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**Criminal Law**

Common law right of access supported denial of defendant’s motion to seal pretrial offer of proof regarding duress defense (M.D. Smith, J.)

*United States v. Carpenter*

9th Cir.; May 9, 2019; 17-10498

The court of appeals affirmed district court judgments. The court held that the district court did not abuse its discretion in denying defendant’s motion to seal her pretrial offer of proof in support of a duress defense.

Roxanne Carpenter, Fausto Velazquez, and others kidnapped Angel Gonzalez—who was suspected of stealing marijuana from a Mexican cartel—in order to turn him over to the cartel in exchange for 30 pounds of marijuana. Gonzalez escaped en route to the delivery site. Carpenter and Velazquez were tried before a jury on charges of conspiracy to kidnap and kidnapping. Both asserted a defense of duress. The jury found them guilty.

On appeal, Carpenter argued that the district court erred in requiring her to disclose, prior to trial, the facts underlying her claim of duress. Velazquez argued that the district court erred in allowing the introduction of evidence that he and others, after grabbing Gonzalez, went to a friend’s house to smoke methamphetamine while waiting to hear back from the cartel.

The court of appeals affirmed, holding that the district court properly required Carpenter to disclose her duress defense prior to trial. The Ninth Circuit requires defendants to make a prima facie showing of duress in a pre-trial offer of proof to be able to present this defense at trial. At issue here was the district court’s denial of Carpenter’s request to present her offer of proof under seal. The Supreme Court has recognized a First Amendment right of access to criminal trials. Because proffers for the duress defense have not traditionally been kept secret, the common law right of access attaches. Absent any showing by Carpenter of prejudice that would result from public disclosure, the district court did not abuse its discretion in denying Carpenter’s motion to seal her proffer.

The court agreed with Velazquez that the district court erred in admitting evidence of his methamphetamine use at trial; the low probative value of the evidence was substantially outweighed by its prejudice. However, in light of the government’s overwhelming evidence of Velazquez’ guilt, the references to his methamphetamine use, while prejudicial, were harmless.

**Immigration Law**

Federal law provides valid statutory basis for DHS protocols mandating return of undocumented asylum applicants to Mexico (per curiam)

*Innovation Law Lab v. McAleenan*

9th Cir.; May 7, 2019; 19-15716

The court of appeals granted the government’s motion for stay of a preliminary injunction pending appeal. The court held that plaintiffs failed to establish a likelihood of prevailing on their claim that the Department of Homeland Security (DHS) lacked statutory authority for protocols dictating the “return” of undocumented asylum applicants to Mexico.

In January 2019, DHS issued the MPP, which initiated a new inspection policy along the southern border. Before the MPP, immigration officers would typically process asylum applicants who lack valid entry documentation for expedited removal. If the applicant passed a credible fear screening, DHS would either detain or parole the individual until her asylum claim could be heard before an immigration judge. The MPP now directs the “return” of asylum applicants who arrive from Mexico as a substitute to the traditional options of detention and parole. Under the MPP, these applicants are processed for standard removal proceedings, instead of expedited removal. They are then required to wait in Mexico until an immigration judge resolves their asylum claims. The MPP is categorically inapplicable to unaccompanied minors, Mexican nationals, applicants who are processed for expedited removal, and any applicant “who is more likely than not to face persecution or torture in Mexico.”

The Innovation Law Lab and others filed suit in district court challenging the MPP on several grounds. After concluding that the MPP lacks a statutory basis and violates the Administrative Procedure Act (APA), the district court enjoined DHS on a nationwide basis “from continuing to implement or expand” the MPP. DHS moved for a stay of the preliminary injunction pending appeal.

The court of appeals granted DHS’ motion for a stay, holding that plaintiffs failed to show a likelihood of success on the merits. At issue is 8 U.S.C. §1225(b)(1), which outlines the procedures for expedited removal and specifies the class of noncitizens who are eligible for expedited removal, which class includes applicants lacking valid documentation. Plaintiffs argued that §1225(b)(1) required such applicants to be processed for expedited removal, and the MPP improperly bypassed that statutory requirement. The government argued that §1225(b)(1) defines the class of applicants eligible for expedited removal, but does not mandate that they actually be processed for expedited removal. The government reasoned that such applicants also fall within §1225(b)(2)(A), which, with certain exceptions, applies to all aliens seeking admission who are not “clearly and beyond a doubt entitled to be admitted,” and which does not provide for expedited
removal. The court found this reasoning persuasive, concluding that the government was likely to prevail on its contention that §1225(b)(1) “applies” only to those applicants for admission who are actually processed under its provisions. Under that reading of the statute, §1225(b)(1) does not apply to an applicant who is processed under §1225(b)(2)(A), even if that individual meets the criteria for treatment under §1225(b)(1). Because applicants placed in regular removal proceedings under §1225(b)(2)(A) may be returned to the contiguous territory from which they arrived under §1225(b)(2)(C), plaintiffs were unlikely to prevail on their claim that the MPP lacked a statutory basis. As to plaintiffs’ remaining claim that that the MPP should have gone through the APA’s notice-and-comment process, the court found DHS likely to prevail on this claim as well, since “general statements of policy” are exempted from the notice-and-comment requirement. Judge Watford concurred, agreeing that DHS is likely to prevail on the plaintiffs’ primary claim under §1225(b), but observing that congressional authorization alone does not ensure that the MPP is being implemented in a legal manner, which requires compliance with both domestic and international law. Judge W. Fletcher concurred in the result only, finding that §1225(b)(2)(C) does not provide authority for the MPP.

Insurance Law

Insurance companies’ “broker fees” constituted unauthorized premium (Thompson, J.)

Mercury Insurance Company v. Lara

C.A. 4th; May 7, 2019; G054496

The Fourth Appellate District reversed a judgment and remanded. The court held that insurance companies were properly subjected to penalties for charging, as so-called “broker fees,” premiums not approved by the California Department of Insurance (CDI).

The California Insurance Commissioner filed a notice of noncompliance against related entities Mercury Insurance Company, Mercury Casualty Company, and California Automobile Insurance Company, alleging they had charged rates not approved by CDI, and the rates were unfairly discriminatory in violation of Ins. Code §§1861.01(c) and 1861.05(b). The allegedly unapproved rates were in the form of broker fees charged by Mercury agents, which fees should have been disclosed as premium. After prevailing at an administrative hearing, the Commissioner imposed civil penalties against Mercury in the sum of $27,593,550 for almost 184,000 unlawful acts.

Mercury filed a petition for writ of mandate, arguing that the “broker fees” were not premium because they were charged for separate services. The trial court granted Mercury’s petition, rejecting the Commissioner’s contrary interpretation of the term “premium.” The court ruled further that the imposition of penalties was error because (1) Mercury did not have proper notice it was subject to penalties and (2) CDI unduly delayed in bringing the action.

The court of appeal reversed, holding that the writ was issued in error.

Mercury’s limited interpretation of premium as including only the cost of risk and administrative expenses was inconsistent with established definitions of premium. According to well-established law and regulations, premium includes all payments made by an insured that are part of the cost of insurance, including “all sums paid to an insurance agent.” Further, Mercury’s reliance on regulation and case law holding that broker fees—paid to an independent broker and not to an insurance agent—are not premium was misplaced. As established in Krumme v. Mercury Ins. Co. (2004) 123 Cal. App.4th 924, Mercury’s so-called “brokers” were not actually brokers but were de facto agents. Thus, the “broker fees” they charged were in fact premium that had to be reported and approved. Krumme was binding here. The court found further that Mercury had fair notice that the charging of unapproved rates could subject it to penalties. At all relevant times, the applicable provisions of the Ins. Code specifically barred charging unapproved or unfairly discriminatory rates and expressly authorized the Commissioner to impose penalties. Further, found CDI “consistently advised” Mercury that its charging of “broker fees” was a violation of the rate statutes subjecting Mercury to penalties. Finally, the court found no undue delay by CDI in bringing this action. Because there was substantial evidence supporting the Commissioner’s decision, the court remanded with directions for the trial court to deny the writ.

Labor Law

Regulation allowing union organizers access to agricultural employees on employers’ premises not unlawful seizure of property or per se taking in violation of Fourth or Fifth Amendments (Paez, J.)

Cedar Point Nursery v. Shiroma

9th Cir.; May 8, 2019; 16-16321

The court of appeals affirmed a district court judgment. The court held that application of a regulation allowing union organizers’ access to agricultural employees on their employers’ premises did not violate the employers’ Fourth or Fifth Amendment rights.

Acting under the authority of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (ALRB) promulgated a regulation allowing union organizers access to agricultural employees at employer worksites. The regulation
specifically restricted any one labor organization’s access to no more than no more than four thirty-day periods in any calendar year, and further limited an organizer’s right to enter an employer’s property to no more than one hour before the start of work, one hour after the completion of work, and one hour during the employees’ lunch period. After labor organizers entered their properties without notice or permission in 2015, agricultural employers Cedar Point Nursery and Fowler Packing Company, Inc. filed a complaint for declaratory and injunctive relief under 42 U.S.C. §1983 against several members of the ALRB and the ALRB’s executive secretary, alleging that the access regulation, as applied to them, amounted to a per se taking in violation of the Fifth Amendment because it caused a permanent physical invasion of their property without just compensation, and that it also effected an unlawful seizure of their property in violation of the Fourth Amendment.

The district court granted the ALRB’s motion to dismiss. The court of appeals affirmed, holding that the growers’ Fifth and Fourth Amendment claims were both without merit. The growers based their Fifth Amendment argument on the theory that the access regulation constitutes a permanent physical invasion of their property and thus is a per se taking. The court disagreed, finding that the regulation does not meet the definition of a permanent physical occupation. Although it does not have a contemplated end-date, the regulation does not allow random members of the public to unpredictably traverse the growers’ property 24 hours a day, 365 days a year. Further, although the regulation impaired the growers’ right to exclude others from their property, the impairment of only a single “strand” from their “bundle” of property rights was insufficient to constitute a permanent physical invasion. The growers based their Fourth Amendment claim on the theories that the access regulation effected a seizure (1) by authorizing a trespass onto their property and (2) by profound changing the character of their property. Neither contention had merit. First, the growers failed to allege an intrusion so constant, uncontrollable, unpredictable, damaging, and stressful as to “meaningfully interfere” with their possessory interests in their property. Second, they alleged no facts showing that the character of their property is somehow “profoundly different” because of the access regulation. They thus failed to plausibly allege that the access regulation effected a “seizure” within the meaning of the fourth Amendment.

Judge Leavy dissented, finding that where, as here, agricultural workers do not reside on the growers’ premises, and thus are arguably not beyond the reach of the union’s message, application of the access regulation may constitute an unconstitutional taking. In such circumstances, the burden should shift to defendants to show “unique obstacles” that frustrate union organizers’ reasonable access to the growers’ employees.

Litigation

Discretionary dismissal of case one month prior to trial constituted abuse of discretion (Tucher, J.)

Corrinet v. Bardy
C.A. 1st; May 9, 2019; A153241

The First Appellate District reversed a judgment of dismissal. The court held that the trial court abused its discretion in granting defendants’ motion for dismissal when a trial date had been set pursuant to the parties’ stipulation and the case was ready for trial.

Attorney Mark Corrinet sued Michael Brady and others for breach of fiduciary duty and conversion based on defendants’ alleged attempts to extort his relinquishment of ownership interests in several limited liability companies. Corrinet filed the action in February 2013. Three related cases were later also filed. Despite the onset of illness in July 2013, Corrinet participated in case management conferences throughout 2013, 2014, 2015, and 2016. Both parties repeatedly averred that thus and the related cases involved “massive” discovery. In 2014, Corrinet gave defendants access to 8,000 pages of documents. Trial was eventually set for July 2017. In March 2017, Corrinet paid jury fees in advance of trial. The following month, he filed a motion by stipulation to change the trial date. The motion was supported by Corrinet’s declaration and a letter from his doctor, which described Corrinet’s health problems and explained why he was unable to participate as a witness at trial or practice law for a minimum of at least three months. Counsel for defendants expressly stipulated to delaying the trial date to January or February 2018. Trial was set for January 22, 2018. In September 2017, attorney Grover Perrigue replaced Corrinet as counsel of record. In November, Corrinet moved to waive the five-year statute for bringing the action to trial due to the fact that Perrigue had suffered a stroke and undergone heart surgery, necessitating his unanticipated withdrawal as counsel. Defense counsel refused to stipulate to a continuance of the trial date and moved to dismiss. Attorney Donald Schwartz, acting on Corrinet’s behalf, opposed, expressly declaring that Corrinet was ready for trial.

In December 2017, the trial court denied Corrinet’s motion and granted defendants’ motion to dismiss based on Corrinet’s lack of diligence in bringing the case to trial.

The court of appeal reversed, holding that the record failed to support the judgment of dismissal. Because Corrinet did not bring his case to trial within three years after filing his complaint, the trial court had discretion to dismiss the action for lack of prosecution. The trial court’s findings, however, were unsupported by the record. It was undisputed that Corrinet served discovery in April and May 2013. It was also undisputed that Corrinet responded to defendants’ discovery by making available at least 8,000 pages of documents, was
actively involved in the related cases with cross-discovery issues, paid jury fees, disclosed his expert witnesses, retained lawyers to assist him and filed a declaration of counsel attesting that he was ready to try this case. Both Corrinet’s health problems and those of attorney Perrigue were well documented, and the trial court itself found that Corrinet’s medical problems constituted good cause to reset the trial date to January 22, 2018. Dismissing a case under these circumstances, with a scheduled trial date was a month away and counsel’s prior express representation that Corrinet was ready for trial, was an abuse of discretion.

Public Utilities

Federal law bars lawsuit for money damages arising out of regulation of cable services (N.R. Smith, J.)

**Comcast of Sacramento I, LLC v. Sacramento Metropolitan Cable Television Commission**

9th Cir.; May 8, 2019; 17-16847

The court of appeals vacated district court judgments and remanded. The court held that plaintiff’s complaint, as pleaded, pertained to the regulation of cable services and was thus barred under 47 U.S.C. §555a(a).

Sacramento Metropolitan Cable Television Commission (SMCTC) regulated the provision of cable television services in Sacramento and the surrounding area. Comcast and related entities offered cable television services in the Sacramento area. Prior to 2008, Comcast was the beneficiary of a franchise issued by SMCTC. As part of that franchise, Comcast was required to pay a deposit to SMCTC. The 2006 enactment of the Digital Infrastructure and Video Competition Act (DIVCA) stripped local governments of their ability to grant cable franchises and established the California Public Utilities Commission (CPUC) as the sole franchising authority for a state franchise to provide video service. Following DIVCA’s enactment, Comcast transitioned over to a franchise issued by the CPUC, and its franchise agreement with SMCTC terminated by operation of law in 2011, except as to fees paid to SMCTC for use of the public right-of-way. Although the deposit previously paid to SMCTC was to be returned to Comcast upon expiration of the SMCTC franchise agreement, SMCTC kept it. When a dispute later arose over the fees due to SMCTC, SMCTC began deducting those fees from Comcast’s security deposit. Comcast filed suit for conversion, seeking the return of its security deposit.

Following cross-motions for summary judgment, the district court granted partial judgment in favor of both parties. The court of appeals vacated and remanded, holding that 47 U.S.C. §555a(a) barred the relief sought by Comcast.
Ninth Circuit Court of Appeals

Cite as 19 C.D.O.S. 4221

CEDAR POINT NURSERY; FOWLER PACKING COMPANY, INC., Plaintiffs-Appellants,

v.

GENEVIEVE SHIROMA; CATHRYN RIVERA-HERNANDEZ; SANTIAGO AVILA-GOMEZ, Esquire; ISADORE HALL III, Defendants-Appellees.

No. 16-16321

United States Court of Appeals for the Ninth Circuit

D.C. No. 1:16-cv-00185-LJO-BAM

Appeal from the United States District Court for the Eastern District of California

Lawrence J. O’Neill, Chief District Judge, Presiding

Argued and Submitted November 17, 2017

San Francisco, California

Filed May 8, 2019


Opinion by Judge Paez; Dissent by Judge Leavy

COUNSEL

Wencong Fa (argued), Jeremy Talcott, Joshua P. Thompson, and Damien M. Schiff, Pacific Legal Foundation, Sacramento, California; Ian B. Wieland and Howard A. Sagaser, Sagaser, Watkins & Wieland PC; Fresno, California, for Plaintiffs-Appellants.

R. Matthew Wise (argued), Deputy Attorney General; Mark R. Beckington, Supervising Deputy Attorney General; Douglass J. Woods, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Sacramento, California; for Defendants-Appellees.

Frank Garrison and Ilya Shapiro, Cato Institute, Washington, D.C., for Amicus Curiae Cato Institute.

Gina Cannon and Steven J. Lechner, Mountain States Legal Foundation, Lakewood, Colorado, for Amicus Curiae Mountain States Legal Foundation.

Nancy N. McDonough and Carl G. Borden, California Farm Bureau Federation, for Amicus Curiae California Farm Bureau Federation.

Mario Martínez, Martínez Aguilasocho & Lynch APLC, Bakersfield, California; Jacob C. Goldberg and Henry M. Willis, Schwartz Steinsapir Dohrman & Sommers LLP, Los Angeles, California; for Amici Curiae United Farm Workers of America and United Food and Commercial Workers Union, Local 770.

OPINION

PAEZ, Circuit Judge:

In 1975, the California legislature enacted the Agricultural Labor Relations Act (“ALRA”) to “ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.” Among the ALRA’s enactments was the creation of the Agricultural Labor Relations Board (“the Board”). Shortly after the ALRA’s effective date, the Board promulgated a regulation allowing union organizers access to agricultural employees at employer worksites under specific circumstances. In this case, we are asked to decide whether the access regulation is unconstitutional as applied to Plaintiffs, Cedar Point Nursery and Fowler Packing Company (collectively, “the Growers”).

The Growers appeal the district court’s dismissal of their complaint seeking declaratory and injunctive relief against members of the Board. The Growers contend that the access regulation, as applied to them, is unconstitutional in two ways. First, the Growers allege that the regulation amounts to a per se taking in violation of the Fifth Amendment because it is a permanent physical invasion of their property without just compensation. Second, the Growers allege that the regulation effects an unlawful seizure of their property in violation of the Fourth Amendment. We conclude the access regulation does not violate either provision, and affirm.

BACKGROUND

The Access Regulation

The ALRA authorized the Board to make “such rules and regulations as may be necessary to carry out” the ALRA. Cal. Lab. Code §§ 1141, 1144. Pursuant to this authority, the Board promulgated an emergency regulation shortly after the ALRA’s effective date that allowed union organizers access to employees on their employer’s property under limited circumstances. The Board later certified that it had subjected the regulation to notice and comment, allowing the regulation to remain in effect until repealed or amended.2 Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons), 546 P.2d 687, 692 n.3 (Cal. 1976).

The access regulation was promulgated in recognition that


2. As the California Supreme Court explained, “The regulation took effect on August 29, 1975. An emergency regulation automatically expire[d] 120 days after its effective date unless the agency certifie[d] during that period that it has complied with certain requirements of notice and hearing.” Pandol & Sons, 546 P.2d at 692 n.3 (internal citation omitted). The Board certified that it had completed these requirements on December 2, 1975. Id.
The United States Supreme Court has found that organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer. Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.

Cal. Code Regs. tit. 8, § 20900(b)–(c).

Thus, the Board determined that adopting a universally applicable rule for access—as opposed to case-by-case adjudications or the “adoption of an overly general rule”—would best serve the “legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California.” Cal. Code Regs. tit. 8, § 20900(d). The access regulation was intended to “provide clarity and predictability to all parties.” Id.

In furtherance of these goals, the access regulation declared that the enumerated rights of agricultural employees under the ALRA include “the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support.” Cal. Code Regs. tit. 8, § 20900(e). This right of access is not unlimited. Rather, the access regulation imposes a number of restrictions on access relating to time, place, number of organizers, purpose, and conduct. Id. These restrictions include, among others:

[A]n agricultural employer’s property shall be available to any one labor organization for no more than four (4) thirty-day periods in any calendar year. § 20900(e)(1)(A).

Each thirty-day period shall commence when the labor organization files in the appropriate regional office two (2) copies of a written notice of intention to take access onto the described property of an agricultural employer, together with proof of service of a copy of the written notice upon the employer . . . . § 20900(e)(1)(B).

Organizers may enter the property of an employer for a total period of one hour before the start of work and one hour after the completion of work to meet and talk with employees in areas in which employees congregate before and after working. § 20900(e)(3)(A).

In addition, organizers may enter the employer’s property for a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. § 20900(e)(3)(B).

Any organizer who violates the provisions of this part may be barred from exercising the right of access . . . for an appropriate period of time to be determined by the Board after due notice and hearing. Any labor organization or division thereof whose organizers repeatedly violate the provisions of this part may be barred from exercising the right of access . . . for an appropriate period of time to be determined by the Board after due notice and hearing. § 20900(e)(5)(A).

Shortly after the Board promulgated the access regulation, several agricultural employers challenged the regulation in California state courts on both constitutional and statutory grounds. Pandol & Sons, 546 P.2d at 692. Ultimately, the California Supreme Court, in a 4–3 decision, vacated several different trial courts’ orders enjoining enforcement of the regulation. Id. at 690. The Pandol & Sons court rejected the statutory claims by holding that the regulation was a permissible exercise of the Board’s statutory authority under the ALRA and that to the extent the access regulation conflicted with the general criminal trespass statute, the access regulation prevailed. Id. at 699–699. The court likewise rejected the plaintiffs’ constitutional claims: first, that the regulation violated their due process rights, and second, that it constituted a taking without just compensation. Id. at 693–699. The regulation has remained in force to the present.

The Growers

Plaintiff Cedar Point is an Oregon corporation with a nursery located in Dorris, California. It raises strawberry plants for producers. Cedar Point employs approximately 100 full-time workers and more than 400 seasonal workers at its Dorris nursery. None of its employees lives on the nursery property. Its seasonal employees are housed in hotels in Klamath Falls, Oregon.3

Cedar Point alleges that on October 29, 2015, organizers from the United Farm Workers union (“the UFW”) entered its property at approximately 5 a.m., without providing prior written notice of intent to take access as required by the regulation. At around 6 a.m., the UFW organizers moved to the nursery’s trim sheds, where they allegedly “disrupted work by moving through the trim sheds with bullhorns, distract

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3. There are no allegations in the complaint regarding where Cedar Point’s full-time workers live.
ing and intimidating workers.” The majority of workers in the trim sheds did not leave their work stations during this time, although some workers joined the UFW organizers in protest. Most of the workers who had left their stations during the protest returned to work by October 31, two days after the UFW organizers entered the property. Sometime after the UFW organizers had accessed the property, they served Cedar Point with written notice of intent to take access. Following this event, Cedar Point filed a charge against the UFW with the Board, alleging that the UFW had violated the access regulation by failing to provide the required written notice prior to taking access. The UFW likewise filed a charge against Cedar Point, alleging that Cedar Point had committed an unfair labor practice. Cedar Point alleges that “it is likely that [UFW] will attempt to take access again in the near future,” and that it would “exercise its right to exclude the [UFW] trespassers from its property” if not for the regulation.

Plaintiff Fowler is a large-scale shipper of table grapes and citrus, and is a California corporation headquartered in Fresno. Fowler employs 1,800 to 2,500 people in its field operations and approximately 500 people at its Fresno packing facility. Fowler’s employees do not live on the premises; Fowler alleges in the complaint that its employees are “fully accessible to the Union when they are not at work.” The UFW filed an unfair labor practice charge with the Board against Fowler, alleging that Fowler blocked its organizers from taking access permitted by the access regulation on three days in July 2015. The UFW subsequently withdrew the charge in January 2016. Fowler alleges that if it were not for the access regulation, it would oppose union access and “exercise its right to exclude union trespassers from its property.”

**Procedural History**

In February 2016, the Growers filed a complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against several members of the Board and the Board’s Executive Secretary, all of whom were sued in their official capacities. The Growers alleged that the access regulation, as applied to them, amounts to a taking in violation of the Fifth Amendment and that it effects an unlawful seizure of their property in violation of the Fourth Amendment. They sought declaratory and injunctive relief, barring the Board from enforcing the regulation against them. Upon filing the complaint, the Growers filed a motion for a preliminary injunction to bar enforcement of the regulation against them. The Board opposed the motion and promptly moved to dismiss the Growers’ complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

After denying the Growers’ motion for injunctive relief as to both the Fifth and Fourth Amendment claims, the district court granted the Board’s motion to dismiss. The district court rejected the Growers’ argument that the regulation constitutes a per se categorical taking, either on its face or as applied to them. As to the Fourth Amendment claim, the district court held that the Growers had not plausibly alleged that the regulation “has been or will be enforced against them in a manner that will cause a meaningful interference with their possessory interests” such that it would effect a seizure within the meaning of the Fourth Amendment. The district court granted the Growers leave to amend. The Growers declined to amend the complaint, and the district court entered judgment in favor of the Board in July, 2016. The Growers timely appealed.

**STANDARD OF REVIEW**

We review de novo a district court’s order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008). In evaluating a motion to dismiss under Rule 12(b)(6), “[r]eview is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice.” Id. (citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

We may affirm a 12(b)(6) dismissal “on any ground supported by the record, even if the district court did not rely on the ground.” Livid Holdings, Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 950 (9th Cir. 2005). In evaluating a 12(b)(6) motion, we accept “as true all well-pleaded allegations of fact in the complaint” and construe them in the light most favorable to the non-moving party. United States v. Corinthian Colls., 655 F.3d 984, 991 (9th Cir. 2011). To survive a motion to dismiss, the complaint “must contain sufficient factual matter” that, taken as true, states “a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

**DISCUSSION**

The Growers argue that the access regulation as applied to them amounts to a per se taking in violation of the Fifth Amendment and effects an unlawful seizure of their property in violation of the Fourth Amendment.

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4. As all Defendants were sued in their official capacities, we refer to them collectively as “the Board” throughout this opinion. The Growers’ suit, which seeks only prospective, declaratory, and injunctive relief, is not barred by the Eleventh Amendment. See Ex parte Young, 209 U.S. 123 (1908); see also Seven Up Pete Venture v. Schweitzer, 523 F.3d 948, 956 (9th Cir. 2008).

5. Takings claims are not ripe in federal court “until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue” and the state has denied the plaintiff any opportunity for just compensation. Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 195 (1985). Although the Board does not challenge ripeness on appeal, we agree with the district court that the Growers’ takings claim is ripe for consideration.

6. Because the Growers did not meet their burden as to the “threshold issue” of plausibly alleging a seizure, the district court did not discuss reasonableness in its order dismissing the case.
I. FIFTH AMENDMENT PER SE TAKINGS CLAIM

We turn first to the Growers taking claim. We agree with the district court that the allegations in the complaint, taken as true, are insufficient to state a plausible claim for relief as a per se taking under the Fifth Amendment’s Takings Clause.

The Fifth Amendment’s Takings Clause “provides that private property shall not ‘be taken for public use, without just compensation.’” Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005). The Supreme Court has recognized three categories of regulatory action in its takings jurisprudence, each of which “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain” and which focus a court’s inquiry “directly upon the severity of the burden that government imposes upon private property rights.” Id. at 539.

The first category is “where government requires an owner to suffer a permanent physical invasion of her property—however minor.” Id. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). The second category involves regulations that “completely deprive an owner of ‘all economically beneficial uses’ of her property.” Id. (emphasis in original) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)). These first two categories involve actions that “generally will be deemed [per se] takings for Fifth Amendment purposes,” but both categories are “relatively narrow.” Id. The third category covers the remainder of regulatory actions, which are governed by the standards set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). Id.

Here, the Growers allege that the access regulation, as applied to them, effects a Fifth Amendment taking by creating an easement that allows union organizers to enter their property “without consent or compensation.” The Growers base their Fifth Amendment argument entirely on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore is a per se taking.

In Loretto, the Supreme Court held that a state law requiring landlords to allow installation of cable facilities by cable television companies on their property constituted a per se taking because the installation was a permanent, albeit minor, physical occupation of the property. 458 U.S. at 421–423, 441. The Court noted the “constitutional distinction between a permanent occupation and a temporary physical invasion.” Id. at 434. The Growers argue that, under Loretto, the access regulation is a permanent physical occupation, as opposed to a temporary invasion. The Growers contend that the concept of permanence, as contemplated in Loretto, “does not require the physical invasion to be continuous, but instead that it have no contemplated end-date.”

This argument is contradicted by the Court’s opinions in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) and Nollan v. California Coastal Commission, 483 U.S. 825 (1987). In PruneYard, the Supreme Court considered whether the California Supreme Court’s decision in Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979), violated the Takings Clause. 447 U.S. at 76–77. In that case, the California Supreme Court held that the California Constitution protects reasonably exercised speech and petitioning in privately owned shopping centers. Robins, 592 P.2d at 347. The PruneYard, a privately owned shopping center that was open to the public for purposes of patronizing its commercial establishments, had a policy of forbidding visitors and tenants from engaging in public expressive activity unrelated to commercial purposes. PruneYard, 447 U.S. at 77.

Although the dissent correctly points out that PruneYard involved free speech, it also addressed a taking claim under the Fifth Amendment. Dissent at 25. As relevant here, the Court recognized that the California Supreme Court’s decision “literally” constituted a “taking” of PruneYard’s right to exclude others, but noted, “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.” PruneYard, 447 U.S. at 82 (citing Armstrong v. United States, 364 U.S. 40, 48 (1960)). The Court concluded that requiring the PruneYard to “permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of [the PruneYard’s] property rights under the Taking Clause.” Id. at 83.

Thus, in PruneYard there was no “contemplated end-date” to the California Supreme Court’s decision holding that the California Constitution protects reasonably exercised speech and petitioning in privately owned shopping centers. Yet, contrary to the Growers’ argument, the Court did not conclude that the California Supreme Court’s decision resulted in a permanent physical invasion. Id. at 83–84.

Similarly, Nollan does not support the Growers’ theory. There, the Court considered whether the California Coastal Commission could condition the grant of a permit to rebuild a house on a transfer to the public of an easement across beachfront property. Nollan, 483 U.S. at 827. The Court held that California could use its power of eminent domain for this “public purpose,” but if it wanted an easement, it must pay for it. Id. at 841–42. In its analysis, the Court concluded that a permanent physical occupation occurs “where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.” Id. at 832. It noted that that the PruneYard holding was not inconsistent with this analysis, “since there the owner had already opened his property to the general public, and in addition permanent access was not required.” Id. at 832 n.1.

Although the access regulation does not have a “contemplated end-date,” it does not meet Nollan’s definition of a permanent physical occupation. As structured, the regulation does not grant union organizers a “permanent and continuous right to pass to and fro” such that the Growers’ property “may continuously be traversed.” Id. at 832. The regulation
significantly limits organizers’ access to the Growers’ property. Unlike in Nollan, it does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year.

Furthermore, the Growers have not suffered a permanent physical invasion that would constitute a per se taking because the sole property right affected by the regulation is the right to exclude. “[I]t is true that one of the essential sticks in the bundle of property rights is the right to exclude others.” PruneYard, 447 U.S. at 82 (internal citation omitted). In a permanent physical invasion, however, “the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.” Loretto, 458 U.S. at 435; accord Murr v. Wisconsin, 137 S. Ct. 1933, 1952 (2017) (“[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety.”) (Roberts, C.J., dissenting) (quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)). The Growers do not allege that other property rights are affected by the access regulation. This undermines their contention that the access regulation effects a taking because they only allege that the regulation affects “one strand of the bundle” of property rights. Cf. Dolan v. City of Tigard, 512 U.S. 374, 394 (1994) (noting that unlike in PruneYard, a permanent recreational easement would not merely “regulate” plaintiff’s right to exclude, but rather would “eviscerate” it, as she “would lose all rights to regulate the time in which the public entered onto the [property], regardless of any interference it might pose with her retail store”).

The above discussion leads us to conclude that the access regulation is not a permanent physical taking. We do note, however, that in PruneYard, the Court analyzed the restriction under the standards set forth in Penn Central Transportation Co. v. New York City, rather than analyzing it as a permanent physical invasion. PruneYard, 447 U.S. at 83–84. In its analysis, the Court noted there was “nothing to suggest” that the restriction would “unreasonably impair the value or use of [the] property as a shopping center” and that the PruneYard was “a large commercial complex … [that was] open to the public at large.” Id.

The Growers attempt to distinguish their case from PruneYard by overstating the extent to which the Supreme Court relied on the fact that the PruneYard was a shopping center generally open to the public. While that was a consideration for the Court, it was not a dispositive one—and critically, it only factored into the Court’s analysis under the standards set forth in Penn Central. Id. at 82–83.

PruneYard’s use of the Penn Central analysis further weighs against the Growers’ contention that the access regulation is a permanent physical taking. In many ways, the access restriction is analogous to the restriction at issue in PruneYard, which required the shopping center to permit individuals to exercise free speech rights on its property. PruneYard, 447 U.S. at 76–77. The Court’s analysis of this restriction under Penn Central counsels against analyzing the access regulation as a permanent per se taking.8

Furthermore, the question of whether the access regulation falls under the category of takings governed by Penn Central is not before this court. At no point in this litigation have the Growers challenged the regulation under Penn Central. Their complaint alleges that the access regulation causes an unconstitutional taking because it “creates an easement for union organizers to enter [the Growers’] private property without consent or compensation.” Before the district court, the Growers argued that the access regulation should be treated as a per se taking because the Growers must surrender their right to exclude trespassers permanently. And before this court, they argued in their opening brief that the access regulation involved a physical invasion, as opposed to a regulatory taking. Therefore, we take no position regarding whether the access regulation falls under the category of takings governed by the standards set forth in Penn Central.

The dissent contends that our analysis should be guided by NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956), and its progeny.9 Dissent at 26–27. Babcock, however, pertained to an alleged violation of section 7 of the National Labor Relations Act (“NLRA”). Nat’l Labor Relations Bd. v. Babcock & Wilcox Co., 351 U.S. 105, 106 (1956); see also Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 529 (1992) (“This case requires us to clarify the relationship between the rights of employees under § 7 of the National Labor Relations Act

8. The Court also contrasted the PruneYard shopping center’s situation with that of the plaintiffs in Kaiser Aetna v. United States, 444 U.S. 164 (1979). See PruneYard, 447 U.S. at 84. Kaiser Aetna also weighs against the Growers’ theory that the access regulation is a permanent physical taking. There, the Court held that requiring owners of a public pond to allow free public use of its marina constituted a taking—but only after applying the Penn Central analysis, rather than the permanent physical invasion analysis. Kaiser Aetna, 444 U.S. at 178–180.

9. The dissent points out that the California Supreme Court looked to Babcock for guidance when first analyzing the access regulation in Pandol & Sons. Dissent at 26. There, the court also pointed out that the Board determined that “significant differences existed between the working conditions of industry in general and those of California agriculture.” Pandol & Sons, 546 P.2d at 702. The court highlighted some of those differences including that “many farmworkers are migrants; “the same employees did not arrive and depart every day on fixed schedules, there were no adjacent public areas where the employees congregated or through which they regularly passed, and the employees could not effectively be reached at permanent addresses or telephone numbers in the nearby community, or by media advertising.” Id. The record is silent on whether the Board has revisited these differences. In any event, we do not need to address them because the only issue before us is whether the access regulation is a per se physical taking.

7. In Penn Central, the Supreme Court observed that an “ad hoc” factual inquiry was required to determine whether a regulatory action required compensation under the Fifth Amendment. 438 U.S. at 124. The Court identified “several factors that have particular significance,” including the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. Id.; see also Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2427 (2015).
(NLRA or Act) ... and the property rights of their employ-
(“The question presented is whether this threat violated the
National Labor Relations Act.”). The NLRA does not apply to
“any individual employed as an agricultural laborer.” 29
U.S.C. § 152(3). And while Babcock may be helpful in ana-
lyzing challenges to the access regulation under the ALRA,
it is not relevant to the Growers’ contention that the access
regulation is a physical per se taking in violation of the Fifth
Amendment.

In conclusion, we hold that the access regulation as ap-
plied to the Growers does not amount to a per se physical
taking of their property in violation of the Fifth Amendment.
Having been granted the opportunity to amend their com-
plaint and having declined to do so, the district court did not
err in dismissing the Growers’ takings claim.

II. FOURTH AMENDMENT SEIZURE
CLAIM

The first clause of the Fourth Amendment provides that
the “right of the people to be secure in their persons, houses,
papers and effects, against unreasonable searches and sei-
zeurs, shall not be violated.” U.S. Const. amend. IV. To estab-
lish a seizure claim under the Fourth Amendment, the Grow-
ers must plausibly allege that a seizure occurred and that it
was unreasonable. See Soldal v. Cook County, Ill., 506 U.S.
56, 61–62 (1992). We agree with the district court’s conclu-
sion that the Growers failed to allege a plausible claim that
the access regulation, as applied to them, effects a seizure
protected by the Fourth Amendment.

A “‘seizure’ of property occurs when there is some mean-
ingful interference with an individual’s possessory interests
in that property.” United States v. Jacobsen, 466 U.S. 109,
113 n.5 (1984). First, the Growers argue the access regula-
tion effects a seizure because it substantially interferes with
their right to exclude. They contend that the access regulation
authorizes a “technical trespass.”

The majority’s holding in United States v. Karo undercuts
the Growers’ Fourth Amendment seizure argument. 468 U.S.
705, 712–13 (1984). There, the Court considered, inter alia,
whether the transfer of a container by federal agents contain-
ing an unknown and unwanted beeper constituted a seizure.
Id. at 712. First, the Court held that “[t]he existence of a
physical trespass is only marginally relevant to the question
of whether the Fourth Amendment has been violated ... for
an actual trespass is neither necessary nor sufficient to estab-
lish a constitutional violation.” Id. at 712–13. The Court then
concluded that the mere transfer of the container with an
unmonitored beeper did not constitute a seizure because it did
not interfere with anyone’s possessory interest in a meaning-
ful way. Id. at 712. The Court noted that “[a]t most, there was
a technical trespass on the space occupied by the beeper,” but
“if the presence of a beeper in the can constituted a seizure
merely because of its occupation of space, it would follow
that the presence of any object, regardless of its nature, would
violate the Fourth Amendment.” Id. at 712–13.

More importantly, the Growers fail to cite any directly ap-
licable authority supporting their contention that the access
regulation is a meaningful interference with their possess-
sory interests in their property. The Growers rely on Presley
v. City of Charlottesville, 464 F.3d 480 (4th Cir. 2006), to
support their argument. There, the Fourth Circuit concluded
that the alleged “constant physical occupation” constituted a
“‘meaningful interference’ with [the plaintiff’s] ‘possessory
interests’ in her property.” Id. at 487 (citing Jacobsen, 466
U.S. at 113). The case concerned a trail map published by the
city of Charlottesville that mistakenly showed a trail crossing
through Presley’s property (which encompassed less than an
acre of land). Id. at 482. City officials refused to correct the
error when Presley repeatedly complained, and declined to
offer her compensation in exchange for an easement. Id. at
482–83. Presley had posted over 100 “No Trespassing” signs
on her property, “all of which were defaced or destroyed.”
Id. at 483. Although Presley contacted the police to help stop
trespassers, the police “could not stem the tide.” Id. When
Presley installed razor wire on her property in an attempt to
block the trespassers, the city enacted an ordinance to pro-
hibit her from pursuing such protective measures, and initi-
ated a criminal prosecution (later dismissed) against her for
violation of the ordinance. Id.

The factual circumstances in Presley make it inapposite
to the access regulation as applied to the Growers. As the
Fourth Circuit noted, Presley alleged that she had been “de-
prived of the use of her property due to the regular presence
of a veritable army of trespassers who freely and regularly
traverse her yard, littering, making noise, damaging her land,
and occasionally even camping overnight.” Id. at 487. Here,
the Growers do not make such allegations. They do not al-
lege that the access regulation authorizes an intrusion that is
constant, uncontrollable (even with police assistance), un-
predictable, damaging, and stressful. The access regulation
only allows controlled, non-disruptive visits that are limited
in time, place, and number of union organizers.

Second, the Growers argue that the access regulation ef-
ffects a seizure because it profoundly changes the character
of the property. They urge us to adopt the test set forth in Justice
Stevens’ partial concurrence in United States v. Karo. There,
Justice Stevens argued that a meaningful interference occurs
when “the character of the property is profoundly different”
with the interference than without it. Karo, 468 U.S. at 729
(Stevens, J., concurring in part dissenting in part). Yet even

10. The Growers attempt to distinguish their case from Karo by
pointing out that federal agents placed the beeper with the consent
of the original owner before possession was transferred. They argue that
that they did not consent to the entry of the union organizers onto their
property. Yet, the original owner’s consent was relevant to the Karo
Court’s analysis of whether “the actual placement of the beeper into
the can” violated the defendant’s Fourth Amendment rights, but did
not factor into the Court’s analysis of whether the transfer of the can to
Karo was a seizure. Karo, 468 U.S. at 711–13.
assuming this were the proper test, the Growers have not alleged facts showing that the character of their property is somehow “profundely different” because of the access regulation. At most, the regulation would allow organizers access to the Growers’ property 360 hours a year out of a total 8,760 hours (and only 120 of those hours would be during the workday). The Growers argue that the access regulation “transform[s] [their] property from a forum for production into a proselytizing opportunity for union organizers,” but there are no such allegations in the complaint.

We therefore hold that the Growers have not plausibly alleged that the access regulation effects a “seizure” within the meaning of the Fourth Amendment.

AFFIRMED.

LEAVY, Circuit Judge, dissenting:

I respectfully dissent. In my view, the complaint sufficiently alleges that the Agricultural Labor Relations Board’s Access Regulation is an unconstitutional taking, so the district court erred in granting the motion to dismiss. The Growers allege that no employees reside on the employers property, and that alternative methods of effective communication are available to the nonemployee union organizers who, under the Access Regulation, are allowed to physically enter the Growers’ properties for substantial time periods. Specifically, I have found no Supreme Court case holding that non-employee labor organizers may enter an employer’s nonpublic, private property for substantial periods of time, when none of the employees live on the employer’s premises.

In spite of the majority’s reliance on PruneYard Shipping Center v. Robins, 447 U.S. 74 (1980), this is not a free speech case. Instead, this case involves labor relations and the government’s policy of encouraging collective bargaining. Thus, PruneYard provides little guidance.

11. The issue in PruneYard was whether the California constitution, which allows individuals to exercise First Amendment rights on private shopping center property, violated the federal constitution. The issue involved “only a state-created right of limited access to a specialized type of property.” Id. at 98 (Powell, concurring). The PruneYard “specialized property” was a multi-block shopping center, open to the public to “come and go as they please,” id. at 87, where “25,000 persons are induced to congregate daily.” Id. at 78 (quoting Robins v. PruneYard Shipping Ctr., 23 Cal. 3d 899, 910–911 (1979)). By contrast, in this case, the Growers are private employers with employees entering their properties daily for the sole purpose of agricultural work, with no public access.

12. The property owner in PruneYard yields the power to impose time, place, and manner restrictions on the general public’s free expression rights on its premises. In the case at bar, a California agency imposes its power to regulate time, place, and manner restrictions on the Growers’ right to exclude nonemployees. In other words, PruneYard involves a private party regulating the expressive conduct of other private parties entering its property where the public is invited. Our case involves a state agency universally regulating the access of nonemployee organizers on non-public, private property.

The California Legislature directs the Agricultural Labor Relations Board to “follow applicable precedents of the National Labor Relations Act.” Cal. Labor Code § 1148. The outcome of this case is guided by cases concerning the rights of nonemployees to physically access the employer’s property in order to communicate with employees about union organization. Although the NLRA’s enforcement authority does not apply to “any individual employed as an agricultural laborer.” 29 U.S.C. § 152(3), there is no dispute in this case about the agricultural status of the employee laborers. Rather, the dispute raised in the Grower’s complaint is the constitutionality of the Board’s regulation requiring employers to grant substantial physical access to nonemployee organizers where the agricultural employees do not reside on the employers’ private property and are not beyond the reach of the organizers’ message.

The California Supreme Court, when first analyzing the Access Regulation in Pandol & Sons, 546 P.2d 692 (Cal. 1976), correctly framed the issue: “The matter at bar, by contrast, is not primarily a First Amendment case; rather, the interest asserted is the right of workers employed on the premises in question to have effective access to information assisting them to organize into representative units pursuant to a specific governmental policy of encouraging collective bargaining.” Id. at 694 (emphasis added). The Pandol court looked for guidance to NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956), “[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.” Pandol, 546 P.2d at 406 (quoting Babcock, 351 U.S. at 112).

The Pandol court upheld the regulation under the California constitution, comparing the inaccessibility of workers in California’s agricultural industry to federal labor cases involving inaccessibility of workers in mining camps, lumber camps, and rural resort hotels. Id. at 406–408. The Pandol court summarized the rule of Babcock: “[I]f the circumstances of employment place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.” Id. at 409 (quoting Babcock, 351 U.S. at 113) (emphasis added). The Babcock rule has not been abrogated. See Lechmere v. NLRB, 502 U.S. 527, 540–41 (1992) (reaffirming Babcock); Hudgens v. NLRB, 424 U.S. 507, 521–22 (1976) (approving Babcock’s admonition that accommodation between employees’ labor rights and employers’ property rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other”); Central Hardware Co. v. NLRB, 407 U.S. 539, 545 (1972) (explaining that under Babcock, nonemployee organizers cannot claim a limited right of access to a nonconsenting employer’s property until after the requisite need for access to the property has been shown); ITT Industries, Inc. v. N.L.R.B., 251
For nearly fifty years, it has been black-letter labor law that the Board cannot order employers to grant nonemployee union organizers access to company property absent a showing that on-site employees are otherwise inaccessible through reasonable efforts.

In my view, the Access Regulation allowing ongoing access to Growers’ private properties, multiple times a day for 120 days a year (four 30-day periods per year) is a physical, not regulatory, occupation because the “right to exclude” is “one of the most fundamental sticks” in the bundle of property rights. Dolan v. City of Tigard, 512 U.S. 374, 394 (1994); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (stating that the right to exclude others is one of the “essential sticks” in the bundle of property rights). The Growers need not allege that the Access Regulation affects more property right “sticks” beyond this single, fundamental property right.

The complaint alleges that the Access Regulation is unconstitutional because the Growers’ employees, none of whom live on the Growers’ premises, are not beyond the reach of union efforts. The complaint alleges employees can be reached by union organizers at nearby, off-premises locations through alternative means of communication. Complaint, Par. 27 (“Seasonal workers at Cedar Point are housed in hotels in nearby Klamath Falls, Oregon. None of Cedar Point’s full-time or seasonal employees live on the Nursery’s property.”); Complaint, Par. 37 (“Fowler’s employees do not live on the premises and are fully accessible to the Union when they are not at work.”); Complaint Par. 64 (“And because such access is unnecessary given the alternative means of communication available, see Lechmere v. NLRA, 502 U.S. 527, 540–41 (1992), it is unreasonable to allow union organizers to seize this possessory interest in Plaintiff’s property.”).

The Supreme Court in Lechmere expressly reaffirmed Babcock’s critical distinction between employees and non-employees regarding union activities on private property. Id. at 537. The Court also reaffirmed Babcock’s general rule that “an employer may validly post his property against nonemployee distribution of union literature,” and rejected an initial balancing test. The Court stated that the threshold inquiry is whether the facts in a case justify application of Babcock’s inaccessibility exception. Id. at 538–39. The Court explained, “[T]he exception to Babcock’s rule is a narrow one. It does not apply wherever nontrespassory access to employee may be cumbersome or less-than-ideally effective, but only where ‘the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.’” Id. at 539 (quoting Babcock, 351 U.S. at 113 (original emphasis)). The Court concluded, “[B]ecause the employees do not reside on Lechmere’s property, they are presumptively not ‘beyond the reach’ of the union’s message.” Id. at 540 (internal citation omitted). Here, in light of the Growers’ allegations, the burden should shift to the defendants to show “unique obstacles” that frustrate their reasonable access to the Growers’ employees. See id. at 540–41.

In summary, because the Growers sufficiently allege that no employees live on the Growers’ properties and the employees are not beyond the reach of the union’s message, the district court erred in dismissing the complaint.

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13. The majority fails to cite any cases dealing with the property rights of employers as opposed to access rights by nonemployees.
In March 2017, Roxanne Carpenter, Fausto Velazquez, Phoelix Begay, and Brian Meyers (together, codefendants) kidnapped Ángel Gonzalez—who was suspected of stealing marijuana from a Mexican cartel—to turn him over to the cartel in exchange for thirty pounds of marijuana. After a five-day trial, a jury convicted Carpenter and Velazquez of conspiracy to kidnap, in violation of 18 U.S.C. § 1201(a)(1) and (c), and kidnapping, in violation of 18 U.S.C. § 1201(a)(1). Carpenter and Velazquez appeal a series of the district court’s rulings pertaining to their joint trial. We affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In early 2017, Gonzalez, who worked for a member of the Mexican cartel, and Velazquez, transported twelve 88-pound bundles of marijuana from Hereford, Arizona to Carpenter’s home. At some point, a portion of the marijuana disappeared from Carpenter’s home. The cartel suspected that Gonzalez was responsible for the missing marijuana, and word of there being a bounty on his head spread through the community. Armed cartel members went to Carpenter’s home, looking for the missing drugs and Gonzalez. Two days later, the police went to her house and asked questions about the cartel members who had recently visited the house.

In March 2017, Begay informed Carpenter that he could no longer hold off the cartel, and that the cartel was going to make Velazquez pay for the missing marijuana. Meyers testified at trial that he believed that the codefendants planned to kidnap Gonzalez to turn him over to the cartel to protect their “family.” Velazquez negotiated with the cartel, arriving at a final price of thirty pounds of marijuana in exchange for Gonzalez.

On March 29, 2017, Meyers borrowed Carpenter’s vehicle, first picking up Gonzalez from his apartment, then Begay from his home, under the pretense that they were taking Gonzalez to Elfrida, Arizona so that he could detox from drugs. On the way, Meyers changed the plans and they drove instead towards Douglas, Arizona to obtain methamphetamine. Gonzalez testified that after he fell asleep, he felt a taser on his neck. Begay and Meyers then handcuffed him, shackled his legs, duct-taped his hands, feet, and face, and shoved him into the car’s trunk.

Begay and Meyers drove to a Safeway outside Bisbee, Arizona to meet Carpenter and Velazquez. While Meyers kept watch in the car, Carpenter, Velazquez, and Begay entered the store, where Carpenter bought water, candy, and duct tape. Carpenter decided that the group needed to leave the Safeway parking lot, and they drove to the home of her friend, Keri Hall. At Hall’s house, the codefendants waited to hear from the cartel, and smoked methamphetamine. Meanwhile, Gon-
Carpenter remained bound in the trunk. When the codefendants learned that the cartel members could no longer meet them on the American side of the border, Carpenter volunteered to take Gonzalez to Mexico. She drove him, still in the trunk, through the Naco, Arizona port of entry. Just across the border, Gonzalez found the trunk latch, opened the trunk, yelled for help, and managed to exit the trunk. Carpenter accelerated away, ditched her car, and then attempted to reenter the United States on foot.

At the border, federal agents arrested Carpenter on kidnapping-related charges. A two-count indictment was later filed charging all four codefendants—Carpenter, Velazquez, Begay, and Meyers—with conspiracy to kidnap, in violation of 18 U.S.C. § 1201(a)(1) and (c), and kidnapping, in violation of 18 U.S.C. § 1201(a)(1).

Meyers and Begay pleaded guilty, while Carpenter and Velazquez proceeded to trial. Prior to trial, Carpenter submitted an offer of proof of her duress defense, and the district court concluded that she could present the defense. After a five-day trial, the jury found Carpenter and Velazquez guilty of both charges. Carpenter received a sentence of two concurrent terms of 168 months’ imprisonment. Velazquez was sentenced to two concurrent terms of 140 months’ imprisonment. Carpenter and Velazquez timely appealed, and their appeals were consolidated before us.

**JURISDICTION**

The district court had jurisdiction over the criminal cases pursuant to 18 U.S.C. § 3231, and we have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

**ANALYSIS**

We consider first Carpenter’s claim that the district court abused its discretion in denying her motion to seal her duress defense proffer, and then Velazquez’s claim that the district court abused its discretion in admitting other act evidence against him.

**I. PRE-TRIAL OFFER OF PROOF FOR DURESS DEFENSE**

The Ninth Circuit requires defendants to make “a prima facie showing of duress in a pre-trial offer of proof” to be able to present this defense at trial. United States v. Vasquez-Landaver, 527 F.3d 798, 802 (9th Cir. 2008). “Absent such a prima facie case, evidence of duress is not relevant.” Id.

In accordance with Vasquez-Landaver, before trial, Carpenter sought to submit an offer of proof of her duress defense. She initially moved ex parte to seal her offer of proof, but the district court denied the motion, finding that it would be “improper and unfair” to decide the substantive issue without input from the government and that the contained information was not “historically kept confidential.” Carpenter subsequently filed the offer of proof publicly. At the hearing on whether to permit Carpenter’s duress defense at trial, the government noted that it had not read the duress proffer. Ultimately, the court allowed the duress defense, finding that Carpenter had offered sufficient evidence to support it. At trial, Carpenter presented a duress defense, and the court instructed the jury on the defense.

On appeal, Carpenter argues that the court erred in ordering public disclosure of the pre-trial offer of proof. Our case law regarding pre-trial offers of proof for a duress defense is in short supply.4 We write to clarify how district courts should contend with these pre-trial offers of proof.

“We review de novo whether the public has a right of access to the judicial record of court proceedings under the First Amendment, the common law, or [the Federal Rules of Criminal Procedure], because these are questions of law.” United States v. Doe, 870 F.3d 991, 996 (9th Cir. 2017) (alteration in original) (quoting United States v. Index Newspapers LLC, 766 F.3d 1072, 1081 (9th Cir. 2014)). Because the district court balanced the “interests of the public and the party seeking to keep secret certain judicial records,” however, we review the court’s decision not to seal or proceed ex parte with Carpenter’s offer of proof for abuse of discretion. Id.

**A. Right of Access**

The right of access to criminal trials is generally protected by both the First Amendment and the common law. See United States v. Sleugh, 896 F.3d 1007, 1013 (9th Cir. 2018). However, this right is not unlimited. See, e.g., Times Mirror Co. v. United States, 873 F.2d 1210, 1215 (9th Cir. 1989) (holding no First Amendment right of access to search warrant proceedings and materials while pre-indictment investigation is ongoing).

The Supreme Court instructed that courts consider (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question,” when determining whether there is a First Amendment right of access to criminal proceedings. Press-Enterprise Co. v. Super. Court of Cal. for Riverside County, 478 U.S. 1, 8 (1986) (Press-Enterprise II). If the proceeding passes this “experience and logic” test, Id. at 9, a qualified First Amendment right of access attaches.

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3. A defendant must establish three elements to present a duress defense: “(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) lack of a reasonable opportunity to escape the threatened harm.” United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996).

4. Perhaps due in part to this lack of guidance, district courts within our circuit have split on whether to permit sealed offers of proof for the duress defense. Compare United States v. Burgueno-Gonzalez, No. 17CR0245-LAB, 2017 WL 1540863, at *1 (S.D. Cal. Apr. 28, 2017) (denying ex parte under seal motion for duress offer of proof where defendant failed to make a showing of its necessity in light of competing interests); with United States v. Murillo, No. ED CR 05-69 (B) VAP, 2008 WL 11411629, at *24 (C.D. Cal. May 23, 2008) (overruling government’s objection to defendant’s in camera and sealed proffer for affirmative defenses because disclosure would require the defendant to choose between his Fifth and Sixth Amendment rights).

A separate, common law right to “inspect and copy public records and documents, including judicial records and documents” also exists. *Doe*, 870 F.3d at 996–97 (quoting *United States v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1192 (9th Cir. 2011)). This right, however, does not apply to documents that “have traditionally been kept secret for important public policy reasons.” *Times Mirror*, 873 F.2d at 1219. Where a presumptive right of access under the common law arises, that presumption can be overcome only by a showing of a “compelling reason.” *Sleugh*, 896 F.3d at 1013.

While we held pre-*Press-Enterprise I* and *II* that there is “a [F]irst [A]mendment right of access to pretrial documents in general,” *Associated Press v. U.S. Dist. Court for Cent. Dist. of Cal.*, 705 F.2d 1143, 1145 (9th Cir. 1983), we have not decided specifically whether the public has a First Amendment or common law right of access to pre-trial duress offers of proof.

Even though we have long required that defendants proffer evidence of their duress defense, we have never held—nor indicated—that these proffers are entitled to secrecy or additional confidentiality. Instead, our early cases demonstrate that courts often dealt with the threshold inquiry of the prima facie showing through unsealed motions in limine. See, e.g., *United States v. Contento-Pachon*, 723 F.2d 691, 693–95 (9th Cir. 1984); *United States v. Shapiro*, 669 F.2d 593, 596–97 (9th Cir. 1982). Open court offers of proof were also utilized. See *United States v. Gordon*, 526 F.2d 406, 408 (9th Cir. 1975). Thus, we conclude that proffers for the duress defense have not “traditionally been kept secret,” *Times Mirror*, 873 F.2d at 1219, and the common law right of access attaches.

We acknowledge the tension that may arise between the public’s right of access and the defendant’s right to a fair trial. Such concerns are not without a place in this inquiry, and even the stronger First Amendment right of access “may give way in certain cases to other rights or interests.” *Waller v. Georgia*, 467 U.S. 39, 45 (1984). The common law right too has “bowed,” so as to, for example, ensure that the court’s records are not “used to gratify private spite or promote public scandal.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)). Courts repeatedly navigate this delicate balance when grappling with whether certain criminal proceedings or documents are afforded the presumption of openness. Unsurprisingly then, this balance of the interests is a “discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Id.* at 599. Accordingly, we next consider whether the district court abused its discretion in denying Carpenter’s ex parte motion to seal her pre-trial offer of proof.

### B. Carpenter’s Offer of Proof

Where there is a presumptive right of access under the common law, that presumption can be overcome only by showing a “compelling reason.” *Sleugh*, 896 F.3d at 1013. A court may seal records “only when it finds `a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture.” *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096–97 (9th Cir. 2016) (alteration in original) (quoting *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).

Carpenter laments being forced to have “preview[ed] all of the evidence and all of her own testimony supporting her duress defense,” and argues that the public disclosure was unconstitutional. The district court considered Carpenter’s concerns that the disclosure of her evidence to the government would be unfair and would conflict with the ethical rules that counsel against revealing information related to the representation of client, and found that she had not stated a compelling reason to seal the proffer. We agree with the district court.

Carpenter asserts only general principles as to why her proffer should remain sealed, but the fundamental starting point is that the proffer is entitled to a “strong presumption in favor of access.” *Kamakana*, 447 F.3d at 1178. Carpenter remains unable to identify any direct way in which prejudice occurred in her case, other than to assert that the government’s witnesses and attorneys were able to learn in advance what she would say, and could, as a result, bolster their own testimony. Her speculative arguments as to the prejudice she suffered because the court did not seal the proffer are unmoored from the facts of the case, and she conceded at oral argument that she has no evidence to suggest that anyone read the proffer and could have cross examined witnesses on this point—yet did not. Carpenter’s arguments are insufficient to overcome the presumption of access.

In *United States v. Gurolla*, on which Carpenter relies for the proposition that public disclosure of her proffer was unconstitutional, we held that the government was not entitled to review the defendant’s sealed declarations regarding his entrapment defense on appeal, when it had not challenged the district court’s seal order below. 333 F.3d 944, 952–53 (9th Cir. 2003). The *Gurolla* court noted, however, that establishing a rule that requires defendants to disclose the substance of
their testimony to the prosecution for an entrapment defense might be unconstitutional because it forced them to choose between their Fifth and Sixth Amendment rights, though it explicitly chose not to wade into that potential quagmire. Id. at 953 n.11.

Carpenter’s reliance is misplaced, and contrary to her contentions, our conclusion today does not establish a compulsory rule that defendants must disclose their testimony to present a duress defense. The public’s common law right of access to these offers of proof is a qualified right—one that a defendant can overcome by making the requisite showing. As we noted, in the balancing test the district court is required to consider the competing rights of the defendant and the public. We hold today only that the common law right of access attaches to pre-trial offers of proof for a duress defense, and that because Carpenter failed to provide a compelling reason to overcome this presumptive right of access, the district court did not abuse its discretion in denying Carpenter’s motion to seal her proffer.6

II. OTHER ACT EVIDENCE

Before trial, the government moved in limine to include “other act” evidence of (1) the February 2017 trafficking of marijuana to Carpenter’s house and the subsequent marijuana disappearance, and (2) the codefendants’ use of methamphetamine at Hall’s home during the kidnapping. The court granted the government’s motions, finding the evidence admissible “under the theory of allowing the Government to complete the story or explain to the jury the background facts surrounding this incident,” and that the probative value outweighed the unfair prejudice. Velazquez argues that the district court erred in admitting this evidence.

We review de novo whether evidence is other act evidence within the meaning of Federal Rule of Civil Procedure 404(b), but the admission of this evidence for abuse of discretion. United States v. Hill, 953 F.2d 452, 455 (9th Cir. 1991). Where a district court erred in admitting other act evidence, we review for harmless error. See id. at 458.

Other act evidence is inadmissible to “prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character,” but this evidence “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b). Even if other act evidence is admissible, it remains subject to the general balancing test concerning whether its “probative value is substantially outweighed by a danger of … unfair prejudice.” Fed. R. Evid. 403.

We have exempted other act evidence from the requirements of Rule 404 where it is “inextricably intertwined” with the underlying offense. United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012 (9th Cir. 1995). The first exempted category consists of evidence that “constitutes a part of the transaction that serves as a basis for the criminal charge.” Id. Second, as relevant here, other act evidence is admissible when “necessary … in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.” Id. at 1012–13.

Velazquez argues that neither the circumstances surrounding the February 2017 drug-trafficking incident nor the use of methamphetamine at Hall’s house was inextricably intertwined with the charged offenses. We consider each in turn.

A. Missing Marijuana

Velazquez concedes that the missing marijuana was “relevant to give context” as to the bounty on Gonzalez’s head, to the “issue of motive,” and to “provide context for Carpenter’s duress claim.” Nonetheless, he contends that the “question of how the marijuana went missing or who was responsible for it … was completely irrelevant to the charges,” and the “repeated references” to Velazquez’ drug-trafficking activity and the suggestions that he stole the marijuana prejudiced the jury against him.

As Velazquez admits, the circumstances of the initial drug-trafficking incident and missing marijuana were necessary to provide a “coherent and comprehensible story” regarding the background for the kidnapping of Gonzalez. His attempt to finely slice this other act evidence is unpersuasive. The speculative testimony at trial regarding who stole the missing marijuana, only underscored the general confusion prior to the kidnapping as to the perpetrator and offered context to the jury as to how the cartel, and therefore the codefendants, focused on Gonzalez. In addition, as the district court found, this evidence also attacked the immediate threat element of the duress defense by showing that the codefendants struggled with the missing marijuana dilemma for over one month before kidnapping Gonzalez. In short, the district court did not abuse its discretion in permitting the government to present evidence regarding the disappeared marijuana and its immediate aftermath.

B. Methamphetamine Use

The district court determined that the codefendants’ use of methamphetamine while they waited at Hall’s home was also admissible to offer a coherent story. But, other act evidence must have a “sufficient contextual or substantive connection” to the charged offense and we find that the codefendants’ methamphetamine use did not. Vizcarra-Martinez, 66 F.3d at 1013.

Similarly to our finding in Vizcarra-Martinez that the defendant’s possession of a small amount of methamphetamine at the time of his arrest was “unquestionably” not part of the offense with which he was charged—possession of hydriodic acid, id., Velazquez’s use of methamphetamine was not part of either charged offense. Although Velazquez’s metham—

6. Since we determine that, at a minimum, the common law right of access applies, and that the district court did not abuse its discretion in holding that Carpenter failed to meet the lower burden to overcome that right, we need not reach the question of whether there is also a qualified First Amendment right to proffers of duress evidence.
amphetamine use while at Hall’s house tends to slightly rebut the duress defense? “[c]oincidence in time is insufficient.” Id. In Vizcarra-Martinez, we also found that the prosecution’s ability to present evidence relevant to the crime without introducing the defendant’s personal methamphetamine favored excluding the evidence. Id. Here too, the government presented additional evidence that attacked Carpenter and Velazquez’s duress defense during this exact same period. Hall testified that Carpenter “kind of laughed” in response to Hall telling her that she could get in trouble for having a person in the trunk of her car, and that Carpenter generally was acting “normal.” In addition, according to Hall, Velazquez was “singing or rapping while he was sitting on the couch.” Velazquez’s use of methamphetamine while he waited at Hall’s house was in no way relevant to the commission of the crimes. Therefore, we conclude that this evidence was not inextricably intertwined with the crimes so as to escape the bounds of Rule 404(b).

Because we conclude that the methamphetamine use constituted other act evidence, we next consider whether it should have been excluded under Rule 404(b). We use a four-part test to determine the admissibility of evidence under Rule 404(b):

Evidence of prior criminal conduct may be admitted if: (1) the evidence tends to prove a material point; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) [in certain cases] the act is similar to the offense charged.

Id. at 1013 (quoting United States v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994)). The government argues that the challenged evidence was admissible under Rule 404(b)(2) because it addressed “motive, state of mind, and absence of duress.”

We seriously doubt that Velazquez’s methamphetamine use speaks to his motive to commit kidnapping or conspiracy to kidnap, although we find that the evidence is probative of his state of mind and the absence of duress. Nonetheless, we conclude that the district court abused its discretion in admitting the evidence because it should have been excluded under Rule 403’s balancing. Drug use “is highly prejudicial,” and the connection between the charged offenses and the methamphetamine use was evidently slight. Id. at 1017. The low probative value of the methamphetamine use—particularly in light of the other evidence that the government introduced to establish the absence of duress and the codefendants’ state of mind—is “substantially outweighed” by its prejudice. Fed. R. Evid. 403.

Finally, finding that the evidence is inadmissible under Rule 403, we must determine whether the district court’s admission of the methamphetamine use was harmless. We start with a “presumption of prejudice,” United States v. Bailey, 696 F.3d 794, 803 (9th Cir. 2012) (quoting Obrey v. Johnson, 400 F.3d 691, 701 (9th Cir. 2005)), and we reverse unless “it is more probable than not that the error did not materially affect the verdict.” United States v. Morales, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc).

The government presented more than enough evidence to defeat Velazquez’s duress defense and overwhelming evidence as to his guilt for both conspiracy to kidnap and kidnapping. Velazquez—the only Spanish speaker among the codefendants—negotiated with the cartel to set the award for Gonzalez. On the day of the kidnapping, he continued to communicate with the cartel to arrange the exchange location. Velazquez entered Safeway with Carpenter to buy additional kidnapping supplies, and he sat at Hall’s house “singing and rapping” while Gonzalez remained bound in the trunk. Carpenter, Gonzalez, Hall, and Meyers, all implicated Velazquez in the planning and/or commission of the crimes. Considering the mountain of evidence against Velazquez, we conclude that the references to his methamphetamine use at Hall’s house, while prejudicial, were harmless.

CONCLUSION

We hold that the district court did not abuse its discretion in requiring Carpenter to publicly file her pretrial offer of proof, and that while the court erred in admitting evidence of Velazquez’s methamphetamine use, the error was harmless.

AFFIRMED.
May 13, 2019

Ninth Circuit Court of Appeal

Cite as 19 C.D.O.S. 4234


Nos. 17-16847, 17-16923

United States Court of Appeals for the Ninth Circuit
D.C. No. 2:16-cv-01264-WBS-EFB

Appeal from the United States District Court for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted December 17, 2018
San Francisco, California

Filed May 8, 2019

Before: Consuelo M. Callahan and N. Randy Smith, Circuit Judges, and Fernando M. Olguin,* District Judge.

OPINION

N.R. SMITH, Circuit Judge:

Under federal law, local authorities and municipalities, involved in the regulation of cable television services within their boundaries, are exempted from civil money damages liability in any lawsuit for any claim arising from the regulation of cable services. See 47 U.S.C. § 555a(a).

This lawsuit concerns the calculation and payment of cable franchise fees. Because Comcast of Sacramento (“Comcast”) seeks money damages in this suit, brings it against a municipality, and the suit arises out of the regulation of cable services, 47 U.S.C. § 555a(a) bars the only relief sought by Comcast. Thus, we vacate the district court’s grants of summary judgment and remand with instructions to dismiss Comcast’s lawsuit.

I. FACTUAL AND PROCEDURAL BACKGROUND

Cable Industry Background

Historically, cable operators pay a fee to local and/or state governments in order to provide service within a particular jurisdiction, usually referred to as a franchise fee. These fees have been justified by the fact that cable operators use public rights-of-way, maintained by the local governmental entities, to deliver their services.

Prior to the 1980s, the Federal Communications Commission (“FCC”) largely left cable franchise regulation to local governments. However in 1984, the FCC determined that many local authorities were imposing varying and often high franchise fees, and that those fees were impeding the growth of the cable television industry. Thus, Congress enacted the Cable Communications Policy Act (the “Cable Act”) of 1984.

The Cable Act imposes a uniform set of franchise procedures and standards, authorizes local authorities to collect fees in connection with the grant of a cable franchise, but caps those fees at 5% of a cable company’s gross revenues. See 47 U.S.C. § 542(a), (b). Franchise fees are defined, and include any tax, fee, or assessment imposed on “a cable operator or cable subscriber, or both, solely because of their status as such.” Id. § 542(g)(1); see also § 542(b). Franchise fees do not include “any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers).” Id. § 542(g)(2)(A). The Cable Act also expressly preempts any inconsistent state law. Id. § 556(c).

Travis Van Ligten and Jeffrey T. Melching, Rutan & Tucker LLP, Costa Mesa, California, for Amici Curiae League of California Cities, California State Association of Counties, and Scan Natoa, Inc.

COUNSEL

Fred A. Rowley, Jr. (argued), Jeffrey Y. Wu (argued), and Aaron Pennekamp, Munger Tolles & Olson LLP, Los Angeles, California; Donald B. Verrilli Jr., Munger Tolles & Olson LLP, Washington, D.C.; Jill B. Rowe, Scott M. McLeod, and Patrick M. Rosvall, Cooper White & Cooper LLP, San Francisco, California; for Plaintiffs-Appellants/Cross-Appellees.

Harriet A. Steiner (argued) and Joshua Nelson, Best Best & Krieger LLP, Sacramento, California, for Defendant-Appellee/Cross-Appellant.

Allison W. Meredith and Jeremy B. Rosen, Horvitz & Levy LLP, Burbank, California, for Amicus Curiae California Chamber of Commerce.


* The Honorable Fernando M. Olguin, United States District Judge for the Central District of California, sitting by designation.
Several years later, Congress determined that the delegation of cable franchising authority had resulted in an unanticipated development: municipalities were being sued for damages by cable operators in connection with cable franchising decisions. See Jones Intercable of San Diego, Inc. v. City of Chula Vista, 80 F.3d 320, 326 n.5 (9th Cir. 1996) (citing S. Rep. No. 92, 102d Cong., 2d Sess. 48–49 (1992), as reprinted in 1992 U.S.C.C.A.N. 1133, 1181–82); see also id. (“[T]he mere pendency of these large damage claims has had significant adverse effects on the functioning of local governments. These claims represent a potentially crippling burden on local government treasuries . . . .” (alterations in original)). In response, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. Among other things, that Act provides that:

In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer, or amendment of a franchise, any relief, to the extent such relief is required by any other provision of Federal, State, or local law, shall be limited to injunctive relief and declaratory relief.

47 U.S.C. § 555a(a) (emphasis added).

Then in 1996, Congress enacted the Telecommunications Act, which sought to increase competition by allowing non-traditional cable companies to enter state cable markets. However, few were able to successfully enter the California market. This inability to enter that market resulted, in part, from a number of traditional cable companies being well established in California. The inability was also partly attributable to the fact that local and municipal governments within California imposed varied, often onerous franchise requirements that, in effect, created barriers to new market entrants.

In order to encourage competition in the cable television market, the California legislature enacted the Digital Infrastructure and Video Competition Act (“DIVCA”) in 2006. DIVCA stripped local governments of their ability to grant cable franchises and established the California Public Utilities Commission ("CPUC") as "the sole franchising authority for a state franchise to provide video service.” Cal. Pub. Util. Code § 5840(a). Under DIVCA, local governments continued to impose and collect “franchise fees” as a form of rent for video service providers’ use of public rights-of-way, but those fees were and are capped at 5% of the providers’ gross revenues. Id. § 5840(q)(1). DIVCA also permits cable operators to “identify and collect the amount of the state [or local] franchise fee as a separate line item on the regular bill of each subscriber.” Id. § 5860(j). Sacramento County has enacted an ordinance that requires each cable franchise operating within the county to pay a franchise fee “equal to five (5) percent per year of the Franchisee’s annual Gross Revenues.” Sac. Cty. Code § 5.50.602.

DIVCA also authorizes the CPUC to collect from each cable franchise an annual fee in an amount necessary “to carry out the provisions of [DIVCA].” Cal. Pub. Util. Code § 441. This is known as a “CPUC fee.” However, DIVCA requires that the CPUC fee must be applied in a manner consistent with the Cable Act’s 5% franchise fee cap. Id. § 442(b).

DIVCA additionally permits local governments to assess public, educational and governmental (“PEG”) fees in a manner consistent with federal law, id. § 5870(m), and in an amount not to exceed “1 percent of the holder’s gross revenues, as defined in Section 5860.” Id. Cable operators may pass those fees on to their subscribers and thereby recover “any fee remitted to a local entity under this section by billing a recovery fee as a separate line item on the regular bill of each subscriber.” Id. § 5870(o). The city of Sacramento has enacted an ordinance imposing such a fee. See Sac. Mun. Code § 5.28.2670(C)(1).¹

The Present Dispute

Both before and after the enactment of DIVCA, Sacramento Metropolitan Cable Television Commission ("SMCTC") regulated the provision of cable television services in Sacramento and the surrounding area. Comcast (or Comcast’s predecessors in interest, all entities hereafter referred to as “Comcast”) offered cable television services in the Sacramento area for years prior to the enactment of DIVCA. Prior to 2008, Comcast was the beneficiary of a franchise issued by SMCTC. As part of that franchise, Comcast’s predecessor had been required to pay a deposit to SMCTC. Following the enactment of DIVCA, Comcast transitioned over to a franchise issued by the CPUC, and the franchise agreement with SMCTC terminated by operation of law in 2011. Comcast was not required to pay a deposit under the CPUC franchise agreement, and the parties do not dispute that the pre-existing deposit (paid to SMCTC) was to be returned to Comcast upon expiration of the SMCTC franchise agreement. However, SMCTC did not return the deposit following the termination of the SMCTC franchise agreement; instead SMCTC continued to hold the deposit in an interest bearing trust account. Though the record does not suggest that SMCTC had any legal authority to continue to hold Comcast’s deposit, Comcast did not immediately request its return.

After the SMCTC franchise had terminated, Comcast continued to pay its annual franchise fee to SMCTC (as rent for use of the public rights-of-way), as required by DIVCA. However, in October 2011, Comcast informed SMCTC by letter that it would deduct the CPUC fee from the franchise fees paid during the 3rd quarter of 2011 and going forward thereafter because, in Comcast’s view, the CPUC fee “quali-

¹. The Sacramento ordinance actually imposes a PEG fee equal to 3% of a cable operator’s gross revenue, but the parties do not dispute that DIVCA limits the fee to 1% of gross revenue, and SMCTC has not attempted to collect any amount greater than that from Comcast.
lies as a “franchise fee” under federal law” that counted towards the Cable Act’s 5% franchise fee cap. Additionally, Comcast informed SMCTC that it would not include the PEG fees it paid to SMCTC as part of the “gross revenues” calculation that formed the basis for Comcast’s annual franchise fee obligations.

Though SMCTC does not appear to have responded immediately to Comcast’s October 2011 letter, SMCTC eventually informed Comcast that it disagreed with Comcast’s interpretation of applicable provisions of state and federal law. Following an audit performed in 2014, SMCTC demanded that Comcast remit the withheld amounts for that period, an amount totaling $334,610. The parties exchanged several additional letters over the months that followed, outlining their disagreement concerning the appropriate calculation of CPUC and PEG fees due under state and federal law. In an October 2014 letter sent by SMCTC, SMCTC informed Comcast that, because Comcast had paid less in franchise fees than SMCTC believed was due for fiscal years 2011 and 2012, SMCTC would begin offsetting the amount Comcast owed against Comcast’s security deposit unless Comcast promptly paid the amounts it had withheld. Comcast declined to pay the amounts SMCTC claimed it owed; instead, it demanded a return of its security deposit. SMCTC refused and instead responded to Comcast’s demand in March 2015 by moving Comcast’s deposit out of the trust account and into SMCTC’s general fund.

In June 2016, Comcast brought suit against SMCTC, asserting state law claims for conversion and common count. Both claims ultimately seek a return of Comcast’s security deposit, which, with accrued interest, totaled $227,639.45. SMCTC did not contest those counts but instead argued as affirmative defenses that: (1) the CPUC fees did not constitute “franchise fees” for purposes of the Cable Act’s 5% cap, and that Comcast therefore was not permitted to offset those fees against the franchise fees due to SMCTC; and (2) PEG fees counted towards “gross revenues” from which the franchise fee would be determined, and Comcast could not exclude those fees when calculating its franchise fee obligations.2

The parties filed cross-motions for summary judgment, and the district court granted each motion in part following a hearing. It found for SMCTC on the franchise fee issue, reasoning that the CPUC fee did not constitute a “franchise fee” and had been improperly withheld by Comcast. Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm’n, 250 F. Supp. 3d 616, 626 (E.D. Cal. 2017). However, the district court found for Comcast on the PEG fee issue, determining that Comcast had properly excluded those fees from its “gross revenue” calculations, because those fees fell within DIVCA’s express exclusion for “amounts billed to, and collected from, subscribers to recover … [a] … fee imposed by [a] governmental entity.” Id. (alterations in original and quotation marks omitted).

Though SMCTC hadn’t raised the issue, the district court considered sua sponte whether Comcast’s lawsuit was barred under 47 U.S.C. § 555a(a). After considering that provision, the district court found that § 555a(a) did not bar Comcast’s suit. The court was not convinced “that this action ‘arise[es] from the regulation of cable service’ under section 555a.” Id. at 627 n.5 (alterations in original). However, the district court noted that it had found few precedential appellate decisions concerning the application of § 555a(a). Nonetheless, the few decisions the court located “indicate that section 555a was meant to bar claims arising directly out of cable regulation, as opposed to claims that are only tangentially related to cable regulation.” Id. (citation omitted). Comcast moved for reconsideration regarding the CPUC fee finding, but that motion was denied.

Both parties timely appealed, and this appeal followed. We have jurisdiction under 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

We review de novo a district court’s decision on cross-motions for summary judgment. Center for Bio-Ethical Reform Inc. v. Los Angeles Cty. Sheriff Dep’t, 533 F.3d 780, 786 (9th Cir. 2008) (“When presented with cross-motions for summary judgment, we review each motion for summary judgment separately, giving the nonmoving party for each motion the benefit of all reasonable inferences.”). “The interpretation and construction of statutes are questions of law reviewed de novo.” Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1041 (9th Cir. 2001).

III. DISCUSSION

Because Comcast’s lawsuit must be dismissed as pleaded if 47 U.S.C. § 555a(a) bars the relief sought, we first consider the application of that provision to Comcast’s lawsuit for the return of the security deposit. Because § 555a(a) applies and bars Comcast’s lawsuit as pleaded, we resolve this appeal on that basis.

A.

As an initial matter, Comcast argues that SMCTC has waived any argument relying on 47 U.S.C. § 555a(a), either by failing to raise such an argument before the district court or by failing to raise such an argument in its opening brief.

Though “[w]e apply a ‘general rule’ against entertaining arguments on appeal that were not presented or developed before the district court,” In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted), this issue was raised and addressed by the district court sua sponte. As the application of 47 U.S.C. § 555a(a) to this lawsuit was “raised sufficiently for the trial court to rule on it,” In re Mercury Interactive Corp. Sec. Litig., 618 F.3d at 992 (internal quotation marks omitted), the waiver rule does not have obvious application here. Even if a col-
orrible argument for waiver could be made, “[s]uch waiver is a discretionary, not jurisdictional, determination.” Id. Where, as here, “the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed,” Davis v. Elec. Arts Inc., 775 F.3d 1172, 1180 (9th Cir. 2015) (citations omitted), we may exercise our discretion and consider it. See also United States v. Hernandez-Rodriguez, 352 F.3d 1325, 1328 (10th Cir. 2003) (finding that “when the district court sua sponte raises and explicitly resolves an issue of law on the merits” it may be considered on appeal even if the party relying on that issue “failed to raise the issue in district court”).

Additionally, SMCTC’s opening brief addresses the district court’s finding that the lawsuit did not arise from the regulation of cable services and by extension its finding that § 555a does not apply here. SMCTC also expands upon that argument in its reply brief. Thus SMCTC’s briefs sufficiently raise this issue for purposes of appeal.

B.

As we have previously explained, “prior to passage of section 555a(a), municipalities [faced] unexpected and ‘potentially crippling’ civil damage liability claims in relation to their regulation of cable operators.” Jones, 80 F.3d at 326 (quoting Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 11–12 (D.D.C. 1993)). In response, Congress enacted § 555a(a), and thereby “exempted municipalities from civil damages liability arising out of the local regulation of cable services in order to ‘preserve the municipal franchising and regulation scheme envisioned by the [Cable Act].’” Id. (quoting Daniels, 835 F. Supp. at 12). Section 555a(a) applies “[i]n any court proceeding . . . involving any claim against a franchising authority … arising from the regulation of cable service,” and limits the relief available in such actions to “injunctive relief and declaratory relief.” See Jones, 80 F.3d at 324 (noting that “damages are precluded if section 555a(a) applies”); Caprotti v. Town of Woodstock, 721 N.E.2d 957, 960 (N.Y. 1999) (“By its plain and unconditional terms, section 555a(a) grants a local municipality broad immunity from monetary liability that arises out of any of the municipality’s regulatory decisions involving cable television.” (internal quotation marks omitted)).

In this case, Comcast pleaded claims of conversion and common count, both intended to obtain a return of the security deposit paid to SMCTC by Comcast’s predecessor in interest under the terms of Comcast’s prior (and now expired) franchise agreement. As these claims both seek an award of money damages (and not injunctive or declaratory relief) and are unquestionably brought against a cable franchising authority, Comcast’s lawsuit would be barred by this statute if it arises from cable regulation.

We find that Comcast’s lawsuit, as pleaded, does indeed arise from cable regulation. Though Comcast’s complaint does not mention or obviously concern cable regulation, Comcast’s complaint cannot be viewed in isolation, nor can the claims pleaded therein be accepted at face value. See Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 769 (9th Cir. 1986) (“A plaintiff will not be allowed to conceal the true nature of a complaint through artful pleading.”) (internal quotation marks and citation omitted); see also Turtle Island Restoration Network v. U.S. Dep’t of Commerce, 438 F.3d 937, 945 (9th Cir. 2006). Comcast argues that its lawsuit merely seeks a return of a security deposit, but this argument glosses over the fact that the security deposit at issue was paid pursuant to a cable franchising agreement that established the terms under which Comcast could offer cable television services in Sacramento and the surrounding area. Thus, however pleaded, Comcast’s lawsuit arises from a franchising agreement that plainly regulated cable services and has more than a tangential connection with cable regulation.

Moreover, both SMCTC’s responsive pleadings and the course of this litigation to date further underscore the connection. SMCTC’s answer includes (as an affirmative defense) a setoff claim under California law, arguing that SMCTC retained Comcast’s security deposit to offset Comcast’s underpayment of its franchise fees in the years (i.e., fiscal years 2011 and 2012) following the expiration of the previous SMCTC issued franchise agreement. SMCTC’s answer also alleges that the parties were unable to agree what cable franchise fees were due for that period of time, and how those fees should be calculated under the applicable provisions of state and federal law. Those particular allegations are borne out in the pleadings, arguments, and evidentiary materials produced by the parties during the course of this litigation. These materials demonstrate that both parties have colorable arguments for their respective franchise fee calculations, but these materials also demonstrate that the relief sought by Comcast, however pleaded, is inextricably intertwined with a wider, ongoing disagreement between the parties that plainly arises from the interpretation of federal and state laws that govern the calculation of cable franchise fees under the current CPUC-issued franchise agreement.

Given the underlying disputes concerning the interpretation of both the current and prior franchise agreements, and the fees and payments due in connection with Comcast’s provision of cable services, Comcast’s lawsuit arises from the regulation of cable television services. As was the case in City of Glendale v. Marcus Cable Associates, LLC, 180 Cal. Rptr. 3d 726 (Cal. Ct. App. 2014), Comcast’s lawsuit is properly understood as an artful attempt to plead around § 555a(a). 180 Cal. Rptr. 3d at 743. To hold otherwise would allow parties, through creative pleading, to do precisely what § 555a(a) bars them from doing, i.e., bring suit for damages against a franchising authority for claims that arise from cable regulation merely by omitting any mention of the regulatory dispute from their pleadings. See Turtle Island, 438 F.3d at 945 (“To allow parties to avoid this limitation through manipulation of form . . . while in substance challenging the regulations, would permit parties ‘through careful pleading . . . [to] avoid the . . . limits imposed by Congress.’”) (altera-
As Comcast seeks a monetary award and has brought claims against a cable franchising authority that arise from cable regulation, we hold that its lawsuit is subject to the bar provided by § 555a(a) and must be dismissed on that basis. Considering the full record and the entire scope of this litigation, it is clear that this lawsuit has sufficient connection with cable regulation to trigger the application of § 555a(a). Because we find that Comcast’s lawsuit is barred by § 555a(a), we vacate the district court’s grants of summary judgment, and remand with instructions that Comcast’s lawsuit be dismissed.5

Though we find that Comcast’s lawsuit must be dismissed as pleaded and instruct the district court to enter an order to that effect on remand, that dismissal should be without prejudice. See Stoyas v. Toshiba Corp., 896 F.3d 933, 939 (9th Cir. 2018) (“Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment.”) (citations omitted)).

C.

Comcast argues that a finding that their lawsuit is barred by § 555a(a) leaves them without any possible means of obtaining the return of its security deposit. Because our holding is narrow in scope, we disagree. We have considered here only the application of § 555a(a) to the present lawsuit and determine only that the particular relief requested in Comcast’s complaint as pleaded is subject to that bar. We have not considered whether a claim for equitable relief would also be subject to § 555a(a)’s bar.6 Nor have we considered whether this bar would apply were Comcast defending a suit for underpayment of franchise fees brought by SMCTC—as would likely occur were Comcast to deduct the deposit as an overpayment from its franchise fee payments, see California Public Utilities Code Section 5860(h)—instead of bringing suit for damages.

3. It also appears that the district court to some degree misconstrued our decision in Jones, and the Eighth Circuit’s decision in Coplin v. Fairfield Public Access Television Committee, 111 F.3d 1395 (8th Cir. 1997). Both in Jones and Coplin, the lawsuit at issue clearly and obviously arose from or concerned cable regulation. See Jones, 80 F.3d at 324 (“It is difficult to see what the City was doing, if not regulating, when it precluded Jones from installing more cable infrastructure and from servicing customers unless Jones first obtained a city-wide franchise.”); Coplin, 111 F.3d at 1408 (lawsuit concerned “a governmental entity’s right to regulate the content carried on a public access cable service”). As a result, neither court considered a lawsuit where the connection to cable regulation was somewhat more attenuated. We are hesitant to attribute to either decision the holding that the district court drew from them, namely that § 555a(a) applies only where the claims brought against the franchising authority have a direct and obvious connection to cable regulation.

4. Even if we were persuaded that the terms Congress chose when it enacted § 555a(a) are in some way ambiguous, Comcast’s argument finds little support in that provision’s legislative history. Congress considered, but ultimately did not enact, a more narrow version of § 555a(a). See Caprotti, 721 N.E.2d at 960 (noting that the original version of § 555a(a) “passed by the Senate immunized local franchising authorities from monetary liability solely ‘in cases where the franchising authorities are charged with violating a cable operator’s First Amendment rights arising from actions authorized or required by [the Cable Act(1)]’”) (quoting H.R. Rep. No. 102-862, at 98 (1992) (Conf. Rep.), as reprinted in 1992 U.S.C.C.A.N. 1231, 1280). That version, had it been enacted, would plainly not have applied to Comcast’s lawsuit. However, Congress didn’t enact that version, or include any other language that specifically limits the scope of this exemption to claims or lawsuits concerning content regulations, the scope of services being offered, or to any other particular sort of regulatory action. Instead, Congress enacted a provision that simply exempts municipalities from claims for civil damages that “aris[e] from the regulation of cable service.” § 555a(a). We are bound to give full effect to those plain unambiguous terms.

5. Because we find that Comcast’s complaint must be dismissed on this basis, we do not address the other arguments raised on appeal by the parties.

6. Section 555a(a) specifically permits parties to bring suits requesting declaratory or injunctive relief. Comcast hasn’t sought such relief here, but an amended complaint that seeks declaratory or injunctive relief would not necessarily be subject to § 555a(a)’s bar. See Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave to amend when justice so requires.”); see also Hoang v. Bank of America, N.A., 910 F.3d 1096, 1102–03 (9th Cir. 2018) (explaining that “[l]eave to amend can and should generally be given, even in the absence of such a request by the party,” unless “the pleading could not possibly be cured by the allegation of other facts”) (quoting Ebner v. Fresh, Inc., 838 F.3d 958, 963 (9th Cir. 2016)).
IV. CONCLUSION

For the foregoing reasons, we hold that Comcast’s lawsuit is barred by 47 U.S.C. § 555a(a). We therefore vacate the district court’s grants of summary judgment and remand with instructions that Comcast’s suit be dismissed without prejudice. The parties shall bear their own costs on appeal. VACATED and REMANDED.
COUNSEL

Innovation Law Lab; Central American Resource Center Of Northern California; Centro Legal De La Raza; University Of San Francisco School Of Law Immigration And Deportation Defense Clinic; Al Otro Lado; Tahirih Justice Center, for Plaintiffs-Appellees.


OPINION

PER CURIAM:

In January 2019, the Department of Homeland Security (DHS) issued the Migrant Protection Protocols (MPP), which initiated a new inspection policy along the southern border. Before the MPP, immigration officers would typically process asylum applicants who lack valid entry documentation for expedited removal. If the applicant passed a credible fear screening, DHS would either detain or parole the individual until her asylum claim could be heard before an immigration judge. The MPP now directs the “return” of asylum applicants who arrive from Mexico as a substitute to the traditional options of detention and parole. Under the MPP, these applicants are processed for standard removal proceedings, instead of expedited removal. They are then made to wait in Mexico until an immigration judge resolves their asylum claims. Immigration officers exercise discretion in returning the applicants they inspect, but the MPP is categorically inapplicable to unaccompanied minors, Mexican nationals, applicants who are processed for expedited removal, and any applicant “who is more likely than not to face persecution or torture in Mexico.”

Eleven Central American asylum applicants who were returned to Tijuana, Mexico, and six organizations that provide asylum-related legal services challenged the MPP on several grounds in the district court. After concluding that the MPP lacks a statutory basis and violates the Administrative Procedure Act (APA), the district court enjoined DHS on a nationwide basis “from continuing to implement or expand the [MPP].”

DHS has moved for a stay of the preliminary injunction pending its appeal to this court. Our equitable discretion in ruling on a stay motion is guided by four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”

I

Some background is in order before addressing the merits of the plaintiffs’ statutory claim. Congress has established an exhaustive inspection regime for all Page 4 of 11 non-citizens who seek admission into the United States. See 8 U.S.C. § 1225(a)(3). Applicants for admission are processed either through expedited removal proceedings or through regular removal proceedings. Section 1225(b)(1) outlines the procedures for expedited removal and specifies the class of non-citizens who are eligible for expedited removal:

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

§ 1225(b)(1)(A)(i). Simply put, an applicant is eligible for expedited removal only if the immigration officer determines that the individual is inadmissible on one of two grounds: fraud or misrepresentation (§ 1182(a)(6)(C)) or lack of documentation (§ 1182(a)(7)).

All applicants for admission who are not processed for expedited removal are placed in regular removal proceedings under § 1225(b)(2)(A). That process generally entails a hearing before an immigration judge pursuant to § 1229a. Section 1225(b)(2)(B) provides exceptions to § 1225(b)(2)(A), while § 1225(b)(2)(C) permits applicants processed under § 1225(b)(2)(A) to be returned to the contiguous territory from which they arrived for the duration of their removal proceedings. Section 1225(b)(2) provides in full:

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

DHS relies on the contiguous-territory provision in subsection (b)(2)(C) as the statutory basis for the MPP. That provision authorizes DHS to return “alien[s] described in subparagraph (A)” to Mexico or Canada. § 1225(b)(2)(C). The phrase “described in” refers to the “salient identifying features” of the individuals subject to this provision. Nielsen v. Preap, 139 S. Ct. 954, 965 (2019) (emphasis and internal quotation marks omitted). Because the plaintiffs in this case are not “clearly and beyond a doubt entitled to be admitted,” they fit the description in § 1225(b)(2)(A) and thus seem to fall within the sweep of § 1225(b)(2)(C).

As the district court interpreted the statute, however, the contiguous-territory provision may not be applied to applicants for admission who could have been placed in expedited removal under § 1225(b)(1), even if they were placed in regular removal proceedings. The crux of this argument is § 1225(b)(2)(B)(ii), which provides that “[s]ubparagraph (A) shall not apply to an alien … to whom paragraph (1) applies.” So long as the applicant is eligible for expedited removal, the district court reasoned, § 1225(b)(1) “applies” to that individual. On this account, it is immaterial that the plaintiffs were not fact processed for expedited removal during their inspection at the border.

The primary interpretive question presented by this stay motion is straightforward: Does § 1225(b)(1) “apply” to everyone who is eligible for expedited removal, or only to those actually processed for expedited removal? The interpretive difficulty arises mainly because the inadmissibility grounds contained in subsections (b)(1) and (b)(2) overlap. A subset of applicants for admission—those inadmissible due to fraud or misrepresentation, § 1182(a)(6)(C), and those who do not possess a valid entry document, § 1182(a)(7)—may be placed in expedited removal. § 1225(b)(1)(A)(i). But as we read the statute, anyone who is “not clearly and beyond a doubt entitled to be admitted” can be Page 7 of 11 processed under § 1225(b)(2)(A). Section 1225(b)(2)(A) is thus a “catchall” provision in the literal sense, and Congress’ creation of expedited removal did not implicitly preclude the use of § 1229a removal proceedings for those who could otherwise have been placed in the more streamlined expedited removal process. See Matter of E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 522–24 (BIA 2011).

Because the eligibility criteria for subsections (b)(1) and (b)(2) overlap, we can tell which subsection “applies” to an applicant only by virtue of the processing decision made during the inspection process. Take first the procedures for designating an applicant for expedited removal. When the immigration officer “determines” that the applicant “is inadmissible” under § 1182(a)(6)(C) or (a)(7), he “shall order the alien removed from the United States without further hearing” unless the applicant requests asylum or expresses a fear of persecution, in which case the officer “shall refer the alien for an interview by an asylum officer under subparagraph (B).” 8 U.S.C. § 1225(b)(1)(A)(i)–(ii). In other words, the officer deciding inadmissibility on the spot without sending the matter to an immigration judge. DHS’s regulations further explain that a § 1225(b)(1) determination entails either the issuance of a Notice and Order of Expedited Removal or the referral of the applicant for a credible fear screening. 8 C.F.R. §§ 235.3(b)(2)(i), (4); see also id. § 208.30. And to “remove any doubt” on the issue, § 1225(b)(2)(B) clarifies Page 8 of 11 that applicants processed in this manner are not entitled to a proceeding under § 1229a. Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 226 (2008).

In contrast, § 1225(b)(2) is triggered “if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A). Following this determination, the officer will issue a Notice to Appear, which is the first step in a § 1229a proceeding. 8 C.F.R. § 235.6(a)(1)(i); see also id. § 208.2(b). A Notice to Appear can charge inadmissibility on any ground, including the two that render an individual eligible for expedited removal. 8 U.S.C. § 1229a(a)(2). The officer then sets a date for a hearing on the issue before an immigration judge. See Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018).

The plaintiffs were not processed under § 1225(b)(1). We are doubtful that subsection (b)(1) “applies” to them merely because subsection (b)(1) could have been applied. And we think that Congress’ purpose was to make return to a contiguous territory available during the pendency of § 1229a removal proceedings, as opposed to being contingent on any particular inadmissibility ground. Indeed, Congress likely believed that the contiguous-territory provision would be altogether unnecessary if an applicant had already been processed for expedited removal. The plaintiffs are properly subject to the contiguous-territory provision because they were processed in accordance with § 1225(b)(2)(A).

Though the plaintiffs contend otherwise, our approach is consistent with the subsections’ headings. Section 1225(b)(1)
is titled “Inspection of aliens arriving in the United States and
certain other aliens who have not been admitted or paroled,”
and § 1225(b)(2) is labeled “Inspection of other aliens.” The
plaintiffs interpret § 1225(b) to create two mutually exclusive
*pre-inspection* categories of applicants for admission; as
explained above, we read the statute to create two mutually ex-
clusive *post-inspection* categories. In our view, those who are
not processed for expedited removal under § 1225(b)(1) are
the “other aliens” subject to the general rule of § 1225(b)(2).

Our interpretation is also consistent with *Jennings v. Ro-
driguez*, 138 S. Ct. 830 (2018), the principal authority on
which the plaintiffs rely. There, the Supreme Court explained
that “applicants for admission fall into one of two catego-
ries, those covered by § 1225(b)(1) and those covered by §
1225(b)(2).” *Id.* at 837. As the Court noted, “Section 1225(b)
(1) applies to aliens *initially determined* to be inadmissible
due to fraud, misrepresentation, or lack of valid documenta-
tion.” *Id.* (emphasis added). “Section 1225(b)(2) is broader,
since it “serves as a catchall provision that applies to all ap-
licants for admission not covered by § 1225(b)(1).” *Id.* We
think our interpretation more closely matches the Court’s un-
derstanding of the mechanics of § 1225(b), as it is attentive to
the role of the immigration officer’s initial determination un-
der § 1225(b)(1) and to § 1225(b)(2)’s function as a catchall.

For the foregoing reasons, we conclude that DHS is likely
to prevail on its contention that § 1225(b)(1) “applies” only
to applicants for admission who are processed under its pro-
visions. Under that reading of the statute, § 1225(b)(1) does
not apply to an applicant who is processed under § 1225(b)
(2)(A), even if that individual is rendered inadmissible by
§ 1182(a)(6)(C) or (a)(7). As a result, applicants for admi-
ission who are placed in regular removal proceedings under
§ 1225(b)(2)(A) may be returned to the contiguous territory
from which they arrived under § 1225(b)(2)(C).

The plaintiffs have advanced only one other claim that
could justify a nationwide injunction halting the implemen-
tation of the MPP on a wholesale basis: that the MPP should
have gone through the APA’s notice-and-comment process.
DHS is likely to prevail on this claim as well, since “general
statements of policy” are exempted from the notice-and-com-
ment requirement. 5 U.S.C. § 553(b)(A). The MPP qualifies
as a general statement of policy because immigration officers
designate applicants for return on a discretionary case-by-
case basis. *See Regents of the Univ. of Cal. v. U.S. Dep’t of
Homeland Sec.*, 908 F.3d 476, 507 (9th Cir. 2018); *Mada-
Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

**II**

The remaining factors governing issuance of a stay pend-
ing appeal weigh in the government’s favor. As to the second
factor, DHS is likely to suffer irreparable harm absent a stay
because the preliminary injunction takes off the table one
of the few congressionally authorized measures available to
process the approximately 2,000 migrants who are currently
arriving at the Nation’s southern border on a daily basis.

See *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219,
1250–51 (9th Cir. 2018). DHS has therefore made a strong
showing on both the first and second factors, which are the
“most critical.” *Nken*, 556 U.S. at 434.

The other two factors support the issuance of a stay as
well. The plaintiffs fear substantial injury upon return to
Mexico, but the likelihood of harm is reduced somewhat by
the Mexican government’s commitment to honor its interna-
tional-law obligations and to grant humanitarian status and
work permits to individuals returned under the MPP. We are
hesitant to disturb this compromise amid ongoing diplomatic
negotiations between the United States and Mexico because,
as we have explained, the preliminary injunction (at least in
its present form) is unlikely to be sustained on appeal. Fi-
nally, the public interest favors the “efficient administration
of the immigration laws at the border.” *East Bay Sanctuary
Covenant*, 909 F.3d at 1255 (quoting *Landon v. Plasencia*,
459 U.S. 21, 34 (1982)).

The motion for a stay pending appeal is **GRANTED**.

**WATFORD, Circuit Judge, concurring:**

I agree that the Department of Homeland Security (DHS) is
likely to prevail on the plaintiffs’ primary claim, as 8 U.S.C.
§ 1225(b) appears to authorize DHS’s new policy of return-
ing applicants for admission to Mexico while they await the
outcome of their removal proceedings. But congressional au-
thorization alone does not ensure that the Migrant Protection
Protocols (MPP) are being implemented in a legal manner.
As then-Secretary of Homeland Security Kirstjen Nielsen
recognized, the MPP must also comply with “applicable do-

No Contracting State shall expel or return (“refouler”) a
refugee in any manner whatsoever to the frontiers of
territories where his life or freedom would be threatened
on account of his race, religion, nationality, membership
of a particular social group or political opinion.

Protocol Relating to the Status of Refugees art. I, Jan. 31,
1967, 19 U.S.T. 6223, 6225, 6276 (binding the United States
to comply with Article 33). Article 3 of the Convention
Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment similarly provides:

No State Party shall expel, return (“refouler”) or extrap-
olate a person to another State where there are substantial
grounds for believing that he would be in danger of be-
ing subjected to torture.

DHS’s stated goal is to ensure that the MPP is implemented in a manner that complies with the non-refoulement principles embodied in these treaty provisions. Specifically, Secretary Nielsen’s policy guidance on implementation of the MPP declares that “a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion …, or would more likely than not be tortured, if so returned pending removal proceedings.”

In my view, DHS has adopted procedures so ill-suited to achieving that stated goal as to render them arbitrary and capricious under the Administrative Procedure Act. See 5 U.S.C. § 706(2)(A). Under DHS’s current procedures, immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country. Immigration officers make inquiries into the risk of refoulement only if an applicant affirmatively states that he or she fears being returned to Mexico.

DHS’s policy is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States’ non-refoulement obligations. It seems fair to assume that at least some asylum seekers subjected to Page 3 of 5 the MPP will have a legitimate fear of persecution in Mexico. Some belong to protected groups that face persecution both in their home countries and in Mexico, and many will be vulnerable to persecution in Mexico because they are Central American migrants. It seems equally fair to assume that many of these individuals will be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico, and hence is information they should volunteer to an immigration officer. If both of those assumptions are accurate, DHS will end up violating the United States’ treaty obligations by returning some number of asylum seekers to Mexico who should have been allowed to remain in the United States.

There is, of course, a simple way for DHS to help ensure that the United States lives up to its non-refoulement obligations: DHS can ask asylum seekers whether they fear persecution or torture in Mexico. I’m at a loss to understand how an agency whose professed goal is to comply with non-refoulement principles could rationally decide not to ask that question, particularly when immigration officers are already conducting one-on-one interviews with each applicant. This policy of refusing to ask seems particularly irrational when contrasted with how DHS attempts to uphold the United States’ non-refoulement obligations in expedited removal proceedings. In that context, immigration officers are required to ask applicants whether they fear being removed from the United States and returned to their home countries. See 8 C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to use Form I-867B). Since the same non-refoulement principles apply to removal and return alike, DHS must explain why it affirmatively asks about fear of persecution in the removal context but refrains from asking that question when applying the MPP.

DHS has not, thus far, offered any rational explanation for this glaring deficiency in its procedures. (One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer.) As the record stands now, then, it seems likely that the plaintiffs will succeed in establishing that DHS’s procedures for implementing the MPP are arbitrary and capricious, at least in the respect discussed above.

Success on this claim, however, cannot support issuance of the preliminary injunction granted by the district court. We explained recently that the “scope of the remedy must be no broader and no narrower than necessary to redress the injury shown by the plaintiff.” California v. Azar, 911 F.3d 558, 584 (9th Cir. 2018). Here, the plaintiffs’ injury can be fully remedied without enjoining the MPP in its entirety, as the district court’s preliminary injunction currently does. I expect that appropriate relief for this arbitrary and capricious aspect of the MPP’s implementation will involve (at the very least) an injunction directing DHS to ask applicants for admission whether they fear being returned to Mexico. The precise scope of such relief would need to be fashioned after further proceedings in the district court. In the meantime, the government is entitled to have the much broader preliminary injunction currently in place stayed pending appeal.

W. FLETCHER, Circuit Judge, concurring only in the result:

I strongly disagree with my colleagues.

The question of law in this case can be stated simply: The Government relies on 8 U.S.C. § 1225(b)(2)(C) for authority to promulgate its new Migrant Protection Protocols (“MPP”). If § 1225(b)(2)(C) provides such authority, the MPP is valid. If it does not, the MPP is invalid. The question is thus whether § 1225(b)(2)(C) provides authority for promulgation of the MPP. The answer can also be stated simply: The Government is wrong. Not just arguably wrong, but clearly and flagrantly wrong. Section 1225(b)(2)(C) does not provide authority for the MPP.

***

I begin with a short summary of established law. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), arriving aliens applying for admission into the United States fall into two separate and non-overlapping categories.

First, there are aliens described in 8 U.S.C. § 1225(b)(1). These are alien applicants for admission who are traveling with fraudulent documents or no documents. Immigration
officers are required by regulation to ask whether these applicants fear persecution in their home country. If so, they are referred for a “credible fear” interview with an asylum officer. If they are found to have a credible fear of persecution in their home country, and are therefore potentially eligible for asylum, they are placed in a regular removal proceeding under 8 U.S.C. § 1229a. In that proceeding, an Immigration Judge (“IJ”) can find them either eligible or ineligible for asylum. Applicants who are referred to regular removal proceedings are entitled to remain in the United States while their eligibility for asylum is determined. Applicants found not to have a credible fear are subject to expedited removal without any formal proceeding.

Second, there are aliens described in 8 U.S.C. § 1225(b)(2). These are all alien applicants for admission not described in § 1225(b)(1). In the words of the statute, they are “other aliens.” § 1225(b)(2) (heading). Section (b)(2) applicants include aliens who are suspected of being, inter alia, drug addicts, convicted criminals, terrorists, or alien smugglers, and who would therefore be inadmissible. See 8 U.S.C. § 1182(a)(1)(A)(iv); (a)(2); (a)(3)(B); (a)(6)(E). Unlike § (b)(1) applicants, § (b)(2) applicants are automatically referred to regular removal proceedings under § 1229a. In those proceedings, an IJ can determine whether the applicants are, in fact, inadmissible on a ground specified in § 1182(a). Also unlike § (b)(1) applicants, § (b)(2) applicants are not entitled to remain in the United States while their admissibility is determined. At the discretion of the Government, they may be “returned” to a “contiguous territory” pending determination of their admissibility, § 1225(b)(2)(C).

This statutory structure has been well understood ever since the passage of IIRIRA in 1996, and until now the Government has consistently acted on the basis of this understanding. The Government today argues for an entirely new understanding of the statute, based on arguments never before made or even suggested.

* * *

It is undisputed that plaintiffs are bona fide asylum applicants under § (b)(1). Although it has long been established that § (b)(1) applicants are entitled to stay in the United States while their eligibility for asylum is determined, the Government is now sending § (b)(1) applicants back to Mexico. The Government refuses to treat them as § (b)(1) applicants. Instead, the Government improperly treats them under the MPP as § (b)(2) applicants who can be “returned” to Mexico under § 1225(b)(2)(C). The Government’s arguments in support of the MPP are not only unprecedented. They are based on an unnatural and forced—indeed, impossible—reading of the statutory text.

The relevant text of 8 U.S.C. § 1225 is as follows:

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission.

…

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien … who is arriving in the United States … is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien … is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

…

(B) Asylum interviews

…

(ii) Referral of certain aliens

If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution … , the alien shall be detained for further consideration of the application for asylum.

…

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining
immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien —

(i) who is a crewman

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

The statutory text is unambiguous. There are two categories of “applicants for admission.” § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are those who may be inadmissible under § 1182(a)(6)(C) (applicants traveling with fraudulent documents) or under § 1182(a)(7) (applicants with no valid documents).

Applicants described in § 1225(b)(2) are distinct. In the words of the statute, they are “other aliens.” § 1225(b)(2) (heading). Put differently, again in the words of the statute, they are “other aliens.” § 1225(b)(2).

The procedures specific to the two categories of applicants are given in their respective subsections. Section (b)(2) applies to all other potentially inadmissible applicants.

Section (b)(1) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that applicants under § (b)(2) are inadmissible on more grounds than applicants under § (b)(1). Applicants inadmissible under § (b)(2) include, for example, aliens with “a communicable disease of public health significance” or who are “drug abuser[s] or addict[s]” (§ 1182(a)(1)(A)(i), (iv)); aliens who have “committed … a crime involving moral turpitude” or who have “violat[ed] … any law or regulation … relating to a controlled substance” (§ 1182(a)(2)(A)(i)); aliens who “seek to enter the United States … to violate any law of the United States relating to espionage or sabotage,” or who have “engaged in a terrorist activity” (§ 1182(a)(3)(A), (B)); aliens who are “likely … to become a public charge” (§ 1182(a)(4)(A)); and aliens who are alien “smugglers” (§ 1182(a)(6)(E)).

Just last year, the Supreme Court distinguished between § (b)(1) and § (b)(2) applicants, stating clearly that they fall into two separate categories:

[Applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation… . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).]


Less than a month ago, the Attorney General of the United States drew the same distinction and briefly described the procedures applicable to the two categories:

Under section 235 of the Act [8 U.S.C. § 1225], all aliens “arriving in the United States” or “present in the United States [without having] been admitted” are considered “applicants for admission,” who shall be inspected by immigration officers.” INA § 235(a)(1), (3).[8 U.S.C. § 1225(a)(1), (3).] In most cases, those inspections yield one of three outcomes. First, if an alien is “clearly and beyond a doubt entitled to be admitted,” he will be permitted to enter, or remain in, the country without further proceedings. Id. § 235(b)(2)(A). [8 U.S.C. § 1225(b)(2)(A).] Second, if the alien is not clearly admissible, then, generally, he will be placed in “proceedings under section 240 [8 U.S.C. § 1229a]” of the Act—that is, full removal proceedings. Id. Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. Id. § 235(b)(1)(A)(i) [8 U.S.C. § 1225(b)(1)(A)(i)]; see Matter of E-R-M- & L-R-M-, 25 I&N Dec. 520, 524 (BIA 2011).


The procedures specific to the two categories of applicants are given in their respective subsections.

To some extent, the statutorily prescribed procedures are the same for both categories. If a § (b)(1) applicant passes his or her credible fear interview he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a. See 8 C.F.R. § 208.30(f). A § (b)(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government. See Matter of E-R-M- & L-R-M-, 25 I. & N. Dec. 520 (BIA 2011). A § (b)(2) applicant who is “not clearly and beyond a doubt entitled to be
admitted” will also be placed in removal proceedings under § 1229a. See § 1225(b)(2)(A).

Both § (b)(1) and § (b)(2) applicants can thus be placed in regular removal proceedings under § 1229a, though by different routes. But the fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a. A homely analogy may help make the point. Dogs and cats can both be placed in the pound. But they still retain their separate identities. Dogs do not become cats, or vice versa.

However, the statutory procedures for the two categories are not identical. Some of the procedures are exclusive to one category or the other. For example, if a § (b)(1) applicant fails to pass his or her credible fear interview, he or she may be removed in an expedited proceeding without a removal proceeding under § 1229a. See § 1225(b)(1)(A), (B). There is no comparable procedure for expedited removal of a § (b)(2) applicant. Further, in some circumstances a § (b)(2) applicant may be “returned” to a “territory contiguous to the United States” pending his or her removal proceeding under § 1229a. See § 1225(b)(2)(C). There is no comparable procedure for a § (b)(1) applicant.

The precise question in this case is whether a § (b)(1) applicant may be “returned” to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant? A plain-meaning reading of § 1225(b)—as well as the Government’s longstanding and consistent practice—tell us that the answer is “no.”

There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be “returned” under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an “officer shall order the alien removed … without further hearing or review unless the alien indicates either an intention to apply for asylum … or a fear of persecution.” Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution “shall” be referred by the immigration officer to an “asylum officer” for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the determination of the asylum officer—either expedited removal or detention pending further consideration. § 1225(b)(1)(B) (ii)-(iii). There is nothing in § 1225(b)(1) stating, or even suggesting, that a § (b)(1) applicant is subject to the “return” procedure of § 1225(b)(2)(C).

Nor is there anything in § 1225(b)(2) to indicate that a § (b)(1) applicant may be “returned” under § 1225(b)(2)(C). Taking § 1225(b)(2) subparagraph by subparagraph, it provides as follows. Subparagraph (A) tells us that unless a § (b)(2) applicant is “clearly and beyond a doubt entitled to be admitted,” she or he “shall be detained” for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is “[s]ubject to subparagraphs (B) and (C).” Id. Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens—“crewm[en],” § (b)(1) applicants, and “stowaway[s],” § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives “on land … from a foreign territory contiguous to the United States,” instead of being “detained” under subparagraph (A) pending his or her removal proceeding under § 1229a, may be “returned” to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which tells us what happens to § (b)(2) applicants—does not apply to § (b)(1) applicants.

The “return-to-a-contiguous-territory” provision of § 1225(b)(2)(C) is available only for § (b)(2) applicants. There is no way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government’s long-standing and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

In support of its motion to stay the order of the district court pending appeal, the Government makes several arguments. None is persuasive.

The Government first argues that § (b)(1) applicants are included within the category of § (b)(2) applicants. See Govt. Brief at 10. Under the Government’s argument, there are two categories of applicants, but the categories are overlapping. There are § (b)(1) applicants, who are defined in § (b)(1), and there are § (b)(2) applicants, who are defined as all applicants, including, but not limited to, § (b)(1) applicants.

For this argument, the Government relies on the phrase “an alien seeking admission” in § 1225(b)(2)(A). The Government argues that because § (b)(1) and § (b)(2) applicants are both “aliens seeking admission,” subparagraph (A) of § (b)(2) refers to both categories of applicants. Then, because subparagraph (A) is, by its terms, “[s]ubject to subparagraphs (B) and (C),” the Government argues that a § (b)(1) applicant may be “return[ed]” to a “foreign territory contiguous to the United States” under subparagraph (C).

The Government’s argument ignores the statutory text, the Supreme Court’s opinion in Jennings last year, and the opinion of its own Attorney General in Matter of M-S- less than a month ago.

The text of § 1225(b) tells us that § (b)(1) and § (b)(2) are separate and non-overlapping categories. Section 1225(b) specifies that § (b)(1) applicants are aliens who are inadmissible either under § 1182(a)(6)(C) or under § 1182(a)(7). Section (b)(2) aliens are “other aliens.” See § 1225(b)(2) (heading) (“Inspection of other aliens”) (emphasis added). That is, § (b)(2) covers applicants “other” than § (b)(1) applicants. In case a reader has missed the significance of the heading of § (b)(2), the statute makes the point again, this time in the body of § (b)(2). Section (b)(2)(B)(ii) specifically provides that subparagraph (A) of § (b)(2) “shall not apply to an alien … to whom paragraph [b](1) applies.”
In *Jennings*, the Supreme Court last year told us explicitly that § (b)(1) and § (b)(2) applicants fall into separate and non-overlapping categories. It wrote, “[A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). … Section 1225(b)(2) … applies to all applicants for admission not covered by § 1225(b)(1).” *Jennings*, 138 S. Ct. at 837 (emphasis added). Finally, in *Matter of M-S-*, the Attorney General wrote on April 16 of this year that an applicant is subject to different procedures depending on whether he or she is a § (b)(1) or § (b)(2) applicant. *Matter of M-S-*, 27 I. & N. Dec. at 510.

The Government’s second argument follows from its first. See Govt. Brief at 10–13. For its second argument, the Government relies on subparagraph (B)(ii), which provides: “Subparagraph (A) shall not apply to an alien … to whom paragraph [b](1) applies.” § 1225(b)(2)(B)(ii) (emphasis added). The Government argues that subparagraph (B)(ii) allows a government official to perform an act. The act supposedly authorized is to “apply” the expedited removal procedures of § (b)(1) to some of the aliens under § (b)(2), as the Government defines § (b)(2) applicants. (The Government needs to make this argument in order to avoid the consequence of treating all § (b)(1) applicants as § (b)(2) applicants, who are automatically entitled to regular removal proceedings.)

There is a fundamental textual problem with the Government’s argument. “Apply” is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, it refers to the application of a statutory section (“Subparagraph (A) shall not apply”). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section (“to whom paragraph [b](1) applies”). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: It does not apply to applicants to whom § (b)(1) applies. Neither time does the word “apply” refer to an act performed by a government official.

The Government’s third argument is disingenuous. The Government argues that § (b)(1) applicants are more “culpable” than § (b)(2) applicants, and that they therefore deserve to be forced to wait in Mexico while their asylum applications are being adjudicated. The Government argues that returning § (b)(2), but not § (b)(1), applicants to a contiguous territory would have “the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud … over aliens who follow our laws.” Govt. Brief at 14. In its Reply Brief, the Government compares § (b)(1) and § (b)(2) applicants, characterizing § (b)(2) applicants as “less-culpable arriving aliens.” Govt. Reply Brief at 5. The Government has it exactly backwards.

Section (b)(1) applicants are those who are “inadmissible under section 1182(a)(6)(C) or 1182(a)(7)” of Title 8. Section 1182(a)(6)(C), entitled “Misrepresentation,” covers, inter alia, aliens using fraudulent documents. That is, it covers aliens who travel under false documents and who, once they arrive at the border or have entered the country, apply for asylum. Section 1182(a)(7), entitled “Documentation requirements,” covers aliens traveling without documents. In other words, § (b)(1) applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents. Indeed, for many applicants, fraudulent documents are their only means of fleeing persecution, even death, in their own countries. The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).

The history of § 1225(b)(2)(C) confirms that Congress did not have § (b)(1) applicants in mind. Section 1225(b)(2)(C) was added to IIRIRA late in the drafting process, in the wake of *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). The petitioner in *Sanchez-Avila* was a Mexican national who applied for entry as a “resident alien commuter” but who was charged as inadmissible due to his “involvement with controlled substances.” *Id.* at 445. In adding § 1225(b)(2)(C) to what was to become IIRIRA, Congress had in mind § (b)(2) applicants like the petitioner in *Sanchez-Avila*. It did not have in mind bona fide asylum seekers who arrive with fraudulent documents or no documents at all.

Contrary to the Government’s argument, § (b)(1) applicants are not more “culpable” than § (b)(2) applicants. Quite the opposite. The § (b)(1) applicants targeted by the MPP are innocent victims fleeing violence, often deadly violence, in Central America. In stark contrast, § (b)(2) applicants include suspected drug addicts, convicted criminals, terrorists, and alien smugglers. See § 1182(a)(1)(A)(iv); (a)(2); (a)(3)(B); (a)(6)(E). Section (b)(2) applicants are precisely those applicants who should be “returned” to a “contiguous territory,” just as § 1225(b)(2)(C) provides.

***

Acting as a motions panel, we are deciding the Government’s emergency motion to stay the order of the district court pending appeal. Because it is an emergency motion, plaintiffs and the Government were severely limited in how many words they were allowed. Our panel heard oral argument on an expedited basis, a week after the motion was filed.

I regret that my colleagues on the motions panel have uncritically accepted the Government’s arguments. I am hopeful that the regular argument panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will be able to see the Government’s arguments for what they are—baseless arguments in support of an illegal policy that will, if sustained, require bona fide asylum applicants to wait in Mexico for years while their applications are adjudicated.
MARK STEVEN CORRINET, Plaintiff and Appellant, v. MICHAEL BARDY et al., Defendants and Respondents.

No. A153241
In The Court of Appeal of the State of California
First Appellate District
Division Four
(Contra Costa County Super. Ct. No. MSC13-00417)
Filed May 9, 2019

COUNSEL
Counsel for Appellant: Donald Charles Schwartz
Counsel for Respondents: Howard Mencher

OPINION

Mark Corrinet (plaintiff) appeals from a judgment dismissing his lawsuit for failure to prosecute. (Code Civ. Proc., §§ 583.410–583.430.)

Plaintiff contends this discretionary dismissal was error when, among other things, a trial date had been set pursuant to the parties’ stipulation and the case was ready for trial. We reverse the judgment.

I. THE DISCRETIONARY DISMISSAL STATUTE

Section 583.410, subdivision (a) provides that a “court may in its discretion dismiss an action for delay in prosecution … if to do so appears to the court appropriate under the circumstances of the case.” This discretion is qualified by section 583.420, subdivision (a), which states that a court may not dismiss an action for delay in prosecution unless one of the specified “conditions has occurred.” (Roman v. Usary Tire & Service Center (1994) 29 Cal.App.4th 1422, 1430.)

Pertinent here, a discretionary dismissal is authorized when the action “is not brought to trial within … [t]hree years after the action is commenced against the defendant.” (§ 583.420, subd. (a)(2)(A).)

California Rule of Court 3.1342 (rule 3.1342) provides that a proper determination of a motion to dismiss for delay in prosecution involves consideration of the following: “(1) The court’s file in the case and the declarations and supporting data submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process; [(2) The diligence in seeking to effect service of process; [(3) The extent to which the parties engaged in any settlement negotiations or discussion; [(4) The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; [(5) The nature and complexity of the case; [(6) The law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; [(7) The nature of any extensions of time or other delay attributable to either party; [(8) The condition of the court’s calendar and the availability of an earlier trial date if the matter was ready for trial; [(9) Whether the interests of justice are best served by dismissal or trial of the case; and [(10) Any other fact or circumstance relevant to a fair determination of the issue.”

When presented with a motion for discretionary dismissal, the trial court is required to consider the rule 3.1342 factors. (Van Keulen v. Cathay Pacific Airways, Ltd. (2008) 162 Cal. App.4th 122, 130–131 (Van Keulen).) On appeal, we review the trial court’s ruling for abuse of discretion. (Denham v. Superior Court (1970) 2 Cal.3d 557, 563–564; Blank v. Kirwan (1985) 39 Cal.3d 311, 331; Van Keulen, supra, 162 Cal. App.4th at p. 131.) We will not substitute our opinion for that of the trial court absent a clear abuse of discretion and a miscarriage of justice. (Ibid.)

II. PROCEDURAL SUMMARY

A. Background

On February 27, 2013, plaintiff filed the underlying action against four individuals and two out-of-state corporations (defendants), seeking damages and injunctive relief for breach of fiduciary duty and conversion. Plaintiff, an attorney acting in pro per, alleged the following facts: he is the former president and CEO of six LLC corporations, including the two corporate defendants, and owns interests in each of them. In December 2009, he resigned his positions from these companies because of unspecified illegal conduct by one of the individual defendants, who subsequently attempted to “purchase back” plaintiff’s ownership units. When plaintiff refused to sell, defendants breached their fiduciary duties by diluting the value of plaintiff’s units and otherwise attempting to “extort relinquishment” of his ownership interests in the companies.

On May 1, 2013, attorney Howard Mencher filed a general denial answer to plaintiff’s complaint on behalf of five of the six defendants, which asserted 29 affirmative defenses. On May 14, Mencher filed a separate general denial answer asserting the same affirmative defenses on behalf of the sixth defendant.

In July 2013, the first case management conference was held before the Honorable Steven Austin, who monitored the action for approximately one and a half years. In their case management statements, both sides stated they were agree-

1. Statutory references are to the Code of Civil Procedure, unless otherwise stated.
cases were also on the court's calendar. The court summarized related case. According to the minute order, the three related cases were
appearing for himself, Mencher appeared for defendants, and plaintiff appeared for Judith Craddick.

Beginning in 2015, this case would be assigned to the Honorable Barbara Zuniga. Plaintiff reported he was retained to the fact that attorney Mencher was representing all defendants in all the related cases. Plaintiff reported there were "thousands of pages" of documents to review, and that the four related cases had "extensive cross-discovery issues."

In December 2014, the court held another case management conference. Defendants reported they had propounded a second round of written discovery and once it was completed, there would be depositions in California and Oregon. Defendants also stated there had been a delay in the case because plaintiff had been ill since July. The minute order from this conference stated that the court was informed this case involved "massive discovery," and that motions would be filed. Noting that there were related cases, the court stated it would consider mediation at the next status conference.

The next conference was held in February 2014. In a statement filed before the conference, defendants reported that a motion to coordinate this case with cases pending in another department had been denied. Plaintiff's health issues had not resolved, but the parties anticipated exchanging discovery responses soon. At the conference, the court observed that the related cases, which involved the same set of defendants, had been re-assigned to the same department as the present case, and it suggested coordinating discovery. Defense counsel did not agree to that proposal.

At a conference in June 2014, defendants reported they granted plaintiff an extension to respond to their second round of discovery because of his health issues. Plaintiff reported there were "thousands of pages" of documents to review and that the four related cases had "extensive cross-discovery issues."

In December 2014, the court held another case management conference. Prior to the hearing, plaintiff sought guidance about two issues. First, he had responded to a document production request by giving defendants access to 8,000 pages of documents, but there was another set of documents that he did not know how to handle because one defendant was claiming a prior attorney-client relationship with plaintiff, which raised confidentiality concerns. The other issue pertained to the fact that attorney Mencher was representing all defendants in all the related cases. Plaintiff reported he was co-counsel in the three related cases, and that settlement offers had been made. However, Mencher had not responded to any offer, which led to a concern that he had a conflict of interest. At the conference, the parties were advised that beginning in 2015, this case would be assigned to the Honorable Judith Craddick.

The next case management conference was held in April 2015, before the Honorable Barbara Zuniga. Plaintiff appeared for himself, Mencher appeared for defendants, and attorney Grover Perrigue appeared on behalf of a plaintiff in a related case. According to the minute order, the three related cases were also on the court's calendar. The court summarized the discovery dispute and then referred the case to court mediation to be completed by August 11. The parties were advised that the next hearing would be a trial setting conference on August 27, so status reports would not be required.

On June 17, 2015, defense counsel Mencher sent a letter by fax to Judge Craddick requesting that the court vacate the referral to mediation in this case and the three related cases. Mencher reported that the parties had agreed on a mediator and had two pre-mediation phone conferences followed by an exchange of emails. However, the communications became so "hostile, contentious and volatile" that defendants changed their mind about any benefit of mediation. Moreover, defendants and counsel lived out of town or in other states, thus making further efforts to mediate "a significant waste of time and money." On June 19, 2015, Judge Craddick set aside the referral to court mediation.

On August 18, 2015, Judge Craddick presided over a case management conference for the four related cases. The minute order from that unreported hearing stated: "Based on the Status Report filed, 8/18/15, by counsel for plaintiffs in case C13-00592 this case is re-referred to Court Mediation." In a separate notice, the court extended the timeline for completion of mediation in all four cases to November 30, 2015 and scheduled a trial setting conference for December 11, 2015.

On February 26, 2016, mediator John Warnlof sent a letter to Judge Craddick. Warnlof stated that he had been asked to "serve as mediator in the[] four inter-related cases," but he had been "unsuccessful in scheduling a mutually agreed upon date for the mediation." Accordingly, Warnlof requested that the court vacate his appointment.

On March 17, 2016, plaintiff and Mencher appeared before Judge Craddick for a trial setting conference in the present case only. Mencher stated there was agreement to mediate with John Warnlof, but he needed to resolve issues regarding an agreeable date and who needed to attend. Plaintiff stated that he intended to file a motion in one of the related cases to extend the five-year statutory deadline for bringing a case to trial (§ 583.310). Mencher declined to stipulate to an extension to "serve as mediator in the[] four inter-related cases," but he had been "unsuccessful in scheduling a mutually agreed upon date for the mediation." Accordingly, Warnlof requested that the court vacate his appointment.

At the July 2016 hearing, plaintiff reported that two of the related cases were in an active discovery phase, there were thousands of documents to review, and he planned to file a summary judgment motion after discovery was completed. A long cause jury trial date was set for June 26, 2017.

In March 2017, plaintiff paid jury fees in advance of trial. The following month, he filed a motion by stipulation to change the trial date. The motion was supported by plaintiff's declaration and a letter from his doctor, which described plaintiff's health problems and explained why he was unable to participate as a witness at trial or practice law for a minimum of at least three months. The motion was also supported.
by a stipulation signed by plaintiff and Mencher pursuant to which the parties agreed that plaintiff would not provide legal representation to a named individual who was a plaintiff in related litigation, and that the trial date in this case would be reset for January or February of 2018.

On April 26, 2017, the trial court re-set the trial date to January 22, 2018. According to the order signed by Judge Craddick, this change was made pursuant to an “application of all the parties,” was supported by the parties’ stipulation, and was based on a finding of “good cause.” The discovery cut-off and expert witness dates were re-set accordingly and a pending motion to continue the trial date was vacated.

In September 2017, Grover Perrigue replaced plaintiff as counsel of record in this case and plaintiff associated in as co-counsel. In October, attorney Donald Schwartz accepted a limited scope representation of plaintiff to handle motions to disqualify Mencher and to compel discovery. A few days later, on October 27, plaintiff filed a substitution of attorney pursuant to which he replaced Perrigue as counsel of record and resumed his pro per status.

On November 7, 2017, plaintiff filed an ex parte application for an order shortening time to file a motion to waive the five-year statute for bringing the action to trial due to the fact that Perrigue had suffered a stroke and underwent heart surgery necessitating his unanticipated withdrawal as plaintiff’s trial counsel. The application was supported by an attorney declaration from Schwartz, who stated that he was not in a position to represent plaintiff at trial, that Perrigue was unable to assist in any capacity, and that Mencher refused to stipulate to a continuance of the trial date. Schwartz also submitted a doctor’s letter, which confirmed that Perrigue had a stroke and surgery and reported he was experiencing cognitive/memory difficulties.

On November 7, 2017, plaintiff’s ex parte application for an order shortening time was denied without explanation.

B. The Motion to Dismiss

On December 7, 2017, defendants filed an ex parte application for an order shortening time to file a motion to dismiss this case, which was supported by an attorney declaration from Mencher. According to Mencher, plaintiff had engaged in “extraordinary delay in moving this case towards trial,” as demonstrated by the following circumstances: “For almost five years, [plaintiff had] done virtually nothing to move this case forward other than to file a first set of form interrogatories—general—and a first document request”; mediation efforts were “totally unsuccessful”; and plaintiff requested the stipulation to change the trial date from June 2017 to January 22, 2018.

In his declaration, Mencher also stated that this case was one of four cases in which plaintiff had played a leading role. Mencher acknowledged that two cases had been settled but characterized the settlements as “minimal.” He further opined that this case was comparable to the fourth related case, which was dismissed for failure to prosecute. According to Mencher, Judge Craddick dismissed that case “for failure to work up the case for over four years and for not having a representative of the deceased Plaintiff, who died almost two years ago, substituted into the case.”

Defendants’ ex parte application for an order shortening time to bring their motion was directed to the attention of the Honorable Barry P. Goode but was granted by Judge Craddick. The court allowed the motion to be filed on shortened notice, and gave plaintiff until 12:00 noon on December 18, 2017 to file opposition.

Plaintiff objected to the order shortening time and opposed the motion to dismiss on the merits, denying that he failed to prosecute this case and pointing out that a stipulated trial date had been set within the five-year deadline. In a supporting attorney declaration, Schwartz stated that plaintiff had paid non-refundable jury fees, demanded exchange of expert witness information and disclosed his experts, and was otherwise ready for trial notwithstanding the fact that the defendants had never responded to plaintiff’s properly served discovery requests. Schwartz also pointed out that the defendants failed to disclose any experts.

A hearing on the motion to dismiss was scheduled for December 20, 2017, before Judge Craddick. The court issued a detailed tentative ruling granting the motion. Neither party appeared at the hearing, so the court adopted its tentative ruling and dismissed this action. In its order, the court acknowledged that a trial was set to begin a month before the five-year deadline for bringing a case to trial. (See § 583.310.) Nevertheless, the court stated it was dismissing the action for delay in prosecution pursuant to the criteria set forth in rule 3.1342. As support for its ruling, the court summarized the procedural history of the case, highlighting the following facts:

1. After the complaint was filed and answered, plaintiff did “virtually nothing to prosecute this case other than to appear at Case Management Conferences.”

2. In April 2015, “this judge” held a Case Management Conference where the parties reported discovery issues and the case was referred to mediation to be completed by August, so a trial date could be set at the next conference, but before that conference the mediation referral was vacated at defense counsel’s request.

3. In August 2015, the court again referred this case to mediation, “based on the Status Report plaintiff filed that date.”

4. In March 2016, the parties had not yet scheduled a mediation notwithstanding the fact that plaintiff was aware of the five-year deadline and that defense counsel had refused to stipulate to an extension of that deadline in a related case.
(5) In July 2016, the court set the trial for June 26, 2017. “There is no record that plaintiff asked for an earlier date.”

(6) The initial trial date was vacated pursuant to a stipulation that was requested by plaintiff and the trial date was reset for January 2018.

(7) In September and October 2017, plaintiff was represented by a different attorney, but he then became pro per again.

(8) In November 2017, plaintiff’s limited scope counsel filed an application for an order shortening time on a motion to waive the five-year statute, which the court denied.

The court concluded that these facts demonstrated plaintiff’s lack of diligence in bringing the case to trial, citing three reasons. First, there was no indication in the record that the plaintiff asked for a trial date earlier than the one ultimately set by the court despite the fact that the court’s docket would have accommodated a trial as early as two years after the complaint was filed. Second, plaintiff represented that this case involved “massive” discovery, which “never materialized.” Third, plaintiff filed no declarations justifying any significant period of delay during the five years the case was pending. Under these circumstances, the court concluded there was no “reason why this case should not be dismissed,” and that dismissing plaintiff’s action furthered the purpose of the discretionary dismissal statute to expedite the administration of justice.

III. DISCUSSION

Because plaintiff did not bring his case to trial within three years after filing his complaint, the trial court had discretion to dismiss the action for lack of prosecution. (§ 583.420, subd. (a)(2)(A).) That discretion was broad, and we must presume it was exercised correctly. (Landry v. Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 698.) Thus, for example, we will defer to the court’s factual determinations when the evidence is in conflict even if we might have reached a contrary result. (Shamblin v. Bratatt (1988) 44 Cal.3d 474, 478–479.) However, trial court discretion is not unfettered. (Cordova v. Vons Grocery Co. (1987) 196 Cal. App.3d 1526, 1535.) A proper exercise of discretion must not be arbitrary, must conform with the spirit of the law, and must be applied in a way that is consistent with substantial justice. (Ibid.; Longshore v. Pine (1986) 176 Cal.App.3d 731, 737.)

Here, the trial court made material findings that are not supported by the evidence, beginning with its key finding that plaintiff did virtually nothing to prosecute this case other than attend case management conferences. First, it is undisputed that plaintiff served discovery in April and May 2013. Also undisputed is the evidence that plaintiff responded to defendants’ discovery by making available at least 8,000 pages of documents, and that he was actively involved in the related cases with cross-discovery issues. Plaintiff also paid jury fees, disclosed his expert witnesses, retained lawyers to assist him and filed a declaration of counsel attesting that he was ready to try this case.

Some findings by the court are supported by evidence but are not indicative of inattention or lack of diligence. For example, the court emphasized that plaintiff did not request a trial date earlier than June 26, 2017. On this record, it is not clear why plaintiff should have requested an earlier date. He had significant health problems, which slowed his pace; he had the set-back of failing to secure court mediation of the four related cases; and discovery was ongoing. In spite of these impediments, we note the undisputed evidence that two related cases were settled.

The court also emphasized that the plaintiff requested the stipulation to re-set the trial date. However, it failed to consider that plaintiff requested the stipulation because of documented medical problems that prevented him from participating as a witness at trial; that as part of the stipulation, defendants extracted a promise from plaintiff that he would not act as counsel for a plaintiff in a related matter; and that the motion to postpone the trial date was granted pursuant to a judicial finding of good cause. In light of these undisputed facts, using the stipulation to justify dismissing this case looks arbitrary.

It seems that the court also faulted plaintiff for making an application for an order shortening time to move for a waiver of the five-year dismissal statute. But it failed to consider undisputed evidence that (1) plaintiff’s trial counsel became unexpectedly unavailable after suffering a stroke and undergoing heart surgery, and (2) after the application was denied, plaintiff’s other retained attorney expressly represented that plaintiff was ready for trial. Nor can we ignore the fact that a month after the court denied plaintiff’s application for an order shortening time, it granted defendants’ ex parte application for an order shortening time, thus allowing them to bring a last minute motion to dismiss this action without explaining why they did not raise the issue sooner. Indeed, had the trial court not granted defendants an order shortening time, their motion to dismiss for failure to prosecute could not have been heard before the first day of trial, since the 45-day notice period normally required for such a motion expired on the weekend before the Monday, January 22, 2018 trial date.

Aside from the time consumed by discovery and mediation efforts, the most significant impediment to bringing this case to trial sooner was plaintiff’s health problems. We recognize that even a “[d]elay attributable to sickness or death of . . . the parties is not necessarily excusable.” (White v. Mortgage Finance Corp. (1983) 142 Cal.App.3d 770, 775.) “Each case must be decided on its own peculiar features and facts.” (Ibid.) The problem here is that the trial court ignored the particular features and facts of this case when it ruled on the motion to dismiss. The defendants acknowledged repeatedly
that plaintiff was ill during the discovery phase of the case. Furthermore, contrary to a finding in the discretionary dismissal order, the plaintiff did submit a declaration explaining why his medical problems necessitated a delay in bringing the case to trial. Indeed, the court itself found that plaintiff’s documented medical problems constituted good cause to reset the trial date to January 22, 2018.

In this court, defendants insist that the trial court acted within its discretion. They argue that a failure to exercise reasonable diligence becomes increasingly more difficult to justify as the case moves closer to the five-year dismissal date (citing Farrar v. McCormick (1972) 25 Cal.App.3d 701, 704 (Farrar)), and they claim that is “exactly what happened” in the present case.

In Farrar, the plaintiff filed an at-issue memorandum two years after the case was filed, stating that discovery was completed, and the case was ready for trial. (Farrar, supra, 25 Cal.App.3d at p. 703.) Then the court held a settlement conference, which was continued several times until it was ordered off calendar due to plaintiff’s non-appearance. After that, there was no activity in the case for 13 months at which point the plaintiff filed a motion to specially set the trial date prior to the five-year deadline. Defendant responded with an application to file a motion on shortened time to dismiss the case for failure to prosecute. (Ibid.) The trial court granted the application and the motion to dismiss. Affirming the judgment, the Farrar court found that the plaintiff failed to explain or justify the delay of nearly five years in bringing the case to trial or his complete inaction for the 13-month period before filing his motion to specially set a trial date. The court also rejected plaintiff’s challenge to the order shortening time, finding that plaintiff had not objected to the application in the trial court or shown prejudice. (Id. at p. 705.)

The present case is materially different than Farrar because there are explanations for the amount of time that this case was pending prior to trial. First, the parties agreed from the outset that trial preparation would take extra time because the case was document intensive and required extensive discovery. Second, plaintiff spent time attempting to mediate because it provided an opportunity to resolve all the related cases together and because defendants repeatedly represented they were amenable to mediation. Third, the initial trial date was moved pursuant to a stipulation of the parties and a finding of good cause by the trial court.

Perhaps the most crucial distinction between the present case and Farrar is that this case was dismissed notwithstanding the fact that the scheduled trial date was a month away and plaintiff’s counsel expressly represented that plaintiff was ready for trial. Indeed, we have found no authority involving a discretionary dismissal under comparable facts. Defendants view this dearth of authority as favorable to them, claiming there is no case restricting a trial court’s discretion to dismiss a case simply because a trial date has been set and plaintiff states he is ready for trial. But the pertinent facts are more troubling. First, the court did not just set a trial date, it set that date within the five-year statutory period pursuant to a stipulation and a judicial finding of good cause. Second, not only did the plaintiff state he was ready for trial, but the trial court did not dispute that representation when it dismissed the case on shortened notice just one month before trial.

The court’s concern that the “massive discovery” “never materialized” might have justified setting a trial date earlier or refusing further continuances if plaintiff had not been ready for trial on January 22, 2018. But dismissing a case under these circumstances was at odds with the fundamental policy favoring trial on the merits over termination of a case on procedural grounds. (§ 583.130.) To be sure, there are situations when this policy is outweighed by other considerations furthering the purpose of the discretionary dismissal statute, which is to discourage stale claims and expedite the administration of justice. (See e.g. Landry v. Berryessa Union School Dist., supra, 39 Cal.App.4th at p. 698.) However, absent evidence that plaintiff’s claim was stale, dismissing his case the month before a stipulated trial date would not expedite the administration of justice.

For all these reasons, we conclude the trial court abused its discretion by dismissing this action. Accordingly, we do not address plaintiff’s other claims, including that his constitutional rights were violated.

IV. DISPOSITION

The judgment is reversed. Costs of appeal are awarded to plaintiff.

TUCHER, J.

WE CONCUR: POLLAK, P. J., BROWN, J.
May 13, 2019

MERCURY INSURANCE COMPANY et al., Plaintiffs and Respondents,
v.
RICARDO LARA, as Insurance Commissioner, etc., Defendant and Appellant;
CONSUMER WATCHDOG, Intervener and Appellant.

No. G054496, G054534
In The Court of Appeal of the State of California
Fourth Appellate District
Division Three
(Super. Ct. No. 30-2015-00770552)
Appeal from a judgment of the Superior Court of Orange County, Gail Andrea Andler, Judge. Motion to strike portion of intervener’s reply brief and motion for judicial notice. Motion to strike denied; motion for judicial notice granted. Judgment reversed and remanded with directions. Filed May 7, 2019
Order modifying opinion May 8, 2019

COUNSEL
Xavier Becerra, Attorney General, Diane S. Shaw, Assistant Attorney General, Lisa W. Chao, Nhan T. Vu and Debbie J. Vorous, Deputy Attorneys General, for Defendant and Appellant.
Consumer Watchdog, Harvey Rosenfield, Pamela M. Pressley, Jonathan Phenix; Aitken Aitken Cohn, Wylie A. Aitken, Casey R. Johnson, Megan G. Demshki; and Arthur D. Levy for Intervener and Appellant.

ORDER MODIFYING OPINION;
NO CHANGE IN JUDGMENT

The opinion filed on May 7, 2019 is modified as follows:

1. On page 1, the name of defendant and appellant is changed from “Dave Jones” to “Ricardo Lara” in the caption;

2. On page 2, the first line of the opinion stating “Defendant and appellant Dave Jones, the Insurance Commissioner of the” is deleted and the following line is inserted in its place: “Defendant and appellant Ricardo Lara, the Insurance Commissioner of the”;

3. On page 2, in footnote 1, a new first sentence is inserted so the footnote reads as follows: “When this action was originally filed, Dave Jones was the California Insurance Commissioner and the named defendant. Commissioner shall also refer to any previous insurance department commissioners when applicable.”

These modifications do not change the judgment. The clerk of this court is ORDERED to serve on the parties a copy of this modification order and a copy of the modified opinion.

As these clerical errors were found prior to the posting of this published opinion, only the modified version of the opinion shall be posted by the Reporter of Decisions.

THOMPSON, J.

WE CONCUR: IKOLA, ACTING P. J., GOETHALS, J.

OPINION

Defendant and appellant Dave Jones, the Insurance Commissioner of the State of California (Commissioner), filed a notice of noncompliance against plaintiffs and respondents Mercury Insurance Company, Mercury Casualty Company, and California Automobile Insurance Company (collectively Mercury) alleging Mercury charged rates not approved by the California Department of Insurance (CDI) and that the rates were unfairly discriminatory in violation of Insurance Code sections 1861.01, subdivision (c) and 1861.05, subdivision (b) (all further statutory references are to this code unless otherwise stated). The allegedly unapproved rates were in the form of broker fees charged by Mercury agents, which should have been disclosed as premium. After prevailing at an administrative hearing, the Commissioner imposed civil penalties against Mercury in the sum of $27,593,550 for almost 184,000 unlawful acts.

Mercury filed a petition for writ of mandate, which the court granted, reversing the Commissioner’s decision. The court found the “broker fees” were not premium because they were charged for separate services. The court also rejected the Commissioner’s interpretation of the term premium under the Insurance Code and regulations. In addition, the court ruled Mercury did not have proper notice it was subject to penalties, in violation of due process, and the action was barred by laches because CDI had unduly delayed in bringing the action.

Commissioner and intervener and appellant, Consumer Watchdog (CWD), appeal on several grounds. They assert the trial court did not use the proper standard of review, failed to give the Commissioner’s findings a strong presumption of correctness and failed to put the burden of proof on Mercury to show the findings were against the weight of the evidence.

1. Commissioner shall also refer to any previous insurance department commissioners when applicable.
They also argue the trial court’s finding the fees were charged for separate services was precluded by collateral estoppel. In addition, they maintain Mercury received proper notice of the potential imposition of a penalty, and laches did not bar the action.

We agree with Commissioner and CWD the writ was issued in error and reverse the judgment. Because there was substantial evidence supporting the Commissioner’s decision, remand for a new hearing would be an idle act and we therefore remand with directions for the court to deny the writ.

As a separate ground to affirm the judgment, Mercury argues its due process rights were violated by improper ex parte communications by the CDI, and the proceedings against it should be dismissed. We disagree. We also deny Mercury’s motion to strike portions of CWD’s brief on this issue.

Finally, we grant intervenor’s unopposed motion for judicial notice of CDI’s responses to initial public comments about proposed rules concerning the interpretation of the term premium.

**BACKGROUND**

In the insurance industry, business is generated by producers, either agents or brokers. (Krumme v. Mercury Ins. Co. (2004) 123 Cal.App.4th 924, 932, fn. 4 (Krumme).) An insurance agent is “a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life, disability, or health insurance, on behalf of an admitted insurance company.” (§ 31; see § 1621.) An insurance broker is “a person who, for compensation and on behalf of another person, transacts insurance other than life, disability, or health with, but not on behalf of, an insurer.” (§ 33; see § 1623.)

“An agent’s primary duty is to represent the insurer in transactions with insurance applicants and policyholders.” (Douglas v. Fidelity National Ins. Co. (2014) 229 Cal. App.4th 392, 410 (Douglas).) “In contrast, a broker’s primary duty is to represent the applicant/insured, and his or her actions are not generally binding on the insurer. ‘Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors.’” (Id. at p. 411, italics omitted.)

A broker may charge a fee as long as the “broker is not an appointed agent of the insurer with which the coverage is or will be placed.” (Cal. Code Regs., tit. 10, § 2189.3, subd. (c).) There is no authority allowing an insurance agent to charge such a fee.

The Insurance Code has prohibited the charging of unfair premiums since 1947. (See former §§ 1852, 1861.05.) In 1980 the Commissioner promulgated Bulletin 80-6 to the insurance industry stating, “The California courts have held that all payments by the insured which are a part of the cost of insurance are premium, including any and all sums paid to an insurance agent,” citing Groves v. City of Los Angeles (1953) 40 Cal.2d 751 (Groves) and Allstate Ins. Co. v. State Board of Equal. (1959) 169 Cal.App.2d 165. It continues, “General rules of agency law prohibit an agent from charging sums not authorized by the agent’s principal. Should an insurer authorize its agents to collect ‘fees’ such fees would have to be reported as premium by the insurer, and would, of course, have to comply with the anti-discrimination statutes. Therefore, an insurer cannot permit each of its agents to determine which fees that agent will charge because to do so would surely result in rate discrimination.” Bulletin 80-6 explained it was “not a new administrative construction of the law, but is a restatement of the law as it exists and as previously interpreted and applied by this office.”

In November 1988 California voters enacted Proposition 103 “‘to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.’” (Donabedian v. Mercury Ins. Co. (2004) 116 Cal.App.4th 968, 981 (Donabedian), quoting Prop. 103, § 2 [uncodified preamble, “Purpose"], reprinted at Historical and Statutory Notes, 42E West’s Ann. Ins. Code (2013 ed.) foll. § 1861.01, p. 65.) Section 8, subdivision (a) of Proposition 103 provides it is to “‘be liberally construed and applied in order to fully promote its underlying purposes.’” (Donabedian, at p. 977.)

Proposition 103 requires prior approval of insurance rates and prohibits unfairly discriminatory rates. (§§ 1861.01, subd. (c), 1861.05, subds. (a), (b); 20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 239-240 (20th Century).) It “is not limited in scope to rate regulation. It also addresses the underlying factors that may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unaffordable, and unaffordable.” (State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal.4th 1029, 1041-1042.)

In 1995 CDI adopted a regulation defining “premium” as “the final amount charged to an insured for insurance after applying all applicable rates, factors, modifiers, credits, debits, discounts, surcharges, fees charged by the insurer and all other items which change the amount the insurer charges to the insured.” (Cal. Code Regs., tit. 10, § 2360.0, subd. (c) (10 CCR § 2360.0(c).)) In adopting this regulation, in response to public comments the Commissioner stated: “‘For purposes [of Proposition 103], a rate is the price or premium that an insurer charges its insureds for insurance,’” quoting 20th Century, supra, 8 Cal.4th at p. 240. He continued, the regulations “must define the term to make it clear that it is the final, total amount charged to the insured which cannot be unfairly discriminatory - - and this is clearly the intent of Proposition 103 as interpreted by the unanimous California Supreme Court. Proposition 103 was not intended to allow insurers to get around the prohibition against unfairly dis-

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2. We are not persuaded by the trial court’s attempt to distinguish these cases on the grounds they were interpreting “gross premium for taxation purposes” only.
criminatory ‘rates’ by adding other unfairly discriminatory charges after a base rate is determined.”

“[I]nurance premium includes not only the ‘net premium’ . . . but also the direct and indirect costs associated with providing that insurance coverage and any profit or additional assessment charged.” (Troyk v. Farmers Group, Inc. (2009) 171 Cal.App.4th 1305, 1325 (Troyk).)

**FACTS AND PROCEDURAL HISTORY**

Since its founding in 1962 up to 1989 Mercury sold insurance only through agents. After Proposition 103 passed in 1988, Mercury “converted” approximately 700 of its agents to “brokers” and notified the CDI their agency status was terminated.

Auto Insurance Specialists (AIS) which became Mercury’s appointed agent in 1968, also entered into a “broker’s contract” with Mercury in 1988 after the passage of Proposition 103. In executing the “broker’s contract” AIS wrote, “we understand that the relationship between Mercury and A.I.S. is not changed in any material fashion as a result of this change in title and understand that our ability to bind coverage and other essentials of our mutual business relationship including our ability to hold ourselves out as a representative of Mercury Insurance Group is not changed by the execution of this new agreement.”

Mercury’s “brokers” began charging “broker fees” on automobile insurance policies. Mercury’s agents who provided the same service and coverage did not charge an extra fee.

In 1998 CDI conducted an examination of Mercury. In July 1999 CDI provided to Mercury a report (1998 Exam Report), which stated Mercury’s “brokers” were actually de facto agents under section 1621. The 1998 Exam Report also stated the purported conversion to “brokers” violated at least three Insurance Code sections because 1) the “brokers” were charging fees for providing the same services as Mercury’s agents (§ 1861.05, subd. (a)); 2) Mercury’s advertising misrepresented that consumers were dealing with agents and failed to advise the “brokers” were charging fees (§ 790.03, subd. (b)); and 3) Mercury had not filed notices of appointment, required for agents, for the “brokers” (§ 1704, subd. (a)). The 1998 Exam Report stated the violations would be reported to CDI’s legal division.

CDI met with Mercury in August 1999 and January 2000 to discuss the 1998 Exam Report. Prior to the 2000 meeting CDI sent Mercury a draft Notice of Noncompliance (Draft NNC). It stated Mercury was violating sections 1861.05 and 1861.05 by virtue of its agents charging “unapproved ‘broker fees.’” It also stated Mercury was subject to civil penalties.

At the 2000 meeting, Mercury agreed to provide a response to the Draft NNC. CDI agreed once it received the response it would notify Mercury if “other action needs to be taken.” Mercury never submitted a response to the Draft NNC.

Mercury then proposed legislation (Assem. Bill No. 2639 (2000 Reg. Sess.) (AB 2639)) to amend the definition of a broker under section 1623 to provide a licensed broker submitting an insurance application to an insurance company is “conclusively presumed” to be a broker and to allow “an insurer to authorize a broker to bind coverage” on the insurer’s behalf. CDI opposed AB 2639 because it would “blur the long-established legal distinctions between ‘agents’ and ‘brokers’ and would create confusion for the consumer and problems for . . . enforcement. . . . [F]ees are commonly non-refundable, excessive, and charged on transactions when they should be included in the premium.”

The Legislature amended section 1623, but not as proposed by Mercury. Rather, it created a rebuttable presumption, for licensing purposes only, that the person is acting as an insurance broker.4

A few weeks after amended section 1623 was enacted, in October 2000 CDI issued an addendum to the 1998 Exam Report (2000 Addendum). Among other things the 2000 Addendum explained CDI had contacted Mercury inquiring as to the whereabouts of Mercury’s promised response to the Draft NNC. It also stated “Mercury will contact CDI’s Legal Division to discuss this matter further.”

The next month Mercury sent a letter to CDI stating it believed passage of AB 2639 had resolved the improper broker fee issue (Mercury Letter).

In December 2000 CDI filed the final version of the 1998 Exam Report, which repeated CDI’s conclusion Mercury’s “broker fees” were illegal.

In the meantime in June 2000 Robert Krumme, a consumer, filed suit against Mercury5 pursuant to Business and Professions Code section 17200 et seq. alleging Mercury’s “brokers” were actually de facto agents who were charging illegal “broker fees.” (Krumme v. Mercury (Super. Ct. S.F. City and County, 2000, No. 313367.) He also alleged the “broker fees” had not been disclosed to or approved by CDI.

Following the Krumme trial in May 2003 the court issued lengthy findings of fact and conclusions of law (Krumme

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3. As discussed below in section 1, the proper standard of review requires trial court review of the Commissioner’s findings, not merely the underlying evidence. Therefore our statement of facts is based primarily on the evidence set out on the Commissioner’s findings. Mercury’s recital of the facts generally did not cite to the Commissioner’s findings and we disregard it to the extent it failed to correspond with the proper standard of review. Likewise, we reject Mercury’s claim CDI and CWD failed to set out all material facts and thereby waived their arguments.

4. The 2000 version of section 1623 provided: “Every application for insurance submitted by an insurance broker . . . shall show that the person is acting as an insurance broker. If the application shows that the person is acting as an insurance broker and is licensed as an insurance broker . . . it shall be presumed, for licensing purposes only, that the person is acting as an insurance broker.” Section 1623 has since been amended by Statutes 2008, chapter, 304 (A.B.2956), section 2 and Statutes 2010, chapter, 4000 (A.B. 2782), section 7.

5. The named defendants were Mercury Insurance Company, Mercury Casualty Company, California Automobile Insurance Company, California General Underwriters Insurance Company and American Mercury Insurance Company.
Prior to the administrative hearing on the Final NNC CDI filed a motion, based on collateral estoppel, to bar Mercury from relitigating several of the Krumme Findings, including that when Mercury’s “brokers” charged “broker fees” they were “act[ing] in the course and scope of their agency in transacting insurance as ‘insurance agents’ on behalf of Mercury.” Administrative Law Judge Michael A. Scarlett (ALJ Scarlett), assigned to hear the matter, granted the motion (Collateral Estoppel Ruling).

The administrative hearing was conducted over 15 days with more than a dozen witnesses testifying and almost 4,000 pages of exhibits admitted. The parties also filed multiple briefs on every disputed issue.

ALJ Scarlett issued a 62-page proposed decision subsequently adopted by the Commissioner (Commissioner’s Decision). He found that after passage of Proposition 103, from 1989 through 2003 Mercury converted almost its entire force of insurance agents to “brokers,” such that about 90 percent of its producers were “brokers.” Mercury used the same contract for the “brokers,” changing only the word “agent” to “producer,” defined in the contract as “broker.” After 1989 all new producers were “brokers.” Mercury’s “brokers” were “indistinguishable” from Mercury’s agents.

The Commissioner’s Decision found that once the producers became brokers they began charging “broker fees” ranging from $50 to $150. “On rare occasions” a customer did not pay a “broker fee.” Actual agents who provided the same services and coverage did not charge any extra fees. As a result a person obtaining a Mercury policy through a “broker” paid more than someone purchasing the same policy from an agent.

The Commissioner found Mercury’s top agent, AIS, also became a “broker” and engaged in the same conduct. AIS collected “broker fees” on more than 99 percent of the policies it obtained for Mercury. In a five-year period between 1999 and 2004, AIS “brokers” charged almost $27.6 million in unapproved “broker fees” on behalf of Mercury in California. “AIS continued transacting insurance on behalf of Mercury in its ‘broker’ status until January 1, 2009, when Mercury purchased AIS.” AIS charged “broker fees” on insurance policies on behalf of Mercury until that purchase, at which time Mercury filed a notice of appointment showing AIS as a Mercury agent.

According to the Commissioner’s Decision, when filing its rate applications for approval with CDI, Mercury did not include the “broker fees” charged by its “brokers.” CDI did not approve the “broker fees” for at least the period 1989 through 2006. Based on Krumme, Mercury was “collaterally estopped from contesting that the ‘broker fees’ were not approved by the CDI.” Further, based on the Collateral Estoppel Ruling, Mercury was estopped from arguing its “brokers” were not Mercury’s de facto agents. In addition, there was sufficient evidence to rebut the presumption that Mercury’s “brokers” were in fact brokers.
The Commissioner found AB 2639 “as enacted, did not provide support for Mercury’s position that its ‘brokers’ were traditional brokers, and not de facto insurance agents acting on behalf of Mercury.”

Based on the language of the rate statutes and regulations, the purpose of Proposition 103, and Bulletin 80-6, the Commissioner’s Decision held the “broker fees” were premium that were required to be approved after reported on a rate application. Therefore, “from at least July 1, 1996 through 2006, Mercury violated sections 1861.01, subdivision (c), and 1861.05, subdivision (a), when it allowed its designated ‘brokers’ to charge and collect unapproved and unfairly discriminatory ‘broker fees’ to Mercury’s policyholders.”

The Commissioner found Mercury knew of Bulletin 80-6, which provided all fees an agent collects on behalf of an insurer are premium and must be reported. Mercury had notice since 1999 that CDI considered Mercury’s conduct violated the Insurance Code and could lead to CDI filing a notice of noncompliance. Although Mercury had actual notice of the violation, it willfully continued to charge the improper “broker fees” through the end of 2008.

The Commissioner’s Decision found CDI’s delay in filing the Final NNC while waiting for the conclusion of Krumme was a proper exercise of judicial economy and conservation of state resources and did not result in an unreasonable delay in filing the Final NNC.

The Commissioner found Mercury was subject to a penalty for each unlawful fee it charged. It imposed a penalty of $150 for each violation from September 1999 to August 2004 for a total sum of $27,593,550 for 183,957 acts.

Subsequently, Mercury filed the action seeking a writ of administrative mandate under Code of Civil Procedure section 1094.5 challenging the Commissioner’s Decision. Consumer Watchdog intervened in opposition to the petition. Thereafter, the court granted the petition.

In the minute order setting out the decision (Minute Order), the court did not dispute the findings in the Commissioner’s Decision as to collateral estoppel, that Mercury’s “brokers” were de facto agents, or that AIS “brokers” were de facto agents throughout the penalty period. It acknowledged Mercury did not dispute that AIS brokers were its de facto agents. Nevertheless, the court found the “broker fees” were not premium because charged for a separate service. It further rejected the Commissioner’s interpretation of “premium” under the Insurance Code and regulations.

The court also ruled the penalty violated due process because Mercury did not have “fair notice that it could be subjected to penalties.” Further, the court found CDI had “unduly delayed in issuing the NNC,” giving rise to the bar of laches.

Additional facts are set out in the discussion.

8. The maximum penalty for a willful violation is $10,000 per act. (§ 1858.07, subd. (a).) The findings noted that under that same section, the penalty for a nonwillful violation is $5,000 per violation. (Ibid.)

DISCUSSION

1. Standard of Review

Review of a decision of the Commissioner must comply with the provisions of the Code of Civil Procedure, requiring the superior court to use an independent judgment standard of review. (§ 1858.6.) Under that standard, although the court may reweigh the evidence and substitute its own findings, before doing so it must “accord a strong presumption of correctness to the Commissioner’s findings.” (State Farm Mutual Automobile Ins. Co. v. Quackenbush (1999) 77 Cal. App.4th 65, 71.) “[T]he party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (Fukuda v. City of Angeles (1999) 20 Cal.4th 805, 817 (Fukuda).)

A party challenging an agency’s decision may argue there was a “prejudicial abuse of discretion” (Code Civ. Proc., § 1094.5, subd. (b)), as Mercury did here. Abuse of discretion is shown if the agency “has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Ibid.) “Where it is claimed that the findings are not supported by the evidence [as Mercury argued], in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.” (Code Civ. Proc., § 1094.5, subd. (c).)

“[A]buse of discretion is established not when the administrative agency’s action is not supported by the weight of the evidence but rather when such agency’s findings are not supported by the weight of the evidence.” (Hadley v. City of Ontario (1974) 43 Cal.App.3d 121, 127, italics omitted.) Thus, the trial court’s duty is to review the agency findings to determine if the weight of the evidence supports them.

“[R]arely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.” (Sager v. County of Yuba (2007) 156 Cal.App.4th 1049, 1053 (Sager).)

Where a court exercises independent judgment, the general rule requires us to review the trial court’s decision for substantial evidence. (Fukuda, supra, 20 Cal.4th at p. 824.) Here we are unable to do so, however, “because that court’s findings are themselves infected by fundamental error.” (Ibid.) The court did not apply the correct standard of review; it failed to “accord a presumption of correctness to the administrative findings.” (Ibid.)

In the Minute Order, the court stated it was required to use the independent judgment standard, “accord[ing] a strong presumption of correctness to the Commissioner’s findings,” but that it was “free to reweigh the evidence and substitute its own findings.” This was correct as far as it went.

However, the court made no mention of plaintiffs’ burden to show the findings in the Commissioner’s Decision were
not supported by the evidence. This was error. (Sager, supra, 156 Cal.App.4th at p. 1053 [trial court erred by failing to place burden of proof on plaintiff to show “the decision was against the weight of the evidence”].)

Further, the court paid scant if any attention to the findings in the Commissioner’s Decision or whether they were supported by the weight of the evidence, in violation of its standard of review. (San Diego Unified School Dist. v. Commission on Professional Competence (2013) 214 Cal.App.4th 1120, 1145, 1146, 1149 [failure to consider all evidence or give proper respect to the Commissioner’s “assessment of the weight of the evidence” warrants reversal].)

The Minute Order does not contain an analysis by the trial court of whether the findings in the Commissioner’s Decision were contrary to the weight of the evidence or whether Mercury had rebutted the presumption of correctness. It did not reject specific evidence on which the Commissioner’s Decision relied or determine the Commissioner’s Decision was not supported by the weight of the evidence. Instead, it ignored the findings in the Commissioner’s Decision and made its own findings in violation of the proper standard of review. This tainted the entire Minute Order and mandates reversal. (City of Pleasanton v. Board of Administration (2012) 211 Cal.App.4th 522, 536 [reversal where court saw “no indication the [trial] court reviewed the administrative record” by properly applying the independent judgment standard].)

Mercury maintains there is no law requiring the trial court to specifically state what it did to comply with the standard of review. We are not holding it was required to do so. But the sense of the ruling must reflect the analysis was done. Here the Minute Order did not do so, as we discussed.

“[W]hether the trial court applied the correct standard of review . . . is a question of law,” which we review de novo. (Coastal Environmental Rights Foundation v. California Regional Water Quality Bd. (2017) 12 Cal.App.5th 178, 188.) We also review de novo both questions of law and mixed questions of law and fact that are primarily legal. (Id. at p. 190.)

2. “Broker Fees” as Premium

The Commissioner’s Decision held Mercury’s “broker fees” were premium that were required to be approved after reported on a rate application. The trial court ruled to the contrary, finding the “broker fees” were not premium because they were charged for separate services. As discussed below, this ruling is precluded by the Krumme Findings, which bind Mercury pursuant to the Collateral Estoppel Ruling.

Whether “broker fees” were premium is mixed question of fact and law which we review de novo. (20th Century, supra, 8 Cal.4th at p. 271.)

As set out above, according to well-established law and regulations, premium includes all payments made by an insured that are part of the cost of insurance, including “all sums paid to an insurance agent.” (Bulletin 80-6.) This includes “all . . . fees . . . and all other items which change the amount the insurer charges to the insured.” (10 CCR § 2360.0(c).) Put another way, premium is comprised of the net premium and “the direct and indirect costs associated with providing” the insurance and “any profit or additional assessment charged.” (Troyk, supra, 171 Cal.App.4th at p. 1325.)

We disagree with Mercury’s limited interpretation of premium as including only the cost of risk and administrative expenses as inconsistent with established definitions of premium. Likewise, Mercury’s claim broker fees are not premium is irrelevant. As Krumme held Mercury’s “brokers” were not actually brokers but were de facto agents. Thus, the “broker fees” they charged were in fact premium that had to be reported and approved.

a. Collateral Estoppel Effect of Krumme

The Krumme Findings found Mercury’s “brokers” were its de facto agents, who, while acting in the course and scope of their agency on behalf of Mercury, were charging illegal “broker fees” for which Mercury was vicariously liable. Mercury did not obtain prior approval from the Commissioner to charge or collect these “broker fees.” ALJ Scarlett ruled the Krumme Findings bound Mercury under the collateral estoppel doctrine. The Commissioner’s Decision held that pursuant to the Collateral Estoppel Ruling Mercury was stopped from arguing its “brokers” were not de facto agents.

In the writ proceeding, Mercury did not challenge those findings nor did the court overturn them. In fact the Minute Order specifically found Mercury did not dispute AIS brokers were its de facto agents. Thus, Mercury cannot challenge these findings on appeal. (K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc. (2009) 171 Cal. App.4th 939, 948.)

When the court ruled the “broker fees” were “charged for a separate service provided by AIS, in giving customers comparative pricing, for multiple potential insurers,” it erred because it did not give collateral estoppel effect to the Krumme Findings that, when charging the “broker fees,” Mercury’s “brokers” were acting and act in the course and scope of their agency in transacting insurance as “insurance agents” on behalf of Mercury. The court’s finding directly contradicts the Krumme Findings that in charging the “broker fees” Mercury’s “brokers” were acting on behalf of Mercury, not providing a service to customers.

In ruling the “broker fees” were not premium the court stated collateral estoppel did not apply because Krumme did not decide whether “broker fees” were premium; rather Krumme stated “ratemaking was not at issue in the case.” But this misses the point. The Commissioner never found Krumme had decided “broker fees” were premium. The Commissioner’s finding Mercury charged “broker fees” while acting as Mercury’s agent forecloses the court’s finding. And a determination about ratemaking is not necessary for a decision in this case.

In Krumme, the court also found Mercury was violating the Business and Professions Code in its advertising of rate
comparisons without disclosing broker fees might be added to the disclosed premium amount. (Krumme, supra, 123 Cal. App.4th at p. 935.) It explained the advertisements were likely to deceive customers “because undisclosed broker fees that materially affect the cost of the insurance and adversely affect the comparison of Mercury’s rates with those of the quoted competitors may be added at the time the consumer purchases Mercury insurance.” (Ibid.) This finding directly conflicts with the court’s finding that the “broker fees” were “not part of the cost of obtaining a policy from Mercury.”

b. Fees for Separate Services

The trial court found the “broker fees” were not premium because they were paid for separate services, i.e., comparative rate shopping. This was error.

First, the Krumme Findings, which Mercury did not challenge, determined Mercury’s “brokers,” i.e., de facto agents, charged “broker fees” “in the course and scope of transacting insurance on behalf of Mercury, and therefore in the capacity of insurance agents within the meaning of section 1621 on behalf of Mercury.”9 (See Krumme, supra, 123 Cal.App.4th at pp. 933, 934.) They also held this was unlawful because “[t]o lawfully charge a broker fee, the broker-agent licensee must be acting in the capacity of an insurance broker within the meaning of section 1623,” which Mercury’s “brokers” were not doing. (Ibid.)

Second, as noted, the trial court here failed to accord the required strong presumption of correctness to the findings in the Commissioner’s Decision. The Commissioner found the “broker fees” were premium, not payment for separate services. The Commissioner cited to evidence that “broker fees” were charged by Mercury’s “brokers,” i.e., de facto agents, in the course of their agency on behalf of Mercury. The “broker fees” were not fees charged for services on behalf of the insured. Rather, the Commissioner found, the “broker fees” are actually agent fees, which are part of premium and must be included in a rate application for prior approval.

The court’s finding that “broker fees” were proper is based on an erroneous assumption the “brokers” were acting in that capacity, not as agents, as found by Krumme. Further, the finding that “broker fees” were for a separate service cannot be reconciled under the circumstances of the case. If the “brokers” were in fact agents acting within their agency on behalf of Mercury, they could not also have been acting as brokers and providing separate services on behalf of customers.

Acknowledging 10 CCR section 2360.0(c) prohibits an agent from charging a broker fee, the court opined “that does not make such a fee into a ‘premium’ under the rate statutes.” There is no legal basis for such a conclusion. (Troyk, supra, 171 Cal.App.4th at p. 1325 [premium includes costs of providing coverage and any “additional assessment charged”].)

Further, contrary to Mercury’s argument and the trial court’s finding, CDI never argued all fees charged by an insurance agent are premium. Rather, the claim is fees charged by Mercury’s “brokers,” i.e., de facto agents billed while the agents were acting within the scope of their agency, were premium.

Moreover, the difference between an insurance broker and an insurance agent is not based on the services they render, as the court’s Minute Order assumes. And contrary to Mercury’s argument, it does matter who was providing the alleged separate services. As set out above, the distinction is based on the principal served and to whom a duty is owed. An agent acts on behalf of and owes a duty to an insurance company (§§ 31, 1621; Douglas, supra, 229 Cal.App.4th at p. 410), while a broker acts on behalf of and owes the primary duty to the customer (§§ 33, 1623; Douglas, at p. 411).

The court made several factual findings about the fees charged for separate services, including that the comparative rate shopping benefitted consumers; the “broker fees” was negotiable or not always charged; and after AIS was converted to a “broker” it sometimes sold a policy for another insurer. But these findings are wholly inconsistent with the Commissioner’s Decision, based on Krumme, that fees were charged as Mercury’s agents while acting on behalf of Mercury. Again, the Collateral Estoppel Ruling bars relitigation of the findings, and the court erred in relying on this evidence to support its Minute Order.

c. Interpretation of Rate Statutes

In reviewing whether an agency has properly interpreted a statute, although we make the final determination of its construction, we give “‘great weight and respect to the administrative construction.’” (Association of California Ins. Companies v. Jones (2017) 2 Cal.5th 376, 397 (Assn.).) In determining how much weight we give to the agency’s interpretation we consider “factors relating to the agency’s technical knowledge and expertise, which tend to suggest the agency has a comparative interpretive advantage over a court[,] and factors relating to the care with which the interpretation was promulgated, which tend to suggest the agency’s interpretation is likely to be correct.” (Id. at p. 390.) We also give deference to the Commissioner’s rulings and bulletins (defining agent fees/broker fees) because, although not controlling on us, they “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” (Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 14 (Yamaha).) This is especially true when the agency here has “technical knowledge and expertise” (Assn., at p. 390) and has “thoroughly considered the issue and reached a reasonable conclusion in harmony with the [statute], long-standing administrative construction, and public policy considerations” (Ohio Casualty Ins. Co. v. Garamendi (2006) 137 Cal.App.4th 64, 79).

The statutes, regulations and case law all support the Commissioner’s Decision the “broker fees” charged by Mercury’s
“brokers” were premium. Bulletin 80-6, adopted in 1980 and about which the Commissioner’s Decision found Mercury was aware, advised insurers fees charged by agents were premium and had to be nondiscriminatory and reported to CDI. The trial court rejected Bulletin 80-6, noting CDI’s purported concession it was not “controlling authority.” Although not specifically cited, the court presumably was relying on a statement in a 1997 letter from Jon Tomashoff (Tomashoff Letter) that stated Bulletin 80-6 “was never intended as, and has never been used by [CDI] as . . . the equivalent of a law or regulation.” This analysis was flawed.

For one thing, the Tomashoff Letter was not addressed to Mercury but to a third party producer. Additionally, Bulletin 80-6 need not be “controlling authority” to give notice to insurers of CDI’s position that fees charged by agents were premium. Moreover, as the Commissioner’s Decision found, “Bulletin 80-6 has been generally accepted in the industry as prohibiting insurance agents from charging ‘broker fees.’” The court also relied on the Tomashoff Letter for the proposition that fees charged by agents for services “outside the scope of the agency” were not considered premium. But this does not assist Mercury. The statement is consistent with Bulletin 80-6 and CDI’s well-established position that fees charged by agents acting within the scope of their agency, including Mercury’s “brokers,” are premium. (Krumme, supra, 123 Cal.App.4th at p. 934.) In any event, a letter from a staff member cannot controvert the official policy of the CDI. (See Yamaha, supra, 19 Cal.4th at p. 13.) And, in addition, Bulletin 80-6 was not the only authority addressing this issue.

Proposition 103 requires the Commissioner’s prior approval of insurance rates. (§ 1861.01, subd. (c).) And section 1861.05, subdivision (a) prohibits “unfairly discriminatory” rates. Further, under 10 CCR section 2360.0(c), premium includes “fees” and “all other items which change the amount the insurer charges to the insured.”

After setting out applicable law, the Commissioner’s Decision stated Mercury’s “brokers,” as de facto agents, collected “broker fees” while transacting insurance business on behalf of Mercury and thus the fees could not be deemed to be “traditional ‘broker’ [fees] for services.” Rather, they had to be “deemed agent fees,” which, under Bulletin 80-6 and 10 CCR section 2360.0(c), are premium and “and must be reported in a rate application for prior approval.”

The trial court found 10 CCR section 2360.0(c) was not applicable based on its conclusion “broker fees” charged here were for separate services. However, as discussed above, this was error.

While acknowledging California Code of Regulations, title 10, section 2189.3 bars an appointed agent from charging a broker fee, without analysis the court makes the unsupported conclusion it “does not make such a fee into ‘premium’ under the rate statutes.” This does not withstand scrutiny in light of the law that all sums paid to an insurance agent in transacting insurance are premium. The court’s interpretation of applicable law defeats rather than promotes the purposes of Proposition 103, and thus contravenes rules of statutory construction. (Catholic Mutual Relief Society v. Superior Court (2007) 42 Cal.4th 358, 372 [court’s construction must promote purpose of statute; construction should not “lead to unreasonable, impractical or arbitrary results”].) The court’s interpretation would lead to the absurd result of eviscerating the rate statutes’ requirements by allowing insurance company agents to charge “broker fees” without any CDI oversight or approval. That would mean insurance agents could charge unapproved and unfairly discriminatory fees for alleged separate services that would increase consumers’ cost of insurance. This is contrary to the voters’ intent as expressed in Proposition 103.

In addition, the court failed to give the longstanding interpretations of statutes and regulations the deference to which they are entitled. (Yamaha, supra, 19 Cal.4th at pp. 12, 14.) Yamaha set out factors as to when deference is appropriate, including when: “the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended or entwined with issues of fact, policy, and discretion”; and “the agency has consistently maintained the interpretation in question, especially if [it] is long-standing.” (Id. at pp. 12-13.)

While courts are not bound by the Commissioner’s interpretation of rate statutes (Automotive Funding Group, Inc. v. Garamendi (2003) 114 Cal.App.4th 846, 851), we do give “great weight and respect to the administrative construction” (Assn., supra, 2 Cal.5th at p. 397). Although the trial court never challenged the Commissioner’s expertise, it did not accord his construction the deference to which it was entitled.

Finally, the court did not comply with Proposition 103 itself, which requires liberal construction “to fully promote its underlying purposes,” “to protect consumers from arbitrary insurance rates and practices . . . , and to ensure that insurance is fair, available, and affordable for all Californians.” (Donabedian, supra, 116 Cal.App.4th at p. 981.)

d. Installment Payments Cases

In ruling the “broker fees” were not premium the trial court relied on In re Ins. Installment Fee Cases (2012) 211 Cal.App.4th 1395 (Installment Fee Cases) and Interinsurance Exchange of the Automobile Club v. Superior Court (2007) 148 Cal.App.4th 1218 (Auto Club). However, they do not support its conclusion.

In Auto Club, the court considered as a question of first impression whether “premium” as used in section 381, subdivision (f) included fees charged for paying annual premiums in monthly installments. It held the installment fees 10. Section 381, subdivision (f) states: “A policy shall specify: [¶] . . . [¶] Either: [¶] (1) A statement of the premium, or [¶] (2) If the insurance is of a character where the exact premium is only determinable upon the termination of the contract, a statement of the basis and rates upon which the final premium is to be determined and paid.”
were “interest for the time value of money and the plain and ordinary meaning of the term ‘premium’ as used in section 381, subdivision (f) does not include interest charged for the time value of money.” (Auto Club, supra, 148 Cal.App.4th at p. 1230.)

In Installment Fee Cases, policyholders who paid premiums in monthly installments were charged interest. The court held this was not premium under section 381 because it was “consideration for a benefit separate from the insurance and is paid under an agreement separate from the policy.” (Installment Fee Cases, supra, 211 Cal.App.4th at p. 1408.)

These two cases differ from the instant case for several reasons. First, the fees were optional based on the policyholders’ choice to pay in a lump sum or over time. In our case, there is no evidence any customer had an opportunity to avoid the fee. Second, in the cited cases only those who paid the fee received the benefit of installment payments. In the current case, however, customers paid $50, $100, or $150 for the same policies as those sold by agents who did not charge a fee.

In Troyk, supra, 171 Cal.App.4th 1305, the same court that decided Auto Club emphasized the limitations of its holding, and by extension that of Installment Fee Cases. In Troyk the defendant insurance company offered six-month and one-month policies. Customers choosing a one-month policy were required to pay a service charge to a third-party. The court found this fee was premium (id. at p. 1326), explaining that “insurance premium includes not only the ‘net premium’ . . . but also the direct and indirect costs associated with providing that insurance coverage and any profit or additional assessment charged” (id. at p. 1325).

The trial court here attempted to distinguish Troyk, noting Mercury did not require its “brokers” to charge a broker fee and did not collect them. But Troyk emphasized premium had to be examined “from the insureds’ perspective.” (Troyk, supra, 171 Cal.App.4th at p. 1324.) And, the Commissioner found, based on uncontested evidence, Mercury’s AIS “brokers” collected a fee from approximately 99 percent of its customers. “Other than the rare exceptions where the ‘broker fee’ was waived, the customer was required to pay the ‘broker fee’ as part of the cost of obtaining insurance coverage.”

Further, the trial court’s ruling conflicts with Krumme, which held Mercury was “‘deemed by operation of law to have constructively received the “broker fees.”’” (Krumme, supra, 123 Cal.App.4th at p. 935.) The Collateral Estoppel Ruling prohibited Mercury from re-litigating this issue.

3. Penalties

The Commissioner has broad discretion to impose penalties for an insurer’s violation of rate statutes. (Szymiatcz v. State Personnel Board (1978) 79 Cal.App.3d 904, 921; §§ 1858.07, 1858.3.) Penalties may not be disturbed unless there is “‘an arbitrary, capricious or patently abusive exercise of discretion’” by the administrative agency.” (Cassidy v. California Bd. of Accountancy (2013) 220 Cal.App.4th 620, 627-628.) “[N]either a trial court nor an appellate court is free to substitute its own discretion as to the matter.” (Cadilla v. Bd. of Medical Examiners (1972) 26 Cal.App.3d 961, 966.) There is no abuse of discretion if the weight of the evidence supports the Commissioner’s findings. (§ 1858.6) “[W]e review de novo whether the agency’s imposition of a particular penalty on the petitioner constituted an abuse of discretion by the agency.” (Cassidy, at p. 627.)

Under section 1858.07, subdivision (a), the Commissioner may impose a penalty up to $5,000 for each act violating Proposition 103 and up to $10,000 if the act was willful. The Commissioner found Mercury’s failure to obtain prior approval for the “broker fees” was a willful violation of rate statutes for the period “from at least 1996 through 2006.” Nevertheless it imposed a penalty of only $150 per violation from September 1999 to August 2004.

The Minute Order did not find the Commissioner abused his discretion defining collection of broker fees as an illegal act or calculation of the penalty. Rather, it held imposition of the fees violated due process because “Mercury was not given fair notice that it could be subjected to penalties for not treating AIS’ broker fees as premium” before CDI issued the Final NNC in 2004. The Minute Order also ruled CDI “unduly delayed in issuing the [Final] NNC,” thereby allowing penalties to accrue. These rulings were error.

a. Fair Notice

In support of its ruling Mercury was not given fair notice of the penalties, the court relied on FCC v. Fox Television Stations, Inc. (2012) 567 U.S. 239 (Fox). But Fox is inapt.

In Fox the Federal Communications Commission (FCC) changed its enforcement policy of 18 U.S.C. section 1464, which prohibits the broadcast of “‘any obscene, indecent, or profane language.’” (Fox, supra, 567 U.S. at p. 243.) It then sought to impose penalties by applying the new policy to broadcasts occurring before the change. (Id. at p. 249.) The Supreme Court ruled the penalties must be set aside because the FCC failed to give fair notice before the broadcasts at issue. (Id. at p. 258.)

Likewise, in Christopher v. SmithKline Beecham Corp. (2012) 567 U.S. 142 the agency sought to impose a new interpretation of of a regulation after the conduct at issue. (Id. at pp. 155-156.) In addition, in Christopher, the court noted the agency did not even “suggest[]” the defendant’s conduct was unlawful. (Christopher, at p. 157.) Such is not the case here.

In our case there was no policy change. Rather, at all applicable times section 1861.01, subdivision (c) specifically barred charging unapproved rates and section 1861.05, subdivision (a) likewise prohibited unfairly discriminatory rates. The Commissioner’s Decision found Mercury did not dispute that. Further, as stated above, at all relevant times section 1858.07, subdivision (a) expressly authorized the Commissioner to impose penalties.
In addition in 1980 CDI promulgated Bulletin 80-6, which stated all payments made by an insured, including fees, are premium, which must be reported to CDI as such and are governed by antidiscrimination statutes. The Commissioner’s Decision found Mercury knew of Bulletin 80-6. This finding is uncontroverted, and it was uncontested by the trial court.

Further, the Commissioner found CDI “consistently advised” Mercury the conduct of Mercury’s “brokers” charging “broker fees” was a violation of the rate statutes subjecting Mercury to penalties. It found Mercury was on notice as early as February 1999 when CDI sent the 1998 Exam Report to Mercury. It found Mercury also had notice from the Draft NNC sent to Mercury in January 2000, where CDI stated the “brokers” were not acting consistent with the definition of a broker; all payments by an insured which are part of the cost of insurance, including payments to an agent, are premium; and fees the “brokers” were charging “were not part of an approved rate application” as required by the Insurance Code.

Additional notice was given during “frequent communications” between CDI and Mercury about the Exam Report and the Draft NNC between August 1999 and October 2000; from the filing of the 1998 Exam Report in December 2000; and from the filing of Krumme, and rendering of the Krumme opinion. In addition, Mercury points to no evidence CDI ever approved Mercury’s “broker fees” or indicated they complied with Proposition 103. None of these findings were contested in the Minute Order.

Instead, the court found the law “generally [was] unclear” before the Draft NNC was issued. It based this on statements in the 1997 Tomashoff Letter that “fees could be charged by agents that would not be deemed premium if provided for services outside the scope of the agency.” This does not contradict CDI’s position because the “broker fees” at issue were not actually broker fees but were charged by Mercury’s de facto agents acting within the scope of their agency for Mercury, and thus were premium.

Further, the Commissioner found the Tomashoff Letter was not sent to Mercury nor was it addressing Mercury’s practices. Moreover, even if Mercury initially could have relied on the Tomashoff Letter, it could not continue to do so after CDI sent the 1998 Exam Report in February 1999. The court failed to address this finding.

The court also apparently relied on a statement made by Tomashoff in a 1999 public hearing that the distinction between a broker and an agent was sometimes ambiguous. But as the Commissioner found, this was a general statement, not made to or about Mercury. In fact, there is no evidence Mercury attended the meeting or knew of the comments. Further, although there might sometimes be ambiguity, there was no ambiguity under the specific facts of this case. And in any event Mercury cannot claim to rely on statements made in 1997 and 1999 after receiving notice at least three times in 2000 that its conduct was violating the statute and subjecting it to penalties.

In addition, as the Commissioner found, in September 1999 Mercury published a bulletin to its producers, which stated, “We believe that the Insurance Department may take the position that all Mercury and Cal Auto producers are acting as agents and represent the company even if the producer’s contract is a broker contract. . . . Under these proposed regulations no broker fee could be charged on any Mercury or Cal Auto personal lines business.” Therefore, its own bulletin confirms Mercury knew there was an issue about its practices.

Mercury relies on the trial court’s factual findings to support its argument it did not have fair notice. But as discussed above, in making the findings, the court did not give the proper weight to the findings in the Commissioner’s Decision. Consequently, the trial court’s findings do not withstand scrutiny.

First, the trial court pointed out that CDI did not respond to the Mercury Letter sent in November 2000 in which Mercury stated it believed AB 2639 had resolved the improper “broker fees” issue. But the Commissioner’s Decision specifically rejected this claim, stating, “Given CDI’s opposition to A.B. 2639, and the language in the final version of the bill that was enacted, Mercury cannot reasonably assert that it believed A.B. 2639 resolved the issues in CDI’s 1998 Exam Report and Draft Notice.” Further, the trial court did not explain how AB 2839 as adopted, and different than what Mercury proposed, in fact did resolve the matter.

Additionally, only a few weeks after the Mercury Letter was sent, CDI issued the final version of the 1998 Exam Report reiterating that Mercury’s practices were unlawful. The Commissioner found this “further placed Mercury on notice that CDI did not consider” the issue was resolved and Mercury’s assertion it believed AB 2639 had resolved the issue was “disingenuous.” Although the trial court may “substitute its own credibility determinations,” “it cannot ignore its statutory obligation to defer to the Commission’s considered credibility findings in doing so. In our view, the superior court’s decision—which is silent as to the Commission’s thoughtful reasoning and analysis as to the witnesses’ credibility—did not afford the respect due those findings.” (San Diego Unified School Dist. v. Commission on Professional Competence, supra, 214 Cal.App.4th at p. 1148.)

Further, CDI filed briefs in 2003 and 2004 in Krumme, opposing Mercury’s position.

The Minute Order also found a 2002 exam report did not mention the “broker fees” issue. It failed to note or dispute, however, the Commissioner’s finding the issue had already been referred to the legal division for enforcement. In addition, the 2002 exam report stated, “Failure to identify, comment on, or criticize non-compliant activities does not constitute acceptance of such activities.” Further, the Final NNC was filed six weeks before the 2002 exam report issued. Subsequent silence in the 2002 exam report cannot disaffirm that prior notice.
Finally, the Minute Order relied on CDI’s approval of Mercury’s rate applications, which did not include “broker fees.” But the Commissioner found the applications were incomplete and “Mercury cannot assert that it relied on CDI’s approval of its rate applications to conclude that its designated ‘broker’s’ ‘broker fees’ were not unlawful when the ‘broker fees’ were actually omitted and never approved by CDI.”

Mercury argues section 1858.07, subdivision (b), a safe harbor statute, should apply. It prohibits imposition of a penalty where the Commissioner has approved a rate. The trial court correctly ruled this statute did not apply because Mercury did not provide complete information. We are not persuaded by Mercury’s claim CDI did not charge it with providing false information. The weight of the evidence controverts Mercury’s claim it should be afforded safe harbor protection because it “had no idea” it should have included “broker fees” in its rate applications.


Thus, the substantial weight of the evidence and the Commissioner’s unchallenged findings show Mercury had fair notice it could be subject to penalties.

b. No Undue Delay

Relying on Walsh v. Kirby (1974) 13 Cal.3d 95 (Walsh), the trial court also found imposition of penalties on Mercury violated due process because CDI “unduly delayed in issuing the NNC while potentially vast penalties accrued.” But Walsh is distinguishable.

In Walsh, the defendant agency collected evidence of multiple statutory violations by a regulated business without ever giving notice to the business of the violations. It then filed an action seeking cumulative penalties. The court ruled the agency had acted arbitrarily and violated the business’s due process, and set aside the penalty. (Walsh, supra, 13 Cal.3d at p. 104.) “A departmental practice whereby notice given in a timely manner is withheld while the licensee is charged an opportunity to engage in a series of violations thus defeats the very purposes of the [statute].” (Ibid.) But the court did “not express any view whether departmental conduct similar to that in the instant case would be arbitrary if exercised against a licensee who, the record would show, was an habitual offender and unwilling to conform.” (Id. at p. 105, fn. 14.)

The Commissioner’s Decision distinguished Walsh, finding “CDI does not have a practice of delaying the filing of an NNC to accumulate penalties. In fact, the delay in this non-compliance proceeding was due to discussions in an attempt to resolve the issues in the Draft Notice, which placed Mercury on notice of its violations, and CDI’s decision to issue the [Final] NNC after conclusion of the Krumme litigation, neither of which involved a concerted effort or practice by the CDI to intentionally allow the accumulation of penalties without notice.”

The Commissioner also found “CDI’s decision to delay filing the [Final] NNC until after the Krumme case involved considerations of judicial economy and conserving State resources by avoiding the necessity to fully litigate issues in the [Final] NNC, that were currently being adjudicated against Mercury in the Krumme case.” Thus, it found, the delay in filing the Final NNC was not a prejudicial delay allowing penalties to accumulate.

Further, as shown by the Commissioner’s Decision, CDI gave Mercury notice of its violation on numerous occasions and Mercury showed no inclination to change its conduct to comply with the statute. Thus, Walsh does not apply. (Coe v. City of San Diego (2016) 3 Cal.App.5th 772, 786 [plaintiff “repeatedly warned . . . of the violations . . . and of her need to take corrective action”].) Even after affirmance of the judgment in Krumme and the filing of the Final NNC, Mercury did not abate its practices for more than four years. Whether that was willful conduct or a calculated gamble by Mercury does not matter. The important thing is Mercury knew and could and should have modified its conduct.

This case is comparable to City and County of San Francisco v. Sainez (2000) 77 Cal.App.4th 1302 where the court held imposition of a cumulative penalty over a two-year period did not violate due process because the defendants “had control over this time period yet allowed the penalties to accumulate.” (Id. at p. 1316.) “[D]espite warning and extensions of the correction or abatement periods, defendants delayed[ and], failed to respond,” “had their own intransigence to blame,” and “had it within their control first to prevent and then to stop the accumulation of penalties.” (Ibid.)

There was no undue delay by CDI.

c. Other Provisions of the Minute Order

The trial court noted specific intent, required to prove willfulness (§ 1858.5), had not been proven. This is irrelevant. Under section 1858.07, subdivision (a), a penalty may be imposed for nonwillful violations.

Likewise, the court’s finding that assessing a penalty of $5,000 to $10,000 per act, as allowed by section 1858.07, subdivision (a), would be an abuse of discretion is incorrect. First, as the court acknowledged and as supported by case law, CDI has discretion to determine that each time Mercury “brokers” charged a “broker fee” could constitute an “act” subject to penalty. The fact potential penalties could be high, as the court seemed to imply, does not show abuse of discretion. Given the per act penalties, the statute plainly anticipates a large penalty could be imposed. In addition, this finding has no bearing on the facts at hand. CDI imposed a penalty of only $150 per act.

Imposition of the penalty did not violate due process.
4. Laches

A party claiming laches must prove both unreasonable delay and prejudice. (Clary v. City of Crescent City (2017) 11 Cal.App.5th 274, 286.) Citing Gates v. Dept. of Motor Vehicles (1979) 94 Cal.App.3d 921, 925, the trial court ruled laches barred the administrative action. It stated CDI unreasonably delayed in filing the Final NNC from at least late 2000 to early 2004. It also found Mercury was prejudiced based on accrual of potential penalties and assessment of the actual penalty. This was error for several reasons.

First, the Commissioner found there was no unreasonable delay in filing the Final NNC because CDI consistently maintained and repeatedly advised Mercury the “broker fees” violated the rat statutes. Further, the Commissioner acknowledged CDI’s delay was to conserve judicial resources and avoid the possibility of conflicting decisions. “‘[D]elay in reliance on legal advice, awaiting determination of a legal issue in another pending case, may be excusable.”’ (Hill v. Hattram (1981) 117 Cal.App.3d 569, 573-574.)

The Commissioner also found there was insufficient evidence to show CDI unreasonably delayed in filing the Final NNC. The court failed to consider or refute these findings nor did it cite to any evidence, other than the time period itself,12 to support its finding the delay was unreasonable.


Second, there is no evidence of prejudice. Prejudice is not presumed. (Green v. Board of Dental Examiners (1996) 47 Cal.App.4th 786, 792.) The only support for the court’s finding Mercury was prejudiced was the accrual and subsequent imposition of penalties. It cited to no evidence of cognizable prejudice and the record contains none. Instead, the Commissioner’s Decision stated there was insufficient evidence Mercury was prejudiced by the filing of the Final NNC in February 2004.

Further, as discussed above, Mercury had notice for years of its potential for imposition of penalties and deliberately chose not to modify its conduct. (See Cedars-Sinai Medical Center v. Shewry (2006) 137 Cal.App.4th 964, 986 [court rejects the plaintiff’s argument delay prejudicial because it would have changed its practice; no evidence to support it]; California Western School of Law v. California Western University (1981) 125 Cal.App.3d 1002, 1007 [“If the defendant continues his act, after due warning, he does so at his own risk.”]

Moreover, the element of prejudice requires a change of position that would not have occurred absent the delay. (Magic Kitchen, supra, 153 Cal.App.4th at p. 1161.) The record contains no evidence Mercury changed its position due to an alleged delay. As discussed above, the evidence is to the contrary.

As Mercury acknowledged in the administrative hearing, there is no statute of limitations for noncompliance proceedings. “By focusing solely on the passage of time, and not on the issue of disadvantage and prejudice, a court risks imposing a de facto—and impermissible—statute of limitations in a situation where the Legislature chose not to create a limitation on actions.” (Fahmy v. Medical Bd. of California (1995) 38 Cal.App.4th 810, 816.) “There is without a doubt a realization on the part of the Legislature that administrative agencies . . . take action for the public welfare rather than for their own financial gain, and should not be hampered by time limits in the execution of their duty to take protective remedial action.” (Ibid. [noting courts have allowed “[e]ven inordinately long delays”).

Third, even assuming Mercury showed both unreasonable delay and prejudice, the court did not acknowledge or apply the higher laches standard that applies to governmental entities.12 If laches is raised as a defense against a government entity, it “‘is not available where it would nullify an important policy adopted for the benefit of the public.”’ (Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249, 263 [agency’s delay of 26 years not barred]; Kajima-Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305, 316 [laches not available against government agency if it would “‘defeat the effective operation of a policy adopted to protect the public”’].)

Here, Proposition 103 embodies a strong public policy to “‘protect consumers from arbitrary insurance rates and practices . . . to ensure that insurance is fair, available, and affordable for all Californians.”’ (Donabedian, supra, 116 Cal.App.4th at p. 981.) Mercury has not sustained its burden to show any exceptional circumstances supporting its position that barring the action based on delay in commencing the suit outweighs the protection of the critical public policy.

5. Due Process – First Administrative Hearing

Mercury seeks affirmance of the judgment on a wholly separate argument rejected by the trial court. During the administrative proceedings a dispute arose as to the requirements of California Code of Regulations, title 10, former section 2614.13 (10 CCR § 2614.13) dealing with “prepared direct testimony” (PDT) of witnesses,13 which required testimony to be in writing and submitted 40 business days before the hearing. CDI and CWD argued the regulation did not apply to adverse witnesses. The Administrative Law Judge, Steven C. Owyang (ALJ Owyang), ruled to the contrary.

12. We reject Mercury’s speculative argument the trial court would not have found “manifest injustice” unless it was weighing such injustice against the public interest.

13. These facts are taken from Mercury Insurance Co. v. Jones (Apr. 26, 2013, B244204) [nonpub. opn.] (Mercury I).

11. Nor did the court mention Mercury and CDI stipulated to stay Final NNC proceedings pending Mercury’s appeal of Krumme.
(Mercury 1, at p. 1) ALJ Owyang refused CDI and CWD’s request to certify the question of whether former 10 CCR section 2614.13 applied to adverse witnesses. (Mercury 1, at p. 2.)

Subsequently the Commissioner (at the time Steve Poizner) issued a notice of a proposed change to 10 CCR section 2614.13 making it applicable to only party-affiliated witnesses or their experts. (Mercury 1, at p. 1.) Mercury filed comments and spoke at the hearing in opposition to the rule change. After 10 CCR section 2614.13 was amended as proposed, ALJ Owyang ruled the amended regulation would not apply in the hearing. He also ordered CDI’s general counsel, Adam M. Cole, to disclose any ex parte communications between the Commissioner and the CDI about the rule change. (Mercury 1, at p. 2.) Cole disclosed that he had initiated the rule change to fix what CDI believed was an erroneous interpretation of former 10 CCR section 2614.13 and spoke with former Commissioner Poizner’s chief of staff and special counsel about it. (Mercury 1, at p. 2.)

ALJ Owyang then issued a proposed decision to dismiss the administrative proceeding for several reasons, including that the ex parte communications between the CDI and the Commissioner’s office violated due process. The Commissioner rejected the recommendation (Mercury 1, at p. 2) and ordered a hearing on the merits. Mercury filed a writ petition to require the Commissioner to adopt the proposed decision. (Mercury 1, at p. 1.) When Mercury appealed the trial court’s order sustaining a demurrer without leave to amend, the court of appeal affirmed. (Mercury 1, at p. 8.)

The administrative proceeding was then assigned to ALJ Scarlett. He ruled former 10 CCR section 2614.13 would apply but if PDT’s for adverse witnesses could not be obtained, after unsigned PDT’s for those witnesses were served on the opposing party, those witnesses could be subpoenaed to testify.

The issue was litigated at the administrative hearing and ALJ Scarlett found the ex parte communications did not violate due process and Commissioner Poizner was no longer in office, thereby effectively disqualifying the decisions maker. Further, Mercury had a full hearing.

When Mercury raised this issue in the writ proceeding, the trial court rejected Mercury’s claim the proceeding should be dismissed, finding Mercury had received a fair hearing. It further found no evidence Commissioner Jones was a party to any improper communications.

Mercury again argues in this appeal that the only remedy for the due process violations is dismissal. We disagree.

Cases on which Mercury relies are distinguishable. In Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.4th 1, which Mercury cites for the proposition that reversal is “required” where an agency communicates ex parte with the decision maker and violates the separation of rulemaking and adjudicative functions, the communication was on the merits after a full hearing was completed. (Id. at pp. 8, 10-11, 15-16.) Here, the communications took place before the hearing and did not address the merits.

Likewise, in Utica Packing Company v. Block (6th Cir. 1986) 781 F.2d 71 the disputed actions occurred after a hearing on the merits when the agency secretary sought to replace the original judicial officer to have a better chance to prevail on a motion for reconsideration. Nothing comparable occurred here.

We also reject Mercury’s argument the hearing in front of ALJ Scarlett was tainted. Mercury complains ALJ Scarlett deviated from ALJ Owyang’s ruling because he allowed adverse witnesses to testify pursuant to subpoena. But ALJ Owyang never ruled out the possibility of allowing noncooperating witnesses to testify. Further, Mercury cites no authority that ALJ Scarlett was required to follow ALJ Owyang’s procedural decision.

The fact the Commissioner rejected ALJ’s Owyang’s proposed order and adopted the proposed decision of ALJ Scarlett does not show the hearing was unfair. The trial court did not agree with Mercury’s contention that Commissioner Jones was “infected” because he retained Commissioner Poizner’s prosecutors and senior advisors, noting there was no evidence. Mercury does not cite to any evidence in the respondent’s brief either. There is no basis to dismiss the proceedings against Mercury.

Mercury filed a motion to strike a portion of CWD’s reply brief addressing this issue, claiming CWD did not properly explain the decision in Mercury 1 and failed to disclose the findings of the trial court here, which, Mercury claims, rejected CWD’s argument. We deny the motion.

We do not decide the substance of Mercury’s motion but note we did not rely on any improper or incomplete argument in CWD’s reply brief. Our summary of the facts was taken from Mercury 1, and our analysis of the trial court’s ruling was based on our independent review of the Minute Order.

6. Remand

Based on the trial court’s failure to apply the proper standard of review one option would be for us to reverse and remand for the trial court to properly exercise its independent judgment. (E.g., Fukuda, supra, 20 Cal.4th at p. 825.) However, a proper application of the standard of review, i.e., according a strong presumption of correctness to the findings, leads to only one conclusion, i.e., Mercury did not meet its burden to prove the findings in the Commissioner’s Decision were not supported by the evidence. As stated above, the court did not reject the evidence, nor did it contest the findings in the Commissioner’s Decision. In addition, several of the issues presented were questions of law, subject to our
de novo review. On that basis, it would be an “idle act” to remand for a new hearing. (Sager, supra, 156 Cal.App.4th at p. 1061.) Thus, we are reversing the judgment and directing the trial court to deny Mercury’s petition and enter judgment in favor of appellants. (Ibid.)

DISPOSITION

The judgment is reversed and the writ of mandate is vacated. The trial court is directed to deny the writ and enter judgment in favor of appellants. The motion for judicial notice is granted; the motion to strike is denied. Appellants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR: IKOLA, ACTING P. J., GOETHALS, J.