egos, divisions, affiliates, integrated enterprises, joint employers, subsidiaries, parents, principals, related entities, co-conspirators, authorized agents, partners, joint venturers, and/or guarantors, actual or ostensible, of each other.”

The complaint alleged the following seven causes of action, all of which were the same “Released Claims” under the Gomez settlement agreement: (i) failure to provide required meal periods, (ii) failure to provide required rest periods, (iii) failure to pay overtime wages, (iv) failure to pay mini-

1. Rojas remained a named plaintiff, joining only in one cause of action against the defendants. Rojas is not a party to this appeal.
maximum wage, (v) failure to pay all wages due to discharged and quitting employees, (vi) failure to indemnify employees for necessary expenditures incurred in discharge of duties, and (vii) unfair and unlawful business practices. According to the complaint, the defendants engaged in a “systematic course of illegal payroll practices and policies.” Among other relief, the complaint sought statutory penalties under Labor Code section 226 (section 226).

b. Glenair’s Motion for Summary Judgment

i. Initial Briefing

In April 2015, Glenair moved for summary judgment or summary adjudication. Glenair argued that, because the Castillos had settled and released their Gomez causes of action, res judicata barred the same causes of action asserted here. Glenair argued the Castillos, therefore, lacked standing to bring the class action. Glenair explained it was undisputed the claims asserted in Gomez were the same as those asserted by the Castillos here and the time period at issue here included that at issue in Gomez. According to Glenair, as “members of the Gomez class action lawsuit, which alleged the same Labor Code violations at issue in this lawsuit, for the same work, during the same time period, and which was fully and finally resolved” the Castillos could not pursue the instant class action. Glenair also argued the Castillos’ section 226 claim for penalties was barred by the applicable statute of limitations.

In its moving papers, Glenair did not squarely address the issue of agency. In connection with its motion for summary judgment, Glenair submitted supporting documents, including the Gomez settlement agreement.

The Castillos opposed summary judgment, arguing they had not released their claims against Glenair. Specifically, the Castillos argued their claims against Glenair were valid because Glenair was not a named party in Gomez. Glenair was not listed as a released party in the Gomez settlement agreement, and Glenair did not contribute to the Gomez settlement. The Castillos claimed, therefore, res judicata did not apply. Nonetheless, the Castillos urged that, even if res judicata applied, Glenair had failed to satisfy its burden on summary judgment to show each element of res judicata, including that it was either a party in Gomez or was in privity with a party in Gomez, or that the claims in each action were the same. The Castillos also asserted policy considerations weighed against application of res judicata. Finally, the Castillos argued they could amend, and should be granted leave to amend the complaint to add a valid cause of action for damages (as opposed to penalties) for violations of section 226. They stated a cause of action for actual damages under that section had a longer statute of limitations than their penalty claim and, therefore, would not be barred.

In opposing summary judgment, the Castillos did not dispute any of the material facts Glenair included in its separate statement of undisputed material facts. However, the Castillos recited additional facts, including some related to the relationship between Glenair and GCA and between Glenair and the Castillos. For example, the Castillos stated Glenair employees directed the services the Castillos performed for Glenair; Glenair collected the time of workers “placed by GCA at Glenair’s facility”; “[a] lead employed by Glenair would review the time records of workers placed by GCA at Glenair’s facility to ensure accuracy”; “leads employed by Glenair” oversaw and generally directed the tasks to be accomplished; GCA did not have a supervisor at the Glenair site; when Glenair no longer needed or wanted the services of the Castillos, a Glenair “lead” advised GCA; and “[t]here is no shared ownership between GCA and Glenair.” Glenair did not dispute these facts.

The Castillos also asserted the following facts in opposition to summary judgment, which Glenair disputed: David Castillo’s Glenair supervisor did not accurately record David’s actual work times, but instead recorded his scheduled work times; David Castillo’s Glenair supervisor did not allow David to take his full required rest or meal breaks; David Castillo’s Glenair supervisors manipulated his timesheets to show meal breaks he did not actually receive; and in order to take time off or to request overtime, David Castillo was required to seek permission from Glenair supervisors and not from anyone at GCA.

In response to the Castillos’ arguments, Glenair claimed the Castillos had admitted Glenair was an agent of GCA and, therefore, a released party under the Gomez settlement agreement. Glenair pointed to evidence the Castillos submitted with their opposition to summary judgment indicating Glenair performed tasks on behalf of GCA. And, in contrast to the Castillos, Glenair argued policy considerations weighed in favor of applying res judicata here. Finally, Glenair urged it would be improper to allow the Castillos leave to amend to allege a new cause of action for damages under section 226.

ii. First Hearing

Prior to the hearing on Glenair’s motion for summary judgment, the trial court issued a tentative ruling granting summary judgment against the Castillos. In its tentative ruling, the court stated: “Glenair performed tasks on behalf of GCA, including collecting and reviewing employees’ time records and transmitting the records to GCA for payment. . . . Glenair thus acted as GCA’s agent for the Castillos’ employment. (Civ. Code § 2295 (‘Agent’ defined. An agent is one who represents another, called the principal, in dealings with third persons.’)).”

At the hearing, counsel for the Castillos urged Glenair was not an agent of GCA and disputed Glenair’s claim that they had admitted an agency relationship. Instead, the Castillos claimed the two companies were joint employers: “we presented evidence showing that they . . . were joint employers or that even though the staffing agency [GCA] hired and fired and paid the workers that they placed workers at Glenair, Glenair controlled working conditions, set schedules and everything like that.” Counsel argued “joint employment
is not the same as agency.” The trial court understood the Castillos’ theory of the case was that Glenair and GCA were joint employers, and stated “[t]hey can’t change their position on that.”

In summarizing the Castillos’ claims against Glenair, counsel stated: “These employees didn’t get their meal periods. They didn’t get their rest periods in accord with California law. They didn’t get their final paycheck because their meal and their rest period premiums weren’t paid. Their paychecks were not properly in accord with California law, because they didn’t have the meal period premiums on them and so on and so forth. [¶] These are our claims. They’re very simple claims.”

Counsel for the Castillos also argued at the hearing that Glenair’s motion for summary judgment was procedurally improper. Counsel claimed that, because Glenair not only failed to address the agency issue until its reply brief, but also in doing so relied on evidence the Castillos submitted in opposition to the motion, Glenair had failed to carry its burden on summary judgment.

Based on the Castillos’ position that Glenair and GCA were joint employers, counsel for Glenair asserted for the first time at the hearing that paragraph nine doomed the Castillos’ case. Specifically, Glenair argued that, through paragraph nine, the Castillos necessarily had admitted Glenair and GCA were agents of one another. Counsel explained paragraph nine alleged “that in connection with that joint employment relationship, . . . those joint employers are, quote, authorized agents of each other.” Counsel for Glenair reasoned, therefore, that the “pleadings define Glenair as an authorized agent of the other joint employers. They’ve conceded that the only way Glenair is a proper defendant in this action is as a joint employer and, therefore, it must be an authorized agent by virtue of their pleadings for . . . in the context of defining who’s an agent and whether or not that agency [was] to be specifically defined.” The trial court noted Glenair’s paragraph nine argument was “clever.”

After hearing argument, the trial court ordered further briefing on the issue of agency. The trial court agreed that the Castillos (as opposed to Glenair) presented the evidence related to agency in their opposition papers. The court stated, “It is true that the material on agency came in in the opposition instead of in the moving papers. . . . And you’re right; that is the burden of the moving party asking for summary judgment to have a complete package at the motion -- the moving paper stage.” The court also noted the agency argument “was not debated in the briefs. In other words, [counsel for the Castillos] never weighed in on what is and what is not an agent because it came up in the reply. [¶] As I say, that could make me think that further briefing on this point is important because you have not had a written chance to advance case authority or legal logic to dispute the agency argument.” The court determined “there needs to be some further briefing where the plaintiffs have a chance to say, this agency argument is completely wrong and should not be accepted.” Thus, the trial court ordered supplemental briefing on the issue of agency and set the matter for further hearing.

iii. Supplemental Briefing on Issue of Agency

A few months later, the parties submitted supplemental briefs on the issue of agency. The Castillos filed their brief first and argued Glenair was not an agent of GCA because GCA did not exercise the requisite control over either Glenair or the workers GCA placed at Glenair. The Castillos also argued there was no evidence GCA authorized Glenair to represent GCA in dealings with third persons. In addition, the Castillos claimed none of the other elements of agency (such as intent) was present in the relationship between Glenair and GCA. To support their position, the Castillos relied in part on an unreported California case and a case from a federal district court in South Carolina. Finally, in a footnote, the Castillos dismissed Glenair’s argument made at the first hearing that paragraph nine constituted an admission that Glenair and GCA were agents of one another. The Castillos claimed the language of paragraph nine was merely boilerplate language that could not be relied upon for such an admission.

In its supplemental brief, filed after the Castillos filed their brief, Glenair reiterated its argument that, in paragraph nine, the Castillos admitted Glenair was an agent of GCA. Beyond the pleadings, Glenair also argued the undisputed facts demonstrated it was the agent of GCA. Glenair claimed it was undisputed that, by collecting and transmitting time records of GCA employees and dictating when they could take rest and meal breaks, work overtime, and take time off, Glenair represented GCA in the specific area of wage and hour matters. Glenair also asserted policy considerations favored a finding that the Gomez release applied here.

iv. Second Hearing and Order Granting Summary Judgment

The continued hearing on Glenair’s motion for summary judgment was held September 21, 2016. Prior to the hearing, the trial court issued a new tentative ruling. The court again indicated it was granting summary judgment against the Castillos, stating it “stands by its analysis” in its first tentative ruling. In addition, the court addressed Glenair’s paragraph nine argument, stating “Glenair noted the concession of agency in paragraph nine of the Third Amended Complaint. The court praised this argument . . . and called for further briefing. In this further briefing the plaintiffs answered this point only in a footnote, on logic this court rejects.”

At the continued hearing, counsel for the Castillos reiterated their position that Glenair’s motion for summary judgment was procedurally defective. Counsel argued the trial court should deny the motion because Glenair failed to include the issue of agency in either its notice of motion, motion, or separate statement of undisputed facts. Counsel also pointed out the court-ordered supplemental briefing did not help because Glenair filed the last brief (in which it claimed for the first time it was a limited or special agent of GCA) to
which the Castillos could not respond. As a result, the Castillos asserted their due process rights were violated. The Castillos also claimed a factual dispute existed with respect to the alleged agency relationship between Glenair and GCA. The Castillos pointed out the record did not include an agreement between Glenair and GCA, and further claimed Glenair collected time records of the GCA employees in order to protect itself against false claims by those employees. (The record does not indicate counsel for Glenair presented any argument on the issue of agency at the continued hearing.)

At the conclusion of the hearing, the trial court stated it was “going to stand by my tentative ruling.”

**c. Appeal**

On October 12, 2016, before judgment was entered, the Castillos filed a notice of appeal from the trial court’s September 21, 2016 order granting summary judgment.

**d. Judgment**

On April 12, 2017, the trial court entered judgment in favor of Glenair and against the Castillos on their complaint. Notice of entry of judgment was filed April 18, 2017.

**DISCUSSION**

**1. Status of Appeal**

Because the Castillos filed their notice of appeal before the trial court entered judgment on its order granting summary judgment, the notice of appeal was premature. Nonetheless, we have jurisdiction to consider the appeal because the trial court later filed a final judgment as to the Castillos. “The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.” (Cal. Rules of Court, rule 8.104(d)(2).)

**2. Relevant Law and Standard of Review**

**a. Summary Judgment and Standard of Review**

“ ‘The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.’ ” (Borders Online v. State Bd. of Equalization (2005) 129 Cal. App.4th 1179, 1187 (Borders Online).) Summary judgment is appropriate “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c) (section 437c).)

“ ‘There is a triable issue of material fact only if ‘the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ ” (Citation.) The party moving for summary judgment generally ‘bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.’ ” (Borders Online, supra, 129 Cal.App.4th at pp. 1187-1188.) “ ‘A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . . Once the defendant’s burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action.’ ” (Villacres v. ABM Industries, Inc. (2010) 189 Cal.App.4th 562, 575 (Villacres).)

“ ‘We review the trial court’s grant of summary judgment de novo, applying the same standards that governed the trial court. [Citation.] We consider all of the evidence the parties offered in connection with the motion, except that which the court properly excluded, and the uncontradicted inferences the evidence reasonably supports.’ ” (Borders Online, supra, 129 Cal.App.4th at p. 1188.) “ ‘We must determine whether the facts as shown by the parties give rise to a triable issue of material fact. . . . In making this determination, the moving party’s affidavits are strictly construed while those of the opposing party are liberally construed.’ . . . We accept as undisputed facts only those portions of the moving party’s evidence that are not contradicted by the opposing party’s evidence. . . . In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true.’ ” (Villacres, supra, 189 Cal.App.4th at p. 575.)

**b. Res Judicata**

The doctrine of res judicata is applicable “ ‘if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding.’ ” (Villacres, supra, 189 Cal.App.4th at p. 577.) “ ‘A courtapproved settlement in a prior suit precludes subsequent litigation on the same cause of action. Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised.’ ” (Id. at p. 569.) “ ‘[R]es judicata will not be applied “if injustice would result or if the public interest requires that relitigation not be foreclosed.” ’ ” (Id. at p. 577.)

For purposes of both res judicata (claim preclusion) and collateral estoppel (issue preclusion), the concept of “privity” has expanded with time. More than 75 years ago, our Supreme Court described the principle of privity: “ ‘Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. . . . A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance,
succession, or purchase.” (Bernhard v. Bank of America (1942) 19 Cal.2d 807, 811.) Over time, courts have embraced a somewhat broader, more practical concept of privity. “ [T]o maintain the stability of judgments, insure expeditious trials,’ prevent vexatious litigation, and ‘to serve the ends of justice,’ courts are expanding the concept of privity beyond the classical definition to relationships ‘sufficiently close to afford application of the principle of preclusion.”” (Cal Sierra Development, Inc. v. George Reed, Inc. (2017) 14 Cal. App.5th 663, 672 (Cal Sierra).) For example, more recently our Supreme Court explained the basic tenents of privity in broader terms: “As applied to questions of preclusion, privity requires the sharing of ‘an identity or community of interest,’ with ‘adequate representation’ of that interest in the first suit, and circumstances such that the nonparty ‘should reasonably have expected to be bound’ by the first suit. [Citation.] A nonparty alleged to be in privity must have an interest similar to the party’s interest that the party acted as the nonparty’s ‘virtual representative’ in the first action.” (DKN Holdings LLC v. Faerber (2015) 61 Cal.4th 813, 826 (DKN Holdings).)

Thus, for purposes of privity, “[t]he emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion.’” (Alvarez v. May Dept. Stores Co. (2006) 143 Cal.App.4th 1223, 1236-1237 (Alvarez.)) Put another way, privity, “as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person’s relationship to the subject matter of the litigation.”” (Cal Sierra, supra, 14 Cal. App.5th at p. 674.)

c. Agency

“An agent is one who represents another, called the principal, in dealings with third persons.” (Civ. Code, § 2295.) “A representative is ‘[o]ne who stands for or acts on behalf of another.’” (Black’s Law Dict. (9th ed.1979) p. 1304, col. 2.)” (Borders Online, supra, 129 Cal.App.4th at p. 1189.) “An agency relationship ‘may be implied based on conduct and circumstances.’” (Ibid.) An agent may be a general agent or a special agent. A special agent is “[a]n agent for a particular act or transaction . . . . All others are general agents.” (Civ. Code, § 2297.)

An agent . . . is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of those transactions.” (2B Cal.Jur.3d (2015) Agency, § 1, p. 149.) “The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. [Citations.]” [Citation.] “The significant test of an agency relationship is the principal’s right to control the activities of the agent. [Citations.] It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship.”” (Violette v. Shoup (1993) 16 Cal.App.4th 611, 620.)

3. Glenair is entitled to judgment as a matter of law because res judicata applies and bars the Castillos’ claims against Glenair.

We begin with the undisputed material facts. The parties do not dispute the following: (i) GCA is a staffing company that supplies employees, such as the Castillos, to the operations of third party companies, such as Glenair, (ii) the work the Castillos performed for Glenair was performed through GCA, (iii) Glenair employees generally directed and oversaw the services the Castillos performed for Glenair, (iv) there was no GCA supervisor on site at the Glenair facility during the relevant time, (v) Glenair collected the time for workers GCA placed at Glenair, (vi) to ensure accuracy, a Glenair employee reviewed the time records of workers GCA placed at Glenair, (vii) there is no shared ownership between Glenair and GCA, (viii) the Castillos were class members in Gomez, (ix) the Castillos did not opt out of the Gomez class settlement, (x) the Castillos’ complaint here asserts the same causes of action as those asserted in Gomez, (xi) the court in Gomez granted final approval of the settlement in that case, and (xii) the Gomez settlement included a broad release that released GCA and its agents from the same wage and hour claims at issue here.

In addition to the above undisputed facts, the parties also agree the Gomez settlement acts as a final judgment on the merits for purposes of res judicata.2 (Villacres, supra, 189 Cal.App.4th at p. 569.) And it cannot be disputed that the Castillos’ claims here relate to the work they performed at Glenair during the same time period at issue in Gomez.

Thus, two of the three elements of res judicata are met. The Gomez settlement was final and on the merits. And the causes of action here are the same as those at issue in Gomez. The dispute then centers on the third and final element of res judicata, namely whether the undisputed material facts demonstrate Glenair was either a party or in privity with a party in Gomez. As discussed below, we conclude based on the undisputed facts that Glenair was both in privity with GCA (a party in Gomez) with respect to the subject matter of this litigation, as well as itself a released party in Gomez.

a. Glenair is in privity with GCA with respect to the subject matter of the litigation.

Although the parties touched on the issue of privity in their briefs on appeal, we requested supplemental briefing

2. On appeal, the Castillos discuss the doctrine of issue preclusion and argue the court in Gomez did not decide the identical issues raised here. Issue preclusion is not relevant, however, because we are concerned with res judicata, or claim preclusion. “It is important to distinguish these two types of preclusion because they have different requirements.” (DKN Holdings, supra, 61 Cal.4th at p. 824.)
to address the question whether Glenair and GCA were in privity with one another. (Gov. Code, § 68081.) While the Castillos argued no privity exists between the parties, Glenair argued the opposite. We agree with Glenair.

As noted above, the concept of privity has expanded over the years and today involves a practical analysis. (Alvarez, supra, 143 Cal.App.4th at p. 1236; Cal Sierra, supra, 14 Cal.App.5th at p. 672.) In the recent Cal Sierra decision, the court relied on the principle that, rather than focusing on the relationship between the parties, privity “‘deals with a person’s relationship to the subject matter of the litigation.’” (Cal Sierra, at p. 674.) In Cal Sierra, the plaintiff mining company (Cal Sierra) had previously received an arbitration decision partly in its favor and against another mining company (Western Aggregates) whose licensee had erected an asphalt plant in a problematic location on the land Cal Sierra and Western Aggregates shared. (Id. at p. 668.) After its partially successful arbitration against Western Aggregates, Cal Sierra filed a lawsuit against the licensee and its parent company based on the same facts and raising the same or similar causes of action as those raised in the arbitration. (Ibid.) The trial court held res judicata applied and entered judgment in favor of the licensee. (Ibid.)

The court of appeal affirmed. (Cal Sierra, supra, 14 Cal. App.5th at p. 667.) The court explained that, although Western Aggregates and its licensee were separate companies with a licensor/licensee relationship, that did not preclude a finding of privity for purposes of claim preclusion. (Id. at p. 673.) Rather, because the “subject matter of the litigation . . . was the same as that at the center of the arbitration dispute: the placement of the asphalt plant and whether it infringed on Cal Sierra’s mining rights,” Western Aggregates and its licensee “had an identical interest” as to that issue and were “adversely and similarly impacted by the propriety (or impropriety) of the plant’s location.” (Id. at p. 674.) Thus, because Western Aggregates and its licensee shared the same relationship to the subject matter of the arbitration and litigation, privity existed and res judicata applied. (Ibid.)

With this in mind, it is clear Glenair and GCA are in privity for present purposes. The subject matter of this litigation is the same as the subject matter of the Gomez litigation—namely, both cases involve the same wage and hour causes of action arising from the same work performed by the same GCA employees (the Castillos) at GCA’s client company Glenair. Based on the undisputed facts, it is apparent Glenair and GCA share the same relationship to the Castillos’ claims here. Both Glenair and GCA were involved in and responsible for payment of the Castillos’ wages. Glenair was authorized by GCA and responsible for recording, reviewing and transmitting the Castillos’ time records to GCA. GCA paid the Castillos based on those time records. And, by virtue of the Gomez settlement, the Castillos were compensated for any errors made in the payment of their wages. Thus, with respect to the Castillos’ wage and hour causes of action, the interests of Glenair and GCA are so intertwined as to put Glenair and GCA in the same relationship to the litigation here. Accordingly, we conclude they are in privity for purposes of the instant litigation.

To be clear, however, our conclusion does not necessarily place Glenair and GCA in privity for all purposes. By way of example only, if the Castillos were to allege claims against Glenair based on injuries they sustained or discrimination they experienced while working at Glenair, it is by no means a foregone conclusion that GCA would be in privity with Glenair in that case. In such a case, it is not clear that Glenair and GCA would share the same relationship to the subject matter of the litigation. In contrast here, because the subject matter of the litigation directly implicates the interdependent and close relationship of Glenair and GCA with respect to payment of wages, they are in privity for present purposes.

Relying on DKN Holdings, supra, 61 Cal.4th 813, the Castillos contend that, “where parties were jointly and severally liable on an obligation, a judgment against one of such parties will not act as res judicata as to claims against the other party.” The Castillos overstate the reasoning in DKN Holdings. In DKN Holdings, our Supreme Court explained that “[j]oint and several liability alone does not create such a closely aligned interest between co-obligors.” (Id. at p. 826, italics added.) This case is distinguishable because, assuming Glenair and GCA are jointly and severally liable, our finding of privity does not rely on any such relationship. Rather, as explained above, Glenair and GCA are in privity for present purposes based both on their interdependent relationship with respect to payment of the Castillos’ wages as well as on the fact that this litigation revolves around alleged errors in the payment of the Castillos’ wages. DKN Holdings does not preclude our conclusion here.

Similarly, McCray-Key v. Sutter Health Sacramento Sierra Region (E.D. Cal. 2015) 2015 WL 6703585, on which the Castillos rely, does not change our conclusion. First, we are not bound by an unpublished district court order. Second, although superficially similar, the facts of that case are distinguishable from those presented here. For example, in McCray-Key, the first action was brought against a staffing company as a putative class action. As part of the plaintiff’s settlement of that first action, however, the class claims were dismissed and plaintiff’s individual claims were remanded to superior court. (Id. at p. *1.) There is no indication there was a final, courtapproved class action settlement defining a settlement class in McCray-Key. And, in McCray-Key, although the settlement in the first case included a restriction on future claims brought by the plaintiff, that restriction was applicable only to the staffing company and not, for example, to its agents. (Id. at p. *4.) Thus, unlike here, there was no broad release of claims in McCray-Key.

Because Glenair and GCA are in privity for purposes of the Castillos’ claims here, the third and final element of res
judicata is satisfied. Accordingly, the Castillos’ claims against Glenair are barred and summary judgment was proper.3

b. Glenair was an agent of GCA and, therefore, a released party.

In addition, we conclude the undisputed facts demonstrate Glenair was an agent for GCA with respect to GCA’s payment of its employees, such as the Castillos. We conclude a reasonable trier of fact could not find otherwise. Accordingly, Glenair was a released party under the Gomez settlement agreement. Thus, on this ground as well, the third and final element of res judicata is satisfied and summary judgment was proper.

Although the issue of agency is typically a question of fact, when “‘the evidence is susceptible of but a single inference,’” summary judgment is not precluded. (Borders Online, supra, 129 Cal.App.4th at p. 1189, italics omitted.) Here, the undisputed evidence is susceptible of only one conclusion, namely that Glenair was an agent of GCA for the purpose of collecting, reviewing, and providing GCA’s employee time records to GCA so that GCA could properly pay its employees. The evidence is undisputed that GCA authorized Glenair to collect, review, and transmit GCA employee time records to GCA. Thus, Glenair was authorized to represent, and did represent, GCA in its dealings with third parties, specifically GCA’s payment of wages to its employees placed at Glenair. (Civ. Code, § 2295; Borders Online, supra, at p. 1189; see also Garcia v. Pexco, LLC (2017) 11 Cal.App.5th 782, 788 [in concluding the plaintiff employee’s claims must be arbitrated, court considered “alleged joint employers” staffing company and its client company “agents of each other in their dealings with” the plaintiff].)

The Castillos argue there can be no finding of agency because there is no evidence that GCA possessed the requisite control over Glenair. We disagree. The undisputed evidence demonstrates GCA had the requisite control over Glenair. It need not be shown that GCA generally controlled Glenair. Rather, it must be shown that GCA had the right to control Glenair with respect to the specific agency at issue, namely Glenair’s role in collecting, reviewing, and providing time records to GCA. Indeed, “‘[i]t is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship.’” (Violette v. Shoup, supra, 16 Cal.App.4th at p. 620.)

Here, GCA authorized Glenair to perform certain timekeeping-related tasks on behalf of GCA and the only reasonable inference is that GCA required Glenair to perform those tasks. Had Glenair failed to perform those timekeeping tasks, GCA would not have been able to pay its employees.

Thus, because the undisputed facts demonstrate Glenair was an agent of GCA—specifically an agent with respect to GCA’s payment of wages to its employees—Glenair was a released party under the Gomez settlement agreement. Accordingly, the Castillos’ complaint against Glenair is barred and summary judgment was proper.

4. Remaining Issues Related to the Finding of Agency

a. The “Golden Rule” of summary judgment did not preclude the trial court from considering the Castillos’ evidence presented in opposition to Glenair’s motion.

The Castillos assert the trial court erred in considering any evidence, disputed or undisputed, that was not included in Glenair’s separate statement of undisputed material facts. As support for their position, the Castillos rely in large part on this district’s decision in United Community Church v. Garcin (1991) 231 Cal.App.3d 327. There, the court cited the so-called “Golden Rule” of summary adjudication and summary judgment, which states “if it is not set forth in the separate statement, it does not exist.” (Id. at p. 337.)

However, as other courts have held and Glenair correctly points out, the trial court is not absolutely prohibited from considering evidence that was not included in the moving party’s separate statement, but was otherwise submitted with the parties’ papers on summary judgment. In San Diego Watercrafts, Inc. v. Wells Fargo Bank (2002) 102 Cal.App.4th 308, 315–316 (San Diego Watercrafts, Inc.), the court held the trial court has discretion to consider evidence not included in the moving party’s separate statement and to grant summary judgment despite an inadequate separate statement. (Id. at p. 315.) This understanding comports with section 437c, the governing statute, which states that the failure of the moving party to comply with the separate statement requirement “may in the court’s discretion constitute a sufficient ground for denying the motion.” (§ 437c, subd. (b)(1); San Diego Watercrafts, Inc., supra, at pp. 315–316.) Moreover, section 437c also provides summary judgment “shall be granted if all the papers submitted show that there is no triable issue,” and the court “shall consider all of the evidence set forth in the papers” except that to which objections have been sustained. (§ 437c, subd. (c).) This unqualified reference to “all the papers” before the court, without limitation to documents submitted with the original motion, supports the conclusion that the trial court should consider all admissible evidence of which the opposing party has had notice and the opportunity to respond. (Weiss v. Chevron, U.S.A., Inc. (1988) 204 Cal. App.3d 1094, 1098.)

We agree with San Diego Watercrafts, Inc. and its progeny, including from this district, that “we may not mechanically conclude, as the ‘Golden Rule’ would have us do, that the court should never consider evidence not referenced in the separate statement. The statute is permissive, not mandatory. . . . Whether to consider evidence not referenced in

3. Although the trial court did not directly address the issue of privity, we may affirm its judgment if correct on any applicable legal theory. (LeBourgeois v. Fireplace Manufacturers, Inc. (1998) 68 Cal. App.4th 1049, 1057, fn. 10.)
the moving party’s separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion.” (San Diego Watercrafts, Inc., supra, 102 Cal. App.4th at pp. 315–316; Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson (2005) 131 Cal.App.4th 1466, 1478 (Zimmerman).) This is not a case where the party opposing summary judgment was blindsided by evidence not referenced in the moving party’s separate statement. Indeed, it was the Castillos who referenced and included the facts they now argue the trial court should not have considered in granting summary judgment. Presumably, the Castillos referenced those facts in an effort to demonstrate a disputed issue of material fact such that summary judgment was not proper. However, as it turned out, those facts either were not material or did not demonstrate a dispute but rather supported the finding of agency and, therefore, summary judgment. We conclude the trial court did not abuse its discretion in considering all the evidence the parties submitted in connection with their summary judgment papers.

Similarly, and despite the Castillos’ claims to the contrary, the trial court properly considered all the evidence submitted by the parties in determining whether Glenair had met its initial burden of proof on its motion for summary judgment. (Villa v. McFerren (1995) 35 Cal.App.4th 733, 750-751.)

b. The trial court afforded the Castillos ample opportunity to brief and address the issue of agency.

The Castillos also argue summary judgment must be reversed because the trial court did not give them a sufficient opportunity to address the issue of agency and, therefore, their due process rights were violated. We disagree.

As the Castillos explain, the issue of agency did not come into focus until after they filed their opposition to Glenair’s motion for summary judgment. Glenair first addressed the issue of agency in its reply brief. At the first hearing on Glenair’s motion for summary judgment, however, the trial court recognized the Castillos had not had a sufficient opportunity to address the agency issue. The court acknowledged the agency argument “was not debated in the briefs. In other words, [counsel for the Castillos] never weighed in on what is and what is not an agent because it came up in the reply. ¶ As I say, that could make me think that further briefing on this point is important because you have not had a written chance to advance case authority or legal logic to dispute the agency argument.” Thus, the trial court ordered further briefing specifically on the issue of agency and set the matter for a second hearing. Other than limiting the supplemental briefing to the issue of agency, the court did not limit the scope of the parties’ briefing on agency.

The Castillos now take issue with the fact that Glenair argued in its court-ordered supplemental brief that it was a “special agent” of GCA. Although Glenair did not use the term “special agent” when it first addressed the issue of agency in its reply brief on summary judgment, but only later used that term in its supplemental brief, we conclude this is a distinction without a difference. The trial court requested that the parties brief the issue of agency. The court did not limit the parties to addressing “general agency” only. In addition, the core elements of a special agency are the same as those for a general agency, namely the agent, whether special or general, represents the principal in dealings with third parties and the principal exercises control over the agent. We conclude the trial court’s directive to file further briefs on the issue of “agency” allowed the parties to address either or both general and special agency and the Castillos’ due process rights were not violated.

c. Glenair’s argument based on paragraph nine of the complaint is not persuasive.

As noted above, we review the trial court’s decision to grant summary judgment de novo. “This means ‘we are not bound by the trial court’s stated reasons or rationales.’” (Citation.) In other words, “[t]he trial court’s stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale.” (Citation.) Indeed, in our review, “we are not concerned with the findings actually made by the trial court in support of its ruling.” (Zimmerman, supra, 131 Cal.App.4th at p. 1485.) Below Glenair argued, and the trial court seemed to agree, that paragraph nine constituted a judicial admission that Glenair was an agent of GCA. Although Glenair presses this same argument on appeal, we are not persuaded.

As noted above, paragraph nine included boilerplate language citing a laundry list of legal relationships, some or all of which are alleged to exist between Glenair and the Doe defendants. In order to make its argument work, Glenair must convince us of two leaps of faith. First, we must agree GCA—which is not a named defendant—is a Doe defendant in this case. Second, we must agree paragraph nine necessarily admits Glenair is an agent of GCA. Assuming we make the first leap of faith and agree GCA is a defendant, we cannot make the second leap. Paragraph nine states all the defendants were, among other things, “the alter egos, . . . joint employers, . . . authorized agents, . . . and/or guarantors, actual or ostensible, of each other.” Glenair overlooks a crucial component of paragraph nine, namely the words “and/or.” Because of those two words, and assuming boilerplate language in a complaint is meaningful (a position on which the parties disagree), paragraph nine cannot be read to admit Glenair is necessarily an agent of any other defendant. At most, paragraph nine can be read to admit Glenair shares any one of the many listed legal relationships with the other defendants. Accordingly, summary judgment is not proper on the basis of Glenair’s paragraph nine argument.

d. Serrano v. Aerotek, Inc.

Following oral argument, counsel for the Castillos filed a notice of new authority advising the court that the First
District recently ordered published its opinion in Serrano v. Aerotek, Inc. (Mar. 9, 2018, No. A149187) __ Cal.App.5th __ [2018 WL 1452237] (Serrano). Although the Castillos assert Serrano bears on the issues of both agency and privity, Serrano addresses agency only.

The plaintiff in Serrano brought a putative class action against both a temporary staffing company (Aerotek, Inc.) and its client Bay Bread. (Serrano, 2018 WL 1452237, at p. *3.) Aerotek had placed the plaintiff at Bay Bread to perform services there. (Ibid.) The plaintiff alleged Aerotek and Bay Bread failed to provide required meal breaks. (Ibid.) The facts demonstrated that Aerotek trained the employees it placed at Bay Bread, like the plaintiff, on Aerotek’s employment policies, including its meal break policies. (Id. at p. *1.) Aerotek also employed an onsite manager at Bay Bread who reviewed time records of the temporary employees placed there and sent those records to Aerotek for payroll processing. (Id. at p. *2.) The onsite manager was not responsible, however, for reviewing temporary employee meal breaks. (Ibid.) The facts also revealed the plaintiff did not believe Aerotek affirmatively prevented her from taking proper meal breaks, but she believed Aerotek may have failed to ensure Bay Bread implemented appropriate meal break policies. (Id. at p. *3.)

The Court of Appeal affirmed summary judgment in Aerotek’s favor. (Serrano, 2018 WL 1452237, at p. *1.) First, the court held Aerotek satisfied its own obligation to provide meal breaks. (Id. at pp. *4–*5.) Next, the court rejected the argument that, as a joint employer with Bay Bread, Aerotek was vicariously liable for Bay Bread’s alleged meal break violations. (Id. at pp. *5–*6.) Relying on this district’s decision in Noe v. Superior Court (2015) 237 Cal.App.4th 316, the Serrano court stated, “whether an employer is liable for a coemployer’s violations depends on the scope of the employer’s own duty under the relevant statutes, not ‘principles of agency or joint and several liability.’ ” (Serrano, at p. *6.)

Although similar in some respects, we conclude Serrano is procedurally, factually and legally distinct from the instant case. Unlike here, the plaintiff in Serrano sued both the staffing company and client company together in the same lawsuit. And again in contrast to the instant case, Serrano did not involve a preexisting final judgment releasing the same claims alleged in the Serrano complaint. In addition, unlike GCA here, Aerotek did not authorize its client company to represent Aerotek with respect to its employment policies. Rather Aerotek not only provided training on its employment policies but also employed an onsite manager who was responsible for time records. Moreover, it does not appear that the parties in Serrano raised the same arguments at issue here; and likewise the parties here did not raise many of the arguments made in Serrano. Thus, Serrano does not affect our decision here.

5. Public policy favors the application of res judicata here.

Policy considerations are relevant to the res judicata analysis. “Even if [the] threshold requirements are established, res judicata will not be applied ‘if injustice would result or if the public interest requires that relitigation not be foreclosed.’ ” (Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal.App.4th 1053, 1065 (Citizens for Open Access).) Despite the Castillos’ arguments to the contrary, we conclude the public interest favors the application of res judicata here.

As Glenair points out, if the Castillos were permitted to pursue their causes of action here, they would undermine the finality of the bargained-for and court-approved Gomez settlement, waste judicial resources, and potentially obtain a double recovery on their already-settled claims. In addition, Glenair indicates that, if the Castillos were successful on their underlying claims, Glenair could seek indemnification from GCA, thus reopening the same wage and hour claims GCA settled in Gomez. Although the Castillos correctly note the Gomez settlement did not award the plaintiffs there (including the Castillos) the full value of their claims and the court here could offset any potential double recovery in this case, their position overlooks the significance of the Gomez parties’ bargained-for finality of the settlement agreement. Thus, in our view, “two fundamental policy considerations—promotion of judicial economy and protection of litigants from unnecessary litigation—are furthered by imposing res judicata as a bar to [the Castillos’] present action.” (Citizens for Open Access, supra, 60 Cal.App.4th at p. 1075.)

6. Leave to Amend

Finally, the Castillos argue the trial court erred when it refused to grant their request for leave to amend the complaint. Although the Castillos concede the applicable statute of limitations bars their requested section 226 penalties, they contend they have a valid section 226 claim for actual damages and should have been permitted to amend the complaint to add that damages claim. However, because we conclude the Castillos’ alleged causes of action are barred as a result of the Gomez settlement, we need not and do not reach this issue related to the relief the Castillos seek on their causes of action.

DISPOSITION

The judgment is affirmed. Glenair, Inc. is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, P. J.

We concur: CHAVEZ, J., HOFFSTADT, J.

4. Noe v. Superior Court addressed Labor Code section 226.8, which is not at issue in this appeal.
Cite as 18 C.D.O.S. 3513

ROBERT Riske, Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY, Respondent;
CITY OF LOS ANGELES, Real Party in
Interest.

No. B283035
In The Court of Appeal of the State of California
Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. BC557535)
ORIGINAL PROCEEDINGS in mandate, Mark V. Mooney,
Judge. Petition Granted.
Filed April 16, 2018

COUNSEL

Law Offices of Gregory W. Smith, Gregory W. Smith,
Diana Wang Wells; Benedon & Serlin, Douglas G. Benedon,
Gerald M. Serlin and Judith E. Posner for Petitioner.
No appearance for Respondent.
Michael N. Feuer, City Attorney, Blithe S. Bock,
Managing Assistant City Attorney, and Paul L. Winnemore,
Deputy City Attorney, for Real Party in Interest.

OPINION

Robert Riske, a retired Los Angeles police officer, sued the City of Los Angeles alleging the Los Angeles Police Department had retaliated against him for protected whistleblower activity by failing to assign or promote him to several positions and selecting instead less qualified candidates. Riske filed a discovery motion pursuant to Evidence Code sections 1043 and 1045 to obtain certain summary personnel records relied on by the City in making assignment and promotion decisions. After the superior court erroneously ruled those records were not subject to discovery because the officers selected for the positions Riske sought were innocent third parties who had not witnessed or caused Riske’s injury, we issued a writ of mandate directing the superior court to vacate its order denying Riske’s discovery motion and to enter a new order directing the City to produce those records for an in camera inspection in accordance with section 1045. (See Riske v. Superior Court (2016) 6 Cal.App.5th 647, 664-665 (Riske I).)

The superior court conducted the in camera hearing and ordered the requested personnel records to be produced in accordance with the parties’ protective order. However, pursuant to section 1045, subdivision (b)(1), which excludes from disclosure “[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation” in which discovery or disclosure is sought, the court ordered redaction of all items in those reports concerning conduct that had occurred more than five years before Riske filed his complaint.

Riske again petitioned this court for a writ of mandate directing the superior court to order the City to produce those records without redaction. In response to our inquiry, both Riske and the City agree that, if section 1045, subdivision (b)’s five-year disclosure bar applies at all, it is measured from the date each officer was promoted instead of Riske—the alleged adverse employment action at issue in the litigation—and not the date Riske filed his complaint, as the superior court ruled. However, Riske also argues more broadly that section 1045, subdivision (b), which prohibits disclosure of stale complaints against police officers, has no application to the personnel reports sought in this case. We agree and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. Riske’s Whistleblower Activity

According to the allegations in his complaint, Riske worked as a police officer with the Department from 1990 until his retirement in September 2014. In 2008, while working as a detective-I in the Southeast Narcotics Enforcement Division, Riske reported two of his fellow officers for filing false police reports and testified against them at an administrative hearing that ultimately resulted in their termination. Afterward, Riske’s colleagues referred to him as a “snitch” and refused to work with him, even at times ignoring Riske’s requests for assistance in the field. Fearing for his safety, Riske transferred from the Southeast Division to the Harbor Division. Between 2011 and 2013 Riske applied for 14 highly desirable detective-I and detective-II positions. Notwithstanding his superior qualifications, his applications were repeatedly denied, each time in favor of less experienced or less qualified persons.

2. Riske’s Lawsuit and Discovery Request

On September 12, 2014 Riske sued the Department for unlawful retaliation in violation of Labor Code section 1102.5, alleging the Department’s refusal to assign or promote him to more desirable positions was in retaliation for his protected whistleblower activity. The City answered the complaint, denying the allegations, and then moved for summary judgment. The City argued, among other things, it had a legitimate business reason for its promotional/assignment decisions: The selected candidates were more qualified than Riske.

Prior to responding to the City’s summary judgment motion, Riske served the City with a discovery request seeking all documents submitted by the successful candidates

1. Statutory references are to this code unless otherwise stated.
for the relevant positions and all documents relied on by the Department to select those officers for the positions, subject to the terms of the parties’ stipulated protective order. The City produced some documents, including rating sheets and ranking matrices used by the Department’s decision makers for each position, but nothing from the selected candidates’ confidential personnel files.

3. Riske’s Motion To Compel Discovery of Peace Officer Personnel Records

Riske moved under sections 1043 and 1045 for production of the selected officers’ Training Evaluation and Management System (“TEAMS”) reports, which summarized the successful candidates’ history of discipline, commendations and other personnel matters throughout the officer’s employment. To support his request for the TEAMS reports, Riske included an affidavit from retired Captain Joel Justice, a 21-year veteran of the Department, who was familiar with the Department’s hiring policies and procedures during the period Riske submitted his applications for reassignment and/or promotion. According to Captain Justice, “TEAMS reports play a crucial role in the [candidate] selection process. Specifically, it is mandatory for supervisors on interview panels to review the TEAMS reports submitted by candidates applying for promotional or coveted positions.” “As a supervisor participating in the decision to select an officer for a promotional or coveted position, I would refer to candidates’ TEAMS reports to determine, among other things, how many sustained personnel complaints they had; how many citizen commendations they had received; how many other commendations they had received; how many uses of force they had; and whether their work history evidenced that they were hard-working.” The TEAMS reports submitted by the candidates contain only sustained complaints; unresolved or unsustained personnel complaints are not included. Captain Justice stated before making a hiring decision he would run “a final selection process TEAMS report,” which would reflect any pending personnel complaints that had not been adjudicated. Information obtained from a candidate’s TEAMS reports, together with the candidate’s two most recent performance evaluations, would then make up the “final rating of ‘Outstanding,’ ‘Excellent,’ or ‘Satisfactory’ the decision makers would assign to that officer for the vacant position.”

4. The Court’s Denial of Riske’s Discovery Motion; Riske’s First Writ Petition; Issuance of the Writ Compelling an In Camera Hearing

The superior court denied Riske’s discovery motion, ruling the discovery procedures applicable to peace officer personnel records did not apply to records of third party officers who had not committed any misconduct. Riske petitioned this court for a writ of mandate, challenging that ruling. We issued an order to show cause and stayed further proceedings in the superior court.

On December 12, 2016 we granted Riske’s petition for writ of mandate. (Riske I, supra, 6 Cal.App.5th at pp. 664-665.) We explained section 1043 requires the party seeking discovery from peace officer personnel records in a criminal or civil case to show good cause for the information by setting forth “the materiality thereof to the subject matter involved in the pending litigation.” (Riske I, at p. 658, quoting § 1043.) The critical limitation for purposes of the initial discovery threshold, we emphasized, was not officer misconduct but materiality—that is, whether the evidence sought is admissible or may lead to the discovery of admissible evidence. (Riske I, at p. 658.) Because Riske’s lawsuit is premised on the allegation that individuals less qualified than he were promoted instead of him in retaliation for his protected whistleblower activity, and Riske had made a plausible factual showing that the TEAMS reports play a critical role in that decisionmaking process and could very well reveal the City’s stated business reason for selecting the candidates over Riske—they were more qualified—was pretext for unlawful retaliation, we found Riske carried his minimal burden to show good cause to obtain an in camera inspection of the personnel records he requested. Accordingly, we directed the superior court to vacate its order denying Riske’s motion to discover the TEAMS reports and performance evaluations of the officers identified in his motion and to enter a new order directing the City to produce those reports for an in camera inspection in accordance with section 1045. We left it to the superior court to determine in the first instance whether, and to what extent, the information it inspected at the hearing was discoverable. (Riske I, at pp. 664-665.)

5. The In Camera Hearings

During the April 12, 2017 in camera hearing the City’s custodian of records, accompanied by the City’s counsel in the instant litigation, produced the TEAMS reports and the two most recent personnel evaluations of 10 of the 14 candidates who were selected or promoted to new positions rather than Riske. The custodian stated documents concerning the other four candidates had not yet been located.
Citing the “five-year-lookback provision” in section 1045, subdivision (b), the custodian and the City’s counsel proposed that all information in the TEAMS reports relating to conduct that had occurred more than five years before Riske filed his complaint—that is, all information, irrespective of category, relating to officer conduct occurring before September 12, 2009—be redacted prior to disclosure. The court agreed with this interpretation of section 1045, subdivision (b)(1), and ordered redaction of all information relating to conduct before September 12, 2009. (Officer commendations given prior to September 12, 2009 were deemed not subject to the five-year bar and were not redacted.) The court ordered the Department to produce the documents, as redacted, by April 19, 2017 and set a further hearing for May 17, 2017 to review any additional responsive documents.

At the second in camera hearing on May 17, 2017 the court reviewed additional TEAMS reports and performance evaluations for two more officers. The custodian averred the Department had now produced all the reports in its possession. Identifying the same “five-year-lookback provision,” the court ordered all the identified unfavorable information occurring before September 12, 2009 be redacted.6

6. The Instant Petition for Writ of Mandate

Riske petitioned for a writ of mandate seeking production of the TEAMS reports without the court-ordered redactions. After reviewing the transcript of the in camera hearing, we issued an order to show cause, set a briefing schedule and stayed further proceedings in the superior court pending our ruling on Riske’s petition. In its briefing in this court, the City has disavowed its prior interpretation of section 1045, subdivision (b)(1), and now agrees with Riske that the five-year period is measured from the date each officer was selected for the TEAMS evaluation. Since the City has now agreed with Riske that the five-year bar applies to the TEAMS reports at issue in this case. The parties filed supplemental letter briefs on December 14, 2017.

DISCUSSION

1. Standard of Review

We review for abuse of discretion the superior court’s discovery ruling concerning the production of a police officer’s personnel records following an in camera hearing conducted in accordance with section 1045. (People v. Winbush (2017) 2 Cal.5th 402, 442; Alford v. Superior Court (2003) 29 Cal.4th 1033, 1039.) When the court’s ruling involves the interpretation of a statute, we review that question of law de novo. (People v. Gonzalez (2017) 2 Cal.5th 1138, 1141; Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1072; Riske I, supra, 6 Cal.App.5th at p. 657.)

2. Governing Law

In Riske I we explained in detail the two-step process mandated by sections 1043 and 1045 for obtaining a police officer’s confidential personnel records. First, the party seeking the information must file a motion with the court describing the records sought, supported by an affidavit demonstrating good cause for their disclosure. (Riske I, supra, 6 Cal.App.5th at pp. 654-655, citing § 1043.) Good cause for discovery under the statutory scheme exists when the party seeking discovery demonstrates through a plausible factual showing the information is material—that is, the evidence sought is admissible or may lead to the discovery of admissible evidence. (Riske I, at pp. 655, 658, citing People v. Gaines (2009) 46 Cal.4th 172, 179; Warrick v. Superior Court (2005) 35 Cal.4th 1011, 1019.)

If the threshold showing of good cause is met, the trial court reviews the pertinent documents in chambers in conformity with section 915 and discloses only that information that is relevant to the subject matter involved in the pending litigation. (§ 1045, subd. (a); Riske I, supra, 6 Cal.App.5th at p. 656.) Although relevance is the sole criterion for disclosure (§ 1045, subd. (a)), the Legislature has identified certain information that is categorically not subject to disclosure, in effect, deemed irrelevant as a matter of law. In particular, section 1045, subdivision (b), requires the trial court when considering relevance to “exclude from disclosure: [¶] (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation”; “(2) [i]n any criminal proceeding the conclusions of any officer investigating a [citizen] complaint”; and “(3) [f]acts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.” (§ 1045, subd. (b)(1)-(3); see Riske I, at p. 656.)

In addition to these mandatory discovery limitations identified in section 1045, subdivision (b), when “litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.” (§ 1045, subd. (c).) The court may also make any order “justice requires” to protect the officer or law enforcement agency from “unnecessary annoyance, embarrassment or oppression.” (§ 1045, subd. (d).) And even when

4. Riske has not challenged the custodian’s assertion the Department had produced all responsive TEAMS reports it could locate for the officer Riske had identified.

5. The court also ordered the City to produce the selected candidates’ two most recent performance evaluations. Riske’s arguments in this proceeding relate solely to the TEAMS reports.

6. If a citizen complaint is more than five years old and has exculpatory value under Brady v. Maryland (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], it is discoverable under the due process clause notwithstanding the statute’s five-year bar to disclosure. (City of Los Angeles v. Superior Court (2002) 29 Cal.4th 1, 14-15.)
discoverable, the court must order the confidential records be used only in connection with the proceeding in which they are requested and for no other purpose. (§ 1045, subd. (e).)

3. The Superior Court Erred in Excluding All Information Relating to Conduct Occurring More than Five Years from the Date Riske Filed his Lawsuit

Riske and the City now agree the five-year disclosure bar applies to citizen complaints concerning and officer’s conduct occurring more than five years before he or she was selected for a position. For example, as to an officer selected or promoted in January 2013 to a position for which Riske had also applied, complaints against that officer concerning conduct that occurred prior to January 2008 would be excluded under section 1045, subdivision (b)(1). Because the superior court used the date Riske filed his lawsuit, rather than the date each identified officer was selected for the desired position, the parties agree the court erred in its redaction order.

Although Riske and the City agree on the correct interpretation of the five-year disclosure bar, they sharply disagree on the proper application of section 1045 to the contents of the TEAMS reports. Riske contends nothing in the TEAMS reports used by the Department in making assignment and promotion decisions is a citizen “complaint” as that term is used in section 1045, subdivision (b)(1), and the reports are not subject to that provision’s disclosure bar. The City, in contrast, contends section 1045, subdivision (b)(1), applies to a broad range of matters relating to complaints and argues information in the TEAMS report involving discipline, use of force, pursuits, collisions and civil litigation and other matters necessarily related to, or obtained from, citizen complaints must be redacted if the event prompting the complaint occurred more than five years before Riske was denied a position.

a. Section 1045, subdivision (b)(1), applies only to complaints

In construing section 1045, subdivision (b)(1)’s five-year disclosure bar, we rely on well-settled and familiar principles of statutory interpretation. “Our primary task in interpreting a statute is to determine the Legislature’s intent, giving effect to the law’s purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.] ‘“Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.”’ [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided.”’ (Tuolomne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1037; accord, In re D.B. (2014) 58 Cal.4th 941, 945-946.) “A court may not, ‘under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.’” (DiCampli-Mintz v. County of Santa Clara (2012) 55 Cal.4th 983, 992.)

We begin with the language of section 1045, subdivision (a), which states “[n]othing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints or discipline imposed as a result of those investigations . . . provided that information is relevant . . . .” In other words, information that is relevant is discoverable. (City of Los Angeles v. Superior Court (2002) 29 Cal.4th 1, 11 (City of Los Angeles).) In sharp contrast to subdivision (a)’s expansive language, section 1045, subdivision (b)(1), is quite narrow, excluding only “[i]nformation consisting of [citizen] complaints concerning conduct more than five years” before the event at issue in the litigation. (See City of Los Angeles, at p. 11 [under section 1045, subdivision (b), “there is no statutory right to disclosure of citizen complaints of police misconduct that occurred ‘more than five years before the charged crime’”].)

Section 1045, subdivision (b)(1)’s use of the phrase “consisting of complaints” rather than “relating to” complaints is telling. Matters pertaining to complaints, including investigative reports and statements of disciplinary consequences as a result of a complaint, expressly identified as discoverable in subdivision (a), if relevant (see City of Los Angeles, supra, 29 Cal.4th at p. 11), are not identified in subdivision (b)(1). Investigatory conclusions are specified in subdivision (b)(2), but excluded in “criminal proceeding[s]” only. The omission of these categories of information from subdivision (b) (1), when expressly included in subdivisions (a) and (b) (2), unmistakably demonstrates the Legislature’s intent to confine section 1045, subdivision (b)(1)’s five-year bar to citizen complaints only. (See Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 725 [“’when the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded’”]; Roy v. Superior Court (2011) 198 Cal.App.4th 1337, 1352 [“’when a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed’”]; City of Port Hueneme v. City of Oxnard (1959) 52 Cal.2d 385, 395 [same].)

This conclusion is reinforced by considering section 1045, subdivision (b)(1)’s five-year bar in context with other statutes enacted as part of the same statutory scheme. (See In re Isaiah W. (2016) 1 Cal.5th 1, 13 [“we do not construe statutes in isolation, but rather read every statute ‘with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness’”]; Smith v. Superior Court (2006) 39 Cal.4th 77, 83 [same].) Penal Code section 832.5, among the statutes enacted with section 1045, requires law enforcement agencies to retain “complaints and any reports or findings relating to [a] complaint” for “at least five years” (Pen. Code, § 832.5, subd. (b)), after which time those records may be destroyed if not otherwise
prohibited as a matter of department policy. (City of Los Angeles, supra, 29 Cal.4th at p. 11.) Likewise, after five years, a citizen complaint is no longer discoverable (§ 1045, subd. (b)(1)). These parallel five-year periods, the Supreme Court has suggested, are not coincidental. They reflect a “legislative recognition that after five years a citizen’s complaint of officer misconduct has lost considerable relevance.” (City of Los Angeles, at p. 11.)

Significantly, Penal Code section 832.5’s retention requirements apply to “complaints and any reports or findings relating to these complaints . . . .” (Pen. Code, § 832.5, subd. (b).) If, as the City asserts, the term “complaint” as used in the context of peace officer personnel records encompasses all information related to a complaint, it would have been unnecessary for the Legislature to include the additional phrase “reports or findings relating to” complaints in Penal Code section 832.5. (Cf. Reno v. Baird (1998) 18 Cal.4th 640, 658 [“[i]t is a maxim of statutory construction that [c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word [or phrase] surplusage”]; State ex rel. Bartlett v. Miller (2016) 243 Cal.App.4th 1398, 1410 [same].) In short, when the Legislature wanted to include not only complaints but also information “relating to” complaints, it plainly knew how to do so. (See Brown v. Kelly Broadcasting Co., supra, 48 Cal.3d at p. 724; Regents of University of California v. Superior Court (2013) 220 Cal.App.4th 549, 565 [court is obligated to interpret different terms used by the Legislature in the same statutory scheme to have different meanings].) It elected in section 1045, subdivision (b)(1), to specify only a strictly limited type of document.

To support its argument that section 1045, subdivision (b) (1)’s five-year bar applies not only to complaints but also to all conduct, including disciplinary consequences, relating to a complaint, the City relies primarily on language in Fletcher v. Superior Court (2002) 100 Cal.App.4th 386 (Fletcher), which stated, “‘[t]he five-year restriction in section 1045 . . . applies only to records of “complaints, or investigations of complaints, or discipline imposed as a result of such investigations.”’” (Fletcher, at p. 399, quoting People v. Superior Court (Gremminger) (1997) 58 Cal.App.4th 397, 407 (Gremminger).) While there is no question that comment supports the City’s argument, the Fletcher court was not asked to, and did not, decide the scope of section 1045, subdivision (b)(1). Rather, because the plaintiff in Fletcher only sought records within five years of the date of the occurrence at issue in the litigation, the Fletcher court, like the Gremminger court it quoted, conflated subdivisions (a) and (b) of section 1045 in summarizing the governing law without actually considering the breadth of the five-year disclosure bar. (See Fletcher, at p. 400 [personnel records requested by plaintiff pertaining to prior law enforcement employment within last five years were relevant and discoverable; nothing in section 1045, subdivisions (a) or (b) excluded such records from scope of discovery]; Gremminger, at p. 407 [personnel records of a peace officer criminal defendant are not exempt from discovery under sections 1043 and 1045].) Even the Supreme Court has at times used broad language in dicta describing section 1045, subdivision (b)(1). (See, e.g., People v. Gaines, supra, 46 Cal.4th at p. 182 [following an in camera hearing, the “trial court may then disclose information from the confidential records that is relevant to the subject matter involved in the pending litigation” (Evid. Code, § 1045, subd. (a), provided that the information does not concern peace officer conduct occurring more than five years earlier”]; but see City of Los Angeles, supra, 29 Cal.4th at p. 6 [under section 1045, subdivision (b)(1), “‘complaints concerning [police officer] conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery . . . is sought’ must be ‘exclude[d] from disclosure’” (italics omitted); People v. Mooc (2001) 26 Cal.4th 1216, 1226-1227 [same, quoting statute].) Of course, “[i]t is axiomatic that cases are not authority for propositions not considered.” (People v. Avila (2006) 38 Cal.4th 491, 566; People v. Ault (2004) 33 Cal.4th 1250, 1268, fn. 10 [same].)

The City’s reliance on Haggerty v. Superior Court (2004) 117 Cal.App.4th 1079, 1082, is also misplaced. There, William Haggerty brought a civil action against a San Diego County sheriff’s deputy, alleging the deputy had used excessive physical force while Haggerty was incarcerated in county jail. Haggerty moved pursuant to sections 1043 and 1045 to obtain the internal affairs report of the incident. Following an in camera hearing, the trial court ordered the sheriff’s department to disclose the internal affairs investigative report. The deputy petitioned for a writ of mandate, arguing Haggerty was entitled only to identifying information of the witnesses and not the full report. Division One of the Fourth District granted the petition in part. Although it rejected the deputy’s argument that the report was not discoverable, it held the investigatory conclusions, categorically inadmissible in a criminal proceeding under section 1045, subdivision (b)(2), should have been excluded from the production in the civil case because Haggerty had not articulated how that information would have had any meaningful benefit to the litigation. (Id. at pp. 1088-1089.) Here, in contrast, Captain Justice’s declaration provided the necessary factual predicate for the relevance of the TEAMS reports. If anything, Haggerty strengthens our conclusion that all relevant material apart from citizen complaints more than five years old is discoverable, unless excluded under other provisions of section 1045, subdivision (b), something the court did not address in the instant case.

b. TEAMS reports are not “complaints” and do not fall within the categorical exclusion of stale complaints contained in 1045, subdivision (b)(1)

The TEAMS reports are not citizen complaints nor, as far as we can determine from the record and the parties’ briefing, do they directly quote from complaints. Rather, the TEAMS reports contain summaries of personnel matters on which
employment-related decisions, such as assignment and promotion, are to be based. As discussed, only complaints, and not broadly all information related to complaints, as proposed by the City, are subject to the five-year disclosure bar in section 1045, subdivision (b)(1). Thus, while the TEAMS report may well identify the nature of a complaint to explain or justify discipline that has been imposed, essential information for the Department’s decision makers in using the reports, none of that information is akin to the unfiltered complaint. As such, the TEAMS report is not subject to the categorical exclusion for stale citizen complaints contained in section 1045, subdivision (b)(1).

7. We not suggest a citizen complaint that has simply been reproduced or transferred to a different medium (for example, digitized) loses its character as a complaint and becomes subject to disclosure. Indeed, presented with that hypothetical at oral argument, Riske’s counsel conceded such a document would be subject to the disclosure bar in section 1045, subdivision (b)(1).

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its April 12, 2017 and May 17, 2017 orders requiring redaction of information in the TEAMS reports pursuant to section 1045, subdivision (b)(1), and to make a new order directing the City to produce those TEAMS reports without redaction. Riske is to recover his costs in this proceeding.

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

[ APPENDIX A DELETED ]

COUNSEL

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

OPINION

Patrick Jackson appeals his conviction and sentence for one count of lewd contact with a minor, arguing the trial court erroneously found him competent to stand trial before taking his guilty plea and again before sentencing him. After the trial court acknowledged a doubt about his competency and committed him to Patton State Hospital, numerous psychologists found him incompetent to stand trial and unlikely to be restored to competency because he suffers from a stable developmental disability—mild mental retardation—which limits his capacity for understanding and communication.

However, in early 2010, hospital staff changed their minds after drilling Jackson until he could answer simple, concrete questions about the judicial system. In February 2010, the trial court found Jackson competent based on their new report and then accepted his guilty plea. Before he could be sentenced, though, new psychological evaluations reported Jackson denied his guilt and did not understand he had pled guilty, and questioned the basis of the report finding him competent. In June 2010, the trial court found substantial evidence Jackson was incompetent.

Over a year later, and in the face of additional evaluations finding Jackson incompetent and unlikely to improve, the trial court again found Jackson was competent and sentenced him to three years in state prison. This time, the court based the competency finding on the contents of an evaluation Patton State Hospital staff had prepared nearly nine months earlier.
which simply copied the analysis from its early 2010 report and failed to address any of the concerns raised thereafter.

On appeal, Jackson argues neither his conviction nor his sentence can stand because neither competency finding was based on substantial evidence. We agree and therefore reverse the judgment.\(^1\)

I

FACTUAL BACKGROUND

This case arose out of incidents in early August 2008 between Jackson and the 13-year-old grandson of a family friend. Jackson was swimming with the child in a pool at the mobile home park in Yucca Valley where he lived with his elderly mother. Jackson was giving the child a piggyback ride and asked the child to “hump his back.” The two then went to the bathroom by the pool, and Jackson touched the victim’s penis with his hand and said, “It’s not growing. It’s not growing.” Later in the week, Jackson touched the victim’s penis through his clothing while they were alone in a vehicle at a shopping center, and Jackson again mentioned the boy’s penis was not “growing.” On August 8, 2008, the victim told his grandmother, who reported the abuse to police.

A. The Charges and First Finding of Incompetency

The San Bernardino County District Attorney charged Jackson with two counts of lewd acts on a child. (Pen. Code, § 288, unlabeled statutory citations refer to this code.) On August 20, 2008, based on a request from the public defender, the court declared there was reason to doubt Jackson’s competency and suspended criminal proceedings. (§ 1368.) The court ordered further proceedings to evaluate Jackson’s competency, appointed Dr. Michael J. Perrotti to examine him, and set a hearing for September 17, 2008. (§ 1369, subd. (a).)

On the date of the hearing, defense counsel informed the court Dr. Perrotti had not yet examined Jackson and suggested substituting a June 20, 2008 competency report prepared by Dr. William H. Jones for proceedings in the Riverside County Superior Court. Dr. Jones found Jackson mildly mentally retarded, saying, “[i]ntellectually, he is at the level of a very young child, comparable to that of a 5 year old.” Dr. Jones concluded, “[b]ecause of his very limited intelligence including very limited comprehension [Jackson] is not able to understand current proceedings and is not able to cooperate in a rational manner. Because of the developmental nature of his problems, treatment with antipsychotic medication is not going to help him, and his lack of mental competence is not changeable.” Defense counsel provided the report to the court and the prosecutor and they discussed using it in the proceedings in San Bernardino. Ultimately, the prosecutor refused to stipulate to Dr. Jones’s report and insisted on obtaining a report from Dr. Perrotti.

Dr. Perrotti too found Jackson had serious cognitive deficits. “He is unable to explain the process of a trial. He is unclear as to the roles of the principals, especially the district attorney. He is unaware of legal entities and their meanings, such as juries.” Dr. Perrotti did find Jackson “is able to assist in his defense,” because he is “able to understand the nature of the charges against him.” However, he found his cognitive deficits rendered him “unable to weigh legal options and the best legal options for himself. He is also unable to make prudent trial-related decisions. His thinking is concrete and primitive.”

Dr. Perrotti concluded Jackson is “an intellectually limited man with a limited knowledge of the principals in the proceedings as well as the nature and process of a trial” and therefore “not competent to participate in legal proceedings at this time.” He recommended placing Jackson in “special instruction” to ensure “the vocabulary and terminology is broken down into terms he can understand” using “repetitive audiovisual video material” because Jackson “does not possess the ability to understand complex concepts [or] retain complex bits of information.”

Based on Dr. Perrotti’s report, the trial court found Jackson to be incompetent to stand trial and referred him to the County Mental Health Director for a placement recommendation. On October 22, 2008, the trial court accepted the director’s recommendation and sent Jackson to Patton State Hospital (Patton) for 180 days. The court ordered the director of Patton to make periodic written reports, the first due March 31, 2009.

B. Attempts to Restore Competency at Patton State Hospital

On March 9, 2009, Patton staff submitted a progress report. They wrote, “Since admission to Patton State Hospital, Mr. Jackson has received treatment consisting of a structured, supportive environment, individual therapy, medication regimen, and treatment activities aimed at restoring him to competency and reduction of symptoms. Mr. Jackson’s initial response to treatment has been slow. His difficulties with written language have been ameliorated with more individual attention by staff members to help him learn verbally. Once his cognitive deficits have been ascertained and strategies to implement learning techniques are implemented, it is hoped that his response to treatment will optimize.” They reported Jackson’s “cognitive deficits obviously remain significant, and will be explored by neuropsychology consultants to ascertain the best methods of coping with them to facilitate learning of necessary court information.”

The progress report concluded Jackson was not able to assist his attorney and did not adequately understand legal proceedings. The problem assisting his attorney stemmed from the fact that his “responses to questions and direction are not always consistent and coherent; he has a difficult time orga-
nizing complex concepts and evidences memory difficulties." Regarding court procedures, Jackson “has not correctly identified the four pleas available to him[,] . . . [has] not yet expressed a correct understanding of the possible consequences of each of the pleas[,] . . . has not correctly explained the nature of a plea bargain, and required prompting to identify the names and roles of the major courtroom participants.” The report concluded, “it is the consensus of the Wellness and Recovery Team that [Jackson] is not yet competent to stand trial and should be retained for further treatment.”

Defense counsel asked the court to order an updated progress report from Patton because the March 2009 report did not “appropriately address[,] his issue of [Jackson’s] developmentally disabled condition.” The trial court agreed, ordered Patton to submit a new competency report, and set a hearing for June 24, 2009. Patton’s updated report said, “Psychological testing results suggest that Mr. Jackson suffers from significant intellectual deficits. He has demonstrated numerous weaknesses in comprehending and learning information presented both verbally and visually, as his test scores fall within the mild retardation range of adult intellectual functioning. . . . He is unable to accurately complete even simple tasks, such as reciting the alphabet or solving basic mathematical calculations. . . . He has a limited ability to memorize and recall information that is spoken to him, though he slightly benefits from repetition of information. His abstract reasoning is also poor, meaning that his thinking is concrete and simplistic.”

The report also addressed whether Jackson’s disability left room for him to become competent through treatment. The examiner concluded he “will likely have difficulty in gaining competency to stand trial,” because his “cognitive limitations . . . may be a result of a biologically inherited intellectual disability . . . [meaning] he will have a limited ability to acquire and retain a factual understanding of court processes. In addition, he will have difficulty communicating with his attorney to assist in preparing and presenting his defense.” The report noted Patton staff had given Jackson significant individual attention to help him overcome his cognitive deficit, to no avail. The report concluded, “there is no substantial likelihood that Mr. Jackson will regain competency in the foreseeable future.”

On July 29, defense counsel said he was not willing to stipulate to the report’s evaluation of Jackson and requested a competency trial. The court set a trial date for September, but later continued trial to December at defense counsel’s request.

On September 16, 2009, the Patton staff submitted another status report, which reached the same conclusions. The report said Jackson still could not work with his attorney, noting he “continues to exhibit impoverished thinking and a childlike demeanor. He seems unable to effectively weigh options in problem solving or make an independent, well-informed decision.” The report also discussed Jackson’s continuing inability to understand the charges and legal proceedings he faced. “Mr. Jackson has been provided with more individual treatment sessions to increase his knowledge of court processes. When asked even basic questions about court he is easily confused and often replies, ‘I don’t know.’ He demonstrates significant difficulty simply repeating information immediately after it is presented to him or remembering it over a period of time . . . . Upon extensive guidance and prompting, he is unable to identify the specific charge against him, but he has given a basic description of the events related to the accusation.” Though he showed “very small improvement” in understanding the roles of court officials and his plea options, “he is unable to identify specific terms, including public defender and district attorney. He continues to show no understanding [of] more complex concepts such as no contest, not guilty by reason of insanity, and plea bargaining . . . [and] has difficulty understanding different sentencing outcomes, such as probation, a prison term or commitment to a hospital.” The report concluded Jackson was not yet competent to stand trial and should be retained for further treatment.

C. Delay for Competency Proceedings in Riverside County Superior Court

All along, Jackson was enmeshed in similar proceedings in Riverside County, where he also faced charges of sexual misconduct. (See Jackson v. Superior Court (2017) 4 Cal.5th 96, 102 (Jackson I).) Jackson was never found competent in the Riverside case. (Id. at pp. 102-103.) Of most immediate relevance to this case, Jackson was being evaluated for competency in late 2009 and early 2010, and the San Bernardino trial court repeatedly delayed proceedings to await the outcome in Riverside.

At a status hearing on December 4, 2009, defense counsel informed the court Jackson would soon have competency proceedings in Riverside County and requested a continuance. “I don’t know whether or not that will assist us in our case or not, but it is my request to continue this matter to the week after that so we can see if anything happens in that Riverside County case that may assist us in this case.” The prosecution said, “I have no objection to that, your Honor. I think it would be in the best interest of both sides to know more.” The court agreed and continued the hearing to December 18. The parties reconvened twice more and agreed to continue the hearing because proceedings in Riverside had been delayed.

Psychologist Michael E. Kania, Ph.D., examined Jackson on January 14, 2010 and submitted a report to the Riverside County Superior Court on January 22, 2010.2 Dr. Kania’s evaluation is consistent with the recent reports submitted in the San Bernardino case. “Mr. Jackson appears to be func-

2. We grant Jackson’s request that we take judicial notice of Dr. Kania’s report submitted to the Riverside County Superior Court (case No. INF061963), as well as our opinion in Jackson v. Superior Court (2016) 247 Cal.App.4th 767. (Evid. Code, §§ 451, subd. (a); 452, subd. (d).) Otherwise, we exercise our discretion and deny Jackson’s motion.
tioning within the range of mild mental retardation, which is consistent with the formal psychological testing completed by Dr. Jones in August 2008 and with the diagnosis at Patton Hospital at the present time . . . He is unable to name the President and he states that there are ‘thirty-one and sometimes thirty’ months in a year. He does not know how many days are in a week. He cannot complete simple addition or subtraction problems . . . His memory for distant and recent events is somewhat confused and simplified. Insight is absent. [¶] Diagnostically, Mr. Jackson is suffering primarily from mild mental retardation, which is a chronic condition.”

Regarding his understanding of the case against him, Dr. Kania wrote, “Mr. Jackson is not clear about the present charge and only with pointed questioning is he able to give any indication of an awareness of this charge. He cannot state if the charge is serious or what the consequences might be. [¶] . . . [H]e is unable to define the role of his attorney, except that his attorney ‘listens to what I got to say.’ He cannot identify his attorney by name. He does not know the role of the district attorney or the jury. He is able to state that the judge would determine guilt or innocence and an appropriate sentence. [¶] When asked what he might do should a witness lie in court, Mr. Jackson states that he would ‘sit there and listen.’ It is only with prompting that he states he would inform his attorney. He is of the opinion that only the judge can advise him to testify in his own behalf.”

Dr. Kania concluded “Mr. Jackson meets the legal criteria to be considered not trial competent at the present time, as a result of his developmental disability.” Dr. Kania also concluded “it is unlikely that he will ever be restored to competency, given that his incompetency is the result of a longstanding and significant intellectual deficit.” Dr. Kania noted, “This appears to be the opinion reached by Patton State Hospital staff with regard to the present charges in San Bernardino County.”

The Riverside trial court apparently credited Dr. Kania’s opinion, because it found Jackson incompetent to stand trial on February 3, 2010. (Jackson v. Superior Court, supra, 247 Cal.App.4th at p. 770 & fn. 2, aff’d. Jackson I, supra, 4 Cal.5th 96 [noting the Riverside court found Jackson incompetent twice—on February 3, 2010 and again December 7, 2011].) After waiting nearly two months to learn of this determination, however, the parties and the San Bernardino court ignored it entirely.

D. First Competency Finding

Instead, the trial court found Jackson competent to stand trial exactly a week after the Riverside trial court found him incompetent. The shift traces to a change of heart among the staff at Patton, for the day after the Riverside court found Jackson incompetent, the Patton medical director certified to the San Bernardino court that he had regained competency and submitted a report recommending Jackson “be returned to court as competent to stand trial.” (§1372, subd. (e).) Though filed February 4, 2010, the report is dated January 13, 2010 and it indicates Patton staff reached their conclusion after a consultation on December 16, 2009.

In the report, they wrote Jackson’s “treatment program consists of a structured supportive environment, individual and group therapy, a psychotropic medication regimen, court preparation classes, and rehabilitation therapy activities.” The report endorsed an evaluator’s conclusions from an October 1, 2009 examination that Jackson “‘has a poor understanding of the factual information regarding the adversarial nature of the courtroom . . . does not appear to have a rational appreciation of the charges against him. . . . [but] appears to have the capacity to cooperate with his lawyer if he chooses to do so and understands proper courtroom behavior.’” The evaluator opined “[m]entally retarded individuals can learn information albeit at a much slower rate and depending on the level of intellectual deficits,” and recommended Jackson receive “individual assistance to solidify his knowledge of court concepts and procedures.”

Consistent with that recommendation, Patton staff drilled Jackson in “intense individual and group treatment sessions to increase his knowledge of judicial terminology and procedures.” According to the report, “when he is asked direct, open-ended questions about his legal situation, he is prone to immediately reply, ‘I don’t know.’ However, when his legal situation is discussed in a more indirect manner (e.g., yes-no questions, in a game scenario, or referencing a hypothetical situation), he is able to demonstrate basic knowledge required to assist in his defense. He is able to identify the charge against him and give a description of the events related to the accusation . . . He is not able to articulate describe the process of plea bargaining, but he believes it is ‘when the court helps you to get a better charge so you go home, or not jail for a long time.’ With further explanation by the treatment team, he shows a basic understanding of the purpose and outcome of plea bargaining . . . [H]e describes the judge’s role as ‘the boss of the court. He says if you spend more time or less time at jail.’ He acknowledges that the prosecutor calls witnesses to ‘talk against’ him. He is aware that ‘a witness talking and a camera’ are forms of evidence. He is more knowledgeable about the possible sentencing outcomes, such as possible time in prison.”

Overall, though, the report indicates Jackson made only limited advances between October and December 2009. Treatment group notes from that period indicate “he attends many of his groups but does not participate. He makes comments irrelevant to group discussion, such as complaining about the room temperature. He has also been noted to rarely talk in group and appear as though he may not be paying attention or learning the material. He often gives negative responses that are not objective when contributing to group discussions. Finally, in a group with this writer he was observed to be sleeping and making physical complaints. Despite his lack of focus in treatment, his inappropriate behaviors and anxiety have improved. Also, with much encouragement he
is able to offer accurate responses when describing court processes.”

The report says the Wellness and Recovery Treatment Team met with Jackson on December 16, 2009 to evaluate his progress. It noted the previous determination he was not competent was based on his “very concrete and primitive thinking” and his “intellectual limitations.” The report concludes “[d]espite cognitive weaknesses,” he has now “demonstrated adequate though rudimentary understanding of court processes . . . [and] is likely able to navigate the court process with increased support from his lawyer.” The report also notes “his current intellectual ability is his baseline level of functioning and is not likely to improve with further treatment at a mental health facility such as [Patton].” Based on these facts, Patton staff recommended Jackson be returned to court as competent to stand trial.

On February 10, 2010, when the parties reconvened in the San Bernardino case, they made no reference to the proceedings in Riverside, Dr. Kania’s evaluation, or the trial court’s determination there that Jackson was incompetent. Instead, they simply took up Patton’s new competency finding. The trial court said, “we are back because we do have a certification of mental competence for Mr. Jackson.” The prosecutor said, “Your Honor, it does seem to indicate that he is now competent, and the People would submit on that.” Defense counsel said, “I am prepared to submit on the doctor’s recommendations,” but noted “the doctors are indicating that their current intellectual ability is limited, but not likely to ever improve.” The prosecutor responded, “for the record, that was my assessment, frankly, as well. I just don’t think it rises to the legal level.” Based on the February 4, 2010 report, the trial court found Jackson had become competent and reinstated criminal proceedings.

E. Jackson’s Guilty Plea

On February 24, 2010, Jackson entered a guilty plea to one count of violating section 288, with a promise of probation if he were found a suitable candidate for supervised release.

In taking his guilty plea, the trial court engaged Jackson in the following colloquy:

The Court: In order to enter a plea, you have to give up certain rights.

Defendant: If I’m still living – I’m not living at West Valley Detention Center.

The Court: Okay. We’re going to figure all that out. I’m going to order you to go back to Patton till we sentence, all right. . . . First thing is I’m going to talk to you about the rights that you’re going to give up. You do have a right to a preliminary hearing and the right to a trial by jury. At both of those proceedings you would be represented by an attorney, either one that you pick if you could afford it. In the event you couldn’t afford an attorney, we would assign you one, an attorney like Mr. George. Then it doesn’t cost you anything, okay. Through Mr. George you’d be able to confront and cross-examine[e] witnesses against you. He would be able to ask anybody that was accusing you of anything, any questions. He would be able to present evidence on your behalf. And subpoena witnesses to court. And you would have the right to either testify on your own behalf if you wanted to or just to remain silent. Do you give up those rights so that I can enter your plea today?

Defendant: Yes.

The Court: My understanding of the agreement in your case is that you’re going to be pleading guilty to a violation of Penal Code Section 288(a), lewd act upon a child. That is punishable by up to a year in county jail, three, six, or eight years in state prison. You’re doing that because the agreement is you’re going to be placed on probation and serve 365 days in jail. . . .

Defendant: Yes, 365.

The Court: Did anybody promise you anything other than what’s on this form to get you to plead today?

Defendant: No.

The Court: Anybody threaten you, beat you up, use any violence against you to get you to plead today?

Defendant: No.

The Court: Okay. Are you under the influence of any alcohol, any drugs, any medications you’re taking that you think affect your ability to understand what is happening?

Defendant: A lot of medicine has.

The Court: I’m sorry, what?

Defendant: A lot of medicine has.

The Court: Okay. Do you feel like you understand what’s going on today?

Defendant: Yeah.

The Court: Okay. Do you feel like you’ve had enough time to talk to Mr. George about your case so that you know what you want to do?
Defendant: Yeah.

Based on these responses, the trial court found Jackson understood the plea form, the nature of the charge, the consequences of punishment, and his constitutional rights, as well as that he knowingly, intelligently, freely, and voluntarily waived his constitutional rights. The court then asked Jackson for his plea, and Jackson pled guilty. The court accepted the plea and found Jackson entered his plea freely, voluntarily, knowingly, and intelligently, and found there was a factual basis for the guilty plea.

Finally, the court ordered the preparation of a psychological report evaluating the suitability of suspending Jackson’s sentence despite his conviction for committing a lewd and lascivious act on a child under 14 years old (section 288.1 report). The court told Jackson the acceptance of his guilty plea was “contingent upon the Court . . . refer[ring] your case for a report about you. And as long as there is a favorable report about you, then the Court will go along with that agreement. If the report is not favorable that you would be a suitable candidate that would be good for you to be on probation then I’ll let you withdraw this plea, meaning we will take all this back if you don’t have a good report, all right. If you do have a good report then the Court will put you on probation. You don’t have to go to prison then.”

F. Reports on the Suitability of Supervised Release

Jackson did not receive encouraging section 288.1 reports. One report found Jackson not suitable for parole. Another report found him suitable with supervision, but questioned his competence as well as Patton’s approach to “restoring” competency. Both reports said Jackson denied his guilt.

Psychologist Jody A. Ward, Ph.D., emphasized Jackson’s “complete lack of insight into his behavior.” She wrote she asked him to share his side of the story about the accusations against him, and he responded “he never touched the boy.” She “asked about riding the boy piggy back on his back and he would not answer. He was asked about the statements that he made to the boy about ‘it’s not growing.’” He said, ‘Eee-ww! You’re gross. I didn’t say it.’” He said he never knew this boy and did not know why he was being accused of this. He said the boy was not a boy and was 16 years old. The defendant stated that he was not guilty, and he did not plead guilty to this case the last time he was in court. He said, “I didn’t say nothing. I want to go home. I’m so upset right now.”’ Dr. Ward indicated his lack of insight and the fact that he had acted in a sexually aggressive fashion on occasion at Patton

made it likely he would re-offend. She concluded Jackson was not a good candidate for supervised release.

In a later report, Dr. Kania, who had evaluated Jackson for competency in the Riverside case, concluded Jackson’s mother could supervise him and he was unlikely to re-offend. However, Dr. Kania raised significant problems with the finding that Jackson was competent in the first place. Dr. Kania wrote, “He appears to not understand that he has, in fact, pled guilty and he asks the examiner ‘What do you mean, guilty? What does that mean?’ With regard to the present charge, he states ‘I didn’t do it.’” Asked about the accusations against him, Jackson responded only, “That’s nasty.” Dr. Kania wrote, “Although you did not ask that I evaluate Mr. Jackson’s trial competency, it became very clear during the course of the evaluation that he is, in my opinion, not trial competent. He seems to indicate a lack of understanding of the fact that he has pled guilty and the consequences of this plea.”

Dr. Kania took issue with Patton’s treatment plan for Jackson and its finding that he was competent. “At one point, the Hospital indicates that he is not likely to regain his competency as a result of his mild mental retardation and communication problems, but six months later the Hospital [finds] that he has, in fact, regained his competency, even though there had been no change in the aforementioned conditions. I also note that Patton gave Mr. Jackson a GAF [Global Assessment of Functioning score] of 35 [out of 100], suggesting an impairment in reality testing or communication (i.e., speech at times is illogical, obscure or irrelevant) or major impairment in several areas such as work or school, family relations, judgment, thinking, or mood. All of this would seem to significantly impair one’s trial competency. Additionally, even though Patton opined that Mr. Jackson was trial competent, they also noted that he requires assistance to effectively weigh options and problem-solving and make well-informed decisions, that he responds to simplistic and concrete communication that is repeated to him numerous times. This would certainly suggest that he is not trial competent, and it is only when information is repeated ‘numerous times’ that he might be expected to learn this material. Whether he could understand it is another question.”

G. A Second Round of Competency Proceedings

On June 28, 2010, the trial court held a status hearing and the court raised Dr. Kania’s opinion that Jackson was not competent. The court concluded there was substantial evidence he was not competent, and again suspended criminal proceedings. The court also indicated it was concerned about Jackson’s status in competency proceedings in the Riverside case and referred the matter out for another competency report.

On July 28, 2010, the court received the new evaluation, this time from psychologist Chuck Leeb, Ph.D. Among other things, Dr. Leeb concluded Jackson “is not mentally competent enough to (A) understand the nature of the criminal
proceedings which (B) makes him unable to assist counsel in a rational manner. [¶] . . . Mr. Jackson’s incompetence is caused by a developmental disorder. By Patton’s own testing, Mr. Jackson’s IQ is 53. This places him in the extremely low range of intellectual functioning and in the bottom 1% of the population.”

Dr. Leeb also concluded no intervention would make Jackson competent to stand trial. He concluded, “[t]here are no effective treatments. Mr. Jackson can never have his competency restored as he has never been competent to begin with. There is no way possible to restore something that one never had. [¶] Mr. Jackson’s condition is permanent and stable . . . He will never be competent.”

At a status hearing on July 11, 2010, the trial court asked the parties how they wanted to proceed. Defense counsel said Jackson was willing to stipulate to the report. However, the prosecutor refused and requested a competency trial. The court set a trial date for September 13, 2010.

However, before trial and with the consent of defense counsel and the prosecutor, the court referred Jackson to the Inland Regional Center (IRC) under section 1369, subdivision (a), which provides, “[i]f it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled . . . to examine the defendant.”

The referral to IRC ended up delaying the competency proceedings considerably. The court was forced to continue numerous scheduled hearings because of problems obtaining reports from the IRC. Ultimately, a psychological assessment from IRC determined Jackson did not qualify for services because, though he scored within the range of mental retardation, there was no evidence he had similarly low scores before age 18, a statutory prerequisite to obtaining services.

H. Racing the Clock on the Maximum 3-Year Term of Commitment

Finally, at a hearing on June 13, 2011, defense counsel argued Jackson had completed serving the maximum three-year term of commitment available under Penal Code section 1370, subdivision (c). The prosecution argued Jackson had been committed to Patton as incompetent for only 26 months because his commitment did not begin immediately on his arrest and he was declared competent for a period of a few months. The trial court agreed with defense counsel, but referred Jackson to be evaluated for a Murphy Conservatorship (Welf. & Inst. Code, § 5008, subd. (h)(1)(B)) on the ground (a), which provides, “[a]s to the person of the defendant . . . to determine whether it is in the best interest of the person concerned that a Murphy Conservatorship be granted as a result of a conservatorship determination.”

On July 11, 2011, the court found Jackson did not qualify for a Murphy Conservatorship. But the court also reconsidered its determination Jackson already had completed the full three-year commitment. Relying on this court’s recent decision in People v. Reynolds (2011) 196 Cal.App.4th 801, the court found the three-year limitation on such commitments began running on the date of his transfer to Patton, January 2, 2009, could not be reduced by pre-commitment custody credits, and would therefore end on January 2, 2012. At defense counsel’s request, the court then set a competency trial date for August 29, 2011.

On that day, the parties returned to court and stipulated Jackson had been restored to competency. They did so based on a Patton certification and report finding him competent from December 2, 2010—nearly nine months before the hearing. The December report reached the same conclusion as the earlier report submitted February 4, 2010 and supported its conclusion with evidence copied nearly entirely from the earlier report.

The new report duplicates almost verbatim the February 4, 2010 discussion of Jackson’s knowledge and understanding of the charges and legal proceedings. It even repeats the exact same quotations attributed to Jackson, which purported to demonstrate he had gained understanding despite his documented intellectual limitations.

So, the report repeats:

• “[W]hen he is asked direct, open-ended questions about his legal situation, he is prone to immediately reply, ‘I don’t know.’”

• He believes plea bargaining is “‘when the court helps you to get a better charge so you go home, or not jail for a long time.’”

• He describes the judge’s role as “‘the boss of the court. He says if you spend more time or less time at jail.’”

• He says the prosecutor calls witnesses to “‘talk against him.’”

• He is aware that “‘a witness talking and a camera’ are forms of evidence.”

These are the only pieces of evidence the report provides as support for its conclusion. The new report also repeats verbatim the earlier report’s conclusion Jackson “is more knowledgeable about the possible sentencing outcomes, such as possible time in prison.”

Like the earlier report, the new report said the Wellness and Recovery Treatment Team met with Jackson to evaluate his progress. Like the earlier report, it noted the previous determination Jackson was not competent was based on his “very concrete and primitive thinking” and his “intellectual limitations.” And like the earlier report, the new report concludes “[d]espite cognitive weaknesses,” Jackson has “demonstrated adequate though rudimentary understanding of court processes . . . [and] is likely able to navigate the court process with increased support from his lawyer,” but notes

4. Patton had submitted another, nearly identical report on November 4, 2010. We find no explanation in the record for why the parties and the court did not take these reports under consideration until August 29, 2011.
“his current intellectual ability is his baseline level of functioning and is not likely to improve with further treatment at a mental health facility such as [Patton].” Based on these assertions—all copied from a report prepared 11 months earlier—Patton staff recommended Jackson be returned to court as competent to stand trial.

The December 2010 report did not address the fact that every other evaluation of Jackson found him to be incompetent. It did not address objections to the earlier report by Dr. Kania and Dr. Ward. Nor did it acknowledge Jackson had been found incompetent in the Riverside trial court. The report simply duplicated its prior evidence, analysis, and conclusion.

Despite these deficiencies, the parties stipulated to the report’s conclusion Jackson was competent. The court indicated it had read the December 2010 report, accepted the parties’ stipulation, and found Jackson to be competent. “[T]he Court finds that the defendant is presently able to stand trial and that he is able to understand the nature of the cause and purpose of the proceedings, able to assist Counsel in his defense in a rational matter [sic]. Criminal proceedings are resumed.” The court delayed sentencing, however, because the probation department did not accept the plea bargain’s recommended sentence of 365 days in county jail and probation conditioned on a favorable section 288.1 report. Instead, they recommended Jackson be sentenced to six years in state prison.

At the sentencing hearing on September 9, 2011, the court told Jackson the section 288.1 reports were not favorable and the court would not follow the plea bargain. The court indicated it “would be okay with” a mitigated term as an alternative, “given what I know about the facts of the case and the significant mental issues with the case.” The court said, “Mr. Jackson, you did have a plea agreement in this case that called for probation. It was contingent upon the 288.1 reports. Instead, they recommended Jackson be sentenced to six years in state prison.

At the sentencing hearing on September 9, 2011, the court told Jackson the section 288.1 reports were not favorable and the court would not follow the plea bargain. The court indicated it “would be okay with” a mitigated term as an alternative, “given what I know about the facts of the case and the significant mental issues with the case.” The court said, “Mr. Jackson, you did have a plea agreement in this case that called for probation. It was contingent upon the 288.1 reports being favorable to you. [¶] As I interpret those, I don’t necessarily see those as favorable for you. So you do have a right to withdraw your plea entirely and start over again if you want to. Or, the other option is that I can go ahead and sentence you to the mitigated term of three years. [¶] . . . So do you want to go ahead and do that?” Jackson responded, “Yes,” and the court imposed a three-year term in state prison, followed by a three or four year term of parole. Because Jackson had already served more than three years in custody, the court ordered his release and ordered him to report to parole, though with the understanding he may face a warrant in the Riverside case.

On December 9, 2016, Jackson filed an amended notice of appeal, seeking a certificate of probable cause to challenge his competency to plead guilty, which the trial court granted the same day.
person is confined pursuant to order of the court under this section, he or she shall be provided with necessary care and treatment.” (Ibid.)

Someone found to be incompetent may be involuntarily committed to determine if they are likely to regain competence. (§ 1370, subd. (a)(1)(B).) However, as our Supreme Court recently recognized in the case against Jackson in Riverside, “the duration of commitment may not exceed ‘the reasonable period of time necessary to determine whether there is a substantial probability [they] will attain that capacity in the foreseeable future.’” (Jackson I, supra, 4 Cal.5th at p. 100.) The Legislature enforced that restriction by setting the maximum period of commitment at three years. (§ 1370, subd. (c); Jackson I, at p. 100.) “If at that point the defendant does not regain competence and is shown to be ‘gravely disabled’ within the meaning of the Landerman-Petris-Short Act [citation], then the court must order conservatorship proceedings . . . . [Citation.] Otherwise, the defendant is released.” (Jackson I, at p. 100.)

Ultimately, the question of the defendant’s competency shall be decided at a trial “by court or jury” and if by jury, it must be decided by unanimous verdict. (§ 1369, subds. (a) & (f).) The factfinder must presume “the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.” (§ 1369, subd. (f); see also People v. Rells (2000) 22 Cal.4th 860, 867.)

We review the trial court’s findings that Jackson was competent to stand trial for support by substantial evidence in the record—that is, for evidence that is reasonable, credible, and of solid value. (People v. Marshall (1997) 15 Cal.4th 1, 31.)

Here, substantial evidence does not support the trial court’s findings Jackson was competent to plead guilty or to accept his sentence. We begin with the court’s finding Jackson was competent at the time of his sentencing. We conclude, for several reasons, the basis for that ruling was essentially nil.

First, the hearing occurred on August 29, 2011 but staff at Patton prepared the supporting psychological evaluation nearly nine months earlier, on December 2, 2010. Every single evaluation of Jackson in this case concluded he was mildly mentally retarded, had extremely limited intellectual abilities, and had great difficulty grasping and retaining the legal concepts necessary for him to understand his legal circumstances and assist his attorney in his defense. Even the two reports in which Patton staff found Jackson had “regained” competency emphasized that he had a limited intellect, learned legal concepts only by rote, and responded accurately only if prompted with simple, targeted questions. For that reason, even if we were inclined to credit the December 2, 2010 report, it does not provide a sound basis for concluding Jackson retained any understanding he may have gained when he stood before the court nine months later to decide whether to maintain his guilty plea and accept a three-year sentence following a period of parole. Given the unanimous opinion that Jackson had a chronic developmental disability that limited his ability to grasp and retain information, a report finding he understood his legal situation well enough to stand trial is not substantial evidence that he retained that understanding nine months later. Relying on it was error.

Second, the analysis of the December 2, 2010 report is even less relevant to the issue of competency in August 2011, because it actually came directly out of a report prepared 11 months previously. Recall the court found Jackson had regained competence on February 10, 2010 based on a Patton report filed February 4, 2010. Within a few months, however, the trial court found there was substantial evidence to conclude he was not (or no longer) competent. The December 2, 2010 report purported to provide reasons for finding he had since regained competence. However, the bulk of that report simply repeated the analysis contained in the February 4, 2010 report, which was prepared 11 months earlier. Thus, the trial court’s evidentiary basis for finding Jackson competent in August 2011 came from an analysis prepared nearly 20 months earlier. As a result, Patton staff failed to provide the trial court with solid, reliable evidence of Jackson’s competence as of August 2011.

Third, setting aside the issue of delay, Patton staff also failed to provide the trial court an evidentiary basis for finding anything had changed from when Dr. Kania (in June) and Dr. Leeb (in July) evaluated Jackson and found he was not competent. Patton’s December 2, 2010 report does not mention the issues raised in those psychological evaluations, which questioned Patton’s analysis and the prior competency finding. The reports by Dr. Ward and Dr. Kania discussed in detail Jackson’s denials of guilt and denials that he had pled guilty, which came only a few months after the court took his plea. Those reports at least raise the question whether Jackson in fact understood what had happened when he pled guilty. Patton’s new evaluation should have addressed those concerns directly and the trial court should have demanded that Patton do so.

Moreover, the reports by Dr. Kania and Dr. Leeb specifically opined Jackson would never “regain” competency because his incompetency stems from chronic and stable mental retardation. To be “of solid value” and therefore constitute substantial evidence, any report reaching a contrary conclusion would at minimum have to address those criticisms and explain why hospital staff had come to a different result. The trial court, which possessed those earlier reports, could reasonably have concluded Jackson had regained competency only if presented with a report or other evidence that rebutted those criticisms. As the record stood on August 29, 2011, the trial court had every reason to conclude Jackson remained incompetent, and no solid basis for concluding otherwise. We therefore conclude it was error for the trial court to find Jackson competent in August 2011 as well as to accept his decision to maintain his guilty plea and accept a prison sentence.

What of the trial court’s finding Jackson had regained competency as of February 10, 2010? Did Patton’s February 4, 2010 report supply the trial court with substantial evidence to make that finding? Our answer again is no. It was
the unanimous opinion of all the professionals who evaluated
Jackson that he suffers from mild mental retardation which
severely limits his ability to understand the charges against
him, the legal proceedings he faced, and his capacity to ra-
tionally assist his attorney. The same professionals, including
staff at Patton, concluded repeatedly—over three years—that
Jackson’s condition was chronic and would not improve with
treatment. So, in June 2008, Dr. Jones wrote “[d]ue to
the developmental nature of [Jackson’s] problems . . . his
lack of mental competence is not changeable.” In June 2009,
Patton staff wrote despite giving Jackson significant indi-
vidual attention Jackson remained incompetent and “there
is no substantial likelihood that Jackson will regain compe-
tency in the foreseeable future.” In January 2010, Dr. Kania
wrote, “it is unlikely that [Jackson] will ever be restored to
competency, given that his incompetency is the result of a
longstanding and significant intellectual deficit.” And in July
2010, Dr. Leeb wrote “Jackson can never have his compen-
tancy restored as he has never been competent to begin with.
. . . [¶] Mr. Jackson’s condition is permanent and stable. . . .
He will never be competent.”

Patton staff did not directly address the substance of these
opinions. Instead, they decided to put Jackson through drills
aimed at teaching him the rudiments of the judicial system.
They wrote that despite his “innate, biological intellectual
ability,” “he has demonstrated adequate though rudimentary
understanding of court processes.” They noted, however, that
“he requires assistance to effectively weigh options in prob-
lem solving and make well-informed decisions. He responds
best to simplistic, concrete communication that is repeated to
him numerous times.” (Italics added.) They then point to the
answers he was able to give their repeated, simplistic ques-
tions about plea bargains, judges, prosecutors, and evidence
as evidence that he had attained competency. We conclude
the evidence that Patton staff drilled Jackson in how to an-
swer the most basic questions about the judicial process and
he learned to parrot the expected responses after numerous
repetitions did not provide substantial evidence Jackson was
competent to stand trial. As Dr. Kania opined, the fact Jac-
son could respond only to “simplistic and concrete communi-
cation that is repeated to him numerous times . . . suggest[s]
that he is not trial competent,” rather than the opposite. (Ital-
ics added.)

The People argue we should give weight to the fact that
“[d]uring the plea colloquy, appellant responded appropriately
to all of the court’s questions and never said anything
that would have caused the court to doubt [Jackson’s] compen-
tency.” We take no comfort from the colloquy. At the plea
and sentencing hearings, the trial court treated Jackson like an
ordinary defendant with a normal ability to comprehend the
proceedings. The court posed stock explanations and ques-
tions to Jackson, which largely consisted of paragraph-long
statements describing the rights Jackson would be waiving
and the contents and consequences of his plea agreement fol-
lowed by questions seeking his assent or dissent. But Jackson
is not a typical criminal defendant. Every report by every pro-
fessional who evaluated him concluded he had very limited
abilities to comprehend and communicate complex informa-
tion. Patton staff concluded he had an IQ of 53 and operated
in the bottom one percent of the population, and found him
competent to stand trial only on the basis of his ability to re-
spond appropriately to repeated, simplistic questions. Faced
with such a defendant, the trial court could not reasonably
rely on Jackson’s responses to the standard plea colloquy as
confirmation of his competency. (See United States v. Mas-
ters (D.C. Cir. 1976) 539 F.2d 721, 728-729, overruled on
[“standard . . . colloquy may prove an inadequate measure of
the validity of a plea proffered by a defendant of questionable
mental competence”].)

An example from the colloquy at sentencing is illustra-
tive. The court explained to Jackson his guilty plea had been
“contingent upon the 288.1 reports being favorable to you”
and told him “I don’t necessarily see those as favorable for
you.” The court then explained he had “a right to withdraw
[his] plea entirely and start over again if you want to. Or, the
other option is that I can go ahead and sentence you to the
mitigated term of three years. ¶. . . So do you want to go
ahead and do that?” Jackson responded, “Yes.” But the trial
court, having commented on Jackson’s “significant mental
issues,” made no effort to explain what a section 288.1 re-
port was, what it meant for his guilty plea to be “contingent
” on a favorable report, or what it would mean for Jackson to
“withdraw [his] plea entirely and start over again.” It is un-
reasonable to think the man described in the psychological
evaluations prepared in this case—a man who barely un-
stood the concept of a plea bargain and has the intelligence
of a five year old—could understand the complicated choice
the court presented to Jackson. Thus, we conclude the trial
court’s exchanges with Jackson do nothing to prop up the
court’s competency findings.

Jackson asks us to go further and hold the trial court erred
by finding him competent without obtaining the psychologi-
cal evaluations and trial court rulings in the Riverside case.
We are not prepared to take that step. The trial court was
required to base its competency determination on substan-
tial evidence. If the report prepared and submitted by Patton
staff had supplied substantial evidence, we would not reverse
just because compelling contrary evidence existed. (E.g., GHK
Associates v. Mayer Group, Inc. (1990) 224 Cal.App.3d 856,
872 [“In determining whether there is any substantial evi-
dence to sustain the judgment, the appellate court will look
only at the evidence supporting the prevailing party and will
disregard the contrary showing.”].)

We recognize obtaining additional information from the
Riverside proceedings may have assisted the San Bernardino
court, providing additional support for refusing to accept the
Patton competency opinions. However, the bottom line is,
the record in this case already contained so much compelling
evidence of Jackson’s incompetence and the Patton reports
provided so little value, that additional information from the Riverside proceedings would have been cumulative.

III

DISPOSITION
We reverse the judgment.

CERTIFIED FOR PUBLICATION

SLOUGH J.

We concur: McKINSTER Acting P. J., MILLER J.

THE PEOPLE, Plaintiff and Respondent,

v.

MISHA YVANNE SANDERS, Defendant and Appellant.

No. D072875
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. SCE331514)
APPEAL from an order of the Superior Court of San Diego County, Lisa R. Rodriguez, Judge. Affirmed.
Filed April 17, 2018

COUNSEL
Randy Mize, Public Defender, Angela Bartosik, Chief Deputy, Michael Begovich and Robert L. Ford, Deputy Public Defenders.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

In 2014, Misha Yvanne Sanders pleaded guilty to two counts of commercial burglary (Pen. Code, § 459) and two counts of identity theft (§ 530.5, subd. (a)). The court sentenced Sanders to a determinate term of three years eight months.

In 2017, Sanders filed a petition under Proposition 47 (Safe Neighborhoods and Schools Act, § 1170.18) to reclassify all of her convictions as misdemeanors and to dismiss the identity theft counts. The trial court granted the petition as to the burglary counts, reasoning they qualified as “shoplifting” under section 459.5. The court denied the petition with regard to the violations of section 530.5.

Sanders appeals contending the offenses under section 530.5 must be deemed petty thefts since the amounts of money or merchandise taken in the burglaries (shoplifting) was less than $950. She asserts that in light of the court’s opinions in People v. Page (2017) 3 Cal.5th 1175 (Page) and People v. Romanowski (2017) 2 Cal.5th 903 (Romanowski), we should find the violations of section 530.5 to be theft offenses and thus subject to the determination they amount to petty theft within the meaning of section 490.2.

We will find the violations of section 530.5, subdivision (a) are not theft offenses. They are not specified in section

1. All further statutory references are to the Penal Code unless otherwise specified.
1170.18, and are not subject to reclassification under that section. Nor do we believe the decisions in Page, supra, 3 Cal.5th 1175 and Romanowski, supra, 2 Cal.5th 903 compel adoption of Sanders’s interpretation of those decisions. Accordingly, we will reject Sanders’s contention and affirm the trial court’s decision.

**STATEMENT OF FACTS**

The facts of the offenses are not in dispute and are taken from the probation officer’s report.

It is sufficient to note Sanders discovered a credit card on the ground. The card belonged to someone else. Sanders used the card to obtain cigarettes and a beverage at a 7-11 store. She also obtained cash at a Burger King restaurant. The total amount of charges made by Sanders on the credit card were $174.61.

**DISCUSSION**

Simply put, Sanders contends that since the burglary charges have been reclassified as misdemeanor shoplifting and the amount of goods taken from the merchants was under $950, the section 530.5 violations must be considered as petty thefts and therefore must be reduced to misdemeanors and dismissed. As we will point out, even though section 530.5 violations are often referred to as “identity theft,” they are not theft offenses. Theft is not an element of the offense. The offense is not in the theft chapter (chapter 5) of the Penal Code, but is instead listed in chapter 8 dealing with false personation. The gravamen of the section 530.5, subdivision (a) offense is the unlawful use of a victim’s identity. Moreover, as we will discuss, there were multiple victims in the offenses charged. The entry into commercial establishments to obtain property by false pretenses victimized the merchant, and not the cardholder. The cardholder is a victim because her identity was unlawfully used.

Additionally, we will point out that section 530.5, subdivision (a) is not one of the listed offenses in section 1170.18 as being subject to reclassification. We will also note that section 473 (forgery) as revised in Proposition 47, specifically excludes cases where the person is convicted of both forgery and identity theft in section 530.5 from the $950 minimum threshold.

**A. Proposition 47**

Proposition 47 was approved by the voters in November 2014. The proposition reduced the punishment for a number of theft related offenses to misdemeanors where the requisite minimum dollar value of the items taken has not been proved. Additionally, section 1170.18, subdivision (a) creates a procedure which permits a previously convicted defendant to petition the trial court for reclassification of the convicted offenses and for resentencing.

The court in Page, supra, 3 Cal.5th at pages 1181 to 1182 summarized the pertinent portions of the reclassification provisions relevant to our analysis. The court said:

“Proposition 47’s resentencing provision, section 1170.18, subdivision (a), provides, in pertinent part: ‘A person who, on November 5, 2014, was serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (“this act”) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.’ The cited provisions include section 490.2, subdivision (a), added by Proposition 47, which provides in pertinent part: ‘Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . .’ [¶] Under these provisions, a person serving a sentence for grand theft under Penal Code section 487 or another statute expressly defining a form of grand theft (e.g., Pen. Code, §§ 484e, 487a, 487i) is clearly eligible for resentencing under section 1170.18 if he or she can prove the value of the property taken was $950 or less. (See People v. Romanowski (2017) 2 Cal.5th 903, 910–914 (Romanowski) [defendant convicted for theft of access card information under Pen. Code, § 484e eligible for resentencing].)”

Also relevant here is that the proposition amended the forgery statute, section 473, to make forgeries misdemeanors unless the threshold amount of loss is more than $950. Subdivision (b) of section 473 provides:

“(b) Notwithstanding subdivision (a), any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars ($950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.” (Italics added.)
Under the amended section where a defendant is convicted of both forgery and violation of section 530.5 the minimum dollar amount for felony classification does not apply.

Finally, we find it significant that section 530.5 is not one of the listed offenses in section 1170.18 which is subject to the $950 loss limitation for felony sentencing. Although the absence of specific listing of the offense in section 1170.18 provides some guidance, we recognize our Supreme Court has applied section 490.2 as created in Proposition 47 to non-listed offenses. (Romanowski, supra, 2 Cal.5th 903 [§ 484e]; Page, supra, 3 Cal.5th 1175 [Veh. Code, § 10851].)

B. Romanowski and Page

Sanders relies heavily on the opinions in Romanowski, supra, 2 Cal.5th 903 and Page, supra, 3 Cal.5th 1175 for her position that offenses under section 530.5, subdivision (a) should be treated as theft offenses, at least when the offender uses another person’s identity to obtain small amounts of property from banks and other merchants. We do not think either case compels or even supports her argument.

In Romanowski the court dealt with the offense of theft of an access card under section 484e. The offense is not listed in section 1170.18, however, the court found that theft of an access card is a form of grand theft. As such, the offense comes within the scope of section 490.2, created by Proposition 47. (Romanowski, supra, 2 Cal.5th at pp. 907-908.)

Section 490.2, subdivision (a) provides:

“(a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.”

In Page, supra, 3 Cal.5th 1175, the court addressed a different offense, which was also an offense not specified in section 1170.18. There the court dealt with Vehicle Code section 10851, the unlawful taking and driving of a vehicle. Again, the court concluded that at least as to those cases where the vehicle was taken with the intent to steal it must fall within the scope of section 490.2. Thus, the court concluded such offenses involving thefts must be of a vehicle valued greater than $950 in order to be treated as a felony.

“By its terms, Proposition 47’s new petty theft provision, section 490.2, covers the theft form of the Vehicle Code section 10851 offense. As noted, section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who ‘obtain[ed] any property by theft’ where the property is worth no more than $950. An automobile is personal property. ‘As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950 by theft must be charged with petty theft and may not be charged as a felon under any other criminal provision.’ [Citation.]” (Page, supra, 3 Cal.5th at p. 1183.)

Both Supreme Court opinions are based on the conclusions that the offenses at issue were in whole or in part based upon theft from the victim. It is the theft nature of the offenses that brings the offense within Proposition 47’s monetary threshold for felony punishment.

As we will discuss below, we are satisfied that section 530.5, subdivision (a) is not a theft based offense. Theft is not an element of the offense. It is the use of the victim’s identity that supports the application of the statute. Thus, we do not believe either Romanowski, supra, 2 Cal.5th 903 or Page, supra, 3 Cal.5th 1175 support the appellant’s arguments in this case.

C. Identity Theft

Central to appellant’s arguments is the claim that section 530.5, subdivision (a) is at least partially a theft offense. The argument continues that at least where the victim’s identity is used to obtain property from someone else, it should be treated as a theft offense subject to section 490.2. That predicate leads appellant to claim that when she used the victim’s card to obtain property from a merchant by false pretenses, she committed shoplifting under section 459.5 and the use of the card must be treated as petty theft. The basic problem is appellant’s acts of stealing from merchants do not amount to a theft from the cardholder. The cardholder was harmed by the unlawful use of her card and thefts from the merchants do not make the cardholder a victim of those thefts.

Perhaps the confusion which arises in evaluating crimes under section 530.5 is the fact it is referred to as “identity theft.” As the court observed in People v. Truong (2017) 10 Cal.App.5th 551, 561: “Although commonly referred to as ‘identity theft’ [citation], the Legislature did not categorize the crime as a theft offense. Thus, while section 484e is found—along with section 496—in part 1, title 13, chapter 5, ‘Larceny,’ section 530.5 is in chapter 8, ‘False Personation and Cheats.’ “ In Romanowski, supra, 2 Cal.5th at pages 908 to 909, the court considered the significance of the legislative decision to place section 484e in chapter 5. The court found the legislative decision informative and supportive of the court’s ultimate conclusion that theft of an access card was a “grand theft” offense, subject to the $950 limitation of section 490.2.

Here the facts of the offenses are not in dispute. Our task is to examine the legal conclusion regarding the scope of section 530.5, which is subject to our independent review.
Section 530.5, subdivision (a) provides:

“Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.”

Section 530.55, subdivision (b) defines “personal identifying information” as:

“[A]ny name, address, telephone number, health insurance number, taxpayer identification number, school identification number, state or federal driver’s license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother’s maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person, or an equivalent form of identification.”

The elements of identity theft include (1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for an unlawful purpose; and (3) that the person who uses the identifying information does so without the consent of the person whose personal identifying information is being used. (Barba, supra, 211 Cal.App.4th at p. 223.)

Identity theft is not actually a theft offense. Rather it seeks to protect the victim from the misuse of his or her identity. In People v. Valenzuela (2012) 205 Cal.App.4th 808, the court said:

“[T]he crimes of identity theft, and complementary statutory provisions, were created because the harm suffered by identity theft victims went well beyond the actual property obtained through the misuse of the person’s identity. Identity theft victims’ lives are often severely disrupted. For example, where a thief used the victim’s identity to buy a coat on credit, the victim may not be liable for the actual cost of the coat. However, if the victim was initially unaware of the illicit transaction, the damage to the person’s credit may be very difficult to repair. The perpetrator could commit other crimes by using the victim’s identity, causing great harm to the victim. Thus, identity theft in the electronic age is an essentially unique crime, not simply a form of grand theft.” (Id. at p. 808.)

Our analysis of the statute and the cases interpreting it lead us to conclude Sanders violation of the “identity theft” statute was not a theft as it relates to the cardholder. It was an unlawful use, one of several unlawful uses set forth in the statute. To the extent there was a theft within the scope of the Proposition 47 limitations in section 490.2, it was against the property interest of the merchants who were defrauded by appellant’s presentation of the card as belonging to her, a false pretense.

The crime of shoplifting as defined in section 459.5 was the entry into a commercial establishment, during regular business hours with the intent to commit theft of less than $950. The cardholder’s property rights were not implicated by that offense, but her identity was unlawfully used. Appellant has received the benefit of Proposition 47’s recasting of certain forms of commercial burglary. She is not, however, entitled to have her nontheft offenses of violating section 530.5, subdivision (a) reclassified under Proposition 47. The trial court correctly denied the motion to reclassify and re-sentence the “identity theft” counts.
DISPOSITION

The trial court’s order denying the petition to reclassify the section 530.5, subdivision (a) offenses is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR: HALLER, J., IRION, J.

Cite as 18 C.D.O.S. 3532

THE POLICE RETIREMENT SYSTEM OF ST. LOUIS et al., Plaintiffs and Appellants,

v.

LARRY PAGE et al., Defendants and Respondents.

No. H043220
In The Court of Appeal of the State of California
Sixth Appellate District
(Santa Clara County Super. Ct. No. 1-14-CV-261485)
Filed April 16, 2018

COUNSEL

Counsel for Plaintiffs/Appellants: The Police Retirement System of St. Louis, Marilyn Clark and Pradeep Shah, Brian J. Robbins, Kevin A. Seely, Gina Stassi, Michael J. Nicoud, Robbins Arroyo LLP, Joseph W. Cotchett, Nancy L. Fineman, Mark C. Molumphy, Cotchett, Pitre & McCarthy


OPINION

In this derivative action, shareholders of Google, Inc. allege the corporation was harmed by executives who agreed to refrain from actively recruiting employees working for competitors. The trial court granted the defendants’ summary judgment motion, finding the action barred by the applicable statute of limitations. We will affirm.

I. BACKGROUND

Plaintiffs are three Google shareholders who brought separate derivative suits that were later consolidated. Defendants are officers and directors of Google, with the corporation itself included as a nominal defendant. The lawsuit stems from agreements Google executives made with competitors regarding the recruitment of employees. The nature of the agreements was that Google would not “cold call” (meaning

1. Defendants move for an order correcting the name of the corporate defendant to read “Google, LLC” instead of “Google, Inc.,” because after the lawsuit was filed the company changed its name. Since the docket correctly reflects the parties named in the complaint, we deny that motion.
initiate contact for the purpose of recruiting) employees of
certain competitors, such as Apple. The competitors similarly
agreed to not call cold Google employees.

In September 2010, the United States Department of Just-
tice filed a civil antitrust action against Google and several
other companies that participated in the no cold call agree-
ments. The complaint alleged that the agreements illegally
diminished competition for high tech employees, denying
them job opportunities and ultimately suppressing wages.
The Department of Justice sought an injunction prohibiting
the companies from engaging in such conduct in the future.
The action was resolved the same day it was filed: Google,
along with the other companies, entered into a stipulated
judgment in which they admitted no liability but agreed
to be bound by an injunction prohibiting the no cold call
arrangements.

Google posted a statement online announcing the settle-
ment of the antitrust action, denying any wrongdoing, and
indicating that to resolve the matter it had agreed to cease
the no cold call practice. The statement included a link to
a press release from the Department of Justice that described
the settlement terms. There was widespread media cover-
age of the antitrust action. Articles about the Department of
Justice investigation into Google’s hiring practices and the
settlement of the enforcement action appeared in The Wall
Chronicle, among many other publications. The matter was
also reported on in at least 30 television news broadcasts.

In mid-2011, several class action lawsuits were filed
against Google and the other companies named in the Depart-
ment of Justice action. The class action suits were brought
by employees who alleged that the cold calling restrictions were
illegal and had caused them wage losses. The cases were
removed to federal court and consolidated, and the consoli-
dated action sought over $3 billion in damages on behalf of
more than 100,000 employees.

This suit was filed in February 2014. Plaintiff shareholders
sued to recover damages caused to Google by defendants’
decision to enter into the anti-competitive agreements. The
complaint alleged several causes of action, all based on the
theory that the company had been harmed because it suffered
financial losses resulting from the Department of Justice an-
titrust action and the employee class action suits. It also al-
leged the agreements made by defendants harmed the compa-
ny’s reputation and stifled innovation. Defendants moved for
summary judgment on the ground that the entire action was
barred by the applicable three-year statute of limitations. The
trial court granted the motion and entered judgment in favor
of defendants, finding the action untimely because plaintiffs
should have been aware of the facts giving rise to their claims
by at least the time of the Department of Justice antitrust ac-
tion in 2010.

II. DISCUSSION

A. Standard of Review

We review a trial court’s decision granting summary judg-
ment de novo, and liberally construe the evidence in favor
of the party opposing the motion. (Lonicki v. Sutter Health
Central (2008) 43 Cal.4th 201, 206.) To decide whether
summary judgment was properly granted, we engage in
the same analysis that was required of the trial court. (Hamburg

Since defendants moved for summary judgment based on the
affirmative defense of the statute of limitations, they have the
“burden of persuasion” on that point, meaning they must con-
vince the court that no reasonable trier of fact could find in
plaintiffs’ favor on the statute of limitations issue. (Aguilar v.
Atlantic Richfield Co. (2001) 25 Cal.4th 826, 849 [In moving
for summary judgment, a defendant may meet the burden of
establishing that a cause of action has no merit by showing
there is a complete defense to that cause of action.]) To ac-
complish that, defendants must first present evidence establish-
ing that plaintiffs’ claims are time barred. It then falls to
plaintiffs to counter with evidence creating a dispute about
a fact relevant to that defense. (Id. at p. 850.) If defendants
presented evidence establishing the defense and plaintiffs
did not effectively dispute any of the relevant facts, summary
judgment was properly granted. (Code Civ. Proc., § 437c,
subd. (p)(2).)

B. Choice of Law

The parties agree that we must apply the law of the state
of Delaware in analyzing the limitations issue here. Because
only one state should have the authority to regulate the affairs
of a corporation, the “internal affairs doctrine” generally re-
quires application of the law of the state of incorporation to
any dispute regarding relations between the corporation and
its shareholders or officers and directors. (Grosset v. Wenaas
(2008) 42 Cal.4th 1100, 1106, fn. 2, citing Edgar v. MITE
Corp. (1982) 457 U.S. 624, 645.) Since Google was incorpo-
rated in Delaware, we will apply Delaware law to determine
whether plaintiffs’ claims are time barred. (See Hambrecht
& Quist Venture Partners v. American Medical Internat., Inc.
(1995) 38 Cal.App.4th 1532, 1544 [applying Delaware stat-
ute of limitations to a dispute governed by Delaware law].)²

C. Summary Judgment Was Properly Granted

The statute of limitations for plaintiffs’ claims is three
years. (10 Del. C., § 8106 [providing for a three-year statute
of limitations for non-personal injury claims].) The causes of
action alleged in the complaint are all based on harm flow-
ing from the no cold call agreements made by defendants,

² Our citations to Delaware authorities include unpublished opin-
ions because “unreported Delaware court opinions are frequently cited
by Delaware courts,” and in Delaware an opinion need not be reported
to have persuasive value. (Nationwide General Ins. Co. v. Thomas
HBO & Co. (Del. 1987) 531 A.2d 1204, 1207 [unpublished opinions
are not necessarily stare decisis but are entitled to great deference].)
conduct that predated the September 2010 Department of Justice antitrust action. Plaintiffs did not file this action until February 2014, more than three years after the events giving rise to their claims, so they cannot—and do not—argue defendants’ conduct occurred within the limitations period. Rather, plaintiffs contend that the operative facts were not known to them until much later, within three years of when they filed the lawsuit.

Delaware law allows for a limitations period to be tolled during the time the facts underlying a claim were “so hidden that a reasonable plaintiff could not timely discover them,” including when the operative facts were fraudulently concealed or where the plaintiff relied in good faith on a fiduciary who prevented plaintiff from gaining a full understanding of the circumstances. (In re Dean Witter Partnership Litig. (Del. 1998) 1998 Del. Ch. Lexis 133, p. 19.) But the statute of limitations will be tolled only until a plaintiff has inquiry notice of the facts giving rise to the cause of action, meaning there is enough information available to prompt a reasonable person to commence an investigation that, if pursued, would lead to discovery of the harm. (Pomeranz v. Museum Partners, L.P. (Del. 2005) 2005 Del. Ch. Lexis 10, p. 11.) To determine whether summary judgment was proper here, we must decide if defendants have established beyond dispute that plaintiffs were on inquiry notice of their claims more than three years before the complaint was filed.

“Inquiry notice does not require actual discovery of the reason for the injury. Nor does it require plaintiffs’ awareness of all of the aspects of the alleged wrongful conduct.” (In re Dean Witter Partnership Litig., supra, 1998 Del. Ch. Lexis 133, at p. 31.) Having all the facts necessary to articulate the wrong is not required; plaintiffs “may not simply wait until the details of the harm are provided to them before the statute begins to run.” (Pomeranz v. Museum Partners, L.P., supra, 2005 Del. Ch. Lexis 10 at p. 44.) We agree with the trial court that plaintiffs were on inquiry notice of potential harm from defendants’ anti-competitive agreements no later than the time the Department of Justice antitrust action was publicized in September 2010. The publicly available complaint in that action alleged that “[b]eginning no later than 2006, Apple and Google agreed not to cold call each other’s employees. Senior executives at Apple and Google reached an express no cold call agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communication.” The complaint went on to allege that Google entered into similar agreements with other companies, and that the agreements restrained trade in violation of federal antitrust laws. Google publicly announced that it had resolved the antitrust action, and included a link to the Department of Justice press release detailing the terms of the settlement. The Department of Justice investigation and resulting enforcement action were widely reported by the media. Given those undisputed facts, no reasonable trier of fact could conclude that as of September 2010 plaintiffs did not have enough information to at least make them suspicious that the corporate officers and directors named as defendants were involved in anti-competitive recruiting agreements. Defendants have therefore established their statute of limitations defense as a matter of law and are entitled to summary judgment.

Relying on In re Primedia, Inc. Shareholders Litigation (Del. 2013) 2013 Del. Ch. Lexis 306 (Primedia), plaintiffs argue that even if there were enough information to suspect that Google officers and directors had participated in wrongdoing, inquiry notice requires a showing that an investigation would have yielded the facts necessary to “plead a viable claim.” Primedia describes inquiry notice in a derivative action as a two-step process: “First, sufficient information must be available to arouse a reasonable stockholder’s suspicions. Second, the reasonable stockholder must be able to commence an investigation and discover the facts necessary to plead the claim and survive the motion to dismiss.” (Id. at pp. 39–40.) Plaintiffs contend an investigation at the time of the Department of Justice antitrust action would not have provided facts sufficient to plead an action that would survive a motion to dismiss (as required under Primedia), because it would not have revealed any misconduct by the officer and director defendants named in the complaint.

Unlike plaintiffs, we do not read Primedia’s “viable claim” language as imposing any new or different criteria for the inquiry notice analysis. The standards for a complaint to survive a motion to dismiss in Delaware are not especially onerous. The complaint’s allegations are accepted as true, and the court must give the plaintiff the benefit of all reasonable inferences that can be drawn from the pleading. (Solomon v. Pathe Communications Corp. (Del. 1996) 672 A.2d 35, 38.) A motion to dismiss will be granted only if the court determines that “a plaintiff could prevail on no set of facts that can be inferred from the pleadings.” (Ibid.) Primedia does not say that an initial investigation would have to yield the facts needed to prove the plaintiff’s case—only facts giving rise to an inference suggesting plaintiff will prevail. (Desimone v. Barrows (Del. 2007) 924 A.2d 908, 929 [Under Delaware pleading standards, “a complaint must plead enough facts to plausibly suggest that plaintiff will ultimately be entitled to the relief she seeks.”].) In this case, the inference necessary for plaintiffs to prevail under the theory of liability alleged in their complaint is that the officer and director defendants were involved in the anti-competitive agreements to the detriment of Google shareholders. By the year 2010, even without conducting any further investigation, plaintiffs had facts to support that inference: the Department of Justice had filed an antitrust action alleging that senior executives at Google agreed not to actively recruit certain competitors’ employees, in violation of federal law. Although neither the allegations made by the Department of Justice nor Google’s immediate settlement of the antitrust action necessarily mean that the company’s directors and officers were involved with the no cold call agreements, those facts give rise to a reasonable
In plaintiffs’ view, they did not have enough information to put them on notice of their claims until 2012, when emails produced in discovery in the employee class action suit relating to the no cold call agreements first became publicly available. The emails include messages sent and received by the CEO of Google discussing the agreements, and plaintiffs characterize the email disclosure as the first indication that high level executives were aware of and participated in the agreements. “The difficulty for the plaintiffs is that their argument depends on the premise that inquiry notice only exists once they were aware of all material facts relevant to their claims. That is not the case.” (Pomeranz v. Museum Partners, L.P., supra, 2005 Del. Ch. Lexis 10, at pp. 46–47.)

Plaintiffs confute the concept of proving a claim with that of being aware of a claim. Certainly, the emails would be useful in proving the claims they have alleged. But as already discussed, the facts available almost two years earlier would have caused a reasonable shareholder to suspect officers and directors at Google were involved in the wrongdoing. So plaintiffs should have been aware of their claims by then, even if they did not yet have all the evidence to prove them. It is not necessary that a plaintiff find the smoking gun before being charged with inquiry notice. (Id. at p. 44 [A plaintiff need not have all the details regarding the alleged harm before the statute begins to run].)

Plaintiffs point to an inability to compel the corporation to produce documents before filing suit as a reason they were not on inquiry notice in 2010. Citing La. Mun. Police Employees’ Ret. Sys. v. Lenmar Corp. (Del. 2012) 2012 Del. Ch. Lexis 230, p. 8, they argue that settlement of a lawsuit without admitting wrongdoing and media reports regarding possible corporate misconduct are insufficient grounds to support a shareholder demand for inspection of corporate books and records. But the issue is not whether plaintiffs could have compelled the company to submit to a shareholder inspection demand in 2010, as the facts already publicly known at that time put them on inquiry notice. Further, plaintiffs do not identify any specific information they were prevented from learning by not being able to inspect records—to the contrary, they concede that an inspection demand would not have yielded any evidence of the no cold call agreements because there was no information about the agreements in corporate minutes or related records. If there was no evidence to be obtained from a records inspection, the inability of plaintiffs to conduct one has no bearing on whether they had inquiry notice.

Plaintiffs argue that the information related to the Department of Justice enforcement action cannot be viewed in isolation but rather must be viewed in context with everything else that was known at the time. They assert that a reasonable shareholder would not have suspected Google executives were involved with the no cold call agreements—despite the antitrust action alleging just that—because the “total mix” of information made it appear that Google had not engaged in any misconduct. The total mix of information as described by plaintiffs includes the facts that Google’s announcement of the settlement with the Department of Justice was crafted to minimize its import; that Google paid no fine nor was it subjected to any other penalty; that Google did not disclose anything about the settlement in its regulatory filings; and that certain news articles described the hiring process at Google as being intensely competitive. Plaintiffs argue one could not reasonably suspect the harm that had been caused to the corporation based on the available information as a whole. But even considering the additional information plaintiffs offer, the fact that the Department of Justice brought an enforcement action alleging that a practice engaged in by Google executives violated federal law would warrant further investigation by a prudent shareholder. (See Pomeranz v. Museum Partners, L.P., supra, 2005 Del. Ch. Lexis 10 at p. 39 [“The plaintiffs, as rational investors, should have begun asking questions.”].)

Plaintiffs cite Neubauer v. Goldfarb (2003) 108 Cal.App.4th 47, 64, for the proposition that under Delaware law, whether a reasonable shareholder would consider a piece of information important given its context is a question of fact precluding summary judgment. Neubauer is inapposite. In that case, the issue was whether a misrepresentation by a corporate officer was sufficiently material such that the plaintiff could avoid summary judgment on a cause of action for breach of fiduciary duty. There was no statute of limitations issue, so the court did not decide whether the facts were sufficient to place a shareholder on inquiry notice.

Plaintiffs also rely heavily on In re Tyson Foods, Inc. Consol. S’holder Litig. (Del. 2007) 919 A.2d 563, 591, in which shareholders were not on inquiry notice “simply because some relevant information was in the public domain.” But the nature of the wrong in Tyson Foods was far more latent than what plaintiffs allege here. It involved spring loading stock options, meaning granting options to executives just before the announcement of an event that would cause the stock price to increase. Though the information needed to prove that claim—the dates of the option grants and the various public announcements—was readily available, the court declined to find that reasonable diligence requires a plaintiff to sift through records disclosing the option grants, compare them with media reports of the public announcements, and then identify the pattern from which spring loading could be inferred. (Ibid.) In that case, even though the underlying information was available, the conclusion giving rise to the claims was not apparent on the face of that information. The situation here is reversed—plaintiffs did not need to piece together any facts to reach the conclusion giving rise to their claims. The wrong that formed the basis of plaintiffs’ claims had already been discovered by the Department of Justice; plaintiffs only needed to seek out further supporting evidence.

Plaintiffs urge us to find that the statute of limitations was tolled on the theory that Google concealed facts about the
settlement with the Department of Justice and made misleading statements about it. In plaintiffs’ view, Google’s announcement of the settlement sanitized it to such a degree that it appeared to be a routine event, and the failure to report the settlement in any regulatory filings reinforced that idea.

A limitations period will be tolled while a defendant “engaged in fraudulent concealment of the facts necessary to put a plaintiff on notice of the truth.” (In re Dean Witter Partnership Litigation, supra, 1998 Del. Ch. Lexis 133, at pp. 20–21.) And “[u]nder the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary.” (Weiss v. Swanson (Del. 2008) 948 A.2d 433, 451.) “But any possible tolling exception to the strict application of the statute of limitations tolls the statute ‘only until the plaintiff discovers (or [by] exercising reasonable diligence should have discovered) [the] injury.’ When plaintiffs are on inquiry notice the statute of limitations begins to run.” (Pomeranz v. Museum Partners, L.P., supra, 2005 Del. Ch. Lexis 10, at p. 11.) “[E]ven where defendant is a fiduciary, a plaintiff is on inquiry notice when the information underlying plaintiff’s claim is readily available.” (In re Dean Witter Partnership Litigation, supra, 1998 Del. Ch. Lexis 133, at p. 36.) We have already determined that the information giving rise to plaintiffs’ claims was readily available as of the time of the Department of Justice antitrust action in 2010. The theories of fraudulent concealment and equitable tolling therefore do not assist plaintiffs.

Plaintiffs point to a lack of response from the public as evidence that a reasonable shareholder would not have considered the settlement of the antitrust action to be an important event. According to plaintiffs, “the public did not react to the DOJ settlement as material news.” Of course, that argument is greatly undermined by the fact that within a year several employee class action lawsuits seeking billions of dollars in damages were filed based on the conduct alleged in the Department of Justice action. Plaintiffs acknowledge the class action suits were premised on the same general facts, but argue that the employee claims in those suits did not require proof the directors of the corporation lacked independence—an element that is required in this shareholder derivative action. Plaintiffs assert that even if the employees had enough facts to be on notice of their wage loss claims against the company, there were no facts at the time to suggest the individual directors were involved in the wrongdoing. Plaintiffs cite several Delaware cases where actions were dismissed for failure to plead specific facts to support an inference of director misconduct. But here, the facts available in 2010 did support an inference of director misconduct. The Department of Justice concluded after an investigation that senior executives at Google reached express no cold call agreements with competitors and actively managed those agreements. The fact that Google does not use the term “senior executives,” makes no difference: the description is still sufficient to put a reasonable shareholder on inquiry notice that corporate directors were involved in the conduct.

We acknowledge that certain facts relevant to plaintiffs’ claims were unavailable to them until well after September 2010. But the facts that were available at that time are sufficient to provide inquiry notice of the claims. The trial court therefore properly granted summary judgment to defendants based on the statute of limitations.³

III. DISPOSITION

The judgment is affirmed. Respondents shall be awarded costs on appeal.

Grover, J.

WE CONCUR: Elia, Acting P. J., Premo, J.

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³ Plaintiffs also argue in their opening brief that the trial court erred in summarily adjudicating their causes of action for indemnification and contribution because those causes of action accrued later than the others. As defendants correctly point out, plaintiffs never raised that argument in the trial court, so it is forfeited. (Brandwein v. Butler (2013) 218 Cal.App.4th 1485, 1519 (“Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider ... Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier.”)). As plaintiffs did not address the forfeiture argument in their reply brief, we assume they abandoned the issue. (Overstock.com, Inc. v. Goldman Sachs & Co. (2014) 231 Cal.App.4th 513, 530, fn. 11.)