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SUMMARIES

Civil Rights

ACCA not enforceable through private cause of action (Paez, J.)

Segalman v. Southwest Airlines Company

9th Cir.; July 23, 2018; 17-15196

The court of appeals affirmed a district court judgment. The court held that the Air Carrier Access Act of 1986 is not enforceable through an implied private cause of action.

Robert Segalman has cerebral palsy and uses a motorized wheelchair. On three occasions in 2009 and 2010, Segalman traveled with Southwest Airlines and entrusted his wheelchair to the airline during his travel. On each of those three occasions, Southwest returned the wheelchair to Segalman in a damaged condition that rendered it either unusable or unsafe to use. Segalman sued Southwest and 10 unidentified Southwest employees for damages and injunctive relief, alleging negligence under California state law and a violation of the Air Carrier Access Act of 1986 (ACCA), codified at 49 U.S.C. §41705(a), which prohibits air carriers from “discriminating against an otherwise qualified individual” on the ground that the individual “has a physical or mental impairment that substantially limits one or more major life activities.”

The court held that the Air Carrier Access Act of 1986 is not enforceable through an implied private cause of action. Congress's express provision of multiple methods of enforcing the ACCA other than through a private cause of action indicated that Congress did not intend to create such a private cause of action.

Criminal Law

Prop 47 allows filing of amended petition to cure pleading defects (Elia, Acting P.J.)

People v. Bear

C.A. 6th; July 23, 2018; H044609

The Sixth Appellate District affirmed in part and reversed in part trial court orders. The court held that Penal Code §1170.18(f) permits the filing of an amended petition to cure pleading defects.

In 1980, Cheyanne Bear was convicted of grand theft person after he threatened a teenager with a knife, took the teenager’s t-shirt, and threw the shirt away. In 2016, Bear filed a §1170.18(f) petition to reduce the 1980 felony conviction to a misdemeanor. The court denied the petition, which was unsupported by any evidence of either what was stolen or the stolen item’s value. In 2017, Bear filed a second petition, supported by the district attorney’s stipulation that Bear was eligible to have his felony grand theft conviction designated as a misdemeanor.

The trial court denied the petition, finding no authority for the filing of a second petition after Bear’s first petition was denied.

The court of appeal affirmed in part and reversed in part, holding that the trial court properly denied Bear’s first petition based on the lack of any evidence of Bear’s eligibility for relief. The trial court erred, however, in finding that it lacked the authority to entertain Bear’s second petition. Although not designated as such, Bear’s second petition was in fact an amended petition. Construing Prop 47 liberally to effectuate its purpose, it must be construed as allowing a petitioner leave to amend to cure pleading defects. Allowing such amendment furthers the initiative’s purpose of sentencing nonserious, nonviolent crimes as misdemeanors rather than as felonies. Further allowing a petitioner leave to amend furthers the policy favoring the resolution of litigation on the merits rather than on procedural grounds. The court accordingly remanded to the trial court to allow Bear leave to file an amended petition. In so doing, the court noted that both the nature of the item stolen (a t-shirt) and the district attorney’s stipulation as to Bear’s eligibility for relief weighed in favor of granting such an amended petition.

Criminal Law

No right of access to former co-defendant’s sealed Rule 17(c) subpoena applications (Berg, J.)

United States v. Sleugh

9th Cir.; July 23, 2018; 17-10424
The court of appeals affirmed a district court order. The court held that a defendant did not have a right of access, under either the First Amendment or common law, to his former co-defendant’s sealed Rule 17(c) subpoena applications.

Damion Sleugh and Shawndale Boyd were indicted together on multiple felony charges arising from a drug deal that culminated on one participant’s death. While awaiting trial, Boyd filed ex parte applications seeking several Rule 17(c) subpoenas. Boyd requested that these applications be filed under seal. The subpoenas sought records relating to multiple cell phone numbers from various service providers for the time period surrounding the date of the alleged crimes, along with some surveillance video from other sources. To support the Rule 17(c) subpoena applications, and as required by local rule, Boyd’s defense attorney submitted affidavits describing the need for the records. Those affidavits were also filed ex parte and under seal. Boyd subsequently pleaded guilty to all counts except the murder charge. He agreed to cooperate with the government, and he testified against Sleugh at trial. A jury found Sleugh guilty.

While his appeal was pending, Sleugh sought permission from the district court to unseal Boyd’s Rule 17(c) subpoena applications, citing the “possibility” that Boyd’s trial testimony may have been inconsistent with counsel’s assertions in those applications, and arguing that he could have used Boyd’s counsel’s statements in the Rule 17(c) subpoena applications to cross-examine Boyd at trial. The district court denied the application.

The court of appeals affirmed, holding that Sleugh had neither a First Amendment nor a common law right to disclosure of the subpoena applications. There is no presumptive right of access to such documents under either the First Amendment or the common law. Rule 17(c) subpoena applications do not have a history of being available to the public; such applications do not constitute evidence, and they do not determine the merits of a criminal case. A defendant’s trial preparation, including discovery, is a private, and not a public, process. Accordingly, access should be permitted only upon a showing of “special need.” Sleugh failed to demonstrate such a special need. That the federal charges against Boyd had been resolved did not compel a different outcome, as the State of California retained the power to file its own charges against him.

The Second Appellate District reversed a judgment and remanded. The court held that defense counsel was ineffective for failing to challenge experts’ inadmissible case-specific hearsay testimony in proceedings under the Sexually Violent Predators Act.

The Los Angeles County District Attorney filed a petition to commit David Yates as a sexually violent predator under the Sexually Violent Predators Act. The trial court found probable cause to hold Yates over for trial, and the case was tried to a jury. At trial, the court permitted the prosecution’s experts to testify to the case-specific content of Yates’s state hospital, criminal, and juvenile records. The records themselves were not admitted into evidence.

The jury returned a verdict finding Yates to be a sexually violent predator. The trial court ordered him committed to the California Department of Mental Health for an indeterminate term.

The court of appeal reversed, holding that the trial court erred prejudicially in allowing testimony regarding the contents of documents that were neither admitted into evidence or shown to be covered by any hearsay exception. Under People v. Sanchez (2016) 63 Cal.4th 665, an expert may not testify to case-specific facts if they are outside the expert’s personal knowledge and do not fall under an exception to the hearsay rule or have not been independently established by competent evidence. Here, except for Yates’s own statements to the experts, which were admissible as party admissions, all of the case-specific facts related by the prosecution’s experts were drawn from documents that were neither introduced or admitted into evidence, nor shown to fall within a hearsay exception. The erroneous admission of this testimony in this case was unquestionably prejudicial. Without the inadmissible hearsay, the foundation for the experts’ opinions disappeared, along with the bulk of the evidence in support of the jury’s SVP finding. Although Yates’ failure to object to the admission of this testimony at trial, would ordinarily result in waiver, counsel’s inexplicable failure to lodge even a single objection under Sanchez violated Yates’s state and federal constitutional rights to effective assistance of counsel. The court accordingly reversed the judgment finding Yates to be an SVP, and directed that a copy of its opinion be forwarded to the State Bar for possible further action as to Deputy Public Defender Todd Montrose.

Evidence

Defense counsel ineffective for failing to challenge inadmissible case-specific hearsay (Lui, P.J.)

People v. Yates
C.A. 2nd; July 23, 2018; B279863

Immigration Law

California conviction for child endangerment constitutes crime of child abuse, neglect, or abandonment (Bybee, J.)

Martinez-Cedillo v. Sessions
9th Cir.; July 23, 2018; 14-71742
The court of appeals denied a petition for review of an order of the Board of Immigration Appeals (BIA). The court held that a California conviction for child endangerment, based on an intoxicated driver’s failure to restrain a child passenger with a seatbelt, qualified categorically as a crime of child abuse, neglect, or abandonment for purposes of removal.

Mexican citizen and lawful permanent resident Marcelo Martinez-Cedillo was arrested for driving under the influence of alcohol (DUI). At the time of his arrest, he had a child in his car who was not wearing a seatbelt. He was accordingly also charged with felony child endangerment under California Penal Code §273a(a). He was convicted of both crimes. Based on the child endangerment conviction, the Department of Homeland Security initiated removal proceedings. The case was tried to an immigration judge, who entered an order of removal.

The BIA affirmed, holding that §273a(a) was categorically a crime of “child abuse, neglect, or abandonment” under 8 U.S.C. §1227(a)(2)(E)(i) as that phrase was interpreted in two prior precedential opinions: Matter of Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008), and Matter of Soram, 25 I. & N. Dec. 378 (BIA 2010).

The court of appeals denied Martinez’ petition for review, holding that the BIA’s interpretation of §1227(a)(2)(E)(i) was entitled to deference. In Velazquez-Herrera, the BIA interpreted the term “crime of child abuse” broadly to mean “any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child’s physical or mental well-being, including sexual abuse or exploitation.” In Soram, the BIA clarified that the term “crime of child abuse,” as described in Velazquez-Herrera, is not limited to offenses requiring proof of injury to the child. Although the BIA’s interpretation of a crime of child abuse, neglect, or abandonment was not the sole possible interpretation, it was nonetheless a reasonable construction of ambiguous statutory language. And, to the extent that the BIA’s interpretation appeared to reflect a change of position, the BIA had explained its reasoning. Under the BIA’s interpretation of §1227(a)(2)(E)(i), Martinez’ conviction under §273a(a) was categorically a crime of child abuse, neglect, or abandonment. Further, Soram, which was decided after Martinez entered his guilty plea in the underlying case, was properly applied retroactively to his conviction. Judge Wardlaw dissented, opining that the BIA’s current interpretation of §1227(a)(2)(E)(i) was not entitled to deference and, even if it were, should not apply retroactively to Martinez’ conviction.
FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 7246

MARCELO MARTINEZ-CEDILLO, AKA Marcelo Martinez, Petitioner,
v.
JEFFERSON B. SESSIONS III, Attorney General, Respondent.

No. 14-71742
United States Court of Appeals for the Ninth Circuit
Agency No. A074-112-169
On Petition for Review of an Order of the Board of Immigration Appeals
Argued and Submitted August 28, 2017
Pasadena, California
Filed July 23, 2018
Before: Kim McLane Wardlaw and Jay S. Bybee, Circuit Judges, and Susan Illston,* District Judge.

Opinion by Judge Bybee;
Dissent by Judge Wardlaw

*The Honorable Susan Illston, United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

David Belaire Landry (argued), San Diego, California, for Petitioner.
Brianne Whelan Cohen (argued), Senior Litigation Counsel; John S. Hogan, Assistant Director; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

BYBEE, Circuit Judge:

Marcelo Martinez-Cedillo was convicted of felony child endangerment under California Penal Code § 273a(a) and ordered removed on the grounds that his conviction qualified as “a crime of child abuse, child neglect, or child abandonment” under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). His petition for review requires us to decide whether to defer to the Board of Immigration Appeals’ (“BIA’s”) interpretation of a crime of child abuse, neglect, or abandonment under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). Our sister circuits have split on this precise issue. See Florez v. Holder, 779 F.3d 207 (2d Cir. 2015) (not deferring); see also Mondragon-Gonzalez v. Att’y Gen. of the United States, 884 F.3d 155 (3d Cir. 2018) (deferring); Martinez v. U.S. Att’y Gen., 413 F. App’x 163 (11th Cir. 2011) (deferring).

We join the Second Circuit in deferring to the BIA’s reasonable interpretation. We further hold that California Penal Code § 273a(a) is categorically a crime of child abuse, neglect, or abandonment, as interpreted by the BIA. Finally, we hold that the BIA’s interpretation applies retroactively to Martinez-Cedillo’s conviction. Accordingly, we deny the petition for review.

I. FACTUAL BACKGROUND

Marcelo Martinez-Cedillo is a citizen of Mexico and, since 2005, has been a lawful permanent resident of the United States. In August 2008, he was convicted of driving under the influence of alcohol (“DUI”) with two prior DUI convictions. At the time of his final DUI, he had a child in his car who was not wearing a seatbelt. For this reason, he was also convicted of felony child endangerment under California Penal Code § 273a(a).

The Department of Homeland Security initiated removal proceedings on the grounds that Martinez-Cedillo’s conviction under California Penal Code § 273a(a) was a crime of child abuse, neglect, or abandonment. An Immigration Judge (“IJ”) entered a final order of removal, which Martinez-Cedillo appealed to the BIA, arguing that (1) California Penal Code § 273a(a) is not a crime of child abuse, neglect, or abandonment, and (2) he should be allowed to apply for cancellation of removal under 8 U.S.C. § 1229b.

On remand, Martinez-Cedillo initially requested cancellation of removal but later conceded that recent authority defeated his request. He then, for the first time, moved for a continuance of removal proceedings based on a pending visa petition his father had submitted on his behalf. The IJ denied his motion for a continuance and again entered a final order of removal. Martinez-Cedillo appealed to the BIA a second time, and this time, the BIA affirmed in full.

We join the Second Circuit in deferring to the BIA’s reasonable interpretation. We further hold that California Penal Code § 273a(a) is categorically a crime of child abuse, neglect, or abandonment, as interpreted by the BIA. Finally, we hold that the BIA’s interpretation applies retroactively to Martinez-Cedillo’s conviction. Accordingly, we deny the petition for review.

*Bybee, Circuit Judge:
not apply retroactively to his 2008 conviction; and (4) denial of his motion for a continuance was an abuse of discretion.

We first review the history of the BIA’s interpretation of § 1227(a)(2)(E)(i), and then address each of Martinez-Cedillo’s arguments in turn.

II. THE BIA’S INTERPRETATION

A. Rodriguez-Rodriguez

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which added § 1227(a)(2)(E)(i) to the INA and made “a crime of child abuse, child neglect, or child abandonment” a deportable offense. Two years later, the BIA made a passing reference to § 1227(a)(2)(E)(i) in In re Manzano-Hernandez, 22 I. & N. Dec. 991 (BIA 1999). At issue in that case was 8 U.S.C. § 1101(a)(43)(a), which makes “sexual abuse of a minor” an “aggravated felony” for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii). The BIA held that Texas’s offense of indecency with a child was “sexual abuse of a minor” and thus an aggravated felony under § 1227(a)(2)(A)(iii), even though the Texas statute did not require physical contact with a child. The BIA reasoned that the term “sexual abuse of a minor,” like the term “child abuse” in § 1227(a)(2)(E)(i), could refer to conduct that did not involve physical contact:

We note that in including child abuse as a ground of removal in section 237(a)(2)(E)(i) of the Act, Congress likewise did not refer to a particular statutory definition, although in the same section it did designate a statutory definition for the term “crime of domestic violence.” By its common usage, “child abuse” encompasses actions or inactions that also do not require physical contact. See [Child Abuse, BLACK’S LAW DICTIONARY (6th ed. 1990)] (defining child abuse as “(a)ny form of cruelty to a child’s physical, moral or mental well-being”).

Id. at 996. Rodriguez’s passing reference to child abuse was dictum and did not purport to offer a precedential interpretation of what constitutes a crime of child abuse, neglect, or abandonment under § 1227(a)(2)(E)(i).

For several years following Rodriguez, the BIA never interpreted the phrase “a crime of child abuse, child neglect, or child abandonment” in a precedential opinion, and its unpublished decisions on the subject were equivocal. Some unpublished decisions during this period stated that “child abuse” means “the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.” In re Palfi, 2004 WL 1167145 (BIA 2004); In re Baez-Cazarez, 2004 WL 2952229 (BIA 2004). Other unpublished decisions hewed to the Black’s Law Dictionary definition of “child abuse” as “any form of cruelty to a child’s physical, moral or mental well-being.” In re Pacheco Fregoso, 2005 WL 698590 (BIA 2005); In re Maltez-Salazar, 2005 WL 952489 (BIA 2005); In re Manzano-Hernandez, 2005 WL 698392 (BIA 2005). In short, the BIA’s interpretation of a crime of child abuse, neglect, or abandonment was unclear at this time.

B. Velazquez-Herrera

In 2006, we considered the BIA’s holding that a conviction for assaulting a child under Washington’s fourth-degree assault statute was a crime of child abuse. Velazquez-Herrera v. Gonzalez, 466 F.3d 781 (9th Cir. 2006). We recognized that the BIA had previously used at least two definitions of “child abuse,” which were “not entirely consistent” with each other. Id. at 783. We held that the “cruelty” definition cited in Rodriguez’s dictum was not “a statutory interpretation that carried the ‘force of law’” and accordingly remanded “to allow the BIA in the first instance to settle upon a definition of child abuse in a precedential opinion.” Id. at 782–83.1

The BIA followed our instructions and, in May 2008, issued its first precedential interpretation of what constitutes a crime of child abuse. Velazquez, 24 I. & N. Dec. 503. The BIA reasoned that, although § 1227(a)(2)(E)(i) defined “a crime of child abuse, neglect, or abandonment under § 1227(a)(2)(A)(iii), even though the Texas statute did not require physical contact with a child. The BIA reasoned that the term “sexual abuse of a minor,” like the term “child abuse” in § 1227(a)(2)(E)(i), could refer to conduct that did not involve physical contact:

We note that in including child abuse as a ground of removal in section 237(a)(2)(E)(i) of the Act, Congress likewise did not refer to a particular statutory definition, although in the same section it did designate a statutory definition for the term “crime of domestic violence.” By its common usage, “child abuse” encompasses actions or inactions that also do not require physical contact. See [Child Abuse, BLACK’S LAW DICTIONARY (6th ed. 1990)] (defining child abuse as “(a)ny form of cruelty to a child’s physical, moral or mental well-being”).

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For several years following Rodriguez, the BIA never interpreted the phrase “a crime of child abuse, child neglect, or child abandonment” in a precedential opinion, and its unpublished decisions on the subject were equivocal. Some unpublished decisions during this period stated that “child abuse” means “the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.” In re Palfi, 2004 WL 1167145 (BIA 2004); In re Baez-Cazarez, 2004 WL 2952229 (BIA 2004). Other unpublished decisions hewed to the Black’s Law Dictionary definition of “child abuse” as “any form of cruelty to a child’s physical, moral or mental well-being.” In re Pacheco Fregoso, 2005 WL 698590 (BIA 2005); In re Maltez-Salazar, 2005 WL 952489 (BIA 2005); In re Manzano-Hernandez, 2005 WL 698392 (BIA 2005). In short, the BIA’s interpretation of a crime of child abuse, neglect, or abandonment was unclear at this time.

The BIA considered various federal statutes defining “child abuse” and related concepts as of the date Congress enacted IIRIRA and found that “the weight of Federal authority . . . reflected an understanding that ‘child abuse’ encompassed the physical and mental injury, sexual abuse or exploitation, maltreatment, and negligent or neglectful treatment of a child.” Id. at 511. The BIA also considered state criminal and civil statutes, concluding that “there was a growing acceptance by 1996 that the concept of ‘child abuse’ included not just intentional infliction of physical injury, but also acts of sexual abuse or exploitation, criminally negligent acts, or acts causing mental or emotional harm.” Id. Finally, the BIA noted that the most recent edition of Black’s Law Dictionary—as opposed to the prior edition cited in Rodriguez—defined “child abuse” as “[i]ntentional or neglectful physical or emotional harm inflicted on a child, including sexual molestation.” Id. (quoting Abuse, BLACK’S LAW DICTIONARY (8th ed. 2004)).2

1. Around this same time, two other Circuit Courts of Appeals reached a different result. The Eighth and Tenth Circuits considered the “cruelty” definition of “child abuse” and—even though the BIA had never adopted it in a precedential opinion—held the definition reasonable and deserving of deference. Loera-Dominguez v. Gonzalez, 428 F.3d 1156 (8th Cir. 2005); Ochieng v. Mukasey, 520 F.3d 1110 (10th Cir. 2008). Neither court took into account—as we did, correctly—that the “cruelty” definition cited in Rodriguez was merely dictum.

2. Black’s Law Dictionary had changed significantly between the
Based on these considerations, the BIA “interpret[ed] the term ‘crime of child abuse’ broadly to mean any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child’s physical or mental well-being, including sexual abuse or exploitation.” \textit{Id}. at 512. The BIA went on to note that:

\textit{At a minimum}, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking.

\textit{Id}. (emphasis added). Significantly, however, the BIA did not address whether a crime of child abuse required actual injury to a child. A concurring opinion noted this very fact:

“It should be noted that, broad though the definition is, it is unclear whether it extends to crimes in which a child is merely placed or allowed to remain in a dangerous situation, without any element in the statute requiring ensuing harm, e.g., a general child endangerment statute, or selling liquor to an underage minor, or failing to secure a child with a seatbelt.” \textit{Id}. at 518 n.2 (Pauley, concurring).

C. Pacheco Fregozo

We had our first opportunity to address Velazquez’s definition of a crime of child abuse in \textit{Pacheco Fregozo v. Holder}, 576 F.3d 1030, 1033 (9th Cir. 2009). Ernesto Pacheco Fregozo had been arrested for driving under the influence of alcohol with two children in his car and convicted of \textit{misdemeanor} child endangerment under California Penal Code § 273a(b). \textit{Id}. at 1033–34. The BIA held in an unpublished opinion—issued before it decided \textit{Velazquez}—that Pacheco Fregozo’s conviction was categorically a crime of child abuse under the “cruelty” definition cited in \textit{Rodriguez}. \textit{Id}. at 1034.

In granting Pacheco Fregozo’s petition for review, we acknowledged that the BIA had recently interpreted “a crime of child abuse” in \textit{Velazquez} but held that it was unnecessary to remand for the BIA to apply \textit{Velazquez} in the first instance. \textit{Id}. at 1036 (“We are convinced that a remand is not necessary in this case. Aside from according \textit{Chevron} deference to the Board’s interpretation of a ‘crime of child abuse’ in the INA, which we do, we review de novo whether the California conviction is a removable offense.”). We interpreted \textit{Velazquez} as requiring conduct that “actually inflict[s] some form of injury on a child,” without explaining where the BIA’s decision imposed such a requirement. \textit{Id}. at 1037. Based on that questionable reading of \textit{Velazquez}, we then concluded that California Penal Code § 273a(b) was not a categorical match for § 1227(a)(2)(E)(i) because it reached conduct that “creates only potential harm to a child; no actual injury to a child is required.” \textit{Id}. at 1036–38.

We also held that § 273a(b) was not a categorical match for a crime of child abuse for an independent reason. Unlike the felony provision in the same statute, § 273a(b) does not require “any particular likelihood of harm to a child”:

[Un]like the analogous felony provision, California Penal Code section 273a(a), the misdemeanor provision \textit{in section 273a(b)} does not require that the perpetrator actually endanger the health or safety of the child at all—the misdemeanor provision applies where the child’s health or safety “may be endangered” by the circumstances. The BIA’s definition of “child abuse,” requiring some actual injury to a child, does not reach conduct that merely \textit{could} place a child’s health and safety at risk.

\ldots Negligent or intentional conduct that places a child in situations in which \textit{serious} harm is imminently likely could fairly constitute “impairment” of a child’s well-being. The misdemeanor California statute under which Pacheco was convicted, however, does not conform to the alternative definition, as it applies “under circumstances or conditions \textit{other than those} likely to produce great bodily harm or death.” Cal. Penal Code § 273a(b) (emphasis added).
July 25, 2018

CALIFORNIA DAILY OPINION SERVICE

NINTH CIRCUIT COURT OF APPEAL

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This alternative basis for our holding in *Pacheco Fregozo* appears to have been in tension with the first, as it implied that Velazquez did not require actual injury but only *actual endangerment*. At the very least, our discussion in this regard suggested that, even though misdemeanor child endangerment under § 273a(b) was not a categorical match for a crime of child abuse as defined in *Velazquez*, felony child endangerment under § 273a(a) likely was.

**D. Soram**

The following year, the BIA responded to our decision in *Pacheco Fregozo*. In *Matter of Soram*, the BIA “respectfully clarif[ied] that the term ‘crime of child abuse,’ as described in *Velazquez-Herrera* is not limited to offenses requiring proof of injury to the child”:

> [T]he United States Court of Appeals for the Ninth Circuit has issued a decision addressing this question. *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009). The court interpreted our decision in *Matter of Velazquez-Herrera* to require that a child must actually be injured for a crime to constitute child abuse. . . . However, as indicated above, we did not directly address this issue in *Velazquez-Herrera*. We do so now and find no convincing reason to limit offenses under section 237(a)(2)(E) of the Act to those requiring proof of actual harm or injury to the child.

25 I. & N. Dec. 378, 380–81 (BIA 2010). At the same time, the BIA also clarified that “the phrase ‘a crime of child abuse, child neglect, or child abandonment’ in section 237(a)(2)(E)(i) of the Act denotes a unitary concept and [its] broad definition of child abuse [in *Velazquez*] describes this entire phrase.” *Id.* at 381.

The BIA reasoned that “[a]s recently as July 2009, some 38 States [and several territories] . . . included in their civil definition of ‘child abuse,’ or ‘child abuse or neglect,’ acts or circumstances that threaten a child with harm or create a substantial risk of harm to a child’s health or welfare;” *Id.* at 382. In this respect, the BIA noted that “endangering a child can reasonably be viewed as either abuse or neglect” and that “some States include child endangerment in their definition of ‘child abuse,’ while a number of others consider it ‘child abuse or neglect.’” *Id.* at 381. A concurring opinion added that: “A review of the criminal child abuse statutes of the various States reveals that as of September 1996, a majority of States—28—had criminal provisions punishing child endangerment offenses as part of their criminal child abuse statutes.” *Id.* at 388 (Filippu, concurring).

The BIA also acknowledged that, although a crime of child abuse, neglect, or abandonment required only a risk of injury to a child, the risk had to be sufficiently great—that placing an outer limit on its broad definition. *Id.* at 382–83. The BIA noted that different state statutes used different terms (e.g., “realistic,” “serious,” or “substantial”) to describe the requisite level of risk, and that even statutes with similar terms were interpreted differently by various state courts. *Id.* Rather than attempt to analyze “the myriad State formulations of endangerment-type child abuse offenses” all at once, the BIA decided a case-by-case analysis was appropriate “to determine whether the risk of harm by the endangerment-type language . . . is sufficient to bring an offense within the definition of ‘child abuse’ under the Act.” *Id.* at 383.

Contrary to what the dissent argues, Dissenting Op. at 38, *Soram* did not reflect a change in the BIA’s position but rather addressed an issue that *Velazquez* had left open. The concurring opinion in *Velazquez* had expressly noted that whether a crime of child abuse required actual injury to a child remained an open question. Moreover, *Soram* responded to our court’s misinterpretation of the BIA’s prior decision. Despite what we said in *Pacheco Fregozo*, the BIA’s decision in *Velazquez* nowhere intimates that child abuse required actual injury. At most, it noted that, “[a]t a minimum,” child abuse included physical harm “even if slight,” *as well as mental or emotional harm, acts injurious to morals, and use of a child as an object of sexual gratification.” *Velazquez*, 24 I. & N. Dec. at 512. The BIA’s correction of our misinterpretation was not a change in position but rather a clarifying, gap-closing measure.

**III. CHEVRON DEFERENCE**

We apply *Chevron’s* two-step framework to the BIA’s construction of the INA in precedential decisions. *See, e.g.*, *Reyes v. Lynch*, 842 F.3d 1125, 1133 (9th Cir. 2016). “Under the first step, we determine whether Congress has directly spoken to the precise question at issue.” *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1073–74 (9th Cir. 2016) (quotation marks omitted). If “Congress has not spoken to a particular issue or the statute is ambiguous,” we pass to the second step and consider the agency’s interpretation of the statute. *Id.* If the “agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *Id.* (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

**A. Chevron Step One**

Section 1227(a)(2)(E)(i) states that “[a]ny alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.” Unlike the term “crime of domestic violence,” no part of the phrase “a crime of child abuse, child neglect, or child abandonment” is defined in the INA. There are no federal crimes of child abuse, neglect, or abandonment to provide analogous definitions, and unlike certain common-law crimes like burglary or assault, there are no widely accepted definitions of child abuse, neglect, or abandonment.
Section 1227(a)(2)(E)(i)’s language is broad and susceptible to multiple interpretations. Every circuit court to have considered it has noted its ambiguity. See Florez, 779 F.3d at 211 (“[W]e have little trouble concluding that the statutory provision is ambiguous.”); Ibarra, 736 F.3d at 910 (rejecting the BIA’s interpretation but only after acknowledging that “the statutory language is ambiguous”). We agree and therefore pass to step two.

B. Chevron Step Two

Step two is where our sister circuits have split. In Florez, the Second Circuit held that the BIA’s interpretation was reasonable and entitled to deference. 779 F.3d 207. Similar to the instant case, Nilfor Yosel Florez had been convicted of child endangerment under New York law for driving under the influence with children in his car and had been ordered removed under § 1227(a)(2)(E)(i). Id. at 208. The Second Circuit reasoned that, as of 1996 when Congress passed IIRIRA, “at least nine states had crimes called ‘child abuse’ (or something similar) for which injury was not a required element.” Id. at 212. Although “even more states used a definition that did require injury,” courts must not “look[] for the best interpretation, or the majority interpretation—only a reasonable one.” Id. The Second Circuit concluded that the BIA acted reasonably in adopting a definition of child abuse “consistent with the definitions used by the legislatures of Colorado, Kentucky, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, and Virginia.” Id. Moreover, Black’s Law Dictionary offered a definition of “child abuse” that did not require injury. Id. (citing Abuse, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “child abuse” as “[a]n act or failure to act that presents an imminent risk of serious harm to a child”). Finally, Soram’s requirement of a sufficiently high risk of harm to a child ensured that the BIA’s treatment of child-endangerment statutes would remain “within the realm of reason.” Id.

In Ibarra, the Tenth Circuit reached the opposite conclusion. The facts were extraordinarily sympathetic: Elia Ibarra had unintentionally left her children home alone one evening while she was at work and, as a result, had been convicted of child endangerment under New York law. Id. at 905. In subsequent removal proceedings, Ibarra conceded removability but sought cancellation of removal. Id. The BIA held her ineligible for cancellation on grounds that her conviction was a crime of child abuse, neglect, or abandonment. Id. at 906. The Tenth Circuit criticized the BIA for relying “primarily on definitions of ‘child abuse’ and ‘child neglect’ from civil, not criminal, law.” Id. at 912. The court held that the BIA should have identified “the majority of states’ consensus as of [the year Congress enacted IIRIRA] . . . to find the generic meaning of criminal child abuse.” Id. at 914 (quotation marks omitted). The court then did its own fifty-state survey of state criminal laws, concluding that the majority of states (thirty-three) required a higher mens rea than criminal negligence for conviction of an offense not involving actual injury to a child. Id. at 915. On this basis, the court rejected the BIA’s interpretation of a crime of child abuse, neglect, or abandonment as unreasonable. Id. at 915–16.

We agree with the Second Circuit and likewise hold that the BIA’s interpretation of § 1227(a)(2)(E)(i) is reasonable and entitled to deference. Velazquez and Soram are careful decisions, and although they may not represent the only permissible construction of the statutory language at issue, the BIA was not unreasonable for the same reasons identified by the Second Circuit. That the BIA’s interpretation does not require intentional or actual injury to a child—the critical distinctions in this case—would perhaps be troubling if the BIA were only interpreting the term “child abuse,” but the term “child neglect” surely admits of such conduct. See Neglect, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “child neglect” as “[t]he failure of a person responsible for a minor to care for the minor’s emotional or physical needs”; and defining “willful neglect” as “intentional or reckless failure to carry out a legal duty, esp. in caring for a child”).

Even as we agree with the Second Circuit, we decline to follow the Tenth Circuit’s reasoning because we find it flawed. First, there is no inherent problem in the BIA relying partly on civil statutes to understand the phrase “a crime of child abuse, child neglect, or child abandonment.” It would be unreasonable for the BIA to interpret that phrase, which refers to one who is “convicted of a crime,” to cover a purely civil action, such as child neglect proceedings brought by a state’s child protective services. We thus agree with the dissent that it would be improper for the BIA to use “a civil definition for a crime.” Dissenting Op. at 50; see also id. at 42, 49–50. But that is not what the BIA did. Rather, the BIA used civil definitions to inform its understanding of which convictions are crimes of child abuse, neglect, or abandonment, and that is not unreasonable.

A phrase such as “child neglect” surely can serve both civil and criminal purposes, and there is nothing unreasonable in trying to find a definition that would serve both simultaneously. That the BIA looked to civil definitions of abuse and neglect does not detract from the fact that an alien’s deportability depends on having been convicted of a crime. The only question is what crimes constitute child abuse, neglect, or abandonment, and for that the BIA was well within reason to look to civil definitions. In fact, civil law makes a particularly apt comparison here: parental rights adjudicated in civil child neglect proceedings implicate serious due process concerns, and courts have sometimes referred to terminating parental rights as a “civil death penalty,” see, e.g., In re K.A.W., 133 S.W.3d 1, 12 (Mo. 2004); In re K.D.L., 58 P.3d (10th Cir. 2005)).
181, 186 (Nev. 2002), and have required the state to satisfy a heightened burden of proof before terminating those rights, see, e.g., In re E.A.F., 424 S.W.3d 742, 746 (Tex. Ct. App. 2014); In re B.A.C., 317 S.W.3d 718, 723–24 (Tenn. Ct. App. 2009).

Second, there is no requirement that the BIA interpret a generic offense in the INA to conform to how the majority of states might have interpreted that term at the time of amendment. That is one reasonable aid to interpreting statutes, but it is not the only reasonable method for doing so.4 Contrary to the Tenth Circuit’s argument, the Supreme Court’s decision in Taylor has no bearing on this issue. See Ibarra, 736 F.3d at 913 (“Taylor instructs courts to find that ‘generally accepted contemporary meaning’ by looking to ‘the criminal codes of most States.’”). In Taylor, the Court interpreted the word “burglary” in a federal sentence enhancement statute and determined that “Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.” 495 U.S. at 598. The Court relied on the “generally accepted contemporary meaning” and looked to elements common to the state definitions. Id. at 596, 598.

The Court was not, however, reviewing an agency’s interpretation of an ambiguous statute and did not purport to offer any guidance to lower courts employing Chevron’s two-step framework. Nothing in Taylor requires that the BIA conduct a fifty-state survey and agree with the majority approach among the states every time it interprets an ambiguous generic offense in the INA. And recently the Court has referred to this methodology as an “aid [to] our interpretation . . . offering useful context.” Esquivel-Quintana, 137 S. Ct. at 1571 n.3. The BIA’s statutory construction is not constrained to a mere head-counting exercise.

4. The dissent cites several cases for the proposition that a survey of state laws may be helpful in interpreting federal law—a proposition we do not dispute. Dissenting Op. at 52–53. For example, the Supreme Court surveyed state criminal codes to supply “additional evidence about the generic meaning of sexual abuse of a minor.” Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571 (2017). The Court ultimately found the phrase unambiguous at Chevron step one, id. at 1572, but noted that surveying state law, though “not required;” “can be useful insofar as it helps shed light on the common understanding and meaning of the federal provision being interpreted.” Id. at 1571 n.3 (citation and quotation marks omitted)). None of the cases cited by the dissent suggest that the majority approach among states is the only reasonable way of interpreting an ambiguous generic offense. Notably, almost all of the cases that the dissent cites in this regard do not involve Chevron deference at all but are instead instances of a court interpreting a statute in the first instance. See, e.g., Nijhawan v. Holder, 557 U.S. 29, 47 (2009); United States v. Garcia-Jimenez, 807 F.3d 1079, 1084 (9th Cir. 2015); United States v. Esparrza-Herrera, 557 F.3d 1019, 1025 (9th Cir. 2009).

Elsewhere, the dissent calls into question whether the BIA—or any agency—should receive deference from the courts in interpreting statutes. See Dissenting Op. at 53 (citing Pereira v. Sessions, No. 17-459, slip op. at 2 (Kennedy, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1152, 1156 (10th Cir. 2016) (Gorsuch, J., concurring)). The origins and legitimacy of the Chevron doctrine provide interesting fodder for further thought, see Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908 (2017), but revisiting Chevron is beyond our power.

Taylor’s methodology worked in context: “burglary” is a well-recognized legal term in the common law, the MPC, and state law.5 By contrast, child abuse, neglect, and abandonment are not common law crimes; they are twentieth-century crimes. According to Black’s Law Dictionary, the first prosecution for child abuse was in 1874, when “[a]n eight-year-old girl named Mary Ellen was found to have been severely abused. Her abusers were prosecuted under the law for prevention of cruelty to animals since no law protecting children then existed.” Abuse, BLACK’S LAW DICTIONARY—ARY (10th ed. 2014) (emphasis added). Similarly, the MPC offers virtually no clue to the terms in § 1227(a)(2)(E)(i). See MPC § 230.4 (Endangering Welfare of Children). The notes to the MPC explain: “The crimes of endangering the welfare of children and persistent nonsupport represent substantial modification and consolidation of offenses that were variously treated in prior law and that have also received widely differing treatment in recent revisions.” MPC Pt. II, Art. 230, Refs., & Anmos. (emphasis added).

Moreover, states have developed different and varied terms in this area, thus complicating Congress’s task in describing what crimes involving children count as crimes of child abuse, neglect, or abandonment. Indeed, it seems that Congress purposefully employed the overlapping concepts of child abuse, neglect, and abandonment to denote a broad array of crimes. As a BIA member’s concurring opinion in Velazquez noted, “crimes of child neglect or abandonment are a subset of ‘child abuse’ and, although technically redundant, were likely inserted by Congress to assure coverage of such crimes, however denominated by the State.” 24 I. & N. Dec. at 519 (Pauley, concurring) (emphasis added).

In short, the lack of a common source for the terms and the varied ways in which states have addressed the problem of child abuse—however it is denominated—only reinforces the ambiguity in what constitutes a crime of child abuse, neglect, or abandonment. It is precisely because of that ambiguity that we must proceed to Chevron step two, where there is no single methodology for resolving ambiguity in a statute.

Third, the Tenth Circuit’s ambitious, fifty-state survey was itself problematic. The court categorized state laws according to the minimum mens rea they required for conviction of a
Finally, this is not a case of the BIA changing positions without explaining its rationale for doing so. For one, the BIA did not change its position: *Rodríguez*’s brief discussion of § 1227(a)(2)(E)(i) was dictum; *Velázquez* gave the first predecendental interpretation of § 1227(a)(2)(E)(i) but left the issue of actual injury undecided; and *Soram* merely filled the gap that *Velázquez* left open. The dissent’s strained reading of *Rodríguez* and *Velázquez* tries to hold the BIA to an interpretation that was never in fact the agency’s position. More importantly, even if one thought the BIA had changed its position, the BIA has explained its reasoning. See *Brand X*, 545 U.S. at 981. It is only an “[u]nexplained inconsistency” that is a reason for finding an interpretation unreasonable. *Id.; Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). Indeed, in *Chevron* itself, the Supreme Court “deferred to an agency interpretation that was a recent reversal of agency policy.” *Brand X*, 545 U.S. at 981 (citing *Chevron*, 467 U.S. at 857–58). The BIA’s interpretation in *Soram* was a response to our decision in *Pacheco Fregoso* and gave sufficient reason for why the agency believed a crime of child abuse, neglect, or abandonment did not require proof of actual injury. This was not a change in the BIA’s position, but even if it had been, it was suitably explained.6

In sum, we hold that the BIA’s interpretation of a crime of child abuse, neglect, or abandonment in *Velázquez* and *Soram* is a reasonable construction of ambiguous statutory language. We therefore join the Second Circuit in deferring to the BIA’s interpretation.

**IV. THE CATEGORICAL APPROACH**

We next consider whether Martinez-Cedillo’s conviction under California Penal Code § 273a(a) is categorically a crime of child abuse, neglect, or abandonment, as interpreted

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6. The Tenth Circuit included in its survey crimes labeled “child abuse,” “child neglect,” and “child abandonment” because these were “well-known terms of art” that Congress employed. *Id. at 914.* The court also added “child endangerment,” “cruelty to children,” and “unlawful conduct toward child” to its survey because they “reflect[ed] the cluster of ideas” behind the terms Congress actually used. *Id.* But it chose not to include crimes of “nonsupport,” “contributing to delinquency,” “enticement,” or “other sundry crimes involving children that state criminal codes may include.” *Id.* The court made no real effort to explain these seemingly arbitrary distinctions. In any event, it strikes us as very odd that the court would feel free to add phrases to a statutory list of “well-known terms of art.”

7. In this regard, we disagree with the dissent’s suggestion that the...
by the BIA. We apply Skidmore deference to the BIA’s non-precedential holding in this case that § 273a(a) is categorically such a crime. See Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009). “Under Skidmore, the measure of deference afforded to the agency varies depending upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” Id. (alteration and quotation marks omitted).

Under the categorical approach, we look “not to the facts of the particular prior case” but to whether “the state statute defining the crime of conviction” categorically fits within the “generic” federal offense: Moncrieffe v. Holder, 569 U.S. 184 (2013). The relevant section of the California statute states:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

Cal. Penal Code § 273a(a). As noted above, the California Supreme Court has interpreted § 273a(a) to cover criminally negligent conduct resulting in risk of “great bodily harm or death” to a child. Valdez, 42 P.3d at 517; see also Ramirez v. Lynch, 810 F.3d 1127 (9th Cir. 2016).9

Even before the BIA decided Soram, our decision in Pacheco Fregozo strongly suggested that felony child endangerment under § 273a(a) was categorically a crime of child abuse, neglect, or abandonment.10 576 F.3d at 1037–38. After Soram, the result is all the more clear. Unlike § 273a(b), § 273a(a) requires criminally negligent conduct under “conditions likely to produce great bodily harm or death” to a child. See id.; People v. Sargent, 159 Cal. Rptr. 771 (Cal. Ct. App. 1979) (holding that § 273a(a) is “intended to protect a child from an abusive situation in which the probability of serious injury is great”).11 This high degree of risk brings the crime completely within the ambit of the BIA’s broad interpretation. See Soram, 25 I. & N. Dec. at 378; Velazquez-Herrera, 24 I. & N. Dec. at 512.

V. RETROACTIVITY

Martinez-Cedillo argues that he pled guilty of violating § 273a(a) before the BIA decided Soram and that therefore Soram should not apply to his conviction. We apply the five-factor Montgomery Ward test to address “the situation when a ‘new administrative policy [is] announced and implemented through adjudication.’” Garfias-Rodriguez v. Holder, 702 F.3d 504, 518 (9th Cir. 2012) (en banc) (quoting Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982)). The five factors are:

(1) whether the particular case is one of first impression,
(2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. Although the Montgomery Ward test was developed in the context of an agency overturning its own rule, it also applies where, as here, an agency disagrees with a court’s decision. Id.

The first factor is generally not “well suited to the context of immigration law” and does not weigh either for or against retroactivity. Id. at 521. The second and third factors “are closely intertwined” and do support retroactivity here. Id. The BIA’s decision in Soram was not an abrupt departure from a well established practice but rather a clarification of a prior uncertainty. As explained above, a concurring opinion in Velazquez expressly noted that whether § 1227(a)(2)(E) (i) required actual injury was an open question. Soram thus “fill[ed] a void in an unsettled area of law” and cannot have come as “a complete surprise” to Martinez-Cedillo. Id. at 521–22. Although the fourth factor favors non-retroactive application because deportation is unquestionably a substantial burden, the fifth factor cuts in the other direction because “non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established.” Id. at 523. In sum, the second, third, and fifth factors of the Montgomery Ward analysis favor ret-

9. In Ramirez, we held that § 273a(a) is not categorically a “crime of violence” but did not address whether it is categorically a crime of child abuse, neglect, or abandonment. 810 F.3d at 1127.

10. Martinez-Cedillo incorrectly suggests that, because the facts underlying his conviction are similar to the facts in Pacheco Fregozo, § 273a(a) is not categorically a crime of child abuse, neglect, or abandonment. This misunderstands the categorical approach, which looks to elements, not facts. See Moncrieffe, 569 U.S. at 184. Section 273a(a) requires proof of “circumstances or conditions likely to produce great bodily harm or death.” Section 273a(b), by contrast, covers only those acts “other than those likely to produce great bodily harm or death.” Section 273a(a) is a felony; § 273a(b) is a misdemeanor. The dissent fails to address this distinction when it claims that there is “no consistency in our current approach” because in two cases in which a father drove drunk with children in the car “one was deemed removable and the other was not.” Dissenting Op. at 44.

11. California’s jury instructions for § 273a(a) require the jury to find that “[t]he defendant . . . caused or permitted the child to (suffer/ or be injured/ or be endangered) under circumstances or conditions likely to produce (great bodily harm/ or death).” Judicial Council of California Criminal Jury Instruction §21.
roactive application of Soram, and the BIA properly applied Soram to Martinez-Cedillo’s conviction in this case. 12

VI. REQUEST FOR A CONTINUANCE

Finally, Martinez-Cedillo challenges the denial of his request for a continuance. An IJ may grant a continuance for “good cause shown.” 8 C.F.R. § 1003.29. “We review the denial of a continuance for an abuse of discretion.” Id. Here, Martinez-Cedillo requested a continuance based on his pending visa application. The IJ denied his request based on the untimeliness of the request, the remoteness of Martinez-Cedillo’s priority date for a visa, and the speculative nature of his eligibility for adjustment of status, and the BIA affirmed for the same reasons. There was no abuse its discretion.

VII. CONCLUSION

For the foregoing reasons, we DENY the petition for review.

WARDLAW, Circuit Judge, dissenting:

I respectfully dissent. The Board unreasonably interpreted the phrase “crime of child abuse, child neglect, and child abandonment,” having inexplicably changed its generic definition three times in the past two decades. Its current definition is not entitled to Chevron deference. And even if it were, the new definition should not apply retroactively to Martinez.

I.

Martinez immigrated to the United States from Mexico in 1992, when he was sixteen years old. He became a lawful permanent resident in 2005, and thus was lawfully in the United States residing and working for more than fifteen years before the Department of Homeland Security (DHS) commenced these removal proceedings. Martinez has two U.S. citizen children, a son born in 2002 and a daughter in 2008. In August 2007 and April 2008, Martinez drove drunk near his home outside San Diego. Martinez’s son was in the car without a seatbelt during those incidents.

In August 2008, Martinez pleaded guilty to violating California Penal Code section 273a(a) for the April 2008 incident and to violating California Vehicle Code section 23152(b) for driving under the influence of alcohol (DUI) with two or more prior DUIs. See Cal. Vehicle Code § 23152(b). The state judge sentenced Martinez to 364 days in jail and five years of probation. At the time, Martinez received a form, prepared by the San Diego Superior Court, that listed “Aggravated Felonies,” as defined under 8 U.S.C. § 1101(a)(43) that “will result in Removal/Deportation” if the noncitizen is convicted. 13 The list of deportable aggravated felonies, however, included neither a conviction under California Penal Code section 273a(a) nor crimes of child abuse, child neglect, or child abandonment, though Martinez acknowledged elsewhere that his guilty plea could result in removal from the United States.

Three months after his guilty plea, DHS commenced removal proceedings against Martinez, charging removability as an immigrant “convicted of” a “crime of child abuse, child neglect, or child abandonment.” 14 U.S.C. § 1227(a) (2)(E)(i). Martinez moved to terminate the proceedings, arguing that a conviction under California Penal Code section 273a(a) was not categorically a crime of child abuse under Matter of Velazquez-Herrera (Velazquez II), 24 I. & N. Dec. 503 (B.I.A. 2008), the BIA definition in effect at the time he pleaded guilty. The Immigration Judge (IJ) disagreed and entered a final order of removal.

Martinez then appealed to the BIA. The Board concluded that California Penal Code section 273a(a) was a categorical match for the “crime of child abuse, child neglect, or child abandonment” under Matter of Soram, 25 I. & N. Dec. 378 (B.I.A. 2010), the definition the Board newly adopted while Martinez’s petition awaited appeal. The Board affirmed the IJ’s removal order and, after a partial remand to the IJ, concluded that Martinez was ineligilbe for voluntary departure.

Martinez now petitions for relief from the removal order. He argues that he is not removable because the definition of “crime of child abuse, child neglect, and child abandonment” in Soram is overbroad and an unreasonable interpretation of congressional intent, and because a conviction under California Penal Code section 273a(a) is not categorically a crime of child abuse under Velazquez II. Martinez argues, in the alternative, that, even if Soram is a reasonable interpretation of congressional intent, the Board should not have applied Soram retroactively to his 2008 conviction.

II.


12. The dissent cites Montgomery Ward but fails to adequately address all of its five factors. Dissenting Op. at 55–57. Instead, the dissent focuses on only two of the five factors, arguing that, because defendants are “acutely aware of the immigration consequences of their convictions,” and because deportation is “a particularly severe penalty,” the BIA’s interpretation should not apply retroactively. Id. Importantly, the two factors the dissent relies upon would apply any time the BIA interprets a generic offense, such that no BIA decision would ever apply retroactively. This is inconsistent with how our court applies Montgomery Ward. See Garfias-Rodriguez, 702 F.3d at 519 (“In every case in which we have applied the Montgomery Ward test, we have done so on a case-by-case basis . . . .”). Indeed, the dissent’s analysis would have required a different result in the very en banc decision in which we decided to apply Montgomery Ward to BIA decisions. See id. at 523 (holding BIA decision applied retroactively).

13. The form has a revised date of “12-07” or December 2007, a period of time during which the BIA required physical, mental, or emotional harm to a child for a conviction of child abuse, child neglect, or child abandonment to qualify as a deportable offense.

14. Our court, sitting en banc, has recognized that drunk driving, by itself, is not a deportable offense because it is not a crime involving moral turpitude, see Marmolejo-Campos v. Holder, 550 F.3d 903, 913 (9th Cir. 2009) (en banc), so the agency could not have charged Martinez on that basis.
the Board’s ever-changing definition of the “crime of child abuse, child neglect, or child abandonment” illustrates. In 1998, the BIA defined a crime of child abuse as “any form of cruelty to a child’s physical, moral, or mental well-being.” In re Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 996 (B.I.A. 1999). That definition required intentional infliction of injury on the child. See id. (citing to Black’s Law Dictionary (8th ed. 2014), which defined “cruelty” as an intentional and malicious act). In 2006, we concluded that the Rodriguez definition was dicta, not precedential and not entitled to deference because it was announced in an appeal about the separate crime of child sexual abuse. See Velazquez-Herrera v. Gonzales (Velazquez I), 466 F.3d 781, 782–83 (9th Cir. 2006). But, in the years between Rodriguez and Velazquez I, and even after, several circuit courts of appeal accepted Rodriguez as a reasonable interpretation of § 1227(a)(2)(E) (i), Ochieng v. Mukasey, 520 F.3d 1110, 1114–15 (10th Cir. 2008); Nguyen v. Chertoff, 501 F.3d 107, 114 n.9 (2d Cir. 2007); Loez-Dominguez v. Gonzales, 428 F.3d 1156 (8th Cir. 2005), and many lawful permanent residents relied on the definition to make decisions about how to plead in criminal proceedings, see INS v. St. Cyr, 533 U.S. 289, 322 (2001) (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.”). After Velazquez I, we remanded the petition to the BIA with an invitation to issue a precedential decision. 466 F.3d at 782–83.

In response, the Board held that the generic definition of crime of child abuse includes crimes committed with a mens rea of criminal negligence so long as the convictions involve “the infliction on a child of physical harm, even if slight” or “mental or emotional harm, including acts injurious to morals . . . .” Velazquez II, 24 I. & N. Dec. at 512. The Board recognized that its generic definition had to reflect a “flexible, uniform standard,” applicable nationwide, and could not make reference to “legal classifications that vary from State to State.” Id. at 508 (citing Kahn v. INS, 36 F.3d 1412, 1414–15 (9th Cir. 1994)).

At the time, a concurring Board member, Roger Pauley, wrote separately to point out that the Board’s definition was incomplete and confusing. It was “unclear,” Pauley wrote, whether the Board’s new definition extended to “crimes in which a child is merely placed or allowed to remain in a dangerous situation, without the statute requiring ensuing harm,” and Pauley included the example of “failing to secure a child with a seatbelt.” Id. at 518 n.2 (Pauley, concurring). Pauley also noted that the Board’s definition ignored the statutory text, defining only the “crime of child abuse” without acknowledging that the phrase enacted by Congress included the “crime of child abuse, child neglect, and child abandonment.” Id. at 518. Nevertheless, the Board issued its definition without adjusting or clarifying the meaning of the phrase.

After Velazquez II, we granted a petition for review in Fregozo v. Holder, 576 F.3d 1030 (9th Cir. 2009), holding that the Velazquez II definition requires injury to the child. Id. at 1036. There, Fregozo, a permanent resident, pleaded guilty to child endangerment under California Penal Code section 273a, subsection (b), after he drove drunk with his wife and two children in the car. Id. at 1033–34. We concluded that a conviction under section 273a(b) is not categorically a crime of child abuse under Velazquez II because the Board’s then-interpretation required “some form of injury to a child” while section 273a(b) required only a potential harm to the child for a conviction, rendering the state statute broader than the generic federal crime. Id. at 1037.

In light of our decision in Fregozo, the BIA again revisited its definition of the crime of child abuse in December 2010. Soram, 25 I. & N. Dec. at 380. Changing course from its prior position that a crime of child abuse requires “infliction on a child of physical harm, even if slight,” or “mental or emotional harm,” Velazquez II, 24 I. & N. at 512, the BIA found “no convincing reason” to limit deportable offenses under § 1227(a)(2)(E)(i) to “those requiring proof of actual harm or injury to the child,” Soram, 25 I. & N. Dec. at 378. The Board inexplicably looked to the civil child abuse statutes in force in thirty-eight states as of 2009, not the criminal laws in effect in 1996 when Congress enacted IIRIRA. Id. at 382 (citing a 2009 Department of Health and Human Services compendium of the civil laws of thirty-eight states). A concurring board member, Lauri Filppu, remarked on the problem, and stated, “I find it most relevant to look to the criminal statutes of the various States in 1996, rather than the civil statutes.” Id. at 386–87 (Filppu, concurring).

The Board changed its position between Velazquez II and Soram in two other respects as well. First, where the Board had rejected a state-by-state analysis in Velazquez II, it approved a state-by-state analysis in Soram, instructing IJs to look at state statutes “to determine whether the risk of harm required by the endangerment-type language” in the state statute is “sufficient to bring an offense within the definition of ‘child abuse.’” Id. at 383 (“We find that a State-by-State analysis is appropriate to determine whether the risk of harm required . . . is sufficient.”). After surveying state laws, the Board confirmed that states use different terms, like “realistic,” “serious,” “reasonably foreseeable,” “substantial,” and “genuine” to describe the level of risk required, and “approximately half of the States that include endangerment-type offenses in their definitions of ‘child abuse’ or ‘child abuse or child neglect’ [did] not specify the degree of threat required.” See id. at 382–83 (collecting terms). But, eschewing its prior command to create a uniform, national definition, the Board left it to courts to decide “whether the risk of harm required by the endangerment-type language in any given State statute is sufficient to bring an offense within the definition of ‘child abuse’ under the Act.” Id. at 383.

Second, the Board changed its position on whether the phrase “crime of child abuse, child neglect, or child aban-
donment” described a unitary concept. Where the Board in Velazquez II decided to define only the “crime of child abuse,” the Board now confirmed that its new definition covered the entire scope of the deportable offense “a crime of child abuse, child neglect, or child abandonment.” Id.

III.

We review the Board’s generic definition of a “crime of child abuse, child neglect, or child abandonment” announced in Soram under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984). First, we ask “whether Congress has directly spoken to the precise question at issue,”—that is, whether the statute is ambiguous. Id. “If the intent of Congress is clear, that is the end of the matter.” Id. But “if the statute is silent or ambiguous,” the second question we must consider is “whether the agency’s answer is based on a permissible construction of the statute.” Id. at 843; see also INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (“It is clear that principles of Chevron deference are applicable to [the INA’s] statutory scheme.”).

A.

The majority correctly notes that all of the circuits to examine the issue agree that the phrase “crime of child abuse, child neglect, or child abandonment” in § 1227(a)(2)(E)(i) is ambiguous. See Flores v. Holder, 779 F.3d 207, 211 (2d Cir. 2015); Ibarra v. Holder, 736 F.3d 903, 910 (10th Cir. 2013); Hackshaw v. Att’y Gen. of U.S., 458 F. App’x 137, 139 (3d Cir. 2012); Martinez v. U.S. Att’y Gen., 413 F. App’x 163, 166 (11th Cir. 2011). Section 1227(a)(2)(E)(i) defines the term “crime of domestic violence,” but it does not define the phrase “crime of child abuse, child neglect, or child abandonment.” 8 U.S.C. § 1227(a)(2)(E)(i). Because Congress did not speak to the question and each state defines the crimes of child abuse, child neglect, and child abandonment differently, the phrase is ambiguous.

B.

The majority and I part ways at Chevron’s second step. The Board unreasonably changed the definition of the phrase “crime of child abuse, child neglect, and child abandonment,” departing from standard rules of statutory construction to include “crimes” resulting in no injury to a child and by requiring a state-by-state risk analysis. Moreover, the Board unreasonably disregarded the Supreme Court’s clear instructions as to how to determine the generic definition of a crime.

I.

As a matter of statutory interpretation, we must review the statute’s language, purpose, history, and the agency’s past decisions and controlling law to determine whether the Board’s definition is reasonable. See Taylor v. United States, 495 U.S. 575, 581 (1990). To determine Congress’s intent, we begin with the language of the statute—something neither the majority nor the Board did here. See Mendez-Garcia v. Lynch, 840 F.3d 655, 663 (9th Cir. 2016).

Section 1227(a) is structured around a list of seven “classes of deportable aliens,” each “class” setting forth a distinct basis for removal of an “alien” from the United States. 8 U.S.C. § 1227(a). Section 1227(a)(2), the second of the seven classes, lists “criminal offenses” for which an alien may be removed from the country. Id. § 1227(a)(2). This criminal offense class in turn lists five subsets of deportable crimes. Id. Section 1227(a)(2)(E)(i), the subsection applicable to Martinez, is within the category of “crimes of domestic violence, stalking, or violation of a protection order, [and] crimes against children.” Id. Martinez was deemed removable for having been “convicted of a “crime of child abuse, child neglect, or child abandonment,” one of the generic crimes under this subsection. Id. § 1227(a)(2)(E)(i).

As its focus on “criminal offenses,” convictions, and crimes indicates, the statute requires the Board to define the elements of a crime. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (“Congress ‘says in a statute what it means and means in a statute what it says there.’” (quoting Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 254 (1992)); Bailey v. United States, 516 U.S. 137, 145 (1995) (recognizing that proper statutory construction also requires considering a phrase’s “placement and purpose in the statutory scheme”). Yet, the Board’s generic definition of the “crime of child abuse” is so imprecise, it violates “essential” tenets of due process, most specifically “the prohibition of vagueness in criminal statutes.” Dimaya, 138 S. Ct. at 1212. The Board explains that the generic definition of the “crime of child abuse, child neglect, or child abandonment” includes any “intentional, knowing, reckless, or criminally negligent mens rea.” Soram, 251 & N. Dec. at 380 (citing Velazquez II, 24 I. & N. Dec. at 512). The Board’s actus reus test is even more vague. It includes conduct that does not result in any injury to the child, and the Board does not define the level of risk to which the child must have been exposed. See id. at 381, 382–83. The definition sweeps widely to include “mental or emotional harm,” “acts injurious to morals,” “sexual abuse,” and “sexually explicit conduct,” combining multiple crimes and including terms covered elsewhere in the immigration codes. Id. at 380 (citing Velazquez II, 24 I. & N. Dec. at 512). Because the statutory language required the Board to define the elements of a specific crime—the “crime of child abuse, child neglect, or child abandonment”—this definition is an unreasonable interpretation of statutory text.

While the Board was supposed to define a criminal act, it instead swept into its definition statutes that are civil in nature, and in so doing, unreasonably read a term into the statute that is not there—endangerment. As discussed in greater detail in Part III.B.2, the Board relied on civil child endangerment statutes to craft the definition of “crime of child abuse, child neglect, or child abandonment,” because it believed that “endangering a child can reasonably be viewed as either abuse or neglect” and because some states included endangerment as
part of their child abuse and child neglect statutes. *Soram*, 25 I. & N. Dec. at 381. But there is a difference between these civil statutes and the crime of child endangerment. While child endangerment statutes share some elements with child abuse, neglect, and abandonment statutes, the crime of child endangerment, unlike the crime of child abuse, neglect, or abandonment, is chiefly concerned with the level of risk to the child, and it is, therefore, a different crime altogether.

Despite acknowledging that including endangerment offenses in the generic definition of the crime would require it to assess the level of risk to the child, id. at 382, the Board failed to define the precise level of risk required to render a state conviction a crime of child abuse, neglect, and abandonment, id. This is problematic not only because it further unmors the Board’s definition from the statutory text but also because it leaves the definition judicially unadministrable and overly vague, along the lines the Supreme Court recently critiqued in *Dimaya*, 138 S. Ct. at 1213–15. The Board’s definition creates uncertainty about how a court is to estimate the “degree of threat” to the child, particularly where the state statute does not specify the “degree of threat” required for a conviction. Cf. id. at 1213–14. Because the reviewing court must use the categorical approach to determine whether the statute of conviction is overbroad, the court will need to identify the level of risk of the “ordinary case” under the state statute of conviction and determine whether that level of risk is sufficiently high to meet the federal generic offense. The Supreme Court rejected a statute requiring similar analysis as unconstitutionally vague in *Dimaya*, and the Board’s definition suffers from the same defects. 15

The Board’s vague definition makes it unreasonably difficult for a lawful permanent resident to predict whether he will be subject to immigration consequences as a result of a state court conviction, particularly for a child endangerment conviction where the state statute allows for a conviction without any resulting injury to the child. Is it enough that the statute criminalizes conduct that is “likely to produce great bodily harm or death[?]” *Cal. Penal Code § 273a(a).* Or, must the statute specify that the petitioner placed the child in conditions where the child is at a “substantial risk of imminent death or physical injury[?]” *Ariz. Rev. Stat. § 13-1201.* What about just a “substantial risk of injury[?]” *Alaska Stat. § 11.51.100.* The Board’s unreasonable failure to specify the level of risk required, coupled with its impermissible expansion into civil law, creates a quagmire that will confound our court for years to come. There truly is no consistency in our current approach. To date, our closest precedents involve two other fathers who drove drunk with their children in the car; one was deemed removable and the other was not. Cf. *Florez*, 779 F.3d 207; *Fregozo*, 576 F.3d at 1030.

The majority makes the same mistake as the Board when it plucks the term “child neglect” out of the statute and suggests that this term, alone, is broad enough to support the Board’s definition. The majority concedes that the Board definition in *Soram* “would perhaps be troubling if the BIA were only interpreting the term ‘child abuse,’” but it assures itself that, by including the term “child neglect,” the definition “surely admits of such conduct.” This contention is distinctly at odds with the Board’s conclusion that the phrase “crime of child abuse, child neglect, or child abandonment” has one meaning that pertains, in the same way, to all removal proceedings with national uniformity. 25 I. & N. Dec. at 381. Congress could have crafted separate removable offenses for the “crime of child abuse,” “crime of child neglect,” and “the crime of child abandonment” that very well might have been a categorical match for section 273a(a). But Congress, and the Board following its lead, chose to view the phrase as a “unitary concept,” and so the Board definition should have reflected each term in the phrase together, rather than singling out the broadest among them, as the majority suggests was appropriate. *Soram*, 25 I. & N. Dec. at 381.

The Board’s unexplained change to its definition of what amounts to a crime of child abuse, neglect, or abandonment also underscores the irrationality of its current position. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); see also *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1078 (9th Cir. 2016) (applying *Chevron* and *Encino Motorcars* to interpret an INA provision). The Board changed its generic definition of the crime of child abuse three times in the last two decades, each time disrupting the expectations of the lawful permanent residents who rely on the Board’s definitions. In 2008, at the time it promulgated its first precedent definition in *Velazquez II*, the Board knew that its definition was incomplete and confusing, see 24 I. & N. Dec. at 518 & n.2, but refused to adjust or clarify it. After our decision in *Fregozo*, where we confirmed that the Board’s definition did not require actual injury, 576 F.3d at 1037, the Board revisited its prior definition and, knowing what it had known all along, adopted the concurring Board member’s suggestions. The Board also reversed its own long-standing precedent instructing that the generic definition of a federal crime should reflect a uniform, national standard, see *Velazquez II*, 24 I. & N. Dec. at 508 (quoting *Kahn*, 36 F.3d at 1414–15), electing instead to instruct IJs and reviewing courts to look to different state statutes to determine whether the level of risk is “sufficient,” without defining what specific level of risk satisfies the generic definition of the federal crime, *Soram*, 25 I. & N. Dec. at 383.

This case illustrates how the Board’s ever-changing definitions harm lawful permanent residents, who rely on the Board’s definitions. We know that Martinez pleaded guilty to a violation of section 273a(a) at the time that the Board’s definition of “crime of child abuse” required an injury for

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15. Contrary to the majority’s suggestion, *Dimaya* is not distinguishable merely because the ambiguity there appeared in a statute while the ambiguity here appears in the Board’s definition. Where the ambiguity appears makes no practical difference for the IJs required to apply the rule or the immigrants who must rely on it—the definition is confusing all the same.
purposes of deportation, and we know that Martinez’s son was not injured. Because Martinez had been here lawfully for more than fifteen years and had received information from the state court that told him that his crime was not among the list of removable offenses, when Martinez pleaded guilty he had reason to believe that his conviction would not render him removable—reason supported by the Board’s then-current definition of the crime. Because this reliance interest is substantial in Martinez’s case and in other cases like his, the Board should not be allowed to arbitrarily change its definition without explaining the need for a change. *See Encino Motorcars*, 136 S. Ct. at 2126 (“In explaining its changed position, an agency must also be cognizant that longstanding practices may have engendered serious reliance interests that must be taken into account.” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

The majority insists that Board has not changed its definition from *Rodriguez* to *Soram*, but the majority’s position is as baffling as it is wrong. Under *Rodriguez* and *Velazquez II*, Martinez was not removable for having been convicted of a crime of child abuse, neglect, or abandonment, but under *Soram*, he is removable for the same crime. The Board’s 1998 definition in *Rodriguez* required a minimum *mens rea* of “intentional and malicious” infliction of pain on the child, 22 I. & N. Dec. at 996, and that generic definition of the federal crime was not a categorical match for California Penal Code section 273a(a), which requires a minimum *mens rea* of criminal negligence, *see People v. Valdez*, 27 Cal. 4th 778, 783–84 (2002). Similarly, the Board’s 2008 definition in *Velazquez II*, as interpreted in *Fregozo*, required injury to the child, 24 I. & N. Dec. at 512; *see also Fregozo*, 576 F.3d at 1037, and that definition too was not a categorical match for California Penal Code section 273a(a), which does not require injury to the child, *see People v. Toney*, 76 Cal. App. 4th 618, 622 (1999). But, under the Board’s 2010 definition in *Soram*, California Penal Code section 273a(a), for the first time, is a categorical match for the federal generic definition. Having dispensed with its prior requirement that the child suffer an injury, the Board, in this case, concluded that the elements of Martinez’s state statute of conviction fell within the overbroad federal definition. The majority’s willfully blind characterization of the Board’s dithering definitions of this deportable offense does not match reality.

Nor does section 1227(a)(2)(E)(i)’s limited legislative history and purpose support the government’s position that a crime of child abuse, child neglect, or child abandonment should include convictions that do not result in injury to the child. *See Taylor*, 495 U.S. at 581 (finding it “helpful” to review legislative history when determining whether an agency construction is reasonable); *see Ibarra*, 736 F.3d at 912 n.12. As originally enacted in 1952, the INA did not treat child abuse as an independent ground for deportability. 17 This ground did not appear until 1996 when Congress enacted IIRIRA, to, among other things, provide immigration consequences for “child abuse” and “child sexual abuse.” 142 Cong. Rec. 10,067 (May 2, 1996) (statement of Sen. Dole). Speaking in favor of the Dole-Coverdell Amendment, which added the section at issue to the INA, Senator Dole remarked that “[i]t is long past time to stop the vicious acts of stalking, child abuse, and sexual abuse.” 142 Cong. Rec. S4613 (daily ed. May 2, 1996) (statement of Sen. Dole). The Board subsequently interpreted the statutory goal of the Dole-Coverdell Amendment as “sing[ing] out those who have been convicted of maltreating or preying upon children” and “facilitating the removal of child abusers in particular.” *Velazquez II*, 24 I. & N. Dec. at 509.

The broadened definition of “crime of child abuse, child neglect, and child abandonment” in *Soram* does not further the statutory purposes of § 1227(a)(2)(E)(i), evinced by this legislative history and the statutory goals announced in the bill. Convictions for criminally negligent acts that do not result in any injury to a child cannot categorically be said to “prey[] upon” or “maltreat[ ]” children. *Id.* Indeed, the expansive definition that the Board adopted in *Soram* encompasses conduct that is neither vicious nor predatory, including conduct driven by poverty, such as leaving a child at home alone while a parent leaves for a brief errand or unintentionally failing to secure a babysitter for a child while the parent is at work. *See Ibarra*, 736 F.3d at 905. The Board’s unreasonable sweep turns away from one of the fundamental tenets of our immigration law—“keeping families of United States citizens and immigrants united.” *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977). It should not be lost on us that, while we fault Martinez for endangering his son, we simultaneously condone the separation of a family, exiling a father of two children who has resided in the United States lawfully for more than twenty-five years. That Congress did not intend such a result is apparent from these facts.

2. The Board’s failure to follow legal precedent to derive the generic definition of a “crime of child abuse, child neglect, or child abandonment” resulted in a deeply flawed and arbitrary rule. The Board inexplicably and unreasonably looked to the civil child abuse statutes in thirty-eight states in force as of 2009, not the criminal laws in effect in 1996 when Congress enacted the statute. *Soram*, 25 I. & N. Dec. at 382 (citing a 2009 Department of Health and Human Services compendium of the civil laws of thirty-eight states). In *Velazquez II*, the Board made the same mistake, relying on federal civil statutes that were designed to protect child abuse victims and to encourage reporting of child abuse, and a 2004 edition of

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16. Although the definition in *Rodriguez* was dicta, it was accepted by the Second, Eighth, and Tenth Circuits as the operative agency definition.

17. Rather, such an offense may have been presumed a ground for deportation under the existing category of crimes involving moral turpitude. *See 142 Cong. Rec. 8706 (Apr. 24, 1996)* (statement of Sen. Coverdell).
Black’s Law Dictionary, which defined child abuse as the “[i]ntentional or neglectful physical or emotional harm inflicted on a child, including sexual molestation.” See Velazquez II, 24 I. & N. Dec. at 509–11 (reviewing contemporaneous federal civil statutes and the dictionary).

The majority fails to acknowledge the unorthodoxy of the Board’s reliance on civil law, yet cannot cite a single case approving of the use of civil law to provide the generic definition of a crime. While it may be true that “a phrase such as ‘child neglect’ surely can serve both civil and criminal purposes,” it is a non-sequitur to conclude that “[i]t is not unreasonable for the BIA to use civil definitions to inform its understanding of which convictions are crimes of child abuse, neglect, or abandonment.”

The majority asserts that civil child abuse laws are not meaningfully distinguishable from criminal child abuse laws, reasoning that, because state courts in Missouri, Nevada, Texas, and Tennessee have suggested that the termination of parental rights is the equivalent of the “civil death penalty,” the Board’s use of civil law in this context is “particularly apt.” But we have long recognized the difference between civil child custody proceedings and criminal prosecutions. See, e.g., Costanich v. Dep’t of Social & Health Servs., 627 F.3d 1101, 1115–16 (9th Cir. 2010) (“The special duties of prosecutors and the unique interests at stake in a criminal action do not parallel the duties and interests at stake in a civil child custody proceeding.”). And rightly so, given that the process of civil adjudication is forward looking and focused on the protection of the child, with the ultimate goal of family reunification, whereas the criminal codes are backward looking and driven by purposes of punishment, retribution, and deterrence. See Ibarra, 736 F.3d at 911 (“The purpose of civil definitions is to determine when social services may intervene. The purpose of criminal definitions is to determine when an abuser is criminally culpable.”).

It was unreasonable for the Board to craft what amounts to a civil definition for a crime. Looking to civil code sections to define the “crime of child abuse, child neglect, or child abandonment” unreasonably widens the net of people subject to removal proceedings. The civil codes encompass a broader array of conduct than their parallel criminal codes, which generally require a higher standard of culpability or a higher risk to the child. See id. at 911 n.9. In California, for example, an “endangered child” for purposes of child dependency proceedings includes a child who has “suffered” or is at “substantial risk” of suffering “serious physical harm or illness . . . as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . .” Cal. Welf. & Inst. Code § 300. In contrast, to incur criminal liability, the California penal codes require the parent or guardian to have a mens rea of criminal negligence. See Valdez, 27 Cal. 4th at 783–84 (explaining that “willfully” in California Penal Code 273a means criminal negligence).

The majority excuses the Board’s foray into civil law by concluding that the crimes of child abuse, neglect, and abandonment are “not common law crimes” but “twentieth-century crimes,” not defined in the Model Penal Code, where states have “developed different and varied terms” to describe criminal conduct. But, that still does not explain why the Board looked to civil law to define criminal conduct. The majority laments that there is a “lack of a common source” for the criminal terms for child abuse, child neglect, and child abandonment, but the majority unreasonably ignores federal and state criminal laws, which could have served as just such a source. Had the Board examined the state criminal child abuse statutes, it would have found that the majority of states require a mens rea greater than criminal negligence or a greater risk of injury to the child before criminalizing the conduct. See Ibarra, 736 F.3d at 910–11, 916 (collecting state criminal statutes and concluding that, in 1996, thirty-three states required a minimum mens rea of recklessness, knowledge, or intent for crimes not involving a resulting injury to the child, while eight states required a mens rea of criminal negligence for crimes not resulting in injury, two states required a mens rea of tort negligence for no-injury conduct, and one state imposed strict liability). Even the Second Circuit, which the majority joins, recognized as much, as it identified only nine states that define criminal child abuse as broadly as the Board. See Flores, 779 F.3d at 212.

The majority criticizes the Tenth Circuit for performing a multi-jurisdictional analysis in the first instance, but the majority disregards that this is the very same methodology that the Supreme Court used just last year to define “sexual abuse of a minor,” a phrase that appears in an adjacent INA code section. See Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571–72 (2017). While the Supreme Court acknowledged that “this sort of multi-jurisdictional analysis” is “not required,” it found it “useful insofar as it help[ed] shed light on the ‘common understanding and meaning’ of the federal provision being interpreted.” Id. at 1571 n.3. Like the Ibarra court, the Supreme Court prepared its own Appendix of state laws, id. at 1573, and found it persuasive that, in 1996, when Congress added the term “sexual abuse of a minor” to the INA, a “significant majority of jurisdictions” had set the age of consent at sixteen for statutory rape offenses. Id. at 1571. Indeed, far from being an outlier, the use of fifty-state surveys of contemporaneous state criminal laws, as in Esquivel-Quintana and Ibarra, is a methodological hallmark of the categorical approach, regularly employed to derive the generic definition of a federal crime. See, e.g., United States v. Garcia-Jiminez, 807 F.3d 1079, 1084 (9th Cir. 2015) (quoting United States v. Garcia-Santana, 774 F.3d 528, 534 (9th Cir. 2014)); see also Nijhawan v. Holder, 557 U.S. 29, 47 (2009) (“We examined state statutes . . . in effect in 1996, when Congress [enacted IIRIRA].”); Perrin v. United States, 444 U.S. 37, 42–45 (1979); United States v. Esparza-Herrera, 557 F.3d 1019, 1025 (9th Cir. 2009) (holding that thirty-three jurisdictions is a sufficient consensus to establish the federal generic definition of a crime); Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc) (“In the ab-
sence of specific congressional guidance as to the elements of a crime, courts have been left to determine the ‘generic sense in which the term is now used in the criminal codes of most States.’”), overruled on other grounds as recognized by United States v. Rivera-Constantino, 798 F.3d 900, 904 (9th Cir. 2015).

3.

This case perfectly illustrates why we should be skeptical of ceding broad powers of interpretation to agencies with the authority to impose a “civil death penalty.” “The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes.” Marmolejo-Campos v. Holder, 558 F.3d 903, 907 (9th Cir. 2009) (en banc) (clarifying the standard of review). We do not defer to agencies, including the Board, when they construe state criminal statutes. See id.; see also Uppal v. Holder, 605 F.3d 712, 714 (9th Cir. 2010). And, at least two prominent jurists have questioned the “reflexive deference” that appellate courts have given to the Board, see Pereira v. Sessions, No. 17-459, slip op. at 2 (U.S. June 21, 2018) (Kennedy, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1152, 1156 (10th Cir. 2016) (Gorsuch, J., concurring), particularly in the immigration context, where our modern administrative state enjoys the power “to penalize persons in ways that can destroy their livelihoods and intrude on their liberty even when exercising only purely civil powers.” see Gutierrez-Brizuela, 834 F.3d at 1156 (Gorsuch, J., concurring). And while we defer to the Board when it construes an ambiguous term in the INA, the act it is charged with administering, Marmolejo-Campos, 558 F.3d at 910–11, we must not cease to question why that is so and whether it is warranted, id. at 910; see also Pereira, slip op. at 2–3 (Kennedy, J., concurring) (calling for reconsideration of Chevron deference in immigration context).

And the Board utterly failed to perform a statutory interpretation analysis consistent with Supreme Court teachings. See Pereira, slip op. at 9 (majority opinion). When the Board here said that the “crime of child abuse” should be interpreted “broadly,” it was not deploying any insights that it might have obtained from adjudicating immigration cases. It was “parroting” what it had found in its own survey of federal and state civil statutes and a since-revised Black’s Law Dictionary. See Velazquez II, 24 L. & N. Dec. at 510; cf. Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004) (“Since the Board hasn’t done anything to particularize the meaning of ‘crime involving moral turpitude,’ giving Chevron deference to its determination of that meaning has no practical significance.”).

The goal of establishing a uniform framework for the determination of the “crime of child abuse, child neglect, or child abandonment” might have been one reason for deferring to the Board, but the ship has sailed on this justification. The circuit split described in the majority opinion means that people convicted of identical crimes in states in the Tenth Circuit will be permitted to remain in the United States, while those in states in the Second and Ninth Circuits will be removed. The majority acknowledges this result, and yet permits the Board to proceed without correcting course.

Courts have a role in correcting arbitrary and capricious agency action, particularly where the agency has not used its expertise to develop its current approach. The majority follows the “troubling” path of the six circuit courts of appeals that were reversed in Pereira v. Sessions, in “an abdication of the Judiciary’s proper role in interpreting federal statutes.” Pereira, slip op. at 2 (Kennedy, J., concurring). An Article III court may not be equipped to define, in the first instance, what the “crime of child abuse, child neglect, and child abandonment” should mean for the fifty states, but it is well within our authority to require the Board to do it properly. Here, where the Board strayed far from congressional intent, adopted a definition that misrelied on non-contemporary civil code sections, failed to follow Supreme Court authority instructing courts how to define generic criminal offenses, changed its position without adequate explanation, and ignored the context, language, and purpose of the statute, deference is not appropriate. The BIA’s generic definition of the crime of child abuse, neglect, and abandonment in Soram is unreasonable and an impermissible interpretation of the statute.

IV.

Even if Soram were due the deference the majority concedes, the new definition should not apply retroactively to Martinez, who pleaded guilty to violating California Penal Code section 273a(a) in 2008, when Velazquez II was the Board’s interpretation. Although, in general, “retroactive application is the presumptive norm,” Garfias-Rodriguez v. Holder, 702 F.3d 504, 517 (9th Cir. 2012) (en banc), retroactivity must be “balanc[ed] [against] a regulated party’s interest in being able to rely on the terms of a rule as it is written,” Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1333 (9th Cir. 1982).

In the immigration context, we have determined that it is “contrary to ‘familiar considerations of fair notice, reasonable reliance, and settled expectations’” to allow a newly enacted law to deprive non-citizens who have already pleaded guilty to certain crimes of the possibilities available to them at the time of their plea. See St. Cyr, 533 U.S. at 323–33; see also Judulang v. Holder, 565 U.S. 42, 63 n.12 (suggesting that anti-retroactivity principles could apply equally to BIA decisions); Landgraf, 511 U.S. at 270 (stating that retroactivity analysis focuses on “considerations of fair notice, reasonable reliance, and settled expectations”). And many states, including California, the State in which Martinez pleaded guilty, require that trial judges advise defendants that immigration consequences may result from accepting a plea agreement. See, e.g., Cal. Penal Code § 1016.5. Here, the Board’s definition is particularly undeserving of retroactive application, given the Board’s refusal to clarify its
definition despite knowing it was confusing at the time it was made, and its changed position since. And, because our law requires us to assume that immigrant defendants will be “acutely aware of the immigration consequences of their convictions” when they enter plea agreements, see St. Cyr, 533 U.S. at 322, and because deportation is “‘a particularly severe penalty,’ which may be of greater concern to a convicted sentence than ‘any potential jail sentence,’” Dimaya, 138 S. Ct. at 1213, the majority of the Montgomery Ward retroactivity factors weigh against retroactive application in this instance. 18

Because the Board abused its discretion in applying Somar retroactively to Martinez’s 2008 conviction, Velazquez II should have been the basis for a categorical analysis to determine whether Martinez’s conviction under California Penal Code section 273a(a) is a categorical match for the generic definition of a crime of child abuse. California Penal Code section 273a(a) criminalizes conduct that does not result in injury to a child. Under Velazquez II, the federal generic definition of a “crime of child abuse” criminalizes conduct that results in injury to a child. 24 I. & N. Dec. at 512; see also Fregozo, 576 F.3d at 1037. 19 Because section 273a(a) criminalizes more conduct than Velazquez II’s federal generic definition of the crime, the California statute is not a categorical match to the federal generic definition. And because we previously concluded that section 273a(a) is not divisible, see Ramirez v. Lynch, 810 F.3d 1127, 1138 (9th Cir. 2016), the analysis should have stopped there, see Sandoval v. Yates, 847 F.3d 697, 704 (9th Cir. 2017) (“Only divisible statutes are subject to the modified categorical approach.”).

Under the categorical approach, California Penal Code section 273a(a) is broader than Velazquez II’s definition of “crime of child abuse,” so Martinez’s conviction under California Penal Code section 273a(a) was not a crime of child abuse. Martinez is not removable under Velazquez II based on his 2008 conviction, and we should have vacated his removal order.

V.

The majority ignores controlling precedent to legitimize the Board’s novel, and impermissible, approach to determining the generic definition of crimes listed in the INA. The Board’s reliance on civil codes and Black’s Law Dictionary leads it to an overbroad definition of the crime of child abuse, neglect, and abandonment that does not reflect state criminal laws and is contrary to what Congress meant by the use of the phrase “crimes of.” We should grant Martinez’s petition, and hold that the generic definition of “crime of child abuse, child neglect, or child abandonment” in Somar is an unreasonable interpretation of the INA, or, at the very least, that it should not apply retroactively to Martinez.

18. Factor one is neutral; factors two, three, and four favor Martinez; and factor five favors the government.
19. The majority relies on dicta from Fregozo to support its argument that section 273a(a) is a categorical match for the federal generic offense of a crime of child abuse as defined in Velazquez II. But, as the majority concedes, to perfect its argument, it must ignore the dicta’s “tension” with Fregozo’s central holding, which was that the federal generic definition of the crime of child abuse requires actual injury to the child. We should follow Fregozo’s holding—not its dicta.
Cite as 18 C.D.O.S. 7262

UNITED STATES OF AMERICA, Plaintiff-Appellee,
SHAWNDALE BOYD, Intervenor,
v.
DAMION SLEUGH, Defendant-Appellant.

No. 17-10424
United States Court of Appeals for the Ninth Circuit
D.C. No. 4:14-cr-00168-YGR-2
Appeal from the United States District Court for the Northern
District of California Yvonne Gonzalez Rogers, District
Judge, Presiding
Argued and Submitted March 15, 2018
San Francisco, California
Filed July 23, 2018
Before: J. Clifford Wallace and Marsha S. Berzon, Circuit
Judges, and Terrence Berg,*District Judge.
Opinion by Judge Berg

*The Honorable Terrence Berg, United States District
Judge for the Eastern District of Michigan, sitting by
designation.

COUNSEL

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Plaintiff-Appellee.

OPINION

BERG, District Judge:

Criminal defendants sometimes seek to obtain evidence
by filing applications asking the court to issue subpoenas for
the production of documents or witnesses pursuant to Federal
Rule of Criminal Procedure 17(c). These applications, sup-
ported by an attorney’s affidavit explaining the reasons the
evidence is necessary, are often filed ex parte and under seal.
The issue on appeal in this case—a question of first impres-
sion for this Circuit—is whether one defendant in a criminal
case can get access to the Rule 17(c) subpoena applications
and supporting documents that were filed under seal by an-
other defendant’s attorney in the same criminal case, either
because of the presumptive right of public access to court
records or upon a showing of special need. In view of the cir-
cumstances presented here, the district court properly denied
the request for disclosure, and we affirm.

I. THE PARTIES, TRIAL, AND
SLEUGH’S APPEAL

In March 2014, Damion Sleugh and Shawndale Boyd
were indicted together on charges of (1) conspiring to dis-
tribute or to possess with intent to distribute marijuana, and
(2) attempted possession with intent to distribute marijuana,
each in violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)
(D); (3) robbery affecting interstate commerce, in violation
of 18 U.S.C. § 1951(a); (4) using or carrying a firearm dur-
ing or in furtherance of a drug trafficking crime, in violation
of 18 U.S.C. § 924(c); and (5) using a firearm during a drug
trafficking crime and causing a murder, in violation of 18
U.S.C. § 924(j). Sleugh was also charged as being a felon in
possession of a firearm, in violation of 18 U.S.C. § 922(g)
(1). The charges arose from a five-pound marijuana drug deal
that Sleugh and Boyd arranged, which ended in the death of
the man who was delivering the marijuana, Vincent Muzac.

While awaiting trial, Boyd filed ex parte applications
with the court seeking several Rule 17(c) subpoenas. Boyd
requested that these applications be filed under seal. The
subpoenas sought records relating to multiple cell phone
numbers from various service providers for the time period
surrounding the date of the alleged crimes, along with some
surveillance video from other sources. To support the Rule
17(c) subpoena applications, and as required by local rule,
Boyd’s defense attorney submitted affidavits describing the
need for the records. Those affidavits were also filed ex parte
and under seal.

On May 5, 2015, Boyd pleaded guilty to all counts except
the murder charge. He agreed to cooperate with the govern-
ment, and he testified against Sleugh at trial. Sleugh also
testified.

Evidence was presented at trial that Sleugh and Boyd ar-
anged to purchase five pounds of marijuana from Vincent
Muzac—Boyd’s friend and co-worker—for $11,000. On the
day of the deal, Boyd and Sleugh met at Sleugh’s house. They
decided to drive separately, Boyd getting a ride from a neigh-
boredhood acquaintance known by the nick-name “Q,” and
Sleugh, carrying the purchase money, driving a white Ford
Escape that had been rented by Boyd’s mother. They met at a
Walmart parking lot, where there was also a Starbucks. Boyd

1. Sleugh has moved to include the Rule 17(c) subpoenas them-

selves, describing the kinds of records sought, as part of the public
record of this appeal. Boyd and the Government did not object to this
unsealing request. (Sleugh did not seek to disclose the applications
and supporting affidavits setting out the reasons why these cell phone
records were being sought by Boyd’s attorney.) We granted Sleugh’s
motion and refer to the contents of the Rule 17(c) subpoenas herein.
However, the applications for the subpoenas, including Boyd’s coun-
sel’s affidavits, remain under seal and, thus, at the center of the instant
dispute.
met Muzac at the Starbucks. Video evidence showed Boyd and Muzac leaving the Starbucks together. Once in the parking lot, Boyd walked by himself up to the white Ford Escape where Sleugh was waiting. Boyd spoke to Sleugh for a few seconds. Boyd then walked away and entered “Q’s” vehicle. Boyd and Q drove off, leaving the area. Muzac then walked to the Ford Escape where Sleugh was waiting and got inside. Four minutes later, the Ford Escape drove off without Muzac. Muzac’s body was later found lying in the parking lot next to only one pound of marijuana, and without the $11,000. Boyd testified that, after he and Q left the Starbucks parking lot, he tried repeatedly to contact Muzac on his cell phone, with no success. Later that day, Boyd met Sleugh at Sleugh’s apartment, and asked Sleugh if everything was okay. Sleugh told Boyd that he and Muzac argued about the quality of the marijuana, that Muzac punched Sleugh in the mouth, and that Sleugh then shot Muzac in the arm. Boyd testified that Sleugh told him that after he shot Muzac, he pushed him out of the car and left.

Muzac ultimately died from his wounds. Boyd testified that he did not become aware that Muzac had died until he and Sleugh were arrested on February 22, 2014 and charged in California state court with Muzac’s murder. Sleugh testified to a different version of events. He claimed that Q — the man who drove off with Boyd in another vehicle — shot Muzac.

On July 17, 2015, the jury convicted Sleugh of all charges. Sleugh was sentenced on November 4, 2015 to life in prison. Boyd received a three-year prison sentence. Sleugh appealed his conviction. See United States v. Damion Sleugh, No. 15-10547 (9th Cir.). At Sleugh’s request, we stayed the briefing schedule of Sleugh’s direct appeal while he sought permission from the district court to unseal Boyd’s Rule 17(c) subpoena applications.

Sleugh argued to the district court that he needed access to Boyd’s Rule 17(c) subpoena applications for his appeal because of the “possibility” that Boyd testified inconsistently with Boyd’s counsel’s assertions in those applications. Sleugh did not specify any particular portion of Boyd’s testimony as problematic, and did not articulate how he thought counsel’s assertions in support of obtaining the cell phone and other records were likely to contain any inconsistent or otherwise impeaching statements. Sleugh reasoned that Boyd’s shift from defending the case to pleading guilty and testifying for the Government suggested that Boyd either misrepresented facts in the Rule 17(c) subpoena applications, or lied during his testimony. Put differently, Sleugh asserts that Boyd’s testimony on behalf of the Government must have been inconsistent with any defense theory Boyd used to support the Rule 17(c) subpoena applications. Standing on that assumption, Sleugh concluded that he could have used the statements of Boyd’s counsel in the Rule 17(c) subpoena applications to cross-examine Boyd at trial. Sleugh also contended that he had a right to access the Rule 17(c) subpoena applications as judicial records. The magistrate judge who originally granted Boyd’s Rule 17(c) subpoena applications denied Sleugh’s motion to unseal them. The district court affirmed.

When Sleugh appealed the district court’s decision denying disclosure, Boyd intervened, arguing that his Rule 17(c) subpoena applications should remain under seal. Sleugh’s direct appeal of his conviction remains stayed, pending the instant appeal.

II. STANDARD OF REVIEW

A district court’s denial of a motion to unseal is reviewed for abuse of discretion. Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096 (9th Cir. 2016). As part of that review, this court must first determine under de novo review whether the district court applied the correct legal rule. United States v. Hinkson, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). If the district court applied the wrong rule, the district court abused its discretion. Id. The application of the correct legal standard may nonetheless constitute an abuse of discretion if the application “was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” Id. at 1262 (quotations, citation, and footnote omitted).

III. ANALYSIS

a. No Presumptive Right of Public Access

Attaches to Rule 17(c) Subpoena Applications

A criminal defendant has a constitutional right to compulsory process in building a defense. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (holding that “criminal defendants have the right to the government’s assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt”).

While Rule 16 of the Federal Rules of Criminal Procedure generally governs discovery procedures in criminal cases, Rule 17(c) allows parties to a criminal trial to use the district court’s subpoena power to request materials or testimony from witnesses. Fed. R. Crim. P. 17(c)(1). The Supreme Court has made it clear that a party seeking production of materials under a Rule 17(c) subpoena must demonstrate to the court “(1) relevancy; (2) admissibility; [and] (3) specificity.” United States v. Nixon, 418 U.S. 683, 700 (1974). If the grounds articulated in support of the subpoena request were made part of the public record, such a showing could reveal counsel’s trial strategies or defense theories to the opposing party, here, the government. This concern about revealing defense strategies to the government could also apply to revelations of such confidential theories to co-defendants, who may have adverse interests—the issue implicated in this appeal. Recognizing this potential conundrum, some courts, like the district court here, have local rules that permit defendants to

2. When the instant federal charges were brought against Sleugh and Boyd, the state prosecutor dismissed the murder charges.
file their Rule 17(c) applications under seal for “good cause.”

At the same time, filings under seal can interfere with open, public access to judicial records and documents. See Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” (footnotes omitted)). Shrouding the mechanics of a criminal case in secrecy places the public’s interest in a transparent judicial system at risk. See Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984) (“Press-Enterprise I”) (observing that open criminal proceedings “enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system”); see also Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 946 (9th Cir. 1998) (observing that “[o]ne of the most enduring and exceptional aspects of Anglo-American justice is an open public trial”).

Sleugh argues that the district court should have granted him access to Boyd’s sealed Rule 17(c) subpoena requests because he has a presumptive right to access them under either the First Amendment or common law. However, “there is no right of access which attaches to all judicial proceedings, even all criminal proceedings.” Phoenix Newspapers, Inc., 156 F.3d at 946.

As to the First Amendment, the test to determine “whether a right of access attaches to a particular kind of hearing” is a two-part test “known as the ‘experience and logic’ test.” Phoenix Newspapers, Inc., 156 F.3d at 946. The test also applies to documents generated as part of a judicial proceeding, such as those here. Times Mirror Co. v. United States, 873 F.2d 1210, 1213 n.4 (9th Cir. 1989). “The ‘experience’ prong of the test questions ‘whether the place and process have historically been open to the press and general public[.]’” Phoenix Newspapers, Inc., 156 F.3d at 946. (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986) (“Press Enterprise II’)). The “logic” element “inquires ‘whether public access plays a significant positive role in the functioning of the particular process in question.’” Id. “If a proceeding fulfills both parts of the test, a qualified First Amendment right of access arises, to be overcome ‘only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” Id.

As to the common law, there is “a strong presumption in favor of access to court records.” Ctr. for Auto Safety, 809 F.3d at 1096. A party seeking to seal a judicial record can overcome this presumption only by showing a “compelling reason.” Id.

The issue here, then, is whether there is a presumptive right of public access to Rule 17(c) subpoena requests under either the First Amendment or common law. We have not addressed this issue before. The district court and the magistrate judge found guidance in the First Circuit’s decision, United States v. Kravetz, 706 F.3d 47 (1st Cir. 2013), the only circuit court opinion squarely addressing this issue. Applying the reasoning of Kravetz, they held that Sleugh has no presumptive right to access Boyd’s sealed Rule 17(c) subpoena requests.

In Kravetz, a journalist appealed from an order denying his request to unseal documents in a criminal case. 706 F.3d at 50. The documents included a sentencing memorandum as well as Rule 17(c) subpoena materials. Id. at 51, 53. The journalist argued that “the sealed documents were ‘judicial documents’ to which he had a right of access under the First Amendment and common law.” Id. at 52.

Applying the “experience and logic” test, the First Circuit rejected the journalist’s First Amendment argument. Id. at 53. Under the “experience” prong, the court noted, “there is no tradition of access to criminal discovery.” Id. at 54. “To the contrary, ‘[d]iscovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.’” Id. (quoting United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986)) (other citation omitted).

Applying the logic prong did not support a presumptive right of access either. The court reasoned that recognizing such a right would dangerously require criminal defense counsel “to prematurely expose trial strategy to public scrutiny.” Kravetz, 706 F.3d at 54. More broadly, public access would have a “deleterious effect . . . on the parties’ search for and exchange of information in the discovery process.” Id. (citation omitted). Accordingly, the court found “no First Amendment right of public access to the subpoenas or related materials.” Id. at 54.

Nor did the common law right of access apply. Id. at 54. The court reasoned that the common law right of access ordinarily attaches to “judicial records,” which “are those ‘materials on which a court relies in determining the litigants’ substantive rights.’” Id. (quoting Providence Journal Co., Inc., 293 F.3d 1, 9–10 (1st Cir. 2002)). Rule 17(c) materials, in contrast, “relate merely to the judge’s trial management role,” not the adjudication process. Id. at 54–55 (citations omitted).

The Kravetz court held, then, that “no presumptive right of public access, based either in the common law or the First Amendment, attaches to the Rule 17(c) subpoenas or the related documents filed in connection with the underlying criminal prosecution.” Id. at 56. Instead, access is permitted “only upon a showing of special need.” Id.

We agree with Kravetz’s application of the First Amendment test. We also agree with Kravetz’s application of the common law test, which is consistent with our position on the somewhat related question of what showing must be made to seal discovery documents filed to support motions in civil cases. For example, in Center for Auto Safety, the district court sealed documents attached to the plaintiffs’ motion for preliminary injunction and to the defendant’s opposition brief. 809 F.3d at 1095. A third party intervened, seeking to unseal the documents. Id. The district court held that the motion for preliminary injunction was a non-dispositive motion,
and, therefore, the documents could be sealed merely upon a showing of “good cause.” Id. at 1095–96.

Observing that “a motion for preliminary injunction frequently requires the court to address the merits of a case” and “often includes the presentation of substantial evidence,” Id. at 1099 (citing Stormans v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)), we reversed and held that such documents should only be sealed for “compelling reasons,” Id. We observed how “[t]he focus in all of our cases is on whether the motion at issue is more than tangentially related to the underlying cause of action.” Id. at 1099. We explained that while motions for preliminary injunctions frequently are “more than tangentially related to the merits of a case,” so that documents supporting such motions should not be sealed except upon a showing of compelling reasons, “materials attached to a discovery motion unrelated to the merits of a case” need satisfy only the less exacting “good cause” standard.” Id. at 1097–99. In adopting the “more than tangentially related to the merits” approach, we cited favorably Kravetz’s test for determining if materials affect substantive rights, thereby triggering the common law right of access. Id. at 1100.

We agree with Kravetz that Rule 17(c) subpoenas, subpoena applications, and supporting affidavits, like civil discovery motions and supporting materials, are ordinarily only “tangentially related to the underlying cause of action.” Ctr. for Auto Safety, 809 F.3d at 1099. To be sure, the actual evidence gathered from the issuance of Rule 17(c) subpoenas could go to the merits of a case. The materials or witnesses sought could impact the verdict at trial, the ultimate issue in any criminal case. Also, to make an assessment of the relevance of the subpoenaed materials, the court will need to take into account the merits of any potential defense theories articulated in Rule 17(c) subpoena applications. See Nixon, 418 U.S. at 700.

But the applications and supporting affidavits for Rule 17(c) subpoenas merely invoke the district court’s authority to compel the production of evidence. They are not evidence themselves. Such affidavits might sketch out possible defense theories that may or may not find support in actual evidence. As Kravetz observed, “‘[m]aterials submitted to a court for its consideration of a discovery motion are actually one step further removed in public concern from the trial process than the discovery materials themselves.’” Kravetz, 706 F.3d at 54 (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)).

Because our law does not dictate when a party may unseal the applications and affidavits filed in support of Rule 17(c) subpoena requests, and Kravetz sets forth a reasonable approach that is consistent with our precedent, we adopt that approach here. See Padilla-Ramirez v. Bible, 882 F.3d 826, 836 (9th Cir. 2017) (“As a general rule, we decline to create a circuit split unless there is a compelling reason to do so.”). As such, we hold that there is no presumption of public access under the First Amendment or common law that attaches to Rule 17(c) subpoena applications and their supporting materials. Accordingly, parties can only justify accessing sealed or in camera Rule 17(c) subpoenas, subpoena applications, and supporting documents by demonstrating a “special need.” Kravetz, 706 F.3d at 56.

The next issue, then, is whether Sleugh showed a “special need” for Boyd’s Rule 17(c) subpoena materials. We hold that he did not.

### b. Sleugh failed to demonstrate a “special need” for Boyd’s Rule 17(c) subpoena materials.

Sleugh contends that his appellate counsel requires access to Boyd’s Rule 17(c) subpoena materials to explore possible issues for his direct appeal. While appellate counsel certainly has an obligation to scour the record for appealable issues, see Jones v. Barnes, 463 U.S. 745, 753 (1983), this duty does not automatically create a right of access to sealed materials containing a co-defendant’s defense theories.3

Sleugh argues that he needs Boyd’s Rule 17(c) applications because they could prove that Boyd lied during trial. Again, Sleugh does not identify any portion of Boyd’s testimony which he believes is false (other than his statements regarding the government’s promises, discussed below), and Sleugh does not explain how the attorney’s affidavit detailing the relevance of the cell phone and other records sought in Boyd’s Rule 17(c) subpoenas could be used to show that Boyd’s trial testimony was false. Sleugh simply speculates that the assertions of counsel in Boyd’s Rule 17(c) subpoena applications must be different from Boyd’s trial testimony.

Underlying Sleugh’s conclusion is, again, the assumption that Boyd’s testimony during trial was inconsistent with any defense theory that Boyd’s counsel proffered in the pre-trial Rule 17(c) subpoena applications.

Sleugh assumes too much. Boyd’s testimony against Sleugh—that Sleugh admitted to shooting Muzac and that Boyd was not present at the time of the shooting—were compelling defense theories for Boyd. Sleugh offers no reason for believing that Boyd’s counsel would have advanced a theory inconsistent with Boyd’s trial testimony in the Rule 17(c) subpoena applications. Nothing about the face of Boyd’s Rule 17(c) subpoena applications suggests that the affidavits

3. As the magistrate judge here noted, the only case law Sleugh relies on does not support Sleugh’s argument. In Ellis v. United States, 356 U.S. 674 (1958), the Court addressed only when leave to appeal may be denied to indigent defendants. The Court held that if defense counsel for an indigent defendant “is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account.” Id. at 675. Then, “[i]f the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel’s evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.” Id. Thus, Ellis simply reminds us of the noncontroversial expectation that counsel diligently and conscientiously investigate grounds for appeal. Nothing in Ellis requires the production of a co-defendant’s trial strategies or defense theories. Similarly, Hardy v. United States, 375 U.S. 277, 282 (1964), only held that appellate counsel for indigent defendants are entitled to a free copy of the entire trial transcript. This entitlement does not include a co-defendant’s sealed filings.
in support of those applications would be likely to undercut Boyd’s testimony.

Sleugh also argues that Boyd “lied” when he testified on redirect that the government made no promises to him in connection with his cooperation. Sleugh’s contention takes Boyd’s testimony out of its surrounding context. During cross-examination, Sleugh’s trial counsel asked Boyd if the government “promised [Boyd] that they would bring a motion for a downward departure . . . if the government feels that you have provided substantial assistance to the government through your cooperation.” Boyd answered that such a motion was “only a possibility. It’s not guaranteed. It’s subject to the government’s discretion” and that the judge is “the only person that will be sentencing me on this case.” Therefore, when Boyd later testified on redirect that the government did not promise him anything, Boyd clearly was referencing the fact that any government “promises” were not guaranteed.

Regardless, Sleugh does not explain how any potentially inconsistent testimony by Boyd creates a “special need” for Boyd’s Rule 17(c) subpoena applications. Even assuming the applications contain “impeachment material,” as Sleugh alleges, they cannot affect this appeal because they were never in front of the jury, and we do not engage in de novo fact-finding on appeal. Nor could Sleugh use the statements to bring a sufficiency of the evidence challenge to his conviction, because for such a challenge, “we [only] look at the evidence actually presented at trial.” United States v. Sayakhom, 186 F.3d 928, 942 n.7 (9th Cir. 1999).

Further, the Rule 17(c) subpoena applications pre-dated the plea agreement and Boyd’s cooperation, and the subpoenas themselves mainly sought cell phone records and some surveillance video. Even if Boyd were caught in a lie about whether his plea agreement involved certain promises by the government, such a misstatement would not necessarily create an entitlement for Sleugh to examine the sealed affidavits proffered by Boyd’s attorney to support the Rule 17(c) subpoenas for records.

We hold that Sleugh failed to present a “special need” to access Boyd’s sealed Rule 17(c) subpoena applications.

c. There is a continued need to seal Boyd’s Rule 17(c) subpoena materials.

Alternatively, Sleugh argues that there is no reason to continue sealing Boyd’s Rule 17(c) subpoena materials. He reasons that Boyd pleaded guilty, testified, and was sentenced and released. Therefore, according to Sleugh, revealing the Rule 17(c) subpoena applications poses no risk to Boyd.

Sleugh has a point, to an extent. There is some support for the position that these subpoena applications should not be sealed forever. Regarding transcripts of sealed trial proceedings, we require that such transcripts “must be released when the danger of prejudice has passed.” Phoenix Newspapers, Inc., 156 F.3d at 948 (internal quotation marks omitted). If there is no longer any need to seal the Rule 17(c) subpoena materials at issue here, then perhaps they should be unsealed.

There are two problems with applying this rule here, though. First, unlike the trial transcripts at issue in Phoenix Newspapers, which we held were entitled to a presumption of public access under the First Amendment “experience and logic” test, Rule 17(c) subpoena applications do not have a history of being available to the public; such applications do not constitute evidence, and they do not determine the merits of a criminal case. Accordingly, it makes sense that it is harder to unseal Rule 17(c) subpoena applications than trial transcripts.

Second, in this case there is a continuing need to seal these Rule 17(c) subpoena applications. Boyd’s plea deal and sentence resolved only his federal charges, but Boyd was initially charged with murder in California state court. That charge was dismissed, but the state is not precluded from refiling that charge against Boyd. See Berardi v. Superior Court, 160 Cal. App. 4th 210, 218 (2008) (observing that Cal. Penal Code § 1387 “generally provides a ‘two dismissal’ rule” precluding prosecutors from refiling certain charges only after the same charges have been dismissed twice already “according to the provisions of that statute”). Because there is no statute of limitations for murder in California, the specter of that charge continues to loom over Boyd. See Cal. Penal Code § 799(a). Also, there is a possibility that the federal government could pursue the murder charge against Boyd should he breach his plea agreement.

Unsealing Boyd’s Rule 17(c) subpoena applications could reveal Boyd’s defense theories to the state and federal governments for any future trial. The prospect of undermining the confidentiality of Boyd’s defense strategies justified sealing these materials in the first place, which Sleugh does not contest. It is no different now.

4. In response to Sleugh’s counsel’s request at oral argument, we reviewed in camera the sealed affidavits that Boyd’s counsel submitted in support of the Rule 17(c) subpoena applications. Sleugh’s position, that they contain factual assertions contradicting Boyd’s trial testimony, is without merit. In situations where a reasonable and plausible basis is articulated suggesting that factual assertions attributable to a witness in a Rule 17(c) application contradict witness’s in-court testimony, a district court could also conduct such an in camera review to protect the integrity of the process.

5. Because we hold that Sleugh has failed to demonstrate a “special need” for Boyd’s Rule 17(c) subpoena application materials, we need not address whether Boyd’s counsel waived any attorney-work product protection to those materials by filing them with the court under seal, or whether attorneys’ representations as to defense theories in affidavits supporting subpoena applications could be attributable to the client for impeachment or other purposes.

6. We grant Boyd’s request for judicial notice of his state court charges. Fed. R. Evid. 201(d); Rosales-Martinez v. Palmer, 753 F.3d 890, 894 (9th Cir. 2014) (“It is well established that we may take judicial notice of judicial proceedings in other courts.”).

7. This is not to say that all Rule 17(c) subpoena applications may or should remain under seal forever. There may be instances when there is no longer any need to protect a defendant’s theories of defense (e.g., upon the defendant’s death, or when the statute of limitations has run on all charges). Boyd’s situation is unique because, as long as
IV. CONCLUSION

For these reasons, we AFFIRM the district court’s affirmance of the magistrate judge’s order denying Sleugh’s motion to unseal Boyd’s Rule 17(c) subpoena applications.

he lives, he will always face the risk of another state murder charge. Accordingly, we need not resolve whether all Rule 17(c) subpoena applications should remain under seal in perpetuity.
Segalman could get an appointment to replace the seatbelt, he fell out of his wheelchair and broke his shin in two places, resulting in a four-day hospital stay. On another occasion, Southwest returned the wheelchair to Segalman with a broken armrest. On a third occasion, Southwest returned the wheelchair with damage to the joystick that rendered the wheelchair inoperable.

In July 2011, Segalman brought this action against Southwest and ten unidentified Southwest employees for damages and injunctive relief. He alleged negligence under California state law and a violation of the ACAA, which prohibits air carriers from “discriminat[ing] against an otherwise qualified individual” on the ground that the individual “has a physical or mental impairment that substantially limits one or more major life activities.” 49 U.S.C. § 41705(a). Segalman subsequently amended his complaint twice, withdrawing his ACAA claim and adding claims alleging California statutory violations. The district court dismissed Segalman’s Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), and we affirmed in part and reversed in part. Segalman v. Southwest Airlines Co., 603 F. App’x 595, 597 (9th Cir. 2015).

On remand, Segalman amended his complaint a third time, reinstating his initial ACAA claim and realleging California statutory violations and negligence. Southwest moved to dismiss Segalman’s Third Amended Complaint except as to his negligence claim, and the district court granted the motion. With respect to the ACAA claim, the district court concluded that no implied private cause of action existed, and that even if it did, Segalman failed to allege that he exhausted his administrative remedies. In December 2016, pursuant to the parties’ stipulation, the district court dismissed Segalman’s remaining negligence claim with prejudice. The district court subsequently entered final judgment, and Segalman timely appealed the dismissal of his ACAA claim.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court’s dismissal under Rule 12(b)(6), Flores v. County of Los Angeles, 758 F.3d 1154, 1158 (9th Cir. 2014), including the question whether a statute provides an implied private cause of action, Northstar Fin. Advisors, Inc. v. Schwab Invs., 615 F.3d 1106, 1115 (9th Cir. 2010).

III.

Applying Alexander v. Sandoval, 532 U.S. 275 (2001), we hold that the ACAA does not create an implied private cause of action. First, for context, we briefly review the shift in the Supreme Court’s case law addressing implied cause of action claims, and the corresponding change in our sister circuits’ decisions applying that case law to the ACAA. Second, we join the Second, Fifth, Tenth, and Eleventh Circuits in concluding that, in light of the ACAA’s statutory structure, Congress did not intend to create a private cause of action under the ACAA. Because we are not at liberty to recognize a private cause of action in the absence of such intent, we affirm the district court’s dismissal of Segalman’s ACAA claim.

A.

As the Supreme Court’s approach to claims alleging an implied cause of action shifted in recent decades, so too did the decisions of our sister circuits addressing claims of ACAA violations. When Congress enacted the ACAA in 1986, the prevailing framework for evaluating whether a statute implied a private cause of action was the four-factor test set out in Cort v. Ash, 422 U.S. 66 (1975). Under that framework, courts considered the following questions:

1. [I]s the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff?

2. [I]s there any indication of legislative intent, explicit or implicit, either to create … a [private] remedy or to deny one?

3. [I]s it consistent with the underlying purposes of the legislative scheme to imply … a [private] remedy for the plaintiff?

4. [I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations and internal quotation marks omitted). Within five years of the ACAA’s enactment, the Fifth and Eighth Circuits held that, under Cort, the ACAA creates an implied private cause of action. See Shinault v. American Airlines, Inc., 936 F.2d 796, 800 (5th Cir. 1991), overruled by Stokes v. Southwest Airlines, 887 F.3d 199, 205 (5th Cir. 1991).


3. “Courts have used the terms ‘private right of action’ and ‘private cause of action’ interchangeably.” Wisniewski v. Rodale, Inc., 510 F.3d 294, 296 n.3 (3d Cir. 2007) (citing cases). Throughout this opinion, we use “cause of action” except when quoting a case that uses “right of action.”
Thus, in the wake of Sandoval, we evaluate whether an implied private cause of action exists under a statute by using ordinary tools of statutory interpretation, and we are not “constrained by the Cort framework.” Logan v. U.S. Bank Nat’l Ass’n, 722 F.3d 1163, 1171 (9th Cir. 2013); see also, e.g., In re Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1233 (9th Cir. 2008) (“Because the text and the structure of the Sarbanes-Oxley Act do not demonstrate an intent to create a private right of action under section 304, we need not delve into the first (federal right in plaintiff’s favor), third (general statutory purpose), and fourth (nature of the action) Cort factors.”). Under this approach, “[w]e begin our search for congressional intent with the language and structure of the statute, and then look to legislative history only if the language is unclear, or if there is a clearly expressed contrary intention in the legislative history that may overcome the strong presumption that the statutory language represents congressional intent.” Logan, 722 F.3d at 1171 (citations omitted). Most relevant here, with respect to statutory structure, “[w]e … look to see whether Congress designated a method of enforcement other than through private lawsuits, because ‘[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.’” Northstar Fin. Advisors, 615 F.3d at 1115 (third alteration in original) (quoting Sandoval, 532 U.S. at 290); see also, e.g., UFCW Local 1500 Pension Fund v. Mayer, No. 17-15435, — F.3d —, 2018 WL 3384950, at *4–5 (9th Cir. July 12, 2018) (holding that section 47(b) of the Investment Company Act of 1940 does not create an implied private cause of action).5

After Sandoval, four of our sister circuits concluded that the ACAA does not create an implied private cause of action. The Second, Fifth, Tenth, and Eleventh Circuits reasoned that Congress’s express provision of specific administrative and judicial methods of enforcing the ACAA indicates that Congress did not also intend to create a private cause of action. See Stokes v. Southwest Airlines, 887 F.3d 199, 202–03 (5th Cir. 2018); Lopez v. Jet Blue Airways, 662 F.3d 593, 597 (2d Cir. 2011); Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1270 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1354 (11th Cir. 2002). In addition, those courts viewed the pre-Sandoval Fifth and Eighth circuit cases as re-

4. Relying on Tallarico and Shinault, we recognized an implied private cause of action under the ACAA in an unpublished decision. See Adutori v. Sky Harbor Int’l Airport, 103 F.3d 137 (Table), 1996 WL 673805, at *3 (9th Cir. Nov. 20, 1996). We also addressed the merits of a claim brought under the ACAA, without squarely addressing the implied cause of action issue, in Newman v. American Airlines, Inc., 176 F.3d 1128, 1132 (9th Cir. 1999).

5. We reject Segalman’s arguments that Sandoval’s holding (1) is limited to disparate-impact claims and (2) has been eroded by Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015). First, we have repeatedly applied Sandoval outside the disparate-impact context. See, e.g., UFCW, 2018 WL 3384950, at *3–5 (applying Sandoval to the Investment Company Act); Logan, 722 F.3d at 1169 (applying Sandoval to the Protecting Tenants at Foreclosure Act). Second, Inclusive Communities Project did not address implied causes of action, let alone alter the Sandoval framework in favor of a test focused on general statutory purpose, as Segalman contends. Instead, the Court held that disparate impact claims are cognizable under the Fair Housing Act, Inclusive Cmtys., 135 S. Ct. at 2525, which contains an express private cause of action, see 42 U.S.C. § 3613. The Supreme Court recently reaffirmed the general applicability of the Sandoval framework in Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–56 (2017).
lying too heavily on the non-dispositive Cort factors as well as contemporary legal context and legislative history. The Eleventh Circuit noted that “both [Tallarico and Shinault] were based on analyses of all four of the Cort factors; neither focused exclusively on whether Congress intended to create such a right to sue.” Love, 310 F.3d at 1359. The Tenth Circuit agreed that, after Sandoval, the “focus on the broad remedial purpose underlying a statute—to the exclusion of its text and its place in the legislative scheme at issue—is no longer warranted.” Boswell, 361 F.3d at 1269. Similarly, the Second Circuit declined to follow Tallarico and Shinault, noting that both “relied significantly on the ACA’s legislative history to recognize an implied right.” Lopez, 662 F.3d at 597. Finally, subsequent to argument in this case, the Fifth Circuit revisited its decision in Shinault and concluded that Sandoval “now mandates a different result.” Stokes, 887 F.3d at 200–01; see also id. at 204 (“To say that Sandoval ‘unequivocally’ abrogated Shinault is, if anything, an understatement.”). For the reasons that follow, we agree with the post-Sandoval decisions of our sister circuits and join them in holding that the ACA does not create an implied private cause of action.

B.

Applying Sandoval, we conclude that Congress did not intend to create an implied private cause of action to remedy violations of the ACA. First, Congress’s express provision of multiple methods of enforcing the ACA other than through a private cause of action indicates that Congress did not intend to create one. Second, to the extent legislative history is relevant, it does not sufficiently express a contrary intent.

I.

We first consider the text and structure of the ACA. See Logan, 722 F.3d at 1171. It is undisputed that the ACA does not expressly provide for a private cause of action. Thus, in our search for legislative intent, we turn to the statute’s structure. See Sandoval, 532 U.S. at 290; UFCW, 2018 WL 3384950, at *4–5.

6. Although the Eighth Circuit has not revisited its pre-Sandoval decision in Tallarico, a district court in that circuit concluded that Tallarico is no longer binding and declined to follow it. See Wright ex rel. D.W. v. American Airlines, Inc., 249 F.R.D. 572, 574–75 (E.D. Mo. 2008).

7. We have at times started an implied cause of action analysis by determining whether the statute speaks in terms of “rights-creating language.” See, e.g., Northstar Fin. Advisors, 615 F.3d at 1115; In re Digimare, 549 F.3d at 1231–32. That approach, however, is not necessary in this case. As the Supreme Court has clarified, “even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy.” Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) (internal quotation marks omitted); see also Pritman v. Or., Emp’t Dep’t, 509 F.3d 1065, 1074 (9th Cir. 2007) (noting “the clarity of the Supreme Court’s recent command in Gonzaga regarding the insufficiency of rights-creating language with regard to the implication of a private cause of action”). Here, regardless of whether the ACA contains rights-creating language, we conclude that Congress did not intend to create a private cause of action. See Sandoval, 532 U.S. at 290 (“[S]ome remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights.”).
related complaint data in a manner comparable to other consumer complaint data,” and “regularly review all complaints received by air carriers alleging discrimination on the basis of disability and… report annually to Congress on the results of such review.”

Further, the general FAA enforcement scheme provides that the Secretary of Transportation may, upon notice of and opportunity for hearing, issue an order to compel compliance with the ACAA, see id. § 46101(a)(4), revoke an air carrier’s transportation certificate, see id. § 41110(a)(2)(B), and/or impose a penalty of up to $10,000 per violation, see id. § 46301(a)(5)(B). In addition, the Secretary of Transportation—or, upon request from the Secretary of Transportation, the Attorney General—has an express cause of action to enforce the ACAA and its implementing regulations. Id. §§ 46106, 46107(b).

Finally, individuals who have a “substantial interest” in DOT’s administrative decision may file a petition for review of that decision in a United States Court of Appeals. Id. § 46110(a). The reviewing court has “exclusive jurisdiction to affirm, amend, modify, or set aside any part” of the Secretary’s order; the court may order DOT “to conduct further proceedings”; and the court “may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists.” Id. § 46110(c). In light of the multiple methods expressly provided for enforcing the ACAA’s prohibition against disability discrimination, we must infer that Congress intended to preclude a private cause of action.

We reject Segalman’s invitation to discount the ACAA remedial scheme on the ground that it is ineffectual as a practical matter. In support of this argument, he cites the Secretary of Transportation’s annual reports to Congress between 2005 and 2012. Despite the statutory mandate that “[t]he Secretary shall investigate each complaint,” id. § 41705(c)(1) (emphasis added), most of those reports state that “[t]he substance of the complaints filed with the [air] carriers has not been reviewed to determine whether the incidents constituted violations of the [ACAA] or [its implementing regulations]” because “[s]uch an undertaking would require resources well beyond [DOT’s] investigative capabilities.”

8. The ACAA’s implementing regulations explain how such complaints should be filed, 14 C.F.R. § 382.159, and require that air carriers designate at least one Complaints Resolution Official (“CRO”) at every airport, id. § 382.151. In addition, upon receiving a complaint, a CRO “must promptly take dispositive action,” including the following: “whatever action is necessary to ensure compliance” with ACAA regulations; if an alleged violation has already occurred, “provide to the complainant a written statement setting forth a summary of the facts and what steps, if any, the carrier proposes to take in response to the violation”; and “inform the complainant of his or her right to pursue [a] DOT enforcement action.” Id. § 382.153.

9. Although subsection (c) was only added to the ACAA in 2000, see supra note 2, the general FAA regulatory scheme previously granted—and still grants—the Secretary of Transportation authority to investigate ACAA complaints where a “reasonable ground” appears for doing so. See Pub. L. No. 103-272, § 46101, 108 Stat. 745, 1226 (1994) (codified as amended at 49 U.S.C. § 46101); Pub. L. No. 85-726, Title X, § 1002, 72 Stat. 781, 788 (1958) (predecessor statute).


11. Segalman is mistaken in asserting that the Secretary of Transportation’s decision not to investigate complaints is unreviewable under Heckler v. Chaney, 470 U.S. 821 (1985). As we noted in Gilstrap, “[a]lthough the general FAA enforcement scheme provides for an investigation only ‘if a reasonable ground appears,’ 49 U.S.C. § 46101(a)(1)–(2), the ACAA itself requires the Secretary to investigate all complaints of an ACAA violation.” 709 F.3d at 1001 n.8. Thus, we agree with the Eleventh Circuit that “[t]he decision whether to investigate is … not discretionary and is subject to judicial review.” Love, 310 F.3d at 1356 n.11.

12. We also reject Segalman’s argument that a DOT webpage indicates that Congress intended to create a private cause of action. The webpage, which is still publicly accessible, states in relevant part: “To obtain a personal monetary award of damages, a(n) [ACAA] claimant would have to institute a private legal action.” Complaints Alleging Discriminatory Treatment against Disabled Travelers under the Air Carrier Access Act and 14 CFR Part 382, U.S. Dep’t of Transp., https://www.transportation.gov/airconsumer/complaints-alleging-discriminatory-treatment-against-disabled-travelers (last updated Jan. 7, 2015). As an initial matter, that statement may be referring, accurately, to private tort actions that exist under state law and in which the ACAA provides the standard of care. See Gilstrap, 709 F.3d at 1010 (holding that the ACAA and its implementing regulations preempt state tort law standards of care “with respect to the circumstances under which airlines must provide assistance to passengers with disabilities in moving through the airport”). Moreover, even if the DOT webpage refers to a purported private legal action directly under the ACAA, this passing reference cannot, itself, give rise to a private cause of action. Cf. Sandoval, 532 U.S. at 291 (“Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”). In so concluding, we need not and do not decide whether, and to what extent, an agency’s express interpretation that a statute implies a private cause of action is entitled to deference.

2.
Thus, Segalman argues, Congress also intended that the ACAA create an implied private cause of action. See Tallarico, 881 F.2d at 570.

At one time such reasoning may have carried the day, but that time has passed. In light of the suggestion of legislative intent in the ACAA remedial scheme, we “look to legislative history only … if there is a clearly expressed contrary intention … that may overcome the strong presumption that the statutory language represents congressional intent.” Logan, 722 F.3d at 1171. Although we also generally “presume that Congress acts with awareness of relevant judicial decisions,” United States v. Alvarez-Hernandez, 478 F.3d 1060, 1065 (9th Cir. 2007) (internal quotation marks omitted), under the post-Sandoval framework such a presumption alone cannot substitute for a clear expression of congressional intent. Moreover, even if it could, the ACAA’s legislative history is equivocal evidence, at best, that Congress intended to regulate air carriers that do not receive direct federal subsidies to the same extent as those that do.13 Compare 132 Cong. Rec. S9899 (Daily ed. July 30, 1986) (“[T]he purpose of the [ACAA] is quite simple. It overturns the recent Supreme Court decision in [PVA].”) (Statement of Sen. Bob Dole), with S. Rep. No. 99-400, at 2 (explaining that the final bill “would mitigate the effect of … PVA” (emphasis added)), and 132 Cong. Rec. S9899 (explaining that the final bill reflected a “compromise” between the Rehabilitation Act framework and the existing aviation regulatory scheme). In sum, the ACAA’s legislative history is insufficient to overcome the strong suggestion that the statute’s remedial scheme forecloses an implied private cause of action.

IV.

In holding that the ACAA does not create an implied private cause of action, we necessarily do not decide whether such a cause of action would be wise or desirable as a policy matter. We must leave such matters for Congress.14 Nor may we ground our holding in the legal framework that prevailed at the time of the ACAA’s enactment or in preceding decades. We are bound by current Supreme Court law, and under that law, a private cause of action does not exist where the statute in question does not manifest Congress’s intent to create one. Sandoval, 532 U.S. at 286–87. For all of the above reasons, the ACAA does not manifest such intent. Thus, the district court did not err in concluding that the ACAA does not imply a private cause of action.15

AFFIRMED.

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13. We further note that Congress’s intent to regulate air carriers that receive direct federal subsidies differently from air carriers that do not receive such subsidies is manifested in differences between the Rehabilitation Act and ACAA statutory frameworks. See Three Rivers Cir. for Indep. Living v. Hous. Auth. of Pittsburgh, 382 F.3d 412, 425–26 (3d Cir. 2004) (discussing the history and structure of the Rehabilitation Act, and recognizing that the statute creates an implied private cause of action).

14. We note, in fact, that the House and Senate have recently introduced bills that would add an express private cause of action to the ACAA. See Air Carrier Access Amendments Act of 2018, H.R. 5004, 115th Cong. § 4(a) (as introduced in the House, Feb. 13, 2018); Air Carrier Access Amendments Act of 2017, S. 1318, 115th Cong. § 4(a) (as introduced in the Senate, June 8, 2017).

15. Because we conclude that the ACAA does not imply a private cause of action, we do not reach the district court’s alternative conclusion that, even if such a cause of action existed, Segalman failed to state a claim under Rule 12(b)(6) by not pleading exhaustion of administrative remedies.
PROCEDURAL HISTORY

On April 21, 2011, the Los Angeles County District Attorney filed a petition to commit Yates as a sexually violent predator under the SVP Act. The trial court found probable cause to hold Yates over for trial, and a jury trial commenced on November 8, 2016. The jury returned a verdict finding Yates to be a sexually violent predator as alleged in the petition. The trial court ordered him committed to the California Department of Mental Health for an indeterminate term.

DISCUSSION

I. THE SVP ACT

The SVP Act allows for the involuntary civil commitment of certain offenders following the completion of their prison terms who are found to be sexually violent predators. (People v. Roberge (2003) 29 Cal.4th 979, 984 (Roberge).) An alleged SVP is entitled to a jury trial, at which the People must prove three elements beyond a reasonable doubt: (1) the person has suffered a conviction of at least one qualifying “sexually violent offense,” (2) the person has “a diagnosed mental disorder that makes the person a danger to the health and safety of others;” and (3) the mental disorder makes it likely the person will engage in future predatory acts of sexually violent criminal behavior if released from custody. (§§ 6600, 6603, 6604; People v. Shazier (2014) 60 Cal.4th 109, 126; People v. McKee (2010) 47 Cal.4th 1172, 1185.)

Under section 6600, subdivision (a)(3), the People may prove the first element—the existence and details underlying the commission of the predicate offense(s)—“by introducing ‘documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals.’” (People v. Burroughs (2016) 6 Cal. App.5th 378, 403 (Burroughs); Roa, supra, 11 Cal.App.5th at p. 443.) The Act thus contains a broad hearsay exception for the documentary evidence described in the statute as well as for the multiple-level hearsay statements contained in such documents in order “to relieve victims of the burden and trauma of testifying about the details of the crimes underlying the prior convictions,” which may have occurred many years in the past. (People v. Otto (2001) 26 Cal.4th 200, 208 (Otto); Roa, supra, at pp. 443–444.)

The Act defines the diagnosed mental disorder required for the second element as “a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” (§ 6600, subd. (c); Roa, supra, 11 Cal. App.5th at p. 444.) To establish this element, the People will

1. Undesignated statutory references are to the Welfare and Institutions Code.

2. Penal Code section 969b also “allows the admission into evidence of records or certified copies of records ‘of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which the defendant has been imprisoned to prove that a person has been convicted of a crime,’ including a sexually violent offense. (People v. Roa (2017) 11 Cal.App.5th 428, 444 (Roa).)
have one or more experts evaluate the person, review documentary evidence (such as state hospital records, police and probation reports, and prison records), and render a diagnosis. (§ 6603, subd. (c)(1); Roa, supra, at pp. 444–445.) This process may be repeated multiple times over several years in order to satisfy the requirement that, at the time of trial, the person has “a currently diagnosed mental disorder.” (§ 6600, subd. (a)(3); see People v. Landau (2013) 214 Cal.App.4th 1, 26 [an SVP case “requires a current mental condition”].

For the third element, the People must show that, if released, the alleged SVP will likely engage in sexually violent criminal behavior due to the diagnosed mental disorder. (§ 6600, subd. (a)(3); People v. Shazier, supra, 60 Cal.4th at p. 126.) The Act requires proof of a clear link between the second and third elements; that is, the finding of future dangerousness must be shown to derive from “a currently diagnosed mental disorder characterized by the inability to control dangerous sexual behavior.” (Hubbart v. Superior Court (1999) 19 Cal.4th 1138, 1158; People v. White (2016) 3 Cal.App.5th 433, 448.) Again, in the SVP trial the People will present expert testimony—usually based on diagnostic tools that predict future violent sexual behavior—to establish the alleged SVP’s dangerousness and likelihood to reoffend. (Roa, supra, 11 Cal.App.5th at p. 445.)

II. THE RELEVANT BACKGROUND

A. Pretrial proceedings

Prior to trial, Yates’s counsel filed a motion in limine under Sanchez to preclude the People’s experts from relating to the jury as the basis for their opinions the contents of state hospital records, the opinions and conclusions of non-testifying experts including hospital staff, hearsay statements regarding other allegations of criminal conduct by Yates, and hearsay information relating to a parole violation. At the hearing on Yates’s motion, the trial court inquired about the People’s anticipated expert testimony in this case. The district attorney responded that she intended to elicit testimony from her experts limited to material that would be presented under section 6600, subdivision (a), the business or official records exception to the hearsay rule, and matters that arose from the experts’ own conversations with Yates.

The prosecutor argued that the hospital records that had been subpoenaed were business records and their content was admissible. Defense counsel responded that the hospital records were extremely voluminous and may not all qualify for admission under the business or official records exception. The court indicated it was uncertain about the extent to which multiple layers of hearsay could be admitted simply because it “happened to be in a business record,” but noted, “We’re talking in a vacuum generally. But if it comes up, counsel, I’m sure you’ll object.” The trial court and parties then moved on to discuss other evidentiary issues, and the court never clearly ruled on the admissibility of the documents or the permissible scope of the expert testimony under Sanchez. During trial, the People did not establish that any of appellant’s records from which the experts had obtained their information were covered by a specific hearsay exception.

B. Expert testimony at trial

The People called two licensed psychologists to testify as expert witnesses in Yates’s SVP trial: Dr. Wesley Maram and Dr. Douglas Korpi. Both experts opined that Yates qualifies as a sexually violent predator based on interviews with him, his scores on sex offender risk assessments, and the experts’ review of his extensive state hospital file and criminal and juvenile records going back over 40 years.

Dr. Maram testified that appellant was convicted of four qualifying offenses when he was 18 years old in 1982, including two counts of oral copulation by force and two counts of sodomy by force against a 16-year-old boy. The expert described the details of the incident and opined that the crimes qualified under California law as sexually violent offenses. Appellant was convicted, served part of an eight-year prison sentence, and was paroled. According to appellant’s criminal records, he violated parole by hitting a woman over the head with a bat. Dr. Maram also described the details of a 1988 qualifying offense in which appellant forced oral copulation and sodomized a 13-year-old boy when appellant was 24. Appellant was sentenced to prison for 21 years for that offense. Dr. Maram reported that appellant threatened his victims on both occasions with a knife. The expert then summarized details of appellant’s social history and other criminal offenses, including the facts underlying a sustained juvenile petition which alleged appellant had forced oral copulation and sodomized two nine-year-old boys. Dr. Maram also informed the jury that Yates’s other criminal history includes “burglary and one or two thefts.”

Dr. Maram diagnosed appellant with “pedophilic disorder,” defined as “intense and persistent[ly] occurring sexually arousing fantasies and behaviors towards [prepubescent] children generally under age 14.” He founded this diagnosis on appellant’s “young history of molesting children” and appellant’s statements during his interview.

In his review of appellant’s hospital records, Dr. Maram learned that while in the California State Hospital at Coalinga, appellant has subscribed to Barely Legal, a publication containing photographs of people over 18 who dress and appear much younger. Dr. Maram identified two sample pages from the magazine but admitted that appellant had never mentioned the publication, and he had no idea when appellant had the subscription or how long he had it. Nevertheless, Dr. Maram opined that appellant’s subscription to a magazine that depicts very young potential sexual partners was a significant factor in diagnosing pedophilic disorder because it suggests an ongoing sexual attraction to young or very young children. Dr. Maram characterized appellant’s interest in the magazine as “high risk behavior,” and agreed with the hospital’s recommendation that appellant not subscribe to
In support of his diagnosis of antisocial personality disorder, Dr. Korpi recited details of appellant’s troubled background, including his mother’s mental illness, appellant’s criminal conduct before the age of 15, and his adult history involving arrests for burglary, theft, sex offenses, assault, and two parole violations. Dr. Korpi stated that according to appellant’s records, Yates is “proud of what a good con man he is,” he failed sexual offender treatment twice, and he has received 11 write-ups while in custody. Indeed, “[Yates] is so by his own rules that he decided he wouldn’t brush his teeth and all his teeth fell out.”

Based on appellant’s extensive history and his scores on the Static-99R and the Static-2002R, Dr. Korpi opined that appellant represents a serious and well-founded risk of reoffending in the future. In particular, appellant’s history of parole and probation violations and the fact that appellant has failed treatment are strong indicators of his likelihood to reoffend.

III. THE PERTINENT LAW

A. General legal principles

Hearsay, defined as an out-of-court statement by someone other than the testifying witness offered to prove the truth of the matter stated, is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subds. (a), (b); Sanchez, supra, 63 Cal.4th at p. 674; People v. Zamudio (2008) 43 Cal.4th 327, 350.) Documents like reports, criminal records, hospital records, and memoranda—prepared outside the courtroom and offered for the truth of the information they contain—are usually themselves hearsay and may contain multiple levels of hearsay, each of which is inadmissible unless covered by an exception. (Sanchez, at p. 675.)

Although expert witnesses frequently acquire knowledge in their field of expertise from hearsay sources, “[t]he hearsay rule has traditionally not barred an expert’s testimony regarding his general knowledge in his field of expertise.” (Sanchez, supra, 63 Cal.4th at p. 676.) Thus, an expert witness may offer opinions based on any matter, including special knowledge, skill, experience, training, and education, “whether or not admissible, that is of a type that reasonably may be relied upon” by experts in the field. (Evid. Code, § 801, subd. (b).) And prior to Sanchez, an expert witness was also permitted to relate case-specific hearsay to the jury, as long as the jury was instructed that it could only consider the expert’s recitation of such information for its effect on the expert’s opinion, and not for its truth. (People v. Bell (2007) 40 Cal.4th 582, 608, overruled by Sanchez, supra, 63 Cal.4th at p. 686, fn. 13; People v. Montiel (1993) 5 Cal.4th 877, 918–919, overruled by Sanchez, supra, at p. 686, fn. 13; People v. Coleman (1985) 38 Cal.3d 69, 92, overruled by Sanchez, supra, at p. 686, fn. 13; People v. Dean (2009) 174 Cal.App.4th 186, 197 [applying these rules in SVP proceedings].)

3. “‘The term paraphilia denotes any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.’ (DSM-V, p. 685.)” (Couzens & Bigelow, Cal. Law and Procedure: Sex Crimes (The Rutter Group 2016) ¶ 14:2, p. 14-10.) “(Burroughs, supra, 6 Cal.App.5th at p. 392, fn. 3.)

Dr. Korpi

Dr. Korpi testified that appellant is a sexually violent predator. He based his conclusion on his 2014 interview with appellant and evaluation of appellant’s criminal and psychological history and the history and severity of his deviance as reflected in appellant’s voluminous hospital file, criminal records, and prior SVP reports.

Like Dr. Maram, Dr. Korpi described the details of the qualifying sexually violent offenses for which appellant had been convicted in 1982 and 1988. Based on the circumstances of those offenses together with appellant’s entire personal, criminal and medical history, Dr. Korpi concluded that appellant suffers from antisocial personality disorder and a paraphilia with features of both pedophilia and sadism. The expert substantiated his diagnosis by citing details of appellant’s sexually violent conduct: He described the juvenile offense in which appellant sodomized and forced two nine-year-olds to orally copulate him at knifepoint when appellant was 13; he related details about appellant’s 1982 and 1988 offenses from the probation reports that revealed particularly sadistic behavior; and he related the facts reported in the parole charge sheet from appellant’s 1987 parole violation in which appellant assaulted his cousin with a bat. Dr. Korpi deemed Yates’s subscription to Barely Legal to be somewhat significant in showing appellant continues to have an “interest in younger looking people.”
B. Sanchez

In Sanchez, our Supreme Court ended this practice and abandoned the “not-admitted-for-its-truth rationale” with respect to case-specific hearsay. (People v. Stamps (2016) 3 Cal.App.5th 988, 994.) Sanchez preserved an expert’s ability to rely on and cite “background information accepted in [his or her] field of expertise,” as well as an expert’s ability to rely on and “tell the jury in general terms” that he or she relied upon hearsay evidence. (Sanchez, supra, 63 Cal.4th at p. 685.) But an expert’s recitation of case-specific facts, which Sanchez defined as “those relating to the particular events and participants alleged to have been involved in the case being tried,” is a different matter. (Id. at p. 676.) Sanchez held that an expert is prohibited from testifying to such facts if they are outside the expert’s personal knowledge and do not fall under an exception to the hearsay rule or have not been independently established by competent evidence. (Id. at pp. 676–677, 686.)

Thus, like any other hearsay evidence, case-specific hearsay an expert relates to the jury as true is not admissible unless a proper foundation has been laid for its admission under an applicable hearsay exception. “Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.” (Sanchez, supra, 63 Cal.4th at p. 684, fn. omitted; People v. Jeffrey G. (2017) 13 Cal.App.5th 501, 510.) However, an underlying fact that has not been proven by independent admissible evidence may not be included in a hypothetical question posed to the expert. (Sanchez, at pp. 677, 686; Stamps, supra, 3 Cal.App.5th at p. 996.)

C. The application of Sanchez to SVP proceedings

Sanchez is not confined to criminal cases. In particular, courts have held Sanchez applicable to SVP proceedings in several published opinions, including our own decision in Roa, supra, 11 Cal.App.5th 428. (See People v. Flint (2018) 22 Cal.App.5th 983, 998–999, 1005; People v. Bocklett (2018) 22 Cal.App.5th 879, 890; Burroughs, supra, 6 Cal. App.5th 378.)

In Burroughs, the People proved the existence and facts of Burroughs’s qualifying sexually violent offenses by presenting documentary evidence made admissible by Welfare and Institutions Code section 6600, subdivision (a)(3), including a Penal Code “section 969b prison packet” and probation reports that recited the facts underlying the qualifying convictions. (Burroughs, supra, 6 Cal.App.5th at p. 403.) Because the existence and details of the predicate offenses had been independently established by admissible documentary evidence, Burroughs concluded that “the experts were permitted to relate the facts to the jury as the basis of their opinions,” consistent with Sanchez. (Ibid.)

But the court found that not all of the information contained in the documentary evidence was relevant or admissible to prove the qualifying offenses. (Burroughs, supra, 6 Cal.App.5th at pp. 410–411.) Such information included references to uncharged offenses and other conduct, as well as information about appellant’s prior record, his personal history, his health, education, and employment, and the terms and conditions of probation. (Id. at p. 410.) This information, the court concluded, constituted inadmissible hearsay, and the trial court had “erred by allowing the experts to testify to the contents of this evidence as the basis for their opinions.” (Id. at p. 411.) With respect to the hospital records, Burroughs noted that none had been introduced or admitted at trial, and therefore “any statements the experts made about the contents of those records as ‘the basis for their opinions’ necessarily were improper under Sanchez. The experts were permitted to rely on those records, and to rely on any reports other experts such as appellant’s treating personnel prepared. [Citations.] They could not testify to the contents of those reports, however.” (Id. at p. 407, fn. 7.)

Burroughs found the evidentiary errors to be prejudicial and reversed the judgment. (Burroughs, supra, 6 Cal.App.5th at pp. 412–413.) The court found that through the admission of numerous hearsay documents and the experts’ testimony relating “a significant amount of hearsay to the jury,” the People had presented “in lurid detail, numerous sex offenses that appellant was not charged with or convicted of committing,” which served to depict “appellant as someone with an irrepressible propensity to commit sexual offenses, and invited the jury to punish him for past offenses.” (Id. at p. 412.) In short, the court concluded, “the improperly admitted hearsay permeated the entirety of appellant’s trial and strengthened crucial aspects of the People’s case,” requiring reversal. (Ibid.)

Similarly, in Roa, we found the trial court had erred in admitting expert testimony which related case-specific facts about uncharged offenses and other conduct drawn from investigator reports that were not subject to any hearsay exception. (Roa, supra, 11 Cal.App.5th at p. 452.) In addition, the Attorney General conceded error in the trial court’s admission of expert testimony relating information contained in Roa’s state hospital records, which had not been shown to be admissible under a hearsay objection. (Ibid.) Finding the erroneous admission of the hearsay testimony to be prejudicial, we reversed the judgment. (Id. at pp. 454–455; People v. Watson (1956) 46 Cal.2d 818, 836.)

IV. IMPROPER ADMISSION OF HEARSAY THROUGH EXPERT TESTIMONY IN THE INSTANT PROCEEDINGS

Yates contends the trial court erred in admitting inadmissible hearsay through expert testimony which related to the jury the content of documents that were never admitted into evidence and never shown to meet the prerequisites for admission under an applicable hearsay exception. We review the court’s evidentiary rulings—including those that turn on
the hearsay nature of the evidence—for abuse of discretion (People v. Waidla (2000) 22 Cal.4th 690, 725), keeping in mind that an abuse of discretion occurs when the trial court makes an error of law (People v. Patterson (2017) 2 Cal.5th 885, 894).

A. Expert testimony relating case-specific facts from Yates’s state hospital, criminal, and juvenile records

Here, except for Yates’s own statements to the experts, which were admissible as party admissions (Evid. Code, § 1220), all of the case-specific facts related by the experts were drawn from documents—Yates’s criminal, juvenile, and state hospital records—that were neither introduced or admitted into evidence, nor shown to fall within a hearsay exception. Applying Sanchez to the instant case, we therefore conclude that the trial court erred in admitting inadmissible hearsay in the form of expert testimony which related case-specific facts to the jury that were neither subject to a hearsay exception nor independently established by competent evidence. (Sanchez, supra, 63 Cal.4th at pp. 676–677, 686.)

Contradicting the concessions the People made in Roa (11 Cal.App.5th at p. 452), respondent maintains that it was not necessary to admit the documents from which the experts in this case testified because Sanchez still permits an expert to rely on hearsay in forming an opinion, and only bars the expert from relating as true case-specific facts asserted in hearsay statements if those statements are not covered by any hearsay exception. (See Sanchez, supra, 63 Cal.4th at pp. 685–686.) Here, the People argue, admission of the expert testimony was consistent with Sanchez because the records from which the experts testified were themselves admissible under section 6600, subdivision (a)(3) and under the business and official records exceptions to the hearsay rule.

Respondent is correct in the general assertion that many of Yates’s criminal records would have been admissible under the hearsay exception created by section 6600, subdivision (a)(3), had they been introduced. As our Supreme Court has observed, the statute specifically authorizes the use of hearsay to show the details underlying the commission of a predicate offense. (Otto, supra, 26 Cal.4th at pp. 206–207.) More recently, however, the high court has observed this hearsay exception applies only to “admission of documentary evidence, not expert testimony.” (People v. Stevens (2015) 62 Cal.4th 325, 338.) Because the hearsay exception under section 6600, subdivision (a)(3) is limited to documentary evidence to show the existence and details of a qualifying offense, and no such documentary evidence was presented or admitted in this case, the experts simply could not testify to the contents of Yates’s criminal records. (See Roa, supra, 11 Cal.App.5th at p. 452; Burroughs, supra, 6 Cal.App.5th at p. 407, fn. 7.)

The People are similarly mistaken in their contention that the expert testimony about the contents of Yates’s hospital and other records was admissible because the underlying records were admissible under the business or official records exception to the hearsay rule.

Hospital records and similar documents are often admissible as business records, assuming a custodian of records or other duly qualified witness provides proper authentication to meet the foundational requirements of the hearsay exception. (Evid. Code, § 1271; In re R.R. (2010) 187 Cal.App.4th 1264, 1280; People v. Landau (2016) 246 Cal.App.4th 850, 872, fn. 7.) Compliance with a subpoena duces tecum may dispense with the need for a live witness to establish the business records exception if the records are produced by the custodian or other qualified witness, together with the affidavit described in Evidence Code section 1561. (Evid. Code, § 1560, subd. (b); In re R.R., at p. 1280; In re Troy D. (1989) 215 Cal.App.3d 889, 903.) In this case, however, no such foundation was laid for any of the documents contained in the “three-to-five [foot] high stack of records” from which the experts testified. Moreover, contrary to the People’s assertion, the mere fact that state hospital files had been subpoenaed did not make their entire contents reliable or otherwise admissible as business records. (See People v. Blagg (1968) 267 Cal.App.2d 598, 609–610 [in the absence of live testimony of a qualified witness, affidavit of an authenticating witness is required in order to lay a proper foundation for admissibility].)

In sum, there was no blanket hearsay exception for the experts’ testimony to the case-specific hearsay contained in documents which were neither presented to the court for an evidentiary ruling nor admitted into evidence. Admission of expert testimony relating case-specific hearsay to the jury that was neither subject to a hearsay exception nor independently established by competent evidence was error.

B. Prejudice

Admission of the experts’ hearsay testimony in this case was unquestionably prejudicial. Except for a few admissions Yates made to the experts during interviews, none of the experts’ testimony relating case-specific facts to the jury was admissible. Without the inadmissible hearsay, the foundation for the experts’ opinions goes up in smoke, and with it most of the evidence in support of the jury’s SVP finding.

“California has long recognized that an expert’s opinion cannot rest on his or her qualifications alone: ‘even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert’s opinion based on assumptions of fact without evidentiary support [citation], or
on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence.’ [Citation.] California courts have been particularly chary of expert testimony based on assumptions that are not supported by the evidentiary record: ‘an expert’s opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities.’” (People v. Wright (2016) 4 Cal.App.5th 537, 545.)

Had the experts’ inadmissible testimony been excluded, we find it reasonably probable—indeed likely—the jury would have reached a result more favorable to Yates. (People v. Watson, supra, 46 Cal.2d at p. 836.)

V. FORFEITURE AND INEFFECTIVE ASSISTANCE OF COUNSEL

During trial, the People neither presented nor did the trial court admit into evidence any hospital records or other documents which were the sources of the case-specific hearsay the experts related to the jury. And when the prosecution experts repeatedly recited case-specific facts gleaned from Yates’s three-to-four-foot high stack of hospital and criminal records, defense counsel did not once object under Sanchez or, except on two occasions, on any hearsay ground at all. Respondent asserts that by failing to raise the issue below, Yates forfeited any claim that the People were required to lay a foundation for the admissibility of the records upon which the experts relied before the experts could testify to the contents of the documents. We are inclined to agree.

However, Yates contends that counsel’s failure to object violated his federal and state constitutional rights to effective assistance of counsel. (See People v. Ledesma (1987) 43 Cal.3d 171, 215; Strickland v. Washington (1984) 466 U.S. 668, 684.) To prevail on this claim, appellant “bears the burden of showing by a preponderance of the evidence that (1) counsel’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficiencies resulted in prejudice.” (People v. Centeno (2014) 60 Cal.4th 659, 674.) “When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, [appellant] must show that there was ‘no conceivable tactical purpose’ for counsel’s act or omission.” (Id. at p. 675.) Reversal is then required if it is reasonably probable “that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (People v. Banks (2014) 59 Cal.4th 1113, 1170, overruled in part on other grounds in People v. Scott (2015) 61 Cal.4th 363, 391; Strickland, supra, 466 U.S. at p. 694.) “[A] ‘reasonable probability is defined as one that undermines confidence in the verdict;’” (People v. Carrasco (2014) 59 Cal.4th 924, 982.)

By filing a motion in limine to exclude certain expert testimony under Sanchez, Yates’s counsel clearly demonstrated familiarity with Sanchez’s prohibition on an expert’s recitation of case-specific hearsay. Because none of the criminal, juvenile, or state hospital records was admitted into evidence or shown to fall under an applicable hearsay exception, and none of the case-specific facts related by the experts was proven by other competent evidence, Sanchez barred the experts from relating the contents of those documents to the jury. Defense counsel therefore should have objected to every instance in which the People’s experts related as true case-specific facts contained in hearsay statements which were not shown to fall within a hearsay exception or were not independently proven by competent evidence. (Sanchez, supra, 63 Cal.4th at p. 686.)

We can conceive of no satisfactory explanation for defense counsel’s failure to object to the experts’ testimony in this case. And given the clear prejudice caused by the admission of volumes of incompetent expert testimony, it is reasonably probable that had the trial court sustained appropriate objections under Sanchez, the result in Yates’s SVP trial would have been different. (People v. Banks, supra, 59 Cal.4th at p. 1170.)

DISPOSITION

The judgment is reversed, and the matter remanded to the trial court.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the Clerk of this court is directed to send a certified copy of this opinion to the State Bar upon issuance of the remittitur in this matter. The Clerk shall also notify defense counsel, Deputy Public Defender Todd Montrose, that he has been referred to the State Bar. (Id., § 6086.7, subd. (b).)

CERTIFIED FOR PUBLICATION.

LUI, P. J.

We concur: CHAVEZ, J., HOFFSTADT, J.
Cite as 18 C.D.O.S. 7279

THE PEOPLE, Plaintiff and Respondent,
v.
CHEYANNE BEAR, Defendant and Appellant.

No. H044609
In The Court of Appeal of the State of California
Sixth Appellate District
(Santa Clara County Super. Ct. No. 70664)
Filed July 23, 2018

COUNSEL

Counsel for Plaintiff and Respondent: The People, Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Donna M. Provenzano, Supervising Deputy Attorney General, Victoria Ratnikova, Deputy Attorney General
Counsel for Defendant and Appellant: Cheyenne Bear, Anna L. Stuart, Sixth District Appellate Program

OPINION

Defendant Cheyanne Bear appeals from orders summarily denying a Penal Code section 1170.18 petition to redesignate a 1980 felony grand theft conviction as a misdemeanor and a subsequent filing that the trial court construed as a second petition regarding the same conviction. The trial court denied the first petition for failure to establish that the value of the property taken did not exceed $950. The trial court denied what it construed as a second petition on several grounds, including the absence of “any authority cited for the filing of a second petition after disposition of the first petition in open court.”

We shall affirm the order denying defendant’s first petition. We construe section 1170.18 as conferring discretion on the trial court to permit the filing of an amended petition. Because the trial court was unaware of, and did not exercise, this discretion, we reverse the second order and remand the matter to give the trial court the opportunity to exercise that discretion.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1978, defendant approached a high schooler on a transit bus and told him to take off his Ted Nugent concert T-shirt because defendant didn’t like it. When the boy did not comply, defendant kicked him in the face and took out a knife. The boy took off the shirt and handed it to defendant who threw it out the bus window. In connection with the incident, defendant pleaded guilty to grand theft person (§§ 484-487), a felony, on January 7, 1980.

The Santa Clara County Public Defender Office filed a section 1170.18, subdivision (f), petition to reduce the felony conviction to a misdemeanor on defendant’s behalf on June 2, 2016. The petition did not identify the stolen item as a T-shirt, allege the value of the stolen item, attach any evidence probative of the stolen item’s value, or provide the trial court with citations to the record of conviction indicating where probative evidence is located. The district attorney requested that the petition be denied for failure to “establish eligibility.” The trial court denied the petition in an order filed on November 28, 2016, reasoning that defendant failed to demonstrate his eligibility for relief because “[t]he record of conviction does not establish the value of the property that was the basis for the charge . . . and Defendant has not provided any information from which that value might be determined.”

Defendant, again with the assistance of the Public Defender Office, then filed a Waiver and Stipulation for Resentencing or Redesignation of Offenses on March 2, 2017, in which he and the district attorney stipulated and agreed that defendant is eligible to have his felony grand theft conviction designated as a misdemeanor under section 1170.18, subdivision (f). The superior court construed the filing as a second petition and, on April 5, 2017, denied it on several grounds: the absence of an “allegation of any changed circumstance,” the absence of “any authority cited for the filing of a second petition after disposition of the first petition in open court,” “the order on the original petition was not made without prejudice,” and failure to make a prima facie showing of eligibility.

Defendant timely appealed from that order. Defendant also moved this court for relief from default for failure to timely appeal from the November 28, 2016 order. This court granted that motion on the condition that defendant file a notice of appeal in superior court within 10 days, which he did.

II. DISCUSSION

A. Proposition 47

In November 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act. (People v. People v. Page (2017) 3 Cal.5th 1175, 1179, 1181 (Page).) Proposition 47 “reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies.” (Page, supra, at p. 1179.) Under Proposition 47, grand theft of property valued at $950 or less is a misdemeanor if the defendant does not have a specified prior conviction. (§ 490.2, subd. (a).) Proposition 47 also added section 1170.18, which permits a defendant to petition to have his or her felony conviction resentedenced to or redesignated as a mis-

1. All further statutory references are to the Penal Code unless otherwise indicated.
2. The facts are taken from the preliminary hearing transcript.
3. At the time, section 487, subdivision (2), defined grand theft to include theft “[w]hen the property is taken from the person of another,” without reference to the property’s value. (Stats. 1965, ch. 161, § 1.)
A petition or application under section 1170.18 must be filed on or before November 4, 2022, absent a showing of good cause. A petition or application under section 1170.18 must be filed on or before November 4, 2022, absent a showing of good cause.

"[T]he proper allocation of the burden of proof . . . [was] not set out expressly in the text of Proposition 47." (Page, supra, 3 Cal.5th at p. 1189.) Courts have held that the petitioner bears the burden of proving eligibility for relief. (People v. Romanowski (2017) 2 Cal.5th 903, 916 (Romanowski).) The first case to so hold was People v. Sherow (2015) 239 Cal.App.4th 875, 878-879 (Sherow), which was issued on August 11, 2015. People v. Perkins (2016) 244 Cal.App.4th 129, 136-137 (Perkins), issued on January 25, 2016, articulated what a petitioner must do to carry that burden, including, “where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950” by “attach[ing] information or evidence necessary to enable the court to determine eligibility.”

“In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility . . . . But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be ‘required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner’s entitlement to relief depends on the resolution of an issue of fact.’ (Cal. Rules of Court, rule 4.551(f); see also People v. Sherow (2015) 239 Cal.App.4th 875, 880 [‘A proper petition could certainly contain at least [the petitioner’s] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination.’].)” (Romanowski, supra, 2 Cal.5th at p. 916.)

**B. The First Petition**

Defendant concedes that, at the time he filed his first petition, “the law was clear that the petitioner bears the burden to establish [Proposition 47] eligibility . . . .” Yet he did nothing to carry that burden: the first petition did not identify the stolen item as a T-shirt, allege the value of the stolen item, attach any evidence probative of the stolen item’s value, or provide the trial court with citations to the record of conviction indicating where probative evidence is located. Plainly, defendant did not meet his burden. (See Perkins, supra, 244 Cal.App.4th at p. 141 [to carry burden of showing eligibility for Proposition 47 relief, “defendant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing, for each conviction, that the stolen [item] did not exceed $950 in value”].)

Defendant contends that his failure to carry his burden “makes no difference” because “the trial court expressly stated it had considered the record of conviction, which included the preliminary hearing transcript,” which in turn established that the stolen item was a T-shirt. We disagree. Accepting defendant’s argument would improperly place the burden on the trial court to search the record of conviction for the evidence necessary to support the petition. It is defendant’s burden and he did not carry it. Therefore, we affirm the November 28, 2016 order denying the first petition.

**C. The Stipulation**

Approximately three months after the trial court denied the first petition, defendant and the district attorney filed a stipulation in which they agreed that defendant is eligible to have his felony grand theft conviction redesignated as a misdemeanor under section 1170.18, subdivision (f). The superior court construed the stipulation as a second petition and denied it for failure to allege “any changed circumstance,” cite any authority “for the filing of a second petition after disposition of the first petition” that “was not . . . without prejudice,” or make a prima facie showing of eligibility for relief in the new petition. The parties assert that none of these bases for denying defendant relief was valid.

### 1. Section 1170.18 Confers Discretion on Trial Courts to Permit the Filing of Amended Petitions

The primary issue raised on appeal from the trial court’s second order is whether, after the denial of a section 1170.18 petition for failure to make a prima facie showing of eligibility, section 1170.18 authorizes the filing of a second or amended petition regarding the same conviction. Defendant contends multiple petitions—whether characterized as amended or second petitions—regarding the same conviction are permitted because section 1170.18 does not preclude them and is to be liberally construed. In his view, the only limitation on multiple section 1170.18 petitions is the section 1170.18, subdivision (j) requirement that petitions be filed on or before the statutory deadline. The Attorney General says a second petition regarding the same conviction is permitted when the law was unsettled at the time of the first petition, a circumstance that does not apply here. But

5. Courts, including this one, frequently have affirmed the denial of Proposition 47 petitions “without prejudice” to the defendant filing another petition. (See Sherow, supra, 239 Cal.App.4th at p. 881 [affirming order denying Proposition 47 petition “without prejudice to subsequent consideration of a properly filed petition”]; Perkins, supra, 244 Cal.App.4th at p. 142 [affirming order denying Proposition 47 petition “without prejudice to consideration of a subsequent petition that supplies evidence of [defendant’s] eligibility”].) The Supreme Court recently took that approach in Page, supra, 3 Cal.5th p. 1190,
the Attorney General maintains this case does not involve a second petition, but rather an amendment to the first petition. The Attorney General argues the court should have permitted the amendment under the general rule allowing pleadings to be amended liberally because defendant established a “reasonable possibility” he could cure the defect that led to the denial of the first petition.

Section 1170.18 does not expressly state whether a second or amended petition is permitted where the first fails to satisfy the statutory criteria. Where, as here, a statute is silent, we employ “the ordinary presumptions and rules of statutory construction.” (Californians For Disability Rights v. Mervyn’s, LLC (2006) 39 Cal.4th 223, 230; Bravo v. Ismaj (2002) 99 Cal.App.4th 211, 224 (“Because section 391.7 is silent on this issue, we turn to well-settled rules of statutory construction”).)

### a. Principles of Statutory Construction

“In interpreting a voter initiative like [Proposition 47], we apply the same principles that govern statutory construction.” (People v. Rivera (2015) 235 Cal.App.4th 1085, 1099.) In construing a statute, our fundamental task is to determine the Legislature’s intent so as to effectuate the law’s purpose. (People v. Cornett (2012) 53 Cal.4th 1261, 1265.) “In the case of [an initiative] adopted by the voters, their intent governs.” (People v. Jones (1993) 5 Cal.4th 1142, 1146.) We may consider the “the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters’ intent and understanding of the initiative.” (Schmeer v. County of Los Angeles (2013) 213 Cal.App.4th 1310, 1316-1317.) The initiative’s purpose and public policy also are proper considerations. (People v. Arias (2008) 45 Cal.4th 169, 177.)

### b. Analysis

We begin by considering the initiative’s purpose. Among the stated “purpose[s]” of the voters in enacting Proposition 47 was to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70 (Guide).) Proposition 47 also expressly states that it “shall be broadly construed to accomplish its purposes” and “shall be liberally construed to effectuate its purposes.” (Guide, supra, §§ 15, 18, p. 74.)

As to public policy, California courts have long adhered to the “policy that cases should be tried on their merits rather than dismissed for technical defects in pleading.” (Bloniardz v. Rosoloson (1969) 70 Cal.2d 143, 149; Denham v. Superior Court (1970) 2 Cal.3d 557, 566 [noting the strength of the policy that “seeks to dispose of litigation on the merits rather than on procedural grounds”).] In furtherance of that policy, “liberal interpretation and amendment of pleadings is strongly favored . . . .” (Dieckmann v. Superior Court (1985) 175 Cal.App.3d 345, 352; Herrera v. Superior Court (1984) 158 Cal.App.3d 255, 259 (“Great liberty is indulged in matters of amendment to the end that lawsuits may be determined upon their merits.”)).

These “principles apply in the criminal context” as well. (People v. Huerta (2016) 3 Cal.App.5th 539, 544 [stating, in dicta, that liberal amendment principles apply to Proposition 47 petitions].) For example, in a habeas corpus proceeding, “a court issuing an OSC retains the discretion to grant a party leave to amend” to cure any “technical irregularities in the pleadings . . . . Retention of this power is necessary to ensure that technical and inadvertent pleading errors do not lead to premature dismissals that would frustrate the ends of justice or require holding unnecessary evidentiary hearings that would squander scarce judicial resources.” (People v. Duvall (1995) 9 Cal.4th 464, 482.)

Broadly construing section 1170.18 as giving superior courts discretion to grant a Proposition 47 petitioner leave to amend to cure pleading defects would further the initiative’s purpose of requiring misdemeanors instead of felonies for nonserious, nonviolent crimes. By contrast, prohibiting the amendment of section 1170.18 petitions such that pleading errors lead to the denial of meritorious petitions would not advance the initiative’s purposes.

The policy in favor of doing justice by resolving litigation on the merits rather than on procedural grounds likewise supports a reading of section 1170.18 that authorizes superior courts, in their discretion, to grant a Proposition 47 petitioner leave to amend.

Other provisions of section 1170.18 also support such a construction. Section 1170.18 has been amended to extend the original three-year deadline by which a petition or application must be filed. (Compare § 1170.18, subd. (j) [petition or application generally must be filed on or before Nov. 4, 2022] with id., former subd. (j), added by Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014) [petition or application generally must be filed within three years after the effective date of Prop. 47].) That extension reflects an intent to increase, not restrict, the ability of qualifying petitioners to obtain relief under section 1170.18. Construing section
1170.18 to allow petitions to be amended in the trial court’s discretion is consistent with that intent. 

In view of the initiative’s purposes and provisions, as well as the long-standing policy of resolving litigation on the merits, we construe section 1170.18 as conferring discretion on the trial courts to grant Proposition 47 petitioners leave to amend their petitions.

Defendant neither sought nor obtained court approval prior to filing the stipulation, which defendant did not identify as an amended petition. And the trial court plainly was unaware that it had the discretion to permit the filing of an amended petition. For these reasons, we conclude that reversal is required. Because the law regarding whether amended petitions were permitted was unclear at the time defendant filed the stipulation, we further conclude that defendant is entitled to an opportunity to seek leave to file an amended petition on remand. (Cf. Page, supra, 3 Cal.5th at p. 1189.)

The trial court should exercise its discretion in considering whether to allow defendant to file the amended petition.

2. Guidance on Remand

To provide some guidance to the trial court on remand, we address other aspects of its second order.

The trial court reasoned that the stipulation failed to make a prima facie showing of eligibility for Proposition 47 relief. Yet the district attorney and defense counsel declared under penalty of perjury that defendant is entitled to have his theft conviction reduced to a misdemeanor. Implicit in that declaration is the representation that defendant stole an item valued at $950 or less. Because “undisputed facts acknowledged by the parties” constitute evidence supporting a finding of eligibility for Proposition 47 relief, the stipulation made a prima facie showing of eligibility. (People v. Hall (2016) 247 Cal.App.4th 1255, 1263.)

We also note that evidence in the record of conviction that the stolen item was a schooler’s T-shirt gives rise to the reasonable inference that the stolen property was worth less than $950 and thus “a reasonable likelihood that the petitioner may be entitled to relief . . .” (Romanowski, supra, 2 Cal.5th at p. 916.) Accordingly, if such evidence were properly brought to the attention of the trial court, an evidentiary hearing would be required to resolve the factual dispute as to the t-shirt’s value. (Ibid.)

III. DISPOSITION

The November 28, 2016 order is affirmed. The April 5, 2017 order is reversed and the matter is remanded to the trial court. Defendant shall have 30 days following issuance of remittitur to seek leave to file an amended petition.

ELIA, ACTING P. J.

WE CONCUR: BAMATTRE-MANOUKIAN, J., MIHARA, J.
5. On page 11, delete the first sentence of the first full paragraph (beginning “There is a further …”).
6. Replace that sentence with the following:

There is a further consideration that undermines the position in the People’s brief and supports Warren’s position.

7. On page 13, delete the first sentence of the first full paragraph (beginning “The People attempt …”).
8. Replace that sentence with the following:

In their brief, the People attempted to support their position by citing People v. Coronado (1995) 12 Cal.4th 145 (Coronado).

9. On page 14, in the first sentence of the third paragraph, delete the phrase “the People’s contention” and replace it with “the contention.”

Except for the modifications set forth above, the opinion previously filed remains unchanged. The modifications do not include a change in the judgment.

SMITH, J.

I CONCUR: PEÑA, J.

I concur in the modifications to part one of the majority opinion, and respectfully reaffirm my dissent to part two as previously set forth.

POOCHIGIAN, Acting P.J.