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SUMMARIES

Civil Appeals

Appellant not “successful” who achieved same relief on appeal already granted him by trial court (Nares, Acting P.J.)

**Hall v. Department of Motor Vehicles**

C.A. 4th; July 20, 2018; D072278

The Fourth Appellate District affirmed a trial court order. The court held that an appellant who achieved the same outcome on appeal that he had previously achieved in the trial court, and rejected, could not be deemed a successful party for purposes of an award of fees under the private attorney general doctrine.

Branden Hall was arrested for driving under the influence. Because he refused to submit to a blood or breath test, his driver’s license was suspended. He appealed the suspension. A hearing was held before a Department of Motor Vehicles (DMV) hearing officer, who upheld the suspension. Hall filed a petition for writ of mandate challenging that decision. While his petition was pending, the hearing officer was charged with taking bribes. The trial court granted Hall’s petition, finding he was not afforded the impartial hearing to which he was entitled, and remanded to the DMV to conduct a new hearing. Hall appealed, arguing the due process violation required the DMV to reinstate his license without further hearing. The court of appeal disagreed, holding that the trial court correctly ordered a new administrative hearing.

Hall thereafter moved in the trial court for an award of $145,044 in attorney fees under Code Civ. Proc. §1021.5, arguing his appeal had enforced an important right affecting the public interest, entitling him to attorney fees under the private attorney general doctrine.

The district court specifically granted plaintiffs leave to amend “with respect to the constitutionality of the CBP photography policy.” Accepting the district court’s invitation, plaintiffs filed an amended complaint, and included facts and claims that were different from those in the initial complaint. Once plaintiffs elected to file an amended complaint, the new complaint was the only operative complaint before the court. The filing of plaintiffs’ amended complaint did not ask the district court to reconsider its analysis of the initial complaint. The amended complaint was a new complaint, entitling the plaintiff to judgment on the complaint’s own merits. Should the district court determine that the amended complaint was substantially the same as the initial complaint, it was free to follow the same reasoning and hold that the amended claims suffered from the same legal insufficiencies. It was not, however, bound by any law of the case doctrine. It should have considered the amended complaint on its merits. The court held further that plaintiffs adequately pleaded their First Amendment claims, and that further factual development was required before the district court can determine what restrictions, if any, the government may lawfully impose in the public, outdoor area surrounding the U.S. ports of entry.

Civil Procedure

“Law of the case” doctrine no bar to consideration of amended complaint (Bybee, J.)


9th Cir.; August 14, 2018; 16-55719

The court of appeals reversed a district court judgment of dismissal. The court held that the district court erred in finding that its consideration of an amended complaint was barred by the law of the case doctrine.

Border policy advocates Ray Askins and Christian Ramirez, while on public property, took photographs of activities at U.S. ports of entry on the United States–Mexico border. Both were stopped and searched by officers of the United States Customs and Border Protection (CBP), and their photos were destroyed. Askins and Ramirez filed suit for violation of their First Amendment rights and sought injunctive and declaratory relief. The district court dismissed plaintiffs’ claims, applying strict scrutiny and upholding CBP’s policies as the least restrictive means of serving the compelling interest of protecting the United States’ territorial sovereignty, but granted leave to amend.

When plaintiffs filed an amended complaint, the district court dismissed it as barred by the law of the case doctrine.

The court of appeals reversed, holding that the law of the case doctrine did not apply.

The district court specifically granted plaintiffs leave to amend “with respect to the constitutionality of the CBP photography policy.” Accepting the district court’s invitation, plaintiffs filed an amended complaint, and included facts and claims that were different from those in the initial complaint. Once plaintiffs elected to file an amended complaint, the new complaint was the only operative complaint before the court. The filing of plaintiffs’ amended complaint thus did not ask the district court to reconsider its analysis of the initial complaint. The amended complaint was a new complaint, entitling the plaintiff to judgment on the complaint’s own merits. Should the district court determine that the amended complaint was substantially the same as the initial complaint, it was free to follow the same reasoning and hold that the amended claims suffered from the same legal insufficiencies. It was not, however, bound by any law of the case. It should have considered the amended complaint on its merits. The court held further that plaintiffs adequately pleaded their First Amendment claims, and that further factual development was required before the district court can determine what restrictions, if any, the government may lawfully impose in the public, outdoor area surrounding the U.S. ports of entry.
Civil Rights

*Bivens* remedy available for ICE attorney’s intentional submission of forged document in immigration proceedings (Wardlaw, J.)

**Lanuza v. Love**

9th Cir.; August 14, 2018; 15-35408

The court of appeals reversed in part a district court judgment and remanded. The court held that plaintiff was entitled to bring suit under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) for damages suffered as the result of a government attorney’s intentional submission of a forged document in immigration proceedings.

In July 2008, the Department of Homeland Security initiated removal proceedings against 38-year old Ignacio Lanuza, who had entered the country when he was 17 years old and who was now married to a U.S. citizen with two U.S. citizen children. Lanuza applied for cancellation of removal. In opposition, U.S. Immigration and Customs Enforcement Assistant Chief Counsel Jonathan Love submitted an I-826 form agreeing to voluntary departure, purportedly signed by Lanuza on January 13, 2000, which form made Lanuza ineligible for cancellation of removal. The immigration judge issued an order of removal. The Board of Immigration Appeals affirmed. It was subsequently discovered that the document was forged. The BIA reopened and remanded the case, Lanuza was found eligible for cancellation of removal and, in 2014, his status was adjusted to lawful permanent resident. Love was later prosecuted and convicted of deprivation of rights under color of law, barred from practicing law for 10 years, and ordered to pay $12,000 restitution to Lanuza, to compensate him for the legal fees he incurred.

Lanuza filed a complaint against Love and the United States alleging, among other things, that he was entitled to damages under *Bivens* for a violation of his Fifth Amendment right to due process. The district court granted Love’s motion to dismiss, finding that *Bivens* did not apply in this context. The district court nonetheless held, however, that if a *Bivens* remedy were available, Love was not entitled to qualified immunity.

The court of appeals reversed in part, holding that Lanuza was entitled to bring suit under *Bivens*. *Bivens* recognizes an implied right of action for damages against federal officers alleged to have violated a plaintiff’s constitutional rights. Although the Supreme Court “has made clear that expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity,” if the principles animating *Bivens* stand at all, they must provide a remedy on these narrow and egregious facts. Love intentional fabricated and submitted a forged document in Lanuza’s immigration proceedings in order to prevent Lanuza from obtaining lawful permanent resident status, a form of relief to which he was otherwise lawfully entitled. Failing to provide a narrow remedy for such an egregious constitutional violation would tempt others to do the same and would run afoul of the court’s mandate to enforce the Constitution. The court affirmed the district court’s ruling that Love’s intentional submission of a forged document was not protected by qualified immunity.

Criminal Law

Duration of previously ordered terms of official detention must be subtracted in calculating juvenile’s maximum remaining term (Lemelle, J.)

**United States v. Juvenile Male**

9th Cir.; August 14, 2018; 17-10257

The court of appeals vacated a judgment of sentence and ordered the defendant’s immediate release. The court held that the maximum term of official detention that could be imposed upon revocation of a 22-year old’s juvenile delinquent supervision was the maximum term of official detention authorized for his underlying offense, less any terms of official detention previously ordered.

In 2013, D.A.T. pleaded guilty to second degree murder based on a crime committed three and a half years earlier, when he was 15 years old. Under 18 U.S.C. §5037(c)(2)(A), the statutory maximum sentence for his crime was five years of official detention. The district court sentenced D.A.T. to 28 months of official detention, followed by juvenile delinquent supervision until his 21st birthday. D.A.T. was released from detention in June 2014, at the age of 20. He was arrested shortly thereafter for violating the terms of his supervision. He was sentenced to 18 months of official detention, followed by 42 months of juvenile delinquent supervision. D.A.T. was released from detention in July 2016, at the age of 22, but was once again promptly arrested for violating the terms of his supervision. In May 2017, the district court revoked D.A.T.’s juvenile delinquent supervision and sentenced him to 34 months of official detention.

D.A.T. appealed, arguing that his sentence exceeded the statutory maximum established in §5037(d)(5).

The court of appeals vacated the judgment of sentence and ordered D.A.T.’s immediate release, holding that his detention reached the statutory maximum at the end of May 2018. Section 5037(d)(5) states that “the term of official detention which is authorized upon revocation of juvenile delinquent supervision shall not exceed the term authorized in section 5037(c)(2)(A) and (B), less any term of official detention previously ordered.” This wording, the court found, is controlling. Although the remaining sentences of subdivision (d)(5) create some ambiguity as to the appropriate treatment of a juvenile offender over the age of 21, such as D.A.T., the cap set forth in this sentence continues to apply. Because the
Employment Litigation

Statutory safe harbor for employer’s failure to compensate piece-rate workers for rest time applies to all claims accrued prior to January 1, 2016 (Bamattre-Manoukian, J.)

Jackpot Harvesting Company, Inc. v. Superior Court (Lainez)

C.A. 6th; August 14, 2018; H044764

The Sixth Appellate District granted a petition for writ of mandate. The court held that a statutory safe harbor for pre-January 1, 2016 claims alleging an employer’s prior failure to compensate piece-rate workers for rest time was not limited to claims accruing on or after July 1, 2012.

Farm worker Jose Lainez sued employer Jackpot Harvesting Company, Inc. for failing to compensate its employees, who were paid on a piece-rate basis, for rest and recovery periods and other nonproductive time on the job (rest/NP time). Jackpot alleged, as an affirmative defense, its compliance with Labor Code §226.2(b), which provides a safe harbor for an employer that, prior to 2016, failed to properly compensate its piece-rate workers for rest/NP time, if, prior to December 15, 2016, that employer pays its employees for previously unpaid rest/NP time accrued between July 1, 2012 and December 31, 2015. Jackpot subsequently moved for summary adjudication based on its compliance with §226.2(b).

Lainez opposed, arguing that although §226.2(b) provided a safe harbor against claims by piece-rate workers for unpaid rest/NP time accruing between July 1, 2012 and December 31, 2015, it did not provide a defense for such claims accruing prior to July 1, 2012. The trial court agreed and denied summary adjudication.

The court of appeal granted Jackpot’s petition for writ of mandate, holding that the unambiguous language of §226.2(b) provided Jackpot a safe harbor for all claims for unpaid rest/NP time accruing on or prior to December 31, 2015. Section 226.2(b) expressly provides for an affirmative defense to “any claim or cause of action…for time periods prior to and including December 31, 2015…” The Legislature’s use of the word “any” argues against imposition of the limitation urged by Lainez and adopted by the trial court. Further, had the Legislature intended such a temporal restriction, it could and would have included language to that effect. The Legislature expressly provided six exceptions to application of §226.2(b), including that claims arising after January 1, 2016 would not be governed by the safe harbor provision. It would contravene accepted principles of statutory construction, as well as the sound policy against the judicial rewriting of legislation, to infer an additional exception for claims accruing prior to July 1, 2012.

Family Law

Absentee parent not indispensable party to parentage action seeking “special immigrant juvenile” findings (Kruger, J.)

Bianka M. v. Superior Court (Gladys M.)

Cal.Sup.Ct.; August 16, 2018; S233757

The California Supreme Court reversed a decision of the court of appeal. The court held that a nonresident, noncustodial parent was not an indispensable party to a parentage action seeking “special immigrant juvenile” (SIJ) findings.

Ten-year old Honduran native Bianka M. entered the United States without documentation to join her mother, Gladys M., who was living in Los Angeles. In a family court action naming her mother as the respondent, Bianka asked for an order placing her in her mother’s sole custody. She also asked the court to issue findings that would enable her to seek SIJ status under federal immigration law—a classification that permits immigrant children who have been abused, neglected, or abandoned by one or both parents to apply for lawful permanent residence while remaining in the United States. She alleged that her father, Jorge, who resided in Honduras, had abandoned her. Although she notified him of the action, he took no steps to participate.

The family court declined to make the requested findings, finding that Bianka’s request for an award of sole custody to her mother in an action under the Uniform Parentage Act necessarily implicated paternity and parental rights, which made Jorge an indispensable party to the parentage action. The court of appeal affirmed, holding that Jorge was an indispensable party.

The California Supreme Court reversed, holding that the lower courts erred in finding Jorge to be an indispensable party. Provided that an absent parent has received adequate notice, a parentage action seeking SIJ findings may proceed even if the parent is beyond the personal jurisdiction of the court and cannot be joined as a party. Further, Bianka’s perceived immigration-related motivations for filing the action had no bearing on whether the action could proceed. The action could proceed regardless of whether the court believed it was filed primarily for the purpose of obtaining the protections from abuse, neglect, or abandonment that federal immigration law provides. A child’s immigration-related
motivations for seeking state court findings bear no necessary relationship to his or her need for relief from a parent’s abuse, neglect, or abandonment. Kruger, J., joined by Cantil-Sakauye, C.J., and Chin, Corrigan, Liu, Cuéllar, and McConnell, sitting by assignment, JJ.
IGNACIO LANUZA, Plaintiff-Appellant, v. JONATHAN M. LOVE, Assistant Chief Counsel, Immigration and Customs Enforcement, Defendant-Appellee.

No. 15-35408
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-01641-MJP
Appeal from the United States District Court for the Western District of Washington Marsha J. Pechman, Senior District Judge, Presiding
Argued and Submitted October 3, 2017
Seattle, Washington
Filed August 14, 2018
Before: Kermit Victor Lipez,*Kim McLane Wardlaw, and John B. Owens, Circuit Judges.
Opinion by Judge Wardlaw

* The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

COUNSEL

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OPINION

WARDLAW, Circuit Judge:

We are tasked with answering in part a question asked by many legal commentators in the wake of the Supreme Court’s decision in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017): where does Bivens stand? Bivens is the first Supreme Court decision to recognize an implied right of action for damages against federal officers alleged to have violated a plaintiff’s constitutional rights. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392–98 (1971). Here, a U.S. Immigration and Customs Enforcement (ICE) Assistant Chief Counsel representing the government intentionally forged and submitted an ostensible government document in an immigration proceeding, which had the effect of barring Ignacio Lanuza (Lanuza) from obtaining lawful permanent resident status, a form of relief to which he was otherwise lawfully entitled. We recognize that the Supreme Court “has made clear that expanding the Bivens remedy is now a ‘disfavored’ judicial activity,” Abbasi, 137 S. Ct. at 1857 (quoting Ashcroft v. IQbal, 556 U.S. 662, 675 (2009)), but, if the principles animating Bivens stand at all, they must provide a remedy on these narrow and egregious facts. We therefore reverse the district court’s holding that Lanuza was not entitled to a Bivens remedy.

I.

Lanuza is a 38-year-old lawful permanent resident married to a U.S. citizen with two U.S. citizen children. He was born in Mexico and first came to the United States without inspection when he was seventeen years old. He lives and works in Seattle, Washington. In July 2008, the Department of Homeland Security (DHS) commenced removal proceedings against him before the Tacoma immigration court, which were ultimately transferred to the Seattle immigration court.

On May 6, 2009, Lanuza appeared before an immigration judge for a master calendar hearing. During that hearing, Lanuza notified the court of his intention to apply for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (cancellation of removal or cancellation) under 8 U.S.C. § 1229b(b)(1). At the time, he was prima facie eligible to apply for cancellation of removal, which is a type of immigration relief that enables nonpermanent residents to adjust their status to that of permanent residents. To qualify for cancellation, a person must demonstrate (1) continuous physical presence in the United States for ten years immediately prior to being served with the Notice to Appear; (2) good moral character; (3) that he is not subject to any other bar to eligibility on account of having certain criminal convictions; and (4) the existence of a U.S. citizen or lawful permanent resident spouse, parent, or child who would suffer exceptional and extremely unusual hardship if the person were removed. See 8 U.S.C. § 1229b(b)(1). As later events would confirm, Lanuza satisfied all these requirements: (1) he had been residing continuously in the United States since 1996 and thus had more than ten years of continuous residence; (2) he possessed good moral character; (3) he was not subject to any other bar to eligibility; and (4) his U.S. citizen.
wife and children would suffer exceptional and extremely unusual hardship without him.

During the master calendar hearing, ICE Assistant Chief Counsel Jonathan Love (“Love”) stated that Lanuza’s immigration file contained an I-826 form, signed by Lanuza, accepting voluntary departure to Mexico in 2000. The I-826 form was critical in determining whether Lanuza would be able to remain in the United States with his family, because a signed I-826 form would render him ineligible for cancellation of removal. By signing an I-826 form, a person accepts an administrative voluntary departure instead of exercising his right to appear before an immigration judge in removal proceedings and thereby breaks whatever continuous physical presence he may have accrued. See Ibarra-Flores v. Gonzales, 439 F.3d 614, 618–20 (9th Cir. 2006); see also Landin-Zavala v. Gonzales, 488 F.3d 1150, 1152–53 (9th Cir. 2007) (”[W]hen [an individual] leaves pursuant to an administrative voluntary departure[ ] he leaves with the knowledge that he does so in lieu of being placed in proceedings…”). As a result, even though Lanuza met all the other elements of § 1229b(b)(1), if Lanuza had signed an I-826 form in 2000, he would have accrued continuous residence in the United States for only seven years, rather than the requisite ten years. See 8 U.S.C. § 1229b(b)(1).

On May 11, 2009 at Lanuza’s actual immigration hearing, Love submitted an I-826 form agreeing to voluntary departure, purportedly signed by Lanuza on January 13, 2000, making Lanuza ineligible for cancellation of removal. See id. Based solely on that I-826 form, the immigration judge issued an order of removal on January 5, 2010; the Board of Immigration Appeals (“BIA”) affirmed on November 15, 2011.

On December 9, 2011, Lanuza hired new counsel, Hilary Han (“Han”), who discovered, for the first time, evidence that the I-826 form Love submitted was forged. Han sent the I-826 form to a forensic examiner, who, on February 1, 2012, confirmed that the form was forged. While several aspects of the form demonstrated it was forged, most glaringly, it referred to the “U.S. Department of Homeland Security” at the top of the page, an agency that did not exist at the time Lanuza purportedly signed the form on January 13, 2000. Congress created DHS in response to the September 11, 2001 terrorist attacks, and the agency did not begin formal operations until 2003. Therefore, it would have been impossible for Lanuza to sign the DHS I-826 form in January 2000, because that form did not then exist.

Based on the forensic report, the BIA reopened and remanded the case, and, on remand, the immigration judge ultimately found that Lanuza was prima facie eligible to apply for cancellation of removal. The agency adjusted his status to lawful permanent resident on January 9, 2014.

The government did not take any action against Love until after this lawsuit was filed on October 24, 2014. Love was ultimately prosecuted and pleaded guilty to deprivation of rights under color of law pursuant to 18 U.S.C. § 242, which ICE characterized as a “deprivation of constitutional rights” in a press release. Love was sentenced to a thirty-day term of imprisonment, one year of supervised release, and 100 hours of community service. See United States v. Love, No. 2:16-cr-00005-BAT-1, ECF No. 16 (W.D. Wash. April 20, 2016). He was also barred from practicing law for ten years and was required to pay restitution to Lanuza in the amount of $12,000, a figure the government proposed based on its approximation of the legal fees Lanuza paid related to his removal proceedings as a result of Love’s submission of the forged I-826 form. Id. at 6–7.

On October 23, 2014, Lanuza filed a complaint against Love and the United States alleging, among other things, that he was entitled to damages under Bivens for a violation of his Fifth Amendment right to due process. Love filed a motion to dismiss, which the district court hesitantly granted. While the district court believed Lanuza was entitled to relief, the court felt its hands were tied by our decision in Mirmehdi v. United States, 689 F.3d 975 (9th Cir. 2012), which declined to extend Bivens to a claim for wrongful detention in the course of immigration removal proceedings. The district court further held that, if a Bivens remedy were available, Love was not entitled to qualified immunity. Lanuza timely appealed.

II.

Whether a Bivens remedy is available here turns on the presence of the conditions articulated in Abbasi for extending the Bivens remedy. See Abbasi, 137 S. Ct. at 1856–58. In Abbasi, the Supreme Court addressed whether Respondents, noncitizens who were suspected of having ties to terrorism and detained in harsh conditions in the aftermath of September 11, could pursue Bivens remedies against various high-level federal officials responsible for the policy that authorized their detention and the wardens responsible for their treatment thereafter. Id. at 1853–54. The Court articulated a two-part test for determining whether Bivens remedies should be extended. Id. at 1859–60. First, courts must determine whether the plaintiff is seeking a Bivens remedy in a new context. Id. If the answer to this question is “no,” then no further analysis is required. Id. If the answer is “yes,” then the court must determine whether “special factors counsel[] hesitation.” Id. at 1860.

A case presents a new context if it “is different in a meaningful way from previous Bivens cases decided by [the Supreme Court].” Id. at 1859. The Court explained that:

[A] case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer

should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

*Id.* at 1860.

Applying this framework to that suit, the Court found that Respondents’ challenge to the executive officials’ detention policy presented a new context, reasoning that:

>[The challenge to] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil … [bore] little resemblance to the three *Bivens* claims the [Supreme] Court … approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate’s asthma.

*Id.* (referring to *Bivens*, 403 U.S. 388; *Davis v. Passman*, 442 U.S. 228 (1979); and *Carlson v. Green*, 446 U.S. 14 (1980), respectively).

Proceeding to the “special factors analysis,” the Court found those factors counseled against implying a *Bivens* remedy. *Id.* First, a *Bivens* action is intended to discourage illegal acts by individual officers and is not “a proper vehicle for altering an entity’s policy.” *Id.* (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Second, “the burden and demand of litigation [against high-level officials] might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties.” *Id.* (citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 382 (2004)). Third, these claims raise serious separation-of-powers issues and “would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch” and “challenge … major elements of the Government’s whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security.” *Id.* at 1861 (citations omitted). Fourth, congressional interest in the response to the terrorist attacks was “frequent and intense,” including interest in “the conditions of confinement at issue[,]” and Congress chose not to create a damages remedy. *Id.* at 1862 (citation omitted). Finally, Respondents had alternate avenues of relief available to challenge their condition of confinement. Respondents could have pursued injunctive relief to attack the large-scale detention policy or perhaps a petition for a writ of habeas corpus to attack their own confinement. *Id.* at 1862–63. The Court reasoned, while “[t]here is … a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril … . [t]he proper balance is one for the Congress, not the Judiciary, to undertake.” *Id.* at 1863 (citation omitted).

The Court separately considered the prisoner abuse claim against Warden Hasty, the warden of the prison where Respondents were held. Addressing whether this claim presented a new context, the Court compared Respondents’ case to *Carlson v. Green*, 446 U.S. 14 (1980), a Supreme Court case where a prisoner’s estate sued federal jailers for failing to treat the prisoner’s asthma, ultimately leading to his death. *Id.* at 16 n.1; *Abbasi*, 137 S. Ct. at 1864. In *Carlson*, the Court found the failure to treat a prisoner’s medical needs violated his Eighth Amendment right to be free from cruel and unusual punishment. 446 U.S. at 17–18. The *Abbasi* Court distinguished Respondents’ case from *Carlson*, finding it meaningful that the *Abbasi* Respondents challenged violations of the Bureau of Prisons’ policy, unlike in *Carlson* where the prison’s policy was not at issue. *Abbasi*, 137 S. Ct. at 1864. The Court further noted that, unlike judicial guidance as to the medical treatment at issue in *Carlson*, “the judicial guidance available to this warden, with respect to his supervisory duties, was less developed.” *Id.* Acknowledging that there were “significant parallels” between the Respondents’ case and *Carlson*, and that the “allegations of injur[ies] here are just as compelling as those at issue in *Carlson*,” the Court nevertheless found Respondents’ claims presented a new *Bivens* context, reasoning that “a modest extension is still an extension.” *Id.* And, the Court found that “this case does seek to extend *Carlson* to a new context.” *Id.* The Court did not perform the special factors analysis, and instead remanded the claim against Warden Hasty to the Court of Appeals to perform a special factors analysis in the first instance. *Id.* at 1865.

One week after *Abbasi* was decided, the Supreme Court again had the opportunity to revisit *Bivens*. In *Hernandez v. Mesa*, a U.S. Border Patrol agent standing on U.S. soil shot and killed a fifteen-year-old Mexican boy who was playing with a group of friends in the cement culvert that separates Texas and Mexico. 137 S. Ct. 2003, 2004–06 (2017) (per curiam). His parents brought a claim against the officer for damages under *Bivens*. *Id.* at 2005. The Court declined to decide whether a *Bivens* claim existed in the first instance because the Court of Appeals had not had the opportunity to consider how the reasoning in *Abbasi* might bear on Hernandez’s case, and the parties had not briefed the issue. *Id.* at 2006–07. The Court remanded the case to the Court of Appeals to apply the *Abbasi* framework to Hernandez’s Fourth and Fifth Amendment claims. *Id.*

A.

Before addressing *Abbasi*’s two part test, we must first consider whether providing a *Bivens* remedy here is precluded by prior cases in which the Supreme Court or our court has declined to extend *Bivens*. We have found no such case. And,
unlike the district court, we do not believe that our decision in *Mirmehdi* precludes a remedy here.

The conduct at issue—the falsification of evidence—has been regularly considered by the courts in actions against prosecutors who commit similar constitutional violations by falsifying evidence and suborning perjury. The Supreme Court has long recognized that “[t]he principle that a State may not knowingly use false evidence … to obtain a tainted conviction [is] implicit in any concept of ordered liberty,” and a violation of due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); see also *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942); *Mooney v. Holohan*, 294 U.S. 103, 110, 112–13 (1935) (per curiam). For this reason, in 42 U.S.C. § 1983 cases, the Supreme Court has declined to extend absolute prosecutorial immunity to prosecutors who falsify evidence because the collection of evidence is an “investigative function[] normally performed by a detective or police officer.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

We see no reason to distinguish the due process rights of a criminal defendant in a criminal proceeding from the due process rights of an immigrant in a deportation proceeding when a government attorney falsifies evidence. It is well-settled that “the Due Process clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1209 (2018) (plurality opinion) (“[T]his Court has reiterated that deportation is ‘a particularly severe penalty,’ which may be of greater concern to a convicted alien than ‘any potential jail sentence.’”) (quoting *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017); *Padilla v. Kentucky*, 559 U.S. 356, 365, 368 (2010)); *Zahedi v. INS*, 222 F.3d 1157, 1164 n.6 (9th Cir. 2000) (stating that “immigration proceedings as a whole” are governed “by the Fifth Amendment’s Due Process Clause”).

Moreover, while *Abbasi* clearly limited *Bivens*’s scope, it did not preclude this case; nor is this case precluded by other Supreme Court precedent. The Supreme Court has recognized a *Bivens* remedy is available under the Fifth Amendment. In *Davis v. Passman*, the Court concluded that a U.S. Congressman’s former staff member was entitled to a *Bivens* remedy where the Congressman terminated her because of her gender, violating her rights under the equal protection component of the Fifth Amendment. 442 U.S. at 248–49. While the Supreme Court has not extended *Bivens* to a case involving the substantive and procedural clauses of the Fifth Amendment, *Abbasi* did not preclude the possibility of such an extension. See *Abbasi*, 137 S. Ct. at 1860–64.

Nor has the Supreme Court barred extending *Bivens* remedies to an immigration case. Although *Abbasi* could have stood for the broad proposition that *Bivens* remedies are not available in the context of immigration proceedings because of the sensitive nature of immigration policy, the *Abbasi* Court did not paint in such broad strokes; rather, it cabin its holding to suits against executive officials issuing policy responses to sensitive issues of national security. *Id.* at 1863. *Abbasi* made no statements about the general nature of immigration, low-level immigration officials, or the comprehensiveness of the INS’s remedial scheme.

Nor is this case precluded by our precedent. The government argues that this action is foreclosed by *Mirmehdi*, where we declined to extend *Bivens* to claims challenging unlawful immigration detention. In that case, which closely mirrors the facts addressed in *Abbasi*, petitioners Mohammad, Mostafa, Mohsen, and Mojtaba Mirmehdi (collectively the “Mirmehdis”) were originally detained for national security reasons and charged as supporters of an officially listed terrorist organization, the Mujahedin-e Khalk. 689 F.3d at 978–79. We concluded that the Mirmehdis were not entitled to *Bivens* damages because they were able to challenge their detention through two different remedial systems: the immigration system and habeas relief. *Id.* at 982. We noted that “Congress’s failure to include monetary relief [in the INA] can hardly be said to be inadvertent, given that despite multiple changes...”

2. The Supreme Court has concluded that a prosecutor may be held liable for damages under *Bivens*, but has not extended a *Bivens* remedy to a claim of prosecutorial misconduct. *Hartman v. Moore*, 547 U.S. 250, 261–66 (2006) (holding that a *Bivens* remedy may be available for malicious prosecution, but the plaintiff had to allege and prove lack of probable cause).

The Seventh Circuit, however, has extended *Bivens* remedies in the *Brady* context. *Engel v. Buchan*, 710 F.3d 698, 708 (7th Cir. 2013). In *Engel v. Buchan*, the Circuit provided a *Bivens* remedy for *Brady* violations pursuant to the Due Process Clause of the Fourteenth Amendment. *Id.* The court explained that punishing a federal officer in that context presents “no great problem of judicial interference with the work of law enforcement, certainly no greater than the Fourth Amendment claim in *Bivens*.” *Id.* While unlike the court in *Engel*, the Board of Immigration Appeals is not an Article III court, it conducts its hearings using similar procedures: parties submit evidence, question witnesses under oath, and the procedure is overseen by an individual called a “judge.” If remedies are available to punish *Brady* violations in a criminal proceeding where liberty is at stake, they should also be available in the context of immigration proceedings to determine removability—a deprivation of liberty that can be as consequential.

3. In other contexts, the Supreme Court has declined to extend *Bivens* remedies based on the special class of federal defendants or the sensitivity of government activity involved. See, e.g., *Malesko*, 534 U.S. at 63 (no *Bivens* action against private correctional corporation acting under color of federal law); *F.D.I.C. v. Meyer*, 510 U.S. 471, 473 (1994) (no *Bivens* action against a federal agency); *United States v. Stanley*, 483 U.S. 669, 683–84 (1987) (no *Bivens* action for injuries arising out of or in the course of activity incident to military service); *Chappell v. Wallace*, 462 U.S. 296, 300–304 (1983) (same). It has also declined to extend *Bivens* if Congress has articulated a complex remedial scheme, even if there is no damages remedy available. See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (no *Bivens* action for an alleged due-process violation in connection with the denial of disability benefits because Congress did not provide for damages in its comprehensive remedial scheme); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (no *Bivens* action where a federal employer commits a First Amendment violation because relief, even if incomplete, is available under a comprehensive statutory scheme). These cases do not preclude extending a *Bivens* remedy here because Love is not a member of a special class, there is no sensitive government information at issue, and the INA's complex remedial scheme does not address the conduct at issue here. See infra Part II.C.
to the structure of the [INA,] Congress never created such a remedy.” Id. (citing Schwieker, 487 U.S. at 423, 425). We also concluded that the Mirmehdis’ case implicated national security concerns, because allowing the Mirmehdis to pursue this lawsuit would result in disclosing “foreign-intelligence products.” Id. at 983 (citation omitted).

Without the benefit of Abbasi, the district court in this case agreed with the government’s argument that our decision in Mirmehdi precluded a Bivens remedy because it stood for the broad proposition that there can be no Bivens remedy for any constitutional violation in the context of immigration proceedings, even while noting the obvious problems with such a reading.4 However, Abbasi makes clear that Mirmehdi does not, and cannot, stand for such a categorically broad proposition. Instead, we must look to the specific facts of this case and the claims presented. See Abbasi, 137 S. Ct. at 1859–60. Although Mirmehdi and this case both arise out of immigration generally, the similarities between Mirmehdi and Lanuza’s case end there. Mirmehdi relates to the detention of suspected terrorists, while Lanuza’s case concerns an individual attorney’s violation of his due process rights in a routine immigration proceeding.

Accordingly, precedent does not preclude providing a Bivens remedy here.

B.

Lanuza’s claim arises in the context of deportation proceedings where a federal immigration prosecutor submitted falsified evidence in order to deprive Lanuza of his right to apply for lawful permanent residence. We know of no other case that has discussed a Bivens remedy in this context.5 The conclusion that Lanuza’s case arises in a context meaningfully different is ineluctable. And it is likely for that reason that the district court, and both parties, agree.

C.

Because Lanuza’s claims arise in a new context, we must ask whether there are “special factors counselling hesitation in the absence of affirmative action by Congress.” Abbasi, 137 S. Ct. at 1857 (quoting Carlson, 446 U.S. at 18). We conclude that the special factors articulated in Abbasi do not counsel against extending a Bivens remedy to the narrow claim here, where an immigration official and officer of the court forged and submitted evidence in a deportation proceeding to deprive an individual of his right to relief under congressionally enacted laws.

Abbasi clarifies the concept of “special factors” by focusing the inquiry on the separation of powers. Id. at 1857–58. Abbasi’s special factors include: the rank of the officer involved; whether Bivens is being used as a vehicle to alter an entity’s policy; the burden on the government if such claims are recognized; whether litigation would reveal sensitive information; whether Congress has indicated that it does not wish to provide a remedy; whether there are alternate avenues of relief available; and whether there is adequate deterrence absent a damages remedy, among other factors. Id. at 1857–63. But the most important question for us to examine is “whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” Id. at 1857–58. If “there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy … the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.” Id. at 1858. However, Abbasi makes clear that, though disfavored, Bivens may still be available in a case against an individual federal officer who violates a person’s constitutional rights while acting in his official capacity. See id. at 1857.

Applying Abbasi’s separation-of-powers principles to this case reveals that there are no “special factors” suggesting Bivens remedies should be unavailable. To begin, Lanuza does not challenge high-level executive action. The Abbasi Court stressed that “Bivens is not designed to hold officers responsible for acts of their subordinates.” Id. at 1860. “The purpose of Bivens is to deter the officer[,]” and thus a Bivens claim should be “brought against the individual official for his or her own acts, not the acts of others.” Id. (quoting F.D.I.C. v. Meyer, 510 U.S. 471, 485 (1994)). Further, Bivens actions against high-ranking executive officers, such as the Director of the Federal Bureau of Investigation and the

We concluded Vega’s claims would require expanding Bivens to a new context “because neither the Supreme Court nor we have expanded Bivens in the context of a prisoner’s First Amendment access to court or Fifth Amendment procedural due process claims arising out of a prison disciplinary process.” Id. at 1153.
U.S. Attorney General in Abbasi, are disfavored because such suits “would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties.” Id. at 1849. As ICE Assistant Chief Counsel, Love was a low-level federal officer acting as the government’s attorney, not the U.S. Attorney General as in Abbasi. And strictly comporting with Bivens, Lanuza is suing Love for his own actions; he does not seek to hold anyone else, including high-level officials, accountable. Allowing a damages suit to proceed against Love therefore does not raise the same concerns on this score as were present in Abbasi.

Relatedly, Lanuza does not challenge or seek to alter the policy of the political branches. Cf. Abbasi, 137 S. Ct. at 1860 (“[A] Bivens action is not ‘a proper vehicle for altering an entity’s policy.’” (quoting Malesko, 534 U.S. at 74)). While immigration officials have “broad discretion,” Arizona v. United States, 567 U.S. 387, 396 (2012), no one is arguing that the United States has a policy of allowing federal officers to submit forged government documents to thwart the integrity of immigration proceedings. To the contrary: when Love knowingly forged evidence, his actions violated the INA, which explicitly prohibits the submission of false evidence. See 8 U.S.C. § 1357(b) (making the submission of false evidence in immigration proceedings actionable under the federal criminal statute for perjury).

Love argues that all actions taken by immigration officials in the course of their duties—even criminal acts—are necessarily intertwined with the execution of immigration policy. We decline to entertain such a broad reading of immigration law, as the illogical nature of such a reading is demonstrated by the absurdity of its results. If, for example, an immigration officer physically forced himself on an asylum-seeker and thereby shot Hernandez, and the United States had denied this assault to be an act by federal law enforcement, Lanuza would have no trouble concluding that such criminal conduct bears no relationship to the legitimate execution of immigration policy. Likewise, we will not allow an officer of the immigration court to cloak himself in the government’s protection when he commits the crimes of forgery and perjury. Indeed, holding accountable an immigration official and officer of the court who engages in domestic criminal activity supports the enforcement of our immigration law in a manner consistent with the intent of the political branches.

Abbasi also advised against allowing suits against executive officials because “the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties.” Abbasi, 137 S. Ct. at 1860. Abbasi noted particular concern for cases in which discovery could reveal “the discussion and deliberations that led to the formation of the policy in question.” Id. at 1860–61 (citing Fed. Open Market Comm. v. Merrill, 443 U.S. 340, 360 (1979)). As this is a straightforward case against a single low-level federal officer, we are not concerned that this litigation will burden the Executive Branch to an unacceptable degree. Further, because the issues in this case involve facts the government itself made publicly available, this lawsuit will not require unnecessary inquiry or discovery into government deliberations or policy making. At most, allowing a lawsuit to proceed in this context would involve the “mere ‘disclosure of normal domestic law-enforcement priorities and techniques.’” Mirmehdi, 689 F.3d at 983 (quoting Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 490 (1999))—although, since the facts are undisputed, discovery would likely not involve the disclosure of any sensitive government information at all. Indeed, Lanuza’s civil suit against Love will likely involve no more investigative intrusion than the criminal prosecution initiated against Love by the United States itself. Accordingly, the fact that the United States saw fit to prosecute Love further supports permitting this lawsuit to proceed.

Similarly, because this case relates only to routine immigration proceedings, expanding Bivens to this context does not threaten the political branches’ supervision of national security and foreign policy. Quoting our decision in Mirmehdi, Love argues that “immigration issues ‘have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,’ which further ‘counsels hesitation in extending Bivens.” Mirmehdi, 689 F.3d at 982 (quoting Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009)). But Abbasi and Mirmehdi involved Congressional and Executive Branch policy decisions in response to the biggest terrorist attack in our nation’s history. In contrast, the facts of this case show that immigration cases often do not implicate high-level policy decisions related to national security. Lanuza has no ties to terrorism and, as a run-of-the-mill immigration proceeding, his case is unrelated to any other national security decision or interest.

Nor is this a case that has garnered any executive or congressional attention. Compare this case with Hernandez v. Mesa, where, upon remand from the Supreme Court, the Fifth Circuit declined to provide Bivens remedies to the parents of a fifteen-year-old Mexican citizen who had been fatally shot by a federal law enforcement agent, in part because the United States and Mexican governments had engaged in “serious dialogue” regarding the events at issue in that case. 885 F.3d 811, 820 (5th Cir. 2018). Specifically, Mexico had requested the extradition of the law enforcement agent who shot Hernandez, and the United States denied this request and refused to indict the agent. Id. The Fifth Circuit reasoned that “[i]t would undermine Mexico’s respect for the validity of the Executive’s prior determinations if, pursuant to a Bivens claim, a federal court entered a damages judgment against [the federal officer].” Id. Here, in contrast, there is no evidence that any executive official has taken an interest in Lanuza’s case, or that his situation has been the subject of diplomatic discussions between the United States and other sovereign nations. The constraints Lanuza seeks mirror the existing Executive Branch policy for federal immigration attorneys, and therefore a Bivens action in this context does not
interfere with executive policy by “risk[ing] interference with foreign affairs and diplomacy more generally.” Id. at 819.

Even so, where, as here, the underlying statutory scheme does not provide a remedy for the injury, we must consider whether Congress’s failure to provide a damages remedy is “more than mere oversight” and that “congressional silence” is more than “inadvertent.” Abbasi, 137 S. Ct. at 1856 (quoting Schweiker, 487 U.S. at 423). Though the INA itself lacks a damages remedy, Congress was not silent. Indeed, a comprehensive review of the INA suggests that Congress intended federal criminal and civil laws outside of the Act itself to provide remedies for the misconduct at issue here. As discussed above, the subsection of the INA that addresses the “[p]ower of immigration officers and employees” specifically delegates punishment for submission of false evidence to 18 U.S.C. § 1621, the federal criminal statute for perjury. See 8 U.S.C. § 1357(b). Further, the INA addresses the “[p]erformance of [f]ederal immigration officer functions by [s]tate officers and employees” in 8 U.S.C. § 1357(g)(8). Subsection 8 provides that any state employee “shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.” Id. This demonstrates Congress contemplated that civil actions would be maintained against both federal immigration officers and state employees acting in the capacity of federal immigration officers when their actions allegedly violate the Constitution or other laws. In providing a Bivens remedy here, we are not attempting to imply “a private remedy” within the INA where “a cause of action does not exist.” Abbasi, 137 S. Ct. at 1856 (quoting Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)) (citations omitted). Instead, we are “recogniz[ing] an implied cause of action to enforce a provision of the Constitution itself[,]” where “there is no single, specific congressional action to consider and interpret.” Id. Congress indicated that such constitutional remedies may be pursued when federal immigration officials violate an individual’s constitutional rights.

While it is true that there has been “frequent and intense” congressional attention to immigration law generally, that congressional attention does not “suggest[] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations” in this case. See Schweiker, 487 U.S. at 423, 425. There is no evidence that Congress has focused on the misconduct here—ICE attorneys intentionally manipulating evidence to deprive immigrants of rights under U.S. laws. To the contrary, Congress presumes that, as a general matter, federal employees faithfully execute federal law, and when they do not, Congress requires those employees be punished for such transgressions.6 8 U.S.C. § 1357(b).

Abbasi also counseled against allowing a Bivens remedy if there is an “alternative, existing process for protecting the [injured party’s] interest.” Abbasi, 137 S. Ct. at 1858 (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007) and citing Bush v. Lucas, 462 U.S. 367, 385–88 (1983); Malesko, 534 U.S. at 73–74; and Minneci v. Pollard, 565 U.S. 118, 127–130 (2012)). In Abbasi, the Court found that Congress’s silence, in conjunction with the plaintiffs’ ability to challenge the conditions of their confinement through a successful habeas petition, indicated that Congress intended for plaintiffs to use other judicially available forms of relief. Id. at 1862–63. But there are no such alternative remedial schemes available to Lanuza. The INA does not provide a remedy for actions by immigration officials that are designed to prevent individuals from accessing its lawful forms of relief. Lanuza was following the law, using the procedures Congress legislated, until his lawful pursuit of legal permanent resident status was criminally obstructed. Love’s submission of the forged I-826 form completely barred Lanuza from using the INA’s remedial scheme. The Act provides no remedial scheme for forgery if undiscovered. And to be sure, there are other individuals like Lanuza who may also be entitled to relief and who may not have obtained it for this very reason. While Lanuza was ultimately able to reopen his case, if Lanuza had not, by stroke of luck, found an exceptionally thorough immigration attorney, the forgery might never have been discovered and Lanuza would be deported and separated from his U.S. citizen wife and children. The system does not account for actions designed to circumvent it.

The government also argues that the $12,000 Love paid Lanuza in restitution pursuant to his criminal guilty plea is an alternative form of judicial relief. However, criminal prosecutions vindicate the government’s interests, not the interests of the victim. The victim does not choose whether to prosecute the case. As such, the criminal law is not an alternative remedial structure designed by Congress for individuals like Lanuza. When Lanuza discovered Love’s transgression, he had no right to force the government to prosecute; indeed the government declined to do so until Lanuza brought his Bivens action—after Lanuza’s immigration proceeding and long after the forgery was discovered. What is more, it is the

tain criminal acts to military courts-martial. In the UCMJ, Congress specifically decided that the military would police itself. But when drafting the INA, it decided that traditional Article III jurisdiction was appropriate. Thus, unlike in the UCMJ, in the INA, “Congress ha[s] not foreclosed a damages remedy in ‘explicit’ terms.” Abbasi, 137 S. Ct. at 1854 (quoting Bivens, 403 U.S. at 397).

7. We note that in Vega and Rodriguez, this court viewed Wilkie’s test for whether there are “alternative remedial structure[s] present” as separate from Abbasi’s special-factors analysis. Vega, 881 F.3d at 1154; Rodriguez, No. 15-16410, 2018 WL 3733428, at *10 (9th Cir. Aug. 7, 2018). We read Abbasi’s special-factors analysis as encompassing all circumstances that counsel against extending a Bivens remedy, including those addressed in Wilkie. Accordingly, we address the “alternative remedial structure[s]” question within our broader special-factors inquiry, but we emphasize that this variance is one of form, not substance.

6. If Congress intended all actions taken by an officer while acting pursuant to the INA to be regulated by the INA itself in a separate court, it would have said so. Compare the INA with the Article 3(b) of the Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. §§ 801–946, codified at 10 U.S.C. § 803(b), which grants jurisdiction over cer-
judge, not the victim, who decides if and how much restitution is appropriate.\(^8\)

With all of these factors in mind, we must now ask “whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” Abbasi, 137 S. Ct. at 1858. We recognize that “it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.” Id. at 1856. We do not take that step lightly. However, we conclude that doing so here is not an improper intrusion into the decisions of other governmental branches where the factors discussed above all suggest that providing a damages remedy is consistent with congressional and executive policy. Although Congress is often better suited to finding a balance between deterrence of constitutional violations and the costs of allowing a lawsuit to proceed, we do not believe that finding “[t]he proper balance” in this case “is one for the Congress, not the Judiciary, to undertake.” Id. at 1863.

Judges are particularly well-equipped to weigh the costs of constitutional violations that threaten the credibility of our judicial system. Indeed, there are few persons better equipped to weigh the cost of compromised adjudicative proceedings than those who are entrusted with protecting their integrity. And, more often than not, the Judicial Branch, not Congress or the Executive, is responsible for remedying circumstances where a court’s integrity is compromised by the submission of false evidence. Thus, it falls within the natural ambit of the judiciary’s authority to decide whether to provide a remedy for the submission of false evidence in an immigration proceeding.

The consequences of allowing the submission of false evidence by government attorneys without repercussion extends beyond its effect on Lanuza. The magnitude of its societal injury was addressed in the government’s press release about Love’s conviction: “[D]efendants in immigration court have a ‘right to proceedings free from false and fabricated evidence knowingly presented against them. When that right is denied, a real harm is inflicted both on society, which loses faith that its government plays fair, and the individual who suffers directly.’”

Accordingly, there are compelling interests that favor extending a Bivens remedy here, and, on balance, those interests outweigh the costs of allowing this narrow claim to proceed against federal officials. See Abbasi, 137 S. Ct. at 1863. The legal standards for adjudicating this claim are well established and administrable. See Wilkie, 551 U.S. at 555 (observing that “difficulty in defining a workable cause of action” may be a special factor). Lanuza’s claim for denial of procedural due process is a “workable cause of action.” Id. Whether the evidence was falsified, and whether it was submitted willfully, and whether the submission of that evidence deprived Lanuza of his right to due process, have definite answers, and we have “established methods” to come to these conclusions. Id. at 556. Indeed, the administration of Lanuza’s case is particularly straightforward because it is undisputed that Love intentionally submitted forged documents, and therefore the only question remaining for the district court is determining the amount of damages to which Lanuza is entitled, an area where our courts have substantial experience.

Finally, we do not foresee a “deluge” of potential claimants seeking to avail themselves of this particular Bivens action. See Davis, 442 U.S. at 248 (rejecting argument that implying Bivens action would cause a deluge of claims). Recognizing a Bivens action here will produce widespread litigation only if ICE attorneys routinely submit false evidence, which no party argues is the case. And if this problem is indeed widespread, it demonstrates a dire need for deterrence, validating Bivens’s purpose. Moreover, a plaintiff seeking a Bivens remedy under this theory must allege sufficient facts to show that a federal official willfully submitted falsified evidence and the submission of this evidence resulted in a complete bar to relief to which the individual was otherwise entitled under congressionally enacted laws. Therefore, frivolous suits will not survive Ashcroft v. Iqbal’s heightened pleading requirements. 556 U.S. 662, 678 (2009).

Because providing a Bivens remedy does not risk improper intrusion by the judiciary into the functioning of other branches; the judiciary is well-equipped to weigh the costs and benefits of this case; the need for deterrence is substantial; and allowing a lawsuit to proceed will place little burden on the government, it is a proper use of our judicial power to allow this Bivens action to proceed.

III.

There can be no doubt that Love—who intentionally, and illegally, submitted falsified evidence in an immigration hearing—is not protected by qualified immunity, as the district court properly held.\(^10\) “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Pearson v. Cal-

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8. Lanuza’s counsel represented at oral argument that he requested that Lanuza’s attorney’s fees and expenses be included in the restitution amount, but government counsel rejected the request, saying that Love and the government had agreed that the amount of restitution was “fair.”


10. The district court reasoned, “It should be obvious to any reasonable federal official that submitting false evidence in an immigration proceeding, or in any judicial or quasi-judicial proceeding for that matter, is unlawful and unconstitutional and would undermine the integrity of such a proceeding.”

IV. For these reasons, we hold that a Bivens remedy is available here, where a government immigration attorney intentionally submitted a forged document in an immigration proceeding to completely bar an individual from pursuing relief to which he was entitled. Failing to provide a narrow remedy for such an egregious constitutional violation would tempt others to do the same and would run afoul of our mandate to enforce the Constitution.

At its core, this case is about a lie, and all the ways it was used, over several years, to defraud the courts. Government attorneys are given great power, and with that power comes great responsibility. These attorneys represent the United States, and when they act, they speak for our government. “[T]he federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them… . Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.” Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 594 n.19 (1980) (Brennan, J., concurring) (quoting Sherman).

AFFIRMED IN PART, REVERSED IN PART, REMANDED.11

11. Love alternatively argues Lanuza’s claim is time-barred because the three-year statute of limitations began to run when Lanuza first received the forged I-826 form in May 2009, instead of when Lanuza learned it may have been forged sometime in December/January 2011, or when the forensic examiner confirmed it was forged in February 2012. A Bivens claim accrues when the plaintiff knows or has reason to know of the injury that forms the basis of his cause of action, see Wallace v. Kato, 549 U.S. 384, 388 (2007), or, in a case involving the submission of fabricated evidence, when the case is “fully and finally resolved,” Bradford v. Scherschligt, 803 F.3d 382, 388–89 (9th Cir. 2015). Under either analysis, Lanuza’s claim was timely. The argument that Lanuza should have known the I-826 form was forged is one that he laid eyes on it is absurd. The form was provided by the government—a party normally thought to be trustworthy—which represented that it came from Lanuza’s A-file. Moreover, both the BIA and the immigration judge, who review these cases for a living, believed it was authentic. Lanuza should not be held to a higher standard.

12. Appellant’s motion for judicial notice (Docket no. 30) is GRANTED. Costs are awarded to Lanuza under FRACP 39(a)(4).

COUNSEL

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Bruce D. Brown, Gregg P. Leslie, and Caitlin Vogus, Reporters Committee for Freedom of the Press; J. Joshua Wheeler, Thomas Jefferson Center for the Protection of Free Expression & The University of Virginia School of Law First Amendment Clinic, Charlottesville, Virginia; for Amici Curiae Reporters Committee for Freedom of the Press and 7 Media Organizations.

OPINION

BYBEE, Circuit Judge:
Plaintiffs Ray Askins and Christian Ramirez are advocates on border policy issues. In separate incidents, while on public property, they took photographs of activities at U.S. ports of entry on the United States–Mexico border. Both were stopped and searched by officers of the United States Customs and Border Protection (“CBP”), and their photos were destroyed. According to CBP, Askins and Ramirez were on CBP-controlled property when they took the photos. Under CBP’s policies, members of the media must obtain advance permission from CBP to photograph, videotape, or film inside or outside of port of entry buildings.

Askins and Ramirez filed suit for violation of their First Amendment rights and sought injunctive and declaratory relief. The district court dismissed plaintiffs’ claims, applying strict scrutiny and upholding CBP’s policies as the least restrictive means of serving the compelling interest of protecting the United States’s territorial sovereignty, but granted leave to file an amended complaint. When plaintiffs filed an amended complaint, the district court dismissed it as barred by the law of the case doctrine.

We conclude that it was error to apply the law of the case doctrine on a motion to dismiss an amended complaint. On the merits, we conclude that plaintiffs have stated First Amendment claims upon which relief can be granted. We vacate the judgment and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs’ suit stems from two separate incidents. Because the district court dismissed plaintiffs’ suit on the government’s motion to dismiss, for purposes of this appeal, we must accept as true plaintiffs’ allegations in the amended complaint. Lacey v. Maricopa Cty., 693 F.3d 896, 907 (9th Cir. 2012) (en banc).

A. The Incidents

1. Calexico West

Ray Askins is a U.S. citizen concerned with environmental health hazards in Imperial County and near the U.S.–Mexico border. He has a special interest in the effect of emissions from vehicles idling in the inspection areas at the ports of entry in California on air quality. In April 2012, Askins sought to photograph the secondary vehicle inspection area of the Calexico West port of entry in connection with a conference presentation he was preparing on the health impacts of border crossings. When Askins called CBP to request permission, he was told by an officer that this would be “inconvenient,” but his request was neither approved nor denied. The next morning, he informed the officer by voicemail that he would photograph the exit of the secondary inspection area from the street outside instead. The exit of the Calexico West secondary inspection area and a port-of-entry building exterior are visible from streets on or near the port of entry and from the Genaro Teco Monroy Memorial International Border Friendship Park, a small park.

On the afternoon of April 19, Askins stood at the intersection of First Street and Paulin Avenue on the U.S. side of the border, near the shoulder of the streets and immediately in front of the park. He was approximately 50–100 feet from the exit of the secondary inspection area, and he had not crossed the border or otherwise passed through border security to reach his location. Standing in the street, Askins took three or four photographs of the exit of the secondary inspection area. Multiple CBP officers approached Askins on the street to demand he delete the photographs he had taken. When Askins refused, the officers threatened to smash his camera, then searched and handcuffed him, confiscated his property, and detained him inside a secondary inspection area building. Askins was released after approximately twenty-five to thirty-five minutes and his property was returned, at which time he discovered that CBP had deleted all but one of his photographs of the exit of the secondary inspection area.

Askins alleges that he wishes to photograph “matters and events exposed to public view from outdoor and exterior areas of the Calexico port of entry” and “in the area immediately surrounding the Calexico port of entry building,” specifically, “vehicular traffic and CBP officers engaged in the public discharge of their duties, in order to document air and other environmental pollution as well as human rights abuses.” He claims that he now refrains from doing so in light of the CBP policies and the past enforcement of those policies against him.

2. San Ysidro

Christian Ramirez is a U.S. citizen and policy advocate who works on human rights issues in border communities. On June 20, 2010, Ramirez and his wife visited his father in Mexico, parking on the U.S. side of the border and crossing through the San Ysidro port of entry pedestrian entrance. They crossed back into the United States later the same day. After they had passed through inspection, the Ramirezes crossed a pedestrian bridge over Interstate 5 to return to their vehicle. While on the bridge, Ramirez observed male CBP officers at a security checkpoint below inspecting and patting down only female travelers. Concerned that the officers might be acting inappropriately, Ramirez observed the checkpoint from the bridge for ten to fifteen minutes and took approximately ten photographs with his cellphone camera.

Ramirez and his wife were approached by men who appeared to be private security officers. The men ordered them to stop taking photographs. The officers also demanded their identification documents, which Ramirez refused to provide as they had already passed through border inspection. The officers radioed for backup as Ramirez and his wife walked away, and at the bottom of the bridge, Ramirez was met by five to seven CBP officers. The CBP officers questioned Ramirez, and, without Ramirez’s consent, a CBP officer confiscated Ramirez’s cellphone and deleted all of
The photographs Ramirez had taken from the bridge. A U.S. Immigration and Customs Enforcement officer confiscated the Ramirez’s passports and walked away, leaving Ramirez surrounded by the CBP officers. After ten to fifteen minutes, their documents were returned to them and the Ramirez were allowed to leave.

The pedestrian bridge from which Ramirez took the photographs has since been replaced. The new bridge runs east to west, passing over Interstate 5 to connect the San Ysidro Boulevard transit plaza and Camiones Way, both on the U.S. side of the border. Plaintiffs allege that the bridge “is open to and used by the public to cross over Interstate 5,” and that “members of the public can and do frequently cross the bridge without crossing the border or entering or exiting any port of entry building.” The outdoor vehicle inspection areas in which CBP conducts primary and secondary inspections at the San Ysidro port of entry are visible from the new bridge. Ramirez alleges that he wishes to photograph “matters exposed to public view, including CBP officers engaged in the public discharge of their duties” from the new pedestrian bridge, the San Ysidro Boulevard transit plaza, and a footpath leading from the transit plaza to the border. U.S. government signs posted at these locations prohibit any form of photography. Ramirez claims that he now refrains from documenting matters and events visible from those locations in light of the CBP policies and the past enforcement of those policies against him.

B. The Suit

1. The Initial Complaint

Plaintiffs filed suit in October 2012 against the Department of Homeland Security, named officials of CBP, and 50 unnamed CBP officers. Plaintiffs claimed that CBP’s policies and practices violated their First and Fourth Amendment rights and sought declaratory and injunctive relief, damages, and costs and attorneys’ fees. The government moved to dismiss under Rule 12(b)(6) and brought to the court’s attention two CBP policies: CBP Directive No. 5410-001B (Mar. 18, 2009) (“Directive”), a national policy “defining guidelines relating to the disclosure of official CBP information to accredited news organizations, mass media, published professional journals, and stakeholder groups,” and CBP’s “Ground Rules for News Media Representatives when Visiting Southern California Ports of Entry” (“Ground Rules”). The government argued that, under these policies, any individual seeking to film or take photographs at ports of entry is required to obtain prior authorization.

The district court held that plaintiffs had sufficiently alleged the policies were content-based restrictions on speech in a public forum, triggering strict scrutiny. But the court decided that the policies survived strict scrutiny because they serve “perhaps the most compelling government interest: protecting the territorial integrity of the United States” and there were no less restrictive alternatives. The district court granted the motion to dismiss with leave to amend “with respect to the constitutionality of the CBP photography policy.”

2. The Amended Complaint

Plaintiffs filed an amended complaint in 2015 against the U.S. Department of Homeland Security, the Commissioner of U.S. Customs and Border Protection, and the directors of Calexico West and San Ysidro ports of entry. Plaintiffs omitted any claims based on the Fourth Amendment, dropped their claims for damages, and did not sue the unnamed CBP officers. Plaintiffs also formally challenged the CBP policies identified by the government under the First Amendment. First, they challenge the policies on their face as prior restraints. Second, they challenge the policies as unreasonable as applied to them. The policies, which we refer to as the “Directive” and the “Ground Rules,” require members of the media to obtain advance permission to document events at ports of entry.

Under the Directive, “CBP shall cooperate with accredited local, national, and foreign news organizations, without favoritism, in the dissemination of official information while not compromising the DHS/CBP mission.” Section 6.2 provides procedures for media requests to photograph suspects and states that “[d]ecisions to allow any photographing, videotaping or filming by the media at CBP facilities shall be made in consultation with the appropriate Public Affairs Specialist and with the concurrence and control of the appropriate CBP supervisor.” It also provides that “[p]hotographing of suspects/detainees by news organizations in public places or in transit is neither encouraged nor discouraged,” and instructs CBP that “[w]hen news organizations arrive at the scene of an enforcement action in progress without prior CBP knowledge, CBP personnel shall not interfere with photographing suspects in public places or in transport.” The Directive prohibits the “[d]etention of persons or media and/or the detention of recording equipment, film or notes . . . unless the owner or operator of such materials has violated federal law, unlawfully breached the security of a CBP facility, or has endangered the safety of CBP personnel.”

The Ground Rules, which apply to the ports of entry involved here, are directed towards “accredited news media representatives” and are motivated by “concerns for the privacy of the traveling public, integrity of law enforcement and investigative activities, and safety of visiting media representatives and the public.” They require “members of the press who desire to film, conduct interviews or engage in any other media activity” to “clear their visit in advance with appropriate CBP officials.” Under the Ground Rules, “[r]eporters who do not have such clearance may be denied access to port property,” and “photographers and camera crews” must “be escorted by a designated officer at ALL times while on port property,” without exception. The Ground Rules prohibit photography in “non-public spaces such as the pat down room and holding cells” and “merchandise storage areas,” “close-up” photographs of “port computer screens,” and rec-
ognizable photographs of CBP officers without their permission “[f]or reasons of officer safety.”

Plaintiffs allege that CBP interprets and enforces these policies as a total ban on all photography by any person from any area within a port of entry without prior authorization from CBP. Plaintiffs do not challenge CBP’s restrictions on photography within CBP facilities, such as buildings and inspection areas. Rather, plaintiffs allege that there are “large swaths of property” owned or leased by CBP that are public streets and sidewalks, that these constitute traditional public fora, and that CBP enforces its no-photography policies within these areas in violation of the First Amendment.

The government moved to dismiss the amended complaint for failure to state a claim. The district court held that it was “precluded” by the law of the case doctrine from revisiting its prior order. Because plaintiffs brought “the identical issue,” but failed to “identify any clear error, intervening change in law, new evidence, changed circumstances, or manifest injustice resulting from the previous decision,” “[t]he law of the case bar[red] Plaintiffs’ claims.” The district court entered judgment for the government. Plaintiffs timely appealed.

II. ANALYSIS

Plaintiffs raise two questions on appeal. First, whether the law of the case doctrine applies in this case. Second, whether, on the merits, the district court properly dismissed their suit. We address each issue in turn.

A. The Law of the Case Doctrine

“The law-of-the-case doctrine generally provides that ‘when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’” Musacchio v. United States, 136 S. Ct. 709, 716 (2016) (quoting Pepper v. United States, 562 U.S. 476, 506 (2011)). The district court determined that it was “precluded” from reconsidering its order dismissing the original First Amendment claims in adjudicating the motion to dismiss the amended First Amendment claims, absent a showing that “1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result.” United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998). Reasoning that the amended claims raised the same issue as the original claims—the constitutionality of the CBP policies—the court held that the claims were barred because plaintiffs failed to “identify any clear error, intervening change in law, new evidence, changed circumstances, or manifest injustice resulting from the previous decision.”

The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case. The doctrine applies most clearly where an issue has been decided by a higher court; in that case, the lower court is precluded from reconsidering the issue and abuses its discretion in doing so except in the limited circumstances the district court identified. See, e.g., Cuddy, 147 F.3d at 1114; United States v. Miller, 822 F.2d 828, 832 (9th Cir. 1987) (“[t]he rule is that the mandate of an appeals court precludes the district court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal.”); United States v. Houser, 804 F.2d 565, 567 (9th Cir. 1986) (“The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. . . . A trial court may not, however, reconsider a question decided by an appellate court.”).

A court may also decline to revisit its own rulings where the issue has been previously decided and is binding on the parties—for example, where the district court has previously entered a final decree or judgment. See Lummi Indian Tribe, 235 F.3d at 452–53 (holding that district court did not abuse its discretion to invoke law of the case where its prior decision interpreted 1974 Indian fishing rights decree). The law of the case doctrine does not, however, bar a court from reconsidering its own orders before judgment is entered or the court is otherwise divested of jurisdiction over the order. See City of L.A. v. Santa Monica Baykeeper, 254 F.3d 882, 888–89 (9th Cir. 2001); Houser, 804 F.2d at 567; see also Fed. R. Civ. P. 54(b) (“[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.”).

The law of the case doctrine does not apply here. The district court dismissed plaintiffs’ First Amendment claim, but without prejudice; it did not enter a final judgment in the case. It specifically granted plaintiffs leave to amend “with respect to the constitutionality of the CBP photography policy.” Accepting the district court’s invitation, plaintiffs filed an amended complaint, and included facts and claims that were different from those in the initial complaint. Instead of ruling on the merits of the government’s motion to dismiss the amended complaint, the district court invoked the law of the case doctrine, holding that it was “precluded” from considering the amended complaint. This was error.

Once the plaintiff elects to file an amended complaint, the new complaint is the only operative complaint before the district court. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992) (“[A]fter amendment the original pleading no longer performs any function and is treated thereafter as non-existent[,]” (internal quotation marks omitted)). Thus, when an original complaint is dismissed without prejudice, the filing of an amended complaint does not ask the court to
reconsider its analysis of the initial complaint. The amended complaint is a new complaint, entitling the plaintiff to judgment on the complaint’s own merits; we do not ask whether the plaintiff is “precluded” or “barred” by the prior ruling. When the defendant files a motion to dismiss the amended complaint, it may urge the district court to determine that the plaintiff’s amended complaint did not cure the deficiencies of the initial complaint. If the district court determines the amended complaint is substantially the same as the initial complaint, the district court is free to follow the same reasoning and hold that the amended claims suffer from the same legal insufficiencies. The district court is not, however, bound by any law of the case. The district court may decide the second motion to dismiss in the same way it decided the first, but permitting the filing of an amended complaint requires a new determination. That leaves the district court free to correct any errors or misunderstandings without having to find that its prior decision was “clearly erroneous.” Cuddy, 147 F.3d at 1114. By contrast, where a final legal determination has been made by a higher court, or by the district court in the same or a related case, the law of the case doctrine allows the court to impose a heightened burden on the plaintiff—to show clear error, changed law, new evidence, changed circumstances, or manifest injustice. Id.

Here, the district court erred in dismissing plaintiffs’ amended complaint as barred by the law of the case doctrine. By invoking the law of the case doctrine, the district court held plaintiffs to a higher standard than if they had pleaded their amended complaint originally. The district court should simply have considered the amended complaint on its merits. As the district court granted plaintiffs leave to file the amended complaint and both orders are before us on appeal, we have the discretion to proceed to consider de novo whether plaintiffs state a claim in their amended complaint.

B. Plaintiffs’ First Amendment Claims

In their amended complaint, plaintiffs claim that CBP’s policies impose unconstitutional restrictions on their First Amendment right to photograph and record CBP officers engaging in the public discharge of their official duties. They contend that the policies impose a prior restraint and prevent the documentation of civil and human rights abuses, including the excessive use of force and racial or religious profiling, at the border. They do not seek unrestricted access to all areas of ports of entry or unlimited photography privileges, but rather assert a right to photograph only those matters that are “exposed to public view from exterior or outdoor areas of the Calexico and San Ysidro ports of entry.” Plaintiffs have alleged that these areas, even if leased or owned by CBP, are public streets and sidewalks that must be considered public fora.

The First Amendment protects the right to photograph and record matters of public interest. See Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1203–04 (9th Cir. 2018); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); cf. Ander-son v. City of Hermosa Beach, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (holding that the process of creating pure speech is entitled to the same First Amendment protection as the product of that process). This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places. See Fordyce, 55 F.3d at 439; see also, e.g., ACLU of Ill. v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing “that the First Amendment protects the filming of government officials in public spaces”); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”).

Whether a place is “public” depends on the nature of the location. The government’s ability to regulate speech in a traditional public forum, such as a street, sidewalk, or park, is “sharply circumscribed.” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). Content-based restrictions on speech are subject to strict scrutiny and may only be upheld if they are “the least restrictive means available to further a compelling government interest.” Berger v. City of Seattle, 569 F.3d 1029, 1050 (9th Cir. 2009) (en banc). Reasonable, content-neutral, time, place, or manner restrictions, on the other hand, are subject to “an intermediate level of scrutiny.” Jacobson v. U.S. Dep’t of Homeland Sec., 882 F.3d 878, 882 (9th Cir. 2018) (quoting Int’l Soc’y for Krishna Consciousness of Cal., Inc. v. City of L.A., 764 F.3d 1044, 1049 (9th Cir. 2014)). They are permitted in public fora so long as they are “narrowly tailored to serve a significant governmental interest,” “leave open ample alternative channels for communication of the information,” and do “not delegate overly broad licensing discretion to a government official.” Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1023–24 (9th Cir. 2009) (quoting Clark v. Cnty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992)). In contrast, restrictions on speech in a nonpublic forum must only be “reasonable in light of the purpose served by the forum and viewpoint neutral.” Jacobson, 882 F.3d at 882 (internal quotation marks omitted) (quoting Int’l Soc’y for Krishna Consciousness, 764 F.3d at 1049).

The district court assumed, for purposes of deciding the government’s first motion to dismiss, that the areas adjacent to Calexico West and San Ysidro were public fora and that CBP’s restrictions were content based. That meant the government had the burden of demonstrating that its restrictions on speech were the least restrictive means necessary to serve a compelling government interest.2 The district court found

2. On appeal, the government attempts to avoid the forum framework altogether by framing this as a First Amendment right of access to government proceedings case. The government likens photography of proceedings at ports of entry to access to courtroom proceedings, jails, town halls, and executions. This analysis might be relevant if plaintiffs challenged the policies’ restrictions on photography of CBP computer screens, secured or interior areas of the port of entry, or
that the CBP policies survived strict scrutiny because of “the extremely compelling interest of border security” and the government’s general interest in “protecting United States territorial sovereignty.” To this, the government adds that the CBP policies serve compelling government interests in protecting CBP’s law enforcement techniques and the integrity of on-going investigations; protecting the privacy of travelers, suspects, and sensitive digital information; ensuring the safe and efficient operation of the ports of entry; and protecting against terrorist attacks. In conclusory fashion, the district court held that the policies were the least restrictive means of serving these interests.

These conclusions are too thin to justify judgment for the government on a motion to dismiss. “When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 816–17 (2000); accord Reno v. ACLU, 521 U.S. 844, 879 (1997) (“The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective[].”); Berger, 569 F.3d at 1035. “It is rare that a regulation restricting speech because of its content will ever be permissible.” Playboy Entm’t Grp., 529 U.S. at 818; see also Berger, 569 F.3d at 1052–53. Without question, protecting our territorial integrity is a compelling interest that could justify restrictive restrictions on speech activities at ports of entry. See United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”). But the devil lies in the details: “Even at the border, we have rejected an ‘anything goes’ approach.” United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013) (en banc). It is the government’s burden to prove that these specific restrictions are the least restrictive means available to further its compelling interest. They cannot do so through general assertions of national security, particularly where plaintiffs have alleged that CBP is restricting First Amendment activities in traditional public fora such as streets and sidewalks.

Moreover, determining whether a location is properly categorized as a public forum involves largely factual questions. We have adopted a “fact-intensive, three-factor test to determine whether a location is a public forum in the first instance.” Jacobson, 882 F.3d at 883. We consider “1) the actual use and purposes of the property, particularly [its] status as a public thoroughfare and availability of free public access to the area; 2) the area’s physical characteristics, including its location and the existence of clear boundaries delimiting the area; and 3) traditional or historic use of both the property in question and other similar properties.” ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1100–01 (9th Cir. 2003) (citations omitted).

How these factors apply here cannot be answered without development of the record and separate consideration of the Calexico West and San Ysidro ports of entry. At Calexico West, Askins took photographs from the shoulder of two streets and will continue to photograph the exterior areas of the port of entry from those streets, the nearby park, and other public, outdoor locations. It appears from the one photograph that we have in the record that the streets on which Askins stood are indistinguishable from other Calexico city streets, and the amended complaint indicates that there are no signs or other indicators marking the port of entry boundaries. Furthermore, the Genaro Teco Monroy Park abuts those streets, and the government concedes the park is not part of the port of entry—which means that Askins presumably could have taken the same photographs of Calexico West had he only taken a couple of steps back from the street into the park.

“Public streets and sidewalks” are “the archetype of a traditional public forum.” Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 945 (9th Cir. 2011) (quoting Snyder v. Phelps, 562 U.S. 443, 456 (2011)); accord United States v. Grace, 461 U.S. 171, 177 (1983) (noting that “‘public places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums’”); ACLU of Nev., 333 F.3d at 1101 (“[W]hen a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity.”). Even if we were to assume these areas are part of the port of entry, we would need to know much more about the port of entry’s boundaries and the public’s access to and use of Calexico West’s streets and sidewalks before we could decide the relative importance of banning photography from those streets and sidewalks. See Grace, 461 U.S. at 179–80 (emphasizing that there was “no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave” in holding that sidewalks bordering the Supreme Court building are a public forum); Jacobson, 882 F.3d at 883.

San Ysidro presents a different set of circumstances. Ramirez took photographs of the San Ysidro port of entry from a pedestrian bridge and wishes to take photographs from the new pedestrian bridge, a transit plaza, and the adjacent sidewalk. Unlike the streets adjacent to the Calexico West port of entry, we are told there are signs prohibiting photography on the pedestrian bridge overlooking the San Ysidro port of entry. The government compares ports of entry to military bases, airport terminals, and interstate rest areas, portions of which have been held to be nonpublic fora. See Int’l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (airport terminals); Greer v. Spock, 424 U.S.
828, 838 (1976) (military bases); Jacobsen v. Bonine, 123 F.3d 1272, 1274 (9th Cir. 1997) (rest areas). But the boundaries of the San Ysidro port of entry are neither established by the record nor a matter of which we can take judicial notice. And even accepting that the San Ysidro port of entry facilities are a nonpublic forum, the public’s access to and use of the transit plaza, sidewalks, and other outdoor areas is critical to determining whether they retain their public fora status. See Jacobsen, 882 F.3d at 884 (“The limited information in the record regarding the layout and use of the checkpoint area leaves many questions unanswered about the specific uses of areas outside the primary and secondary inspection zones.”); see also Flower v. United States, 407 U.S. 197, 198–99 (1972) (per curiam) (holding that First Amendment protections applied equally on city streets and an open, unguarded street regularly used by civilians that passed through a military base).

We do not mean to suggest that all or even any areas within a port of entry are necessarily public fora, or that allowing the public to transit through a port of entry for the purpose of crossing the border creates a public forum. We decide today only that plaintiffs have adequately pleaded their claims and that further factual development is required before the district court can determine what restrictions, if any, the government may impose in these public, outdoors areas.3

III. CONCLUSION

For the foregoing reasons, we VACATE the district court’s dismissal of plaintiffs’ First Amended Complaint and REMAND for further proceedings. Costs shall be taxed against Defendants-Appellees.

3. We also anticipate that the parties will help illuminate why CBP’s Directive and Ground Rules are even relevant to this case. Both written policies apply to “accredited” news organizations and representatives seeking advance approval for visits to CBP facilities. The Directive states that “[p]hotographing of suspects/detainees by news organizations in public places or in transit is neither encouraged nor discouraged” and provides that CBP personnel will “not interfere with photographing suspects in public places.”

Similarly, the Ground Rules provides that “[r]eporters” who do not obtain advance permission may be denied entry and that members of the media who are admitted to port property must be accompanied. The Ground Rules prohibit photography in “non-public-spaces such as the pat down room and holding cells.”

We are puzzled as to how these guidelines apply to members of the public, whether media or not, who take photographs outside of port of entry facilities from streets and sidewalks accessible to the general public, whether those streets and sidewalks are on or off the port of entry. On their face, the policies would not appear to apply to plaintiffs at all, much less sanction the detention of plaintiffs and the destruction of their photographs under the circumstances alleged.

Cite as 18 C.D.O.S. 8134

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUVENILE MALE, Defendant-Appellant.

No. 17-10257
United States Court of Appeals for the Ninth Circuit
D.C. No. 4:12-cr-01126-CJK-JR-1
Appeal from the United States District Court for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding
Argued and Submitted July 10, 2018
San Francisco, California
Filed August 15, 2018
Opinion by Judge Ivan L.R. Lemelle, Senior United States District Judge for the Eastern District of Louisiana, sitting by designation.

COUNSEL

United States Of America, for Plaintiffs-Appellants.
Juvenile Male, for Defendants-Appellees.

OPINION

LEMELLE, Senior District Judge:

Juvenile Defendant-Appellant D.A.T. appeals the district court’s imposition of a 34-month term of official detention following revocation of Appellant’s juvenile delinquent supervision. Appellant argues that his term of official detention exceeded the statutory maximum established in 18 U.S.C. § 5037(d)(5). Because we agree, we vacate the sentence and remand with instructions that the district court order Appellant’s immediate release.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In August 2009, when Appellant was 15 years old, he and two other individuals killed R.O. on the Tohono O’odham Nation. Appellant was arrested by tribal authorities and remained in tribal custody until he was transferred to federal custody in June 2012, shortly after the government charged Appellant with first degree murder in a one count information. In January 2013, Appellant reached a plea agreement with the government and pled guilty to second-degree murder, as charged in an amended information. The statutory maximum sentence was five years of official detention. See 18 U.S.C. § 5037(c)(2)(A). On April 2, 2013, the district
court sentenced Appellant to 28 months of official detention, followed by juvenile delinquent supervision until Appellant’s 21st birthday.

Appellant was released from detention on June 25, 2014, at the age of 20. But in November 2014, a warrant was issued for Appellant’s arrest because he violated the conditions of his juvenile delinquent supervision. As part of a Juvenile Revocation Disposition Agreement with the government, Appellant admitted to two violations of his juvenile delinquent supervision conditions—commission of various crimes and use of controlled substances. In October 2015, the district court revoked Appellant’s juvenile delinquent supervision and sentenced him to nine months of official detention for each violation, to be served consecutively, followed by 42 months of juvenile delinquent supervision.

Appellant was released from detention on July 29, 2016, at the age of 22. In September 2016, a second warrant was issued for Appellant’s arrest, again because Appellant violated the conditions of his juvenile delinquent supervision. In April 2017, Appellant admitted to two violations (failure to notify probation of contact with law enforcement and consumption of alcoholic beverages) without a plea agreement. In May 2017, the district court revoked Appellant’s juvenile delinquent supervision and sentenced him to 34 months of official detention for each violation, to be served concurrently, with no term of juvenile delinquent supervision to follow. Appellant did not object at the hearing, but timely appealed his sentence.

**JURISDICTION AND STANDARD OF REVIEW**

The district court had jurisdiction over Appellant’s revocation proceeding pursuant to 18 U.S.C. §§ 3231 and 5031-5037. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The parties disagree about whether we should review de novo or for plain error. Regardless of which standard applies, the sentence imposed exceeded the maximum permitted by law.¹

**DISCUSSION**

This appeal presents a question of statutory interpretation. The Federal Juvenile Delinquency Act (FJDA) governs the adjudication of juvenile delinquency in federal courts. See 18 U.S.C. §§ 5031-5042. When a district court finds a juvenile to be a juvenile delinquent, the FJDA empowers the district court to impose a term of official detention, followed by a term of juvenile delinquent supervision. See id. § 5037(a), (c), (d). The FJDA also empowers the district court to revoke juvenile delinquent supervision if a juvenile violates a condition of supervision, and to impose a new term of official detention. See id. § 5037(d)(5). In this appeal, the parties dispute the maximum term of official detention that can be imposed upon revocation of juvenile delinquent supervision when the juvenile is more than 21 years old at the time of the revocation proceeding. To resolve this dispute, we must examine § 5037(d)(5) of the FJDA.

Section 5037(d)(5) states:

> If the juvenile violates a condition of juvenile delinquent supervision at any time prior to the expiration or termination of the term of supervision, the court may, after a dispositional hearing and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to section 994 of title 18, revoke the term of supervision and order a term of official detention. The term of official detention which is authorized upon revocation of juvenile delinquent supervision shall not exceed the term authorized in section 5037(c)(2)(A) and (B), less any term of official detention previously ordered. The application of sections 5037(c)(2)(A) and (B) shall be determined based upon the age of the juvenile at the time of the disposition of the revocation proceeding. If a juvenile is over the age of 21 years old at the time of the revocation proceeding, the mandatory revocation provisions of section 3565(b) are applicable. A disposition of a juvenile who is over the age of 21 years old shall be in accordance with the provisions of section 5037(c)(2), except that in the case of a juvenile who if convicted as an adult would be convicted of a Class A, B, or C felony, no term of official detention may continue beyond the juvenile’s 26th birthday, and in any other case, no term of official detention may continue beyond the juvenile’s 24th birthday.

Section 5037(d)(5) references § 5037(c)(2), which provides the maximum term of official detention that may be imposed when “a juvenile [is] found to be a juvenile delinquent.” Id. § 5037(c). As relevant here, § 5037(c)(2) initially authorized a five-year term of official detention for Appellant.²

Section 5037(d)(5) is not a model of clarity with respect to calculating the maximum term of official detention that can be imposed when supervision is revoked. Relying on the unqualified wording of § 5037(d)(5)’s second sentence, Appellant argues that the duration of previously ordered terms of official detention is always subtracted from the maximum

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¹. See United States v. Goodbear, 676 F.3d 904, 912 (9th Cir. 2012) (holding that it is plain error to impose a “sentence [that] exceeds the statutory maximum”); United States v. Juvenile Male, 470 F.3d 939, 940-41 (9th Cir. 2006) (reversing juvenile’s sentence under plain error review because district court used incorrect statute to sentence juvenile, even though there was no controlling Ninth Circuit precedent on the issue); United States v. Echavarria-Escobar, 270 F.3d 1265, 1267-68 (9th Cir. 2001) (applying de novo review to “a district court’s construction and interpretation of the Sentencing Guidelines,” even though no objection was raised in district court (internal quotation marks omitted)).

². Appellant’s offense would have been a Class A felony if he had been charged as an adult, and the sentencing guidelines range for a similarly situated adult exceeded five years. See 18 U.S.C. § 5037(c)(2).
term prescribed by § 5037(c)(2). The government argues that § 5037(d)(5) contains two independent methods for calculating the maximum term of official detention following revocation. Pointing to the last two sentences of the section, the government maintains that juveniles older than 21 do not receive credit for previously ordered terms of official detention. Both interpretations are plausible. Therefore, § 5037(d)(5) is ambiguous. See United States v. Miranda-Lopez, 532 F.3d 1034, 1038 (9th Cir. 2008) (providing definition).

“If [a] statute’s terms are ambiguous, we may use canons of construction, legislative history, and the statute’s overall purpose to illuminate Congress’s intent.” Jonah R. v. Carmona, 446 F.3d 1000, 1005 (9th Cir. 2006). We conclude that Appellant’s construction of § 5037(d)(5) best reflects the structure of the statute and congressional intent, while remaining faithful to the purpose of the FJDA.

I. TEXT AND STRUCTURE

The structure of § 5037(d)(5) suggests that all juveniles receive credit for previously ordered terms of official detention when supervision is revoked. Section 5037(d)(5) is a single paragraph with no subparts or other internal divisions. The paragraph begins with the unqualified statement that a district court “may . . . revoke [a juvenile’s] term of supervision and order a term of official detention” when a “juvenile violates a condition of . . . supervision.” 18 U.S.C. § 5037(d)(5). The next sentence states, again without qualification, that the term of official detention imposed “shall not exceed the term authorized in section 5037(c)(2)(A) and (B), less any term of official detention previously ordered.” Id.

But, by its own terms, § 5037(c)(2) applies only “in the case of a juvenile who is between eighteen and twenty-one years old.” And the third sentence of § 5037(d)(5) states that the district court must use “the age of the juvenile at the time of the disposal of the revocation proceeding” when applying § 5037(c)(2). Therefore, § 5037(c)(2) and the first two sentences of § 5037(d)(5) leave a crucial question unanswered: how does a district court revoke supervision when a juvenile is more than 21 years old at the time of the revocation proceeding? The last two sentences of § 5037(d)(5) answer that question. Per the penultimate sentence, revocation of supervision is mandatory when juveniles older than 21 commit certain serious violations. Id. (referring to 18 U.S.C. § 3565(b)). The last sentence instructs the district court to use § 5037(c)(2) to calculate the maximum term of official detention after revocation, even when a juvenile is older than 21 at the revocation proceeding. Id.

As previously discussed, the parties dispute the significance of the last sentence of § 5037(d)(5). Whereas Appellant argues that the last sentence supersedes, but does not displace, the section’s first three sentences, the government argues that the last sentence creates an independent method of calculating the maximum term of official detention for juveniles who are over the age of 21 at their revocation proceedings. The government’s argument primarily relies on the definition of the term “juvenile.” The government points to the definitional section of the FJDA, which states that, “for the purpose of proceedings and disposition under this [the FJDA] for an alleged act of juvenile delinquency,” a “juvenile . . . is a person who has not attained his twenty-first birthday.” Id. § 5031. Based on this definition, the government argues that Appellant was not a “juvenile” at the time of the revocation proceeding and was, therefore, not entitled to credit for previously ordered terms of official detention.

But the government’s attempt to separate § 5037(d)(5) into its constituent parts runs counter to the natural reading of the statute. Section 5037 repeatedly uses the phrase, “a juvenile who is over the age of 21 years old.” Id. § 5037(b), (d)(5), (d)(6). This phrase suggests that, at least for purposes of § 5037, a defendant can be a “juvenile” and over the age of 21 at the same time. See Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2441 (2014) (“[A] statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” (internal quotation marks omitted)); cf. United States v. Olsen, 856 F.3d 1216, 1223 (9th Cir. 2017) (presumption that statutory definition controls use of term “may yield to context” “[i]f interpreting a term consistently with its statutory definition would, for instance, lead to ‘obvious incongruities’ or would ‘destroy one of the major congressional purposes’” of the statute (alteration omitted)) (quoting Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949)).

Considering Appellant a juvenile for purposes of § 5037 is also consistent with our analysis in United States v. LKAV, 712 F.3d 436, 444 (9th Cir. 2013), where we concluded that juveniles over the age of 21 remain “subject to” the FJDA as long as the district court had jurisdiction when the information was filed.

Moreover, the government’s proposed construction fails to account for the fact that only the first sentence of § 5037(d)(5) authorizes revocation of supervision and imposition of official detention. If, as the government suggests, the first sentence of § 5037(d)(5) applies only to juveniles who are under the age of 21 at their revocation proceedings, then there would be no statutory authorization to revoke Appellant’s supervision. That is certainly not the government’s position, and the resulting inability to revoke Appellant’s supervision would be an “obvious incongru[ity]” that “destroy[s] one of the major congressional purposes” of the 2002 amendments.
to the FJDA. See Lawson, 336 U.S. at 201; see also H.R. Rep. No. 107-685, at 218 (2002) (Conf. Rep.) (explaining that the FJDA was amended to “provide[] authority to sanction a violation of probation when a person adjudicated a juvenile delinquent is over 21 at the time of the violation”). The government offers no persuasive rationale for considering appellant a “juvenile” for purposes of the first sentence of § 5037(d)(5), but not the second.

Appellant’s proposed construction is more faithful to the text and structure of § 5037(d)(5) because it explains that the last two sentences of the section supplement the general framework established by the first three sentences of the section. The general framework is that: (1) supervision can be revoked for violating conditions of supervision, and official detention can be imposed upon revocation; (2) the maximum term of official detention is provided by § 5037(c)(2), subject to reduction for previously ordered terms of official detention; and (3) application of § 5037(c)(2) depends on the juvenile’s age at the time of the revocation proceeding. The modifications that apply when a juvenile is older than 21 at the revocation proceeding are: (1) certain serious violations of supervision conditions trigger mandatory revocation; and (2) the maximum term of official detention is provided by § 5037(c)(2), subject to certain age limits.

But simply reading § 5037(d)(5) as a whole, instead of as two independent pieces, does not fully resolve the parties’ dispute. The question remains whether the last sentence of § 5037(d)(5) alters the operation of the section’s second sentence by implicitly eliminating credit for previously ordered terms of official detention when a juvenile is older than 21 at the revocation proceeding. The last clause of § 5037(d)(5) reads:

except that in the case of a juvenile who if convicted as an adult would be convicted of a Class A, B, or C felony, no term of official detention may continue beyond the juvenile’s 26th birthday, and in any other case, no term of official detention may continue beyond the juvenile’s 24th birthday.

This clause appears two other times in § 5037.

In § 5037(b), which governs the revocation of probation, and in § 5037(d)(6), which governs the imposition of juvenile delinquent supervision after revocation of a previous term of supervision, the clause serves to limit the district court’s authority to detain or supervise a juvenile. See id. § 5037(b), (d)(6). Moreover, in neither instance does the clause create an independent sentencing framework for juveniles over the age of 21. For example, consider a juvenile who was sentenced to three years of probation for a Class A felony at the age of 20. See 18 U.S.C. § 5037(b)(2)(A). If that juvenile’s probation is later revoked, § 5037(c)(2) allows a period of official detention of five years. See id. § 5037(b). But if the revocation proceeding occurs after the juvenile’s 21st birthday, the last clause of § 5037(b) limits the term of official detention to end on the juvenile’s 26th birthday. The result would be less than five years of official detention. Because the clause limits a juvenile’s exposure to detention when used in other parts of § 5037, it should similarly limit a juvenile’s exposure to official detention upon revocation of supervision. See United States v. Maciel-Alcala, 612 F.3d 1092, 1098-99 (9th Cir. 2010) (“We interpret identical phrases used in the same statute to bear the same meaning,” especially when the phrases are in “close proximity”).

Understanding the clause to limit a district court’s authority to detain a juvenile is also consistent with the implicit age limits on detention that exist throughout § 5037. Section 5037 consistently rejects control over juveniles after their 24th or 26th birthday, depending on the severity of the underlying conviction. See 18 U.S.C. § 5037(b), (c)(2), (d)(2)(B), (d)(6). For example, when a juvenile who committed a class A felony is initially sentenced, he can neither be detained nor supervised after his 26th birthday because the maximum sentence of five years will start no later than his 21st birthday. See id. § 5037(c)(2)(A), (d)(2)(B). In fact, under no circumstances does § 5037 allow detention or supervision of a juvenile past his 24th or 26th birthday. See id. § 5037(b)-(d). Accordingly, it is not remarkable that § 5037(d)(5) contains a similar limiting provision to ensure that juveniles are not indefinitely detained or supervised under the FJDA.

II. LEGISLATIVE HISTORY

The authority to order juvenile delinquent supervision, as well as the power to impose a term of official detention upon revocation of that supervision, was added to the FJDA in 2002. See Juvenile Justice and Delinquency Prevention Act of 2002, Pub. L. No. 107-273, § 12301, 116 Stat. 1869, 1896-99. The legislative history offers little insight into the specific question presented in this appeal: whether juveniles over the age of 21 receive credit for previous terms of official detention when their supervision is revoked. Admittedly, the legislative history suggests that Congress was concerned about the level of violent juvenile crime when it enacted § 5037(d)(5). See H.R. Rep. No. 107-685, at 113-14 (2002) (Conf. Rep.). This concern could support the government’s construction of § 5037(d)(5), because the government’s construction allows for the imposition of longer terms of official detention for older juveniles. But the conference report only briefly acknowledges § 5037(d)(5), stating that it “(1) provides authority to impose a term of juvenile delinquency supervision to follow a term of official detention, [and] (2) provides authority to sanction a violation of probation when a person adjudicated a juvenile delinquent is over 21 at the time of the violation.” Id. at 218. Neither provision of authority noted in the conference report suggests a strong intent in favor of the government’s construction.

The interpretation of an analogous statute that was in effect when § 5037(d)(5) was enacted may shed more light on Congress’s intent. See Jonah R., 446 F.3d at 1007 (“It is a rudimentary principle of construction that statutes dealing with
similar subjects should be interpreted harmoniously." (internal quotation marks and alterations omitted). In the adult criminal justice system, the closest analog to a term of juvenile delinquent supervision is a term of supervised release. Compare 18 U.S.C. § 3583(a) with 18 U.S.C. § 5037(d)(1).

When juvenile delinquent supervision was introduced in 2002, “the circuit courts were in agreement that, when calculating the maximum term of imprisonment to impose upon revocation of [an] [adult] defendant’s supervised release, the district court was required to subtract the aggregate of length of any and all terms of revocation imprisonment from the statutory maximum.” United States v. Knight, 580 F.3d 933, 937 (9th Cir. 2009).

The text of § 5037(d)(5) appears more generous than the consensus described in Knight because § 5037(d)(5) reduces the potential term of official detention upon revocation by “any term of official detention previously ordered,” not just those ordered during previous revocation proceedings. See 18 U.S.C. § 5037(d)(5) (emphasis added). But the government’s proposed construction would mean that juveniles older than 21 at their revocation proceedings would get no credit at all, neither for official detention ordered during the initial disposition hearing, nor for official detention ordered at previous revocations.


### III. MOTIVATING POLICIES

Finally, the FJDA’s purpose cautions against adopting the government’s construction. “The FJDA creates a separate system of criminal justice for juveniles to shield them from the ordinary criminal justice system and to provide them with protective treatment not available to adults accused of the same crimes.” Jonah R., 446 F.3d at 1010 (internal quotation marks and alterations omitted). “The primary goal of the FJDA is rehabilitative, not punitive; we have thus declared that a least restrictive standard for confinement is implicit in the structure and purposes of the FJDA sentencing provisions.” Id. (internal quotation marks omitted). “In keeping with its rehabilitative goals, the FJDA disfavors institutionalization and in particular the warehousing of young people away from their communities.” United States v. Juvenile, 347 F.3d 778, 785 (9th Cir. 2003). Whereas the government’s construction would expose juveniles to longer terms of detention, Appellant’s construction would help prevent excessive detention of juveniles, furthering the FJDA’s purpose.

Also weighing in favor of Appellant’s construction is the risk that the government’s construction would create constitutional concerns. The government’s construction could subject similarly situated juveniles to different maximum terms of official detention based on how promptly each juvenile’s revocation proceeding is held. Because the maximum term of official detention is driven by a juvenile’s age at the time of his revocation proceeding, a juvenile who violates a condition of supervision before he turns 21 would have a different maximum sentence depending on whether his revocation proceeding occurred before or after his 21st birthday. Disparate treatment of similarly situated defendants triggers equal protection concerns when there is no rational basis for the distinction. See Jonah R., 446 F.3d at 1008; see also cf. United States v. Stokes, 292 F.3d 964, 968-69 (9th Cir. 2002).

“We must interpret statutes to avoid such constitutional difficulties whenever possible.” Jonah R., 446 F.3d at 1008.

The FJDA does provide for different maximum terms of detention depending on whether a juvenile was originally sentenced before or after his 18th birthday. See United States v. Leon H., 365 F.3d 750, 753-54 (9th Cir. 2004). But differentiating between juveniles based on when they were originally sentenced is consistent with the language and structure of the FJDA. See id. at 752–53. It also “makes sense from a policy perspective,” because it avoids a “nonsensical” juvenile sentencing scheme “in which the potential penalty that can be applied decreases as the defendant ages.” Id. at 753. Here, however, there is no apparent rational basis for granting credit for previous terms of official detention to juveniles who have revocation hearings before their 21st birthdays, but refusing credit to juveniles whose revocation hearings happen after they turn 21. In this context, the period of possible detention is already limited by the juvenile’s age because § 5037(d)(5) prohibits extending detention beyond a juvenile’s 24th or 26th birthday. Therefore, our holding in Leon H. does not assure our concerns about the constitutional implications of the government’s construction of § 5037(d)(5).

### CONCLUSION

The text and structure of § 5037(d)(5), its legislative history, and the FJDA’s motivating purpose support Appellant’s construction of § 5037(d)(5). Because Appellant was entitled to credit for “any term of official detention previously ordered,” the maximum term of official detention that could have been imposed upon revocation of his juvenile delinquent supervision was 14 months. See 18 U.S.C. § 5037(d)(5). Appellant was sentenced to 34 months of official detention. Therefore, Appellant’s sentence exceeded the maximum permitted by law. At the end of May 2018, Appellant had

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4. The maximum statutory term of official detention is 60 months. See 18 U.S.C. § 5037(c)(2). At the time of his second revocation hearing, Appellant had been previously ordered to serve 46 months of official detention (28 months at the original dispositional hearing and 18 months at the first revocation hearing). 60 months less 46 months is 14 months.
been detained for 14 months for the instant supervision violations. We therefore vacate Appellant’s sentence and remand with instructions that the district court order Appellant’s immediate release. We also order that the mandate issue immediately upon filing of this disposition. See Fed. R. App. P. 41.

VACATED and REMANDED. The mandate shall issue immediately upon filing of this decision. The district court shall order Appellant’s immediate release.
Supreme Court of California

Cite as 18 C.D.O.S. 8140

BIANKA M., a Minor, etc., Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; GLADYS M., Real Party in Interest.

No. S233757
In the Supreme Court of California
Ct.App. 2/3 B267454
Los Angeles County Super. Ct. No. BF052072
Filed August 16, 2018

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No appearance for Respondent.

No appearance for Real Party in Interest.

Barnes & Thornburg, L. Rachel Lerman and Joseph Wahl as Amici Curiae, upon the request of the Supreme Court.

OPINION

At the age of 10, petitioner Bianka M., a native and citizen of Honduras, entered the United States unaccompanied and without prior authorization. After a brief detention by federal authorities, she was reunited with her mother, who had left Honduras for the United States many years before. In a family court action naming her mother as the respondent, Bianka asked for an order placing her in her mother’s sole custody. She also asked the court to issue findings that would enable her to seek “special immigrant juvenile” status under federal immigration law—a classification that permits immigrant children who have been abused, neglected, or abandoned by one or both parents to apply for lawful permanent residence while remaining in the United States. (See 8 U.S.C. § 1101(a)(27)(J); Code Civ. Proc., § 155.) She alleges that her father, who resides in Honduras, has abandoned her and that it is not in her interest to return to her home country. Although she has notified her father of the action, he has taken no steps to participate.

The superior court denied Bianka’s requests. The court concluded it could not issue either a custody order or findings relevant to special immigrant juvenile status unless Bianka first established a basis for exercising personal jurisdiction over her father and joined him as a party to the action. The Court of Appeal upheld the ruling. We granted review to determine whether the superior court properly required the child’s nonresident, noncustodial parent to be joined as a party in her parentage action seeking special immigrant juvenile findings. We also consider whether, as certain language in the Court of Appeal’s opinion might suggest, the child’s
perceived immigration-related motivations for filing the action have any bearing on whether the action may proceed. Our answer to both questions is no. Provided that the absent parent has received adequate notice, the action may proceed even if the parent is beyond the personal jurisdiction of the court and cannot be joined as a party. The action may also proceed regardless of whether the court believes it was filed primarily for the purpose of obtaining the protections from abuse, neglect, or abandonment that federal immigration law provides. We reverse the judgment of the Court of Appeal and remand for further proceedings.

I.

A.

The facts are taken from Bianka’s petition and supporting documentation. Bianka was born in 2002 in Honduras to Gladys M. In 2005, Gladys moved to the United States in search of better employment opportunities, leaving Bianka in the care of an older daughter. Despite the physical distance between them, Bianka and Gladys maintained a close relationship. Gladys frequently called to check on Bianka’s well-being and sent half of her weekly income for Bianka’s care.

Bianka’s father is Jorge L., a resident of Honduras. Gladys and Jorge had a 15-year relationship but were never married. During their relationship, the pair had four children together, of whom Bianka is the youngest. Their relationship ended around the time Bianka was born, and Jorge has refused to develop a relationship with Bianka. According to Bianka and Gladys, Jorge has rejected several desperate pleas for financial support. Gladys also claims that Jorge often physically abused her, once using the blunt end of a machete to beat her while she was pregnant with Bianka.

When Bianka left Honduras for the United States at the age of 10, she sought to escape the rampant violence in her home country and reunite with her mother. Bianka asserts that there are no longer relatives in a position to take care of her in Honduras. Federal immigration officials initially detained Bianka at the border, but she was later released to Gladys’s custody. Bianka now resides with Gladys in Los Angeles.

B.

Bianka initiated this action under the Uniform Parentage Act (UPA; Fam. Code, § 7600 et seq.), the statutory framework governing judicial determinations of “the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.” (Fam. Code, § 7601, subd. (b).) In a petition naming Gladys as the sole respondent, Bianka asked the court to find a legal parent-child relationship between her and Gladys and to award Gladys sole legal and physical custody. (Id., §§ 3006, 3007.) In addition, Bianka asked the court to make the findings necessary to apply for classification as a special immigrant juvenile (SIJ) under federal immigration law.

Congress first established the SIJ classification in 1990 to provide relief to immigrant children who were eligible for long-term foster care and whose interests would not be served by returning to their country of origin. (Immigration Act of 1990, Pub.L. No. 101–649 (Nov. 29, 1990) 104 Stat. 4978.) Congress has since amended the provisions governing SIJ status several times. In the most recent amendment, passed in 2008, Congress eliminated the requirement that the child be found eligible for foster care. (William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub.L. No. 110–457, § 235(d)(1)(A) (Dec. 23, 2008), 122 Stat. 5044.) Under the law as amended, a child is eligible for SIJ status if: (1) the child is a dependent of a juvenile court, in the custody of a state agency by court order, or in the custody of an individual or entity appointed by the court; (2) the child cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis found under state law; and (3) it is not in the child’s best interest to return to his or her home country or the home country of his or her parents. (8 U.S.C. § 1101(a)(27)(J)(i)–(ii).) Under federal immigration regulations, each of these findings is to be made in the course of state court proceedings. (8 C.F.R. § 204.11(c)(3)–(6), (d) (2)(i)–(iii) (2009).)

SIJ applications are reviewed by the United States Citizenship and Immigration Service (USCIS), an agency within DHS. (See 8 U.S.C. § 1101(a)(27)(J)(iii) [requiring DHS’s consent to SIJ classification]; 8 C.F.R. §§ 100.1 (2009) [delegating authority under the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.) to USCIS and other federal agencies], 103.2(a)(7)(i) (2016) [discussing USCIS’s adjudication of benefit requests, which includes the primary form for SIJ status].) Once granted, SIJ status permits a recipient to seek lawful permanent residence in the United States, which, in turn, permits the recipient to seek citizenship after five years. (See 8 U.S.C. §§ 1255, 1427.)

To provide a basis for SIJ-eligible children to secure the necessary state court findings, the California Legislature in 2014 enacted Code of Civil Procedure section 155 (Stats. 2014, ch. 685, § 1). Section 155 confers jurisdiction on every superior court—including its juvenile, probate, and fam-
ily court divisions—to issue orders concerning the findings relevant to SIJ status. (Code Civ. Proc., § 155, subd. (a).) The statute further provides that superior courts “shall issue the order” if “there is evidence to support [SIJ] findings, which may consist of . . . a declaration by the child who is the subject of the petition.” (Id., § 155, former subd. (b)(1).) The statute has since been amended to provide that the evidence may consist solely of the child’s declaration. (Ibid., as amended by Stats. 2016, ch. 25, § 1, p. 916.)

In the declaration attached to her petition, Bianka has asserted that her father, Jorge, had abandoned her before birth and that there are no other relatives available to take care of her in Honduras. In a separate declaration, Gladys has similarly asserted that Jorge is Bianka’s father and had abandoned her before birth. Gladys attached to her declaration a copy of Bianka’s birth certificate listing Jorge as Bianka’s father. Bianka asks the court to find, among other things, that she cannot reunify with her father because of his abandonment and that it is not in her best interest to return to Honduras.

C.

After filing her petition, Bianka requested the appointment of a guardian ad litem to represent her interests; she served both Gladys and Jorge with the application via mail. (Fam. Code, § 7635, subd. (a).) Bianka’s counsel also notified Jorge by telephone, in Spanish, and informed him of the hearing date. Bianka later submitted a request for order, asking the court to grant sole custody to Gladys and to issue findings relevant to SIJ eligibility. Bianka’s counsel served Jorge by mail with a copy of the petition, the proposed order of custody, which contained the SIJ findings, and supporting documents. Counsel again called Jorge to advise him of the upcoming hearing on the request for order. Jorge neither responded to the petition nor participated in the hearing, which took place more than a month later.

Following the hearing, the superior court denied Bianka’s request for order on the ground that it could not be adjudicated without joining Jorge as a party to the action. The court reasoned that joinder was required because Bianka’s request to award sole custody to Gladys affected Jorge’s potential custody rights. The court also concluded that Jorge’s joinder was required in order to make the requested SIJ finding that reunification with Jorge was not viable because of his abandonment. The court acknowledged that there was no evidence to indicate that it had personal jurisdiction over Jorge, who lives in Honduras. The court nevertheless denied Bianka’s request “without prejudice to further application after [Jorge] has been properly joined, personal jurisdiction issues have been resolved and a determination of parentage is made.”

Bianka sought appellate review by petition for writ of mandate. The Court of Appeal denied the petition. As an initial matter, the court held that Bianka’s request for order was premature because the superior court had yet to determine Gladys’s parentage, a prerequisite to an order granting custody to Gladys. But because the record evidence suggests that there is unlikely to be a dispute regarding whether Gladys is in fact Bianka’s mother, the court went on to address the merits of the superior court’s ruling on joinder.

The Court of Appeal observed that Bianka’s petition is unusual in that it involves an uncontested parentage action between a child and her natural mother. Although nothing in the statutory scheme forbids such an action, the Court of Appeal held that the superior court was within its discretion to insist that Jorge be joined as a party. The Court of Appeal reasoned that “[b]y requesting an order giving her mother sole legal and physical custody predicated on Jorge’s abuse and abandonment, Bianka is implicitly asking the court to adjudicate Jorge’s custody rights (if any),” as well as his status as Bianka’s father. The appellate court noted that the superior court was “understandably reluctant” to make such findings in an action to which Jorge was not a party. The Court of Appeal also concluded that the superior court acted within its discretion to attempt to give Jorge “a meaningful opportunity” to refute Bianka’s allegation that Jorge “abandoned” her—a term the appellate court understood to refer to whether Jorge had left Bianka “without provision for reasonable and necessary care or supervision.” (Fam. Code, § 3402, subd. (a).) Finally, the Court of Appeal asserted that “an order containing SIJ findings will not be useful to Bianka unless it is issued in the context of a bona fide custody proceeding,” as opposed to one “brought only to obtain SIJ findings.” Without deciding whether Jorge’s joinder was mandatory, the Court of Appeal held that under the circumstances, where Bianka’s father’s identity and whereabouts are known, the superior court did not abuse its discretion in requiring Jorge to be joined under the permissive joinder provision of rule 5.24(e)(2) of the California Rules of Court. We granted Bianka’s petition for review. 4

II.

A.

The primary issue in this case concerns the application of the rules governing when an absent person or entity must be joined as a party in a civil action. Although the issue arises in the context of what the Court of Appeal termed a “novel” parentage suit, the governing rules are familiar.

In any parentage action under the UPA, there may be multiple parties involved, including the child and his or her “natural,” “presumed,” and “alleged” parents. (Fam. Code, §§ 7601, 7635.) The term “natural” parent refers to an individual whose status as a nonadoptive parent is recognized under the UPA (id., § 7601, subd. (a)); that status may be established, for example, by proof that the parent gave birth to the child. (Id., § 7610, subd. (a).) An individual is a “presumed” parent if, for example, the child was born during the individual’s marriage to the child’s natural mother, or if the

4. Since respondent did not file a brief in this case, we invited L. Rachel Lerman to file an amicus curiae brief in place of a respondent’s brief. We thank Ms. Lerman for her assistance.
individual accepted the child into their home and held the child out as a natural child. (Id., § 7611, subds. (a), (d); see id. subds. (b)–(c), (e)–(f) [enumerating other categories of presumed parents].) All other individuals who may be parents, but whose maternity or paternity has neither been established nor presumed, are referred to as “alleged” parents. (In re Zacharia D. (1993) 6 Cal.4th 435, 449, fn. 15.)

By statute, all three categories of parents are entitled to notice of the parentage action and an opportunity to be heard, if they so desire. (Fam. Code, §§ 7635, subd. (b), 7666.) Notice must be given at least 10 days before the date of the proceeding. (Id., § 7666, subd. (a).) Proof of the notice must be filed with the court before it considers the petition. (Ibid.) The method of giving notice must comply with the requirements for service of process in a civil action in this state, which permits service by, inter alia, first-class mail with acknowledgment of receipt. (Ibid.; see Code Civ. Proc., §§ 415.10–415.40.) In a custody matter involving an individual outside of California, the relevant statute provides that notice “may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice . . . .” (Fam. Code, § 3408, subd. (a).) 5

The UPA does not, however, mandate that all parents be made parties to the action. As a rule, of course, a court may adjudicate the rights and responsibilities only of the parties before it; a parent therefore must be named as a party if the parentage action seeks to establish a legal relationship between that parent and the child. (See, e.g., County of San Diego v. Gorham (2010) 186 Cal.App.4th 1215, 1227 (Gorham); cf. Kulko v. California Superior Court (1978) 436 U.S. 84, 91.) Beyond that basic background rule, however, the UPA imposes no general requirement of parental participation: While a child who is 12 or older “shall . . . be made a party to the action,” the statute provides that parents—whether natural, presumed, or alleged—and younger children “may be made parties,” depending on the circumstances. (Fam. Code, § 7635, subds. (a), (b), italics added.)

In civil litigation generally, the question whether a person must be joined as a party to a suit is governed by the compulsory joinder statute, section 389 of the Code of Civil Procedure. Subdivision (a) of that statute states: “A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.” (Code Civ. Proc., § 389, subd. (a).) If such a person (sometimes called a “necessary” party) cannot be joined, subdivision (b) requires the court to consider “whether in equity and good conscience the suit can proceed without the absent party, or whether the suit should instead be dismissed without prejudice, “the absent person being thus regarded as indispensable.” (Id., subd. (b).) To make that judgment, the statute instructs the court to consider several factors, including: (1) the extent to which a judgment rendered in the person’s absence might be prejudicial to him or those already parties”; (2) “the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided”; (3) “whether a judgment rendered in the person’s absence will be adequate”; and (4) “whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.” (Ibid.)

To guide implementation of these general joinder principles in the family law context, the Judicial Council has promulgated rule 5.24 of the California Rules of Court. As relevant here, rule 5.24, under the heading “Mandatory joinder,” provides that a court must order that a person be joined as a party to a family court proceeding “if the court discovers that person has physical custody or claims custody or visitation rights with respect to any minor child of the marriage, domestic partnership, or to any minor child of the relationship.” (Cal. Rules of Court, rule 5.24(e)(1)(A).) Under the heading “Permissive joinder,” rule 5.24 provides that a court may order that a person be joined as a party “if the court finds that it would be appropriate to determine the particular issue in the proceeding and that the person to be joined as a party is either indispensable for the court to make an order about that issue or is necessary to the enforcement of any judgment rendered on that issue.” (Id., rule 5.24(e)(2).) “In deciding whether it is appropriate to determine the particular issue in the proceeding, the court must consider its effect upon the proceeding, including: [¶] (A) Whether resolving that issue will unduly delay the disposition of the proceeding; [¶] (B) Whether other parties would need to be joined to make an effective judgment between the parties; [¶] (C) Whether resolving that issue will confuse other issues in the proceeding; and [¶] (D) Whether the joinder of a party to determine the particular issue will complicate, delay, or otherwise interfere with the effective disposition of the proceeding.” (Ibid.)

Because the determination of whether a person or entity must be joined as a party to a civil action is a case-specific inquiry that “weighs factors of practical realities and other considerations,” a trial court’s ruling on joinder is reviewed for abuse of discretion. (TG Oceanside, L.P. v. City of Oceanside (2007) 156 Cal.App.4th 1355, 1366.)

5. As of 2016, the California Rules of Court also require a person requesting a SIJ order to serve notice of the hearing on the request, along with a “copy of the request and supporting papers,” on all “alleged, biological, and presumed parents of the child who is the subject of the request.” (Cal. Rules of Court, rule 5.130(c).) Parents are entitled to “file and serve a response.” (Id., rule 5.130(d).)
B.

In this parentage action, Bianka seeks to establish a parent-child relationship with her mother, Gladys, as well as SIJ findings concerning, among other things, her alleged father, Jorge. By statute, she was required to notify Jorge of the pending action, and she complied with this requirement by mailing her petition and supporting documents to him and following up by telephone. Although the Court of Appeal suggested in passing that the notice was inadequate because it did not specifically alert Jorge to Bianka’s request for SIJ findings, the record reflects that Bianka in fact did inform Jorge of her intent to seek such findings, including a finding that he had abandoned her. Although the specific factual allegations supporting Bianka’s claims were not included in her petition or request for order, they were included in the attached proposed order, as well as Bianka’s and Gladys’s declarations. All of these documents, which were served on Jorge more than a month before the hearing, identify with adequate specificity the nature of the findings Bianka seeks from the superior court.

Despite being notified of the action, however, Jorge has taken no steps to participate. The question is whether Bianka must nevertheless join Jorge as a party in order to proceed. The superior court held that she must—even though the court also acknowledged that the record contains no basis for exercising personal jurisdiction over Jorge, who resides out of the country. The Court of Appeal upheld the ruling on alternative grounds, concluding that the superior court acted within its discretion in ordering Jorge’s joinder under the permissive joinder provision of rule 5.24(e)(2) of the California Rules of Court. We conclude that both courts erred.

I.

Under the compulsory joinder statute, the basic rule is that, “‘[w]henever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.’ ” (Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal.App.4th 785, 793; see Code Civ. Proc., § 389, subd. (a).) But if it is not feasible to join a necessary person as a party—for example, because that person is beyond the personal jurisdiction of the court—then the court must proceed to consider whether, “‘in equity and good conscience,’ the action should proceed in that person’s absence. (Code Civ. Proc., § 389, subd. (b).) If the person is found to be essential, or ‘indispensable,’ to the action, then the action must be dismissed. (Ibid.)

In a family law action, the mandatory joinder provision of rule 5.24(e) of the California Rules of Court identifies one category of persons who, by definition, are materially interested in the action and are therefore necessary parties: those who have physical custody of the child or make a claim to custody or visitation after being served with notice of the pending action. (Cal. Rules of Court, rule 5.24(e)(1)(A).) A person who claims custody or visitation rights is entitled to join himself or herself to the proceeding (id., rule 5.24(c)) (2), and by the very fact of participation in the proceeding may consent to the court’s exercise of jurisdiction (see, e.g., In re Marriage of Torres (1998) 62 Cal.App.4th 1367, 1380).

Here, however, after receiving notice of Bianka’s action, Jorge has made no claim to custody or visitation rights, much less participated in the proceeding in any manner that could be interpreted as consent to the court’s jurisdiction. Thus, as the superior court itself observed, there is no clear basis on which the court could exercise personal jurisdiction over Jorge. It is therefore not feasible to join him. And if it is not feasible to join Jorge as a party because he is beyond the court’s personal jurisdiction, then the proper course is not simply to order that Jorge be joined anyway. Rather, as a general rule, when it is not feasible for an interested person to be joined, the law instructs the court to consider whether, “‘in equity and good conscience,’ the suit may proceed in the person’s absence. (Code Civ. Proc., § 389, subd. (b).)

Although the superior court in this case did not cite Code of Civil Procedure section 389 or expressly address any of the section 389 factors, the court’s reasoning suggests it believed that Jorge is not only a “necessary” but also an “indispensable” party—to use the usual section 389 terminology—because Bianka’s action unavoidably requires adjudication of Jorge’s parental rights and responsibilities. The premise is faulty. Bianka asks for three things in this proceeding: (1) the establishment of a legal mother-child relationship with Gladys; (2) an award of sole legal and physical custody to Gladys; and (3) findings relevant to SIJ status, including findings concerning the prospect of reunification with Jorge. Certainly Jorge’s participation is not essential for the court to determine the existence of a mother-child relationship between Bianka and Gladys. And although Jorge is certainly entitled to be heard on the remaining two matters if he chooses, he is not indispensable to their resolution.

To begin with, Jorge is not necessary—much less indispensable—to the resolution of Bianka’s request that sole cus-

6. Code of Civil Procedure section 389, by its terms, refers to the joinder of a person who, as relevant here, “claims an interest relating to the subject of the action.” (Code Civ. Proc., § 389, subd. (a).) Rule 5.24 of the California Rules of Court similarly refers to the joinder of “[a] person who claims or controls an interest in any matter subject to disposition in the proceeding.” At oral argument, the Attorney General suggested that by failing to respond to the notice of Bianka’s action, Jorge may have already provided an adequate indication that he does not “claim[ ] an interest” in the subject matter of the action. (Cf. Hartenstine v. Superior Court (1987) 196 Cal.App.3d 206, 222 [rejecting an argument that the State of California’s interest in enforcing its laws required its joinder, emphasizing that California had not claimed an interest in the action]; U.S. v. Bowen (9th Cir. 1999) 172 F.3d 682, 689 (“Here, [the third party] was aware of this action and chose not to claim an interest. That being so, the district court did not err by holding that joinder was ‘unnecessary.’ ”); but see Tell v. Trustees of Dartmouth College (1st Cir. 1998) 145 F.3d 417, 419 and fn. 2 (interpreting identical phrase in federal joinder rule to mean “nothing more than appears to have such an interest,” and holding that a third party may fit this description even if it remains silent.) We will, however, assume without deciding that Jorge’s silence is not necessarily dispositive, and proceed to consider the remaining elements of the joinder analysis.
tody be awarded to Gladys. Such an award would impose no obligation on Jorge, nor is Jorge’s participation otherwise needed for full consideration of whether relief should be granted. Determinations about the custody of children are to be made based on a determination of the child’s best interests. (Fam. Code, §§ 3011, 3022.) In making that determination, the court must consider, among other relevant factors, the health, safety, and welfare of the child; any history of abuse by one parent against the child or the other parent; the amount and nature of the existing contact between the child and parents; and the habitual use of controlled substances or alcohol by either parent. (Id., § 3011, subds. (a)–(d).) Here, the superior court essentially already conducted this inquiry; the court found that Bianka “is very happy living with Mother and she is thriving in school.” The court further found that there was a “lack of available relatives to care for her” in Honduras.

The superior court’s primary concern was that awarding sole custody to Gladys would effectively terminate any parental rights Jorge might wish to assert, and therefore should not be done in Jorge’s absence. But Jorge was given an opportunity to assert those rights in response to the notice of the pendency of the proceeding, and he did not do so. Had he asserted an interest in custody or visitation of Bianka, he would have been entitled to participate in the proceeding as a party. (Cal. Rules of Court, rule 5.24(e)(1)(A).) But when a nonresident parent chooses not to assert parental rights or otherwise participate in the proceeding, there is no bar to adjudicating the rights of those parties who are present. It is by now established that a court may award sole custody to one parent even if the other parent (alleged or otherwise) is outside the court’s personal jurisdiction and does not participate as a party, provided the absent parent receives notice of the proceeding and an opportunity to be heard. (See In re Marriage of Leonard (1981) 122 Cal.App.3d 443, 459.) Were it otherwise, the nonresident parent would have an effective veto over the adjudication of parental custody rights in the minor’s best interests. (See id. at pp. 457–458.) And to the extent the courts below were concerned that the award of sole legal and physical custody to Gladys would effectively terminate any parental rights that Jorge might later wish to claim, the law is to the contrary. (See In re Marriage of Brown & Yana (2006) 37 Cal.4th 947, 958 [“an award of sole legal and sole physical custody of a child to one parent does not serve to ‘terminate’ the other parent’s rights or due process interest in parenting”]; see also Fam. Code, § 3088 [“An order for the custody of a minor child entered by a court in this state or any other state may . . . be modified at any time to an order for joint custody in accordance with this chapter.”].)

We turn, then, to the matter of the SIJ findings. Consistent with the federal statute and section 155 of the Code of Civil Procedure, Bianka asked the superior court to find that (1) she is in the court-ordered custody of Gladys; (2) she cannot reunite with her alleged father, Jorge, due to his abandonment; and (3) it is not in her best interest to return to Hondu-

ras. (See 8 U.S.C. § 1101(a)(27)(J).) Of these findings, the record makes clear that neither the first nor the last requires Jorge’s participation as a party; indeed, although the court expressed some misgivings about making the finding in Jorge’s absence, the superior court has already found that it is not in Bianka’s best interest to be returned to Honduras, given “both the overall violence of her city and the lack of available relatives to care for her.” Both courts below, however, concluded that Jorge must be joined as a party before the court may make findings about whether reunification with Jorge is not viable due to abandonment. In support of that conclusion, they offered two reasons.

First, the courts below appeared to believe that Bianka, by seeking findings relevant to SIJ status, is also seeking the equivalent of a parentage determination under the UPA concerning Jorge. Bianka, the Court of Appeal reasoned, “has placed Jorge’s paternity squarely at issue by requesting an order containing a factual finding that her father abandoned her.” If, as the courts appeared to believe, Bianka were seeking to establish a father-child relationship with Jorge under the UPA, then, as a matter of due process, she would be required to join her alleged father as a party to the action. (Gorham, supra, 186 Cal.App.4th at p. 1227.) But Bianka has not sought an order establishing a father-child relationship under the UPA, nor has she asked the court to grant Jorge parental rights or to order him to fulfill parental responsibilities. Bianka has instead simply asked the court to make a finding of fact: that reunification with her alleged father is not viable because of abandonment. Standing alone, that factual finding carries with it no necessary implications about Jorge’s parental rights or responsibilities beyond what his nonparticipation in the litigation has already demonstrated—that is, that he has not asserted an interest in, or right to, the physical or legal custody of Bianka. There is no due process bar to issuing such a finding in Jorge’s absence.

Second, the courts below cited the potential prejudice to Jorge if the finding is made in his absence. It is, the superior court noted, only a short step from finding that Jorge is Bianka’s father to concluding that Jorge must assume greater responsibility for her support. The court also expressed concern about the finding of abandonment, emphasizing that Jorge should be given an adequate opportunity to rebut the allegations. Bianka argues these concerns are overstated: She has not sought child support in this case, nor is it clear that it would be feasible for her to seek child support from Jorge, who is beyond the court’s jurisdiction. Any decision issued in Jorge’s absence could not bind him in any event. (In re Wren (1957) 48 Cal.2d 159, 163 [“It is the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extent.”].) And while both the superior court and Court of Appeal were certainly correct to be concerned about potential prejudice to Jorge and his opportunity to respond to the allegations of abandonment, Jorge was notified of the allegations and had the opportunity to respond if
he so chose; he did not, however, take any steps to participate in the pending proceeding.

Ultimately we need not decide here whether the courts’ concerns about prejudice would justify Jorge’s joinder as a necessary party if it were feasible to join him. We instead assume, without deciding, that Jorge is a necessary party as to the SIJ finding of abandonment. Because Jorge’s joinder is not feasible, the central question under the mandatory joinder statute is whether the court can, “in equity and good conscience,” make the finding in Jorge’s absence. Under section 389, subdivision (b), the potential prejudice that may flow from a judgment rendered in Jorge’s absence must be weighed alongside other factors: whether the prejudice can be lessened by the shaping of relief; whether a judgment rendered in Jorge’s absence will be adequate; and, as particularly important here, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Code Civ. Proc., § 389, subd. (b).)

Although the superior court did not squarely address the last question, the answer is no: Bianka has no way to obtain a state court finding on the matters relevant to an application for SIJ status, as section 155 of the Code of Civil Procedure entitles her to do, other than to ask the state court for the finding. There is no available alternative forum that could provide the relief she seeks. To conclude that the state court finding cannot be made in Jorge’s absence is therefore effectively to say that Jorge, by failing to assert any right to custody or visitation of Bianka in this proceeding, can essentially bar Bianka from seeking relief premised on the very fact of his abandonment. While the potential prejudice to Jorge is, at this point, necessarily speculative, the prejudice to Bianka’s legal position is immediate and unavoidable. To foreclose suit under these circumstances would risk defeating Congress’s apparent aim in extending relief to immigrant children who have been abandoned by their parents, as well as the Legislature’s aim in providing a jurisdictional basis for superior courts to issue the type of findings Bianka has requested. (See Code Civ. Proc., § 155, subd. (a)(1).)

In the end, considerations of “equity and good conscience” point in one direction. (Code Civ. Proc., § 389, subd. (b).) If, as the superior court asserts, it is not feasible to join Jorge as a party, the relevant findings can be made in Jorge’s absence.

2.

The permissive joinder rule, rule 5.24(e)(2) of the California Rules of Court, on which the Court of Appeal relied as an alternative basis for upholding the superior court’s judgment, does not change the analysis. That rule states that a court may order that a person be joined to a proceeding if it finds that it would be appropriate to determine a particular issue in the proceeding and the court finds that the person “is either indispensable for the court to make an order about that issue or is necessary to the enforcement of any judgment rendered on that issue.” (Cal. Rules of Court, rule 5.24(e)(2).) All of this appears to presuppose that joinder is, in fact, feasible. The rule does not expressly address what should happen when joinder is infeasible because, for example, the person to be joined is beyond the court’s jurisdiction. In the absence of any more specific direction, the Rules of Court make clear that the ordinary rules relating to joinder of parties in civil cases apply. (Id., rule 5.24(a)(1).) Those rules, as noted, do not authorize a court to order joinder when it is not feasible to join the nonparty and when the nonparty is not indispensable to the action. In any event, even where rule 5.24(e)(2) does apply, it directs courts to consider, among other things, whether “the joinder of a party to determine the particular issue will complicate, delay, or otherwise interfere with the effective disposition of the proceeding.” (Id., rule 5.24(e)(2)(D).) Here, because Jorge is beyond the court’s jurisdiction, requiring his joinder would not only “complicate” proceedings, but would likely end them altogether.

The Court of Appeal did briefly acknowledge this problem, but suggested there may be a workaround: Jorge could stipulate to parentage, which would constitute a general appearance and establish the court’s personal jurisdiction over him. The court did not, however, consider what would happen if Jorge refused. For reasons already explained, the law does not condition Bianka’s ability to proceed with her suit on Jorge’s consent to submit to the jurisdiction of the superior court.

III.

We now turn to a second issue raised by the Court of Appeal’s decision. In its opinion, the Court of Appeal expressed concern that findings issued in the context of an uncontested custody proceeding would not be useful to Bianka’s SIJ application in any event. The court pointed to an excerpt from a 1998 House of Representatives conference report, a USCIS memorandum citing the same report, and a 2011 proposed rule (yet to be finalized), all of which contain language suggesting that USCIS will approve SIJ status only when the findings are issued in bona fide proceedings, meaning actions that are sought to obtain relief from abuse, neglect, or abandonment, and not primarily to obtain immigration relief. (See H.R.Rep. No. 105–405, 1st Sess., p. 130 (1997); USCIS, mem. on Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (Mar. 24, 2009), superseded by USCIS Policy Manual, vol. 6, pt. J, ch. 2, D.5. (May 23, 2018); 76 Fed. Reg. 54978, 54985 (Sept. 6, 2011).) The court suggested that any findings issued in this case are unlikely to meet this standard, reasoning that Bianka had not demonstrated a practical need to establish her mother’s sole custody and must therefore be primarily motivated by a desire to obtain SIJ findings.

Reading this passage as effectively a secondary basis for upholding the superior court’s denial of her requested order, Bianka urges us to make clear that a court cannot deny a child’s request for SIJ findings on the basis of its conclusion that the findings are the child’s central motivation in filing the action. As it happens, the Legislature has already sup-
plied the clarification Bianka seeks. Shortly after the Court of Appeal issued its decision in this case, the Legislature in 2016 amended Code of Civil Procedure section 155 to make clear that a court must issue findings relevant to SIJ status, if factually supported, regardless of its assessment of the child’s perceived motivations in invoking the court’s jurisdiction: “The asserted, purported, or perceived motivation of the child seeking classification as a special immigrant juvenile shall not be admissible in making the findings under this section. The court shall not include nor reference the asserted, purported, or perceived motivation of the child seeking classification as a special immigrant juvenile in the court’s findings under this section.” (Code Civ. Proc., § 155, subd. (b)(2), as amended by Stats. 2016, ch. 25, § 1.)

Even setting aside this recent amendment to Code of Civil Procedure section 155, we would agree with Bianka that a conclusion that a proceeding is primarily motivated by a desire to secure SIJ findings is not a ground for declining to issue the findings. Certainly no such qualification has ever appeared in section 155; since its enactment, that provision has made clear that a superior court “shall” issue an order containing SIJ findings if there is evidence to support them. (Code Civ. Proc., § 155, subd. (b)(1).) The enactment of section 155 reflects legislative recognition that for some immigrant children, effective relief from abandonment and immigration status may be intertwined. Nor, for that matter, does such a “primary motivation” qualification appear in either the federal statute governing the SIJ classification or its implementing regulations. As a practical matter, such a requirement would foreclose a considerable number of children from securing the state court findings necessary to apply for immigration relief, even though they meet the stated statutory criteria. Regardless of whether USCIS chooses, as a policy matter, to employ additional criteria in evaluating applications for SIJ status, we agree with the Courts of Appeal that “[a] state court’s role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country.” (Leslie H. v. Superior Court (2014) 224 Cal.App.4th 340, 351; In re Israel O., supra, 233 Cal.App.4th at p. 289; Eddie E. v. Superior Court, supra, 234 Cal.App.4th at p. 329; see id. at p. 331.) A child’s immigration-related motivations for seeking state court findings bear no necessary relationship to his or her need for relief from a parent’s abuse, neglect, or abandonment.

IV.

The judgment of the Court of Appeal is reversed.

Kruger, J.

WE CONCUR: CANTIL-SAKAUYE, C. J., CHIN, J., CORRIGAN, J., LIU, J., CUÉLLAR, J., McCONNELL, J.*

*Administrative Presiding Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
THE PEOPLE, Plaintiff and Respondent,
v.
CHARLES EDWARD CASE, Defendant and Appellant.

No. S057156
In the Supreme Court of California
Sacramento County Super. Ct. No. 93F05175
Filed August 15, 2018

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

THE COURT:

The opinion in this matter filed May 31, 2018, and appearing at 5 Cal.5th 1, is modified as follows:

The final sentence at the end of the first paragraph on page 45 — which currently states, “In any event, the argument fails on its merits.” — is deleted. The following sentence is inserted to start the subsequent paragraph on page 45:

To the extent defendant raises a challenge on an issue other than credibility, the argument fails on its merits.

In the last sentence of the first full paragraph on page 45, the word “convincingly” is inserted between the words “not” and “explain.” The sentence now reads:

Defendant says that “[d]emonstrating that Reed did not know about the inconsistencies between Langford’s and Webster’s testimony was important to appellant’s defense that Webster framed appellant,” but does not convincingly explain why that is so.

The modification does not affect the judgment.
The petition for rehearing is denied.

Cite as 18 C.D.O.S. 8148

THE PEOPLE, Plaintiff and Respondent,
v.
MICHAEL AUGUSTINE LOPEZ, Defendant and Appellant.

No. S099549
In the Supreme Court of California
Alameda County Super. Ct. No. H28492A
Filed August 15, 2018

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

THE COURT:

The opinion in this matter filed June 28, 2018, and appearing at 5 Cal.5th 339, is modified as follows:

In the first sentence of the second full paragraph on page 353, the following words are deleted: “that a competency ruling under Evidence Code section 701 was not sufficient and.” As modified, the sentence will now read: “We reject Lopez’s argument that the trial court was required to hold a hearing under Evidence Code section 702.”

The modification does not affect the judgment.
The petition for rehearing is denied.
Branden Lee Hall appeals from an order denying his motion for attorney fees he incurred in litigation culminating in Hall v. Superior Court (2016) 3 Cal.App.5th 792 (Hall I). The superior court determined that Hall was not a successful party because Hall I did not provide him with any relief that was not already granted to him by the trial court and available from the Department of Motor Vehicles (DMV). We agree with the superior court’s ruling and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Hall’s Arrest

In March 2014, after the car Hall was driving rear-ended another car stopped at a red traffic signal, police arrested Hall for driving under the influence. (Hall I, supra, 3 Cal.App.5th at p. 797.) One of Hall’s minor children, a passenger in the back seat of his car, told police that Hall had been drinking and that several people tried to stop Hall from driving because he “drank too much.” (Id. at p. 798.) The arresting officer noticed a strong odor of alcohol on Hall’s breath and that Hall’s eyes were bloodshot and he was slurring his speech. (Ibid.) After his arrest, Hall refused to submit to a chemical test for blood alcohol. After obtaining a warrant, police obtained a blood sample from him anyway. (Ibid.) The officer’s statement indicates that Hall’s blood alcohol level was 0.08 percent or more.

B. License Suspension Hearing

Because Hall refused to submit to a blood alcohol test, police seized his driver’s license, notified him that his license would be suspended or revoked by the DMV in 30 days, and advised him of his right to request a DMV hearing to show that the suspension or revocation was not justified. (Hall I, supra, 3 Cal.App.5th at p. 798.) Hall requested a hearing, which was conducted by Alva Garrido Benavidez, a DMV-appointed hearing officer. (Ibid.) At the hearing, the DMV offered documentary evidence including an “Officer’s Statement” indicating that police arrested Hall on “3-22-14”; however, the reverse side of the form, containing the admonishment police gave to Hall about the consequences of his refusal to submit to a blood alcohol test, is dated “9-27-14.” (Id. at p. 799.) Hall’s attorney objected to this document, asserting the date discrepancy “renders the document not an official record” under Evidence Code section 1280. (Hall I, at p. 799.) However, Benavidez overruled these objections, ruling that the date discrepancy was a clerical error, and she sustained the revocation of Hall’s driver’s license. (Ibid.)

C. Writ Petition

In July 2015 Hall filed a petition for a writ of mandate in the superior court. Hall argued that the date discrepancy was not a clerical error, rendering the document inadmissible.1 The court set a hearing date on the writ petition.

1. Without evidence that police properly admonished Hall about the consequences of his refusal to submit to a blood alcohol test, the DMV could not have properly suspended or revoked Hall’s license. (Hall I, supra, 3 Cal.App.5th at p. 803.)
D. Amended Petition

Before the hearing on Hall’s writ petition, Benavidez was charged with conspiring with certain attorneys to accept bribes in exchange for unlawfully issuing temporary driver’s licenses to persons charged with driving under the influence. (Hall I, supra, 3 Cal.App.5th at pp. 799-800.) In light of these charges, the superior court granted Hall leave to amend his writ petition.

After Benavidez pleaded guilty, Hall filed an amended writ petition, which in addition to the original date discrepancy allegation, also alleged that the DMV violated his due process right to a fair hearing because Benavidez took bribes in other cases. (Hall I, supra, 3 Cal.App.5th at p. 800.) Although there was no evidence that Benavidez had asked for a bribe in Hall’s case, Hall’s attorney insisted that the lack of an impartial hearing officer constituted a constitutional violation that required the DMV to reinstate Hall’s driver’s license. (Ibid.)

After conducting a hearing, the court granted Hall’s amended petition on due process grounds, but denied Hall the relief he requested. Instead, the court remanded the matter to the DMV to conduct a new hearing with an impartial hearing officer. (Hall I, supra, 3 Cal.App.5th at p. 806.)

The DMV advised Hall that he had “been granted a de novo [sic] hearing” at a “mutually agreeable” date and time. Later that month, the DMV attempted to contact Hall’s attorney to schedule a hearing; however, he did not return calls. The DMV set Hall’s new hearing for July 31, 2015; however, on July 20 Hall filed a notice of appeal from the superior court’s order and the DMV cancelled the hearing.

E. Hall I

Unsatisfied with a de novo DMV hearing, Hall appealed, asserting the court should instead have ordered the DMV to reinstate his driver’s license. (Hall I, supra, 3 Cal.App.5th at p. 797.) In Hall I we agreed with Hall that a hearing officer “who admits to taking bribes for nearly a decade does not meet the constitutional standard of impartiality.” (Ibid.) However, we rejected Hall’s argument that this due process violation required the DMV to reinstate his license, and instead held that the court “correctly ordered a new administrative hearing.” (Id. at p. 797.) We did not address whether the date discrepancy on the admonishment form required the DMV to reinstate Hall’s license because that issue was to be decided in the first instance by the hearing officer. (Id. at p. 811.) We awarded costs to Hall, but did not state we were doing so because he was the “prevailing party.” (Ibid.)

2. Asserting that he was the prevailing party on appeal, Hall’s opening brief states, “The superior court ruled that there was no due process violation . . . but that decision was reversed by the Court of Appeal . . . .” Hall makes similar assertions in his reply, Hall is incorrect. In Hall I, supra, 3 Cap.App.5th at page 305, we stated, “Considering the [trial court’s] order as a whole, the overarching ruling is that Hall is entitled to a new DMV hearing on due process grounds”—a ruling we affirmed, not reversed. (Id. at p. 806.)

F. Attorney Fee Motion

After Hall I became final, Hall’s attorney filed a motion in the superior court seeking $145,044 in attorney fees under Code of Civil Procedure section 1021.5. This consisted of a lodestar of $72,522 based on 183.6 hours at $395 per hour, which Hall asserted should be doubled. Alternatively, Hall sought the maximum under Government Code section 800.4 His principal argument was that Hall I enforced an important right affecting the public interest, entitling him to attorney fees under the private attorney general doctrine, codified in section 1021.5. Opposing the motion, the DMV asserted that Hall was not successful in the litigation because the DMV offered to provide him with a new hearing—Hall was the one who rejected that relief and lost on that point in Hall I.

After conducting a hearing, the court denied Hall’s attorney fee motion. The court determined Hall was not successful because “the remedy that [the] trial court imposed was proper and affirmed on appeal[,] while Hall’s argument on the proper remedy, i.e. suspension revoked, was rejected.” The court noted that Hall was “trying . . . to portray his case as one imposing a significant benefit to the general public, even though he was unsatisfied with the remand remedy from the very start.” The court also determined that Hall’s litigation did not result in any public benefit regarding the admissibility of documents in a DMV hearing because Hall I declined to decide that issue.

DISCUSSION

I. THE COURT CORRECTLY DENIED HALL’S ATTORNEY FEE MOTION

A. Section 1021.5

Generally, parties in litigation pay their own attorney fees. (Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498, 504.) Section 1021.5 is an exception to that rule. This statute codifies the private attorney general doctrine and acts as an incentive to pursue “‘public-interest litigation that might otherwise have been too costly to bring.’” (Save Our Heritage Organisation v. City of San Diego (2017) 11 Cal. App.5th 154, 159 (Save Our Heritage.).) Section 1021.5 provides in part: “[A] court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit . . . has been conferred on the general

3. Undesignated statutory references are to the Code of Civil Procedure.

4. Government Code section 800 provides in part: “(a) In any civil action to appeal or review the . . . determination of any administrative proceeding . . . if it is shown that the . . . determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof . . . the complainant if he or she prevails in the civil action may collect . . . attorney’s fees . . . but not to exceed seven thousand five hundred dollars ($7,500).”
public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.”

Thus, to obtain fees under section 1021.5, the moving party must establish all of the following: (1) he or she is a “successful party,” (2) the action has resulted in the enforcement of an important right affecting the public interest, (3) the action has conferred a significant benefit on the public or a large class of persons, and (4) an attorney fees award is appropriate in light of the necessity and financial burden of private enforcement. (Sagaser v. McCarthy (1986) 176 Cal. App.3d 288, 313.)

B. The Standard of Review

Generally, we review the trial court’s determination of whether the requirements under section 1021.5 have been satisfied for abuse of discretion. (Espejo v. Copley Press, Inc. (2017) 13 Cal.App.5th 329, 378.)

C. Analysis Under Section 1021.5

Asserting the court erred in denying attorney fees under section 1021.5, Hall contends that important due process rights were vindicated by Hall I, supra, 3 Cal.App.5th 792. However, before considering the nature of the rights vindicated, to qualify for fees under section 1021.5, Hall must first establish he is a “successful party.” (Urbaniak v. Newton (1993) 19 Cal.App.4th 1837, 1842 (Urbaniak).)

“‘The term “successful party,” as ordinarily understood, means the party to the litigation that achieves its objectives.’” (Save Our Heritage, supra, 11 Cal.App.5th at p. 160.) Under this test, as explained by this court in Leiserson v. City of San Diego (1988) 202 Cal.App.3d 725 (Leiserson), Hall was not the successful party.5

In Leiserson, supra, 202 Cal.App.3d 725, a news photographer was arrested after filming an airline crash site that was under police investigation. He sued the city for violating his civil rights although his primary goal in the litigation was to advance his own personal economic interests by obtaining a damage award. (Id. at p. 738.) The Leiserson court determined that the plaintiff had been properly excluded from a disaster scene, but the case resulted in a published opinion that defined the rights of the press to be present at such scenes. (Ibid.) After our opinion became final, Leiserson sought attorney fees under section 1021.5, contending his action had resulted in enforcing an important right affecting the public interest and conferring significant benefits on the general public and news media by vindicating the media’s right to disseminate information. (Leiserson, at p. 731.)

This court held as a matter of law that Leiserson was not a “successful” litigant within the meaning of section 1021.5. (Leiserson, supra, 202 Cal.App.3d at pp. 733, 736.)

The court acknowledged that the published opinion defined certain media rights, but it did not warrant private attorney general fees “considering the precise nature of the tort litigation Leiserson elected to pursue and his failure to prevail in any manner within his chosen context.” (Id. at p. 738.) The court explained: “Although the procedural device by which a plaintiff seeks to enforce an important right does not always determine entitlement to attorney’s fees under section 1021.5 [citations], the relief sought is probative of such entitlement. Indeed, where only a litigant’s personal economic interests are advanced by a lawsuit, fees may not be awarded since the litigation does not significantly benefit a large class of persons.” (Ibid.) The court noted that Leiserson “confined his tort action prayer to civil damages for himself, never requesting a declaration of the access rights of the press at disaster sites . . . . By tactical design, the litigation was not intended to promote the rights of the media by obtaining a judicial declaration of those rights. Rather, a review of Leiserson’s damages complaint reveals his primary intent for pursuing the litigation was to advance his own personal economic interest.” (Ibid.) This court stated that given the focus of Leiserson’s case, the ensuing published opinion was “simply fortuitous.” (Ibid.)

In sum, the plaintiff in Leiserson, supra, 202 Cal.App.3d 725 was not “successful” within the meaning of section 1021.5 because he had not achieved his primary litigation goal—a damage award, not a vindication of media rights. (Leiserson, at p. 738.) The litigation achieved only incidental public benefits.

Leiserson, supra, 202 Cal.App.3d 725 compels the same result here. Hall’s primary litigation goal—in fact, his only litigation goal—was reinstatement of his driver’s license. This was the only relief he pleaded in his original petition for writ of mandate, and after Benavidez’s bribery came to light, Hall repeated that prayer for relief, verbatim, in his amended petition.

Unsatisfied with the trial court’s ruling giving him a new hearing with an impartial hearing officer, Hall insisted on appeal that this court must reinstate his driver’s license. (Hall I, supra, 3 Cal.App.5th at pp. 806-807.) He characterized the superior court’s remand order as being “ultra vires.” (Id. at p. 807.) We rejected that argument. (Ibid.)

Under California law, a plaintiff may be deemed to have been successful under section 1021.5 by succeeding on any significant issue in the litigation which achieves some of the benefit plaintiff sought in bringing suit. (Center for Biological Diversity v. California Fish & Game Com. (2011) 195 Cal.App.4th 128, 138 (Center for Biological Diversity).) However, the only relief, achievement, or success for Hall from this litigation was a remand to the DMV to conduct another hearing. This was not a significant issue; indeed, it was no issue at all because Hall’s strategic objective was to obtain a court order that he prevail as a matter of law by overturning the DMV’s decision to revoke his license. He did not achieve his only litigation objective. All Hall achieved was

5. Although the DMV cites Leiserson, supra, 202 Cal.App.3d 725 in its brief, Hall does not cite or discuss Leiserson in his reply.
a do-over, something he did not seek, does not want, and in fact, when offered by both the trial court and later the DMV, a remedy he rejected. 6

Another test established in case law for determining whether a party was successful under section 1021.5 is the before-and-after test. Under this test, courts consider the situation immediately prior to the commencement of the suit and the situation after. (People v. Investco Management & Development LLC (2018) 22 Cal.App.5th 443, 458.) Before, Hall’s license was suspended for refusing to take a blood alcohol test. After the litigation, Hall’s license was suspended for refusing to take a blood alcohol test. The only relief—using the term in the broadest sense—that Hall achieved was a remand to the DMV.

Disagreeing with this conclusion, Hall characterizes the litigation as vindicating the public’s right to due process and a fair DMV hearing officer. Hall’s attempt to recast the purpose, scope, and outcome of the litigation is not persuasive. Although the subject of impartial decision makers and due process undoubtedly is an important right affecting the public interest, in no sense did Hall cause it to be enforced because when offered the very remedy the trial court ordered and this court affirmed in Hall I, supra, 3 Cal.App.5th 792, he refused it.

Hall also contends he was successful within the meaning of section 1021.5 because in Hall I, supra, 3 Cal.App.5th at page 811, this court awarded him costs, which he construes as a judicial determination that he was the “prevailing party.” However, under California Rules of Court, 7 rule 8.493(a)(2), an opinion resolving an original proceeding in the Court of Appeal must specify the award or denial of costs. Such costs may, but are not required to, be awarded to the prevailing party. Rather, under rule 8.493(a)(1)(B), the court may award costs “[i]n the interests of justice.” Given the result in Hall I—i.e., we rejected Hall’s argument that his license must be reinstated—the only reasonable inference is we awarded Hall costs in the interests of justice because the DMV had not afforded him an impartial hearing officer.

Hall additionally contends that the publication of Hall I, supra, 3 Cal.App.5th 792 is “strong evidence” that an important right is involved, entitling him to an attorney fee award under section 1021.5. However, whether an important right is involved is distinct from whether Hall is or is not a “successful party.” To obtain fees under section 1021.5, Hall must first establish he is a “successful party.” (Urbaniaik, supra, 19 Cal.App.4th at p. 1842; Leiserson, supra, 202 Cal.App.3d at p. 738 [despite published opinion on constitutional rights, plaintiff not successful under section 1021.5 where he failed to achieve his litigation goal].)

Moreover, even assuming for the sake of argument that Hall was “successful” within the meaning of section 1021.5, we would still affirm the trial court’s ruling because Hall cannot satisfy another essential requirement—that an attorney fee award is appropriate in light of the necessity and financial burden of private enforcement.

“The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual’s financial interests to the extent necessary to encourage private litigation to enforce the right. [Citation.] To encourage such suits, attorney’s fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action.” (Beach Colony II v. California Coastal Commission (1985) 166 Cal.App.3d 106, 114.) Conversely, section 1021.5 was not designed to reward litigants motivated by their own personal interests who only coincidentally protect the public interest. (Ibid.)

Here, it is indisputable that Hall had a significant personal stake in seeking reinstatement of his driver’s license—he filed his original writ petition seven months before even knowing that Benavidez was being investigated for taking bribes. During that period, when there was no issue involving a corrupt decision maker, Hall’s attorney billed 32.3 hours ($12,758.50) in prosecuting the case.

Once Hall learned about the charges against Benavidez, he amended his writ petition to also allege that Benavidez’s bribery in other cases deprived him of due process at his hearing. Hall’s motive was always about his self-interest in getting his license reinstated. His reliance on the DMV’s duty to provide an impartial hearing officer was not an issue he created. It fell in his lap, a fortuity of timing, and it was simply another alternative means to his desired end—license reinstatement—but never the goal itself. For litigating in the trial court this additional ground for relief, Hall’s attorney billed an additional 32.4 hours—nearly the same amount of time spent litigating in the superior court before Hall’s attorney even knew that Benavidez was charged with taking bribes. 8

Placing the litigation burden on Hall is eminently fair because he was willing to place it upon himself for seven months of litigation, incurring $12,758.50 in attorney fees. Moreover, once the due process violation was remedied by the order granting Hall a de novo DMV hearing, this litigation proceeded solely to vindicate Hall’s personal goal of having his license reinstated without undergoing a new

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6. The record does not reflect the result of Hall’s new DMV hearing. For that reason, the DMV’s reliance on Center for Biological Diversity, supra, 195 Cal.App.4th 128 and Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region (2010) 183 Cal.App.4th 330 for the proposition that Hall was not successful in the litigation is misplaced. In each of those cases, the agency reconsidered the matter on remand and reiterated its earlier decision.

7. Citations to rules are to the California Rules of Court.

8. Billing records Hall’s attorney submitted show he has spent more time attempting to obtain an attorney fee award (69.7 hours) then he did litigating the merits of Hall I (45.5 hours). (See Dorsey v. Superior Court (2015) 241 Cal.App.4th 583, 599 (“The attorneys’ fees in this case have not simply become a case of the tail wagging the dog; the attorneys’ fees have become the dog.”).}
hearing. That unsuccessful effort, costing Hall an additional $19,434 in attorney fees (49.2 hours) does not warrant reimbursement at the public’s expense.

Because Hall is not a successful party under section 1021.5 and, even if he were, his personal stake in the litigation precludes an award under section 1021.5, it is unnecessary to consider his remaining contentions that the court erred in denying his motion for attorney fees under section 1021.5. (Urbaniak, supra, 19 Cal.App.4th at p. 1844.)

D. Government Code Section 800

To obtain attorney fees under Government Code section 800, Hall must show, among other things, that he “prevail[ed]” in his civil action challenging the administrative proceeding. (Gov. Code, § 800, subd. (a).) For purposes of attorney fee statutes, the terms “prevailing party” and “successful party” are synonymous. (Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal.4th 604, 610.) Accordingly, for the same reasons we affirm the order denying Hall’s motion under section 1021.5, we also affirm the trial court’s determination he did not “prevail” under Government Code section 800.

E. Costs

The court awarded Hall $1,662 in costs. In a footnote in his opening brief, under the topic heading “Judgment or Order from which the Appeal is Taken,” Hall contends the court erroneously failed to award him $132.88 in additional costs he incurred after filing his cost memorandum.

An appellate brief must state each point under a separate heading. (Rule 8.204(a)(1)(B).) Because Hall’s argument about $132.88 in costs is not distinctly set forth and developed under a separate heading, he has forfeited this issue. (See People v. Crosswhite (2002) 101 Cal.App.4th 494, 502, fn. 5 [argument is forfeited “by raising it only in a footnote under an argument heading which gives no notice of the contention”].) Moreover, even if not forfeited, the argument is unavailing because (1) Hall concedes that these costs were not included in his memorandum of costs; and (2) to the extent Hall incurred the $132.88 in costs after his memorandum of costs was otherwise required to be filed, he has not shown that he sought (and was erroneously denied) an extension of time to file his cost memorandum under rule 3.1700(b)(3). 9

DISPOSITION

The order is affirmed. Respondent to recover costs incurred on appeal.

9. Rule 8.278(c)(1), governing costs on appeal, provides that a party claiming such costs must file a memorandum of costs in the superior court under rule 3.1700. Rule 3.1700(b)(3) provides in part: “The party claiming costs and the party contesting costs may agree to extend the time for serving and filing the cost memorandum and a motion to strike or tax costs. . . . In the absence of an agreement, the court may extend the times for serving and filing the cost memorandum . . . for a period not to exceed 30 days.”
JACKPOT HARVESTING COMPANY, INC., Petitioner,
v.
THE SUPERIOR COURT OF MONTEREY COUNTY, Respondent;
JOSE ROBERTO LAINEZ et al., Real Parties in Interest.

No. H044764
In The Court of Appeal of the State of California
Sixth Appellate District
(Monterey County Super. Ct. No. 15CV000491
Original Proceedings; petition for writ of prohibition. Steven G. Coundis, Judge. Petition is denied.
Filed August 14, 2018

COUNSEL


I. INTRODUCTION

Employers in California—and, specifically, agricultural employers—are required to “authorize and permit all employees to take rest periods.” (Cal. Code Regs. tit. 8, § 11140, subd. 12.) Agricultural employees working outdoors in temperatures exceeding 95 degrees Fahrenheit are entitled to a specified recovery period. (Cal. Code Regs. tit. 8, § 3395, subd. (e)(6) [minimum 10-minute recovery period every two hours].) Under California law, mandated rest and recovery periods “shall be counted as hours worked, for which there shall be no deduction from wages.” (§ 226.7, subd. (d); see id., subd. (c) [providing for penalties for an employer’s failure to provide mandated rest or recovery periods].) Further, where an employee’s work hours are separately classified by the employer as productive (directly compensated) or non-productive (not compensated), an employer must still pay the employee for all hours worked; an employer may not simply divide the total hours worked into the amount the employee was paid for productive time to arrive at an average hourly wage. (Armenta v. Osmose, Inc. (2005) 135 Cal.App.4th 314, 324 (Armenta).)

Appellate courts in two 2013 decisions—Gonzalez v. Downtown LA Motors, LP (2013) 215 Cal.App.4th 36 (Gonzalez) and Bluford v. Safeway Stores, Inc. (2013) 216 Cal. App.4th 864 (Bluford)—clarified that the principles that non-productive time and rest/recovery time are separately compensable apply to workers who are paid on a piece-rate basis, i.e., workers compensated based upon the type and number of tasks performed rather than the number of hours worked. The California Legislature thereafter, through Assembly Bill 1513 (AB 1513), enacted section 226.2, which codified the

1. All statutory references are to the Labor Code unless otherwise specified.

2. In this case, we refer to section 226.2(b) as a “safe harbor” provision insofar as it affords an employer an affirmative defense to certain claims by piece-rate workers for unpaid rest/NP time when the employer complies with a number of specified conditions. In so doing, we acknowledge that a “safe harbor” statutory provision takes a number of different forms and therefore has various meanings. (See, e.g., Optimal Markets, Inc. v. Salant (2013) 221 Cal.App.4th 912, 920 [Code Civ. Proc., § 128.7 provides party a 30-day safe harbor to avoid sanctions by withdrawing improper pleading]; Bourgi v. West Covina Motors, Inc. (2008) 166 Cal.App.4th 1649, 1660 [safe harbor provisions under Veh. Code, §§ 9990, 9991, for benefit of automobile dealers concerning minor repair damage to vehicles].)
Gonzalez/Bluford decisions and provided a mechanism for compensating piece-rate workers for previously unpaid accrued rest/NP time. (Stats. 2015, ch. 754, § 4, p. 5609.)

Real party in interest Jose Roberto Lainez (Lainez) filed suit on May 14, 2015, against his former employer, petitioner Jackpot Harvesting Company, Inc. (Jackpot), a company that performs harvesting and farming activities in Monterey County and Ventura County. Lainez alleged that he had worked for Jackpot as an agricultural worker and was compensated on a piece-rate basis. He alleged six causes of action for himself and on behalf of all members similarly situated. Only the first cause of action—asserting claims for unpaid minimum wages for rest/NP time, as well as interest, liquidated damages, and statutory penalties—is at issue here.

On January 1, 2016, approximately six months after Lainez filed the class action complaint, section 226.2 went into effect. Under section 226.2(b), an employer complying with the statute’s requirements, including payment (by December 15, 2016) of all amounts due to employees for uncompensated rest/NP time for the period of July 1, 2012 to December 31, 2015, may assert an affirmative defense to an employee’s “claim or cause of action” arising out of such uncompensated rest/NP time “for time periods prior to and including December 31, 2015.” (§ 226.2(b).)

In March 2016, Jackpot filed a first amended answer to the Lainez complaint, alleging its compliance with section 226.2(b) as a 37th affirmative defense. Jackpot later moved for summary adjudication, contending that because it had complied with all of the safe harbor requirements by making back payments to Lainez and other Jackpot employees—a total of 1,138 current and former employees—the 37th affirmative defense was an absolute bar to the first cause of action of the complaint. Lainez opposed the motion, but he admitted that Jackpot had complied fully with section 226.2(b).

The superior court denied the motion, concluding that the language of the statute was unclear and that, while section 226.2(b) provided a safe harbor to employers against claims by piece-rate workers for unpaid rest/NP time accruing between July 1, 2012 and December 31, 2015, it did not provide a defense for such claims accruing prior to July 1, 2012.

Jackpot challenges that order by this petition for writ of mandate. Jackpot contends that under the plain language of the statute, if an employer complies with the requirements of section 226.2(b), it has a safe harbor defense to all employee claims for unpaid rest/NP time accruing on or prior to December 31, 2015. Jackpot argues alternatively that even if the language of section 226.2(b) is unclear, applying all rules of statutory interpretation, including consideration of legislative history, the intent of the Legislature was to provide employers that complied with section 226.2(b) a complete defense to all such claims for unpaid rest/NP time accruing on or prior to December 31, 2015. Jackpot urges that writ relief is appropriate to address the claimed error because, inter alia, the trial court’s ruling “has far-reaching consequences for similarly situated California employers” that, like Jackpot, elected under the safe harbor provision to make back payments to their piece-rate employees. Jackpot claims that over 2,300 private companies made such an election.

The parties have cited no published cases interpreting the safe harbor provisions of section 226.2(b). After our careful reading of the statute and our application of established rules of statutory interpretation, we conclude that the unambiguous language of section 226.2(b) provides the employer a safe harbor for all employee claims for unpaid rest/NP time accruing on or prior to December 31, 2015, where the employer has complied with all the requirements of the statute, including timely paying employees for such claims that had accrued between July 1, 2012 and December 31, 2015. We conclude that the court erred in denying Jackpot’s motion for summary adjudication. We will therefore grant the petition for writ of mandate and will direct respondent superior court to enter an order granting Jackpot’s motion for summary adjudication of the first cause of action of the complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Pleadings

Lainez filed his class action complaint on May 14, 2015, alleging six causes of action. In the first cause of action of his complaint, Lainez alleged that he, along with members of his purported class, were piece-rate agricultural workers employed by Jackpot. (See Cal. Code Regs, tit. 8, § 11140, subd. 2[L] [defining piece-rate compensation for agricultural workers as “a method of payment based on units of production or a fraction thereof”].) Their jobs required them to (1) perform a minimum of 10 minutes of mandatory exercise in the morning, (2) attend meetings of approximately 15 minutes in duration, (3) make trips between fields two to three times per month with an average duration of 30 minutes, and (4) take 15-minute rest breaks. Jackpot’s workers were compensated only on a piece-rate basis, and they were not separately paid for this nonproductive time and rest time at a rate equal to or greater than minimum wage. Citing various provisions of the Labor Code, Lainez asserted on behalf of

3. In support of this assertion, Jackpot cited a Department of Industrial Relations website. (See <https://www.dir.ca.gov/piecerate-backpayelection/pieceratelisting.asp> (as of Aug. 14, 2018).) We take judicial notice of this website (see Evid. Code, §§ 452, 459; Moehring v. Thomas (2005) 126 Cal.App.4th 1515, 1523 & fn. 4 [judicial notice taken of United States Census Bureau’s website containing 2000 U.S. Decennial Census]), in which the Department of Industrial Relations listed a total of more than 2,100 employers that had filed elections to make back payments to piece-rate employees under the safe harbor provision of section 226.2(b).

4. Lainez cited the following Labor Code sections in support of his first cause of action: sections 558 (liability for civil penalties for violating wage and hour laws); 1194 (recovery of minimum wages plus interest, reasonable attorney fees, and costs); 1194.2 (liquidated damages based upon failure to pay minimum wages); 1197 (unlawful to pay less than minimum wage); and 1198 (unlawful to require employee to work a greater number of hours than maximum hours fixed by law). Lainez also cited “Wage Orders 13 and/or 14” in support of the first cause of action.
himself and similarly situated Jackpot workers a claim for damages, liquidated damages, interest, and fees.

The remaining five causes of action of the complaint are not at issue in this petition for writ of mandamus challenging the trial court’s denial of Jackpot’s summary adjudication motion.

Jackpot filed its answer on July 13, 2015. Jackpot thereafter filed a first amended answer to the complaint, alleging as a 37th affirmative defense that it intended to avail itself of certain provisions of section 226.2, subdivisions (b) and (d).

**B. Motion for Summary Adjudication**

On February 3, 2017, Jackpot filed a motion for summary adjudication asserting that the first cause of action of the complaint was without merit and the 37th affirmative defense of the amended answer to the complaint had been established. Jackpot presented evidence of 12 claimed undisputed material facts relating to its assertion that it had complied fully with the safe harbor provisions of section 226.2(b).

The 12 undisputed material facts stated in the motion were that (1) Jackpot had employed Lainez until his termination in or about December 2015 on its celery harvesting crew, and he was compensated on a piece-rate basis; (2) Jackpot had filed on June 23, 2016, the requisite notice with the Department of Industrial Relations (DIR) that Jackpot elected to make back payments to its piece-rate employees under section 226.2(b)(3) and subdivision (c); (3) Jackpot had elected to use the formula identified in section 226.2(b)(1)(B) (i.e., “4% of gross earnings”) for calculating and making back payments to current and former employees for previously uncompensated rest/NP time from July 1, 2012, to December 31, 2015; (4) Jackpot had engaged Charles Doglione, a certified public accountant and business consultant, to obtain payroll data necessary to make the calculations for back payments to current and former employees; (5) Jackpot had retained Simpluris, a national class action settlement administrator, to locate and provide payments to all current and former affected workers; (6) Jackpot had determined that there were 1,138 current and former employees who had been paid by Jackpot on a piece-rate basis between July 1, 2012 and December 31, 2015; (7) Doglione had provided to Simpluris the employee information and calculations for each affected employee to be compensated, and he wired Simpluris the funds necessary to make the payments and required payroll and other taxes; (8) Simpluris had located and confirmed the mailing address for each affected employee; (9) Simpluris had sent on November 18, 2016, checks for uncompensated or undercompensated rest/NP time accrued for the period of July 1, 2012, to December 31, 2015, to all workers who had been located, as well as explanatory statements and spreadsheets to those workers; (10) Simpluris had sent by overnight delivery on December 14, 2016, a statement to the DIR concerning amounts calculated as due to affected workers who could not be located, along with a single check for the total amount due to this group of affected workers, a second check for the administrative fee due under section 226.2, subdivision (d)(1), and a statement detailing for each affected employee his or her name, last known address, social security number, and amount payable; (11) Jackpot had preserved the records showing hours worked, calculation of hours worked, and payments made to employees and the Labor Commissioner; and (12) Jackpot stated that if any affected employee who did not receive his or her check inquired of Jackpot, it would advise the employee to contact Simpluris, who would then direct the person to the DIR. Jackpot argued therefore that, under section 226.2(b), it had established as a matter of law a complete defense to the first cause of action.

Lainez opposed the motion. He declared that he had begun working for Jackpot prior to May 14, 2011, and that he was seeking compensation in the first cause of action for unpaid minimum wages prior to July 1, 2012. Lainez in his opposition agreed that each of the material facts identified in Jackpot’s summary adjudication motion was undisputed. But Lainez argued that the safe harbor provision of section 226.2(b) did not offer a complete defense to Jackpot because the statute did not immunize the company against unpaid minimum wage claims accruing prior to July 1, 2012.

After hearing argument, the court denied the motion for summary adjudication. In its formal order filed May 17, 2017, the court reasoned “that the express language in Labor Code Section 226.2 is not clear and … while the [L]egislature intended the ‘safe harbor’ defense to eliminate an employer’s liability for penalties and other consequential damages arising from the failure to compensate piece rate workers for rest periods and other non-productive time during the ‘safe harbor’ period of July 1, 2012 to December 31, 2015, the [L]egislature did not intend to deprive piece-rate workers of their rights to receive compensation for rest periods and other non-productive time for time periods prior to July 1, 2012.”

Jackpot filed a petition for writ of mandate and a request for temporary stay with this court. We granted a temporary stay of all trial court proceedings to permit further consideration of the issues raised in the petition. In the same order, we directed respondent superior court to show cause why a peremptory writ of mandate should not issue as requested in the petition. Real party in interest Lainez filed an answer and opposition to the petition, and Jackpot filed a formal reply.

**III. DISCUSSION**

**A. Parties’ Contentions**

Jackpot argues there was no dispute below that it had complied with all requirements of section 226.2(b) to assert the safe harbor defense. It contends the language of the statute clearly provides that if, on or before December 15, 2016, the employer pays its piece-rate employees prior amounts due for unpaid rest/NP time for July 1, 2012 through December 31, 2015, and otherwise complies with the statute, it will have a defense for “any claim or cause of action … for time periods prior to and including December 31, 2015.” (§ 226.2(b).) Jackpot argues that since the Legislature chose not
to provide a specific date earlier than December 31, 2015, to limit the scope of the defense, the court erred in construing section 226.2(b) as providing a safe harbor only for claims accruing between July 1, 2012 and December 31, 2015.

Jackpot asserts further that the legislative history demonstrates that section 226.2(b) was intended to provide the employer a defense for all claims accruing on or prior to December 31, 2015. Jackpot cites both material it presented below in its reply to Lainez’s opposition to the motion and evidence it discovered after the court’s ruling that it presented below in a motion for reconsideration of the denial of summary adjudication.

Lainez responds that the language of the statute is ambiguous and that the phrase “for time periods prior to and including December 31, 2015” (§ 226.2(b)) is reasonably susceptible of multiple interpretations, including the one adopted by the court below. He contends the construction advanced by Jackpot that “would allow an employer to negate any liability for minimum wages earned by piece-rate workers prior to July 1, 2012” would constitute “[d]ivesting piece-rate workers of earned wages [which] is an absurd result that must be avoided.” And Lainez asserts that interpreting section 226.2(b) as urged by Jackpot would mean the divestiture of workers’ vested property rights (i.e., earned wages) in violation of the takings clause of the Fifth Amendment of the United States Constitution.

Before addressing the merits of Jackpot’s position, we will (1) describe familiar rules of statutory interpretation, (2) identify our standard of review, (3) provide some background concerning the enactment of AB 1513, and (4) discuss the relevant provisions of section 226.2.

B. Rules of Statutory Interpretation

Our interpretation of section 226.2 “is an issue of law, which we review de novo. [Citation.]” (United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. (2018) 4 Cal.5th 1082, 1089 (United Riggers & Erectors.).)

Our essential task in interpreting a statute “is to determine the Legislature’s intent so as to effectuate the law’s purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose, legislative history, and public policy.” [Citation.] “Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.” [Citation.]” (Sierra Club v. Superior Court (2013) 57 Cal.4th 157, 165-166.)

California courts follow an approach to determine legislative intent that involves up to three steps. (Alejo v. Torlakson (2013) 212 Cal.App.4th 768, 786-787.) The first step is our “examination of the actual language of the statute. [Citations.]” (Halbert’s Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1238 (Halbert’s Lumber.).) We do so “because the statutory language is generally the most reliable indicator of legislative intent.” [Citation.]” (Klein v. United States of America (2010) 50 Cal.4th 68, 77.) In this first step, we scrutinize “words themselves, giving them their ‘usual and ordinary meanings’ and construing them in context. [Citation.]” (People v. Lawrence (2000) 24 Cal.4th 219, 230.) And we “will apply common sense to the language at hand and interpret the statute to make it workable and reasonable. [Citation.]” (Wasatch Property Management v. Degrate (2005) 35 Cal.4th 1111, 1122 (Wasatch Property Management.) In doing so, if we find the statutory language to be “clear, its plain meaning should be followed. [Citation.]” (Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155.) Thus, if there is no ambiguity, “we presume the Legislature meant what it said, and the plain meaning of the language governs. [Citations.]” (People v. Montes (2003) 31 Cal.4th 350, 356.)

If we determine the statutory language is unclear, we will proceed to the second step and review the legislative history. (In re York (1995) 9 Cal.4th 1133, 1142; Halbert’s Lumber, supra, 6 Cal.App.4th at p. 1239.) In doing so, we “examine the legislative history and statutory context of the act under scrutiny.” (Sand v. Superior Court (1983) 34 Cal.3d 567, 570.) Under these circumstances, we “select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (People v. Jenkins (1995) 10 Cal.4th 234, 246.)

In the event the proper interpretation of the statute is not evident after examining the legislative history, “we must cautiously take the third and final step in the interpretive process. [Citation.] … Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation. [Citation.] Thus, ‘[i]n determining what the Legislature intended we are bound to consider not only the words used, but also other matters, “such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction.”’ [Citation.]” (MacIsaac v. Waste Management Collection & Recycling, Inc. (2005) 314 Cal.App.4th 1076, 1084.)

An overarching principle for our interpretation of statutes is that courts have a “limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law, ‘“whatever may be thought of the wisdom, expediency, or policy of the act.’” [Citations.]” … [The judi-
cial role in a democratic society is fundamentally to interpret laws, not to write them….’ [Citation.] It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. ‘This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.’ [Citations.]’ (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 632-633 (California Teachers Assn.).)

C. Standard of Review

Our interpretation of the language of section 226.2 “is an issue of law, which we review de novo. [Citation.]” (United Riggers & Erectors, supra, 4 Cal.5th at p. 1089.) Likewise, where, as is the case here, the relevant facts are undisputed, we review de novo the application of the law to those facts. (International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal.4th 606, 611; see also Harustak v. Wilkins (2000) 84 Cal.App.4th 208, 213 [appellate court “particularly well suited” to decide as question of law the meaning of statutory phrase].) Further, a determination regarding a statute’s constitutionality is a question of law that we review de novo. (Zubara v. City of Palmdale (2011) 192 Cal.App.4th 289, 307.)

The same standard of review applies to our review of the trial court’s order denying summary adjudication. A party may move for summary adjudication as to one or more causes of action if it contends that there is no triable issue of fact or there is an absolute defense to the cause of action. (Code Civ. Proc., § 437c, subd. (f)(1).) An appellate court scrutinizes the denial of summary adjudication by independent review. (Certain Underwriters at Lloyd’s of London v. Superior Court (2001) 24 Cal.4th 945, 972.) Such a ruling “resolves a pure question of law [citation], namely, whether there is any triable issue as to any material fact and, if not, whether the moving party is entitled to adjudication in his [or her] favor as a matter of law [Citation].” (Ibid.)

D. Background Concerning Enactment of AB 1513

There were two cases decided in 2013 by California courts of appeal that prompted the subsequent drafting and enact-
they were not paid.’ [Citation.]” (Gonzalez, supra, at p. 48.) The Gonzalez court found Armenta’s reasoning persuasive. It held that “[b]y its terms, Wage Order No. 4 does not allow any variance in its application based on the manner of compensation.” (Gonzalez, supra, at p. 49.) The Gonzalez court thus concluded the automobile service technicians were entitled to separate compensation for all hours worked and that the averaging method utilized by the employer did not satisfy California’s minimum wage requirements. (Gonzalez, supra, at pp. 48-49.) In so holding, the Gonzalez court rejected the employer’s argument that because the plaintiffs were piece-rate workers, Armenta was inapplicable. (Gonzalez, supra, at pp. 48-49; see also Cardenas v. McLane FoodServices, Inc. (C.D.Cal. 2011.) 796 F.Supp.2d 1246, 1250-1252 [formula that did not separately compensate piece-rate truck driver employees for required pre- and post-shift duties held non-compliant with the Labor Code].)

In Bluford, supra, 216 Cal.App.4th at page 866 (Bluford), the Third District Court of Appeal reversed the trial court’s denial of class certification in an action by a truck driver claiming the employer had violated the law by, inter alia, failing to compensate him and other employees similarly situated for rest periods. The employer—similar to the position asserted by its counterpart in Gonzalez concerning hours spent on the job for tasks other than repair work—argued that it was not required to pay separate compensation to its piece-rate employees for rest periods. (Bluford, supra, at p. 871.) The appellate court disagreed. It noted that “[u]nder Industrial Welfare Commission wage orders, employers are required to ‘authorize and permit all employees to take rest periods’ at the rate of at least 10 minutes for every four hours worked. (Cal.Code Regs., tit. 8, §§ 11070, subd. 12; 11090, subd. 12.) ‘Authorized rest periods shall be counted as hours worked for which there shall be no deduction from wages.’ (Ibid.)” (Bluford, supra, 135 Cal.App.4th 314, held that “a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law. [Citations.]” (Bluford, supra, at p. 872; cf. Vaquero v. Stoneledge Furniture LLC (2017) 9 Cal.App.5th 98, 108-110 [sales associates paid on commission basis entitled to separate compensation for rest periods].)

“In response to Gonzalez and Bluford, the Governor directed the [Labor and Workforce Development] Agency to take the lead in drafting and enacting legislation to address any penalties California employers should face as well as providing an expedited process by which piece-rate employees would receive years of back wages. The Agency assumed a key role in formulating and drafting AB 1513, and in coordinating with the Governor’s office and members of the Legislature. In preparing legislative proposals for AB 1513, the Agency communicated with Legislative Counsel. The Agency also sought confidential input from key stakeholders including representatives of business and labor.” (Labor and Workforce Development Agency v. Superior Court (2018) 19 Cal.App.5th 12, 18 (LWDA).)

The Legislature under AB 1513 codified the Gonzalez/Bluford decisions requiring employers to separately compensate piece-rate workers for rest/NP time periods at or above minimum wage. As explained by the Legislative Counsel’s Digest: “This bill would require the itemized statement provided to employees compensated on a piece-rate basis to also separately state the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period, and the total hours of other nonproductive time as specified, the rate of compensation, and the gross wages paid for that time during the pay period. The bill would require those employees to be compensated for rest and recovery periods and other nonproductive time at or above specified minimum hourly rates, separately from any piece-rate compensation.” (Legis. Counsel’s Dig., Assem. Bill No. 1513 (2015-2016 Reg. Sess.) Stats.2015, Summary Dig., p. 5609.) In addition, the new legislation “until January 1, 2021, would provide that an employer shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties based solely on the employer’s failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, the employer complies with specified requirements, subject to specified exceptions.” (Ibid; see also Fowler Packing Company, Inc. v. Lanier (9th Cir. 2016) 844 F.3d 809, 812 [“[t]o protect California businesses from unforeseen liability arising from Gonzalez and Bluford, … AB 1513 also created a ‘safe harbor’ that provided employers with an affirmative defense against claims alleging failure to pay previously for nonproductive work time … so long as they pay, no later than December 15, 2016, any minimum wage deficiencies occurring between July 1, 2012, and December 31, 2015”].)

Additionally, we note the comments to the Assembly Committee on Labor and Employment describing the background of AB 1513. The Assembly Committee noted that after the Gonzalez and Bluford decisions, “many employers have expressed concern about liability since they had not previously [separately] compensated employees paid on a piece rate system … [for rest/NP time]. They and others have expressed concerns that these decisions may generate significant litigation and administrative workload for employers, the courts, and the Labor Commissioner, in actions to recover back wages and penalties. This litigation will be costly and there is significant uncertainty whether workers will recover back pay, and when that may occur. [¶] Therefore, this bill represents compromise in an attempt to address many of these concerns. The legislation provides a means to resolve these issues in a way that is intended to: 1) reach more piece-rate workers and provide larger and more timely back pay recoveries than could be expected through litigation; 2)
Section 226.2, subdivision (a)—codifying the decisions in Gonzalez and Bluford—mandates that piece-rate employees receive compensation for all rest/NP time that is “separate from piece-rate compensation.” (§ 226.2, subd. (a)(1).) Such employees are assured under an alternative formula in subdivision (a) that their compensation for rest and recovery time will be no less than minimum wage; in some instances the compensation may be greater than minimum wage. (§ 226.2, subd. (a)(3)(A), (B).) An employer must compensate its piece-rate employees for nonproductive time at no less than the applicable minimum wage. (§ 226.2, subd. (a)(4).)

Under section 226.2(b), the safe harbor provision,7 “[n]otwithstanding any other statute or regulation, the employer ... shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226, based solely on the employer’s failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016,” it complies with the enumerated steps in section 226.2(b). Those steps include completing payment to employees for all unpaid rest/NP time “from July 1, 2012, to December 31, 2015, inclusive.” (§ 226.2(b)(1).) The employer may choose one of two specified formulas in calculating the rate of compensation for such unpaid rest/NP time. (Ibid.) The statute also mandates that the employer provide each employee with a statement that includes a recitation that payment was made under the statute, the method of calculation used, and, by spreadsheet or similar document, a detailed calculation of the payment. (§ 226.2(b)(5).) The employer must provide under the safe harbor provision a written notice to the DIR on or before July 1, 2016, of the employer’s intention to make payments to current and former employees for prior unpaid rest/NP time. (§ 226.2(b)(3).) And there is an outside deadline for the employer to make the payments for all unpaid rest/NP time—whether to the employee directly or to the Labor Com...
missioner if the employee cannot be located—of December 15, 2016. (§ 226.2(b)(4).)

Under subdivision (c) of section 226.2, an employer may assert the defense under the safe harbor provision notwithstanding its good faith failure to make a payment to one or more employees as required under section 226.2(b)(1), or its good faith failure to provide an accurate statement as required under section 226.2(b)(5), if the employer promptly remedies the error. Subdivision (d) contains, inter alia, a requirement that the employer use due diligence to locate and pay former employees. Subdivision (e) tolls the statute of limitations for rest/NP time claims accruing before January 1, 2016, for periods (1) from January 1, 2016 through July 1, 2016, as to instances in which the employer has not provided a notice of its intention to pay prior amounts due for accrued rest/NP time, and (2) from January 1, 2016 through December 15, 2016, as to instances in which the employer has provided such a notice. Further, application of the safe harbor provision is subject to six exceptions specified in subdivision (g). Lastly, there is a sunset clause for the statute, including the safe harbor subdivision, of January 1, 2021. (§ 226.2, subd. (k).)

F. Safe Harbor Applies to All Claims Accruing Prior to and Including December 31, 2015

1. Section 226.2(b) Is Not Ambiguous

In resolving the question of the scope of the safe harbor defense, we begin by “examining ... the actual language of the statute. [Citations.]” (Halbert’s Lumber, supra, 6 Cal. App.4th at p. 1238.) The statute provides that, if the employer complies with certain requirements (including payment to current and former piece-rate employees) on or before December 15, 2016, it may assert “an affirmative defense to ‘any’ claim or cause of action ... based solely on the employer’s failure to pay the employee for [rest/NP time] for time periods prior to and including December 31, 2015. . . .” (§ 226.2(b), italics added.) After this prefatory language, section 226.2(b) recites in five subparts the specific tasks the employer must accomplish by December 15, 2016, to avail itself of the safe harbor. One requirement is that the employer pay its current and former employees prior amounts due for unpaid rest/NP time “from July 1, 2012, to December 31, 2015,” utilizing one of two formulas presented in the statute. (§ 226.2(b)(1).)

Real party in interest Lainez argues that the language in section 226.2(b), “time periods prior to and including December 31, 2015,” “does not have a plain or unequivocal meaning.” He contends that because the words “all” or “any” do not precede the phrase, “time periods prior to and including December 31, 2015,” the language is reasonably susceptible of an interpretation that only claims accruing between July 1, 2012 and December 31, 2015, are subject to the safe harbor provision. For several reasons, we disagree, and we find that the language of section 226.2(b) is not reasonably susceptible of the construction advanced by Lainez.

First, the relevant statutory language refers to “any claim or cause of action” (§ 226.2(b), italics added) with a date restriction of “prior to and including December 31, 2015,” “ ‘Any’ is a term of broad inclusion.” (Lopez v. Sony Electronics, Inc. (2018) 5 Cal.5th 627, 635.) It “means without limit and no matter what kind. [Citation.]” (Delaney v. Superior Court (1990) 50 Cal.3d 785, 798; see also Zabrucky v. McAdams (2005) 129 Cal.App.4th 618, 628 [the word “ ‘any’ mean[s] ‘of whatever kind’ or ‘without restriction’ ”].) Thus, the use of “any” in the statute “unambiguously reflects a legislative intent for that statute to have a broad application. [Citations.]” (Department of California Highway Patrol v. Superior Court (2008) 158 Cal.App.4th 726, 736.) Because the plain import of “any” is the absence of restriction or limitation (U.S. ex rel. Barajas v. U.S. (9th Cir. 2001) 258 F.3d 1004, 1011), it is not reasonable to infer a date limitation in the safe harbor provision other than the one specified by the Legislature, i.e., “prior to and including December 31, 2015.”

Second, other language in section 226.2 supports the Legislature’s clear intent, as expressed in the first paragraph of 226.2(b), that the safe harbor applies to any unpaid rest/NP time claims accruing on or prior to December 31, 2015. The Legislature provided that “[c]laims for unpaid wages, damages, and penalties that accrue after January 1, 2016” were expressly excepted from the safe harbor. (§ 226.2, subd. (g) (4).) Thus, considering “the context of the statute as a whole and the overall statutory scheme” (Smith v. Superior Court (2006) 39 Cal.4th 77, 83), the statutory intent of the safe harbor provision was to provide a defense to employers for any pre-2016 claims for unpaid rest/NP time.

Third, it would have been a simple matter for the Legislature, had it wished, to have limited the safe harbor provision to claims for time periods from July 1, 2012 through December 31, 2015. It could have easily provided for a limitation of pre-2016 claims for unpaid rest/NP time. Similarly, had this been its intent, the Legislature could have specified in subdivision (g) (4) that the safe harbor exclusion applied to “[c]laims for unpaid wages, damages, and penalties that accrue [before July 1, 2012, or] after January 1, 2016.” (Ibid., bracketed italics added denoting potential statutory rewrite.) “We must assume that the Legislature knew how to create an exception if it wished to do so; nothing would have been simpler than to insert [language creating an exception].” (City of Ontario v. Superior Court (1993) 12 Cal.App.4th 894, 902.) Moreover, as drafted, section 226.2 contains numerous (38) references to specific dates and several (seven) designations of particular timespans. The Legislature here has demonstrated that it knew how to identify a particular date or a specific time interval, and it chose not to do so; it did not describe the pre-2016 safe harbor period as having a date beginning on July 1, 2012. (Cf. People v. Murphy (2001) 25 Cal.4th 136, 143 [where Legislature demonstrates ability to express specific requirement and fails to use that language in a particular stat-
ute, absence of such language in a similar enactment shows Legislature did not intend to impose that requirement].)

Fourth, Lainez’s construction of the safe harbor provision is contrary to the sound policy against the judicial rewriting of legislation. As explained by our high court, “We may not, however, insert qualifying provisions not included or rewrite the statute to conform to an inferred intention that does not appear from its language. [Citations.]” (Mills v. Superior Court (1986) 42 Cal.3d 951, 957, superseded by constitutional amendment on other grounds as stated in Whitman v. Superior Court (1991) 54 Cal.3d 1063, 1076; see also California Teachers Assn., supra, 14 Cal.4th at p. 633.) This rule is codified in Code of Civil Procedure section 1858, under which the court is prohibited from “insert[ing] what has been omitted, or . . . omit[ting] what has been inserted” from a statute. (See People v. Guzman (2005) 35 Cal.4th 577, 587 (Guzman).) Here, adopting Lainez’s position would require that we rewrite the first paragraph of section 226.2(b) to read “any claim or cause of action for recovery . . . for time periods prior to and including December 31, 2015, [but on or after July 1, 2012,] . . . .” (Italics added to denote potential statutory rewrite.) Further, were Lainez’s position credited, we would be compelled to rewrite subdivision (g)(4) of section 226.2 to provide that “[c]laims for unpaid wages, damages, and penalties that accrue after January 1, 2016 [or prior to July 1, 2012]” are expressly excepted from the safe harbor. (Italics added to denote potential statutory rewrite.) Such judicial statutory revision is prohibited. (Guzman, supra, at p. 587; see also Haniff, supra, 9 Cal.App.5th at pp. 201-202.)

Fifth, concluding that the safe harbor of section 226.2(b) does not apply to pre-July 1, 2012 claims would run counter to expressio unius est exclusio alterius. Under this “ ‘familiar rule of construction, . . . where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.’” [Citation.]” (Mutual Life Ins. Co. v. City of Los Angeles (1990) 50 Cal.3d 402, 410.) Thus, “if exceptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citation.]” (Sierra Club v. State Bd. of Forestry (1994) 7 Cal.4th 1215, 1230.) Here, the Legislature expressly provided—as one of the six specified exceptions to section 226.2(b)8—that claims arising after January 1, 2016, would not be governed by the safe harbor provision. (See § 226.2, subd. (g)(4).) We may not infer a further exception for claims accruing prior to July 1, 2012, absent a clear showing that the Legislature had an intent contrary to the express language of the statute. (See, e.g., FNB Morg. Corp. v. Pacific General Group (1999) 76 Cal.App.4th 1116, 1131 [where 10-year statute of limitations under Code Civ. Proc., § 337.15 contained several express exceptions, court would not infer unstated tolling exception based upon promise to make repairs].)

Sixth, our duty in construing the statute is to “apply common sense to the language at hand and interpret the statute to make it workable and reasonable. [Citation.]” (Wasatch Property Management, supra, 35 Cal.4th at p. 1122.) Interpreting the safe harbor of section 226.2(b) to apply to all claims or causes of action for rest/NP time accruing on or before December 31, 2015, not only is consistent with the plain language of the statute; it is a construction that “make[s] the statute workable and reasonable.” (Wasatch Property Management, supra, at p. 1122.) An employer that complies with the statute by, inter alia, timely paying all employees for unpaid rest/NP time that accrued in the 42 months prior to the effective date of the statute, January 1, 2016, will be entitled to assert such compliance as “an affirmative defense to any claim or cause of action [for monetary relief]” for rest/NP time claims accruing “for time periods prior to and including December 31, 2015.” (§ 226.2(b).) It would not make sense—and would thus be unworkable and unreasonable—to construe the statute as setting forth a detailed method by which the employer may avoid liability and potentially lengthy and expensive litigation by making payments for a time period spanning up to 42 months, while discouraging the employer from making those payments by leaving it exposed to liability and litigation for older claims (i.e., those accruing prior to July 1, 2012). Moreover, such a construction would be unreasonable in that it would afford the employer no safe harbor for pre-July 2012 claims—ones that arose during a period in which the employer’s liability to pay separate compensation for rest/NP time to piece-rate workers was not clear—while providing the employer with a defense for previously unpaid rest/NP time that accrued after the clarifying decisions of Gonzalez and Bluford were rendered in March and May 2013, respectively.9

8. Subdivision (g) of section 226.2 provides in its entirety: “The provisions in subdivisions (b), (c), (d), (e), and (f) shall not apply to any of the following: [¶] (1) Damages and penalties previously awarded in an order or judgment that was final and not subject to further appeal as of January 1, 2016. [¶] (2) Claims based on the failure to provide paid rest or recovery periods or pay for other nonproductive time for which all of the following are true: [¶] (A) The claim was asserted in a court pleading filed prior to March 1, 2014, or was asserted in an amendment to a claim that relates back to a court pleading filed prior to March 1, 2014, and the amendment or permission for amendment was filed prior to July 1, 2015. [¶] (B) The claim was asserted against a defendant named with specificity and joined as a defendant, other than as an unnamed (DOE) defendant pursuant to Section 474 of the Code of Civil Procedure, in the pleading referred to in subparagraph (A), or another pleading or amendment filed in the same action prior to January 1, 2015. [¶] (3) Claims that employees were not advised of their right to take rest or recovery breaks, that rest and recovery breaks were not made available, or that employees were discouraged or otherwise prevented from taking such breaks. [¶] (4) Claims for unpaid wages, damages, and penalties that accrue after January 1, 2016. [¶] (5) Claims for paid rest or recovery periods or pay for other nonproductive time that were made in any case filed prior to April 1, 2015, would be impractical and unreasonable for an additional reason. Although the question of whether the specific pre-July 2012 rest/
Seventh, we construe the statute to ascertain the intent of the Legislature “so as to effectuate the purpose of the law.” [Citation.]” (Moyer v. Workmen’s Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 (Moyer).) We interpret the language of section 226.2 by “keeping in mind the nature and obvious purpose of the statute where they appear” [citations].” (Moyer, at p. 230.) With that in mind, the intent of the safe harbor provision is clear: It provides a straightforward method of compensating piece-rate workers for unreimbursed pre-2016 rest/NP time without protracted, expensive, and uncertain litigation, while providing incentive to employers to reimburse employees voluntarily by affording them a defense to further claims based solely upon their failure to have made such payments. Interpreting the language of the safe harbor as providing employers with a defense to all claims and causes of action accruing “for time periods prior to and including December 31, 2015” (§ 226.2(b))—as clearly provided in subdivision (b)—effectuates the purpose of the statute.

In denying the motion for summary adjudication, the trial court found that “the [L]egislature did not intend to deprive piece[-]rate workers of their rights to receive compensation for rest periods and other non-productive time for time periods prior to July 1, 2012.” Lainez urges that the court’s conclusion regarding legislative intent was correct, arguing that the language at the beginning of section 226.2 “expressly prohibits an interpretation that would divest piece[-]rate workers of their earned wages.”

The preamble of section 226.2 reads in part: “This section shall apply for employees who are compensated on a piece-rate basis for any work performed during a pay period. This section shall not be construed to limit or alter minimum wage or overtime compensation requirements, or the obligation to compensate employees for all hours worked under any other statute or local ordinance.” Lainez contends that because the courts in Gonzalez and Bluford made it clear that employers were required to comply with minimum wage requirements under section 1197 by compensating piece-rate workers separately for rest/NP time, a construction of section 226.2(b) that would provide complying employers with a safe harbor for rest/NP time claims accruing prior to July 1, 2012 “would ‘alter’ or ‘limit’ those preexisting minimum wage obligations under [section] 1197.”

Although statements of the purpose or intent of legislation in a preamble “do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute,” but are not conclusive. (People v. Canty (2004) 32 Cal.4th 1266, 1280; see also Carter v. California Dept. of Veterans Affairs (2006) 38 Cal.4th 914, 925 [preamble is an aid to interpreting statute but it is not controlling].) “Legislative findings and statements of purpose in a statute’s preamble can be illuminating if a statute is ambiguous. [Citation.] But a preamble is not binding in the interpretation of the statute. Moreover, the preamble may not overturn the statute’s language. [Citations.]” (Yeager v. Blue Cross of California (2009) 175 Cal.App.4th 1098, 1103, fn. omitted (Yeager).) This point has been reiterated in a leading treatise: “In general, statements regarding the scope or purpose of an act that appear in the preamble may aid in the construction of doubtful clauses, but they cannot control the substantive provisions of the statute.” (1A Singer & Singer, Sutherland Statutes and Statutory Construction (7th ed. 2009), § 20.3, p. 123, fn. omitted.)

Here, the language in section 226.2(b) that an employer complying with the statute’s requirements “shall have an affirmative defense to any claim or cause of action for recovery … for time periods prior to and including December 31, 2015” is clear and unambiguous. Since section 226.2’s preamble does not expressly state an intention that its safe harbor provision be limited to those rest/NP claims accruing between July 1, 2012, and December 31, 2015, we will not construe the general language of the preamble in a manner that contradicts the express language of subdivision (b). (Yeager, supra, 175 Cal.App.4th at p. 1103; see also Chambers v. Miller (2006) 140 Cal.App.4th 821, 825-826 [preamble to statute “does not override its plain operative language”].)

We conclude therefore that, based upon the plain meaning of the language of section 226.2(b), the employer safe harbor applies to any claims or causes of action for unpaid rest/NP time that accrued prior to and including December 31, 2015. We do not agree with the conclusion by the court below that the statute is ambiguous, and we find that section 226.2(b) is not reasonably susceptible of the interpretation that the safe harbor defense applies only to rest/NP time claims that accrued in the three and one-half years before the December 31, 2015 date specified in the statute (i.e., between July 1, 2012 and December 31, 2015).

2. Lainez’s Due Process Contention

Lainez makes a constitutional argument in further support of his position that the trial court did not err. He contends that interpreting section 226.2(b) as providing a safe harbor for all rest/NP time claims accruing prior to and including December 31, 2015, would result in a taking of the vested property rights of piece-rate workers in violation of the takings clause of the Fifth Amendment of the United States Constitution.10

10. “As relevant here, the Fifth Amendment provides that no person shall ‘be deprived of … property, without due process of law; nor shall private property be taken for public use without just compensation.’ The latter provision is commonly referred to as the ‘takings clause.’ “ (Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal.4th 952, 984, fn. 2 (dis. opn. of Baxter, J.).)
Lainez did not make this argument below that the safe harbor provision as drafted would violate the takings clause of the Fifth Amendment. As a general rule, “constitutional issues not raised in earlier civil proceedings are waived on appeal. [Citations.]” (Bettencourt v. City and County of San Francisco (2007) 146 Cal.App.4th 1090, 1101; see Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal.App.4th 563, 585 [failure to raise at trial contention that statute was unconstitutional because it violated procedural due process and equal protection rights resulted in its forfeiture on appeal].) This principle applies equally to arguments not raised in summary judgment proceedings. (Saville v. Sierra College (2005) 133 Cal.App.4th 857, 872-873 [unasserted issue in opposing motion for summary judgment forfeited; were doctrine not applied, losing parties “could attempt to embed grounds for reversal on appeal into every case by their silence”].) Lainez has forfeited the constitutional argument.

Lainez, as the party asserting unconstitutionality, “bears a substantial burden” of establishing the claim. (Eastern Enterprises v. Apfel (1998) 524 U.S. 498, 523 (Eastern Enterprises.) Even if we were to consider the merits of his federal due process contention as a pure question of law presented by undisputed facts (Hale v. Morgan (1978) 22 Cal.3d 388, 394), we would conclude it to be without merit.11

The takings clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment (Chicago, B. & Q. R. Co. v. Chicago (1897) 166 U.S. 226, 239), has as its purpose the “prevent[ion of] the government ‘from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ ” [Citation.](Eastern Enterprises, supra, 524 U.S. at p. 522.) As the United States Supreme Court has explained: “[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. [Citations.] Similarly, our doctrine of regulatory takings ‘aims to identify regulatory actions that are functionally equivalent to the classic taking.’ [Citation.] … Finally … , States effect a taking if they recharacterize as public property what was previously private property. [Citation.]” (Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection (2010) 560 U.S. 702, 713.) Initially, in evaluating a challenge under the takings clause, the court resolves whether there is, in fact, a constitutionally protected property right implicated. (Peterson v. U.S. Dept. of Interior (9th Cir. 1990) 899 F.2d 799, 807; see, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment (1986) 477 U.S. 41, 55 [states’ contractual right to withdraw state and local government employees from Social Security System “did not rise to the level of ‘property’ ” and “[could] not be viewed as conferring any sort of ‘vested right’ ”].)

Lainez’s constitutional argument is based upon the broad assertion that construing section 226.2(b) as a safe harbor to all claims accruing on or prior to December 31, 2015, would violate the takings clause of the Fifth Amendment because it “would result in piece-rate workers being divested of their earned wages—effectively taking their property away from them and transferring it to the employers who failed to pay them their wages.” Lainez argues that he and other similarly situated piece-rate workers have vested property rights to claims for unpaid rest/NP time accruing prior to July 1, 2012, of which they would be unconstitutionally deprived if section 226.2(b) were interpreted as providing a safe harbor to complying employers against all rest/NP time claims accruing prior to and including December 31, 2015. Lainez has cited no cases holding that an employer’s failure to separately pay minimum wages for a piece-rate employee’s rest/NP time prior to the appellate courts in Gonzalez and Bluford making this requirement clear created a vested right in favor of the employee to such compensation.

Jackpot responds that the takings clause of the Fifth Amendment is not implicated. Jackpot cites a body of law rejecting constitutional challenges by employees to an amendment to a federal labor statute. The statute was the Fair Labor Standards Act of 1937 (29 U.S.C. § 201 et seq.; the FLSA), and the amendment was the Portal-to-Portal Act (29 U.S.C. § 251 et seq.).

In 1938, Congress enacted the FLSA, which “established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek” for workers engaged in commerce or in the production of goods for commerce within the meaning of the act. (Integrity Staffing Solutions, Inc. v. Busk (2014) 135 S.Ct. 513, 516 (Integrity Staffing.) As explained by our nation’s high court, the FLSA did not include definitions of “work” or “overtime work.” and the Supreme Court, “[a]pplying … expansive definitions [to those terms], … found compensable the time spent [by employees] traveling between mine portals and underground work areas, [citation], and the time spent walking from timeclocks to work benches, [citation]. [¶] These decisions provoked a flood of litigation … [namely,] more than 1,500 lawsuits under the FLSA [citation]. These suits sought nearly $6 billion in back pay and liquidated damages for various preshift and postshift activities. [Citation.] [¶] Congress responded swiftly. It found that the FLSA had ‘been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in

11. The California Constitution contains a parallel takings clause. (See Cal. Const., art. I, § 19.) Lainez does not assert here that the construction of section 226.2(b) advanced by Jackpot would violate the takings clause of the California Constitution. We therefore do not separately consider the issue. (See Kim v. Sumitomo Bank (1993) 17 Cal.App.4th 974, 979 [notwithstanding de novo standard of review of summary judgment, appellate court’s function is not to address arguments not raised on appeal or issues for which authorities are not cited].) Generally, however, the federal and state takings clauses are construed congruently. (San Remo Hotel v. City and County of San Francisco (2002) 27 Cal.4th 643, 664.)
amount and retroactive in operation, upon employers.’ [Citation.] Declaring the situation to be an ‘emergency’ ” (Integrity Staffing, supra, 135 S.Ct. at p. 516), Congress passed an amendment to the FLSA, the Portal-to-Portal Act, which created an exemption for employers for future claims for compensation for certain activities, including “activities which are preliminary to or postpreliminary to” the employee’s principal work activity. (29 U.S.C. § 254(a)(2).)

Employees mounted a number of constitutional challenges to the Portal-to-Portal Act, which had effectively barred their claims for compensation for preshift and postshift activity. They argued, inter alia, that the amendment violated the takings clause of the Fifth Amendment. The constitutional claims were uniformly rejected. (See Moss v. Hawaiian Dredging Co. (9th Cir. 1951) 187 F.2d 442, 445, fn. 3 (Moss) [citing 16 cases upholding constitutionality of Portal-to-Portal Act.]) In Battaglia v. General Motors Corp. (2d Cir. 1948) 169 F.2d 254 (Battaglia), the plaintiffs contended that although “the employees’ rights to overtime compensation ultimately flowed from the [FLSA], they were also in some sense ‘contractual’ in nature and hence vested.” (Id. at p. 258, fn. omitted.) The Ninth Circuit Court of Appeals disagreed, concluding the Portal-to-Portal Act was constitutional, and that Congress’s decision to amend the FLSA in the exercise of its power to regulate commerce did not violate the takings clause of the Fifth Amendment. (Battaglia, supra, at pp. 259-260, 261.)

Likewise, the court in Seese v. Bethlehem Steel Co. (4th Cir. 1948) 168 F.2d 58, 62 (Seese) addressed whether “under the Fifth Amendment[, the Portal-to-Portal Act] takes property without due process in that it strikes down vested rights under existing contracts.” The court of appeals rejected the constitutional challenge, holding that “even rights arising out of contract cannot fetter [C]ongress in the exercise of a power granted it by the Constitution, and … the rights stricken down by the statute are not rights arising out of contract at all, but rights created by statute as an incident of the statutory regulation of commerce. The Portal-to-Portal Act of May 14, 1947, like the [FLSA] which it modified and amended, was an exercise by Congress of the power to regulate interstate and foreign commerce; and it is well settled that the exercise of such power is not invalidated even by the fact that its effect is to destroy rights under valid existing contracts.” (Ibid.: see also Fisch v. General Motors Corp. (6th Cir. 1948) 169 F.2d 266, 270-272 [Portal-to-Portal Act did not deprive workers of vested rights in violation of due process].)

Further, in Moss, supra, 187 F.2d 442, the court rejected a constitutional challenge by employees to a different amendment to the FLSA. There, the plaintiffs had urged in litigation that a section of the FLSA should be interpreted as entitling them to overtime on overtime. (Id. at p. 443.) After trial but prior to decision in Moss, the United States Supreme Court rendered its decision in Bay Ridge Co. v. Aaron (1948) 334 U.S. 446 (Bay Ridge), which had the effect of validating the plaintiffs’ argument. (Moss, supra, at p. 443.) And prior to judgment being entered in Moss, Congress passed legislation, “popularly known as the Overtime-on-Overtime Act,” which amended the FLSA and retroactively sustained the positions of the employer defendants that they had properly paid overtime to the employees. (Moss, supra, at p. 444.) The plaintiffs, challenging the constitutionality of the Overtime-on-Overtime Act amending the FLSA, argued “that when they did the work for which additional compensation [was] sought [in the lawsuit] they acquired rights to overtime compensation under the [FLSA], the measure of which overtime compensation was required to be as stated in the Bay Ridge decision. These, they say, were vested rights, contractual in nature.” (Moss, supra, at p. 444-445.) The Ninth Circuit Court of Appeals, relying on the Portal-to-Portal Act cases discussed, ante, upheld the constitutional validity of the Overtime-on-Overtime Act. (Moss, supra, at p. 446-447.)

The analogy between due process challenges to amendments to the FLSA and those directed to section 226.2 addressing compensation for rest/NP time for piece-rate workers, while perhaps not perfect, nonetheless informs our conclusion that the safe harbor provision is not violative of the takings clause of the Fifth Amendment. We see no distinction between the claims for preshift and postshift compensation affected by the Portal-to-Portal Act amending the FLSA, and the pre-July 2012 rest/NP time claims affected here by the enactment of section 226.2. As found by the courts in such cases as Battaglia, supra, 169 F.2d at pages 259 to 260 and Seese, supra, 168 F.2d at page 62, the Portal-to-Portal Act, notwithstanding its impact on the employees’ preshift and postshift compensation claims, did not constitute a violation of the takings clause of the Fifth Amendment. The same conclusion applies here to section 226.2 and its impact upon employees’ pre-July 2012 rest/NP time claims.

As the California Supreme Court has explained: “All presumptions and intentions favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citation.]” (Lockheed Aircraft Corp. v. Superior Court (1946) 28 Cal.2d 481, 484.) We conclude that the

12. For example, Congress, in enacting the Portal-to-Portal Act, made detailed findings expressing the necessity of the legislation as a matter of national public interest, stating that, because the FLSA had “been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that if [the FLSA] as so interpreted or claims arising under such interpretations were permitted to stand, … the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others … [and] the courts of the country would be burdened with excessive and needless litigation.” (Seese, supra, 168 F.2d at p. 60.) While Jackpot contends that the California Legislature enacted AB 1513 “to avoid disastrous effects to [California’s] economy due to unanticipated judicial interpretations” of minimum wage laws as applied to piece-rate employees, there are, unlike the Portal-to-Portal Act, no express urgency findings in the legislation that we consider here.
safe harbor provision, as construed to apply to all claims for unpaid rest/NP time accruing prior to and including December 31, 2015, is not an unconstitutional taking. (See Eastern Enterprises, supra, 524 U.S. at p. 523 [party asserting unconstitutionality “bears a substantial burden”].)

3. Conclusion

Section 226.2(b) provides an affirmative defense to “any [employee] claim or cause of action” arising out of “previously uncompensated or undercompensated” “[rest/NP time] for time periods prior to and including December 31, 2015,” where the employer complies with various requirements, including reimbursing the employee for unpaid rest/NP time from July 1, 2012, to December 31, 2015, inclusive.” (§ 226.2(b)(1), italics added.) The language of subdivision (b) makes clear that the employer safe harbor applies to all pre-2016 claims, as confirmed elsewhere in the statute noting the safe harbor to be inapplicable to claims accruing after January 1, 2016. (See § 226.2, subd. (g)(6).) And the specification in subdivision (g) of six exceptions to the safe harbor, without inclusion of an exception for pre-July 1, 2012 claims, is further evidence of this intent. The language of subdivision (b) is not reasonably susceptible of the interpretation advanced by Lainez and adopted by the court below. Section 226.2(b) clearly and unambiguously provides that employers complying with the statute will receive, through the availability of an affirmative defense, a safe harbor for all claims and causes of action arising solely from the failure to pay rest/NP time as to any such claims accruing prior to and including December 31, 2015.

In reaching this conclusion, we are guided by the overarching principle that the court’s “‘role in a democratic society is fundamentally to interpret laws, not to write them…’ [Citation.] … ‘This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.’ [Citations.]” (California Teachers Assn., supra, 14 Cal.4th at pp. 632-633.) Interpreting section 226.2 as providing an employer safe harbor for rest/NP claims accruing on or prior to December 31, 2015, but not for those claims accruing prior to July 1, 2012, would effectively require us to rewrite the statute. We respectfully submit that any requests for changes to the statutory language must be presented to the Legislature.

IV. DISPOSITION

Let a peremptory writ of mandate issue commanding respondent superior court to vacate its order of May 17, 2017, and enter a new order granting the motion for summary adjudication of the first cause of action of the complaint. Upon finality of this opinion, the temporary stay issued by this court is vacated. Statutory costs are awarded to Jackpot.

Bamattre-Manoukian, J.

WE CONCUR: ELIA, ACTING P.J., MIHARA, J.

Cite as 18 C.D.O.S. 8166

POST FOODS, LLC, et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; RICHARD SOWINSKI, Real Party in Interest.

No. B284057
In The Court of Appeal of the State of California
Second Appellate District
Division One
(Los Angeles County Super. Ct. No. BC516747)
Filed August 15, 2018

ORDER MODIFYING OPINION, GRANTING JUDICIAL NOTICE, AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 16, 2018, be modified as follows:

1. In section A of the FACTUAL AND PROCEDURAL BACKGROUND, on page 6, the first sentence of the last paragraph, which reads:

   "Notably, the OEHHA heeded the FDA’s advice letters and deferred to the FDA’s approach to acrylamide."

Is modified to read as follows:

   "Notably, the California authorities heeded the FDA’s advice letters and deferred to the FDA’s approach to acrylamide."

2. In section E of the FACTUAL AND PROCEDURAL BACKGROUND, on page 13, the first two sentences of footnote 5, which read:

   "Neither party addressed whether a Proposition 65 warning on whole grain cereals would lead to labels on other foods, but this presents a concern. Proposition 65 warnings on foods containing acrylamide above California’s nonsignificant risk levels would cause many otherwise healthy foods to appear to consumers to be unhealthful and vice versa."

Are modified to read as follows:

   "Neither party addressed whether a Proposition 65 warning on whole grain cereals would lead to labels on other foods, but this presents a concern. Proposition 65 warnings on foods containing acrylamide above California’s nonsignificant risk levels would cause many otherwise healthy foods to appear to consumers to be unhealthful and vice versa."

Notably, the OEHHA heeded the FDA’s advice letters and deferred to the FDA’s approach to acrylamide.

Is modified to read as follows:

   "Notably, the California authorities heeded the FDA’s advice letters and deferred to the FDA’s approach to acrylamide.

Neither party addressed whether a Proposition 65 warning on whole grain cereals would lead to labels on other foods, but this presents a concern. Proposition 65 warnings on foods containing acrylamide above California’s nonsignificant risk levels would cause many otherwise healthy foods to appear to consumers to be unhealthful and vice versa.

Are modified to read as follows:

   "Neither party addressed whether a Proposition 65 warning on whole grain cereals would lead to labels on other otherwise healthful foods, but this presents a concern. Proposition 65 warnings on foods containing acrylamide above California’s nonsignificant risk levels would cause many otherwise healthy foods to appear to consumers to be unhealthful and vice versa."
would cause many such foods to appear to consumers to be unhealthful and vice versa.

3. In section V of the DISCUSSION, on page 24, the last sentence on that page, which reads:

Dr. Sowinski characterizes them as “old letters,” but California regulators complied with them, so the FDA had no reason to issue further advice letters regarding Proposition 65 warnings for acrylamide.

Is modified to read as follows:

Dr. Sowinski characterizes them as “old letters,” but California regulators heeded them, so the FDA had no reason to issue further advice letters regarding Proposition 65 warnings for acrylamide.

4. In section V of the DISCUSSION, on page 24, at the end of the last sentence on that page:

Insert a new footnote number 9, which will require renumbering of all subsequent footnotes, that reads as follows:

Notably, it is not the FDA’s letters that preempt the proposed Proposition 65 acrylamide warnings here, but the numerous federal statutes enacted by Congress to increase Americans’ consumption of whole grains, whose policy objectives would be obstructed by such a warning. For this reason, Reid v. Johnson & Johnson (2015) 780 F.3d 952, in which the Ninth Circuit held that a particular FDA letter lacked any preemptive effect, is inapproriate. Moreover, Reid merely held the FDA letter at issue lacked the force of law necessary to preempt state law, largely due to its “equivocal language” regarding the FDA’s intentions. That letter was “couched in tentative and non-committal terms” and did “not promise that the FDA will not enforce its … regulation” but instead provided “that the FDA ‘intends to consider the exercise of enforcement discretion’ in certain circumstances.” (Id. at p. 965, italics added.) By contrast, the FDA letters here were unequivocal. The 2003 FDA letter stated, “[A] requirement for warning labels on food might deter consumers from eating foods with such labels. Consumers who avoid eating some of these foods, such as breads and cereals, may encounter greater risks because they would have less fiber and other beneficial nutrients in their diets. For these reasons, premature labeling requirements would conflict with FDA’s ongoing efforts to provide consumers with effective scientifically based risk communication to prevent disease and promote health.” In its 2006 letter, the FDA stated, “California should not require acrylamide warning labels for foods under Proposition 65 before completion of scientific studies adequate to assess the potential risk of acrylamide to consumers and until FDA determines, based on our risk assessment, that risk management measures (beyond our current advice to eat a balanced diet) are needed.”

5. In section V of the DISCUSSION, on page 25, the last sentence of the partial paragraph, which reads:

This shows that the FDA continues to execute on the strategy outlined in its advice letters and has not endorsed California’s 0.2 microgram/day standard that would require many foods to be labeled.

Is modified to read as follows:

This shows that the FDA continues to execute on the strategy outlined in its advice letters and has not endorsed California’s 0.2 microgram/day standard that would require whole grain cereals to be labeled.

There is no change in the judgment.

Real party in interest’s request for judicial notice is granted.

Real party in interest’s petition for rehearing is denied.

CERTIFIED FOR PUBLICATION

ROTHSCHILD, P. J., CHANEY, J., JOHNSON, J.