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SUMMARIES

Copyrights

Success of film producer’s prosecution of copyright infringement action not diminished by fact that defendant was only one of more than 100,000 infringing internet distributors (McKeown, J.)

Glacier Films (USA), Inc. v. Turchin

9th Cir.; July 24, 2018; 16-35688

The court of appeals reversed a district court judgment and remanded. The court held that the district court erred in concluding that a film producer achieved only “minimal” success in successfully prosecuting a copyright infringement action against one BitTorrent user who unlawfully distributed the producer’s film.

Glacier Films’ motion picture “American Heist” was pirated prior to release and distributed online to BitTorrent users, preempts its release in theatres. After the film was illegally distributed online to more than 100,000 users, Glacier tracked down one infringing user in Oregon, Andrey Turchin, who had distributed the film 80 times and was associated with over 700 other pirated titles. Glacier filed suit for copyright infringement. At his deposition, Turchin admitted to downloading copyrighted content with that IP address, right up until the day before his deposition. The parties ultimately reached a stipulated consent judgment, under which Turchin stipulated to liability and to $750 in statutory damages. The court permanently enjoined Turchin from using the internet to reproduce, copy or publish “American Heist,” and ordered him to immediately delete any unlicensed copies of the movie in his possession.

The court denied Glacier’s motion for attorney fees, finding Glacier’s success in the lawsuit was “minimal,” legal penalties were unnecessary for deterrence, and an award of fees would not further the goals of the Copyright Act.

The court of appeals reversed, holding that the district court’s rationale for not awarding fees was fundamentally flawed. In finding that Glacier achieved only “minimal” success in this lawsuit, the district court focused on the fact that Turchin was but one of over 100,000 BitTorrent users who unlawfully distributed Glacier’s film, with the result that Glacier’s success was “de minimus in relation to the serious online piracy problem” Glacier sought to combat. The problem with this assessment was two-fold. First, under a March 2016 order of the United States District Court for the District of Oregon, copyright holders are limited to suing one BitTorrent infringer at a time. Second, as against the one user it sued, Turchin, Glacier achieved complete success: Turchin admitted liability and paid statutory damages. In this context, and in light of Turchin’s continued infringing conduct right up to the eve of his deposition, an assessment of attorney fees would not only have assisted to deter further unlawful conduct, but would clearly have furthered the goals of the Copyright Act. The court remanded to the district court to reconsider Glacier’s motion for fees.

Criminal Law

No abuse of discretion in admission of rap lyrics to show motive for murder (Nares, J.)

People v. Johnson

C.A. 4th; June 29, 2018; D071011

The Fourth Appellate District affirmed judgments of conviction and remanded. The court held that the trial court did not abuse its discretion in admitting rap lyrics that supported the prosecution’s theory of motive for a murder.

In 2014, Lamar Canady was shot to death in broad daylight at his San Diego barbershop. After months of investigation, police arrested Peter Johnson and Ian Guthrie, both of whom were tried for murder. According to the prosecution, drug kingpin Omar Grant ordered a hit on Canady after Canady stole drugs from Grant and slept with Grant’s girlfriend. The hit was executed by Johnson with assistance from Guthrie and other uncharged coconspirators. Among the evidence introduced at trial was a rap song written by Canady, in which he allegedly referenced his affair with Martin and declared that his enemies were plotting to kill him and if his life was threatened, the instigator should be “ready to die.”

The jury found both men guilty and found true a firearm enhancement allegation as to Johnson.

The court of appeal affirmed, holding that the trial court did not abuse its discretion in admitting Canady’s rap lyrics into evidence. The trial court found the evidence was relevant to show motive and identity, and that the statements were hearsay but admissible under the exception for statements against penal interest. In so ruling, the trial court acknowledged the lyrics were subject to interpretation, but found this went “to the weight, not the admissibility” of the lyrics. The court of appeal agreed. The lyrics were relevant to the prosecution’s theory of the case, particularly defendants’ motive to seek revenge for Canady’s theft from Grant and relationship with Grant’s girlfriend. The lyrics tended to show that Canady was engaged in conduct that could provoke retaliation by Grant. Further, even if the evidence’s probative value was relatively low, defendants failed to show that the lyrics’ relevance was outweighed by the probability of prejudicial effect. The court rejected defendants’ remaining contentions of trial error as similarly without merit. The court remanded to the trial court to afford it the opportunity to consider whether to strike Johnson’s firearm enhancement under Senate Bill No. 620, which took effect during the pending of this appeal.
Criminal Law

“Malicious” destruction of telephone equipment not specific intent crime (Banke, J.)

People v. Quarles

C.A. 1st; July 26, 2018; A152282

The First Appellate District affirmed a judgment of conviction. The court held that a charge of “maliciously” disconnecting a telephone line did not require a showing of specific intent and thus did not entitle defendant to an instruction on voluntary intoxication.

Jeffrey Quarles assaulted his elderly father in his parents’ home. When his mother tried to call 911, Quarles yanked the phone away from her and threw it down, ejecting the batteries and disconnecting the call. Quarles was allegedly intoxicated at the time of the incident. A jury found him guilty of misdemeanor elder abuse, misdemeanor battery on an elder, and damaging a telephone line or mechanical equipment connected to the line, in violation of Penal Code §591.

On appeal, Quarles argued that §591 is a specific intent crime, and the trial court thus erred in refusing to instruct the jury on voluntary intoxication.

The court of appeal affirmed, holding that there was no instructional error. Section 591 makes it a crime to “unlawfully and maliciously” take down, remove, injure, disconnect, cut, or obstruct a telephone line. The use of the word “malice” in this context, the court found, requires no more than general criminal intent. The wording of the statute does not import any further specific intent or mental state, and the crime involves an aggressive act that may well be impulsive and triggered by voluntary intoxication. Quarles was thus not entitled to an instruction on voluntary intoxication.

Immigration Law

Consular officer’s allegedly erroneous but facially legitimate and bona fide reasons for denial of visa application barred judicial review (Bybee, J.)

Allen v. Milas

9th Cir.; July 24, 2018; 16-15728

The court of appeals affirmed a district court judgment. The court held that a consular officer’s facially legitimate and bona fide reasons for denying a visa application barred further judicial review, even though those reasons were alleged to be legally erroneous.

While stationed in Germany, U.S. Army Major Jerrid Allen married German citizen Dorothea Baer. They had three children. When Allen was ordered back to the U.S., Baer applied for a visa so she and the children could join him. A consular officer denied the application, citing prior German convictions for theft and illicit acquisition of narcotics. Baer was advised that she could apply for a waiver of her ineligibility on the grounds of theft, but that no waiver was available for her ineligibility on the grounds of the narcotics conviction.

Allen filed suit against the Consul General of the U.S. Consulate in Frankfurt, the Secretary of State, and others, arguing that the consular decision was legal error, that he had a right to judicial review under the Administrative Procedure Act, and that the district court should set aside the decision as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Allen contended that the consular officer committed legal error in identifying Baer’s theft conviction as a “crime involving moral turpitude” and in identifying her narcotics adjudication as a disqualifying “conviction” because it was a juvenile adjudication only. Finding that the denial of Baer’s application was based on “facially legitimate and bona fide” reasons, the district court dismissed Allen’s petition for failure to state a claim on which relief could be granted.

The court of appeals affirmed, holding that the doctrine of consular nonreviewability precluded the Court from reviewing the findings of a consular officer under the guise of the APA. The doctrine was addressed in Kleindienst v. Mandel, 408 U.S. 753 (1972), which reaffirmed that where Congress entrusts discretionary visa-processing and ineligibility-waiver authority in a consular officer or the Attorney General, the courts cannot substitute their judgments for those of the Executive. Rather, the only standard by which a court can review the merits of a consular officer’s denial of a visa is for constitutional error, where the visa application is denied without a “facially legitimate and bona fide reason.” Here, notwithstanding Allen’s claim of legal error, because the consular officer provided facially legitimate and bona fide reasons for rejecting Baer’s application, the doctrine of consular nonreviewability barred further review.

Tax

Related entities must share cost of employee stock compensation as part of cost-sharing arrangement in order to avoid IRS adjustment (Thomas, J.)

Altera Corporation v. Commissioner of Internal Revenue

9th Cir.; July 24, 2018; 16-70496

The court of appeals reversed a decision of the U.S. Tax Court. The court held that the Department of the Treasury complied with the Administrative Procedure Act in issuing regulations requiring related entities to share the cost of em-
employee stock compensation in order for their cost-sharing arrangements to avoid IRS adjustment.

In 2003, Treasury amended its cost-sharing regulations to provide that related entities must share the cost of employee stock compensation in order for their cost-sharing arrangements to be classified as qualified cost-sharing arrangements and thus avoid an IRS adjustment. In 2005, the U.S. Tax Court decided *Xilinx, Inc. v. Commissioner*, 125 T.C. 37 (2005), involving a challenge to the allocation of employee stock compensation costs under the 1994–1995 cost-sharing regulations. *Xilinx* held that the arm’s length standard controls the determination of costs to be shared by controlled participants in a qualified cost sharing arrangement, and that this standard “always requires an analysis of what unrelated entities do under comparable circumstances.” Relying on *Xilinx*, Altera Corporation and its U.S. subsidiaries did not account for research and development related stock-based compensation costs on their consolidated 2004–2007 federal income tax returns. The IRS issued notices of deficiency. Altera petitioned the tax court for relief.

The tax court rendered judgment in favor of Altera, finding the Treasury’s 2003 regulations, 26 C.F.R. §1.482-7A(d)(2), to be invalid under the APA. The court determined that the Commissioner’s allocation of income and expenses between related entities must be consistent with the arm’s length standard, and that the arm’s length standard is not met unless the IRS allocation can be compared to an actual transaction between unrelated entities. The court reasoned that the IRS could not require related parties to share stock compensation costs because the Commissioner had not considered any unrelated party transactions in which the parties shared such costs. The court concluded that the agency decision-making process was fundamentally flawed because it (1) rested on speculation rather than hard data and expert opinions and (2) failed to respond to significant public comments, particularly those identifying uncontrolled cost-sharing arrangements in which the entities did not share stock compensation costs.

The court of appeals reversed, holding that the challenged regulations were not arbitrary and capricious but rather a reasonable execution of the authority delegated by Congress to Treasury. In issuing the regulations, Treasury complied with the APA. It issued notice of the proposed regulations, solicited public comments, and adequately considered the comments it received. It was not, however, required to modify its proposed regulations in response to those comments. The commenters attacked the proposed regulations as inconsistent with the traditional arm’s length standard. Treasury disagreed. That disagreement did not make the rulemaking process defective. The rule-making process complied with the APA, and the disputed regulations were entitled to deference. Judge O’Malley dissenting, would affirmed the decision of the tax court.
JERRID ALLEN, Plaintiff-Appellant,
v.
KEVIN C. MILAS, Consul General, U.S. Consulate, Frankfurt, Germany; CHARLES J. WINTHEISER, Consular Section Chief, U.S. Consulate, Frankfurt, Germany; KIRSTJEN M. NIELSEN, Secretary, U.S. Department of Homeland Security; L. FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services; MIKE POMPEO, U.S. Secretary of State, Defendants-Appellees.

No. 16-15728
United States Court of Appeals for the Ninth Circuit
D.C. No. 1:15-cv-00705-MCE-SAB
Appeal from the United States District Court for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding
Argued and Submitted October 12, 2017
San Francisco, California
Filed July 24, 2018
Before: A. Wallace Tashima and Jay S. Bybee, Circuit Judges, and Matthew Frederick Leitman,* District Judge.
Opinion by Judge Bybee

* The Honorable Matthew Frederick Leitman, United States District Judge for the Eastern District of Michigan, sitting by designation.

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Audrey Hemesath (argued), Assistant United States Attorney; Phillip A. Talbert, United States Attorney; United States Attorney’s Office, Sacramento, California; for Defendants-Appellees.

OPINION

BYBEE, Circuit Judge:

Jerrid Allen petitions under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., for review of a decision by the U.S. Consulate in Frankfurt, Germany to deny a visa to his wife. Allen claims that the consular officer committed legal error in denying Mrs. Allen a visa, and that the error was “arbitrary, capricious, … or otherwise not in accordance with law.” Id. § 706(2)(A). We hold that the APA provides no avenue for judicial review in this case. Rather, the only standard by which we can review the merits of a consular officer’s denial of a visa is for constitutional error, where the visa application is denied without a “facially legitimate and bona fide reason.” Kleindienst v. Mandel, 408 U.S. 753, 769 (1972). We affirm the district court’s denial of Allen’s petition for a writ of mandamus.

Allen is a U.S. citizen and a Major in the United States Army. While stationed in Germany following deployment to Iraq, Allen married Dorothea Baer (“Mrs. Allen”), a German citizen. They now have three children. In 2013, the Army ordered Allen to return from Germany to the United States for restationing. Mrs. Allen applied for a visa so she and the children could join him. The U.S. Citizenship and Immigration Services (“USCIS”) approved Allen’s Petition for Alien Relative (“Form I-130”). But after hosting Mrs. Allen for an interview, an officer with the U.S. Consulate in Frankfurt denied her visa application, stating in relevant part:

This office regrets to inform you that your visa application is refused because you are ineligible to receive a visa under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act. On July 16, 1998, you were convicted in a German court of theft pursuant to paragraphs 242 and 248a of the German criminal code. This crime constitutes behaviour reflecting moral turpitude. The maximum punishment is over one year in prison. You are eligible to seek a waiver of the grounds of ineligibility by filing an I-601 with USCIS in the United States.

Additionally your visa application is refused because you are ineligible to receive a visa under section 212(a) (2)(A)(i)(II) of the Immigration and Nationality Act. On March 20, 1997 you were convicted in a German court for illicit acquisition of narcotics pursuant to paragraphs 242 and 248a of the German criminal code. This crime constitutes behaviour reflecting moral turpitude. The maximum punishment is over one year in prison. You are eligible to seek a waiver of the grounds of ineligibility by filing an I-601 with USCIS in the United States.

This office regrets to inform you that your visa application is refused because you are ineligible to receive a visa under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act. On July 16, 1998, you were convicted in a German court of theft pursuant to paragraphs 242 and 248a of the German criminal code. This crime constitutes behaviour reflecting moral turpitude. The maximum punishment is over one year in prison. You are eligible to seek a waiver of the grounds of ineligibility by filing an I-601 with USCIS in the United States.

… .

Additionally your visa application is refused because you are ineligible to receive a visa under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act. On March 20, 1997 you were convicted in a German court for illicit acquisition of narcotics pursuant to paragraphs 29, 25, 1 and 3 of the German criminal code. There is no waiver for this ineligibility.

The letter is signed “Consular Officer.” The consular officer’s decision rested on two statutory grounds of inadmissibility in the Immigration and Nationality Act (“INA”):

[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.


Allen brought this action in the Eastern District of California against the Consul General of the U.S. Consulate in Frankfurt, the Consular Section Chief of the same, the United States Secretary of Homeland Security, the Director of the United States Citizenship and Immigration Services, and the United States Secretary of State. Allen’s one and only cause of action was under the APA: Allen argues that the consular decision was legal error, that he had a right to judicial review under the cause of action codified at 5 U.S.C. § 702, and that the district court should set aside the decision as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” id. § 706(2)(A). Allen argues that the consular officer committed legal error when he identified Mrs. Allen’s 1997 conviction as a “crime involving moral turpitude,” because the German theft statute does not categorically require an intent to deprive a person of property permanently—which he alleges is an element of the generic offense under federal law in the United States. See Castil- lo-Cruz v. Holder, 581 F.3d 1154, 1159–61 (9th Cir. 2009). Similarly, Allen claims that the consular officer committed legal error when he identified Mrs. Allen’s 1997 conviction for illegal acquisition of narcotics under the German Criminal Code as her disqualifying “violation of…any law…relating to a controlled substance,” allegedly because those proceedings did not result in a “conviction,” as the German court applied only the ameliorative, rehabilitative, diversionary provisions of German juvenile law in consideration of Mrs. Allen’s youth. See Lujan-Armendariz v. INS, 222 F.3d 728, 742–43 (9th Cir. 2000).

The Government moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which the district court construed as a motion to dismiss for failure to state a claim under Rule 12(b)(6), and granted. The district court assumed without deciding that Allen’s constitutional rights were implicated, Bustamante v. Mukasey, 531 F.3d 1059, 1061 (9th Cir. 2008), and conducted a narrow inquiry to ensure the denial was based on “facially legitimate and bona fide reasons, and dismissed Allen’s petition for failure to state a claim on which relief can be granted.

Allen appeals. We have appellate jurisdiction under 28 U.S.C. § 1291 and we review this question of law de novo.

II

Section 1201(g)(3) of Title 8 provides that no visa shall be issued if “the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law.” In accord with this provision, the consular officer here advised Mrs. Allen of the two grounds on which he believed she was not eligible for a visa under § 1182. First, because she had been convicted of a theft offense, the consular officer determined that she was ineligible for a visa because theft is a crime involving moral turpitude. 8 U.S.C. § 1182(a)(2)(A)(i)(I). Second, the officer determined that because Mrs. Allen had been convicted of “illicit acquisition of narcotics” under German law, she was ineligible for a visa because she had been convicted of “a violation of…any law or regulation of…a foreign country relating to a controlled substance.” Id. § 1182(a)(2)(A)(i)(II).

Allen, on his own behalf as Mrs. Allen’s husband, seeks review of the consular officer’s decision under the APA. The government contends that we lack subject matter jurisdiction to review the consular officer’s decision. We will turn first to the government’s claim. Finding that we have subject matter jurisdiction, we then turn to Allen’s claim.

A

The government argues that the doctrine of consular non-reviewability means that “federal courts lack subject matter jurisdiction to review a consular officer’s issuance or refusal of a visa.” In the same breath, the government tells us that the doctrine “precludes the Court from reviewing the findings of a consular officer under the guise of the APA.” The government’s argument has conflated our power to hear “Cases” and “Controversies,” U.S. Const. art. III, § 2, cl. 1, with the scope of our review over a case in which we are properly vested with jurisdiction.


1. As an excluded noncitizen, Mrs. Allen has no personal right to entry, nor a right to judicial review absent a personal detention by the United States. In that case she could challenge her detention by writ of habeas corpus. See 28 U.S.C. § 2241; INS v. St. Cyr, 533 U.S. 289, 301–04 (2001).
are subject to judicial review.” 5 U.S.C. § 704. Any person “suffering legal wrong” or “adversely affected or aggrieved by agency action” may bring an action in federal court for “relief other than money damages,” id. § 702. These provisions of the APA waive the sovereign immunity of the United States, but such a waiver is on its terms neither coextensive with subject matter jurisdiction nor a guarantee of a federal forum. See United States v. Park Place Assoc., Ltd., 563 F.3d 907, 923–24 (9th Cir. 2009). “It is beyond question … that the APA does not provide an independent basis for subject matter jurisdiction in the district courts.” Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998); see Califano v. Sanders, 430 U.S. 99, 107 (1977) (“[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.”). Although the Declaratory Judgment Act and the APA do not provide for subject matter jurisdiction in this case, unless some other provision deprives the district court of jurisdiction, § 1331 supplies ample basis for its subject matter jurisdiction.

The government cites no provision from Title 28, the INA, or the APA that would divest the district court of subject matter jurisdiction in this case. Instead, it cites four of our cases for the proposition that the doctrine of consular nonreviewability deprives courts of subject matter jurisdiction. Rivas v. Napolitano, 714 F.3d 1108, 1111 (9th Cir. 2013); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986); Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981); Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1969). We admit that some statements in these cases might be read to suggest the district courts lack subject matter jurisdiction over cases in which a plaintiff requests the court order a consular officer to issue a visa, but the cases cannot bear the weight the government places on them.

In the earliest of these cases, Loza-Bedoya, we stated that a consular officer’s “determination is not subject to either administrative or judicial review.” Id. Loza-Bedoya had been excluded because of a conviction of assisting unlawful entry into the United States, but Loza-Bedoya claimed this was error. We stated that “a correction of the record would not in any manner affect the deportation [Loza] seeks to avoid.” Id. We then stated, infelicitously, that “[t]hough erroneous this Court is without jurisdiction to order an American consular official to issue a visa to any alien whether excludable or not.” Id. (emphasis added). By “jurisdiction” we could not have meant subject matter jurisdiction because, in the end, we found there was “no abuse [of discretion] and affirm[ed] the final order of deportation.” Id. Had we been convinced that we lacked subject matter jurisdiction, we could not have reviewed the officer’s exercise of discretion, and we would have dismissed the action rather than affirm the judgment.

In Ventura-Escamilla, we stated that “review of the Consul’s decision denying [an] application for a visa” was “beyond the jurisdiction of the Immigration Judge, the BIA, and this court.” 647 F.2d at 30. However, we were not discussing subject matter jurisdiction, but rather the origins and context of the doctrine of consular nonreviewability. Affirming the decision of the BIA, we concluded we were “without power to substitute [our] judgment for that of a Consul … on the issue of whether a visa should be granted or denied.” Id. at 32. Our passing reference to “jurisdiction” went to our remedial power—our power to “substitute [our] judgment”—not our adjudicatory power. Id. at 33.

In Li Hing, the U.S. Consulate in Hong Kong denied a visa to a noncitizen employee who was to be transferred by his U.S. employer from Hong Kong to California. We affirmed dismissal of the suit because “[e]xercising jurisdiction over this case would … violate the long-recognized judicial nonreviewability of a consul’s decision to grant or deny a visa.” 800 F.2d at 971. Our choice of language was unfortunate, because elsewhere in the opinion we stated the rule of consular nonreviewability thusly: “the consular official’s decision to issue or withhold a visa is not subject either to administrative or judicial review.” Id. (citing, inter alia, Mandel). Thus, we were “without power to substitute [our] judgment for that of a Consul.” Id. (citation omitted). That was not to say that the district court lacked subject matter jurisdiction over the case. Rather, by “jurisdiction” we meant that the district courts lack the power to grant the relief requested—“substitut[ing] [our] judgment for that of a Consul”—and thus evaluation of the merits of Li Hing’s case was foreclosed by judicial nonreviewability.” Id. (quoting Ventura-Escamilla, 647 F.2d at 32).

Most recently, in Rivas, we reviewed two claims brought by Mr. Rivas and his daughter, noncitizens, arising out of the consulate’s denial of their visas. 714 F.3d at 1110. The district court found that “the doctrine of consular nonreviewability deprived the court of subject matter jurisdiction to review the consular official’s discretionary decisions.” Id. at 1110. Citing Li Hing, we observed that “[f]ederal courts are generally without power to review the actions of consular officials.” We noted two exceptions to this “without power” rule: First, where the official has failed to act at all. Id. (citing Patel v. Reno, 134 F.3d 929, 931–32 (9th Cir. 1997)). Second, where “a U.S. citizen’s constitutional rights are alleged to have been violated by the denial of a visa to a foreigner without a ‘facially legitimate and bona fide reason’ for the denial.” Id. (quoting Bustamante, 531 F.3d at 1060). Finding that “neither of the exceptions to the doctrine of consular nonreviewability apply,” we simply “affirm[ed] the district court’s denial of Riva’s claims … for lack of subject matter jurisdiction.” Id. at 1110, 1111. The two brief references to subject matter jurisdiction—one a description of what the district court did, and the second our affirming what the district court did—are the beginning and the end of our analysis of subject matter jurisdiction. As with Li Hing, Ventura-Escamilla, and Loza-Bedoya, we should not read too much into such passing references. We were undoubtedly correct when we wrote that we are generally “without power” to review a consular official’s decision, but we may lack the power to do
many things in cases in which we are fully vested with subject matter jurisdiction. That we considered in Rivas several “exceptions” to the “doctrine of consular nonreviewability” shows that we could not have been referring to district court’s power to hear the case in the first place.

That power—the federal courts’ subject matter jurisdiction, including our appellate jurisdiction—is conferred by Article III of the Constitution, subject to “such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const. art. II, § 2, cl. 1, 2. See Bowles v. Russell, 551 U.S. 205, 212 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.”). No statute purports to strip us of jurisdiction over consular decisions; nor does any statute purport to confer subject matter jurisdiction over the two exceptions we described in Rivas. See Trump v. Hawaii, No. 17-965, 2018 WL 3116337, at *8, slip op. at 9 (U.S. June 26, 2018) (“The Government does not argue that the doctrine of consular nonreviewability goes to the Court’s jurisdiction, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs’ claims.”) (citations omitted). The doctrine of consular nonreviewability, which is judicial in origin, is surely informed by our respect for the separation of powers, but it is not, for that reason, a constraint on subject matter jurisdiction; our deference goes to our willingness, not our power, to hear these cases. Understandably, we have sometimes treated the doctrine of consular nonreviewability as though it were a constraint on our subject matter jurisdiction because it appears to function in the same way as such constraints. But a rule of decision is different from a constraint on subject matter jurisdiction, even if the result is roughly the same for the parties. See Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 89 (1998) (“[T]he absence of a valid … cause of action does not implicate subject-matter jurisdiction, i.e., the courts’ statutory or constitutional power to adjudicate the case.”) (emphasis in original).

We are not the only court to have had such looseness in our language. “Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis.” Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010). The Court has thus admonished that “the word ‘jurisdiction’ has been used by courts … to convey ‘many, too many, meanings,’” and has cautioned “against profligate use of the term.” Union Pac. R.R. Co. v. Bhd. of Teamsters Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009) (quoting Steel Co., 523 U.S. at 90). The Court later explained that because “[j]urisdiction” refers to “a court’s adjudicatory authority,” the term “properly applies only to ‘prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating [the court’s adjudicatory] authority.” Reed Elsevier, 559 U.S. at 160–61 (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004)).

Over time, we have all “miss[ed] the ‘critical difference[s]’ between true jurisdictional conditions and nonjurisdictional limitations on causes of action.” Id. at 161 (quoting Kontrick, 540 U.S. at 456).

We conclude that the district court had subject matter jurisdiction in this case under 28 U.S.C. § 1331 and the doctrine of consular nonreviewability did not strip the district court of that jurisdiction. Subject matter jurisdiction over this class of claims, otherwise amply provided here by the federal question statute, is constrained only if we identify and apply some “prescriptive delineation,” and the government has not pointed to any. The rule at issue here, that is, the rule of consular nonreviewability, supplies a rule of decision, not a constraint on the subject matter jurisdiction of the federal courts. See Fiallo v. Bell, 430 U.S. 787, 795–96 n.6 (1977) (denying that “the Government’s power in this area [of immigration] is never subject to judicial review,” but “only to limited judicial review”); Matthes v. Díaz, 426 U.S. 67, 81–82 (1976) (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”); Mattushkina v. Nielsen, 877 F.3d 289, 294 n.2 (7th Cir. 2017) (“We treat the doctrine of consular nonreviewability as a matter of a case’s merits rather than the federal courts’ subject matter jurisdiction.”). We discuss consular nonreviewability and Mandel in greater detail below, but it suffices at present to observe that the Court’s “facially legitimate and bona fide” standard is not the language of subject matter jurisdiction, but the language of the discretion courts afford consular officers. It is a scope of review, the contours of which we turn to now. The district court was correct to treat the government’s Rule 12(b)(1) motion as a motion under Rule 12(b)(6).

B

The core of Allen’s petition is that he was entitled to judicial review of the non-issuance of his wife’s visa under the “scope of review” provisions of the APA found in § 706. More particularly, Allen contends that the consular officer failed to apply the appropriate legal standards to Mrs. Allen’s German convictions, and that this legal error renders the consular officer’s decision “arbitrary, capricious, and otherwise not in accordance with law.”

We start with some first principles. The APA provides the fundamental framework for how executive agencies are expected to conduct business. It prescribes the rules by which agencies may promulgate regulations, 5 U.S.C. § 553, and conduct adjudications, id. §§ 554–58. The APA provides for judicial review of agency decisionmaking, id. §§ 701–06. “Agency” is defined by the statute as “each authority of the Government of the United States, whether or not it is within
or subject to review by another agency.” *Id.* § 701(b). Congress may exempt an agency altogether from the APA, *id.* § 551(1), or from its judicial review provisions, *id.* § 701(b)(1). Congress may also preempt application of some or all of the APA, such as by expressly providing for an otherwise inconsistent procedure or standard for judicial review. See *id.* §§ 701(a)(1)–(2), 702(1)–(2); *Marcello v. Bonds*, 349 U.S. 302, 305–10 (1955). It is undisputed here that the Department of State is an agency for purposes of the APA. See *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015).

The immigration laws provide a good example of these principles. Shortly after the APA was adopted in 1946, the Supreme Court held that the APA’s provisions relating to adjudicatory hearings governed deportation hearings. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48–51 (1950). Just months later, Congress exempted such hearings from the APA. Supplemental Appropriation Act, Pub. L. 81–843, 64 Stat. 1044, 1048 (1951) (“Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act.”). Following Congress’s adoption of comprehensive immigration reform, see Immigration and Nationality Act of 1952, Pub. L. 82–414, 66 Stat. 163 (1952) (INA), the Court held in *Marcello* that the Congress had not reinstated the APA as the framework for immigration hearings. 349 U.S. at 305–10. The Court observed that in the INA “Congress was setting up a specialized administrative procedure . . . , drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to the particular needs of the deportation process.” *Id.* at 308. But where Congress “depar[t]ed from the Administrative Procedure Act . . . it was the intention of the Congress to have the deviation apply and not the general model.” *Id.* at 309. Congress confirmed this when it provided that “[t]he procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section.” *Id.* (quoting 8 U.S.C. § 1252(b) (1952)). The INA thus gave a “clear and categorical direction . . . meant to exclude the application of the Administrative Procedure Act.” *Id.*; see also *Ardestani v. INS*, 502 U.S. 129 (1991) (applying Marcello, and noting that the attorneys fees provisions of the Equal Access to Justice Act, 5 U.S.C. § 504, do not apply to removal proceedings); *Heikkila v. Barber*, 345 U.S. 229, 235–36 (1953) (finding the APA inapplicable in light of the finality provisions of the predecessor statute to the INA).

We recognize that the APA’s judicial review provisions supply a “strong presumption that Congress intends judicial review of administrative action.” *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Sections 701–06 of the APA supply a “default rule . . . that agency actions are reviewable under federal question jurisdiction . . . even if no statute specifically authorizes judicial review.” *ANA Int’l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004). The presumption of judicial reviewability is so strong that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)); see also *Dickinson v. Zurko*, 527 U.S. 150, 154, 155 (1999) (because of “the importance of maintaining a uniform approach to judicial review of administrative action,” any “departure from the norm must be clear”). Even in the immigration context, that is, the context of adjudicating matters affecting claims brought by those wishing to acquire constitutional rights, we have never abrogated our “[j]udicial supremacy” to order relief if, in any individual case, “fundamentals were violated”:

Judicial supremacy has been maintained upon the ground that our government is founded upon law. It is incumbent upon the executive, whether elective or by divine right as a Stuart king, to act according to rules of law. There is no doctrine of omnipotence of Parliament here as there is in England. Therefore, even final action of an administrative agency, although declared unappealable by legislation, has always been subject to attack in court if fundamentals were violated.

*Bustos-Ovalle v. Landon*, 225 F.2d 878, 880 (9th Cir. 1955).

Nevertheless, the APA itself anticipates that, on occasion, Congress might itself abrogate the presumption of judicial review. First, the APA recognizes that a statute may preclude judicial review. 5 U.S.C. § 701(a)(1). Second, the APA provides that its judicial review provisions do not apply where “agency action is committed to agency discretion by law,” *id.* § 701(a)(2), a “rare instance[] where statutes are drawn in such broad terms that in a given case there is no law to apply.” *Webster v. Doe*, 486 U.S. 592, 599 (1988) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)); see also, e.g., *Ekimian v. INS*, 303 F.3d 1153, 1157–58 (9th Cir. 2002) (finding no judicially reviewable standard to examine BIA decision’s not to reopen a case). The government does not contend that either of these exceptions to judicial review applies.

The APA recognizes two other instances in which at least some provisions of §§ 701–06 might not apply. Section 702 confers the broad right to judicial review and sets out the cause of action, but then concludes in limiting fashion:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

This narrows our focus: Is the doctrine of consular nonreviewability either (1) a “limitation[] on judicial review” or (2) based on statutes that “impliedly forbid[] the relief which is sought”? In other words, is Allen entitled to APA review of
the consular official’s decision not to issue his wife a visa, or is the standard set forth in Mandel his only avenue for judicial relief? The D.C. Circuit has addressed this precise question, and it concluded that Mandel supplies the only standard by which the federal courts can review a consular officer’s decision on the merits. Saavedra Bruno v. Albright, 197 F.3d 1153, 1162–63 (D.C. Cir. 1999). We start with Mandel and the rule of consular nonreviewability, and we then turn to Saavedra Bruno.

We have long recognized that “ordinarily, a consular official’s decision to deny a visa to a foreigner is not subject to judicial review.” Bustamante, 531 F.3d at 1060; see also Li Hing, 800 F.2d at 970–71; Ventura-Escamilla, 647 F.2d at 30–31. The rule is based on “the recognition that the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government.” Ventura-Escamilla, 647 F.3d at 30; see also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542–43 (1950); Kaoru Yamataya v. Fisher, 189 U.S. 86, 97–98 (1903). Unless we are otherwise “authorized by treaty or by statute,” or where we are “required by the paramount law of the constitution[] to intervene,” Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893)), Congress may “prescribe the terms and conditions upon which [noncitizens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.” Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); see also Fok Yung Yo v. United States, 185 U.S. 296, 305 (1902) (“Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country.”). If our review is not required by some other provision of law, such as the Constitution, the APA, or the INA, the long-standing rule foreclosing review of the merits of consular visa decisions is precisely the kind of “limitation[] on judicial review” or “implied” prohibition on relief that forms an exception to the APA’s cause of action and review provisions. 5 U.S.C. § 702(1), (2).

In Mandel, the Court reaffirmed that where Congress entrusts discretionary visa-processing and eligibility-waiver authority in a consular officer or the Attorney General, the courts cannot substitute their judgments for those of the Executive. 408 U.S. at 769–70. But the Court also recognized a narrow exception for review of constitutional claims. Belgian Marxist Ernest Mandel was denied a visa to visit the United States for academic activities. Id. at 756–57. He and six American professors brought suit challenging the Attorney General’s failure to waive Mandel’s eligibility, claiming injury to the professor plaintiffs’ First Amendment rights. Id. at 760. A divided three-judge district court held that the professor plaintiffs had a First Amendment right to hear Mandel’s views, and that plaintiffs’ were entitled to an order enjoining the Attorney General from denying Mandel admission to the United States. Mandel v. Mitchell, 325 F. Supp. 620, 632–33 (E.D.N.Y. 1971). Reversing, the Supreme Court began with the proposition that Mandel had no right of entry and thus no personal right to judicial review. 408 U.S. at 762. The Court assumed the professor plaintiffs had First Amendment rights to hear Mandel speak, and sought a means to balance their rights against Congress’s grant of discretionary waiver authority to the Attorney General. It did so against the presumption of consular nonreviewability that had embedded itself as a rule of decision, the provenance of which the Court was “not inclined in the present context to reconsider.” Id. at 767. Rejecting Mandel’s request for an “arbitrary and capricious” standard of review, id. at 760, the Court recognized an exception to the rule of consular nonreviewability for review of constitutional claims. The exception itself is quite narrow, requiring deference to the consular officer’s decision so long as “that reason was facially legitimate and bona fide.” Id. at 769. The Court concluded:

We hold that when the Executive exercises this power [of exclusion] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, not test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 770.

The Court returned to Mandel in Fiallo v. Bell, 430 U.S. 787 (1977). There, three sets of fathers and sons challenged immigration laws giving preference to natural mothers of “illegitimate” children, thereby alleging constitutional injury through “‘double-barreled’ discrimination based on sex and illegitimacy.” Id. at 788, 794. The government argued that these claims were not subject to judicial review at all, a claim the Court rejected. But the Court also rejected any review beyond that set out in Mandel: “We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in Kleindienst v. Mandel.” Id. at 795.

The Mandel rule was again upheld in Din. 135 S. Ct. at 2141. Din, a U.S. citizen, challenged a consular officer’s decision to deny an entry visa to her husband, and sought a writ of mandamus and a declaratory judgment to remedy her alleged constitutional injury arising out of the visa denial. Id. at 2131–32 (plurality opinion of Scalia, J.). Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, found in a plurality opinion that Din had no such constitutional right and so received the process due. Id. at 2138–40. But Justice Kennedy, joined by Justice Alito, concurred in the judgment alone, in the narrowest and thus controlling opinion in that case. See Cardenas v. United States, 826 F.3d 1164, 1171 (9th Cir. 2016). Justice Kennedy found it unnecessary to answer
whether Din had a protected constitutional interest, because even assuming she did “[t]he reasoning and the holding in Mandel control here.” Di n, 135 S. Ct. at 2139, 2140 (Kennedy, J., concurring in the judgment). Moreover, Mandel “extends to determinations of how much information the Government is obliged to disclose about a consular officer’s denial of a visa to an alien abroad.” Id. at 2141. In Din, the consular officer offered no explanation other than a citation that he was entitled to review for the purpose of challenging Saavedra Bruno, he brought suit under the APA, arguing the consular officer’s allegedly nondiscretionary duty.

Id. at 2162. From this the court deduced that “[i]n terms of APA § 702(1), the doctrine of consular nonreviewability— the origin of which predates passage of the APA,” constitutes precisely such a “limitation[] on judicial review” unaffected by § 702’s otherwise glad-handing statutory cause of action and right of review to those suffering “‘legal wrong’ from agency action.” Id. at 1160 (quoting 5 U.S.C. § 702). In sum, “the immigration laws preclude judicial review of consular visa decisions.” Id. at 1162; see also Morfin v. Tillerson, 851 F.3d 710, 714 (7th Cir. 2017) (rejecting a claim brought under the APA that a consular decision was arbitrary and capricious and not supported by substantial evidence, and concluding that “the denial of a visa application is not a question open to review by the judiciary”).

We agree with the D.C. Circuit’s analysis and conclusion in Saavedra Bruno. If Allen were correct, then constitutional claims would be reviewable under the limited Mandel standard, and nonconstitutional claims would be reviewable under the APA; in other words, all claims would be reviewable under some standard. Allen’s theory converts consular nonreviewability into consular reviewability. The conclusion flies in the face of more than a century of decisions limiting our review of consular visa decisions. Allen attempts to narrow our focus to legal error, which he argues is within the province of the judiciary. We reject his argument for several reasons. First, the burden the INA places on consular officers—who may or may not have any formal legal training—is not to make legal determinations in a way that an administrative agency (such as the BIA) or a court might do. Rather the officer is charged with adjudicating visas under rules prescribed by law, and the officer is instructed not to issue a visa if the officer “knows or has reason to believe that such alien is ineligible to receive a visa” under any provision of law. 8 U.S.C. § 1201(g)(3). 3

Second, the distinction Allen presses for would eclipse the Mandel exception itself. The claims in Mandel, Fiallo, and Din were all legal claims. To be sure, they were legal claims based on the law of the Constitution, as opposed to statutory law, but we fail to see why legal claims based on statute should receive greater protection than legal claims based on the Constitution. Indeed, we think the Court has already rejected such an argument in Webster, 486 U.S. at

2. In addressing a series of challenges to an executive order affecting the issuing of entry visas to foreign nationals from eight countries, the Court stated that “[a] conventional application of Mandel, asking only whether the policy is facially legitimate and bona fide, would put an end to our review.” 2018 WL 3116337, at *21, slip op. at 32. The Court, however, did not end its analysis with Mandel, but “assume[d]” “[f]or our purposes today” that it could look behind the executive order and apply rational basis review. Id.

In this case, we do not have broad constitutional challenges to an executive policy. Indeed, Allen does not raise a constitutional challenge at all, only a statutory challenge. We will confine our focus to the only relief Allen seeks—review under the APA.

3. During oral argument, Allen’s counsel acknowledged that the phrase “knows or has reason to believe,” when used elsewhere in the INA, see, e.g., 8 U.S.C. § 1182(a)(2)(C), does confer discretion to deny visa applications. We do not see how Allen can reconcile that position with his insistence that a consular officer makes a purely legal decision when, acting under 8 U.S.C. § 1201(g)(3), the officer denies a visa on the basis of the officer’s “reason to believe” that the applicant has been convicted of an offense rendering the applicant inadmissible.
594. There the Court addressed whether a statute giving the Director of the CIA blanket authority to terminate any officer or employee when deemed “necessary or advisable in the interests of the United States,” rendered the Director’s decisions unreviewable under § 701(a)(2). Id. at 594, 601 (quoting 50 U.S.C. § 403(c)). Although the Court found that Doe’s claims could not be reviewed under the APA, it did find that Doe could nonetheless otherwise raise constitutional claims arising out of his termination, namely that his termination deprived him of liberty and property interests, denied him equal protection under the law, and impaired his right to privacy. Webster, 486 U.S. at 601–05. After Webster, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims. See, e.g., Am. Fed’n of Gov’t Employees Local 1 v. Stone, 502 F.3d 1027, 1034–39 (9th Cir. 2007). Allen’s argument would flip Webster on its head: Statutory arguments would be subject to full APA review even if constitutional arguments, per Mandel, are not. We find no support for Allen’s position.

Allen also argues that we have previously applied APA review to consular decisions. The cases cited by Allen do not help him. We subjected a State Department decision to APA review in ASSE Int’l Inc., 803 F.3d at 1064–68. But it was not a consular visa decision that we reviewed, but rather a State Department decision to disqualify a U.S.-based third-party sponsor participating in the Exchange Visitor Program. Id. Similarly, Singh v. Clinton, 618 F.3d 1085 (9th Cir. 2010), also did not concern a challenge to a consular officer’s adjudication of the noncitizen’s visa application, but rather was a suit against the State Department for failure to follow the INA and its own regulations. Singh does not guide us here. Patel v. Reno, 134 F.3d 929 (9th Cir. 1997), likewise does not aid Allen’s argument. Patel did involve the non-issuance of a visa. But what we faced was the State Department’s failure to issue any decision on a visa application at all, a clear violation of a nondiscretionary duty, as “[a] consular office is required by law to act on visa applications,” because “[i]ssuance or refusal [is] mandatory.” Id. at 932 (quoting 22 C.F.R. § 42.81). In other words, a visa application must be adjudicated one way or the other. We acknowledged the consular nonreviewability principle, but distinguished the case as one that “challenges the authority of the consul to take action as opposed to a decision taken within the consul’s discretion.” Id. at 931–32. We remanded with instructions “to order the consulate to either grant or deny the visa applications.” Id. at 933.4

4. We are not persuaded by Allen’s references to Wong v. Department of State, 789 F.2d 1380 (9th Cir. 1986), or Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965). In Wong, the State Department revoked the nonimmigrant visas of Mr. Wong’s wife and children after the family had arrived in the United States from Hong Kong. Id. at 1381–82. We held that the consular officer’s grounds for such revocation—that Mrs. Wong and the children had failed to attend the visa interview in Pago Pago—fell outside the limited “authorized grounds for visa revocation.” Id. at 1386. As such, like Patel, Wong found that “[t]he consular officer had no authority to conduct the act complained of.” Id. In We join the D.C. Circuit in holding that the APA provides no avenue for review of a consular officer’s adjudication of a visa on the merits. Whether considered under § 702(1) or (2), the doctrine of consular nonreviewability is a limitation on the scope of our judicial review and thus precludes our review under § 706. Allen raises no claim to review under Mandel, and regardless, we agree with the district court that the consular officer’s citations to the INA and identification of Mrs. Allen’s criminal history constituted facially legitimate and bona fide reasons for rejecting her visa application.

III

We are sympathetic to Major Allen’s efforts to unite his family in the United States during his next military assignment. Section 706 of the APA, however, provides no avenue for our review of the consular officer’s decision.

The judgment of the district court is AFFIRMED.

Braude, California growers sought review under what is now § 706 of visa denials to Mexican laborers. We never reached the § 706 question because we held the growers lacked standing. 350 F.2d at 708.
An important remedy under the Copyright Act provides that courts “may” award attorney’s fees to a prevailing party in an infringement action. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Supreme Court laid out factors to guide discretion in whether to award fees. Because the district court did not faithfully apply the “Fogerty factors” in this meritorious BitTorrent action, we reverse and remand for consideration of an award of reasonable attorney’s fees. The court’s denial of fees under the present circumstances—based on a one-size-fits-all disapproval of other BitTorrent suits—requires a remand.

BACKGROUND

For context, we discuss the proliferation of peer-to-peer Internet piracy suits before clicking through to the specifics of this case.

PEER-TO-PEER INTERNET PIRACY SUITS

Peer-to-peer networking involves a “decentralized infrastructure whereby each participant in the network . . . acts as both a supplier and consumer of information resources.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1024 (9th Cir. 2013). In other words, “peers” download content from fellow peers, while leaving their own folders of digital content available for others to download. One type of peer-to-peer networking involves the BitTorrent protocol, in which a file is broken up into smaller pieces from various peers and then reassembled upon completion of a download. See *AF Holdings*, 752 F.3d at 998. With BitTorrent, “each user is both downloading and uploading several different pieces of a file from and to multiple other users.” *Fung*, 710 F.3d at 1027. Peer-to-peer networks like BitTorrent are “ideally suited for sharing large files, a feature that has led to their adoption by, among others, those wanting access to pirated media, including music, movies, and television shows.” *Id.* at 1025; see also *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–20 (2005).

Digital piracy of copyrighted materials on peer-to-peer networks can have severe financial consequences for copyright holders. As one member of Congress put it:

Under U.S. law, stealing intellectual property is just that—stealing. It hurts artists, the music industry, the movie industry, and others involved in creative work. And it is unfortunate that the software being used—called “file sharing,” as if it were simply enabling friends to share recipes, is helping create a generation of Americans who don’t see the harm.

1. See, e.g., *AF Holdings, LLC v. Doe* 1–1058, 752 F.3d 990, 992 (D.C. Cir. 2014); In re *BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y. 2012).

2. The parties consented to a magistrate judge for all district court proceedings, including the entry of final orders. Hence, we review directly the magistrate judge’s order denying fees. We refer to the magistrate judge as “the district court” or “the court” throughout the opinion.
To combat losses from peer-to-peer file sharing, copyright holders have filed a spate of lawsuits against infringers in federal courts across the country. See, e.g., BMG Rights Mgmt. (US) LLC v. Cox Comms’ns, Inc., 881 F.3d 293, 298–99 (4th Cir. 2018); Killer Joe Nevada, LLC v. Does 1–20, 807 F.3d 908, 910 (8th Cir. 2015); Dallas Buyers Club, LLC v. Madsen, No. C14-1153RAJ, 2015 WL 6680260, at #1 (W.D. Wash. Nov. 2, 2015) (noting that the action is “one of 13 practically identical cases filed” alleging BitTorrent users’ infringement of the movie Dallas Buyers Club).

Facing a “large number of similar peer-to-peer copyright infringement cases,” in March 2016 the United States District Court for the District of Oregon sought a practical solution and established special procedural rules in a “Case Management Order.” See U.S. District Court for the District of Oregon, Standing Order 2016-8, available at https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/standing-orders/active-standing-orders#civil-matters (last accessed July 11, 2018). Among other things, the Order allows copyright holders to seek limited discovery from an Internet Service Provider to establish a potential infringer’s identity, directs that holders must alert potential defendants of the availability of pro bono counsel to defend against infringement claims, and limits holders to suing one alleged BitTorrent infringer at a time.

**GLACIER’S LAWSUIT IN OREGON**

Glacier Films (USA), Inc. and Glacier Films 1, LLC (collectively, “Glacier”) hold valid and enforceable copyrights in the film American Heist. Scheduled for widespread theatrical release in January 2015, Heist instead leaked prematurely on BitTorrent, where it became a top downloaded (i.e., pirated) movie. According to Glacier, over 100,000 Internet Protocol (“IP”) addresses illegally downloaded and exchanged the copyrighted film on BitTorrent.

Tracking one such infringing IP address to Oregon, Glacier brought suit in district court against the John Doe owner and subpoenaed records from Comcast to ascertain the Doe’s identity. Glacier selected that particular IP address because the user distributed the film 80 times and was associated with over 700 other titles. When records revealed Andrey Turchin as the owner of the IP address, Glacier sent two letters seeking his participation in determining who downloaded the movie. After Turchin proved non-responsive, Glacier obtained leave to depose him. At his deposition, Turchin admitted to downloading copyrighted content with that IP address, right up until the day before his deposition.

Glacier amended its complaint to name the avid BitTorrent user as the single defendant and sent Turchin a letter advising him of the district court’s pro bono program so that he could obtain assistance in filing a responsive pleading. After nearly three months of attempting to contact Turchin, Glacier filed a motion for default. The court appointed pro bono counsel, who filed an answer raising various affirmative defenses, denying liability, and seeking costs and attorney’s fees. On that same day, Turchin provided Glacier with a Rule 68 Offer of Judgment in which Turchin offered to pay $2,501 to Glacier in exchange for Glacier’s agreement that the sum would satisfy all debts and obligations related to the suit, including any claim for damages, costs and attorney’s fees. A few days later, Turchin filed an amended answer removing five of the seven affirmative defenses, but continuing to deny liability and maintaining his own request for costs and fees.

After conferring, the parties reached a stipulated consent judgment. Per the agreement, Turchin stipulated to the “allegations that give rise to liability for the infringement of [Glacier’s] rights” and to $750 in statutory damages. The court permanently enjoined Turchin from using the Internet to reproduce, copy or publish American Heist, and ordered him to immediately delete any unlicensed copies of the movie in his possession. The parties agreed that “any award of reasonable attorneys fees shall be determined by the [c]ourt in accordance with 17 U.S.C. § 505 and pursuant to [Federal Rule of Civil Procedure] 54.” Glacier moved for costs of $791.70 and attorney’s fees totaling $4,833.35. The court awarded costs to Glacier but denied any attorney’s fees.

**ANALYSIS**

The Copyright Act, coupled with expansive precedent from both the Supreme Court and our court, lay the foundation for our analysis. The statute states simply that the district court “may . . . award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. Although the court enjoys “wide latitude to award attorney’s fees based on the totality of circumstances in a case,” its discretion must remain tethered to judicial guideposts. Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979, 1985 (2016).

The Supreme Court in Fogerty provided a nonexclusive list of factors for courts to consider in making a fee determination: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” 510 U.S. at 534 n.19; see also Kirtsaeng, 136 S. Ct. at 1985. We have added factors that “may be considered” and “need not all be met”: the degree of success obtained in the litigation, the purpose of the Copyright Act, and “whether the chilling effect of attorney’s fees may be too great or impose an inequitable burden on an imppecunious [litigant].” Perfect 10, Inc. v. Gi-
ganews, Inc., 847 F.3d 657, 675 (9th Cir. 2017). We recently re-affirmed our commitment to these factors, but emphasized that district courts should “accord substantial weight to” the “reasonableness of [the] losing party’s legal and factual arguments.” Shame On You Prods., Inc. v. Banks, 893 F.3d 661, 666 (9th Cir. 2018); see also Kirtsaeng, 136 S. Ct. at 1989 (giving the factor “significant weight”).

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN APPLYING THE FACTORS

Although the court properly cited all of the Supreme Court and Ninth Circuit factors, it focused on three—“minimal success” in the litigation, the lack of need for further deterrence, and the goals of the Copyright Act. The court’s analysis was infused with criticism of other BitTorrent cases as well as a critique of Glacier’s counsel in other file sharing litigation. While we understand that prolific BitTorrent litigation has taxed the courts and that the District of Oregon has adopted a sensible way to manage its dockets, individual cases nonetheless deserve to be judged on their own merits and not saddled with a blanket indictment against peer-to-peer copyright litigation. The sheer volume of suits should not preordain a court’s fee determination in any one suit. Nor should an individual client, such as Glacier, be penalized for the tactics of its counsel in other cases.

For these and the more specific reasons explained below, we conclude that the court misapplied the factors on which it focused while omitting analysis of other factors that may counsel toward an award of fees—including the unreasonableness of the losing party’s (Turchin’s) conduct.

A. THE DEGREE OF SUCCESS IN THE LITIGATION

The district court noted that Glacier’s suit was “not frivolous,” but went on to conclude that its success was “minimal.” In fact, Glacier’s infringement suit against Turchin was a “total success.” Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 890 (9th Cir. 1996). Glacier alleged that Turchin copied and distributed American Heist through a public BitTorrent network without Glacier’s permission; Turchin’s actions infringed on Glacier’s exclusive rights under the Copyright Act; and Turchin’s conduct was “willful, intentional, in disregard of and indifferent to [Glacier’s] rights with the intent to deprive [Glacier] of income and cause [Glacier] harm.” Turchin stipulated to those facts giving rise to liability and to $750 in statutory damages for violating the Copyright Act.5 Despite Glacier’s complete victory, the district court did not weigh the degree of success in the litigation in Glacier’s favor; instead, the court twisted total triumph into a conclusion that “the degree of success in each of these BitTorrent copyright cases is minimal.”

The court’s reasons for reaching this unexpected outcome lack support in the law and the record. To begin, the court observed that “the $750 statutory damage award Defendant has agreed to pay is low in relation to the amount of attorney fees Plaintiffs have accrued ($4,833.45), to achieve that result.” This is a flawed premise that mixes and matches actual success with the determination of a reasonable fee award. Actual success in an infringement action involves establishing the defendant’s liability. See Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t, 447 F.3d 769, 787 (9th Cir. 2006) (affirming an award of fees under the appropriate factors and noting that a “plaintiff will ordinarily be regarded as the prevailing party if he succeeds . . . in establishing the defendant’s liability, even if the damages awarded are nominal or nothing”). An award of a “reasonable” attorney’s fee requires a separate determination of an amount, which may consider the hours worked among other factors. See The Traditional Cat Ass’n, Inc. v. Gilbreath, 340 F.3d 829, 832–33 (9th Cir. 2003) (“In applying [17 U.S.C. § 505], district courts are charged with two tasks: first, deciding whether an award of attorneys’ fees is appropriate, and second, calculating the amount of fees to be awarded.”).

The court did not cite any precedential authority that a small (and agreed upon) amount of statutory damages is a reflection of “minimal success.” To the contrary, we have expressed concern that a “small award for damages,” without fees, may be “insufficient to deter future copyright infringements such as the one at issue here.” Magnuson v. Video Yes-teryear, 85 F.3d 1424, 1432 (9th Cir. 1996); see also Wall Data Inc., 447 F.3d at 787.

The Seventh Circuit has gone so far as to announce a “presumptive entitlement” to fees for a “prevailing party in a copyright case in which the monetary stakes are small.” Gonzales v. Transfer Techs., Inc., 301 F.3d 608, 610 (2002) (citing Magnuson, 85 F.3d at 1432). We do not adopt such a presumption because doing so would collide with Supreme Court guidance and is not consistent with the statute. See Kirtsaeng, 136 S. Ct. at 1988–89 (underscoring that “§ 505 confers broad discretion on district courts” and rejecting an approach that effects a presumption of fees under certain circumstances). Nevertheless, the policy rationale underlying the presumption—that “willful infringements involving small amounts of money” may not be “adequately deterred” absent an award of fees—is a principle that bears on the calculus of whether to award fees. Gonzales, 301 F.3d at 609–10.

As a factual matter, we consider it curious that the district court focused on the $750 statutory damages amount. In doing so, the district court elided that Turchin offered to pay Glacier $2,501 in exchange for Glacier’s agreeing that the sum would satisfy all debts and obligations related to Glacier’s lawsuit, including any claim for damages, costs and attorney’s fees. That Glacier’s counsel rejected the $2,501 offer in favor of $750 in stipulated damages and the oppor-

5. The parties contest whether the stipulation encompasses the allegation that Turchin infringed Glacier’s copyright willfully. Because the underlying facts surrounding Turchin and American Heist are undisputed, the answer to that legal question does not affect the outcome.
tunity for costs and fees hardly reveals “minimal success” in the litigation; rather, it underscores a belief that Glacier had a strong legal case for costs and fees.

Next, the court reasoned that because American Heist had been illegally downloaded over 100,000 times and this suit yielded an injunction against only one infringer, “that result is de minimis in relation to the serious online piracy problem Plaintiffs seek to combat.” This conclusion makes little sense in light of the district court’s Case Management Order, which allows copyright holders to sue only one BitTorrent infringer at a time. Under that Order, an injunction against one infringer is the best possible result Glacier could have achieved in this suit. An assertion that “lots of other people are doing it, too” is not a persuasive equitable principle and does not counsel toward a denial of fees. Instead, we see dissonance between the district court’s citation to the large number of infringers and its conclusion that fees are unnecessary as a deterrent.

B. DETERRENCE

Overall, the district court did not appropriately weigh the interests of deterrence and compensation. See Magnuson, 85 F.3d at 1432 (“Because it is not apparent from the district court’s['] decision that it considered the factors listed in Fogerty, particularly the goal of deterring future copyright infringements, we remand for reconsideration of this issue.”). The court asserted without support that a “financial penalty” of $1,500 (consisting of the costs and the agreed statutory damages) “is sufficient to deter [Turchin], as well as others, from illegally downloading movies in the future.” The record belies this contention.

In fact, Turchin continued to use BitTorrent to pirate copyrighted content even after he received notice that he might be at risk of legal penalties—right up until the day before his deposition. See Kirtsaeng, 136 S. Ct. at 1989 (noting that a court may order fee-shifting to deter repeated instances of infringement). Turchin was “associated with” 700 pirated titles, an amount that may be worth more in economic value than $1,500. An avid BitTorrent user like Turchin may rationally decide that the risk of being caught and sued for $1,500 is worth the price of admission for access to unlimited media.

Further, the district court identified various BitTorrent cases with stipulated consent judgments of over $8,000 that settled before Turchin continued to download copyrighted titles. See, e.g., Cobbler Nevada, LLC v. Reardon, No. 3:15-cv-01077-ST, 2015 WL 9239773, at *2 (D. Or. Dec. 16, 2015). If those larger judgments did not deter Turchin and his peers from using BitTorrent, why would a “penalty” a fraction of that size deter willful infringements in the future? The district court’s assertion does not add up.

We recognize that new technologies have strained application of certain sections of the Copyright Act, but the attorney’s fee provision is not one of them. In fact, in recognition of the ubiquity of file sharing and the need to enhance deterrence, in 1999, Congress increased available statutory damages: raising minimum damages from $500 to $750, maximum damages for non-willful infringements from $20,000 to $30,000, and maximum damages for willful infringements from $100,000 to $150,000. Pub. L. No. 106-160, 113 Stat. 1774 (codified at 17 U.S.C. § 504). One need look no further than the statutory title to see what Congress had in mind: The Digital Theft Deterrence and Copyright Damages Improvement Act. As one member of Congress stated at the time: “Copyright piracy . . . is flourishing in the world. With the advanced technologies available and the fact that many computer users are either ignorant of the copyright laws or simply believe that they will not be caught or punished, the piracy trend will continue” absent increased penalties. 145 Cong. Rec. H12884-01 (daily ed. Nov. 18, 1999) (statement of Rep. Cobble). By passing the Deterrence Act, “Congress specifically acknowledged that consumer-based, noncommercial use of copyrighted materials constituted actionable copyright infringement” and “contemplated that suits like this were within the Act.” Sony BMG Music Entm’t v. Tenenbaum, 660 F.3d 487, 500 (1st Cir. 2011).

In raising the stakes for unlawful digital file-sharing, however, Congress left the attorney’s-fees provision intact. Given that congressional choice, it is not logical to resolve that statutory damages alone sufficiently deter this species of copyright infringement—while making fees categorically unavailable. If now, almost two decades after the Deterrence Act, copyright trolls and mass filings present a further public policy issue, then Congress should step in. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430–31 (1984) (“As new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.”). Meanwhile, we must judge each case on its own merits.

C. THE GOALS OF THE COPYRIGHT ACT

Finally, the district court erred in its assessment of whether awarding fees in this case would “further the purposes of the [Copyright Act].” Mattel, Inc. v. MGA Entm’t, Inc., 705 F.3d 1108, 1111 (9th Cir. 2013). Some of our earlier opinions have called this the “most important factor” in granting or denying a request for fees. See SOFA Entm’t, Inc. v. Dodger Prods., Inc., 705 F.3d 1273, 1280 (9th Cir. 2013); Mattel, 705 F.3d at 1111; Fantasy, Inc. v. Fogerty, 94 F.3d 553, 558 (9th Cir. 1996). After Kirtsaeng’s 2016 endorsement of a “totality of circumstances” approach and its statement that the losing party’s reasonableness carries “significant weight,” it is unclear whether the purposes-of-the-Copyright-Act factor remains the “most important” one. 136 S. Ct. at 1989. In any event, it is sufficient to note that because the guiding principles of the Copyright Act run throughout the other factors, it remains important.

The goal of the Copyright Act is “to promote creativity for the public good.” Jackson v. Axton, 25 F.3d 884, 890 (9th Cir. 1994); see also Fogerty, 510 U.S. at 524 (“The primary objective of the Copyright Act is to encourage the production
of original literary, artistic, and musical expression for the
good of the public’). Inherent in the Act’s purpose is that “a
copyright holder has always had the legal authority to bring
a traditional infringement suit against one who wrongfully
copies.” *Grokster*, 545 U.S. at 963. In the Internet Age, such
suits “have served as a teaching tool, making clear that much
digital file sharing, if done without permission, is unlawful[,] and
apparently have had a real and significant deterrent effect.”
*Id.*

This case fits squarely within the tradition of copyright
enforcement. Turchin’s conduct—pirating and distributing
dozens of copies of Glacier’s film—does not “promote the
Progress of Science and useful Arts” by “assur[ing] authors
the right to their original expression” and “encourag[ing] oth-
ers to build freely upon the ideas and information conveyed
by a work.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499
U.S. 340, 349–50 (1991). This is not a case of the infringer
creating something new and incorporating a copyrighted ele-
ment into that new, creative work. *See Williams v. Gaye*, 885
F.3d 1150, 1177 (9th Cir. 2018) (affirming the denial of fees
in an infringement award involving the 2013 Robin Thicke
and Pharrell Williams song “Blurred Lines” and the 1977
Marvin Gaye song “Got to Give It Up”). Rather, this case is
the digital equivalent of standing outside the neighborhood
Redbox—or Blockbuster Video, for fans of history—and giv-
ing away copies of the movie for free. Nevertheless, the
district court did not analyze whether Turchin’s conduct furthers
or frustrates the goals of the Copyright Act.

Nor did the district court find that Glacier acted contrary to
those goals in this particular case. Instead, its decision rested
on a view that awarding “attorney fees in this case would
only contribute to the continued overaggressive assertion and
negotiation of” *other* copyright claims. Apparently, the court
saw the fact that Glacier’s counsel had filed 300 copyright
actions against BitTorrent infringers as an “overaggressive
assertion[] of copyright claims,” which counseled toward a
denial of fees.

The district court initially erred by positing that “[i]n
*Kirtsaeng*, the Supreme Court noted that a court may also
consider the need to ‘deter . . . overaggressive assertions of
copyright claims’” in *denying fees. See* 136 S. Ct. at 1989.
That paraphrasing of the *Kirtsaeng* decision is inaccurate.

*Kirtsaeng* actually stated that a district court “may or-
der fee-shifting . . . to deter . . . overaggressive assertions
of copyright claims, again even if the *losing position*
was reasonable in a particular case.” 136 S. Ct. at 1988–89 (em-
phases added). For example, the Supreme Court cited a Sixth
Circuit case “awarding fees against a copyright holder who
filed hundreds of suits on an overbroad legal theory, includ-
ing in a subset of cases in which it was objectively reason-
able” to do so. *Id.* at 1989 (citing *Bridgeport Music, Inc. v.*

*WB Music Corp.*, 520 F.3d 588, 593–94 (6th Cir. 2008)). But
crucially, *Bridgeport Music* was a case in which the copy-
right holder *lost*, even though it asserted some objectively
reasonable claims. *See* 520 F.3d at 593. The court nonethe-
less awarded fees to the prevailing alleged infringers in an
effort to deter the copyright holder from over-aggressively
filing losing claims. *Id.* Contrary to the district court’s state-
ment, nowhere in *Kirtsaeng* did the Supreme Court promote
denying fees in *meritorious claims* because those winning
claims are somehow “overaggressive.” Indeed, it is difficult
to see how pursuing a meritorious infringement claim “less
aggressively” furthers “the Copyright Act’s essential goals.”

The court also based its decision on generalizations about
*other* BitTorrent cases, not on the “totality of circumstances
in [*this*] case.” *Id.* at 1985. It is revealing that the court ob-
served that another district court had denied fees in a “similar
BitTorrent copyright case,” despite the fact that the other case
is quite dissimilar. In *Countryman Nevada, LLC v. DOE*,
copyright holders “conducted th[e] litigation in a manner cal-
culated to increase the opposing party’s costs.” 193 F. Supp.
3d 1174, 1182 (D. Or. 2016). Unlike Turchin, the alleged
infringer downloaded the movie by accident, “promptly con-
duct[ed] an investigation,” admitted liability, and offered
to settle without asserting spurious defenses. *Id.* at 1176–77,
1183. The copyright holders refused to settle unless the
infringer paid $8,500, even after the infringer claimed financial
hardship. *Id.* at 1177.

The district court nonetheless lumped the present case to-
gether with the worst of “these BitTorrent copyright cases,”
even though it shares none of the unsavory characteristics.
Here, Glacier did not “demand thousands of dollars to settle
a claim . . . where the infringing defendant admits early in
the case that they illegally downloaded the movie.” The com-
pany did not seek a confidential or uncounseled settlement
not subject to court approval, or “pursue particularly vulner-
able individuals.” Nor is Glacier a quintessential “copyright
troll”—a term defined by the district court as an entity “more
focused on the business of litigation than on selling a pro-
duct or service or licensing their [copyrights] to third parties
to sell a product or service.”7 *Glacier produced* *American
Heist*, a Hollywood feature film with a substantial budget and
a recognizable cast, including Hayden Christensen, Adrien
Brody, and Jordana Brewster. The company prepared the
film for widespread North American theatrical release. When
that fell through—in part, Glacier contends, because of il-
legal downloads before the release date—Glacier released
the movie on DVD and Blu-Ray and licensed the movie for
legal, commercial download on services such as Amazon.
Glacier’s production and marketing of artistic content shares
little resemblance to entities hiding in the shadows, buying
the copyrights to pornographic films (without creating any-

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6. That Glacier’s counsel filed many actions may be a product of the district court’s Case Management Order, which provides that copyright holders may name only one potential infringer per BitTor-
rent suit.

7. C.f. Berkla v. Corel Corp., 302 F.3d 909, 924 (9th Cir. 2002)
(“Corel’s attempt to paint Berkla as a litigious schemer who ‘set up’
Corel obscures Corel’s underlying wrongful conduct . . . .”).
thing), and seeking settlements from crowds of John Does embarrassed that they were “caught” downloading tawdry titles. See AF Holdings, 752 F.3d at 992–93 (describing the “modus operandi” of a copyright troll).

D. OBJECTIVE UNREASONABLENESS AND FRIVOLOUSNESS

District courts do not necessarily need to analyze all of the factors set out in the cases, as those factors are discretionary and non-exclusive. But in misapplying the three factors on which it focused, the court passed over a factor that “carries significant” or “substantial weight.” Kirtsaeng, 136 S. Ct. at 1989; Shame On You, 893 F.3d at 666. Notably, the district court never once mentioned the unreasonableness of the losing party’s (Turchin’s) factual and legal position. Instead, the court referred only to the prevailing party’s (Glacier’s) position, confirming that “a copyright holder’s action against an individual BitTorrent copyright infringer is not frivolous under the Copyright Act.”

We emphasize the reasonableness factor because “[w]hen a litigant . . . is clearly correct, the likelihood that he will recover fees from the opposing (i.e., unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small.” Kirtsaeng, 136 S. Ct. at 1986. The Supreme Court’s guidance squarely addresses the present case.

The failure to analyze Turchin’s conduct in the litigation is particularly problematic because his actions added to Glacier’s attorney’s fees. Although an “infringer with no reasonable defense has every reason to give in quickly, before each side’s litigation costs mount,” id. at 1987, Turchin delayed resolution of this case for nearly eight months from when he was first notified of Glacier’s claims. Because Turchin did not respond to letter inquiries, Glacier needed to seek leave to subpoena Turchin for a deposition. There, Turchin admitted to regularly using BitTorrent to download content. Notwithstanding those admissions, Turchin did not file a responsive pleading for almost three months, causing Glacier to file a notice of default in May 2016. Only then did Turchin file an answer.

Despite having previously admitted to regularly using BitTorrent to download media without permission and conceding that he downloaded American Heist, Turchin denied liability, sought costs and fees from Glacier, and asserted seven baseless affirmative defenses. For example, Turchin argued that “[a]ny downloading or uploading of the copyrighted work was permitted by the doctrine of fair use” and that the film was not eligible for copyright protection under the doctrine of scenes a faire. But, in fact, this was not “a close and difficult case.” Seltzer v. Green Day, Inc., 725 F.3d 1170, 1181 (9th Cir. 2013). The district court, however, never considered the unreasonableness of Turchin’s positions.3

E. OTHER FACTORS

We also note that the district court did not assess motivation, a potentially relevant factor here. Given Turchin’s constant BitTorrent use (even after receiving notice of this suit) and his multiple admissions to unlawfully downloading content on the network (including American Heist), it may be that Turchin’s affirmative defenses were not made in good faith. See Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1231 (9th Cir. 2008). And because Turchin repeatedly distributed copies despite the express warnings in American Heist that unlicensed duplication is illegal and will result in penalties, it may be that his copyright infringement was willful. See Historical Research v. Cabral, 80 F.3d 377, 379 (9th Cir. 1996) (noting that “willful infringement is an important factor favoring an award of fees”).

II. ON REMAND, THE DISTRICT COURT MUST ASSESS THE SPECIFICS OF THIS CASE

In sum, based on a generally unfavorable view of other BitTorrent litigation, the district court abused its discretion by denying fees without assessing the particulars of this case. The court’s analysis of whether fees are warranted should be based on Glacier’s case against Turchin—and not on the court’s view of BitTorrent litigation in general or on the conduct of Glacier’s counsel in other suits.8 To be sure, the unfortunate facts of other BitTorrent cases may well warrant a denial of fees in certain cases. But an approach that furthers the goals of the Copyright Act considers the facts of a given case, weighs the appropriate factors, and makes a fee determination based on the conduct of both parties.

As the Supreme Court recently counseled, the district court “must view all the circumstances of a case on their own terms, in light of the Copyright Act’s essential goals.” Kirtsaeng, 136 S. Ct. at 1989 (emphasis added). We thus reverse and remand for application of the factors and reconsideration of whether to award reasonable attorney’s fees. See VMG Sal-soul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016) (vacating a fees decision and remanding for “reconsideration”).

REVERSED AND REMANDED.

8. We acknowledge that Turchin’s counsel filed an Amended Answer revising the defenses soon after the initial Answer and it may be that researching the defenses only minimally increased Glacier’s attorney’s fees. That is a factor to weigh in calculating the reasonableness of the claimed fee. We do not criticize pro bono counsel, but rather assess holistically Turchin’s legal positions in this litigation.

9. If, indeed, the court objects to counsel’s conduct in other cases, appropriate procedures exist to address that behavior.
In this case, we consider the validity of 26 C.F.R. § 1.482-7A(d)(2), under which related entities must share the cost of employee stock compensation in order for their cost-sharing arrangements to be classified as qualified cost-sharing arrangements (“QCSA”) and thus avoid an IRS adjustment. We conclude that the regulations withstand scrutiny under general principles of administrative law.

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eral administrative law principles, and we therefore reverse
the decision of the Tax Court.

I

Corporations often elect to conduct business through in-
ternational subsidiaries. Transactions between related com-
panies can provide opportunities for minimizing or avoiding
taxes, particularly when a foreign subsidiary is located in
a low tax jurisdiction. For example, a parent company in a
high tax jurisdiction can sell property to its subsidiary in a
low tax jurisdiction and have its subsidiary sell the property
for profit. The profits from those sales are thus taxed in a
lower tax jurisdiction, resulting in significant tax savings for
the parent. This practice, known as “transfer pricing” can
result in United States companies shifting profits that would
be subject to tax in America offshore to avoid tax. Similarly,
related companies can identify and shift costs between Amer-
ican and foreign jurisdictions to minimize tax exposure.
In recent years, United States corporations have used these
techniques to develop intangible property with their foreign
subsidiaries, and to share the cost of development between
the companies. Under these arrangements, a U.S. corpora-
tion might enter into a research and development (“R&D”) cost-sharing agreement with its foreign subsidiary located in
a low tax jurisdiction and grant the offshore company rights
to exploit the property internationally. The interplay of cost
and income allocation between the two companies in such a
transaction can result in significantly reduced taxes for the
United States parent.

To address the risk of multinational corporation tax avoid-
ance, Congress passed legislation granting the United States
Department of the Treasury the authority to allocate income
and costs between such related parties. 26 U.S.C. § 482. In
turn, the Secretary of the Treasury promulgated regulations
authorizing the Commissioner of the Internal Revenue Ser-
tice to allocate income and costs among these related enti-

At issue before us are employee stock options, the cost of
which the companies in this case elected not to share, result-
ing in substantial tax savings for the parent—here, the tax as-
associated with over $80 million in income. The Commissioner
contends that allocation of stock compensation costs between
the companies is appropriate to reflect economic reality: Al-
tera Corporation (“Altera”) and its subsidiaries contend that
any cost allocation exceeds the Commissioner’s authority.

Fundamental to resolution of this dispute is an understand-
ing of the arm’s length standard, a tool that Treasury devel-
oped in the mid-twentieth century to ensure that controlled
taxpayers were taxed similarly to uncontrolled taxpayers.
The arm’s length standard is results-oriented, meaning that
its goal is parity in taxable income rather than parity in the
method of allocation itself. 26 C.F.R. § 1.482-1(b)(1) (“A
controlled transaction meets the arm’s length standard if the
results of the transaction are consistent with the results that
would have been realized if uncontrolled taxpayers had en-
gaged in the same transaction under the same circumstances
(arm’s length result).”). A traditional arm’s length analysis
looks to comparable transactions among non-related parties
to achieve an arm’s length result. The issue in this case is
whether Treasury can permissibly allocate between related
parties a cost that unrelated parties do not agree to share.

Altera asserts that the arm’s length standard always de-
mands a comparability analysis, meaning that the Commis-
sioner cannot allocate costs between related parties in the ab-
ence of evidence that unrelated parties share the same costs
when dealing at arm’s length. Altera argues that, because un-
controlled taxpayers do not share the cost of employee stock
options, the Commissioner cannot require related parties to
share that cost.

The Commissioner argues that he may, consistent with
the arm’s length standard, apply a purely internal method of
allocation, distributing the costs of employee stock options
in proportion to the income enjoyed by each controlled tax-
payer. This “commensurate with income” method analyzes
the income generated by intangible property in comparison
with the amount paid (usually as royalty) to the parent. In
the Commissioner’s view, the commensurate with income
method is consistent with the arm’s length standard because
controlled cost-sharing arrangements have no equivalent in
uncontrolled arrangements, and Congress has provided that
the Commissioner may dispense with a comparability analy-
sis where comparable transactions do not exist in order to
achieve an arm’s length result.

Because this case involves a challenge to regulations, the
ultimate issue is not what the arm’s length standard should
mean but rather whether Treasury may define the standard as
it has. We conclude that the challenged regulations are not
arbitrary and capricious but rather a reasonable execution of
the authority delegated by Congress to Treasury.

II

At issue is Altera’s tax liability for the years 2004 through
2007. During the relevant period, Altera and its subsidiaries
designed, manufactured, marketed, and sold programmable
logic devices, electronic components that are used to build
circuits.

In May of 1997, Altera entered into a cost-sharing agree-
ment with one of its subsidiaries, Altera International, Inc., a
Cayman Islands corporation (“Altera International”), which
had been incorporated earlier that year. Altera granted to Al-
tera International a license to use and exploit Altera’s preex-
isting intangible property everywhere in the world except the
United States and Canada. In exchange, Altera International
paid royalties to Altera. The parties agreed to pool their re-
sources to share R&D costs in proportion to the benefits an-
ticipated from new technologies.

Altera and the IRS agreed to an Advance Pricing Agree-
ment covering the 1997–2003 tax years. Pursuant to this
agreement, and consistent with the cost-sharing regulations
in effect at the time, Altera shared with Altera International
stock-based compensation costs as part of the shared R&D costs. The Treasury regulations were amended in 2003, and Altera and Altera International amended their cost-sharing agreement to comply with the modified regulations, continuing to share employee stock compensation costs.

The agreement was amended again in 2005 following the Tax Court’s opinion in Xilinx, Inc. v. Commissioner; involving a challenge to the allocation of employee stock compensation costs under the 1994–1995 cost-sharing regulations. 125 T.C. 37 (2005). The parties agreed to “suspend the payment of any portion of [a] Cost Share … to the extent such payment relates to the Inclusion of Stock-Based Compensation in R&D Costs” unless and until a court upheld the validity of the 2003 cost-sharing regulations. The following provision explains Altera’s reasoning:

The Parties believe that it is more likely than not that (i) the Tax Court’s conclusion in Xilinx v. Commissioner, 125 T.C. [No.] 4 (2005), that the arm’s length standard controls the determination of costs to be shared by controlled participants in a qualified cost sharing arrangement should also apply to Treas. Reg. § 1.482-7[A](d) (2) (as amended by T.D. 9088), and (ii) the Parties’ inclusion of Stock-Based Compensation in R&D Costs pursuant to Amendment I would be contrary to the arm’s length standard.

Altera and its U.S. subsidiaries did not account for R&D-related stock-based compensation costs on their consolidated 2004–2007 federal income tax returns. The IRS issued two notices of deficiency to the group, applying § 1.482-7(d)(2) to increase the group’s income by the following amounts:

2004 $24,549,315
2005 $23,015,453
2006 $17,365,388
2007 $15,463,565

The Altera group timely filed petitions in the Tax Court. The parties filed cross-motions for partial summary judgment, and the Tax Court granted Altera’s motion. Sitting en banc, the court held that § 1.482-7A(d)(2) is invalid under the Administrative Procedure Act (“APA”). Altera Corp. & Subsidiaries v. Comm’r, 145 T.C. 91 (2015).

The Tax Court unanimously determined that the Commissioner’s allocation of income and expenses between related entities must be consistent with the arm’s length standard, and that the arm’s length standard is not met unless the Commissioner’s allocation can be compared to an actual transaction between unrelated entities. The court reasoned that the Commissioner could not require related parties to share stock compensation costs because the Commissioner had not considered any unrelated party transactions in which the parties shared such costs. The court concluded that the agency decision-making process was fundamentally flawed because: (1) it rested on speculation rather than hard data and expert opinions; and (2) it failed to respond to significant public comments, particularly those identifying uncontrolled cost-sharing arrangements in which the entities did not share stock compensation costs. Altera, 145 T.C. at 122–31.

The Tax Court’s decision rested largely on its own opinion in Xilinx, in which it held that “the arm’s-length standard always requires an analysis of what unrelated entities do under comparable circumstances.” Id. at 118 (citing Xilinx, 125 T.C. at 53–55). In its decision in this case, the Tax Court reinforced its conclusion that the Commissioner cannot require related entities to share stock compensation costs unless and until it locates uncontrolled transactions in which these costs are shared. Id. at 118–19.

The court reached five holdings: (1) that the 2003 amendments constitute a final legislative rule subject to the requirements of the APA; (2) that Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983) provides the appropriate standard of review because the standard set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), incorporates State Farm’s reasoned decision-making standard; (3) that Treasury failed to adequately support its decision to allocate the costs of employee stock compensation between related parties; (4) that Treasury’s failure was not harmless error; and (5) that § 1.482-7A(d)(2) is invalid under the APA. Id. at 115–33.

On appeal, the Commissioner does not dispute the first holding regarding the applicability of State Farm, although he argues that the appropriate standard is more deferential and less empirically minded than the standard actually applied by the Tax Court. Nor does he claim that any error in the decisionmaking process, if it existed, was harmless. The challenged holdings—(2), (3), and (5)—are all part of the same broader question: did Treasury exceed its authority in requiring Altera’s cost-sharing arrangement to include a particular distribution of employee stock compensation costs?

III

The Commissioner’s position is founded on 26 U.S.C. § 482. Because an understanding of § 482 and its history is integral to resolution of each of the issues raised by the parties, a brief overview of the statute and its history is important. At the relevant time,26 U.S.C. § 482 appeared to provide a nearly limitless grant of authority to Treasury to allocate income between related parties:

2. Section 482 was amended in December 2017 to include a third sentence:

For purposes of this section, the Secretary shall require the valuation of transfers of intangible property (including intangible property transferred with other property or services) on an aggregate basis or the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers.

Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054. Because the amendment postdates the operative regulations, it does not affect our analysis.
In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.

The first sentence has remained substantively unchanged since 1928, Revenue Act of 1928, ch. 852, § 45, 45 Stat. 791, 806 (1928), and it provides the statutory authority for the arm’s length standard, which first appeared in the 1934 tax regulations, Regulations 86, Art. 45-1(b) (1935). The second sentence sets forth the commensurate with income standard, and it was added to the statute in 1986. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1231(e)(1), 100 Stat. 2085, 2562 (1986).

A

From the beginning, § 482’s precursor was designed to give Treasury the flexibility it needed to prevent cost and income shifting between related entities for the purpose of decreasing tax liability. See H.R. REP. NO. 70-2, at 16–17 (1927) (“[T]he Commissioner may, in the case of two or more trades or businesses owned or controlled by the same interests, apportion, allocate, or distribute the income or deductions between or among them, as may be necessary in order to prevent evasion (by the shifting of profits, the making of fictitious sales, and other methods frequently adopted for the purpose of ‘milking’), and in order clearly to reflect their true tax liability.”); accord S. REP. NO. 70-960, at 24 (1928). The purpose of the statute is “to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer ….” Comm’r v. First Sec. Bank of Utah, 405 U.S. 394, 400 (1972) (quoting Treas. Reg. § 1.482-1(b)(1) (1971)). This parity is double-edged: as much as § 482 works to ensure controlled taxpayers are not overtaxed, the concern expressed on the face of § 482, even before the 1986 amendment, is preventing tax avoidance by controlled taxpayers.

After 1934, when the arm’s length standard appeared in the regulations—in what is essentially its modern form—courts did not hold related parties to the standard by looking for comparable transactions. For example, in Seminole Flavor Co. v. Commissioner, the Tax Court rejected a strict application of the arm’s length standard in favor of an inquiry into whether the allocation of income between related parties was “fair and reasonable.” 4 T.C. 1215, 1232 (1945); see also id. at 1233 (“Whether any such business agreement would have been entered into by petitioner with total strangers is wholly problematical.”); Grenada Indus., Inc. v. Comm’r, 17 T.C. 231, 260 (1951) (“We approve an allocation … to the extent that such gross income in fact exceeded the fair value of services rendered …”). And in 1962, this Court collected various allocation standards and outright rejected the superiority of the arm’s length standard over all others:

[W]e do not agree … that “arm’s length bargaining” is the sole criterion for applying the statutory language of § 45 in determining what the “true net income” is of each “controlled taxpayer.” Many decisions have been reached under § 45 without reference to the phrase “arm’s length bargaining” and without reference to Treasury Department Regulations and Rulings which state that the talismanic combination of words—“arm’s length”—is the “standard to be applied in every case.”

For example, it was not any less proper … to use here the “reasonable return” standard than it was for other courts to use “full fair value,” “fair price including a reasonable profit,” “method which seems not unreasonable,” “fair consideration which reflects arm’s length dealing,” “fair and reasonable,” “fair and reasonable” or “fair and fairly arrived at,” or “judged as to fairness,” all used in interpreting § 45.

Frank v. Int‘l Canadian Corp., 308 F.2d 520, 528–29 (9th Cir. 1962) (footnotes omitted).3

In the 1960s, the problem of abusive transfer pricing practices created a new adherence to a stricter arm’s length standard. In response to concerns about the undertaxation of multinationals, Congress considered reworking the Code to resolve the difficulty posed by the application of the arm’s length standard to related party transactions. H.R. REP. No. 87-1447, at 28–29 (1962). However, it instead asked Treasury to “explore the possibility of developing and promulgating regulations … which would provide additional guidelines and formulas for the allocation of income and deductions” under § 482. H.R. CONF. REP. NO. 87-2508, at 19 (1962), reprinted in 1962 U.S.C.C.A.N. 3732, 3739. Legislators believed that § 482, at least in theory, authorized the Secretary to employ a profit-split allocation method without amendment. Id.; H.R. REP. No. 87-1447, at 28–29 (“This provision appears to give the Secretary the necessary authority to allocate income between a domestic parent and its foreign subsidiary.”).

In 1968, following Congress’s entreaty, Treasury finalized the first regulation tailored to the issue of intangible prop-

3. The Court later took a hard turn from the flexibility it welcomed in Frank, which it limited to situations in which “it would have been difficult for the court to hypothesize an arm’s-length transaction.” Oil Base, Inc. v. Comm’r, 362 F.2d 212, 214 n.5 (9th Cir. 1966)
erty development in cost-sharing arrangements. Treas. Reg. § 1.482-2(d) (1968). The novelty of the 1968 regulations was their focus on comparability. Compare Treas. Reg. § 1.482-2(d)(2) (“An arm’s length consideration shall be in a form which is consistent with the form which would be adopted in transactions between unrelated parties in the same circumstances.”) with Regulations 86, Art. 45-1(b) (1935) (focusing on arm’s length results rather than arm’s length form). The 1968 regulations “constituted a radical and unprecedented approach to the problem they addressed— notwithstanding their being couched in terms of the ‘arm’s length standard,’ and notwithstanding that that standard had been the nominal standard under the regulations for some 30 years …. ” Stanley I. Langbein, The Unitary Method and the Myth of Arm’s Length, 30 TAX NOTES 625, 644 (1986).

Despite the asserted focus on comparability, the arm’s length standard has never been used to the exclusion of other, more flexible approaches. Indeed, a study determined that direct comparables were located and applied in only 3% of IRS’s adjustments prior to the 1986 amendment. U.S. GEN. ACCOUNTING OFFICE, GGD-81-81, IRS COULD BETTER PROTECT U.S. TAX INTERESTS IN DETERMINING THE INCOME OF MULTINATIONAL CORPORATIONS 29 (1981). The decades following the 1968 regulations involved

a gradual realization by all parties concerned, but especially Congress and the IRS, that the [arm’s length standard], firmly established … as the sole standard under section 482, did not work in a large number of cases, and in other cases its misguided application produced inappropriate results. The result was a deliberate decision to retreat from the standard while still paying lip service to it.


B

As controlled transactions increased in frequency and complexity, Congress determined that legislative action was necessary. The Tax Reform Act of 1986 reflected Congress’s view that strict adherence to the arm’s length standard prevented tax parity.

The House Ways and Means Committee recommended the addition of the commensurate with income clause because it was “concerned” that the current statute and regulations “may not be operating to assure adequate allocations to the U.S. taxable entity of income attributable to intangibles … ” H.R. REP. NO. 99-426, at 423 (1985). The clause was intended to correct a “recurrent problem”—“the absence of comparable arm’s length transactions between unrelated parties, and the inconsistent results of attempting to impose an arm’s length concept in the absence of comparables.” Id. at 423–24.

Congress intended the commensurate with income standard to displace a comparability analysis where comparable transactions cannot be found:

A fundamental problem is the fact that the relationship between related parties is different from that of unrelated parties… . [M]ultinational companies operate as an economic unit, and not “as if” they were unrelated to their foreign subsidiaries.

…

Certain judicial interpretations of section 482 suggest that pricing arrangements between unrelated parties for items of the same apparent general category as those involved in the related party transfer may in some circumstances be considered a “safe harbor” for related party pricing arrangements, even though there are significant differences in the volume and risks involved, or in other factors… . [S]uch an approach is sufficiently troublesome where transfers of intangibles are concerned that a statutory modification to the intercompany pricing rules regarding transfers of intangibles is necessary.

…

… There are extreme difficulties in determining whether the arm’s length transfers between unrelated parties are comparable. The committee thus concludes that it is appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation … be commensurate with the income attributable to the intangible… .

…

… [T]he committee intends to make it clear that industry norms or other unrelated party transactions do not provide a safe-harbor minimum payment for related party intangible transfers. Where taxpayers transfer intangibles with a high profit potential, the compensation for the intangibles should be greater than industry averages or norms… .

Id. at 423–25.

The Conference Committee suggested only one change—to broaden the sweep of the amendment so as to encompass domestic related party transactions—in order to better serve

C

Treasury’s first response to the Tax Reform Act was the “White Paper,” an intensive study published in 1988. A Study of Intercompany Pricing under the Code, I.R.S. Notice 88-123, 1988-C.B. 458 (“White Paper”). The White Paper makes clear that Treasury initially understood the commensurate with income standard to be consistent with the arm’s length standard (and that Treasury understood Congress to share that understanding). Id. at 475. Treasury wrote that a comparability analysis must be performed where possible, id. at 474, but it also suggested a “clear and convincing evidence” standard for comparables, suggesting that a comparability analysis would rarely suffice, id. at 477–78.

Despite its use of the phrase “arm’s length standard,” the White Paper signaled a dramatic shift from the standard as it had been defined following the 1968 regulations. Treasury advanced a new allocation method, the “basic arm’s length return method,” id. at 488, which—contrary to its name—would apply only in the absence of comparables and would essentially split profits between the related parties, id. at 490. The White Paper’s re-framing of the arm’s length standard was not novel:

[D]espite the Treasury’s affirmation of the traditional [arm’s length standard] in its 1988 White Paper, this narrow conception … was already obsolete by 1988 in the large majority of cases, insofar as the United States’ approach to international taxation was concerned. Subsequent developments, especially the recently issued proposed, temporary and final regulations under section 482 of the Code, merely strengthened the nails in its coffin.

Avi-Yonah, supra, at 94–95.

The White Paper was silent regarding employee stock compensation—unsurprisingly, as the practice did not develop on a major scale until the 1990s. Zvi Bodie, Robert S. Kaplan, & Robert C. Merton, For the Last Time: Stock Options Are an Expense, 81 HARV. BUS. REV. 62, March 2003, at 63, 67 (March 2003).

In 1994 and 1995, Treasury issued the regulations challenged in Xilinx. As in previous iterations, the 1994–1995 regulations defined the arm’s length standard as results-oriented, meaning that the goal is parity in taxable income rather than parity in the method of allocation itself. Treas. Reg. § 1.482-1(b)(1) (1994) (“A controlled transaction meets the arm’s length standard if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm’s length result).”). The arm’s length standard remained “the standard to be applied in every case.” § 1.482-1(b)(1) (1994).

The regulations also set forth methods by which income could be allocated among related parties in a manner consistent with the arm’s length standard. § 1.482-2(b)(2)(i) (1994). Absent from the list of approved methods was the method outlined in the singular cost-sharing regulation separately issued in 1995, § 1.482-7. The 1995 regulation provided that intangible development costs included “all of the costs incurred by … [an uncontrolled] participant related to the intangible development area.” Treas. Reg. § 1.482-7(d)(1) (1995). Beginning in 1997, the Secretary interpreted the “all … costs” language to include stock-based compensation, meaning that controlled taxpayers had to share the costs (and associated deductions) of providing employee stock compensation. Xilinx v. Comm’r, 598 F.3d 1191, 1193–94 (9th Cir. 2010).

According to Treasury, the 1994 regulations defined the arm’s length standard in terms of “the results that would have been realized if uncontrolled taxpayers had engaged in the same transactions under the same circumstances.” Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. 48,997, 48,998 (July 29, 2002). On the other hand, the 1995 regulation, consistent with the 1986 Conference Report excerpted above, “implement[ed] the commensurate with income standard in the context of cost sharing arrangements” by “requir[ing] that controlled participants in a [QCSA] share all costs incurred that are related to the development of intangibles in proportion to their shares of the reasonably anticipated benefits attributable to that development.” Id. Recognizing the potential for conflict between the 1994 and 1995 regulations (also discussed by this Court in Xilinx, as described below), Treasury later issued new cost-sharing regulations, the 2003 regulations that Altera now challenges.

IV

We turn then, to the disputed 2003 amendments to the regulations, which Treasury intended to clarify rather than overhaul the 1994 and 1995 regulations. The clarifications were two-fold. First, the amendments expressly classified employee stock compensation as a cost to be allocated between QCSA participants. Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. at 48,998;
Altera challenges two regulations. It squarely challenges 26 C.F.R. § 1.482-7A(d)(2). It also objects to § 1.482-7A(a)(3), but only insofar as it incorporates § 1.482-7A(d)(2) by reference.

Broadly, § 1.482-7A provides that costs are shared by parties to a QCSA, a controlled cost-sharing arrangement that meets the standards of the cost-sharing regulations and thus enables the participants to avoid an IRS adjustment. Section 1.482-7A(a)(3) incorporates and attempts synthesis with the arm’s length standard:

A qualified cost sharing arrangement produces results that are consistent with an arm’s length result … if, and only if, each controlled participant’s share of the costs (as determined under paragraph (d) of this section) of intangible development under the qualified cost sharing arrangement equals its share of reasonably anticipated benefits attributable to such development … .

Section 1.482-7A(d)(2) provides that parties to a QCSA must allocate stock-based compensation between themselves:

[In a QCSA], a controlled participant’s operating expenses include all costs attributable to compensation, including stock-based compensation. As used in this section, the term stock-based compensation means any compensation provided by a controlled participant to an employee or independent contractor in the form of equity instruments, options to acquire stock (stock options), or rights with respect to (or determined by reference to) equity instruments or stock options, including but not limited to property to which section 83 applies and stock options to which section 421 applies, regardless of whether ultimately settled in the form of cash, stock, or other property.

Altera does not challenge the allocation of other intangible development costs under § 1.482-7A(d).

In determining whether Treasury’s regulation is permissible, we are faced with two questions: whether Treasury’s “decreed result [is] within the scope of its lawful authority,” and whether “the process by which it reached[d] that result [was] logical and rational.” Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (quoting State Farm, 463 U.S. at 43). Consideration of these issues requires examination of the APA and Chevron deference.

The Tax Court correctly held that the APA applies to Treasury in the context of the present controversy. See Mayo Found. for Med. Ed. & Res. v. United States, 562 U.S. 44, 55 (2011) (“In the absence of [any] justification, we are not inclined to carve out an approach to administrative review good for tax law only.”). 5

Under the APA, we must “hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C)–(D). However, “[t]he scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” State Farm, 463 U.S. at 43.

If we conclude that Treasury complied with the APA in its rulemaking, we apply the familiar Chevron standard in examining the agency’s interpretation of the statute that defines the scope of its authority. Chevron, 467 U.S. at 843.

A

Accordingly, our first task is to determine whether Treasury complied with the APA in the first instance. Only if Treasury complied with the APA may we defer to its interpretation of § 482 under Chevron. Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2125 (2016). 6


5. Because the Commissioner does not contest the applicability of the APA or Chevron in this context, this case does not require us to decide the broader questions of the precise contours of the application of APA to the Commissioner’s administration of the tax system or the continued vitality of the theory of tax exceptionalism. See generally, e.g., Stephanie Hoffer and Christopher J. Walker, The Death of Tax Court Exceptionalism, 99 MINN. L. REV. 221 (2014); Kristin E. Hickman, Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements, 82 NOTRE DAME L. REV. 1727 (2007).

6. We note that the procedural posture of this case—following enforcement—differs from that of a typical case challenging a regulation under the APA. Generally, strict APA-based challenges arise in the pre-enforcement context, which is less disruptive to the agency and which allows plaintiffs to avoid the six-year statute of limitations applicable to APA-based challenges. See 28 U.S.C. § 2401. By contrast, post-enforcement challenges, often brought after the six-year statute of limitations, are rarely brought under the APA, even if the APA proves relevant. Rather, courts are generally called on to address the degree of deference to which the agency is entitled. In these typical post-enforcement challenges, the ultimate question is not whether the agency action was procedurally defective but rather whether it was a permissible exercise of executive authority. The court focuses not on the APA but on the statute as it is implemented by the agency.
consider and respond to significant comments received during the period for public comment." \textit{Perez}, 135 S.Ct. at 1203. Third, the agency must incorporate in the final rule “a concise general statement of [its] basis and purpose.” \$ 553(c).

\textbf{I}

Altera does not dispute that Treasury satisfied the first step by giving notice of the 2003 regulations. \textit{Altera}, 14 T.C. at 103. Nor does there appear to be a controversy as to whether Treasury included in the final rule “a concise general statement of [its] basis and purpose.” 5 U.S.C. \$ 553. Rather, Altera argues that the regulations fail on the second step, asserting that although Treasury solicited public comments, it did not adequately consider and respond to those responses, rendering the regulations arbitrary and capricious under \textit{State Farm}. \textit{Altera}, 14 T.C. at 120–31. We disagree.

Section 706 of the APA directs courts to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. \$ 706 (flush language). Agencies may not act in ways that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. \$ 706(2)(A). Following \textit{State Farm}, the touchstone of arbitrary and capricious review under the APA is “reasoned decisionmaking.” \textit{State Farm}, 463 U.S. at 52. “The agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” \textit{Id.} at 43 (quoting \textit{Burlington Truck Lines v. United States}, 371 U.S. 156, 168 (1962)). “[A]gency action is lawful only if it rests ‘on a consideration of the relevant factors.’” \textit{Michigan}, 135 S. Ct. at 2706 (quoting \textit{State Farm}, 463 U.S. at 43). However, courts may not set aside agency action simply because the rulemaking process could have been improved; rather, we must determine whether the agency’s “path may reasonably be discerned.” \textit{State Farm}, 463 U.S. at 43 (quoting \textit{Bowman Transp. Inc. v. Arkansas-Best Freight Sys}, 419 U.S. 281, 286 (1974)).

Altera argues that Treasury’s rulemaking process does not sufficiently support the regulations, which Altera understands to be a significant departure from Treasury’s earlier regulations implementing \$ 482. This argument is premised on: (1) Treasury’s rejection of the comments submitted in opposition to the proposed rule, and (2) Altera’s claim that Treasury’s current litigation position is inconsistent with statements made during the rulemaking process.

“[A]n agency need only respond to ‘significant’ comments, \textit{i.e.}, those which raise relevant points and which, if adopted, would require a change in the agency’s proposed rule.” \textit{Am. Mining Congress v. EPA}, 965 F.2d 759, 771 (9th Cir. 1992) (quoting \textit{Home Box Office v. FCC}, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977)). If the comments to which the agency did not respond would not bear on the agency’s “consideration of the relevant factors,” the court may not reverse the agency’s decision. \textit{Id.}

Treasury published its notice of proposed rulemaking in 2002. Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. 48,997. In its notice, Treasury made clear that it was relying on the commensurate with income provision. \textit{Id.} at 48,998. To support its position, Treasury drew from the legislative history of the 1986 amendment, explaining that Congress intended a party to a QCSA to “bear its portion of all research and development costs.” \textit{Id.} (quoting H.R. CONF. REP. NO. 99-841, at II-638). It also informed interested parties of its intent to coordinate the new regulations with the arm’s length standard, suggesting that it was attempting to synthesize the potentially disparate standards found within \$ 482 itself. \textit{Id.;} at 48,998, 49,000–01.

Commenters responded by attacking the proposed regulations as inconsistent with the traditional arm’s length standard. To support their position, they primarily discussed arm’s length agreements in which unrelated parties did not mention employee stock options. They explained that unrelated parties do not share stock compensation costs because it is difficult to value stock-based compensation, and there can be a great deal of expense and risk involved.

In the preamble to the final rule, Treasury dismissed the comments (and, relatedly, the behavior of controlled taxpayers) as irrelevant:

Treasury and the IRS continue to believe that requiring stock-based compensation to be taken into account for purposes of QCSAs is consistent with the legislative intent underlying section 482 and with the arm’s length standard (and therefore with the obligations of the United States under its income tax treaties …). The legislative history of the Tax Reform Act of 1986 expressed Congress’s intent to respect cost sharing arrangements as consistent with the commensurate with income standard, and therefore consistent with the arm’s length standard, if and to the extent that the participants’ shares of income “reasonably reflect the actual economic activity undertaken by each.” See H.R. CONF. REP. NO. 99-481, at II-638 (1986)… [I]n order for a QCSA to reach an arm’s length result consistent with legislative intent, the QCSA must reflect all relevant costs, including such critical elements of cost as the cost of compensating employees for providing services related to the development of the intangibles pursuant to the QCSA. Treasury and the IRS do not believe that there is any basis for distinguishing between stock-based compensation and other forms of compensation in this context.

Treasury and the IRS do not agree with the comments that assert that taking stock-based compensation into account in the QCSA context would be inconsistent with the arm’s length standard in the absence of evidence that parties at arm’s length take stock-based compensation into account in similar circumstances…. The uncontrolled transactions cited by commentators do not share
enough characteristics of QCSAs involving the development of high-profit intangibles to establish that parties at arm’s length would not take stock options into account in the context of an arrangement similar to a QCSA….


Treasury added:

Treasury and the IRS believe that if a significant element of [the costs shared by unrelated parties] consists of stock-based compensation, the party committing employees to the arrangement generally would not agree to do so on terms that ignore the stock-based compensation.

Id. at 51,173.

With its references to legislative history, Treasury communicated its understanding that Congress had called upon it to move away from the traditional arm’s length standard.

In short, the objectors were arguing that the evidence they cited—showing that unrelated parties do not share employee stock compensation costs—proved that Treasury’s commensurate with income analysis did not comport with the arm’s length standard. Thus, the thrust of the objection was that Treasury misinterpreted § 482. But that is a separate question—one properly addressed in the Chevron analysis. That commenters disagreed with Treasury’s interpretation of the law does not make the rulemaking process defective.

Under the APA, the issue is whether Treasury’s references to legislative history gave interested parties notice of its proposal and an opportunity to respond to it. Here, Treasury’s “path may reasonably be discerned.” State Farm, 463 U.S. at 43. Treasury’s citations to legislative history in the notice of proposed rulemaking and the preamble to the final rule make clear enough why Treasury believed it could require related parties to share all costs—including employee stock compensation—in proportion to the income enjoyed by each. Treasury set forth its understanding that it should not examine comparable transactions when they do not in fact exist and should instead focus on a fair and reasonable allocation of costs and income. Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. at 48,998 (quoting H.R. Conf. Rep. No. 99-841, at II-638); accord Compensatory Stock Options under Section 482 (Preamble to Final Rule), 68 Fed. Reg. at 51,172. Treasury relied on Congressional rejection of primacy of the traditional arm’s length standard. None of the comments at issue address why Treasury was mistaken in its understanding that it was authorized to use a method that did not include comparables.

Thus, Treasury’s refusal to credit oppositional comments is not fatal to a holding that it complied with the APA. Treasury gave sufficient notice of what it intended to do and why; it considered the comments, but it rejected them. Because the comments had no bearing on “relevant factors” to the rulemaking, nor any bearing on the final rule, there was no APA violation. Am. Mining Congress, 965 F.2d at 771.

Further, Treasury’s current litigation position is not inconsistent with the statements it made to support the 2003 regulations at the time of the rulemaking. Altera argues that its position is justified by SEC v. Chenery Corp., 332 U.S. 194 (1947). “[A] reviewing court … must judge the propriety of [agency] action solely by the grounds invoked by the agency.” Chenery, 332 U.S. at 196. “If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” Id.

Altera argues that the Commissioner cannot now claim that “Treasury reasonably determined that it was statutorily authorized to dispense with comparability analysis” because “[n]owhere in the regulatory history did the Secretary suggest that he ‘was statutorily authorized to dispense with comparability analysis.’” This argument twists Chenery, which protects judicial deference by strengthening administrative processes, into excessive proceduralism. See Nat’l Elec. Mfrs. Ass’n v. U.S. Dept. of Energy, 654 F.3d 496, 515 (4th Cir. 2011) (”[Chenery] does not oblige the agency to provide exhaustive, contemporaneous legal arguments to preemptively defend its action.”). But it is also inconsistent with the record, given Treasury’s citation to legislative history.

Altera also argues that Treasury did not adequately support its position that employee stock compensation is a cost. Treasury cites generally to “tax and other accounting principles” for its determination that there is a “cost associated with stock-based compensation.” Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. at 48,999. Treasury classifies stock compensation as a “critical element” of R&D costs and notes that it is “clearly related to the intangible development area.” Compensatory Stock Options under Section 482 (Preamble to Final Rule), 68 Fed. Reg. at 51,173.

The rulemaking record is sufficient to survive an APA challenge because Treasury’s position is supported by logic and by industry norms. Treasury wrote that parties would not “ignore” stock-based compensation if such compensation were a “significant element” of the compensation costs one party incurs and another party agrees to reimburse. Id. at 51,173. Treasury’s determination is reasonable because parties dealing at arm’s length certainly would not grant stock options to each other’s employees without mentioning the arrangement in the cost-sharing agreement. In other words, parties dealing at arm’s length simply do not share these costs, but related parties, whose stock is commonly owned, do. “[T]hrough bargaining,” each unrelated party ensures that the cost-sharing agreement is in its best interest, meaning that the parties will consider the internal costs of stock compen-
sation without requiring the other party to recognize those costs. *Id.*

A distinction exists between the economic costs of stock compensation—which are debatable—and the accounting costs—which are not. Because entities account for the cost of providing employee stock options, it is reasonable for Treasury to allocate the costs, and it is irrelevant how much the same entity ultimately pays to provide the options. Further, as the Commissioner noted, “tax and other accounting principles” provide a strong foundation for the Commissioner’s interpretation.

Most notably, the Tax Code classifies stock-based compensation as a trade or business “expense.” 26 U.S.C. § 162(a). And the challenged regulation cites to the provision providing that the expense is deductible. Treas. Reg. § 1.482-7A(d)(2)(iii)(A) (citing 26 U.S.C. § 83(h)) (“[T]he operating expense attributable to stock-based compensation is equal to the amount allowable … as a deduction for Federal income tax purposes … (for example, under 83(h)) ….”). Indeed, the dispute here is not truly whether stock-based compensation is a cost but whether Altera—rather than the Commissioner—may decide how to apportion that cost between related entities.

3

Finally, in addition to its general *State Farm* argument, Altera asks for a more searching review under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502. Altera claims that the cost-sharing amendments present a major shift in administrative policy such that Treasury could not issue the regulations without carefully considering and broadcasting its decision. Altera argues that “[t]he assertion that the commensurate with income clause supplants the arm’s-length decision. Altera argues that “[t]he assertion that the commensurate with income clause supplants the arm’s-length standard with a ‘purely internal’ analysis is a sharp—but unacknowledged—reversal from Treasury’s long-standing prior policy.” Fox, 556 U.S. at 515.

“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars*, 136 S.Ct. at 2125. Indeed, “[w]hen an agency changes its existing position, it ‘need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.’” *Id.* at 2125–26 (quoting *Fox*, 556 U.S. at 515). However, an agency may not “depart from a prior policy sub silentio or simply disregard rules that are still on the books.” *Fox*, 556 U.S. at 515.

[A] policy change complies with the APA if the agency:

1. displays “awareness that it is changing position,”

2. shows that “the new policy is permissible under the statute,”

3. “believes” the new policy is better, and

(4) provides “good reasons” for the new policy, which, if the “new policy rests upon factual findings that contradict those which underlay its prior policy,” must include “a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy.”

*Organized Vill. of Kake v. USDA*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (ellipses in original) (quoting *Fox*, 556 U.S. at 515–16).

This argument is not meaningfully different from Altera’s general APA argument. If the arm’s length standard allows the Commissioner to allocate costs between related parties without a comparability analysis, there is no policy change, merely a clarification of the same policy. Moreover, even if the policy changed, it changed well before 2003, as *Xilinx* demonstrates. And if so, it changed as a result of the 1986 amendment to § 482, in which case the question is, again, whether the cost-sharing regulations are allowable under *Chevron*.

4

Thus, the 2003 regulations are not arbitrary and capricious under the standard of review imposed by the APA. Treasury’s regulatory path may be reasonably discerned. Treasury understood § 482 to authorize it to employ a purely internal, commensurate with income approach in dealing with related companies. It provided adequate notice of its intent and adequately considered the objections. Its conclusion that stock based compensation should be treated as a cost was adequately supported in the record, and its position did not represent a policy change under *Chevron*.

B

Having determined that Treasury adequately satisfied the *State Farm* requirements, we turn to *Chevron*.

I

Under *Chevron*, we first apply the traditional rules of statutory construction to determine whether “Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. We start with the plain statutory words, and “when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’” *King v. Burwell*, ___ U.S. ___, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). In addition, we examine the legislative history, the statutory structure, and “other traditional aids of statutory interpretation” in order to ascertain congressional intent. *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 13 (1981). If, after conducting that *Chevron* step one examination, we conclude that the statute is silent or ambiguous on the issue, we then defer to the agency’s interpretation so long as “it is based on a permissible construction of the statute.”
Chevron, 467 U.S. at 843. A permissible construction is one that is not “arbitrary, capricious, or manifestly contrary to the statute.” Id. at 844.

Ultimately, questions of deference boil down to whether “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). “When Congress has ‘explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,’ and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” Id. at 227 (internal citation and footnote omitted) (quoting Chevron, 467 U.S. at 843–44).

Here, the resolution of our step one Chevron examination is straightforward. Section 482 does not speak directly to whether the Commissioner may require parties to a QCSA to share employee stock compensation costs in order to receive the tax benefits associated with entering into a QCSA. Further, as the text of the statute and its legislative history indicate, Congress intended to provide Treasury with the flexibility it needed to prevent improper cost and income allocation between related parties for the purpose of defeating tax liability.

Thus, we must move on to Chevron step two to consider whether Treasury’s interpretation of § 482 as to allocation of employee stock option costs is permissible. An agency’s interpretation of statutory authority is examined “in light of the statute’s text, structure and purpose.” Miguel-Miguel v. Gonzales, 500 F.3d 941, 949 (9th Cir. 2007). The interpretation fails if it is “unmoored from the purposes and concerns” of the underlying statutory regime. Indulang, 565 U.S. at 64.

Thus, Congress’s purpose in enacting and amending § 482 in 1986 is key to resolution of this issue. That purpose is parity. First Sec. Bank of Utah, 405 U.S. at 400. The 1986 amendment reflected Congress’s recognition that the traditional arm’s length standard did not serve the purpose of § 482.

The 1986 amendment to § 482 provides that: “In the case of any transfer (or license) of intangible property . . . , the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.” This is a purely internal standard, and evidence supports Treasury’s belief that Congress intended it to be. H.R. REP. NO. 99-426, at 423–35; H.R. CONF. REP. NO. 99-841, at II-637. Indeed, Congress’s objective in amending § 482 was to ensure that income follows economic activity. H.R. CONF. REP. NO. 99-841, at II-637. Further, legislative history supports Treasury’s application of the commensurate with income standard in the QCSA context. Congress did not want to interfere with controlled cost-sharing arrangements, but only to the degree that the allocation of costs and income “reasonably reflect[s] the actual economic activity undertaken by each.” H.R. CONF. REP. NO. 99-841, at II-638. Treasury’s decision to dispense with a comparability analysis was reasonable.

So was Treasury’s determination that uncontrolled cost-sharing arrangements do not provide helpful guidance regarding allocations of employee stock compensation. As discussed above, Treasury discounted the relevance of comments demonstrating that parties at arm’s length do not share employee stock compensation costs, writing: “The uncontrolled transactions cited by commentators do not share enough characteristics of QCSAs involving the development of high-profit intangibles to establish that parties at arm’s length would not take stock options into account in the context of an arrangement similar to a QCSA.” Compensatory Stock Options under Section 482 (Preamble to Final Rule), 68 Fed. Reg. at 51,173.

Treasury’s conclusion is entirely consistent with Congress’s rationale for amending § 482 in the first place. See id. (citing H.R. REP. NO. 99-426, at 423–25) (“As recognized in the legislative history of the Tax Reform Act of 1986, there is little if any, public data regarding transactions involving high-profit intangibles.”); see also H.R. REP. NO. 99-426, at 425 (“There are extreme difficulties in determining whether the arm’s length transfers between unrelated parties are comparable . . . . It is appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation be commensurate with the income attributable to the intangible.”).

As Congress noted, the goal of parity is not served by a constant search for comparable transactions. H.R. REP. NO. 99-426, at 423. That is why, in 1986, it acted by adding the commensurate with income standard to § 482, synthesizing the long-standing arm’s length standard with the new provision; without an internal approach to allocation, related parties had been able to escape paying the taxes that would be paid by parties dealing at arm’s length. In other words, the amendment was intended to hone the definition of the
arm’s length standard so that it could work to achieve arm’s length results instead of forcing application of arm’s length methods.

Thus, the 2003 regulations are not “arbitrary and capricious in substance.” Mayo Found., 562 U.S. at 53 (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004)). Treasury reasonably understood § 482 as an authorization to require internal allocation methods in the QCSA context, provided that the costs and income allocated are proportionate to the economic activity of the related parties. Treasury’s interpretation is not “arbitrary, capricious, or manifestly contrary to the statute,” and it is therefore permissible under Chevron. 467 U.S. at 844.

2

Altera contends that the Commissioner misreads § 482 and its history, arguing that the addition of the commensurate with income standard to § 482 did nothing to change the meaning and operation of the arm’s length standard. Altera supports its argument with a canon of construction: “Amendments by implication, like repeals by implication, are not favored.” United States v. Welden, 377 U.S. 95, 102 n.12 (1964). The canon does not apply here. It operates to prevent courts from attributing unspoken motives to legislators, not to force courts to ignore legislative action. It is illogical to argue that an amendment does not change the meaning of the statute that is amended. Moreover, Altera’s conclusion, that the commensurate with income standard is one method of satisfying the arm’s length standard, is one with which the Commissioner agrees.

Altera’s interpretation of the 1986 amendment would render the commensurate with income clause meaningless except in two circumstances: (1) to allow the Commissioner to periodically adjust prices initially assigned following a comparability analysis; and (2) to reflect a party’s contribution of existing intangible property or “buy-in” to a cost-sharing arrangement. This narrow reading of § 482 is not supported by the text or history of the 1986 amendment.

The Commissioner’s allocation of employee stock compensation costs between related parties is necessary for Treasury to fulfill its obligation under § 482. Congress did not intend to interfere with qualified cost-sharing arrangements when those arrangements provided for the allocation of income consistent with the commensurate with income provision. H.R. CONF. REP. NO. 99-841, at II-638.

3

Altera makes much of the United States’s treaty obligations with other countries. However, there is no evidence that the unworkable empiricism for which Altera argues is also incorporated into our treaty obligations. As demonstrated by nearly a century of interpreting § 482 and its precursor, the arm’s length standard is aspirational, not descriptive. It reflects neither how related parties behave nor how they are taxed. Moreover, our most recent treaties incorporate not only the arm’s length standard, but also the 2003 regulations. See, e.g., Technical Explanation of the US-Poland Tax Treaty, at 31 (Feb. 13, 2013) ("It is understood that the Code section 482 ‘commensurate with income’ standard for determining appropriate transfer prices for intangibles operates consistently with the arm’s-length standard. The implementation of this standard in the regulations under Code section 482 is in accordance with the general principles of paragraph 1 of Article 9 of the Convention … ").

The 1986 amendment focused specifically on intangibles, and it gives Treasury the ability to respond to rapid changes in the high tech industry. “The broad language of [§ 482] reflects an intentional effort to confer the flexibility necessary to forestall … obsolescence.” Massachusetts v. EPA, 549 U.S. 497, 532 (2007). In the modern economy, employee stock options are integral to R&D arrangements. In fact, in Altera’s 2015 annual report, its stock-based compensation cost equaled nearly five percent of total revenue. Altera Corp., Annual Report for the Fiscal Year Ended Dec. 31, 2014 (Form 10-K). Simply speaking, the rise in employee stock compensation is an economic development that Treasury cannot ignore without rejecting its obligations under § 482.

4

Altera also argues that the outcome of this case is controlled by our Court’s decision in Xilinx. We disagree. While the Xilinx panel could have reached a holding that would foreclose the Commissioner’s current position, it did not.

In Xilinx, this Court considered the 1994 and 1995 cost-sharing regulations. The case involved a matter of regulatory interpretation, not executive authority. Xilinx, Inc., another maker of programmable logic devices, challenged the Commissioner’s allocation of employee stock options between Xilinx and its Irish subsidiary. 598 F.3d at 1192. As framed by the panel, the issue was whether § 1.482-1 (1994)—which sets forth the arm’s length standard—could be reconciled with § 1.482-7(d)(1) (1995)—under which parties to a QCSA were required to share “all … costs” incurred in developing intangibles. Id. at 1195.

Initially the panel, in a 2–1 decision, voted to reverse the Tax Court, which had unanimously struck the 1995 cost-sharing regulations. Xilinx, Inc. v. Comm’r, 567 F.3d 482 (9th Cir. 2009), withdrawn 592 F.3d 1017 (9th Cir. 2010). However, the panel withdrew its first opinion after reconsideration, and the panel—over Judge Reinhardt’s dissent—ultimately affirmed the Tax Court in striking the regulations. Xilinx, 598 F.3d 1191. As framed by all three judges in both the withdrawn and final opinions, the issue came down to whether the arm’s length standard and all costs provision could be synthesized. All three judges determined that synthesis was impossible, and the conflict was therefore whether the arm’s length standard, versus the all costs provision, had priority.

Xilinx does not control for two reasons. First, the parties in Xilinx were not debating administrative authority, and the
Court did not consider the “commensurate with income” standard, which Congress itself did not see as inconsistent with the arm’s length standard. Second, and more significantly, the Xilinx panel was faced with a conflict between two rules. If the rules were conceptually distinguishable, they were also in direct conflict. The arm’s length rule, § 1.482-1(b)(1) (1994), listed specific methods for calculating an arm’s length result. The all costs provision was not one of those methods, as the first Xilinx majority noted. 567 F.3d at 491. Treasury issued the coordinating amendment in 2003, after the tax years at issue in Xilinx, and the arm’s length regulation now expressly references the cost-sharing provision that Altera challenges. The Xilinx panel did not address the “open question” of whether the 2003 regulations remedied the error identified in that decision. 598 F.3d at 1198 n.4 (Fisher, J., concurring). Today, there is no conflict in the regulations, and Altera does not challenge the regulations on the ground that a conflict exists.

V

In sum, we conclude that the Commissioner did not exceed the authority delegated to him by Congress. The Commissioner’s rule-making complied with the APA, and its regulation is entitled to Chevron deference.

REVERSED.

O’MALLEY, Circuit Judge, dissenting:

A “foundational principle of administrative law [is] that a court may uphold agency action only on the grounds that the agency invoked when it took the action.” Michigan v. EPA, 135 S. Ct. 2699, 2710 (2015) (citing SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 87 (1943)). In promulgating the rule we consider here, Treasury repeatedly insisted that it was applying the traditional arm’s length standard and that the resulting rule was consistent with that standard. Today, however, the majority holds that Treasury’s citation to the legislative history surrounding the enactment of the Tax Reform Act of 1986 “communicated its understanding that Congress had called upon it to move away from the historical arm’s length standard.” Op. 31. And the majority finds that, despite Treasury’s own statements to the contrary, that same citation to legislative history sufficed to “make it clear enough” to interested parties that Treasury was changing its longstanding practice of applying the arm’s length standard in all but the narrowest of circumstances. Op. 32.

The majority, in effect, “suppl[ies] a reasoned basis for the agency’s action that the agency itself has not given.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 196 (1947)). It also endorses a practice of requiring interested parties to engage in a scavenger hunt to understand an agency’s rulemaking proposals. That is inconsistent with another fundamental Administrative Procedure Act (“APA”) principle: that a notice of proposed rulemaking “should be sufficiently descriptive of the ‘subjects and issues involved’ so that interested parties may offer informed criticism and comments.” Am. Mining Cong. v. U.S. EPA, 965 F.2d 759, 770 (9th Cir. 1991) (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 48 (D.C. Cir. 1976) (en banc)). In doing both of these things, the majority stretches “highly deferential” review, Providence Yakima Med.Ctr. v. Sebellius, 611 F.3d 1181, 1190 (9th Cir. 2010) (quoting J & G Sales Ltd. v. Truscott, 473 F.3d 1043, 1051 (9th Cir. 2007)), beyond its breaking point.

I instead would find, as the Tax Court did, that Treasury’s explanation of its rule did not satisfy the State Farm standard; that Treasury did not provide adequate notice of its intent to change its longstanding practice of employing the arm’s length standard; and that its new rule is invalid as arbitrary and capricious. I would also hold that this court’s previous decision in Xilinx, Inc. v. Commissioner of Internal Revenue (Xilinx II), 598 F.3d 1191 (9th Cir. 2010), controls and mandates an order affirming the Tax Court’s decision. I therefore would affirm the judgment of the Tax Court that expenses related to stock-based compensation are not among the costs to be shared in qualified cost sharing arrangements (“QCSAs”) under Treas. Reg. § 1.482-7(d)(1) (as amended in 2013). See Altera Corp. v. Comm’r, 145 T.C. 91, 92 (2015). For these reasons, I respectfully dissent.

I. BACKGROUND

A. The Arm’s Length Standard

“The purpose of section 482 is to place a controlled taxpayer on a tax parity with an unrelated taxpayer by determining, according to the standard of an unrelated taxpayer, the true taxable income from the property and business of a controlled taxpayer.” Comm’r v. First Sec. Bank of Utah, 405 U.S. 394, 400 (1972) (quoting Treas. Reg. § 1.482-1(b) (1) (1971)). The “touchstone” of this tax parity inquiry is the arm’s length standard. Xilinx II, 598 F.3d at 1198 n.1 (Fisher, J., concurring). Since the 1930s, Treasury regulations consistently have explained that, “i)n determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm’s length with an unrelated taxpayer.” Treas. Reg. § 1.482-1(b)(1) (2003). That is, income and deductions are to be allocated among related companies in the same way that unrelated companies negotiating at arm’s length would allocate the same income and deductions.

The 1986 amendment that introduced the commensurate with income standard did not dislodge the arm’s length test.8 Congress explained in the committee report that it was intro-

8. This amendment added a second sentence to § 482 that provided: “In the case of any transfer (or license) of intangible property . . . , the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.” Tax Reform Act of 1986, Pub. L. No. 99-514, § 1231(e)(1), 100 Stat. 2085, 2562 (codified as amended at 26 U.S.C. § 482).
ducing the commensurate with income standard to address a “recurrent problem” with transfers of highly valuable intangible property: “the absence of comparable arm’s length transactions between unrelated parties, and the inconsistent results of attempting to impose an arm’s length concept in the absence of comparables.” H.R. REP. NO. 99-426, at 423–24 (1985). Congress noted that “[i]ndustry norms for transfers to unrelated parties of less profitable intangibles frequently are not realistic comparables in these cases,” and that “[i]n the extreme difficulties in determining whether the arm’s length transfers between unrelated parties are comparable.” Id. at 424–25. To address this potential gap, Congress found it “appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation … be commensurate with income attributable to the intangible.” Id. at 425.

Treasury reiterated in its 1988 “White Paper” that “intangible income must be allocated on the basis of comparable transactions if comparables exist.” A Study of Intercompany Pricing under Section 482 of the Code (“White Paper”), I.R.S. Notice 88-123, 1988-2 C.B. 458, 474; see also id. at 473 (noting that, where “there is a true comparable for the licensing of a ‘high profit potential intangible[,]’” the royalty rate for the license “must be set on the basis of the comparable because that remains the best measure of how third parties would allocate intangible income”). Only “in situations in which comparables do not exist” would the commensurate with income standard apply. Id. at 474. Indeed, the United States continued to insist in tax treaties, and in documents that Treasury issued to explain these treaties, that § 482 reflected the arm’s length principle. See Xilinx, 598 F.3d at 1196–97 (citing tax treaty explanations); see also id. at 1198 n.1 (Fisher, J., concurring) (noting that “the 1997 United States-Ireland Tax Treaty, … and others like it, reinforce the arm’s length standard as Congress’ intended touchstone for § 482”).

B. Treatment of Stock-Based Compensation

Treasury promulgated new regulations governing the tax treatment of controlled transactions in 1994 and 1995. These regulations affirmed that “the standard to be applied in every case” was the arm’s length standard. Treas. Reg. § 1.482-1(b) (1) (as amended in 1994). They also provided that intangible development costs included “all of the costs incurred by … [an uncontrolled] participant related to the intangible development area.” Treas. Reg. § 1.482-7(d)(1) (as amended in 1995). The IRS interpreted this latter “all costs” provision to include stock-based compensation, so that related companies in cost-sharing agreements would have to share the costs of providing such compensation. Xilinx II, 598 F.3d at 1193–94.

When Xilinx, Inc. (“Xilinx”) challenged the IRS’s interpretation, the Tax Court decided that the agency’s reading violated Treas. Reg. § 1.482-1, because the IRS had not adduced evidence sufficient to show that unrelated parties transacting at arm’s length would share expenses related to stock-based compensation. Xilinx v. Commissioner (Xilinx I), 125 T.C. 37, 53 (2005). The Commissioner did not appeal this underlying factual finding and, instead, argued on appeal to this court that Treas. Reg. § 1.482-7 superseded the arm’s length requirement of Treas. Reg. § 1.482-1. All three members of the divided panel therefore assumed that sharing expenses related to stock-based compensation would be inconsistent with the arm’s length standard. Xilinx II, 598 F.3d at 1194 (“The Commissioner does not dispute the tax court’s factual finding that unrelated parties would not share [employee stock options] as a cost.”); id. at 1199 (Reinhardt, J., dissenting) (assuming that the Tax Court “correctly resolved” the issue of whether sharing stock-based compensation costs would constitute an arm’s length result). We also assumed that Treas. Reg. § 1.482-7 required stock-based compensation expenses to be shared. Id. at 1196 (majority opinion) (noting that the “all costs” provision “does not permit any exceptions, even for costs that unrelated parties would not share”); id. at 1199 (Reinhardt, J., dissenting) (assuming that the “all costs” provision includes “employee stock option costs”). But a majority of the panel ultimately held that the arm’s length standard, which was the fundamental “purpose” of the regulations, trumped Treas. Reg. § 1.482-7, and therefore that stock-based compensation expenses could not be shared in the absence of evidence that unrelated parties would share such costs. Id. at 1196 (majority opinion); see also id. at 1198 n.1 (Fisher, J., concurring) (finding the “arm’s length standard” to be “Congress’ intended touchstone for § 482”). On that ground, we affirmed the Tax Court’s judgment in favor of Xilinx. Id. at 1196 (majority opinion).

C. The Regulations at Issue

While Xilinx II was pending before this court, Treasury promulgated the regulations at issue here. Compensatory Stock Options Under Section 482, 68 Fed. Reg. 51,171, 51,172 (Aug. 26, 2003) (codified at 26 C.F.R. pts. 1 and 602). The amended regulations sought to reconcile the apparent contradiction between the arm’s length standard in Treas. Reg. § 1.482-1 and the requirement that stock-based compensation expenses be shared under Treas. Reg. § 1.482-7. The former provision now specifies that § 1.482-7 “provides the specific method to be used to evaluate whether a [QCSA] produces results consistent with an arm’s length result.” Treas. Reg. § 1.482-1(b)(2)(ii) (2003). And § 1.482-7, in turn, now provides that a QCSA produces an arm’s length result “if, and only if,” the participants share all of the costs of intangible development—explicitly including costs associated with stock-based compensation—in proportion to their
shares of reasonably anticipated benefits attributable to such development. Treas. Reg. § 1.482-7(d)(2) (2003).

Altera Corp. (“Altera U.S.”), a Delaware corporation, and its subsidiary Alcía International, a Cayman Islands corporation, (collectively, “Altera”) entered into several cost-sharing agreements in 1997, under which Altra U.S. licensed various forms of intangible property to Alícia International, and Alícia International paid royalties to Altra U.S. Altra, 145 T.C. at 92–93. During the 2004 to 2007 taxable years, Altra U.S. granted stock options and other stock-based compensation to certain of its employees, but costs related to that compensation were not included in the cost pool under the operative cost-sharing agreements. Id. at 93.

Each year from 2004 to 2007, the IRS notified Altra that the cost-sharing payments did not satisfy the new regulations. Id. at 94. But when Altra challenged these regulations, the Tax Court unanimously held, as discussed in more detail below, that the explanation Treasury offered in the preamble accompanying the new regulations was insufficient to justify those regulations under State Farm. Id. at 120–33. The Commissioner appeals that decision.

II. DISCUSSION

The Tax Court considered and rejected Treasury’s stated explanation for its regulation—that Treasury applied the commensurate with income test because it could find no transactions comparable to the QCSAs at issue, and that Treasury’s analysis was actually consistent with the arm’s length standard. But the Commissioner now argues on appeal, and the majority accepts, that what Treasury was actually saying is that § 482 no longer requires an arm’s length analysis. I disagree.

A. The New Rule Is Invalid Under State Farm

Under the Administrative Procedure Act, we must “hold unlawful and set aside agency action … found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). To satisfy this standard, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” State Farm, 463 U.S. at 43 (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). “That is, an agency must ‘cogently explain why it has exercised its discretion in a given manner,’ and ‘[i]n reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”’” Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 (9th Cir. 2007) (alteration in original) (quoting State Farm, 463 U.S. at 43, 48).

Although an agency action is not subject to “more searching review” simply because it represents a change in position, “the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009). “An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.” Id. And an agency may need to “provide a more detailed justification than what would suffice for a new policy created on a blank slate … when, for example, … its prior policy has engendered serious reliance interests that must be taken into account.” Id. (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 736, 742 (1996)). “Unexplained inconsistency’ between agency actions is ‘a reason for holding an interpretation to be an arbitrary and capricious change.’” Organized Vill. of Kake v. USDA, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

Our review of an agency regulation is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” Crickon v. Thomas, 579 F.3d 978, 982 (9th Cir. 2009) (quoting Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007)). But “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” State Farm, 463 U.S. at 50 (citing Burlington Truck Lines, 371 U.S. at 168). For that reason, “we may not supply a reasoned basis for the agency’s action that the agency itself has not given.” Id. at 43 (citing Chenery II, 332 U.S. at 196).

I start, therefore, with what Treasury said when it promulgated the regulation at issue. In Treasury’s notice of proposed rulemaking, the agency explained the origins of the commensurate with income standard and discussed the White Paper. Compensatory Stock Options Under Section 482, 67 Fed. Reg. 48,997, 48,998 (proposed July 29, 2002) (to be codified at 26 C.F.R. pt. 1). Treasury noted, in particular, the White Paper’s observation “that Congress intended that Treasury and the IRS apply and interpret the commensurate with income standard consistently with the arm’s length standard.” Id. (citing White Paper, 1988-2 C.B. at 458, 477). Treasury then detailed how the proposed rules would function, including that the new rules required stock-based compensation costs to be included among the costs shared in a QCSA to produce “results consistent with an arm’s length result.” Id. at 49,000–01.

Treasury expanded on its reasoning in the preamble to the final rule. It explained that the tax treatment of stock-based compensation in QCSAs would have to be consistent “with the arm’s length standard (and therefore with the obligations of the United States under its income tax treaties and with the OECD transfer pricing guidelines).” Compensatory Stock Options Under Section 482, 68 Fed. Reg. at 51,172. Treasury observed, however, that the legislative history of the 1986 amendment to § 482 “expressed Congress’s intent to respect cost sharing arrangements as consistent with the commensurate with income standard, and therefore consistent with the arm’s length standard, if and to the extent that participants’ shares of income ‘reasonably reflect the actual economic ac-
tivity undertaken by each.’” *Id.* (quoting H.R. Conf. Rep. No. 99-481, at II-638 (1986)). Applying this standard, Treasury declared that, “in order for a QCSA to reach an arm’s length result consistent with legislative intent,” the QCSA must include stock-based compensation among the costs shared. *Id.*

Throughout the preamble, Treasury repeatedly emphasized that it was applying the arm’s length standard. Treasury explained, for example, that “[t]he regulations relating to QCSAs have as their focus reaching results consistent with what parties at arm’s length generally would do if they entered into cost sharing arrangements for the development of high-profit intangibles.” *Id.* (emphasis added). Treasury determined that “[p]arties dealing at arm’s length in [a cost-sharing] arrangement based on the sharing of costs and benefits generally would not distinguish between stock-based compensation and other forms of compensation.” *Id.* (emphasis added). And Treasury concluded that “[t]he final regulations provide that stock-based compensation must be taken into account in the context of QCSAs because such a result is consistent with the arm’s length standard.” *Id.* (emphasis added).

Treasury also responded to comments invoking the arm’s length standard. See *id.* (rejecting “comments that assert that taking stock-based compensation into account in the QCSA context would be inconsistent with the arm’s length standard in the absence of evidence that parties at arm’s length take stock-based compensation into account in similar circumstances”). Treasury acknowledged that comparable arm’s length transactions may have been relevant, but it determined that there were no comparable transactions available for QCSAs for the development of high-profit intangibles:

While the results actually realized in similar transactions under similar circumstances ordinarily provide significant evidence in determining whether a controlled transaction meets the arm’s length standard, in the case of QCSAs such data may not be available. As recognized in the legislative history of the Tax Reform Act of 1986, there is little, if any, public data regarding transactions involving high-profit intangibles. The uncontrolled transactions cited by commentators do not share enough characteristics of QCSAs involving the development of high-profit intangibles to establish that parties at arm’s length would not take stock options into account in the context of an arrangement similar to a QCSA.

*Id.* at 51,172–73. Treasury further detailed why it believed that certain comparable transactions proposed by commentators were not in fact comparable. *Id.* at 51,173.

The Tax Court held that Treasury’s explanation for its regulation was insufficient under *State Farm v. Altera*, 145 T.C. at 120–33. It found that Treasury “failed to provide a reasoned basis” for its “belief that unrelated parties entering into QCSAs would generally share stock-based compensation costs.” *Id.* at 123. The court acknowledged that agencies need not gather empirical evidence for some policy-based propositions, but it held that “the belief that unrelated parties would share stock-based compensation costs in the context of a QCSA” was not such a proposition. *Id.* In reaching this conclusion, the court observed that commentators submitted significant evidence about whether unrelated parties would share stock-based compensation costs in QCSAs; that the Tax Court itself had made a factual determination on that issue in *Xilinx I*, and that Treasury was required at least to attempt to gather empirical evidence before declaring that no such evidence was available. *Id.* at 123–24.

The Tax Court then detailed why Treasury’s explanation for the regulations was insufficient. The court noted that only some QCSAs involved high-profit intangibles or included stock-based compensation as a significant element of compensation, yet Treasury failed to distinguish between QCSAs with and without those characteristics. *Id.* at 125–27. And the court found that Treasury responded only in conclusory fashion to a number of comments identifying comparable transactions or explaining why unrelated parties would not share stock-based compensation costs in QCSAs. *Id.* at 127–30. On these grounds, the Tax Court struck down the regulation. *Id.* at 133–34.

The Commissioner does not meaningfully dispute the Tax Court’s determination that Treasury’s analysis under the arm’s length standard was inadequate and unsupported. The Commissioner now contends, instead, “that, in the context of a QCSA, the arm’s-length standard does not require an analysis of what unrelated entities do under comparable circumstances.” Appellant’s Br. 57 (internal quotation marks omitted). In the Commissioner’s view, Treasury’s detailed explanations regarding its comparability analysis were merely “extraneous observations”—“since Treasury reasonably determined that it was statutorily authorized to dispense with comparability analysis in this narrow context, there was no need for it to establish that the uncontrolled transactions cited by commentators were insufficiently comparable.” Appellant’s Br. 64.

The majority accepts Treasury’s rationalization. “With its references to legislative history,” the majority holds, Treasury adequately “communicated its understanding that Congress had called upon it to move away from the historical arm’s length standard.” Op. 31. The majority finds that Treasury was therefore entitled to ignore the comments opposing the final rule because they did not “bear on the agency’s ‘consideration of the relevant factors.’” Op. 28–29 (quoting *Ann. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992)). As to Altera’s rejoinder that Treasury never suggested that it had the authority to “dispense with” comparability analysis entirely, Appellee’s Br. 43, the majority dismisses these arguments as “twist[ing] Chenery … into excessive proceduralism.” Op. 33.

I do not share the majority’s view. Treasury may well have believed that, given the fundamental characteristics of stock-based compensation in QCSAs, it could dispense with arm’s length analysis entirely. Cf. *Xilinx II*, 598 F.3d at
The APA’s safeguards ensure that those regulated do not have to guess at the regulator’s reasoning; just as importantly, they afford regulated parties a meaningful opportunity to respond to that reasoning. Treasury’s notice of proposed rulemaking ran afield of these safeguards by failing to put the relevant public on notice of its intention to depart from traditional arm’s length analysis. See CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1080 (D. C. Cir. 2009) (holding that a final rule “violates the APA’s notice requirement where ‘interested parties would have had to “divine [the agency’s] unsaid—either in the notice of proposed rulemaking or in the preamble accompanying the final rule—that the nature of stock compensation in the QCSA context rendered arm’s length analysis irrelevant. Treasury instead explained only that it could not conduct an arm’s length analysis because comparable transactions could not be found. See Compensatory Stock Options Under Section 482, 68 Fed. Reg. at 51,172–73 (“While the results actually realized in similar transactions under similar circumstances ordinarily provide significant evidence in determining whether a controlled transaction meets the arm’s length standard, in the case of QCSAs such data may not be available.”). As the majority acknowledges, in fact, “Treasury set forth its understanding that it should not examine comparable transactions when they do not in fact exist and should instead focus on a fair and reasonable allocation of costs and income.” Op. 32 (emphasis added).

Treasury itself explained, in effect, that a precondition for the applicability of the commensurate with income standard is the lack of real-world comparable transactions with which to make an arm’s-length comparison. The comments submitted were relevant to the issue of whether “similar transactions under similar circumstances” existed. Any such transactions, as Treasury originally admitted, would “ordinarily provide significant evidence in determining whether a controlled transaction meets the arm’s length standard.” Compensatory Stock Options Under Section 482, 68 Fed. Reg. at 51,172.10 If Treasury felt that these comments were irrelevant, it presumably would have said so. Treasury’s decision to respond to the comments on their merits underscores that Treasury’s only justification for eschewing comparability analysis was its belief that no comparable transactions could be found. The fact that evidence of comparable transactions might support more favorable tax treatment does not mean such comparables do not exist.11

10. The majority points to no language in the notice of proposed rulemaking that contradicts this understanding.

11. The majority also glosses over the Tax Court’s criticism that the final rule applied to all QCSAs, but was based only on Treasury’s beliefs about the subset of QCSAs involving “high-profit intangibles” where stock-based compensation is a “significant element” of compensation. Altera, 145 T.C. at 125–26 (quoting Compensatory Stock Options Under Section 482, 68 Fed. Reg. at 51,173). Treasury’s failure to explain this leap and the Commissioner’s failure to defend it provide another reason that the regulation does not satisfy the State Farm standard.

B. Section 482 Does Not Require Sharing of Stock-Based Compensation Costs

Because I would find the 2003 regulations were invalid, I believe that this court’s decision in Xilinx II controls, and that the Tax Court properly entered judgment in favor of Altera. Altera, 145 T.C. at 134. Even if Xilinx II did not control, I would hold that related parties entering into QCSAs would generally share stock-based compensation costs.” Altera, 145 T.C. at 123. The Tax Court set forth in detail why Treasury’s explanation for the regulations was insufficient. Id. at 125–30. Treasury offers no response to these findings; it simply invites this court to recreate the record in order to justify its decision-making. I therefore would hold, as the Tax Court did, that the 2003 regulations are invalid under State Farm.
applies only to a “transfer (or license) of intangible property,” 26 U.S.C. § 482, which is distinct from a cost sharing agreement for joint development of intangibles. See White Paper, 1988-2 C.B. at 474 (noting that “bona fide research and development cost sharing arrangements” provided a way to “avoid[] section 482 transfer pricing issues related to the licensing or other transfer of intangibles”).

QCSAs fall neatly into the latter category. See Treas. Reg. § 1.482-7(a)(1) (2003) (defining a QCSA as “an agreement under which the parties agree to share the costs of development of one or more intangibles in proportion to their shares of reasonably anticipated benefits”). The Commissioner’s argument that the commensurate with income standard applies to “intangible transactions in general, and cost sharing arrangements in particular,” Appellant’s Br. 57, is inconsistent with the plain language of the statute. Under the only reasonable interpretation of § 482, therefore, the commensurate with income standard does not apply to QCSAs. For at least this reason, I also disagree with the majority’s conclusion that Treasury’s reading of § 482 satisfies the second step of the Chevron test. Op. 39–46.
BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLETON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILICANCA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAIT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D’ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAIT, Defendants-Appellees,

v.

CAITLIN AHEARN; ANDREW YORK, Objectors-Appellants.

No. 15-56014
United States Court of Appeals for the Ninth Circuit
D.C. No. 5:16-cv-03957-LHK

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION, In Re, KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTMER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCVOZZI; HERBERT J. YOUNG; LINDA HASPERS; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESHCI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHERIA NAVARRO; OWEN CHAPMAN; MICHAEL
July 30, 2018

BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLETEN; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAI; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D’ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAI, Defendants-Appellees,

v.

ANTONIO SBERNA, Objector-Appellant,

No. 15-56025
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-cv-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD
BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLTEON; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAF; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D’ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLEY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERTSON; JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,

GREG DIRENZO, Petitioner-Appellee,

HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAF, Defendants-Appellees,

v.

PERI FETSCH, Objector-Appellant.

No. 15-56059
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-ml-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON; KAYLENE P. BRADY; GUNTER KRAUTH; ERIC GRAEWINGHOLT; REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI; JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF; MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS; MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM HAMMOND; MARK LEGGETT; EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVIZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE;
MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S.
SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST;
CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS
GANIM; DANIEL BALDESCHI; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN
GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD
BURKARD; ADAM ClOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH;
MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDAHL; NICHOLAS MCDANIEL; MARY J.
MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI;
MICHELLE SINGLETIENT; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A.
STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS;
DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN
GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS;
ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY
MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL
BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL;
JAMES KUNDRAF; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN
NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER
MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN;
JOHN CHAPMAN; MARY D’ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY
HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; LINDA RUTH SCOTT;
DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees,
GREG DIRENZO, Petitioner-Appellee,
HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER
AUTOPEX, INC., FKA Grossinger Hyundai; JOHN KRAFCKIK; HYUNDAI MOTOR COMPANY; SARAH
KUNDRAF, Defendants-Appellees,
v.
DANA ROLAND, Objector-Appellant.

No. 15-56061
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-cv-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION,
KEHLIE R. ESPINOSA; NICOLE MARIE HUNTER; JEREMY WILTON;
KAYLENE P. BRADY; GUNTER KRAUTH; ERIC GRAEWINGHOLT;
REECE PHILIP THOMSON; ALEX MATURANI; NILUFAR REZAI;
JACK ROTTNER; LYDIA KIEVIT; REBECCA SANDERS; BOBBY
BRANDON ARMSTRONG; SERGIO TORRES; RICHARD WOODRUFF;
MARSHALL LAWRENCE GORDON; JOEL A. LIPMAN; JAMES GUDGALIS;
MARY P. HOESSLER; STEPHEN M. HAYES; BRIAN REEVES; SAM
HAMMOND; MARK LEGGETT;
EDWIN NAYTHONS; MICHAEL WASHBURN; IRA D. DUNST; BRIAN WEBER; KAMNEEL MAHARAJ; KIM IOCOVOZZI; HERBERT J. YOUNG; LINDA HASPER; LESLIE BAYARD; TRICIA FELLERS; ORLANDO ELLIOTT; JAMES BONSIGNORE; MARGARET SETSER; GUILLERMO QUIROZ; DOUGLAS KURASH; ANDRES CARULLO; LAURA S. SUTTA; GEORGIA L. THOMAS; ERIC J. OLSON; JENNIFER MYERS; TOM WOODWARD; JEROLD TERHOST; CAMERON JOHN CESTARO; DONALD BROWN; MARIA FIGUEROA; CONSTANCE MARTYN; THOMAS GANIM; DANIEL BALDSCHE; LILLIAN E. LEVOFF; GIUSEPPINA ROBERTO; ROBERT TRADER; SEAN GOLDSBERRY; CYNTHIA NAVARRO; OWEN CHAPMAN; MICHAEL BREIN; TRAVIS BRISSEY; RONALD BURKARD; ADAM CLOUTIER; STEVEN CRAIG; JOHN J. DIXSON; ERIN L. FANTHORPE; ERIC HADESH; MICHAEL P. KEETH; JOHN KIRK MACDONALD; MICHAEL MANDEHL; NICHOLAS MCDANIEL; MARY J. MORAN-SPICUZZA; GARY PINCAS; BRANDON POTTER; THOMAS PURDY; ROCCO RENGHINI; MICHELLE SINGLETONE; KEN SMILEY; GREGORY M SONSTEIN; ROMAN STARNO; GAYLE A. STEPHENSON; ANDRES VILLICANA; RICHARD WILLIAMS; BRADFORD L. HIRSCH; ASHLEY CEPHAS; DAVID E. HILL; CHAD MCKINNEY; MORDECHAI SCHIFFER; LISA SANDS; DONALD KENDIG; KEVIN GOBEL; ERIC LARSON; LIN MCKINNEY; RYAN CROSS; PHILLIP HOFFMAN; DEBRA SIMMONS; ABELARDO MORALES; PETER BLUMER; CAROLYN HAMMOND; MELISSA LEGGETT; KELLY MOFFETT; EVAN GROGAN; CARLOS MEDINA; ALBERTO DOMINGUEZ; CATHERINE BERNARD; MICHAEL BREIEN; LAURA GILL; THOMAS SCHILLE; JUDITH STANTON; RANDY RICKERT; BRYAN ZIRKEL; JAMES KUNDRAT; ROBERT SMITH; MARIA KOTOVA; JOSIPA CASEY; LUAN SNYDER; BEN BAKER; BRIAN NGUYEN; HATTIE WILLIAMS; BILL HOLVEY; LOURDES VARGAS; KENDALL SNYDER; NOMER MEDINA; SAMERIA GOFF; URSULA PYLAND; MARCELL CHAPMAN; KAYE KURASH; HOLLY AMROMIN; JOHN CHAPMAN; MARY D’ANGELO; GEORGE RUDY; AYMAN MOUSA; SHELLY HENDERSON; JEFFREY HATHAWAY; DENNIS J. MURPHY; DOUGLAS A. PATTERSON; JOHN GENTRY; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs-Appellees, GREG DIRENZO, Petitioner-Appellee, HYUNDAI MOTOR AMERICA; KIA MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRA, Defendants-Appellees.

v.

LINDA RUTH SCOTT, Objector-Appellant.

No. 15-56064
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-mc-02424-GW-FFM

In re: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

JOHN GENTRY; LINDA RUTH SCOTT; DANIELLE KAY GILLELAND; JOSEPH BOWE; MICHAEL DESOUTO, Plaintiffs,

and

JAMES BEN FEINMAN, Appellant,

v.

HYUNDAI MOTOR AMERICA; KIA
MOTORS AMERICA; KIA MOTORS CORPORATION; GROSSINGER AUTOPLEX, INC., FKA Grossinger Hyundai; JOHN KRAFCIK; HYUNDAI MOTOR COMPANY; SARAH KUNDRAT, Defendants-Appellees.

No. 15-56067
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-m1-02424-GW-FFM
Filed July 27, 2018
Order

ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that these cases be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in these cases shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges Wardlaw and Callahan did not participate in the deliberations or vote in these cases.
ORDER MODIFYING OPINION

THE COURT:

The opinion in this matter, which was filed June 4, 2018, appearing at 5 Cal.5th 216, is modified as follows:

1. The final sentence of the third full paragraph on page 220, beginning “The district” is modified to read:

   The district court granted summary judgment to Liberty on its claim for declaratory relief.

2. The second sentence of the paragraph spanning pages 226 and 227, beginning “There, the insured” is modified to read:

   There, the insured taxi cab company sought liability insurance coverage for a child molestation committed by one of its drivers at a school.

These modifications do not affect the judgment.
COUNSEL

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Jeffrey M. Laurence, Assistant Attorneys General, Rene A. Chacon and Bruce Ortega, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Defendant Jeffrey Lynn Quarles appeals from a judgment of damaging a telephone line or mechanical equipment connected to the line (Pen. Code, § 591),

misdeemeanor battery on an elder (§ 243.25), and the lesser included offense of misdemeanor elder abuse (§ 368, subd. (c))–count 4).

misdemeanor elder abuse (§ 368, subd. (c)–count 3), and misdemeanor battery on an elder (§ 243.25–count 4).

At the outset of trial, defendant’s counsel stated she anticipated asking for a voluntary intoxication instruction as to count 2. The prosecution maintained damaging a telephone line or the connected phone is a general intent crime and therefore a voluntary intoxication instruction is unnecessary and inappropriate. Defendant’s counsel asked a second time for a voluntary intoxication instruction just prior to the court instructing the jury. Citing People v. Atkins (2001) 25 Cal.4th 76, 82–83, 84 (Atkins), the court refused to give the instruction.

The jury convicted defendant of damaging a telephone line, misdemeanor battery on an elder and the lesser included offense of misdemeanor elder abuse. The trial court sentenced him to one year in jail, with release pending space available in a treatment program, plus three years’ formal probation.

DISCUSSION

We review a trial court’s refusal to give a requested instruction de novo. (People v. Waidla (2000) 22 Cal.4th 690, 733; see People v. Moore (2018) 19 Cal.App.5th 889, 893 (Moore).)

“Section 29.4 governs the admissibility of evidence of voluntary intoxication and states, in part, ‘[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.’ (§ 29.4, subd. (b).) Evidence of voluntary intoxication is thus inadmissible to negate general criminal intent, and whether such evidence is admissible typically depends on whether the crime at issue is one of general or specific intent. ([Atkins, supra] 25 Cal.4th [at pp.] 81–82 . . . ) General intent crimes require only a general criminal intent to commit the proscribed act, while specific intent crimes require an additional intent to do some further act or achieve some future consequence, typically denoted by language such as ‘with the intent to’ or ‘for the purpose of.’” (Atkins, at pp. 82, 86; see People v. Hood (1969) 1 Cal.3d 444, 456–457 [superseded by amendments to former Pen. Code, § 22, on different grounds]. . . )” (Moore, supra, 19 Cal.App.5th at p. 893.)
“In addition, evidence of voluntary intoxication may be admissible to negate the specific knowledge or mental state requirement included in a narrow set of crimes nevertheless classified as general intent crimes. ([People v. Reyes](1997) 52 Cal.App.4th 975, 983–984 . . .; People v. [Lopez](1986) 188 Cal.App.3d 592, 598–599 . . .) For example, the crime of resisting arrest requires the perpetrator to know the person they are resisting is an officer, and thus evidence of voluntary intoxication is admissible to show the defendant did not know. ([Reyes](at pp. 985–986.) Similarly, the crime of possession of stolen goods requires the perpetrator to know that the goods at issue were stolen, and evidence of voluntary intoxication is admissible to show the defendant did not. ([Lopez](at pp. 599–600.))” ([Moore](19 Cal.App.5th at p. 894.)

Defendant contends damaging a telephone line or the attached phone is a specific intent crime because section 591 speaks in terms of “unlawfully and maliciously” taking down, removing, injuring, disconnecting, cutting, or obstructing a telephone line. (§ 591.) In support of this assertion, defendant points to section 7, subdivision 4 which defines “malice” as a “wish to vex, annoy, or injure another person, or an intent to do a wrongful act.” (§ 7, subd. (4), italics added.)

In [Moore](the Court of Appeal rejected essentially the same argument in connection with the crime of vandalism ([§ 594, subd. (a)]and held the trial court did not err in refusing to instruct on voluntary intoxication. ([Moore](supra, 19 Cal.App.5th at p. 891.) As the court explained, section 594 “is part of a set of statutes dealing with malicious injury to property, and follows the language of the original malicious mischief statutes.” ([Moore](at p. 894.) Section 591, at issue here, is also one of these statutes.2

“Section 7, subdivision (4),” said [Moore], “explains that the use of the words ‘malice’ or ‘maliciously’ in the modern criminal statutory provisions, including section 594, ‘import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established by either proof or presumption of law,’ unless another meaning is apparent from the context of the statute.” ([Moore](supra, 19 Cal.App.5th at pp. 894–895.) And while no published case had specifically addressed whether vandalism was a general or specific intent crime, the court observed that a “number of cases have concluded that other crimes requiring malice or maliciousness as defined by section 7, subdivision 4 require only general criminal intent.” ([Id.](at p. 895.)

The appellate court then discussed our Supreme Court’s decision [Atkins], in which the high court “addressed whether evidence of voluntary intoxication is admissible to negate the required mental state for arson, which requires ‘willfully and maliciously’ setting fire to or burning a structure, forest land, or property.” ([Moore](supra, 19 Cal.App.5th at p. 895.)

The Supreme Court concluded that despite this language, arson is not a specific intent crime. ([Ibid.] Neither the term “maliciously” nor any other word in the statute “required any specific intent or mental state.” ([Ibid.] Further, public policy did not weigh in favor of a voluntary intoxication defense because “arson is often committed impulsively and intoxication is often a precursor as it inhibits more sound judgment.” ([Ibid.]

“As with the arson statute, the vandalism statute itself does not require any intent besides the intent to do the proscribed acts of defacing, damaging, or destroying property, and the term ‘maliciously’ does not import any further specific intent or mental state.” ([Moore, supra](19 Cal.App.5th at p. 895.) “Similarly, from a policy standpoint, vandalism is an aggressive act often committed impulsively, and more likely to be committed while intoxicated due to lowered inhibitions.” ([Id.](at pp. 895–896.)

The same is true of section 591, which makes it a crime to “unlawfully and maliciously” take down, remove, injure, disconnect, cut, or obstruct a telephone line. (§ 591.) This language does not import any further specific intent or mental state, and the crime involves an aggressive act that may well be impulsive and triggered by voluntary intoxication.

As did the defendant in [Moore], defendant attempts to distinguish arson and other general intent offenses—such as mayhem, willfully and maliciously discharging a firearm at a residence or out of a vehicle, and maliciously placing an obstruction on a railroad track—as “inherently dangerous” and “carry[ing] the possibility of injury or death.” This inherent danger, defendant maintains, means someone committing one of these offenses “can be presumed to be aware of the wrongfulness of his conduct, and can be deemed to satisfy the malice requirement by intentionally committing the act.” He contends that merely damaging a telephone line carries no such presumption.

Like the defendant in [Moore], defendant “does not provide any authority for the proposition that only inherently dangerous acts carry a presumption of wrongfulness.” ([Moore, supra](19 Cal.App.5th at p. 896.) Moreover, the fact that section 591, like the crime of vandalism, has its roots in “a century-old statute dealing with malicious injury to another’s property suggests that such destruction of another’s property is fundamentally and presumptively wrong.” ([Moore](at p. 896.)

In sum, there is no merit to defendant’s assertion that he was entitled to an instruction on voluntary intoxication in connection with the charge of damaging a telephone line or mechanical equipment connected to the line.

**DISPOSITION**

The judgment is affirmed.

Banke, J.

We concur: Humes, P.J., Dondero, J.
THE PEOPLE, Plaintiff and Respondent, v. PETER JOHNSON et al., Defendants and Appellants.

No. D071011
In The Court of Appeal of the State of California Fourth Appellate District Division One
(Super. Ct. No. SCD258303)
APPEALS from judgments of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed, and remanded with directions. Filed June 29, 2018 Certified for Publication July 26, 2018

COUNSEL
Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Ian Guthrie.
Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Peter Johnson.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

ORDER CERTIFYING OPINION FOR PUBLICATION
THE COURT:
The opinion in this case filed June 29, 2018, was not certified for publication. It appearing the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c), the request pursuant to rule 8.1120(a) for publication is GRANTED.
IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and
ORDERED that the words “Not to Be Published in the Official Reports” appearing on page 1 of said opinion be deleted and the opinion herein be published in the Official Reports.

HUFFMAN, Acting P. J.

Copies to: All parties

OPINION
In 2014, Lamar Canady was shot to death in broad daylight in the Oak Park neighborhood of the City of San Diego. After months of investigation by police, with the assistance of the Federal Bureau of Investigation (FBI) and authorities in Kansas City, Missouri, Peter Johnson and Ian Patrick Guthrie were arrested and eventually charged with murder (Pen. Code, § 187, subd. (a),1 count 1) and assault with a semi-automatic firearm (§ 245, subd. (b); count 2) for Canady’s death. The information also alleged that Johnson intentionally and personally discharged a firearm during the commission of the murder, causing death (§ 12022.53, subd. (d)) and that John- son had a strike prior and serious felony prior stemming from a 1998 murder conviction in Jamaica (§§ 667, subds. (b)-(i), 668, 1170.12). The information alleged Guthrie had a strike prior and serious felony prior stemming from a 1997 manslaughter conviction in New York (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)).
The investigation into Canady’s death revealed Johnson and Guthrie were participants in a conspiracy to kill Canady led by drug kingpin Omar Grant.2 Prosecutors alleged Grant ordered a hit on Canady, executed by Johnson with assistance from Guthrie and other uncharged coconspirators, to retaliate against Canady for stealing drugs from Grant and sleeping with his girlfriend. After the trial, which was conducted jointly but with separate juries, Johnson and Guthrie were both convicted of first degree murder. Johnson’s jury also found true the allegation that Johnson personally discharged a firearm resulting in Canady’s death.
Johnson and Guthrie appeal their convictions on various grounds. Guthrie asserts: (1) The trial court erred by denying his motion to suppress statements made to police after he invoked his right to counsel during his postarrest interview; (2) insufficient evidence supported the prosecution’s theory that he aided and abetted Canady’s murder; (3) the trial court abused its discretion by admitting into evidence a rap song recorded by Canady prior to his death; (4) that even if the errors individually do not require reversal, cumulatively they do; and (5) that the trial court abused its discretion by denying the defendants’ motion to continue the sentencing hearing to allow additional discovery concerning police use of a cell site simulator to locate him. Johnson asserts the trial court erred by failing to instruct on the lesser included offenses of second degree murder and voluntary manslaughter, and that the use of his Jamaican conviction as a prior strike and prior serious felony ran afoul of his right to equal protection under the California and United States Constitutions. Both men also contend that the trial court abused its discretion by admitting into evidence testimony and documents concerning their illegal entry into the United States. We conclude these claims lack merit, and accordingly affirm both men’s convictions.
Additionally, while the appeal was pending, we granted Johnson’s motion to file a supplemental brief to explain the impact, if any, of newly enacted section 12022.53, subdivision (h) on his sentence. The amended provision allows the superior court, in the interest of justice, to strike firearm en-

1. Subsequent statutory references are to the Penal Code unless otherwise indicated.
2. Grant died after Johnson’s and Guthrie’s arrests and before trial.
hancements. The Attorney General concedes the change in law applies to Johnson, but argues the record shows the court would not have struck the firearm enhancement even if it had had discretion to do so. Although we agree there is some support in the record for the People’s position, section 12022.53, subdivision (h) was not effective when the trial court sentenced Johnson and the court lacked the discretion to strike the firearm enhancement. Thus, we remand the matter for the limited purpose of allowing the trial court to consider whether to strike the firearm sentencing enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

Canady was murdered by a gunman in his barbershop in broad daylight at approximately 11:30 a.m. on May 9, 2014. The prosecution contended Grant, who led a drug trafficking operation, plotted revenge against Canady for stealing marijuana and sleeping with Grant’s girlfriend, Talya Martin, over a year before the murder. According to prosecutors, Grant commissioned defendants Johnson and Guthrie, and other uncharged and unknown individuals, to murder Canady.

Investigative efforts after Canady’s murder showed John-son, a Jamaican citizen who resided in Kansas City, Missour before the crime, began using a prepaid cell phone, or “burner,” on April 15, 2014. Phone records showed Johnson activated the burner phone in Houston, Texas, that day, and that he was in San Diego by April 20th. The first name and phone number entered as a contact on the phone was Guthrie’s. Guthrie also purchased multiple burner phones on May 5, 2014. Phone records revealed that Guthrie was in the area where Canady was shot and was in contact with Johnson on May 8, 2014.

May 9, 2014, the day Canady was killed, Guthrie called Grant around 9:18 a.m. Cell phone data showed Guthrie calling Johnson a few minutes later, then both men’s phones moving toward the neighborhood where Canady’s barber-shop was located until Guthrie and Johnson were both in the area just minutes before the shooting. Around 11:00 a.m., the security cameras at the Trade Winds liquor store directly west of the barbershop captured Johnson walking down the street and entering the liquor store.

At that time, Canady was next door in the barbershop with one of his barbers, Pride Erving. Both Canady and Erving were known members of the West Coast Crips gang. Security footage from an auto repair business across the street from the liquor store, Nu’s Auto Repair & Body Shop, showed Guthrie and a man in khaki pants standing near a silver sedan parked across from the barbershop. At one point in the video, Guthrie is seen raising his arms, hopping and shadow boxing.

At 11:22 a.m., Canady briefly walked outside the barbershop then reentered. Phone record showed Guthrie called Johnson within seconds of Canady returning inside the barbershop. The owner of the liquor store reported to the police that Johnson purchased a 40-ounce beer before leaving, and the time-stamped video footage from the store showed John-son walking to the cash register after the call from Guthrie to purchase beer, then exiting the store at 11:24 a.m. At about the same time, a red SUV with a spare tire on the back of its lift gate proceeded down the street in the same direction as Johnson was walking.

As Johnson exited the liquor store, video from the auto shop showed Guthrie opening the silver sedan’s trunk. The video then showed Guthrie’s companion, referred to at trial as the man in khaki pants, walk toward the silver sedan’s open trunk and grab something from within. As Johnson exited the store, he and the man in the khaki pants walked towards each other, then the man in the khaki pants crossed the street toward Johnson and handed Johnson the item retrieved from the trunk in exchange for the bag containing the beer Johnson purchased at the liquor store. Prosecutors contended the man in the khaki pants exchanged the murder weapon for the beer Johnson purchased. Once the handoff was complete, the man in the khaki pants returned to the silver sedan and entered the passenger side of the vehicle.

The time-stamped video surveillance showed Johnson entering the barbershop at approximately 11:25 a.m. and exiting within seconds. In that short time, Johnson fired 14 shots, 10 of which hit Canady’s head, face, torso, and legs. The video surveillance showed Johnson quickly leaving the shop, tucking the gun in his waistband, and running east, away from Guthrie and the man in khaki pants who had remained in the silver sedan. As soon as Johnson exited the barbershop, simultaneous video surveillance showed the sedan with Guthrie and the other accomplice inside driving away from the scene.

An employee of the auto shop, who was across the street from the barbershop at the time shots were fired, testified that he saw a man “turn real quick around the corner” while running away from the barbershop. The witness did not see if Johnson had a gun, but did recall something glinting off Johnson’s back that appeared to be shaped “like a gun handle in back.” The red SUV then circled the area, followed Johnson’s movements and, according to a detective who analyzed the video surveillance, likely picked Johnson up. Johnson was also seen on video footage raising an arm to talk on the phone.

The silver sedan, driven by Guthrie, pulled away from the curb where it was parked, then drove east away from the barbershop, made a U-turn and paused in front of the barbershop for almost a minute before driving away. Cell phone records showed Guthrie called Grant at 11:35 a.m. from an area just outside of the neighborhood where the shooting occurred.

Meanwhile, Erving exited the barbershop and was seen outside panting heavily and struggling to catch his breath. Erving entered the liquor store, and a customer called 911 to report the shooting and eventually put Erving on the phone, who reported to the dispatcher that his friend had been shot 15 times. Erving also called his friend, Mark Ritchey, in a

3. The man was never clearly identified at trial.
panic and asked Ritchey to come pick him up. When Ritchey arrived, Erving was distraught and frantic.

San Diego Police Officer David Beathard was the first law enforcement official to arrive at the scene. Erving flagged Beathard down and exclaimed, “He is gone. They shot him like 15 times.” Beathard entered the barbershop and found Canady lying on the floor in a pool of blood. Canady was pronounced dead at the scene and investigators found 14 cartridge casings, all fired from the same nine-millimeter Glock pistol.

Erving spoke with another officer about the shooting at the scene and consented to being swabbed for gunshot residue, photographed, and patted down. Once officers asked Erving to go back to police headquarters, however, he refused to answer any additional questions or cooperate further, and made himself unavailable to testify at trial.

An autopsy revealed Canady suffered 10 gunshot wounds, four to the front of his body and six to the back. One of the bullets entered the back of Canady’s head and exited the left side of the top of his skull. That bullet was fired from a closer distance than the other bullets, likely 12 inches or less from Canady’s head.

Officers eventually learned Johnson was in the Trade Winds liquor store next door to the barbershop immediately before the shooting, and his DNA and fingerprints were obtained from two beer cans in the liquor store that he had handled, but did not purchase. Police recovered surveillance video from the liquor store and the auto shop.

Police used the clothes Johnson was wearing—a dark blue American Eagle shirt with an “A-Eagle” emblem, a baseball cap, dark pants, a dark-colored wristwatch with a large face, and white Adidas shoes with black stripes—to identify him as the person who bought the beer and entered the barbershop immediately before the shooting. Once Johnson was identified, within weeks of the shooting San Diego police, with assistance from the FBI, requested a “cell tower dump” from major wireless carriers and used that data and the time of his call to Guthrie while in the liquor store to ascertain the numbers of Guthrie's phone. Guthrie’s phone number as the first phone number in his possession. Authorities also found his burner phone, watch, and Adidas shoes he wore the day of the shooting in his possession. Authorities also found his burner phone, which had Guthrie’s phone number as the first phone number recorded in the phone’s list of contacts.

On August 27, 2014, San Diego Police Officer Jim Jones interviewed Johnson in Kansas City. When shown a picture of Guthrie, Johnson told Jones that he was not sure if he knew Guthrie. Johnson admitted to shooting Canady, but denied that anyone else was involved with the crime. Johnson told Jones that the “support at the scene” that the video surveillance showed were just kids who wanted liquor.

Guthrie’s phone was eventually traced back to 9881 Via Monzon, where officers conducted surveillance and saw Guthrie using the phone. After identifying Guthrie, San Diego police officers conducted a traffic stop and Guthrie produced a Florida driver license with the name Devon John. Officers later obtained a warrant to search the Via Monzon residence and discovered that it was being used as a marijuana stash house. The search of the house uncovered significant marijuana residue and packaging, a Taurus handgun, two extended round magazines, packaging materials, scales, fake identification cards, passport photos of multiple individuals, pay/owe sheets, tables with cuts on them, and multiple cell phones, one of which contained Guthrie’s DNA. Officers also learned the house was leased to Talya Martin.

The same day that Johnson was arrested in Kansas City, San Diego police officers executed the search warrant for the Via Monzon house and arrested Guthrie, who was there. Guthrie was taken into custody and interviewed at the homicide office of the police department headquarters. Guthrie initially claimed to be Mike Smith from Brooklyn. When the officers showed photos of the crime scene and Johnson to Guthrie, he first denied being in the area or knowing anything about the shooting. He told the interviewing officers he was staying at the Via Monzon address because the person who lived there, Talya Martin, was vacationing.

Eventually, Guthrie admitted his real name. He insisted he lied about his name only because he entered the United States illegally in 2013. He also eventually admitted the Via Monzon house was used for packing marijuana and that he served as the “middle man” or runner for Grant. When shown a photo of Johnson again, Guthrie admitted he recognized him, knew him as “Boom,” and that he bought 20 pounds of marijuana from him. Guthrie then changed his story, and said he was the seller and that he sent or gave weed to Johnson. Guthrie also told officers he bought the phone that he used to communicate with Johnson.

Guthrie eventually admitted that he knew more about Canady and the shooting, but told police he did not want to pro-

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4. Police later confirmed that Johnson flew this route using information obtained from United Airlines.
vide more information because he feared for the safety of his family in Jamaica. He admitted he and Johnson worked for Grant, who was also known as Razor. Guthrie maintained he was not involved in the shooting, but told officers Grant was upset with Canady for stealing Grant’s marijuana and sleeping with Grant’s girlfriend, Martin. Guthrie also eventually admitted to being in the neighborhood where the shooting occurred, but claimed he was there to sell marijuana. When confronted with records of cell phone calls between him and Johnson, Guthrie stated the calls all related to drug deals.

Law enforcement also interviewed Martin, who initially told police she would not cooperate. The prosecutor, however, entered an immunity agreement with her. At trial, she told the juries that she and Grant, whom she called Razor, were in an on and off again relationship for several years. She did not live with Grant, but Grant paid for her apartment, car, clothing, purses, and all of her other expenses. In exchange, Martin would run errands for Grant, including receiving wired money, exchanging cash for prepaid credit cards, using fake identification to open post office boxes and retrieve packages, and renting houses for Grant, including the one on Via Monzon. Martin testified that she never lived at that house, but Guthrie did.

Martin was introduced to Guthrie by Grant, who referred to Guthrie as his family. She knew Guthrie as Shawn and by the nickname “Boxer” and one of her friends, Claudia Ambrose, formed a relationship with Guthrie around 2013. Martin testified that she and Grant would socialize with Guthrie and Ambrose regularly, including going on trips and frequent double dates.

Martin testified that in 2012 and 2013, she was also seeing Canady. At one point during this relationship, Martin agreed to store six storage bins of marijuana in her apartment for Grant while Grant was out of town. Martin stated that in the same time frame, approximately a year before Canady’s death, Canady occasionally stayed with Martin at her apartment, including when the marijuana was stored there. On the last occasion that Canady stayed the night, Martin woke up in the morning to find both Canady and the bins of marijuana gone. Martin called Canady, who denied taking the marijuana. Martin eventually told Grant what had happened, including that she had been in a relationship with Canady. Martin testified that she and Grant continued to be in a relationship for several years after the incident.

Martin testified she learned through social media that Canady had been killed. Martin did not suspect Grant was involved in the killing because two years had passed since Canady had stolen the bins, and because her relationship with Grant was going well. Several months later, in August 2014, Martin learned about the search warrant served at the Via Monzon house. At that time, she was in Jamaica with Grant. Martin had planned to return to San Diego the day after they learned of the search warrant, but she extended her trip for another three months. Martin also testified that Grant never returned to the United States from Jamaica and was murdered there on April 2, 2015.

After a three-week trial, Johnson’s jury convicted him of first degree murder and found true the firearm enhancement allegation that he intentionally and personally discharged a firearm during the commission of the murder, causing death. Several days later, Guthrie’s jury returned its verdict, finding Guthrie also guilty of first degree murder.

Before sentencing, Johnson admitted he was convicted of murder in Jamaica but did not concede the conviction qualified as either a strike prior or a serious felony prior. The trial court found the conviction qualified as both, sentencing Johnson to 50 years to life in prison on count 1, consisting of 25 years to life doubled under the “Three Strikes” law (§§ 667 and 1170.12), and to a consecutive second life term with a minimum of 25 years for the firearm enhancement. The court imposed a $10,000 restitution fine, ordered Johnson to pay a $40 court security fee, a $30 criminal conviction assessment, and $5,000 in victim restitution jointly and severally with Guthrie. The court sentenced Guthrie to 50 years to life, doubled under the Three Strikes law, plus another consecutive five years for the felony strike prior. The court imposed a $10,000 restitution fine, ordered Guthrie to pay a $40 court security fee, $30 criminal conviction assessment, and directed Guthrie to pay $5,000 in victim restitution jointly and severally with Johnson. Both men appealed.

DISCUSSION

I

Failure to Instruct on Lesser Included Offenses

Johnson first argues the trial court erred by denying his request for a jury instruction on the lesser included offense of second degree murder.

A. Relevant Background

Before closing arguments, counsel conferred with the court on jury instructions. Both Johnson’s attorney and the district attorney requested an instruction on second degree murder. During the discussion, the trial court asked the attorneys “if a juror finds that Mr. [Johnson] or Mr. Guthrie was factually involved in the homicide, is there any way that they would find it other than premeditated? Is there any way a reasonable juror could find that other than premeditated?” The prosecutor responded, “I suppose the only argument a juror might entertain in their mind is that perhaps this was intended to be . . . some type of drug deal, and when [Johnson] went in, something happened that he wasn’t expecting and he ended up firing the gun and killing Mr. Canady.” The prosecutor then requested instructions on both first and second degree murder.

5. The prosecution dismissed the charges for assault with a semi-automatic firearm (count 2) at the close of its presentation of evidence.
Guthrie’s counsel next responded to the trial court’s question, indicating the second degree instruction was required for his client since it was possible that the killing could have been the result of a drug deal gone awry, stating: “We don’t know really what happened from maybe the people in the car, the silver car’s perspective, what was going to happen in the shop, let’s say. And so a killing ensues. What kind of a killing is it? And what are they aiding and abetting? They leave, according to the theory of the prosecutor, and then they come back to see what the hell happened. I heard shots. Is that shots? Let me go check that out. They circle around and come back to see the fallout of it and are horrified by the fact that this just happened. Because of her theory that the car is coming back and it is not the getaway driver at that point maybe . . . there was something, a struggle ensued . . . .”

Johnson’s counsel then noted he was not planning to argue second degree murder during his closing argument, even if the jury were so instructed. Johnson’s counsel stated, “I don’t think I have facts from my client without divulging what he has told me . . . to support making that argument.” He then stated that he would like the second degree instruction to provide the jury with more options, and to allow them to “split the baby.”

After these arguments, the trial court initially indicated it would instruct on second degree murder “out of an abundance of caution.” But after hearing from defense counsel, the court concluded it did “not have a duty to instruct on second as to [Johnson],” but permitted Johnson’s counsel to revisit the issue after speaking with his client. The court concluded the jury should be instructed on second degree murder as to Guthrie.

The following day, Johnson’s attorney conceded there was not sufficient evidence to warrant any argument that Johnson’s conduct constituted second degree murder, stating, “basically the way the evidence has come out in this case, there’s really nothing that supports any finding that this was some sort of, you know, accidental, in terms of the way the evidence was presented, that either the government’s theory is right or it isn’t. And that is that either, under their theory, that you planned to walk into the barbershop and execute Mr. Canady or you didn’t. There is really nothing that suggests that this was some sort of accident that unfolded.” The attorney then stated, “we can’t ask for jury instructions that don’t match any of the evidence.”

After the court reminded Johnson’s attorney to preserve potential issues for appeal, he requested the instruction for the record. The trial court then formally denied the request, finding there was no substantial evidence to support an instruction on the lesser offense.

B. Legal Principles

Trial courts have a duty, even in the absence of a request, to instruct juries in criminal cases in those principles of law necessary to assist them in understanding the case. (People v. Moye (2009) 47 Cal.4th 537, 548; People v. Breverman (1998) 19 Cal.4th 142, 154.) Courts must instruct juries on lesser included offenses where there is substantial evidence from which a jury could conclude that the lesser offense was committed and the greater offense was not. (People v. Cook (2006) 39 Cal.4th 566, 596.) “Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.” (People v. Barton (1995) 12 Cal.4th 186, 201, fn. 8.)

“‘Homicide is the killing of a human being by another . . . .’” (Citation.) Criminal homicide is divided into two types: murder and manslaughter. ‘Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.’ (§ 187, subd. (a).)” (People v. Beltran (2013) 56 Cal.4th 935, 941.) “A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.] Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.” (‘Id. at p. 942.)

“Manslaughter is a lesser included offense of murder. (§ 192; People v. Thomas (2012) 53 Cal.4th 771, 813.) The mens rea element required for murder is a state of mind constituting either express or implied malice. A person who kills without malice does not commit murder. Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, ‘at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’” (Citation.) Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of reconsideration to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice.” (People v. Beltran, supra, 56 Cal.4th at p. 942.)

On appeal, we independently review the record to determine whether there is substantial evidence that could support a finding of guilt on a lesser offense. We do not assess credibility or decide whether a jury should convict on the lesser offense. Our concern is only whether the evidence is substantial such that a jury could reasonably choose the lesser of the offenses. (People v. Manriquez (2005) 37 Cal.4th 547, 587.)

C. Analysis

The trial court did not err by failing to give a second degree murder or voluntary manslaughter instruction to Johnson’s jury. On appeal, Johnson asserts the instruction was warranted because there was evidence that the killing was not a coordinated hit, but merely a drug deal gone bad that erupted in gun fire. Specifically, Johnson points to the facts
that (1) one of the auto shop employees heard two sets of gunshots, (2) Erving did not cooperate with police and got into a physical altercation with Canady’s brother after the shooting, and (3) the abundance of evidence concerning Grant’s marijuana operation.

Importantly, there is no evidence in the record showing any quarrel between Johnson and Canady or Erving. To the contrary, the video footage showed Johnson entering the barbershop and exiting just 16 seconds later, indicating there was no time for a drug deal to go south, or another type of dispute to erupt. In addition, there was no evidence that Canady or Erving were armed or that Johnson felt his own life was in danger. All the bullets collected from the shooting were fired from the same gun. With respect to the auto shop employee’s testimony that there was a gap in time between two sets of gunfire, there was no specific testimony concerning the length of that gap. The employee stated only that he heard shots, then got up from the outdoor table he was eating at to see if an engine had backfired, then sat back down and heard more shots. This evidence does not show a jury could have reasonably concluded Johnson acted without malice or in the heat of passion.

The other two facts that Johnson points to, an altercation between Canady’s brother and Erving and the drug operation found at the Via Monzon house, are equally insufficient to show the instruction was required. Neither fact showed there had been a drug deal involved or any altercation at the scene of the murder. Simply put, there was no evidence before the court that supported that theory. Indeed, the evidence of Grant’s drug operation at the Via Monzon house supported the prosecution’s theory that the killing was in retaliation for Canady stealing drugs from Grant. There was no evidence that tied the drug operation at that house to Canady’s death.

Likewise, Johnson fails to identify any specific evidence tying Erving’s conduct to his theory that Johnson did not intend to kill Canady in the 16 seconds he was in the barbershop. With respect to Erving’s unwillingness to cooperate with the police, Johnson argues that “juries reasonably could have concluded that Erving followed an armed shooter out of the barbershop and tried to leave the scene because he needed to take something out the barbershop [for instance money, marijuana or guns] before the police arrived.” However, there was no evidence that Erving did so. Clear video footage showed Erving exiting the barbershop empty handed and there was no evidence that there was any contraband recovered from the barbershop or Erving.

Further, Johnson’s defense at trial was that he was not the shooter. His attorney argued that the “gunshots started happening before [Johnson] ever even walked into” the barbershop, and suggested that Erving was the perpetrator. Johnson’s own statements to police, however, showed he was hired to kill Canady and did so deliberately. The jury heard Johnson tell police that the killing was retaliation—“he [Canady] the one that did what he did. . . . He is the right guy [to kill]”—and that to find Canady, Johnson and his coconspirators “do our homework like you guys do.”

The evidence Johnson now marshals on appeal to support his claim of instructional error was not sufficient “to deserve consideration by the jury.” (People v. Barton, supra, 12 Cal.4th at p. 201, fn. 8.) These facts were not “evidence that a reasonable jury would find persuasive” to show Johnson committed a lesser included offense to first degree murder. (Ibid.) The trial court’s failure to instruct on second degree murder or manslaughter was not error.

II

Admission of Fraudulent Identification Evidence

Johnson and Guthrie contend the trial court erred by denying their motions to exclude false identification documents seized from their homes.

A. Relevant Background

Johnson and Guthrie are both Jamaican nationals who used fake birth certificates and driver licenses from the Virgin Islands to illegally enter the United States. Both birth certificates were similar in terms of templates, printer marks, and false content. Both certificates, for example, stated that they were born in Christiansted on the island of St. Croix. Both listed their mother’s first name as “Sonia” and their doctor’s first name and middle initial as “Marc K.” Both doctors’ signatures also resembled each other.

Guthrie’s attorney moved to exclude the documents as “highly prejudicial and inflammatory,” specifically as “to the illegal immigration issue,” which he argued was “highly inflammatory in politics . . . .” Johnson’s attorney added that the evidence only tenuously connected the defendants to each other and that the prosecution had other more persuasive evidence tying them together. He argued that because of this, the prejudicial nature of the evidence outweighed its probative value.

In response, the prosecutor agreed not to elicit testimony that the defendants were illegal immigrants, but opposed the motion with respect to the documents. She argued the similarities in the forgeries suggested a common manufacturer, which was highly relevant to the theory of her case, specifically the defendants’ conspiratorial relationship. In denying the defendants’ motion, the court emphasized the importance of the fraudulent documents to the prosecution’s conspiracy theory and found that their probative value outweighed the potential prejudice to the defendants. The court also acknowledged the prosecutor’s agreement to avoid testimony relating to immigration status and stated it would sustain any objections to testimony of that nature.

The topic of the defendants’ immigration status was also at issue with respect to Guthrie’s motion to exclude specific statements he made during his police interview about his immigration status. When he was arrested, Guthrie initially gave detectives a false name and told them he was from Brooklyn,
New York. During the interview, Guthrie eventually admitted he had given the police a false name but told them he had only done so because he was in the country illegally and feared deportation.

In denying Guthrie’s motion to exclude those statements, the court stated “I don’t want the people trying to argue that his illegal entry is in some fashion relevant either to his credibility, which it is, but I am not going to let that argument, or to whether he committed this crime. But having said that, the fact that he was in the country illegally is going to go before jurors.” The court also stated it did not want the prosecution to raise any immigration hold that might have been in place, but noted the defense was free to argue that the only reason they had fraudulent documents was to illegally enter the United States.

The fraudulent identification documents were introduced by the prosecution through the testimony of Florida Highway Patrol Master Sergeant Spencer Ross, who investigated identity theft and fraudulent identification operations in Florida. Ross testified that the defendants’ fake names were on a list of 300 people who might have obtained fraudulent Florida driver licenses relying on false Virgin Island documents. Ross also testified that the Virgin Islands government never found a driver license or birth record for Johnson’s false name, Derrick Brown. Ross stated that in his opinion, the common features of the defendants’ fraudulent birth certificates suggested that they were generated by the same person or group. He also testified that Johnson’s and Guthrie’s fake licenses were issued about two months apart.

B. Legal Principles and Analysis

The admission of evidence is in general governed by Evidence Code sections 210, 351, and 352. Evidence Code section 351 states: “Except as otherwise provided by statute, all relevant evidence is admissible.” Evidence Code section 210 defines relevant evidence as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” Although all relevant evidence is admissible, Evidence Code section 352 gives a trial court discretion in excluding some otherwise admissible evidence: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“We review a trial court’s decision to exclude evidence for abuse of discretion. (People v. Linton (2013) 56 Cal.4th 1146, 1181.) The decision to exclude evidence ‘will not be disturbed except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].’ “ (People v. Peoples (2016) 62 Cal.4th 718, 745.)

Johnson and Guthrie do not contend that Ross’s testimony concerning their fraudulent identification was irrelevant, only that it was unfairly prejudicial because it referenced their immigration status. Specifically, they assert the introduction of their false identification documents was inflammatory and extremely prejudicial because “caselaw in California and in other jurisdictions have recognized the strong danger of prejudice attendant with the disclosure of a party’s status as an undocumented immigrant.” The case Johnson quotes for this proposition, Velasquez v. Centrome, Inc. (2015) 233 Cal.App.4th 1191, however, supports the opposite outcome he and Guthrie advance. In Velasquez, the Court of Appeal overturned the defense judgment in a personal injury lawsuit where the plaintiff’s immigration status was disclosed during voir dire, but was entirely irrelevant to the claims at trial. Unlike Velasquez, here there is no dispute that the evidence at issue—that the defendants obtained false identification through the same fraudulent channel—was relevant to show Johnson and Guthrie were part of the conspiracy with Grant to murder Canady.

The record is clear that the trial court considered the potentially prejudicial effect of the evidence and limited the presentation of that evidence to minimize its inflammatory character. Further, the prosecution did not use the defendants’ immigration status to insinuate criminal proclivity or challenge the defendants’ credibility. In fact, federal immigration crimes specifically were raised for the first time by Guthrie’s attorney during her cross-examination of Ross. On redirect, the prosecutor then asked, “did you learn anything about any citizenship or background that seemed to be consistent throughout your investigation” into the false identification scheme. Ross replied that all the individuals that obtained fraudulent identification were not lawful citizens of the United States and were uniformly from Jamaica.

Ross’s testimony was relevant to the crimes at issue, and the trial court did not abuse its discretion by finding the evidence’s probative value was not substantially outweighed by any potential prejudicial effect.

III

Johnson’s Prior Jamaican Conviction

Johnson next alleges the trial court erred by finding his Jamaican murder conviction qualified as a strike prior and serious felony prior. He asserts that because a defendant in Jamaica can potentially be convicted of murder by nine members of an 11-person jury, and not a unanimous 12-person jury, use of the conviction to enhance his punishment violates his right to equal protection under the law.

6. Johnson also argues that the probative value was low because Ross’s testimony showed the fraudulent identification scheme involved 300 individuals and Guthrie’s and Johnson’s false driver licenses were issued two months apart in different counties in Florida. This information goes to the weight of the evidence, and does not diminish its probative value to the point that it is substantially outweighed by prejudicial effect.
A. Relevant Background

The information alleged Johnson’s 1998 conviction for murder in Jamaica constituted a prior strike and prior serious felony. At the initial sentencing hearing, Johnson admitted he was convicted of murder in Kingston County, Jamaica, but did not concede the conviction qualified as a strike or a serious felony prior under California law. The prosecution filed a sentencing brief asserting the elements of murder in Jamaica were the same as those in California and explaining the legal system was constitutionally sound. At a subsequent sentencing hearing, the court compared Jamaica’s law with section 187 and concluded the elements were the same. The trial court also stated it had considered whether Jamaica’s “guilt-determining process” was “incompatible with the fundamental principles reflected by [the] constitution” and had concluded that “Jamaica’s legal system adheres to our fundamental constitutional principles.” The court then found that Johnson’s foreign conviction qualified as a serious and violent felony under California law.

The court then invited counsel to argue if the prior conviction should be stricken under People v. Superior Court (Romero) (1996) 13 Cal.4th 497. Johnson’s attorney responded that Johnson “is 49 years old” and the “reality of it, it is frankly academic because given the time that he is facing” even if he were paroled, “he would be extradited to Jamaica to serve out the remainder of the murder sentence there . . . .” Johnson’s attorney then stated he would rest on the pleadings. The trial court concluded striking the prior conviction was not appropriate. The court noted that Johnson had a strong affection for his family, but the nature of the current offense, and the fact he was previously convicted for murder and escaped from prison in Jamaica made it an inappropriate case to dismiss the strike.

B. Legal Principles

“For criminal sentencing purposes in this state, the term ‘serious felony’ is a term of art. Severe consequences can follow if a criminal offender, presently convicted of a felony, is found to have suffered a prior conviction for a serious felony.” (People v. Warner (2006) 39 Cal.4th 548, 552.) If the present conviction is also for a serious felony, “the offender is subject to a five-year enhancement term to be served consecutively to the regular sentence.” (Ibid.) A prior conviction for a serious felony also “renders the offender subject to the more severe sentencing provisions of the three strikes laws.” (Ibid.)

“The Legislature has provided in section 668: ‘Every person who has been convicted in any other state, government, country, or jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state.’” (People v. Warner (2006) 39 Cal.4th 548, 552.) If the present conviction is also for a serious felony, the offender is subject to the more severe sentencing provisions of the three strikes laws. (Ibid.) A prior conviction for a serious felony also “renders the offender subject to the more severe sentencing provisions of the three strikes laws.” (Ibid.)

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C. Analysis

Johnson does not dispute that the elements of murder in Jamaica are aligned with section 187. He argues, however, that his prior conviction does not qualify as a serious prior felony or a strike prior because the Jamaican legal system allows a murder conviction by a jury of 11, and not 12, if a juror dies or is “discharged by the Court through illness or other sufficient cause,” and allows for conviction when nine jurors are in agreement. Johnson contends that because article 1, section 16 of the California Constitution provides a criminal defendant with a right to be tried by an impartial and unprejudiced jury of 12 and requires a unanimous verdict, his right to equal protection under the United States Constitution is violated by the use of the Jamaica conviction.7

7. The Attorney General argues as an initial matter that Johnson waived this issue because it was not raised in the trial court. We agree the issue was forfeited, but exercise our discretion to consider the claim to avoid a later challenge to the judgment on the basis of ineffective assistance of counsel.
“...The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” (In re Lemanuel C. (2007) 41 Cal.4th 33, 47.) To prevail on an equal protection claim, the defendant must show (1) the state has adopted a classification that affects two or more similarly situated groups in an unequal manner, and (2) the challenged classification does not bear a rational relationship to a legitimate state purpose. (People v. Hofsheier (2006) 37 Cal.4th 1185, 1200.) When determining whether two persons are similarly situated, the court does not inquire whether they are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. (Id. at pp. 1199-1200.)

Under the recidivist statutes at issue, to determine if a foreign conviction qualifies the defendant for increased punishment, the relevant inquiry is “whether the offense of which the defendant was convicted in [the foreign jurisdiction] includes the elements of first or second degree murder in California such that the [foreign] offense was one which had the capacity for punishment as first or second degree murder.” (People v. Martinez (2003) 31 Cal.4th 673, 681, italics omitted.) The recidivist laws do not look to the process by which the conviction was obtained, but rather to the elements of the crime for which the defendant was convicted. As discussed, a foreign conviction may form the basis for a prior felony enhancement or strike if the crime “includes all of the elements of any serious felony in California.” (People v. Narevrette, supra, 4 Cal.App.5th at p. 842; §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).)

While no California opinion has explored whether the process afforded in a foreign jurisdiction must meet California’s own constitutional requirement of 12 unanimous jurors for a conviction, we agree with the Attorney General that the California Supreme Court’s decision in People v. Andrews (1989) 49 Cal.3d 200 (Andrews) provides useful guidance and supports the conclusion that a prior foreign conviction can form the basis for a sentencing enhancement, even if the foreign jurisdiction did not afford the same procedural protections available to a defendant in California.

In Andrews, the defendant was convicted of first degree murder. The jury found true the special circumstance allegation under section 190.2, subdivision (a)(2) that he had been previously convicted of murder, which made the defendant eligible for the death penalty and life in prison without the possibility of parole. (Andrews, supra, 49 Cal.3d at p. 221.) The defendant was 16 when he committed the prior offense in Alabama, “where he was charged and convicted as an adult. Under Alabama law at the that time, minors 16 to 18 years old came within the original jurisdiction of the adult criminal court. . . . Had defendant committed the murder in this state, California law would have permitted his being tried as an adult only if a juvenile court had [first] found him unfit . . . .” (Ibid.) The defendant argued he was denied equal protection under the federal and state Constitutions because he was treated differently than capital defendants who had committed murder at the age of 16 in California, who would have been entitled to a fitness hearing. (Id. at p. 223.)

The Supreme Court summarily rejected this assertion, stating “[i]n no two states is the process by which a conviction is obtained identical. This does not mean, however, that a violation of equal protection results when a conviction from a foreign jurisdiction and a California conviction for the same offense are accorded equal weight . . . .” (Andrews, supra, 49 Cal.3d at p. 224.) The court continued, “[w]e conclude that, as long as the guilt ascertainment process in the foreign jurisdiction is not in and of itself constitutionally flawed, there is no constitutional bar against treating a murder conviction from a foreign state in the same manner as a California conviction for the same offense.” (Ibid.)

Johnson argues that unlike the prior conviction in Andrews, his Jamaican conviction does not pass constitutional muster in California because our Constitution requires a unanimous jury of 12 for a criminal conviction.8 Because not all foreign jurisdictions provide the same procedural protections as California’s constitution, he argues defendants with foreign convictions are treated in an unequal manner. However, “[t]he recidivist laws do not look to the process by which the conviction was obtained, but rather to the elements of the crime for which the defendant was convicted. As discussed, a foreign conviction may form the basis for a prior felony enhancement or strike if the crime ‘includes all of the elements of any serious felony in California.” (People v. Narevrette, supra, 4 Cal.App.5th at p. 842; §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).)

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In Andrews, the defendant was convicted of first degree murder. The jury found true the special circumstance allegation under section 190.2, subdivision (a)(2) that he had been previously convicted of murder, which made the defendant eligible for the death penalty and life in prison without the possibility of parole. (Andrews, supra, 49 Cal.3d at p. 221.) The defendant was 16 when he committed the prior offense in Alabama, “where he was charged and convicted as an adult. Under Alabama law at the that time, minors 16 to 18 years old came within the original jurisdiction of the adult criminal court. . . . Had defendant committed the murder in this state, California law would have permitted his being tried as an adult only if a juvenile court had [first] found him unfit . . . .” (Ibid.) The defendant argued he was denied equal protection under the federal and state Constitutions because he was treated differently than capital defendants who had committed murder at the age of 16 in California, who would have been entitled to a fitness hearing. (Id. at p. 223.)

The Supreme Court summarily rejected this assertion, stating “[i]n no two states is the process by which a conviction is obtained identical. This does not mean, however, that a violation of equal protection results when a conviction from a foreign jurisdiction and a California conviction for the same offense are accorded equal weight . . . .” (Andrews, supra, 49 Cal.3d at p. 224.) The court continued, “[w]e conclude that, as long as the guilt ascertainment process in the foreign jurisdiction is not in and of itself constitutionally flawed, there is no constitutional bar against treating a murder conviction from a foreign state in the same manner as a California conviction for the same offense.” (Ibid.)

Johnson argues that unlike the prior conviction in Andrews, his Jamaican conviction does not pass constitutional muster in California because our Constitution requires a unanimous jury of 12 for a criminal conviction.8 Because not all foreign jurisdictions provide the same procedural protections as California’s constitution, he argues defendants with foreign convictions are treated in an unequal manner. However, “[t]he recidivist laws do not look to the process by which the conviction was obtained, but rather to the elements of the crime for which the defendant was convicted. As discussed, a foreign conviction may form the basis for a prior felony enhancement or strike if the crime ‘includes all of the elements of any serious felony in California.” (People v. Narevrette, supra, 4 Cal.App.5th at p. 842; §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).)

In reaching this conclusion, the Andrews opinion used “a jury consisting of fewer than 12 persons” as one example of a procedure that is required in California, but the absence of which would not preclude a foreign conviction from forming the basis for a sentence enhancement under section 190.2. (Andrews, supra, 49 Cal.3d at p. 223.) The court noted that such “procedural differences might conceivably spell the difference between a murder conviction and some other result,” but concluded neither the language of section 190.2 nor its legislative history showed that the Legislature or the electorate “intended that the prosecution’s ability to use convictions from other states should turn on such questions.” (Andrews, at p. 223.) The court held the intent of the statute “was to limit the use of foreign convictions to those which include all the elements of the offense of murder in California, and [that the] defendant . . . failed to show otherwise.” (Ibid.)

As stated, Johnson does not dispute that the elements of murder in Jamaica are aligned with the elements of murder in California. Nor does he contend that he could not have
been convicted of murder if he had committed the crime in California. Because the recidivist sentencing provisions at issue look exclusively to the elements of the crime to determine their application, we reject Johnson’s assertion that the laws treat defendants with convictions from foreign jurisdictions differently than those who are charged and convicted in this state. In other words, the dichotomy that Johnson has set up between himself and those with prior murder convictions obtained in California is a false one. (See People v. Johnson (1991) 233 Cal.App.3d 1541, 1549-1550 [rejecting claim that Nevada conviction for burglary could not serve as basis for prior serious felony because “Nevada law did not allow him the same procedural protections he would have enjoyed in California”].) Contrary to Johnson’s assertion, the two types of defendants are treated equally so long as the crime at issue is the same in both jurisdictions. 9

Further, and critically, Johnson has not shown that his conviction was in fact deficient under California’s Constitution. (See People v. Tassell (1984) 36 Cal.3d 77, 92 [Rejecting defendant’s claim that prior conviction under Florida law improper basis for sentencing enhancement because “the documentation submitted by defendant [was] insufficient to support his claim that he was not advised of his rights against self-incrimination and to confront and cross-examine witnesses at the time he entered his guilty plea.”].) Johnson has presented no evidence from his prior trial that shows his conviction was obtained by anything less than 12 unanimous jurors.

Even if we were to conclude that the two groups of defendants are treated differently, however, Johnson has also not shown the state lacked an appropriate basis for differing treatment. The challenged classification bears a rational relationship to the legitimate state purpose of imposing greater punishment on offenders who have shown a propensity to repeat their violent crimes, regardless of where those crimes occurred. (See § 667, subd. (b) [“It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious and/or violent felony offenses.”]; People v. Superior Court (2014) 225 Cal. App.4th 1007, 1016 [The purpose of the Three Strikes law is ‘“to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses” ’ [citation] and ‘“to promote the state’s compelling interest in the protection of public safety and in punishing recidivism.” ’].) For these reasons, we reject Johnson’s claim that the use of his Jamaican conviction resulted in a violation of his constitutional rights.

IV

Guthrie’s Motion to Suppress His Statements to Police

Guthrie contends that statements he made to police on August 27, 2014, after his arrest were obtained in violation of his rights under Miranda v. Arizona (1966) 384 U.S. 436 (Miranda). Guthrie asserts he unequivocally invoked his right to counsel during the interview, and that all of the statements made after that invocation were improperly admitted at trial. We disagree.

A. Relevant Background

On August 27, 2014, Detective Gary Avalos arrested Guthrie at the Via Monzon residence. Avalos and San Diego Police Sergeant Greg Flood questioned Guthrie in an interview room at the police headquarters furnished with recording equipment. Video footage of the interview was played for the jury. After asking Guthrie basic identifying information, Avalos read Guthrie his Miranda rights. Avalos then asked Guthrie if he understood those rights and if he was willing to talk. Guthrie responded “Yeah…I,…yeah cause I want to, I want to know what this is about.” Flood then explained that if Guthrie was not a United States Citizen he also had the right to speak with his consulate. Guthrie did not assert his rights.

Avalos and Flood then continued questioning Guthrie, primarily about his relationship with Ambrose and Martín, Guthrie’s whereabouts, and his identity. Avalos showed Guthrie a photo of Johnson from the liquor store’s surveillance camera and asked Guthrie who the man was. Guthrie denied knowing the man or being at the scene of the murder. Avalos showed Guthrie a copy of a Florida driver license with his name and picture, and Guthrie finally admitted his

9. Johnson also relies on Trevino, supra, 26 Cal.4th 237 to support his argument that Andrews is not applicable here, but his reliance is misplaced. Trevino held that it is the prior offense that establishes whether the defendant is eligible for the death penalty or a life sentence without the possibility of parole under section 190.2, subdivision (a), and not the particular characteristics of the defendant at the time he committed the offense. (Trevino, at p. 244.) In Trevino, the defendant committed a prior murder at age 15 in Texas where he was tried as an adult. (Ibid.) Had the crime occurred in California he would have been tried as a juvenile and, on appeal, the defendant argued this distinction precluded the use of the conviction as the basis for enhanced punishment under section 190.2. (Trevino, at p. 239-240.) In rejecting this argument, the Trevino court distinguished the statutory language of section 668 from that of section 190.2, noting that “section 668 would permit consideration of a defendant’s age in determining whether that defendant could have been imprisoned for the same conduct in California.” (Trevino, at p. 241-242.) In drawing this distinction the court pointed to the statutory language of section 668, which provides, “Every person who has been convicted in any other state, government, country, or jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state.” (Trevino, at p. 241, quoting § 668.) In contrast, section 190.2 stated, “For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.” (Trevino, at p. 241.) We do not agree with Johnson that this distinction is relevant to the determination in this case. Unlike the defendant in Trevino, Johnson points to no personal characteristic that would have precluded a conviction in California had the murder he committed in Jamaica occurred in this state.
identity and told the officers he did not disclose his name because he was in the United States illegally. Avalos then pressed Guthrie to admit he was at the scene of the murder and Guthrie repeatedly denied it, eventually stating, “Then charge me, sir. A lawyer, lawyer.”10 Flood then stated: “I mean do you want to talk to a lawyer?” Guthrie responded: “Yeah, yeah. Do, do I, if anything…” The colloquy continued: “FLOOD: We want to continue to talk to you. Do you want to continue to talk to us or do you want to talk to a lawyer? [¶] GUTHRIE: Listen, listen. If you’re gonna charge me, charge me. If not, let me go. Or, or call . . . immigration and say I’m here illegally. [¶] FLOOD: Well, you’re under arrest right now. [¶] GUTHRIE: Yeah. [¶] FLOOD: So, you understand that. [¶] GUTHRIE: Yeah. [¶] FLOOD: Okay, you, you, but you read me my rights, but what I under arrest for? [¶] FLOOD: Right now you’re under arrest for murder.”

Flood continued the questioning, telling Guthrie they knew he was not the gun man, but they knew he was at the scene and involved in the murder. Guthrie continued to deny he was at the scene and maintained he did not know anything about Johnson. Avalos asked Guthrie to give him information about his connection to Ambrose, but Guthrie declined and said, “I’m, I’m not speaking no more man. Because I don’t know that dude [referring to Johnson], man.” Avalos pressed Guthrie to continue to provide information to help himself out if what he was saying was true. The interview then continued for over another hour. Guthrie continued to deny any involvement in the shooting, but admitted he was involved in drug sales with Grant and eventually provided information about the motive for the killing, telling Avalos and Flood that Canady had robbed Grant and slept with Martin.

Before trial, Guthrie moved to suppress the videotaped interview. At the hearing on the motion, Guthrie’s attorney asserted that by stating, “yeah, yeah” in response to Flood’s question, “do you want to talk to a lawyer,” Guthrie invoked his right to counsel. The prosecutor argued Guthrie’s words were ambiguous because he uttered the phrase “yeah, yeah” constantly throughout the interview, and that it was reasonable for Flood and Avalos not to perceive it as a clear request for an attorney. The trial court found that Guthrie made a free and knowing waiver of his right to an attorney at the beginning of the interview, and that Guthrie did not “make an unequivocal, unambiguous assertion of [that] right[] in order to revoke that waiver.”

B. Legal Principles

As a safeguard to protect a suspect’s Fifth Amendment privilege against self-incrimination, the United States Supreme Court requires law enforcement agencies to advise a suspect, prior to any custodial questioning, “that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” (Miranda, supra, 384 U.S. at p. 479; People v. Martinez (2010) 47 Cal.4th 911, 947 (Martinez.).) Before admitting a defendant’s incriminating statements into evidence, the prosecution must demonstrate “the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” (Miranda, at p. 475.)

After a knowing and voluntary waiver of the rights to remain silent and to the presence and assistance of counsel, law enforcement may continue questioning the suspect until and unless the suspect clearly and unambiguously invokes these rights. (Davis v. United States (1994) 512 U.S. 452, 461 (Davis.).) An unambiguous request for counsel or refusal to talk bars further questioning (People v. Cruz (2008) 44 Cal.4th 636, 668 (Cruz) and the interrogation must end (Miranda, supra, 384 U.S. at p. 474).

If a suspect makes an ambiguous statement that could be construed as an invocation of his Miranda rights, a different standard applies. A statement is ambiguous when a reasonable officer, in view of the totality of the circumstances, would have understood “only that the suspect might be invoking the right” to remain silent or to the assistance of counsel. (People v. Williams (2010) 49 Cal.4th 405, 428 (Williams.).) “[O]fficers may, but are not required to, seek clarification of ambiguous responses before continuing substantive interrogation.” (Id. at p. 427, italics omitted; see Martinez, supra, 47 Cal.4th at p. 949 [the same rules apply to invitations of the right of counsel and the right to remain silent].)

“In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that in context it would not be clear to the reasonable listener what the defendant intends. In those instances, the protective purpose of the Miranda rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant.” (Williams, supra, 49 Cal.4th at p. 429.) Although officers are not required to clarify what may be a post waiver invocation, “it will often be good police practice for the interviewing officers to clarify . . . whether the right was being invoked.” (Martinez, supra, 47 Cal.4th at p. 947, quoting Davis, supra, 512 U.S. at p. 461.)

“In evaluating the voluntariness of a statement, no single factor is dispositive. [Citation.] The question is whether the statement is the product of an ‘“essentially free and unconstrained choice”’ or whether the defendant’s ‘“will has been overborne and his capacity for self-determination critically impaired” by coercion. [Citation.] Relevant considerations are ‘“the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity” as well as “the defendant’s maturity [citation]; education [citation]; physical condition [citation]; and mental health.”’ (Williams, supra, 49 Cal.4th at p. 436.)

10. The transcript of the interview contains an error and states instead, “Then charge me sir. I, I can get a lawyer.” (Italics added.)
This court conducts an independent review of the trial court’s legal determination of the post waiver invocation of a *Miranda* right, relying upon the trial court’s factual findings, if supported by substantial evidence. (Williams, *supra*, 49 Cal.4th at p. 425.)

C. Analysis

We agree with the trial court that Guthrie’s statements to Avalos and Flood after he initially waived his right to counsel did not constitute an invocation of his right to counsel and against self-incrimination. Guthrie does not contest the fact that he initially waived his right to counsel immediately after Avalos read him his rights. Thus, to invoke his rights during the interview, Guthrie needed to unambiguously request an attorney. (See Cruz, *supra*, 44 Cal.4th at p. 668.)

Approximately 30 minutes into the close to two and a half hour interrogation, Guthrie grew frustrated with the officers’ repeated accusation that he was at the scene of the crime. In response to their repeated statements that they knew Guthrie was near the barbershop when the shooting occurred, Guthrie stated in a frustrated tone, “[t]hen charge me, sir. A lawyer, lawyer.” To clarify if Guthrie was invoking his right to representation, Flood asked a follow up question, “do you want to talk to a lawyer?” Guthrie responded by saying, “Yeah, yeah. Do, do I, if anything. . . .” This statement was objectively ambiguous because from the start of the interrogation, Guthrie responded to almost every statement and question posed by Avalos and Flood by saying, “yeah, yeah.”

Flood, reasonably, then sought further clarification, stating, “We want to continue to talk to you. Do you want to continue to talk to us or do you want to talk to a lawyer?” Guthrie again did not unambiguously invoke his rights, stating only, “If you’re gonna charge me, charge me. If not, let me go. Or, or call . . . immigration and say I’m here illegally.” Flood explained that Guthrie was under arrest and that he was being charged with murder. The interrogation then continued without any further statement from Guthrie about his rights.

Guthrie contends that his statement, “yeah, yeah,” to Flood’s first question was an unambiguous invocation of his rights. We disagree. The trial court’s finding that the statement was ambiguous was supported by the evidence before the court. Because of Guthrie’s speech patterns, specifically his habit of stating “yeah, yeah” in response to most of the questions Avalos and Flood asked, it was reasonable for the officers to understand only that Guthrie might be invoking his right to assistance of counsel and to seek further clarification. (Williams, *supra*, 49 Cal.4th at p. 428.) Guthrie then failed to signal a clear request for a lawyer and the interrogation properly continued. The trial court’s denial of Guthrie’s motion to suppress was not error.

11. Because Guthrie initially waived his right to counsel, his heavy reliance on Smith v. Illinois (1984) 469 U.S. 91 (Smith) is misplaced. Smith explicitly considered only the threshold inquiry of “whether [the defendant] invoked his right to counsel in the first instance.” (Id. at p. 95.) Not the invocation of the right after an initial waiver at issue here.

V

**Sufficiency of the Evidence to Support Guthrie’s Conviction for First Degree Murder**

Guthrie next contends that the evidence at trial was insufficient to support his conviction for aiding and abetting, or conspiring to commit, first degree murder. He argues that all of the evidence presented by the prosecution was circumstantial, and no direct evidence established Guthrie was even at the scene of the crime.

A. Legal Principles

In reviewing the sufficiency of the evidence to support a jury’s verdict finding a defendant guilty of a criminal offense, we apply the substantial evidence standard of review. (People v. Johnson (1980) 26 Cal.3d 557, 575-579.) “Under this standard, the court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on ‘ “isolated bits of evidence.” ’ (People v. Cuevas (1995) 12 Cal.4th 252, 260-261.)

“The testimony of one witness, if believed, may be sufficient to prove any fact. (Evid. Code, § 411.)” (People v. Rasmussen (2006) 145 Cal.App.4th 1487, 1508.) “Further, ‘the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] This standard applies whether direct or circumstantial evidence is involved. Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ‘ [Citation.]’ (People v. Catlin (2001) 26 Cal.4th 81, 139; see People v. Mobley (1999) 72 Cal.App.4th 761, 788-789.)

“Whether a particular inference can be drawn from the evidence is question of law.” (People v. Austin (1994) 23 Cal. App.4th 1596, 1604.) “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.” (Evid. Code, § 600, subd. (b).) However, “[a] reasonable inference . . . “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.” [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.” [Citation.]’ (People v. Davis (2013) 57 Cal.4th 353, 360.)
B. Analysis

A person aids and abets the commission of a crime when he acts with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of encouraging or facilitating the commission of the crime, and his act or advice in some manner aids, promotes, encourages or instigates the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) “Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.” (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) To establish liability as a coconspirator, the prosecutor must prove the defendant intended to and agreed with a coconspirator to commit a crime, and that one member of the conspiracy committed an overt act to accomplish the crime. (*People v. Williams* (2008) 161 Cal. App.4th 705, 710.)

Guthrie argues reversal is required because the prosecution failed to present sufficient evidence to support the conviction under either theory. Guthrie asserts the Attorney General can only point to five types of evidence, none of which establish his involvement in Canady’s murder: (1) Guthrie’s pretrial statements to police, (2) Guthrie’s relationship with Grant, (3) Guthrie’s knowledge of Grant’s motive to murder Canady, (4) Guthrie’s presence near the murder scene, and (5) Guthrie’s contacts with Johnson in the time surrounding the murder. Guthrie’s characterization of the evidence as insufficient, however, is not supported by the record before this court.

As Guthrie argues, his close relationship with Grant and his knowledge of the motive and the crime, standing alone, do not establish his involvement in the crime. Other facts, however, are sufficient to support the jury’s verdict. This evidence included the cell phone records placing Guthrie at the scene the day before the murder, cell phone records showing Guthrie was on the phone with Johnson seconds before the shooting and seconds after Canady is seen on the video surveillance footage coming outside of the barbershop (confirming his presence there), records showing Guthrie on the phone with Johnson shortly after the shooting and showing his movement away from the scene at the same time Johnson was moving away, and video footage of a man meeting Guthrie’s physical characteristics and shadow boxing serving as lookout and support for Johnson at the scene.

As Guthrie notes, the “prosecution’s case hinged on its ability to prove [Guthrie] was one of the two men in front of Nu’s Auto Repair.” Viewing the evidence before the jury—that particularly the cell phone records and video footage—in the light most favorable to the judgment, there was sufficient evidence to support the jury’s finding that Guthrie was one of those men. In addition, Guthrie’s assertions (1) that the evidence against him was only circumstantial and (2) that circumstantial evidence alone cannot be sufficient as a matter of law are both inaccurate. The cell phone records constituted direct evidence of Guthrie’s communications with Johnson at the scene of the murder. (See Evid. Code, § 410 [“‘direct evidence’ means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact’.”])

Further, that the verdict rested on circumstantial evidence does not warrant reversal. “[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.] This standard applies whether direct or circumstantial evidence is involved. “Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.]” “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citation.] (People v. Catlin, supra, 26 Cal.4th at p. 139; see People v. Mobley, supra, 72 Cal. App.4th at pp. 788-789.)

While no witness confirmed that one of the two accomplices seen in the video surveillance footage was Guthrie, the video footage combined with the cell phone evidence showing Guthrie’s involvement with Johnson (and to a lesser extent the testimony that Guthrie was a former boxer), amply supported the inference that Guthrie was one of Johnson’s accomplices. (See People v. Campbell (1994) 25 Cal.App.4th 402, 409 [“Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.”].) In sum, there was sufficient evidence to support the jury’s finding that Guthrie knowingly and willingly participated in the murder of Canady.

VI

*Canady’s Rap Lyrics*

Guthrie next contends the trial court abused its discretion by admitting into evidence a rap song recorded by Canady before his death. The prosecution argued the song was evidence of the defendants’ motive to kill Canady.

A. Relevant Background

The prosecution moved to admit statements made by Canady that he had “stolen marijuana worth $250,000” from Grant and that he slept with Martin. The district attorney argued the statements, one of which was the rap song, were relevant to prove motive and the identity of the perpetrator. The prosecutor also asserted the statements were admissible hearsay because they were declarations against interest.

In response, Guthrie argued “people take creative license with songs” and the statements, therefore, were not “[a] reliable indicia of any facts.” Guthrie’s counsel argued the statements should not be admitted because Canady could not be cross-examined. He also argued it was not clear what the
meaning of the lyrics were, so there was no way to determine whether the lyrics constituted a statement against penal interest.

The trial court found the evidence was relevant to show motive and identity, and that the statements were hearsay but admissible under the exception for statements against penal interest. The court acknowledged the lyrics were subject to interpretation, but found this “goes to the weight, not the admissibility.” The court also ruled Evidence Code section 352 did not require exclusion of the statements.

During trial, the prosecution introduced the lyrics of Canady’s song found on his cell phone. The lyrics matched portions of a recorded song titled “Don’t Threaten My Life,” which officers found on a CD obtained after Canady’s death. The prosecution played the song for the jury and provided them with a transcript of the lyrics. The lyrics included passages in which Canady rapped that if his life was threatened, the instigator should be “ready to die,” and that his enemies were plotting to kill him. Other passages seemed to refer to his affair with Martin: “Soon as I let off this chopper your girl gon’ call the boys. She got my name all in a twist. Do your investigation just don’t trust your bitch. She got them killas in your house fuckin’ on your couch. Fuckin’ on your bed. Fuckin’ up your head. Kissin’ my pinky ring when she saw them rocks. . . . If she ain’t ridin’ foreign then her life is borin’. Said you ain’t scorin’ if she ain’t Chanel, Christian, Diorin’. Just ‘cause I’m paid in full don’t mean that I won’t bang the tool. Boy, I know you a rude boy. But your bitch actin’ a fool boy. Light and ‘cush, you bees’ watchin’ my movies. We the cartel savages. Gold plated oozi’s . . .”

During his testimony, Avalos explained that Canady’s reference to “I’m in the west” was acknowledging his membership in the West Coast Crips, while “lighting cush doobies” referred to smoking marijuana. He also explained that Canady’s use of the phrase “trap it out” and his self-identification as “cartel savages with gold-plated Uzis” were narcotics trafficking references. Avalos stated other terms used in the song referred to street robberies and threats to kill anyone that attempted to hurt him.

During closing arguments for Guthrie’s jury, the prosecutor referred to the song once, repeating Canady’s lyric “‘you ain’t scorin’ if [you] ain’t Chanel [and] Christian Diorin,’ “ while discussing Guthrie’s motivation for being involved in the crime. Guthrie’s counsel’s closing argument also referenced the lyrics, stating, “Canady taunted [Grant] with that rap song. Come kill me. I’m ready for you. This is life on the streets. And Omar [Grant] went and had him killed. But he did not involve Ian Guthrie in this.”

B. Legal Principles and Analysis

As discussed, the admission of evidence is governed by Evidence Code sections 210, 351, and 352. All relevant evidence is admissible, unless excluded by statute. (Evid. Code, § 351.) Relevant evidence, however, may be excluded by the trial court if its “probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Id., § 352.) “We review a trial court’s decision to exclude evidence for abuse of discretion. (People v. Linton, [supra, 56 Cal.4th at p. 1181].) The decision to exclude evidence ‘will not be disturbed except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].’ “ (People v. Peoples, supra, 62 Cal.4th at p. 745.)

Guthrie contends the rap lyrics were not relevant to the case because they contained no information that was specific to Canady’s murder. He argues upon hearing the rap, the “jury was left to engage in pure speculation that the lyrics might be talking about Grant and Talya, might be talking about Canady’s theft of Grant’s marijuana, might be talking about his affair with Grant’s girlfriend, and might be talking about Canady’s awareness that Grant might retaliate.” Guthrie also asserts the rap lyrics were not probative because they were cumulative to other evidence introduced by the prosecution.

We disagree with Guthrie’s assertions. The lyrics were relevant to the prosecution’s theory of the case, particularly the defendants’ motive to seek revenge for Canady’s theft and relationship with Martin. The lyrics tended to show that Canady was engaged in conduct that could provoke retaliation by Grant. Specifically, Canady’s lyrics included statements about making money by selling drugs stolen from a girl who couldn’t be trusted and that the theft was from “rude boys” and “Jack boys,” slang parlance for Jamaicans. A trial court has wide latitude to admit evidence relevant to motive (People v. Gonzalez (2005) 126 Cal.App.4th 1539, 1550) and Canady’s lyrics did not fall outside this broad discretion.

Further, Guthrie has not explained why the lyrics were inflammatory or prejudicial to his defense, instead focusing narrowly on the relevance of the lyrics and their ambiguity. Thus, even if the evidence’s probative value was relatively low, Guthrie has failed to show that their relevance was outweighed by the probability of prejudicial effect. (See People v. Cudjo (1993) 6 Cal.4th 585, 609 [“Unless these dangers ‘substantially outweigh’ probative value, the objection must be overruled.”].) Guthrie has not shown the trial court abused its discretion in admitting this evidence.

VII

Motion for Continuance to Conduct Discovery Concerning Use of Cell Site Simulator

Guthrie next asserts that the trial court’s denial of his motion to continue the sentencing hearing constituted an abuse of discretion and resulted in the violation of his rights to due process, effective assistance of counsel, and a fair trial. Guthrie sought a continuance to conduct additional discovery to determine whether investigators used a technology called a
A. Relevant Background

On July 22, 2014, the San Diego Police Department collaborated with the FBI’s Violent Crimes Task Force (VCTF) to obtain search warrants seeking call detail records and cell site data from Cricket and Verizon for the “832” and “619” mobile phone numbers that were used by Johnson and Guthrie to communicate to each other. One of the search warrants authorized “‘all activation and monitoring of a tracking device and ongoing disclosure of location information, including cell site locations and Global Positioning Satellite (‘GPS’) coordinates, also known as ‘pinging’, including, but not limited, to cell site location utilized at cell initiation and call termination, real-time Global Positioning System (‘GPS’) coordinates location of the handset, latitude and longitude, E911 location data, and call progress locations . . . , and for government agents to monitor the tracking devices, and subscriber information for a period of 30 days.’”

With respect to those two mobile numbers, the trial court authorized an additional search warrant to “‘download and forensically examine all contents of any such phone or device in order to obtain active or deleted data including but not limited to phone directories, contact information, identifying information, photographs, videos, call data, sent and received emails, SMS/text messages, access to social media sites such as Facebook, Twitter, Social, and Instagram posts, or other digital communication, data access times and locations, GPS information for posts, photos, and any other stored location information. . . .’”

Using cell phone data they believed was authorized by the warrants, VCTF agents tracked Guthrie’s 619 number to the area around 9881 Via Monzon. The agents then began surveillance in the surrounding vicinity and eventually observed Guthrie using the 619 mobile device through an open garage door. The officers later confirmed that 9881 Via Monzon was Guthrie’s residence. VCTF agents used a similar process to determine Johnson’s location in Kansas City, Missouri. Law enforcement authorities never accessed recorded conversations, text messages, or other communications from defendants’ phones.

Guthrie and Johnson moved in limine to suppress evidence and for additional discovery regarding the cell phone tracking devices. Guthrie’s attorney asserted that based on the discovery of his client’s cell phone records, he suspected a cell site simulator was used to find Guthrie’s location and that the use of such a device was not encompassed by the warrant issued by the court. Defense counsel argued they had requested this information from the prosecution, but the district attorney refused to confirm or deny that a cell site simulator had been used in the investigation. Guthrie’s counsel agreed with the trial court that “the current state of federal [and state] law would allow, at least upon a showing of probable cause, a court to issue a warrant to allow the capture of prospective or real-time cell site information.” Guthrie’s attorney also conceded the court had the ability to issue a warrant to allow law enforcement to use such a device, but argued the court could not do so unless law enforcement provided the court with clear information about the device it intended to use, which had not occurred in this case.

In response to the arguments of defense counsel, the district attorney asserted the warrants that were issued by the court in this case were broad enough to include the use of the cell site simulator because they requested global positioning satellite (GPS) information, which can tell law enforcement “specifically where somebody is at a certain point in time.” Guthrie’s counsel argued that if the device was used, Guthrie’s address was obtained by searching the Via Monzon home without a valid warrant. At the conclusion of the hearing, the court ordered an in camera hearing to determine whether the cell site simulator was used.

After conducting the in camera inquiry, the trial court found the search did not exceed the scope of the authorized warrants and denied the motion for a continuance to conduct additional discovery. The trial court reasoned that the authorized warrants allowed the use of “any electronic device that permits the tracking of a person or an object, including, . . . inside the person’s home.” The court explained, “when the court issues a search warrant for a house for the police to go in, whether it is a homicide scene or a drug scene or whatever it might be, the court doesn’t tell the police officers how to execute it. The officers get to execute it, provided it doesn’t shock the conscience of the court and complies otherwise with the fourth amendment jurisprudence, however they want. I think the same thing is applicable here. The court authorized the seizure of the information that was seized. The officers, the state agents executed that in the way that they executed it. There was no seizure outside the scope of the warrant.” The court agreed with the prosecution that if the cell site simulator was used, its use was authorized by the warrants that were issued.

Guthrie and Johnson filed a separate motion to suppress the evidence found at the Via Monzon residence, arguing again that any cell site simulator signals captured from within the residence violated their constitutional rights. The trial court denied that motion, again concluding that if a cell

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12. “A cell-site simulator—sometimes referred to as a ‘StingRay,’ ‘Hailstorm,’ or ‘TriggerFish’—is a device that locates cell phones by mimicking the service provider’s cell tower (or ‘cell site’) and forcing cell phones to transmit ‘pings’ to the simulator. The device then calculates the strength of the ‘pings’ until the target phone is pinpointed.” *(United States v. Lambis* (S.D.N.Y. 2016) 197 F.Supp.3d 606, 609.)
site simulator was used, it did not exceed the scope of the warrants.

During trial, after the testimony of the FBI agent who assisted with the cell phone aspect of the investigation, Guthrie’s counsel moved for a mistrial. Guthrie’s attorney argued his client was unfairly prejudiced because the use of the cell site simulator, which allowed law enforcement to locate Guthrie with precision, would cause the jury to conclude Guthrie was near the scene of the crime on the day of the murder even though the type of cellular data used to show this fact was not as precise as the cell site simulator technology. The court denied the motion, reiterating he had considered the issue before trial and continued to find that the “the search warrants that were issued authorized the capture of the [GPS] coordinates” using the cell site simulator technology.

After the verdict, but prior to sentencing, Guthrie and Johnson moved jointly to continue sentencing “to allow for further discovery concerning the San Diego Police Department’s unauthorized use of cell site simulators, as described herein, during the investigation into Lamar Canady’s death.” In the alternative, the defendants moved for a new trial pursuant to section 1181 subdivision (5). Guthrie and Johnson asserted that the court and the defense were “deceived into believing surveillance performed during the investigation into Lamar Canady’s death was restricted to pen-register, trap-and-trace, and geological tracking devices,” which “directly resulted in deprivation of the defendants’ rights to a fair trial . . . .” The defendants asserted the devices were designed “to eavesdrop, record, and possibly alter a target’s intercepted communications.”

Guthrie asserted additional discovery was warranted because the timing of the warrants suggested that police had conducted “illegal call and text message eavesdropping” and suggested “widespread prosecutorial misconduct and illegal surveillance practices by the SDPD and District Attorney’s Office.” Guthrie conceded that “the Stingray Warrants arguably authorized the SDPD to use some of [the cell-site simulator’s] functions . . . .” He contended, however, that because the cell site simulators might have the ability to engage in content-based eavesdropping, the authorities here engaged in it.

When the trial court asked for the evidence of such eavesdropping, defense counsel admitted that they did not have such evidence and they were “asking for . . . the continuance to obtain that.” Without any supporting evidence, Guthrie asserted the trial court had somehow been misled about the nature of the tracking device and contended that law enforcement authorities had illegally gathered voice and written communications that went beyond the parameters of the four search warrants issued in the case.

The court denied the motion for a continuance and the motion for a new trial. The trial court found that the People had not used any tracking device to “access or record conversations, text messages or other communications from a mobile phone.” The court concluded, for the third time, that even if a cell site simulator was used, its use was permitted by valid warrants.

B. Legal Standards

A continuance of a criminal trial may be granted only for good cause, and the trial court has broad discretion to determine whether good cause exists. (§ 1050, subd. (e); People v. Alexander (2010) 49 Cal.4th 846, 934.) This court thus reviews a trial court’s denial of a motion for a continuance for abuse of discretion. (People v. Mungia (2008) 44 Cal.4th 1101, 1118.) “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.” (Ibid.) “In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request.” (People v. Frye (1998) 18 Cal.4th 894, 1013.)

C. Analysis

Guthrie contends that the trial court’s denial of his motion for a continuance to conduct additional discovery was an abuse of discretion because there was evidence that his Fourth Amendment rights might have been violated by investigators’ use of a cell site simulator. He asserts there would have been no detriment caused by granting the continuance to seek additional discovery about the use of the cell site simulator. In response, the Attorney General argues that Guthrie failed to show good cause for the requested continuance. We agree.

The postverdict motion sought time to conduct the same discovery that Guthrie and Johnson requested before trial. In their motion in limine, defendants asserted the same arguments that Guthrie repeated in his postverdict motion for a continuance. In response to the motion in limine, the trial court conducted a full hearing, including an in camera evidentiary proceeding to address whether investigators used a cell site simulator to engage in surveillance of the content of Guthrie’s cell phone communications. The court concluded that no such content surveillance had occurred, and found that the cell site technology, which allowed police to narrow the geographic location of Guthrie’s phone, fell within the scope of the warrants issued by the court during the investigation.

The trial court’s determination that Guthrie had not shown good cause for a continuance did not constitute an abuse of the court’s discretion. Importantly, Guthrie did not provide any new information suggesting that the methods used by investigators were outside the ambit of the validly issued warrants. Further, as requested by Guthrie, we have reviewed the sealed transcripts of the in camera proceedings conducted by the trial court, and the evidence confirms the technology used by investigators to locate the cell phone conformed with the warrants issued by the court and that no content-based surveillance occurred.13 In sum, Guthrie has not shown

13. On June 8, 2017, this court granted Guthrie’s unopposed motion to review the sealed transcript of the in camera proceeding filed
the court abused its wide discretion to deny his motion for continuance.¹⁴

VIII

**Senate Bill 620**

Johnson’s sentence includes an enhancement of 25 years to life under section 12022.53 for the personal use of a firearm causing death. While this matter was pending, we granted Johnson’s motion to file a supplemental brief to address the impact of Senate Bill 620, which took effect on January 1, 2018, and provides trial courts with discretion to strike firearm enhancements under sections 12022.5 and 12022.53. (See §§ 12022.5, subd. (c) and 12022.53, subd. (h).) As Johnson points out, these subdivisions were not effective at the time he was sentenced and the trial court, therefore, did not have discretion to strike the firearm use enhancement. He asserts Senate Bill 620 should be applied retroactively and we should remand this matter to allow the superior court to consider striking his firearm use enhancement.

In its supplemental brief, the Attorney General concedes *People v. Francis* (1969) 71 Cal.2d 66 (Francis) is controlling and requires retroactive application of section 12022.53, subdivision (h) to all nonfinal judgments. In Francis, the defendant was charged with selling and giving away marijuana. (Id. at pp. 69-70.) The matter was tried to the court and submitted on the preliminary examination transcript. (Id. at p. 70.) The court found defendant guilty of possession of marijuana as a lesser included offense. (Ibid.) At the time of the defendant’s sentencing, possession of marijuana was punishable by a term of one to 10 years in prison. The court also had the authority to grant the defendant probation and require him to serve time in the county jail as a condition of probation. (Id. at p. 75.) The trial court sentenced the defendant to state prison. (Id. at p. 70.) After his conviction, but prior to the conclusion of his appeal, the Legislature amended the Health and Safety Code, authorizing a trial court to reduce a conviction for possession of marijuana to a misdemeanor, punishable by a term in county jail. (Ibid.)

The court held the amendment should be given retroactive effect pursuant to *In re Estrada* (1965) 63 Cal.2d 740. (Francis, supra, 71 Cal.2d at pp. 75-76.) In arguing against remand, the People noted the trial court rejected the idea of placing the defendant on probation and to impose county jail time as a condition of probation. (Id. at p. 76.) In rejecting that contention, the court stated, “the mere fact that the Legislature changed the offense from a felony to a felony-misdemeanor conceivably might cause a trial court to impose a county jail term or grant probation in a case where before the amendment the court denied probation to a defendant eligible therefor and sentenced the defendant to prison.” (Ibid. at p. 77.)

The Attorney General concedes, and we agree, the same reasoning applies in the instant case and section 12022.53, subdivision (h) should be applied retroactively. However, the Attorney General argues remand is not necessary because the record demonstrates the trial court would have sentenced Johnson no differently even if it had the discretion to strike the firearm use enhancement.

We need not remand the instant matter if the record shows that the superior court “would not . . . have exercised its discretion to lessen the sentence.” (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) The People contend the sentence imposed by the trial court below combined with the court’s comments at sentencing show the court would not have exercised its discretion under section 12022.53, subdivision (h). The Attorney General points out that the trial court stated that the enhancement, which was mandatory at that time, “appears to me to be entirely appropriate.” The People also point out that in concluding dismissal of Johnson’s prior strike was not appropriate, the court noted the murder was a sophisticated, planned execution, that Johnson committed the crime despite having any personal motive to kill Canady, and that Johnson was previously convicted of murder.

Although the trial court was not sympathetic to Johnson, it is undisputed that the court had no discretion, at that time, to strike the firearm use enhancement. The subsequently enacted section 12022.53, subdivision (h) provided the court with that discretion, greatly modifying the court’s sentencing authority. Thus, even with the court’s statements during sentencing, we cannot be certain the court would not have exercised its new discretion to strike the firearm enhancement. In an abundance of caution, we remand this matter for resentencing to allow the superior court to consider whether Johnson’s firearm enhancement should be stricken under section 12022.53, subdivision (h).

**DISPOSITION**

This matter is remanded to allow the superior court to consider whether Johnson’s firearm use enhancement should be stricken under section 12022.53, subdivision (h). In all other respects, we affirm the judgments.

NARES, J.

WE CONCUR: HUFFMAN, Acting P. J., IRION, J.

¹⁴ Having concluded there was no error as to any of the issues raised by Guthrie, we need not address his claim of cumulative error.
ORDER DENYING PETITION FOR
REHEARING AND MODIFYING
OPINION
[NO CHANGE IN JUDGMENT]
THE COURT:

Real parties in interest have filed a petition for rehearing with this court. It is ordered that the published opinion filed herein on July 2, 2018, be modified as follows:

1. At page 5 of the slip opinion, in the first full paragraph beginning with “At the hearing on the motion for summary adjudication,” add the word “clearly” so the first sentence reads as follows:

At the hearing on the motion for summary adjudication, plaintiffs argued clearly for the first time that punitive damages are appropriate because (1) PG&E has a non-delegable duty to operate its power lines safely, (2) PG&E sought to delegate responsibility for this duty to independent contractors, and (3) PG&E failed to ensure that contractors hired employees who were qualified and properly trained, such that (4) PG&E’s conduct demonstrates conscious disregard of the safety of others, whether or not PG&E was aware of its contractors’ alleged deficiencies.

There is no change in the judgment. Real parties in interest’s petition for rehearing is denied.

MAURO, Acting P. J.

MURRAY, J., RENNER, J.