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Creditors’ and Debtors’ Rights

Deed of trust does not provide for award of attorney fees to lender in action brought by non-borrower (Rubin, J.)

Hart v. Clear Recon Corp.

C.A. 2nd; September 18, 2018; B283221

The Second Appellate District reversed a judgment. The court held that language in a deed of trust allowing the lender to add to the borrower’s secured debt any expenses incurred in protecting the lender’s interest cannot be construed as authorizing an award of attorney fees, particularly where the underlying litigation is brought by someone other than the borrower.

Sara and Guy Hart asserted an interest in a house purportedly owned by Don Hart. While they disputed the title, nobody was paying the mortgage on the property, which had been taken out in Don’s name alone. Nationstar Mortgage LLC commenced foreclosure proceedings. Sara and Guy sued Nationstar, seeking to enjoin a foreclosure sale. They challenged Nationstar’s authority to conduct a foreclosure while the title dispute was pending. The trial court granted summary judgment in favor of Nationstar, finding that because Sara and Guy were not the borrowers, they had no rights under the deed of trust.

Nationstar then moved for attorney fees, citing a provision in the deed of trust authorizing it to pay “reasonable attorneys’ fees” to protect its interest in the encumbered property, and directing that any such expenditures “shall become additional debt of Borrower secured by the Security Instrument.” The trial court granted the motion for fees, finding that the cited provision authorized Nationstar’s recovery of fees as the prevailing party on Sara and Guy’s complaint.

The court of appeal reversed, holding that the provision at issue was not an attorney fee provision. Civil Code §1717 allows the recovery of attorney fees by a prevailing party only where a contract specifically provides for such an award. By its plain language, the deed of trust does not provide for such an award. It merely states that attorney fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt. Federal courts that had considered this issue had reached the same conclusion. Even if the deed of trust could be construed against the borrower in the manner urged by Nationstar, Sara and Guy were not the borrowers. No authority holds that, in an unsuccessful suit by a non-borrower against a lender, the lender may recover attorney’s fees against a nonborrower pursuant to this type of language in a deed of trust. Further, that Sara and Guy included a plea for attorney fees in their complaint against Nationstar did not judicially estop them from challenging Nationstar’s motion for fees.

Criminal Law

FBI agent’s affidavit demonstrated necessity for wiretap (N.R. Smith, J.)

United States v. Estrada

9th Cir.; September 18, 2018; 16-50439

The court of appeals affirmed a district court order. The court held that the district court did not abuse its discretion in denying defendants’ motion to suppress evidence obtained by means of a wiretap.

The Federal Bureau of Investigation undertook an investigation into the operations of the Westside Verdugo, a criminal street gang subordinate to the Mexican Mafia. As part of its investigation, the FBI sought to obtain wiretaps on the telephones of several members of the Westside Verdugo, including Jonathan Brockus, the self-proclaimed “shot caller” for the gang. Special Agent Matthew Tylman submitted a 113-page affidavit in support of the FBI’s request for wiretaps. With regard to Brockus, the affidavit described Brockus’ recent interactions with the San Bernardino police, who had attempted, with only limited success, to use Brockus as an informant. The police nonetheless obtain significant information regarding Brockus’ role in the gang and his interactions with a representative of the Mexican Mafia. The district court authorized the wiretaps. The information obtained from the wiretaps led to the arrest of gang members Ernie Estrada and Mark Rios, both of whom moved to suppress the wiretap evidence.

The district court denied their motion to suppress. Estrada and Rios appealed, arguing that Tylman’s affidavit had significant omissions. They also argued that the district court abused its discretion in authorizing the wiretap of Brockus’ phone when he could instead have been used as a confidential informant.

The court of appeals affirmed, holding that any omissions from Tylman’s affidavit were not material. The information provided by Tyman was sufficient, standing alone, to establish the need for the wiretap. Among other things, the affidavit explained in detail why using Brockus as an informant was not a viable option, noting his previously spotty record of cooperation with local police and the likelihood that he would provide misinformation both in order to mask his own, ongoing criminal activities and due to fear of retaliation by the Mexican Mafia. Further, based on the information provided by Tylman, the district court did not abuse its discretion in concluding that using Brockus as a confidential informant was unlikely to result in the successful prosecution of each and every gang member involved in the gang’s narcotics conspiracy.
Employment Litigation

Department of Labor regulation and interpretation pertaining to “tip credit” entitled to deference (Paez, J.)

Marsh v. J. Alexander’s LLC

9th Cir.; September 18, 2018; 15-15791

The court of appeals reversed a district court judgment and remanded. The court held that the Department of Labor’s 1967 dual jobs regulation and its subsequent interpretation of that regulation were consistent both with each other and with the Fair Labor Standards Act (FLSA) and thus were entitled to deference.

Alec Marsh and others sued their restaurant employers under the FLSA for minimum wage violations, alleging the employers’ misuse of the “tip credit.” According to the employees, their employers misused the credit in two ways: (1) by taking a tip credit for time spent on tasks such as cleaning toilets that were unrelated to the employees’ duties as servers or bartenders; and (2) by taking the tip credit for time in excess of 20 percent of the workweek spent on non-tip-generating tasks related to serving or bartending, such as maintaining drink dispensers. In so arguing, the employees relied on 29 C.F.R. §531.56(e), a 1967 dual jobs regulation promulgated by the DOL and the DOL’s subsequent interpretation of the regulation in its 1988 Field Operations Handbook.

The district court dismissed the employees’ claims without leave to amend. A divided panel of the court of appeals vacated and remanded, agreeing with the district court that the DOL’s interpretation of its dual jobs regulation was not entitled to deference, but finding the district court nonetheless erred in denying leave to amend.

After granting rehearing en banc, the court of appeals reversed the district court judgment and remanded, holding that both the regulation and the DOL’s interpretation were entitled to deference. Congress did not intend to give employers a blank check when it enacted the FLSA’s tip credit provision. Recognizing this and foreseeing the possibility that employers could misuse this provision to withhold wages from dual job employees such as plaintiffs, who are titled “servers” or “bartenders,” but who function in actuality as bussers, janitors, and chefs at least part of the time, the DOL promulgated the dual jobs regulation to clarify that dual job employees do not count as tipped employees in certain circumstances. Employers had six years to challenge this regulation; they did not. Instead, they sought clarification, which the DOL provided first through its opinion letters and later in the Handbook. Together, the regulation and interpretation clarify the boundaries of acceptable tip credit use. Both are entitled to deference where, as here, the latter is consistent with the former and both are consistent with the purpose of the FLSA. The employees thus stated two viable claims for relief under FLSA—one pertaining to unrelated tasks and one pertaining to related, but untipped, tasks that exceed 20 percent of the employee’s workweek. Judge Graber, dissenting in part, would allow only plaintiffs’ claim with regard to unrelated tasks to go forward. Judge Ikuta, joined by Judge Callahan, dissented, finding that because the DOL’s regulation and interpretation effectively eliminated an employer’s statutory right to take a tip credit, neither was entitled to deference.

Environmental Law

Prior demolition of uninhabitable structure not part of proposed residential construction project for purposes of CEQA (Aaron, J.)

Bottini v. City of San Diego

C.A. 4th; September 18, 2018; D071670

The Fourth Appellate District affirmed a trial court judgment. The court held that property owners’ demolition of an existing structure, deemed to be a public nuisance, was not part of their subsequently proposed residential construction project for purposes of the California Environmental Quality Act.

In February 2011, Francis and Nina Bottini purchased a residential lot in La Jolla with a 100-year old cottage. The Bottinis applied to the City of San Diego’s Historical Resources Board to determine whether the cottage was eligible for historical designation. The board found the cottage ineligible, concluding it had undergone too many alterations to warrant historical designation. In November 2011, the city’s Neighborhood Code Compliance Division inspected the cottage and determined it to be uninhabitable and at risk of collapse. It declared the cottage a public nuisance and directed that it be demolished. In August 2012, following demolition of the cottage, the Bottinis applied to the city for a coastal development permit (CDP) to construct a single-family home on the now vacant lot. City staff determined that the Bottinis’ proposed construction project was categorically exempt from environmental review under CEQA, but the city council reversed that determination, finding that full environmental review was necessary due to the Bottinis’ removal of the cottage. The city council declared the cottage “historic,” concluded that its demolition had to be considered part of the Bottinis’ project for purposes of CEQA, and found a reasonable possibility that CEQA’s “historical resources” and “unusual circumstances” exceptions applied to the Bottinis’ construction project, thus requiring full environmental review.

The trial court granted the Bottinis’ petition for writ of mandate and ordered the city counsel to set aside its determination.

The court of appeal affirmed, holding that the demolition of the cottage was not a component of the Bottinis’ residential construction project for purposes of CEQA, and the city
council abused its discretion in finding otherwise. The appropriate baseline for evaluation of the proposed project was not January 2010, as the city council found, but rather August 2012, when the Bottinis filed their request for a CDP. At that time, their property was a vacant lot. Under CEQA, that environmental condition accurately reflected the baseline for the Bottinis’ construction project. The only project that remained for purposes of CEQA after the city authorized the Bottinis to demolish the cottage was the construction of a single-family residence on a vacant lot—a categorically exempt act under CEQA.

**Family Law**

**Dependent minor’s removal from mother and placement with presumed father does not trigger ICWA (Hull, Acting P.J.)**

*In re K.L.*

C.A. 3rd; September 18, 2018; C079100

The Third Appellate District affirmed a dependency court judgment. The court held that a dependent minor’s removal from his mother and placement with his presumed father does not trigger the provisions of the Indian Child Welfare Act.

Two-year old K.L. was removed from his mother’s custody after she was arrested for child cruelty. He was placed with his presumed father, L.V. A.A., who had never met the minor, who was subsequently determined to be K.L.’s biological father. Because A.A. was an enrolled member of a federally recognized Indian tribe, the county sent notice of the dependency proceedings to the tribe. The court confirmed that it was in the process of enrolling the minor and intended to intervene in the proceedings.

At the subsequent jurisdiction and dispositional hearing, the dependency court declared the minor to be a dependent child, placed him with L.V., and ordered family maintenance services for L.V. The court declared that because custody of the minor was simply being transferred from his mother to his presumed father, ICWA did not apply. On appeal, A.A. and the tribe challenged that ruling.

The court of appeal affirmed, holding that K.L.’s removal from his mother and placement with his presumed father did not trigger the application of ICWA. ICWA applies when a minor either is placed in foster care or is the subject of an “Indian child custody proceeding,” neither of which occurred here. Placing K.L. with L.V. was not, as A.A. argued, akin to placing the minor with a guardian. Unlike guardians and foster parents, a presumed parent has legal status as a “parent” and enjoys the full panoply of rights attendant to parenthood, including custody of his or her child. “Foster care” and “Indian child custody proceeding” are defined and do not, by their terms, include a proceeding wherein the county seeks, and the dependency court orders, placement of a minor with a presumed parent.

**Immigration Law**

Egregious regulatory violation may support termination of removal proceedings (Paez, J.)

*Sanchez v. Sessions*

9th Cir.; September 19, 2018; 14-71768

The court of appeals granted a petition for review of an order of the Board of Immigration Appeals (BIA) and remanded. The court held that petitioner made a prima facie showing that U.S. Coast Guard officers seized him solely on the basis of his Latino appearance, in egregious violation of federal regulations.

Mexican citizen Luis Sanchez entered the U.S. without inspection in 1988, when he was 17 years old. In 2004, he was granted Family Unity Benefits, which allowed him to reside and work in the U.S. Those benefits expired in 2006. He thereafter remained in the country without lawful status. In 2010, Sanchez took some friends out fishing. The boat’s engine died not far from shore. They called the U.S. Coast Guard for assistance. The responding Coast Guard officers towed Sanchez’s boat back to the harbor, detained Sanchez and his friends, frisked them, and demanded identification. Although Sanchez produced his driver’s license, the Coast Guard contacted Customs and Border Protection (CBP) to report “the possibility of 4 undocumented worker aliens.” CBP officers detained and interrogated Sanchez, and prepared a Form I-213 (Record of Deportable/Inadmissible Alien) that included Sanchez’s admission of his unlawful status. Sanchez was eventually taken into custody and placed in removal proceedings.

Sanchez moved to suppress his statements on the I-213 as the products of Fourth Amendment and regulatory violations. The IJ denied the motion and found Sanchez removable. The BIA upheld that decision.

The court of appeals granted Sanchez’s petition for review, holding that Sanchez made a prima facie showing that he was seized solely on the basis of his Latino appearance. Under 8 C.F.R. §287.8(b)(2), officers must possess “reasonable suspicion” that a person is unlawfully present in the United States before detaining her or him. Detention and interrogation based on racial or ethnic profiling and stereotyping constitutes a particularly egregious violation of §287.8(b) (2). Mere suppression of Sanchez’ statements to the officers, as documented in the I-213 would not remedy that violation, however, because the government has other documents at its disposal that similarly document Sanchez’s unlawful status—specifically, his applications for Family Unity Benefits. Accordingly, where, as here, an individual makes a prima
facie showing of prejudice from a particularly egregious regulatory violation, he or she may be entitled to the termination of removal proceedings without prejudice. The court remanded to the BIA to afford the government an opportunity to rebut Sanchez’s prima facie showing that there was a regulatory violation and that the violation was egregious. If the government fails to rebut Sanchez’s showing that the violation was egregious, the agency shall consider whether Sanchez is entitled to termination without prejudice. Judge Paez wrote separately to reiterate Judge Pregerson’s previously voiced concern regarding the government troubling practice of encouraging noncitizens to apply for immigration relief, and later using that information against them in removal proceedings.
Sanchez v. Sessions, 870 F.3d 901, 904 (9th Cir. 2017), withdrawn, 895 F.3d 1101 (9th Cir. 2018).¹

Neither Sanchez nor his friends could have predicted the sequence of events that produced this outcome. Their plan had been to go fishing for a few hours, but after they had been out for about thirty minutes, the boat unexpectedly lost power. Stranded and with an infant on board, Sanchez’s friend called for emergency assistance. Some time later, United States Coast Guard (“Coast Guard”) officers arrived and towed the boat safely into Channel Islands Harbor, a recreational harbor near Oxnard, California, where Sanchez and his friends were promptly detained, frisked, and asked for identification. Although Sanchez complied and produced his driver’s license, the Coast Guard continued to hold him and his friends without explanation. The Coast Guard also contacted Customs and Border Protection (“CBP”) because they suspected that Sanchez and his friends were “possib[ly]” “undocumented worker[]” aliens.”

Sanchez was eventually taken into custody by CBP and placed in removal proceedings, where he unsuccessfully sought to suppress the Government’s evidence of both his alienage and his entry into the United States without inspection as the products of Fourth Amendment and regulatory violations. Sanchez petitions for review of the agency’s decision to admit the Government’s evidence. We grant the petition and conclude that Sanchez has made a prima facie showing that he was seized solely on the basis of his Latino appearance, which constitutes a particularly egregious regulatory violation. We remand for further proceedings before the IJ so that the Government may rebut Sanchez’s prima facie showing. We hold that the agency may consider on remand after the Government’s rebuttal whether the Coast Guard officers violated 8 C.F.R. § 287.8(b)(2) and if so, whether the violation was egregious and therefore warrants terminating Sanchez’s removal proceedings without prejudice.

I.

Sanchez is a forty-seven year old citizen of Mexico. He was seventeen years old when he entered the United States without inspection in 1988 and has lived in this country ever since. Until December 1, 1988, Sanchez’s father was a legalized Special Agricultural Worker. This meant that Sanchez was eligible to apply for Family Unity Benefits, a program that grants unmarried children of such legalized workers authorization to reside and work in the United States. See 8 C.F.R. § 236.12(a)(1).

Sanchez submitted his Family Unity Benefits and Employment Authorization applications to the United States Citizenship and Immigration Service (“USCIS”) on May 11, 2004. Both applications were granted, with his Family Unity Benefits set to expire on May 11, 2006. Sanchez applied for

¹ Following Judge Pregerson’s death, Judge Wardlaw was drawn to replace him. The newly reconstituted panel withdrew the prior opinion. Portions of this opinion draw from Judge Pregerson’s previous opinion in this case.
an extension in December 2008. This time, however, USCIS denied Sanchez’s applications. USCIS concluded that he was ineligible for Family Unity Benefits and that his prior application for benefits had been approved in error, because he had previously been convicted of several California Vehicle Code violations. See 8 C.F.R. § 236.13(b).

As a result, Sanchez was without lawful status on February 25, 2010, the day he and his friends embarked on their ill-fated fishing trip from Channel Islands Harbor. The weather was balmy and the group planned to go fishing for approximately two hours. The trip was not meant to be particularly arduous: one of Sanchez’s friends brought his fourteen-month-old son and the small recreational boat they took out to sea never made it beyond two or three miles from the harbor—well within United States territorial waters. See Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) (extending U.S. territorial waters to twelve nautical miles from the baseline).

The friends had just settled into their trip when, approximately thirty minutes after leaving the harbor, the boat’s engines lost power. Unable to make their way back to shore, one of Sanchez’s friends called 911 to request assistance. The 911 operator, in turn, contacted the Coast Guard for assistance. The Coast Guard proceeded to tow the boat and its occupants back to Channel Islands Harbor. The Coast Guard officers, however, did not inform Sanchez and his friends that they would be detained once they reached the shore. When Sanchez disembarked from the boat around 5:00 p.m., he was confronted by approximately eight Coast Guard officers waiting to take him into custody. The officers frisked Sanchez and his friends and then ordered them to turn over their identification documents and belongings. Sanchez complied with the officers’ orders and produced his driver’s license, identification documents and belongings. Sanchez responded by filing a motion to suppress and to terminate removal proceedings. He argued that the Coast Guard egregiously violated his Fourth Amendment rights because the detention was based solely on race. He also argued that his detention violated 8 C.F.R. § 287.8(b), which requires that officers possess “reasonable suspicion” that a person is unlawfully present in the United States before detaining her or him. Sanchez contended that the Form I-213 was therefore inadmissible and requested that the IJ terminate removal proceedings.

The IJ denied Sanchez’s motion because he had failed to attach an affidavit in support of his motion; nonetheless, the IJ scheduled a suppression hearing. At the suppression hearing, the Government sought to establish Sanchez’s nationality and entry without inspection by submitting CBP’s National Crime Information Center, and the Treasury Enforcement Communications System.

Sanchez’s testimony was consistent with his affidavit, she declared. Nonetheless, because courts have “also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons,” we “refer[] to the nature of the bias as racial in keeping with the primary terminology” used by the Supreme Court. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

4. The four databases were the Automated Fingerprint Identification System, the Consular Consolidated Database, the National Crime Information Center, and the Treasury Enforcement Communications System.


6. Sanchez argues that the Coast Guard officers engaged in ethnic profiling by detaining him based on his Hispanic or Latino appearance. Nonetheless, because courts have “also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons,” we “refer[] to the nature of the bias as racial in keeping with the primary terminology” used by the Supreme Court. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).
nied his motion and ordered Sanchez removed to Mexico. In her decision, the IJ found that Sanchez had failed to establish a prima facie case of either an egregious Fourth Amendment violation or a regulatory violation. The IJ also concluded that Sanchez’s Family Unity Benefits and Employment Authorization applications were separately and independently admissible to prove Sanchez’s identity.

Sanchez unsuccessfully appealed the IJ’s decision to the Board of Immigration Appeals (“BIA”). In a brief, unpublished decision, the BIA concluded that even assuming the Coast Guard officers violated Sanchez’s rights, the Government was entitled to rely on independent evidence—here, Sanchez’s Family Unity Benefits and Employment Authorization applications—to establish his nationality and identity. The BIA therefore affirmed the IJ’s decision denying Sanchez’s motion to suppress and terminate removal proceedings and the IJ’s removal order.

Sanchez timely petitioned us for review.

II.

We have jurisdiction over final orders of removal pursuant to 8 U.S.C. § 1252. “Where, as here, the BIA adopts the IJ’s decision while adding some of its own reasoning, we review both decisions.” Lopez-Cardona v. Holder, 662 F.3d 1110, 1111 (9th Cir. 2011). “We review constitutional claims and questions of law de novo.” Id.

III.

It is well-established that the exclusionary rule generally does not apply to removal proceedings. See Chuyon Yon Hong v. Mukasey, 518 F.3d 1030, 1034 (9th Cir. 2008). There are, however, two critical exceptions to this rule: (1) when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner’s protected interests, see id. at 1035; and (2) when the agency egregiously violates a petitioner’s Fourth Amendment rights, see Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018 (9th Cir. 2008). Because Sanchez has made a prima facie showing that the Coast Guard officers violated 8 C.F.R. § 287.8(b)(2) when they detained him, we do not address Sanchez’s constitutional argument.

A.

The subject regulation, 8 C.F.R. § 287.8(b)(2), states that “[i]f the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.” As an initial matter, we reject the Government’s argument that the Coast Guard officers who detained Sanchez were not acting as “immigration officers” within the meaning of the regulation.

The Coast Guard is required by law to “enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States.” 14 U.S.C. § 2(1). This includes enforcing all applicable provisions of the Immigration and Nationality Act (“INA”). See Gary W. Palmer, Guarding the Coast: Alien Migrant Interdiction Operations at Sea, 29 Conn. L. Rev. 1565, 1567, 1570 (1997) (explaining that the Coast Guard “enforce[s] compliance with the [INA] on behalf of INS and the Attorney General” (footnote omitted)). The Coast Guard is thus empowered to search, seize, and arrest anyone “for the prevention, detection, and suppression of violations of laws of the United States” as long as the individuals in question are located within the high seas and waters over which the United States has jurisdiction. 14 U.S.C. § 89(a).

The Coast Guard’s broad law enforcement powers are not, however, without restriction. Because they are tasked with “enforcing any law of the United States,” including all those for which they do not have primary enforcement authority, officers of the Coast Guard are considered “agents of the particular executive department or independent establishment charged with the administration of the particular law” subject to “all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.” Id. § 89(b). In practice, 14 U.S.C. § 89(b) ensures that when—as here—Coast Guard officers detain individuals in service of the INA, they act as immigration agents subject to the same regulations as their counterparts in CBP and Immigration and Customs Enforcement (“ICE”).

We therefore conclude that when the Coast Guard officers detained Sanchez, they were acting as “immigration officers” within the meaning of 8 C.F.R. § 287.8(b)(2).

B.

For nearly four decades, it has been the law in our circuit that evidence may be excluded for a regulatory violation as long as three conditions are satisfied: (1) the agency violated one of its regulations; (2) the subject regulation serves a “purpose of benefit to the alien”; and (3) the violation “prejudiced interests of the alien which were protected by the regulation.” Matter of Garcia-Flores, 17 I. & N. Dec. 325, 328 (BIA 1980) (quoting United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979)); see also Chuyon Yon Hong, 518 F.3d at 1035. Sanchez has made a prima facie showing that all three of these conditions have been met here.

I.

Section 287.8(b)(2) requires that officers possess reasonable suspicion on the basis of “specific articulable facts” that a person is unlawfully present in the country before they detain the person. The record before us is devoid of any such

7. Contrary to the Government’s argument, it matters little that the DHS does not formally include Coast Guard officers in its non-exhaustive, regulatory definition of immigration officers. See 8 C.F.R. § 1.2. Lest there be any doubt, 14 U.S.C. § 89(b) declares that Coast Guard officers who act to enforce immigration laws “shall[1] be deemed to be acting as agents” of the relevant immigration agency.
specific articulable facts. CBP’s Form I-213 is remarkably terse in its recitation of events surrounding Sanchez’s detention. The form simply states, in relevant part, that “US Coast Guard was not able to establish positive identity or nationality of the 3 adult males and 14 month infant on board the vessel” and that “US Customs and Border Protection was notified of the possibility of 4 undocumented worker aliens.”

The narrative in the Form I-213 is troubling for two reasons. First, Sanchez consistently testified and maintained throughout his removal proceedings that he provided the Coast Guard with his driver’s license when he was initially detained. A valid driver’s license would, of course, positively establish Sanchez’s identity. Second, Sanchez testified that he was immediately detained and met by a number of Coast Guard officers once they returned to the Channel Island Harbor. The Government has yet to dispute the veracity of Sanchez’s testimony. Crediting both the information in the Form I-213 and Sanchez’s testimony, the record indicates that the Coast Guard officers thought Sanchez was an “undocumented worker alien” before they returned to the harbor.

In other words, as the record currently stands, the officers could not have reasonably suspected Sanchez was unlawfully present in this country for lack of identification because they detained him and called CBP before they asked for identification and obtained Sanchez’s driver’s license.

On these facts, we agree with Sanchez that it appears he was detained solely on the basis of his race. The Government has yet to offer specific and articulable facts that would support the Coast Guard officers’ decision to detain Sanchez on the basis of reasonable suspicion that he was unlawfully present in this country or otherwise engaged in illegal activity. There is no evidence, for instance, that Sanchez’s boat contained contraband of any kind or that he informed the Coast Guard officers before his detention that he had entered the United States without inspection two decades ago. Because race and ethnicity are never grounds for reasonable suspicion, we conclude that Sanchez has made a prima facie showing that the Coast Guard officers who detained him violated 8 C.F.R. § 287.8(b)(2). See United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975) (“We cannot conclude that [the apparent Mexican ancestry of the occupants in a car] furnished reasonable grounds to believe that the three occupants were aliens.”).

2.

We also conclude that 8 C.F.R. § 287.8(b)(2) was promulgated to serve a “purpose of benefit” to petitioners like Sanchez. Calderon-Medina, 591 F.2d at 531.

The Department of Justice (“DOJ”) proposed § 287.8(b)(2)—along with a number of other regulations—to “establish enforcement standards in the areas of force, interrogation and detention not amounting to arrest.” 57 Fed. Reg. 47011 (Oct. 14, 1992). The goal was to “bring immigration officers in line with other Department of Justice law enforcement officers” and to “assure the continuance of disciplined and professional conduct by Service enforcement personnel.” Id. During the notice and comment period, a number of commenters suggested amending the proposed regulation to “include current judicial precedent defining ‘reasonable suspicion’ and the general authority to interrogate and detain.” 59 Fed. Reg. 441093, 42411 (Aug. 17, 1994).

DOJ ultimately declined to adopt the commenters’ suggestions. See id. DOJ explained that it would not “be appropriate to codify” current judicial precedent defining reasonable suspicion because “binding judicial precedent … is subject to revision in the ongoing process of litigation.” Id. (emphasis added) (citing Brewer v. Williams, 430 U.S. 387 (1977)). DOJ thus made clear that the regulation was intended to reflect constitutional restrictions on the ability of immigration officials to interrogate and detain persons in this country—a doctrine rooted in the Fourth Amendment. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1044–45 (1984) (explaining that “the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers,” including “regulations require[ing] that no one be detained without reasonable suspicion of illegal alienage”).

The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons … against unreasonable searches and seizures […] shall not be violated.” U.S. Const. amend. IV. As the Supreme Court has long held, officers may not “stop and briefly detain a person for investigative purposes” under the Fourth Amendment unless they have “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot.’” United States v. Sokolow, 490 U.S. 1, 7 (1989) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). Section 287.8(b)(2) all but parrots this standard: it provides that immigration officers may not briefly detain a person for questioning unless the officer has a “reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States.”

The regulation and the Fourth Amendment standards it reflects are undoubtedly for the benefit of petitioners and not mere best-practices suggestions for immigration officers. We therefore conclude that § 287.8(b)(2) was promulgated for the benefit of petitioners like Sanchez. 9

9. Our conclusion is not affected by 8 C.F.R. § 287.12, which states that all regulations within Part 287 of the Code of Federal Regulation “do not, are not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.” Section 287.12’s bark is worse than its bite. DOJ made clear when it first promulgated section 287.12—previously designated section 287.11—that the provision was “only intended to ensure that the regulations do not create rights not otherwise existing in law.” 57 Fed. Reg. 42406, 42414 (Aug. 17, 1994). DOJ pushed back against concerns that the disclaimer would somehow “preclude victims of unlawful Service enforcement practices from pursuing remedies for regulatory violations,” adding that section 287.12 would not “prevent any party from

8. The IJ acknowledged that Sanchez’s testimony at the suppression hearing was “consistent[] with his declaration.”
This brings us to the final condition that Sanchez must satisfy: prejudice. Ordinarily, it is the petitioner’s responsibility to “specifically identify any prejudice from the violation” that potentially affected the outcome of the petitioner’s removal proceeding. Garcia-Flores, 17 I. & N. Dec. at 328 (quoting Calderon-Medina, 591 F.2d at 532). But where, as here, “compliance with the regulation is mandated by the Constitution, prejudice may be presumed.” Id.; see also Puc-Ruiz v. Holder, 629 F.3d 771, 780 (8th Cir. 2010) (“As a general rule, ... prejudice will have to be specifically demonstrated,” unless compliance with the regulation is mandated by the Constitution, in which case prejudice may be presumed.” (alteration in original) (quoting Garcia Flores, 17 I. & N. Dec. at 328)); Martinez Camargo v. INS, 282 F.3d 487, 492 (7th Cir. 2002) (same). Because 8 C.F.R. § 287.8(b)(2) reflects the Fourth Amendment’s requirement that brief detentions be supported by reasonable suspicion, we presume that Sanchez was prejudiced by the Coast Guard officers’ failure to abide by § 287.8(b)(2)’s requirements.

C.

The BIA erroneously concluded that there was “nothing unreasonable about the Coast Guard seeking assurances that the occupants of ... a vessel are entitled to be present in the United States before allowing them to enter the country.” That is not the test that applies here. The test for an alleged violation of § 287.8(b)(2) is whether the Coast Guard officers possessed reasonable suspicion that Sanchez was unlawfully present in the country when they detained him. Sanchez has made a prima facie showing that the Coast Guard officers did not.

3.

We turn to the heart of this case. A successful prima facie showing of a regulatory violation for evidentiary suppression purposes would normally entitle the petitioner to a remand for the government to rebut the petitioner’s showing. See Matter of Barcenas, 19 I. & N. Dec. 609, 611 (BIA 1988) (explaining that a petitioner must establish a prima facie case for suppression “before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence”). This remedy, however, is beyond Sanchez’s reach. The BIA correctly concluded in the alternative that Sanchez’s unlawful status could be independently established through his Family Unity Benefits and Employment Authorization applications, both of which are admissible.22 Put simply, the Government does not need Sanchez’s Form I-213 to prove that he entered this country without inspection.

Were suppression of tainted evidence the only remedy available to Sanchez, our review—much like the BIA’s—would end here. But that is not the case. In Calderon-Medina, we recognized that regulatory violations may invalidate deportation proceedings. See 591 F.2d at 531. At the time, we did not elaborate on what such an invalidation would entail. Today, we join the Second Circuit and hold that petitioners may be entitled to termination of their removal proceedings without prejudice for egregious regulatory violations. See Rajah v. Mukasey, 544 F.3d 427, 446–47 (2d Cir. 2008) (holding that pre-hearing regulatory violations may be grounds for termination without prejudice if they resulted in “prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights”). Because Sanchez has made a prima facie showing that he was detained solely on the basis of his race and that his detention was contrary to the requirements of § 287.8(b)(2), we grant his petition for review and remand for the agency to determine in the first instance whether termination without prejudice is appropriate here.

The roots of termination without prejudice may be traced back to Calderon-Medina, when we first held that regulatory violations could “invalidate a deportation proceeding.”

IV.

12. It is well-established that “the simple fact of who a defendant is cannot be excluded, regardless of the nature of the violation leading to his identity.” United States v. Del Toro Guadino, 376 F.3d 997, 1001 (9th Cir. 2004). Here, however, Sanchez seeks to suppress evidence that he entered the country without inspection. Accordingly, that aspect of Sanchez’s Form I-213 is suppressible. Because his Family Unity Benefits and Employment Authorization applications predated the Coast Guard officers’ actions, they are admissible. See United States v. Crews, 445 U.S. 463, 472 (1980) (concluding that evidence of the victim’s identity was admissible because it “was known long before there was any official misconduct, and her presence in court [was] thus not traceable to any Fourth Amendment violation”). The fruit-of-the-poisonous-tree doctrine does not extend backwards to taint evidence that existed before any official misconduct took place. See id. at 475 (“The exclusionary rule enjoins the Government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.”).

pursuing relief for alleged violations of the Constitution or laws of the United States.” Id. The agency also clarified that section 287.12 was wholly consistent with United States v. Caceres, 440 U.S. 741 (1979), see 59 Fed. Reg. 42406, 42414, which held that “[a] court’s duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.” Caceres, 440 U.S. at 749 (emphais added); see also Bridges v. Wixon, 326 U.S. 135, 152-53 (1945) (invalidating a deportation order because the INS violated a regulation designed to “afford [petitioners] due process of law”).

Section 287.12 thus leaves in place all regulatory rights derived from the Constitution or federal law. This necessarily includes 8 C.F.R. § 287.8(b)(2), which was promulgated to effectuate the Fourth Amendment.

10. The regulation need not explicitly invoke the Constitution for the Constitution to mandate compliance with the regulation. See Bridges, 326 U.S. at 153 (concluding that a number of regulations, including one requiring statements to be signed and delivered under oath, were “designed as safeguards against essentially unfair procedures” and that the agency’s failure to abide by those regulations necessitated vacating the petitioner’s order of deportation); see also Garcia-Flores, 17 I. & N. Dec. at 328 (citing Bridges approvingly).

11. Sanchez was seized at Channel Islands Harbor, which is not a United States port of entry. See 8 C.F.R. §§ 101.4, 19 C.F.R. §§ 101.1, 101.3. Nor is there any evidence in the record that Sanchez’s boat entered United States territorial waters from international waters.
591 F.2d at 531. Calderon-Medina concerned criminal indictments against two defendants for illegal re-entry following deportation. See id. at 530. The question was whether the defendants’ original deportations had been the unlawful product of a regulatory violation, such that they could not serve as a basis for the defendants’ criminal indictments. See id. We concluded that although the INS had violated its own regulation, remand was necessary to give the defendants an opportunity to show prejudice. See id. at 532. Because it was impossible to invalidate the defendants’ original deportations, which were carried out long before the defendants were criminally indicted for subsequent re-entry, we instructed the district court to dismiss the criminal indictments if the defendants successfully demonstrated prejudice on remand. See id. Put differently, invalidating the defendants’ deportation proceedings in Calderon-Medina meant nullifying their deportations as a legal matter for purposes of their criminal proceedings. Our decision, however, did not limit invalidation of removal proceedings to criminal indictments.13

The BIA’s decision in Garcia-Flores built upon Calderon-Medina and recognized that certain types of regulatory violations can “render subsequent agency actions invalid.” 17 I. & N. Dec. at 328 (emphasis added). This suggests that the invalidation remedy turns on when in the process the regulatory violation occurred. Indeed, the Second Circuit has recognized as much. See Rajah, 544 F.3d at 446-47 (distinguishing between pre-hearing regulatory violations and regulatory violations that take place during a deportation hearing). In Montilla v. INS, 926 F.2d 162 (2d Cir. 1991), for example, the Second Circuit concluded that the IJ presiding over Montilla’s hearing violated a regulation by failing to ask Montilla to state on the record whether he wished to procure representation. See id. at 169. The court then granted Montilla’s petition and remanded for a new hearing. See id. at 170.

Montilla’s remedy fits cleanly within Garcia-Flores’s framework for invalidating deportation proceedings: the regulatory violation took place during the hearing, thereby invalidating the agency’s actions that took place from the hearing onwards—but, critically, not any action that took place before. Montilla was not entitled to termination with prejudice because his initial presence in removal proceedings was not the product of a disqualifying regulatory violation. He was, however, entitled to a new hearing because the IJ’s failure to properly inquire about representation at the start of his hearing rendered the hearing itself invalid. By remanding for a new hearing, the Second Circuit effectively afforded Montilla a new hearing devoid of any of the regulatory infirmities that had taken place at the first one.

Nor is the Second Circuit the only circuit to have recognized the importance of providing petitioners with a clean slate on remand. The Seventh Circuit emphasized in Snajder v. INS, 29 F.3d 1203 (7th Cir. 1994), that the agency’s interference with the petitioner’s regulatory right to counsel “call[s] for the prophylactic remedy of vacating the order of deportation and for writing thereafter on a clean slate.” Id. at 1207 (emphasis added) (quoting Castaneda-Delgado v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975)). Because the agency’s actions tainted Snajder’s hearing, the Seventh Circuit concluded that Snajder’s case “must be remanded for a new hearing.” Id.

Applying our sister circuits’ reasoning to this case, we agree with the Second Circuit that certain kinds of pre-hearing regulatory violations can be remedied only by termination without prejudice as opposed to a new hearing. See Rajah, 544 F.3d at 446-47. Accordingly, we conclude that a petitioner is entitled to termination of their proceedings without prejudice as long as the following requirements are satisfied: (1) the agency violated a regulation; (2) the regulation was promulgated for the benefit of petitioners; and (3) the violation was egregious, meaning that it involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the petitioner. See Calderon-Medina, 591 F.2d at 531; Rajah, 544 F.3d at 447. For this rare subset of cases, simply remanding for a new hearing or for further proceedings will be insufficient because the agency’s violations predate any hearing. Only full termination of the proceedings without prejudice can “effectively cure[] any procedural defect by putting the parties into the position they would have been had no procedural error taken place.” Barton v. INS, 12 F.3d 662, 667 (7th Cir. 1993).

We emphasize that this remedy is reserved for truly egregious cases. Termination without prejudice is undoubtedly burdensome; it effectively means that the agency must hit the reset button and begin deportation proceedings anew. We also acknowledge that the Supreme Court has expressed particular concern with the unique costs of “releas[ing] from custody persons who would then immediately resume their commission of a crime though their continuing, unlawful presence in this country.” Lopez-Mendoza, 468 U.S. at 1050. Nonetheless, we conclude that the costs of termination without prejudice do not outweigh its considerable benefits when the Government crosses the line into conscience-shocking conduct.

“Careless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law.” Montilla, 926 F.2d at 170. This is particularly true when the agency stands accused of singling out persons for detention and deportation based on race or ethnicity. In such circumstances, the Government cannot simply rely on the existence of untainted evidence to continue with removal proceedings that are “tainted from their roots.” Castaneda-Delgado v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975) (quoting United States v. Robinson, 502 F.2d 894, 896 (7th Cir. 1974)). To permit the Government to pick up where it left off would not only do a great disservice to petitioners, who have been subjected to conscience-shocking

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13. Since then, courts have invalidated removal proceedings by remanding for new hearings. See, e.g., Montilla v. INS, 926 F.2d 162 (2d Cir. 1991).
racial and ethnic profiling, but also remove from the table an effective tool for deterrence, specifically, termination without prejudice. See Lopez-Mendoz, 468 U.S. at 1043 (acknowledging the reduced “deterrent value of the exclusionary rule in a civil deportation proceeding”).

B.

Applying our test for termination without prejudice, we conclude that Sanchez has made a prima facie showing that the Coast Guard officers’ violation of § 287.8(b)(2) was conscience-shocking and therefore egregious. Cf. Omni Behavioral Health v. Miller, 285 F.3d 646, 652 (8th Cir. 2002) ("If … Miller conducted his investigation in order to harass Woodlawn employees because of their race, it is possible, if not likely, that such conduct would meet the ‘shock the conscience’ test."). As discussed earlier, see supra pp. 15–16, we agree with Sanchez that the record indicates that the Coast Guard detained him on the basis of his Latino appearance.14 The Government, to date, has offered no explanation for why Coast Guard officers contacted CBP and detained Sanchez and his companions for two hours, even after Sanchez produced his driver’s license. Nor does CBP’s Form I-213 shed much light on the Coast Guard officers’ motivations that afternoon beyond noting that the officers suspected that Sanchez and his companions were “undocumented worker[] aliens.”

It is beyond question that detentions and interrogations based on racial or ethnic profiling and stereotyping egregiously violate § 287.8(b)(2)’s requirement that all detentions be based on reasonable suspicion.15 See, e.g., Maldonado v. Holder, 763 F.3d 155, 159 (2d Cir. 2014) (explaining that a seizure “may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration)” (quoting Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006))). “[W]e have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be ‘repugnant under any circumstances.’” Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 571 n.1 (1976)). “[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring). When the Government ignores this country’s commitment to equality and fairness by engaging in racial and ethnic profiling, it betrays all of its people—citizens, lawful permanent residents, visitors, and migrants alike who live within its borders.

We emphasize that race and ethnicity alone can never serve as the basis for reasonable suspicion. The violation alleged by Sanchez here is egregious both for its grotesque nature and its patent unlawfulness. We therefore conclude that Sanchez has made a prima facie showing of an egregious violation of 8 C.F.R. § 287.8(b)(2).16

V.

When Sanchez first decided to gather his friends for a fishing trip on his boat, he could never have imagined that the short excursion would ensnare him in removal proceedings. Sanchez has since introduced evidence suggesting that the Coast Guard’s decision to detain him was based on his race alone in contravention of 8 C.F.R. § 287.8(b)(2)’s requirements. Nonetheless, because the Government has not yet had an opportunity to introduce evidence rebutting Sanchez’s prima facie showing that the Government egregiously violated the regulation, we grant Sanchez’s petition and remand for further proceedings. On remand, the agency shall afford the Government an opportunity to rebut Sanchez’s prima facie showing that there was both a regulatory violation and that the violation was egregious. If the Government fails to rebut Sanchez’s showing that the violation was egregious, the agency shall consider whether Sanchez is entitled to termination without prejudice.

PETITION FOR REVIEW GRANTED AND REMANDED.

PAEZ, Circuit Judge, concurring:

In our prior panel opinion, Judge Pregerson wrote a separate concurrence expressing his frustration with the Government practice of encouraging noncitizens to apply for immigration relief, and later using that information against noncitizens in removal proceedings. See Sanchez v. Sessions, 870 F.3d 901, 913–14 (9th Cir. 2017) (Pregerson, concurring), withdrawn, 895 F.3d 1101 (9th Cir. 2018). I share these concerns about the dilemma created by the Government’s contradictory positions.

On the one hand, when the Government enacts immigration relief programs—such as driver’s licenses, deferred action, and work authorization—it encourages noncitizens to apply and thereby provide the Government with personal information. See Plyler v. Doe, 457 U.S. 202, 220 (1982) (noting there are “significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”). On the other hand, the Government could at a later date use that personal information against noncitizens—as was the case here with

14. Sanchez has also made a prima facie showing that the Coast Guard violated 8 C.F.R. § 287.8(b)(2) and that the regulation was promulgated for the benefit of petitioners. See supra pp. 13–20.

15. The Government concedes in its brief that a “stop made solely on the basis of ethnicity constitutes an egregious Fourth Amendment violation.” Because 8 C.F.R. § 287.8(b)(2) is premised on Fourth Amendment standards, it follows that such a stop would also egregiously violate the regulation.

16. Consequently, we need not consider whether the Coast Guard and CBP officers also violated other regulations.
Sanchez. Maj. Op. at 21 fn.12. As a result, many noncitizens are reluctant to “come out of the shadows” and “step[] into the potential net of immigration enforcement.” See Angélica Cházaro, Challenging the “Criminal Alien” Paradigm, 63 UCLA L. Rev. 594, 642–43 (2016). I agree with Judge Pregerson that the Government’s practice in this regard contradicts the nation’s longstanding principle of welcoming immigrants into our communities. Judge Pregerson’s concurrence is quoted in full below:

I write separately to explain why it is unfair for the Government to encourage noncitizens to apply for immigration relief, and at a later date use statements in those relief applications against noncitizens in removal proceedings.

The Government should not be permitted to use noncitizens’ applications for immigration relief to remove noncitizens from their homes and their families in our country. When the Government enacts immigration relief programs, it encourages noncitizens to apply because there are “significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” Plyler v. Doe, 457 U.S. 202, 220 (1982).

The Government asks noncitizens to provide personal information to receive benefits, such as driver’s licenses, visas, deferred action, and work authorization. But because noncitizens are afraid that the Government could at a later date use that information against them, many are reluctant to apply. See Angélica Cházaro, Challenging the “Criminal Alien” Paradigm, 63 UCLA L. Rev. 594, 642–43 (2016) (“Coming out of the shadows to be counted and accounted for, however, while it may bring the benefits of work authorization and a social security number, involves stepping into the potential net of immigration enforcement.”).

The Government’s practice in this regard contradicts the principle of welcoming immigrants into our communities. This practice also contradicts President Kennedy’s view that our nation’s “[i]mmigration policy should be generous; it should be fair; it should be flexible.” John Fitzgerald Kennedy, A Nation of Immigrants (1964).

We should encourage, not punish, noncitizens who come out of the shadows seeking avenues to lawful status.

I am also concerned about the Government’s argument that the exclusionary rule does not apply to Sanchez’s Family Unity Benefits and Employment Authorization applications because they predate the egregious constitutional violation. See United States v. Del Toro Gudino, 376 F.3d 997 (9th Cir. 2004).

Categorically exempting applications that predate an egregious constitutional violation from the exclusionary rule allows immigration and other law enforcement agencies to prey on migrant and working-class communities. Law enforcement officers can unconstitutionally round up migrant-looking individuals, elicit their names, and then search through Government databases to discover incriminating information in pre-existing immigration records. See Eda Katharine Tinto, Policing the Immigrant Identity, 68 Fla. L. Rev. 819, 864 (2016).

Nothing prevents law enforcement from engaging in this unfair tactic if, as the Government contends, immigration records that predate an egregious constitutional violation can never be the fruit of the poisonous tree. See Elkins v. United States, 364 U.S. 206, 217 (1960) (“[T]he purpose [of the exclusionary rule] is … to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”); United States v. Olivares-Rangel, 458 F.3d 1104, 1120 (10th Cir. 2006) (“[T]he deterrence purpose of the exclusionary rule would effectively be served only by excluding the very evidence sought to be obtained by the primary illegal behavior, not just the means used to obtain that evidence.”).

This troubling end-around the exclusionary rule corrupts our justice system. The Government should not be allowed to flout the protections of the Fourth Amendment and then use a noncitizen’s application for immigration relief against her or him. We should foster communication, not distrust, between migrant communities and law enforcement.

See Sanchez, 870 F.3d at 913–14 (Pregerson, concurring).
Cite as 18 C.D.O.S. 9453


No. 15-15791
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-01038-SMM


No. 15-15794
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-00464-SMM


No. 15-16561
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-00465-SMM

SAROSHA HOGAN; NICHOLAS JACKSON; SKYLAR VAZQUEZ; THOMAS ARMSTRONG; PHILIP TODD; MARIA HURKMANS, Plaintiffs-Appellants, v. AMERICAN MULTI-CINEMA, INC., DBA AMC Theatres Esplanade 14, Defendant-Appellee.

No. 15-16659
United States Court of Appeals for the Ninth Circuit

NATHAN LLANOS, an individual, Plaintiff-Appellant, v. P.F. CHANG’S CHINA BISTRO, INC., Defendant-Appellee.

No. 16-15003
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-00261-SMM

KRISTEN ROMERO, an individual, Plaintiff-Appellant, v. P.F. CHANG’S CHINA BISTRO, INC., Defendant-Appellee.

No. 16-15004
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-00262-SMM

ANDREW FIELDS, an individual, Plaintiff-Appellant, v. P.F. CHANG’S CHINA BISTRO, INC., Defendant-Appellee.

No. 16-15005
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-00263-SMM

ALTO WILLIAMS, Plaintiff-Appellant, v. AMERICAN BLUE RIBBON HOLDINGS, LLC, Defendant-Appellee.

No. 16-15118
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-01467-SMM

STEPHANIE R. FAUSNACHT, Plaintiff-Appellant, v. LION’S DEN MANAGEMENT LLC, DBA Denny’s, Defendant-Appellee.

No. 16-16033
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:15-cv-01561-SMM
Appeals from the United States District Court for the District of
Arizona
Stephen M. McNamee, Senior District Judge, Presiding
Argued and Submitted En Banc March 20, 2018
San Francisco, California
Filed September 18, 2018
Opinion by Judge Paez;
Partial Concurrence and Partial Dissent by Judge Graber;
Dissent by Judge Ikuta

COUNSEL

Paul DeCamp (argued), Jackson Lewis P.C., Reston, Virginia; Stephanie M. Cerasano, Jackson Lewis P.C., Phoenix, Arizona; for Defendant-Appellee P.F. Chang’s China Bistro.

David A. Selden, Julie A. Pace, and Heidi Nunn-Gilman, The Cavanagh Law Firm, Phoenix, Arizona; for Defendant-Appellee Romulus, Inc.

Robert W. Horton and Mary Leigh Pirtle, Bass Berry & Sims PLC, Nashville, Tennessee; Eric M. Fraser, Osborn Maledon P.A., Phoenix, Arizona; for Defendant-Appellee J. Alexander’s LLC.

Karen L. Karr, K. Leone Karr Law Office, Scottsdale, Arizona, for Defendants-Appellees Arriba Enterprises Inc. and Lion’s Den Management LLC.


Caroline Larsen and Alexandra J. Gill, Ogletree Deakins Nash Smoak & Stewart P.C., Phoenix, Arizona, for Defendant-Appellee American Blue Ribbon Holdings LLC.

Sarah K. Marcus (argued), Senior Attorney; Paul L. Frieden, Counsel for Appellate Litigation; Jennifer S. Brand, Associate Solicitor; M. Patricia Smith, Solicitor of Labor; Office of the Solicitor, United States Department of Labor, Washington, D.C., for Amicus Curiae Secretary of Labor.

OPINION

PAEZ, Circuit Judge:

Congress enacted the Fair Labor Standards Act (“FLSA”) in 1938 in response to a national concern that the price of American development was the exploitation of an entire class of low-income workers. President Roosevelt, who pushed for fair labor legislation, famously declared: “The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.” S. Rep. No. 93-690, at 4 (1974).

The FLSA thus safeguards workers from poverty by preventing employers from paying substandard wages in order to compete with one another on the market. See id. And yet, the plaintiffs in these consolidated cases allege that the defendant employers have done exactly that.

The FLSA permits employers to take a tip credit for employees in tipped occupations. See 29 U.S.C. § 203(m). The tip credit offsets an employer’s obligation to pay the hourly minimum wage; employers may therefore pay as little as $2.13 per hour to tipped employees under federal law. 29 C.F.R. § 531.59. If the employee’s tip credit wage and tips do not meet minimum wage, however, the employer must make up the difference. See 29 U.S.C. § 203(m).

Alec Marsh and thirteen other former servers and bartenders1 allege that their employers abused the tip credit provision by paying them the reduced tip credit wage and treating them as tipped employees when they were engaged in either (1) non-tipped tasks unrelated to serving or bartending, such as cleaning toilets; or (2) non-incidental tasks related to serving or bartending, such as hours spent cleaning and maintaining soft drink dispensers in excess of 20% of the workweek. Using the tip credit in such a manner effectively makes tips—intended as gifts to servers for their service—payments to employers instead, who use these tips to minimize their obligations to pay employees the full minimum wage for time spent working in a non-tipped occupation.2 Furthermore, by

1. The thirteen other servers and bartenders are Crystal Sheehan (No. 15-15794); Silvia Alarcon (No. 15-16561); Sarosha Hogan, Nicholas Jackson, Skylar Vazquez, Thomas Armstrong, Philip Todd, and Maria Hurnkmans (No. 15-16659); Nathan Llanos (No. 16-5003); Kristen Romero (No. 16-15004); Andrew Fields (No. 16-15005); Alto Williams (No. 16-15118); and Stephanie Fausnacht (No. 16-16033).
2. In the dissent’s view, employers do not abuse tipped employees as long as the employees receive minimum wage. Dissent at 58 n.2. But, the DOL was entitled to conclude otherwise. Congress has gradually increased the minimum wage over the years to “eliminate[e] labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” H.R. Rep. No. 89-1366, at 2 (1966) (emphasis added). The minimum wage is meant to be a floor, not a ceiling: it is the bare minimum necessary to secure “the very lowest standards” of living. Id. at 6. By crediting a server’s tips towards their obligations to pay full minimum wage for time employees spend working in a non-tipped occupation,
employers deprive servers the full value of their tips, which are the property of the employee, see 29 C.F.R. § 531.52, and make it significantly more difficult for the server to earn a living beyond minimum wage. The dissent’s protestations to the contrary miss the forest for the trees: the issue is not whether tipped employees are entitled to the full minimum wage, but whether employers can allegedly eliminate or significantly reduce their need to hire full-time janitors and cooks, cooks—who—as non-tipped workers—are entitled to the full minimum hourly wage and therefore cost more to employ.

We conclude today that the Department of Labor (“DOL”) foreclosed an employer’s ability to engage in this practice by promulgating a dual jobs regulation in 1967, 29 C.F.R. § 531.56(e), and subsequently interpreting that regulation in its 1988 Field Operations Handbook. We agree with Marsh that both the regulation and the agency’s interpretation are entitled to deference. Because Marsh has stated a claim under the FLSA for minimum wage violations, we reverse the district court’s judgments and remand for further proceedings consistent with this opinion.

I.

Alec Marsh worked as a server at J. Alexander’s, a chain restaurant with at least one location in Phoenix, Arizona, from November 2012 to April 2013. Marsh typically worked around thirty-two hours per week, but spent almost half his time on tasks that did not produce tips, such as cutting and stocking fruit, cleaning the soft drink dispenser and nozzles, replacing soft drink syrups, stocking ice, taking out the trash, scrubbing the walls, and cleaning the restrooms. These tasks often took place out of customer view, either before the restaurant had opened or after it had closed. For example, Marsh was required to stock ice, brew tea, and cut and stock fruit every opening shift and to wipe down tables and collect and take out the trash every closing shift. In return for his labor, J. Alexander’s paid Marsh an hourly tip credit wage of $4.65 per hour in 2012 and $4.80 per hour in 2013 pursuant to Arizona law. See Ariz. Rev. Stat. § 23-363 (2007).

Marsh filed suit, alleging that J. Alexander’s use of the tip credit wage violated the FLSA’s minimum wage requirements. See 29 U.S.C. § 206(a). Marsh’s complaint alleged that, pursuant to the DOL’s dual jobs regulation, he was a dual job employee working in multiple occupations— one tipped, and the others not—because J. Alexander’s required him to complete tasks unrelated to his tipped occupation, such as cleaning the restrooms, and to spend well over 20% of his time per week on tasks related to his occupation that did not in and of themselves produce tips, such as brewing coffee. Marsh alleged that although J. Alexander’s was entitled to pay him a tip credit wage for the time he spent working in his tipped occupation as a server, it was not entitled to continue paying him the tip credit wage for time spent working in an untipped occupation.

Under this theory, J. Alexander’s violated the FLSA’s minimum wage requirements when it failed to pay Marsh the full hourly minimum wage for time spent working in an untipped occupation. Marsh requested compensation equal to the difference between the wages he was paid and Arizona’s minimum wage.

A few months after filing his complaint, Marsh moved for leave to file a first amended complaint. The proposed first amended complaint detailed how much time Marsh spent completing each untipped task in a given workweek and estimated his compensation for time engaged in a non-tipped second occupation at $3.00 per hour. As the original complaint, the amended complaint alleged two violations of the FLSA and the dual jobs regulation: the first for failing to pay Marsh the full minimum wage for time spent in excess of 20% of his workweek on non-tipped, related duties; and the second for failing to pay Marsh full minimum wage for time spent on unrelated duties.

J. Alexander’s moved to dismiss the original complaint. The district court granted the motion, denied Marsh’s motion to file an amended complaint, and dismissed Marsh’s suit with prejudice. The court concluded that Marsh failed to state an FLSA claim as a matter of law for three reasons: (1) Marsh could not state a minimum wage violation pursuant to United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487 (2d Cir. 1960), as long as he was paid minimum wage per workweek, irrespective of how much he was actually paid per hour; (2) the dual jobs regulation, 29 C.F.R. § 531.56(e), is unambiguous and does not recognize that servers like Marsh work in different occupations when the non-tipped tasks are related to the tipped occupation; and (3) even if the dual jobs regulation is ambiguous, the DOL’s interpretation of the regulation in its 1988 Field Operations Handbook (the “Guidance”)—which treats the performance of related duties in excess of 20% of an employee’s workweek as a different occupation—is not entitled to Auer deference.

Marsh timely appealed. A divided panel of this court agreed with the district court that the DOL’s interpretation of its dual jobs regulation was not entitled to deference. See Marsh v. J. Alexander’s LLC, 869 F.3d 1108 (9th Cir. 2017). The panel majority concluded that the Guidance’s focus on duties and tasks was inconsistent with the dual jobs regulation’s focus on jobs and characterized the Guidance as less an interpretation entitled to Auer deference than a de facto new regulation masquerading as an interpretation. See id. at 1121–24. The panel majority, however, vacated the district court’s dismissal of the suit and remanded to give Marsh an opportunity to file an amended complaint. See id. at 1127.
A majority of the non-recused active judges voted to grant Marsh’s petition for rehearing en banc. See Marsh v. J. Alexander’s LLC, 882 F.3d 777 (9th Cir. 2018). We reverse the district court’s judgments and conclude, as the Eighth Circuit did in Fast v. Applebee’s Int'l, Inc., 638 F.3d 872 (8th Cir. 2011), that the Guidance is entitled to Auer deference.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court’s final orders and its interpretation of the relevant statutory and regulatory provisions. See Shaver v. Operating Eng’rs Local 428 Pension Tr. Fund, 332 F.3d 1198, 1201 (9th Cir. 2003) (motion to dismiss).

III.

This case revolves around several statutory and regulatory provisions and agency guidance governing the payment of wages to tipped employees: the FLSA, the dual jobs regulation, and the Guidance. Although the FLSA guarantees all workers a federal minimum wage of $7.25 per hour, see 29 U.S.C. § 206(a)(1), employers may pay tipped employees a reduced tip credit wage below the hourly minimum wage, see id. § 203(m). A tipped employee is “any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.” Id. § 203(t). Employers may therefore take up to a $5.12 tip credit against the full hourly minimum wage and pay tipped employees as little as $2.13 per hour in cash wages so long as the employee’s tips bring him or her up to minimum wage. See Fast, 638 F.3d at 874–75. If, however, a server’s tips fall short of covering the minimum wage, the employer must increase the employee’s cash wage to make up the difference. See Cumbie v. Woody Woo, Inc., 596 F.3d 577, 580 (9th Cir. 2010).

Seeking to clarify the meaning of a “tipped employee” under the statute—including what constitutes an “occupation” that “customarily and regularly” receives tips—the DOL promulgated several regulations in 1967. One of these regulations, 29 C.F.R. § 531.56, explains that “[a]n employee employed full time or part time in an occupation in which he does not receive more than $30 a month in tips customarily and regularly is not a ‘tipped employee’ within the meaning of [the FLSA]” and that a calendar month need not be used to determine whether an employee meets the $30-a-month benchmark. Id. § 531.56(a), (b). The DOL also included a provision in this regulation directly addressing situations in which an employee is employed in dual jobs, one tipped and one not. This dual jobs regulation states in full:

Dual jobs. In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R. § 531.56(e) (emphases added).

The dual jobs regulation initially generated some confusion among employers, who were unsure whether their tipped employees qualified as dual job employees. The DOL consequently issued several opinion letters in an attempt to delineate the boundaries of the dual jobs regulation. The DOL ultimately released a guidance addressing the dual jobs regulation in its Wage and Hour Division’s Field Operations Handbook (“FOH”) in 1988, which the DOL revised in 2012. See FOH § 30d00(e) (1988) (the “Guidance”). Judge Ikuta calls the Guidance a new rule promulgated by the DOL, but it is clearly an interpretation in line with that of the DOL’s prior opinion letters. The most recent version of the Guidance states:

(1) When an individual is employed in a tipped occupation and a non-tipped occupation, for example, as a server and janitor (dual jobs), the tip credit is available only for the hours spent in the tipped occupation, provided such employee customarily and regularly receives more than $30.00 a month in tips. See 29 CFR 531.56(e).
(2) 29 CFR 531.56(e) permits the employer to take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washes dishes or glasses.

(3) However, where the facts indicate that tipped employees spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.

(4) Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

FOH § 30d00(f) (2016) (emphases added). 7 The Guidance thus clearly contemplates that a server who performs unrelated tasks, such as cleaning restrooms, is a dual job employee entitled to the full minimum hourly wage for her unrelated work. The Guidance also clearly lays out that a server is a dual job employee if her related tasks occupy more than 20% of her hours in a workweek.

The dissent takes issue with the 2012 update to the Guidance 8 and asserts that this was the first time the agency “provided that employers could not take a tip credit for any time employees spent on tasks that did not directly relate to serving customers.” Dissent at 61–62. This presumes, of course, that prior to 2012, the DOL would have permitted employers to take a tip credit even for hours a server spent on tasks unrelated to their tipped occupation. As we discuss infra, the dual jobs regulation squarely forecloses that line of argument by distinguishing between a tipped employee who spends some time completing related, but untipped work, and a dual job employee who works as a maintenance man part of the time and a server the rest. 29 C.F.R. § 531.56(e). Accordingly, if both the Guidance and the dual jobs regulation are entitled to deference, then Marsh has alleged facts sufficient to make out an FLSA minimum wage violation claim. We turn to those questions. 9

A.


I.

As an initial matter, it is beyond question that the DOL promulgated the dual jobs regulation, 29 C.F.R. § 531.56, in the exercise of its congressionally delegated authority. See United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). Congress amended the FLSA in 1966 by defining “tipped employee” for the first time, see 29 U.S.C. § 203(t), and adding a formula for calculating the wage of a tipped employee, see id. § 203(m). See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 80 Stat. 830, 830. The 1966 Amendments authorized the Secretary of Labor “to promulgate necessary rules, regulations, or orders with regard to

7. This formulation represents the DOL’s current interpretation of the dual jobs regulation and may be found online at https://www.dol.gov/whd/FOH/FOH_Ch30.pdf. The 20% benchmark has been in place since the Guidance was first issued in 1988. The 1988 version of the Guidance provided in full:

Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e., maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

8. The dissent’s characterization of the Guidance as a “Time-Tracking Rule” is a novel one. Dissent at 62. Neither the district court nor the parties referred to the Guidance in this manner. Indeed, the prior panel opinion—which was authored by Judge Ikuta—never mentioned this “Time-Tracking Rule.” See Marsh v. J. Alexander’s LLC, 869 F.3d 1108 (9th Cir. 2017), rehg en banc granted by Marsh v. J. Alexander’s LLC, 882 F.3d 777 (9th Cir. 2018) (referring to the Guidance as “the FOH § 30d00(f),” “the FOH,” and “the guidance”).

9. We are not the first circuit to grapple with these questions. The Eighth Circuit addressed similar claims brought by tipped employees in Fast v. Applebee’s Int’l Inc., 638 F.3d 872 (8th Cir. 2011). The employers in Fast, however, conceded that the dual jobs regulation was entitled to Chevron deference. See id. at 877. The Eighth Circuit focused instead on whether the Guidance was entitled to Auer deference. The court concluded that because the dual jobs regulation was ambiguous and included temporal considerations, the Guidance was not plainly erroneous or inconsistent with the regulation and was therefore entitled to deference. See id. at 879–80. Accordingly, the district court did not err when it denied the employer’s motion for summary judgment. See id. at 882.
the amendments made by this Act.” Id. at § 603, 80 Stat. at 844. Shortly thereafter, the DOL issued a notice of proposed rulemaking aimed at “expand[ing] 29 CFR Part 531 to make provisions responsive” to the “Fair Labor Standards Amendments of 1966,” specifically the newly amended sections 203(m) and 203(t) regarding tipped employees. 32 Fed. Reg. 222, 222 (Jan. 10, 1967). This process eventually produced the dual jobs regulation, 29 C.F.R. § 531.56(e). See 32 Fed. Reg. 13,575 (Sept. 27, 1967).

Defendants nonetheless urge us to conclude that Chevron deference is inapplicable in this instance because the dual jobs regulation was promulgated without adequate notice and an opportunity to comment. This argument, however, is decades too late. See Perez-Guzman v. Lynch, 835 F.3d 1066, 1077 (9th Cir. 2016), cert. denied, 138 S. Ct. 737 (2018) (“Procedural challenges to agency rules under the Administrative Procedure Act are subject to the general six-year limitations period in the U.S. Code.”); see also 28 U.S.C. § 2401(a). The dissent may object to the way the DOL promulgated the dual jobs regulation, but as a matter of law, such procedural challenges to the regulation here are indisputably untimely and beyond our scope of review. Dissent at 58–60. We therefore conclude that Mead’s requirements have been met. 533 U.S. at 226–27.

2. Applying the Chevron framework, we next ask whether “Congress has directly spoken to the precise question at issue.” 467 U.S. at 842. We conclude that it has not.

Section 203(t) defines a tipped employee as “any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.” 29 U.S.C. § 203(t). The FLSA, however, does not separately define “occupation.” Id. Nor does the statute shed light on the meaning of “customarily and regularly.” Id. Counsel for Defendants urge us to conclude that the use of the word “occupation” in section 203(t) was not “intended to do a lot of work” and that the statute is therefore “not ambiguous.” United States Court of Appeals for the Ninth Circuit, 15-15791 Alec Marsh v. J. Alexander’s LLC, YouTube (Mar. 20, 2018) at 47:10–47:15; 49:45–49:51. We decline to treat Congress’s choice of words so dismissively; to the contrary, we must presume that Congress’s choice of words is deliberate. See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 355 (2013). Accordingly, we agree with the Eighth Circuit that where, as here, Congress has crafted an ambiguous statute and tasked the DOL with implementing the ambiguous provisions, we must “defer to the agency’s regulation so long as it is not arbitrary, capricious, or manifestly contrary to the statute.” Fast, 638 F.3d at 876 (internal quotation marks omitted).

Contrary to Defendants’ assertions, the FLSA’s legislative history does not “evince an unambiguous congressional intention” to treat all employees as tipped employees, regardless of their tasks or time spent on untipped tasks. Chem. Mfrs. Ass’n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 129 (1985). At most, Congress suggested in a Senate report—published seven years after the DOL promulgated its dual jobs regulation—that “[i]n establishments where the employee performs a variety of different jobs, the employee’s status as one who ‘customarily and regularly receives tips’ will be determined on the basis of the employee’s activities over the entire workweek.” S. Rep. No. 93-690, at 43 (1974).

Under Defendants’ view, this sentence indicates that section 203(t) unambiguously allows employers to take a tip credit for every hour an employee spends working, as long as the employee’s total tips exceed $30 per month—even if the employee engages in tipped work only 10% of the time. See United States Court of Appeals for the Ninth Circuit, 15-15791 Alec Marsh v. J. Alexander’s LLC, YouTube (Mar. 20, 2018) at 34:43–35:45.

But this sentence does not bear the weight Defendants put on it. Critically, the legislation accompanying the 1974 report did not make any changes to section 203(t). Further, the report expressly recognized “the ethical question involved in crediting tips toward the minimum wage” and emphasized that tipped employees “should have stronger protection to ensure the fair operation” of the tip credit provision. S. Rep. No. 93-690 at 42–43. Neither the plain language of the statute nor its legislative history suggest—much less clearly demonstrate—that section 203(t) is unambiguous.

3. Having concluded that the FLSA “is silent or ambiguous” with respect to the treatment of employees who make more than $30 a month in tips but who may be engaged in multiple occupations, we consider “whether the agency’s answer is based on a permissible construction of the statute.” Chevron, 467 U.S. at 843. We conclude that it is.

The 1966 amendments to the FLSA were intended to “improve living standards by eliminating substandard working conditions in employment” and to bring the law up to date with the “advancing economy,” which had outpaced the FLSA’s worker protections. H.R. Rep. No. 89-1366, at 10 (1966). Later amendments to the FLSA stressed the importance of guaranteeing “a fair day’s pay for a fair day’s work.” H.R. Rep. No. 93-913, at 8 (1974). The dual jobs regulation, which was promulgated to give effect to new statutory provisions addressing tipped employees, was neither an arbitrary reversal of a prior agency position nor “manifestly contrary to the statute.” Chevron, 467 U.S. at 844. Confronted with a gap in the FLSA’s coverage of dual job employees, the DOL reasonably exercised its authority to fill that gap by ensuring that employees working in tipped and untipped occupations would not be shortchanged by their employers.

Defendants concede that under the FLSA, if some of an employee’s tasks were outside the scope of a tipped occupation, the employee would be engaging in non-tipped employment for which the employer would not be entitled to take a tip credit. See United States Court of Appeals for the Ninth Circuit, 15-15791 Alec Marsh v. J. Alexander’s LLC, YouTube
The dual jobs regulation establishes that an employee is entitled to the full minimum wage for any time spent in a non-tipped occupation. See 29 C.F.R. § 531.56(e). Thus, an employee who serves as both a maintenance man and a waiter in a hotel “is a tipped employee only with respect to his employment as a waiter.” Id. This provision prevents employers from paying maintenance workers as little as $2.13 an hour, simply because they also happen to work as servers. Having concluded that the dual jobs regulation “is a reasonable choice within a gap left open by Congress, the challenge must fail.”10 Chevron, 467 U.S. at 866.

B.

Our inquiry, however, does not end with the dual jobs regulation. For Marsh to state a claim under the FLSA, we must also conclude that the Guidance—which establishes the 20% related duties benchmark and separates occupations by duties—is entitled to judicial deference under either Auer v. Robbins, 519 U.S. 452 (1997), or Skidmore v. Swift & Co., 323 U.S. 134 (1944). See Indep. Training & Apprenticeship Program v. Cal. Dep’t of Indus. Relations, 730 F.3d 1024, 1035 (9th Cir. 2013). Because the dual jobs regulation is ambiguous and the Guidance’s interpretation is both reasonable and consistent with the regulation, we agree with the Eighth Circuit that the Guidance is entitled to Auer deference.11 See Fast, 638 F.3d at 880–81.

I.

“[W]here an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under Auer unless ‘plainly erroneous or inconsistent with the regulation.’” Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (quoting Auer, 519 U.S. at 461). “Under this standard, we defer to the agency’s interpretation of its [ambiguous] regulation unless an ‘alternative reading is compelled by the regulation’s plain language or by other indications of the [agency’s] intent at the time of the regulation’s promulgation.’” Id. at 391 (emphasis and second alteration in original) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). Interpretations that “do[] not reflect the agency’s fair and considered judgment of the matter in question” or unfairly surprise regulated parties are not entitled to Auer deference. Christopher v. SmithKline, 567 U.S. 142, 155–56 (2012) (quoting Auer, 519 U.S. at 462).

We agree with Marsh that the dual jobs regulation is ambiguous.12 The dual jobs regulation, like the FLSA, does not offer a precise definition for “occupation.” Instead, the regulation relies on a series of examples to illustrate the difference between a tipped employee and a dual job employee engaged in both a tipped and an untipped occupation. See 29 C.F.R. § 531.56(e). The regulation explains that a person working as both a maintenance man and a server is obviously “employed in two occupations,” such that “no tip credit can be taken for his hours of employment in his occupation of maintenance man.” Id. But it does not explain how to classify the person’s occupation—whether through official title, expected duties, or some other method. See Fast, 638 F.3d at 877.

The second half of the dual jobs regulation suggests that the DOL likely intended to tie a person’s occupation to his or her duties. See 29 C.F.R. § 531.56(e) (explaining that the maintenance man/server’s situation is “distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses”). But like a door leading to

10. We note that in many of the challenges to the Guidance, the employers do not contest that the dual jobs regulation is entitled to Chevron deference. See, e.g., Fast, 638 F.3d at 877; Knox v. Jones Grp., 201 F. Supp. 3d 951, 961 n.8 (S.D. Ind. 2016); Chavez v. T&B Mgmt., LLC, No. 1:16cv1019, 2017 WL 2275013, at *5 (M.D.N.C. May 24, 2017). In cases where defendants have disputed whether Chevron applied, the argument has not been successful. See, e.g, Flood v. Carlson Rests. Inc., 94 F. Supp. 3d 572, 583 n.9 (S.D.N.Y. 2015); Goodson v. OS Rest. Servs., LLC, No. 5:17-cv-10-0c-37PRL, 2017 WL 1957079, at *6 (M.D. Fla. May 11, 2017).

11. The Eighth Circuit deferred to an earlier version of the Guidance, see FOH § 30d00(e) (1988). The differences between the current version of the Guidance and its predecessor, however, are immaterial because both utilize the 20% benchmark.

12. Unlike with Chevron deference, there is no preliminary analysis that precedes Auer’s two-step analysis. Cf. Oregon Rest. and Lodging Ass’n v. Perez, 815 F.3d 1080, 1086 n.3 (9th Cir. 2016) (acknowledging that United States v. Mead Corp., 533 U.S. 218 (2001) created a “Chevron step zero” that precedes the Chevron test). There is certainly no mandatory “threshold question” regarding whether the interpretation in question is a “legislative rule” as opposed to an interpretation. Dissent at 64. The dissent’s reliance on Mission Group Kansas, Inc. v. Riley, 146 F.3d 775 (10th Cir. 1998), and Director, OWCP v. Mangifest, 826 F.2d 1318 (3d Cir. 1987), to establish the boundaries of Auer deference is puzzling. Dissent at 64–65. For one, neither case mentions Auer—indeed, Mangifest predates Auer by over nine years. For another, the Supreme Court has never adopted a pre-Auer test that asks at the outset whether an interpretation is a regulation in disguise. In fact, the Supreme Court’s case law seems to suggest the exact opposite. In Christensen v. Harris County, 529 U.S. 576 (2000), the Supreme Court held that if a court determines at step one of Auer that a regulation is ambiguous, the court cannot defer to the agency’s position because that would sanction the de facto creation of a new regulation to override a previously existing one. Id. at 588. The dissent’s citation to Gonzales v. Oregon, 546 U.S. 243 (2006), does nothing to make up the paucity of case law supporting the dissent’s interpretation of Auer, in part because the dissent omits critical context in describing the Court’s holding. Gonzales made clear that Auer deference was inappropriate because the supposedly ambiguous regulation at issue simply parroted the statute. Id. at 257. Because “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language,” the Court concluded that Auer deference was inapplicable to the interpretive rule at issue. This is a well-established exception to Auer deference that has no bearing on this case. None of the Defendants argue that the dual jobs regulation merely parrots the language of the FLSA, nor could they give the obvious differences.

The Defendants were free to separately challenge whether the Guidance should have gone through notice-and-comment rulemaking. That they did not means this argument is waived. See infra p. 37 n.19.
more doors, this clarification only produces more questions. As the Eighth Circuit recognized, although the regulation establishes that a server who spends “part of her time” cleaning tables and “occasionally” washing dishes is not a dual job employee, see id., the regulation does not define either ambiguous, temporal term. 13 See Fast, 638 F.3d at 877. If a server spends 10% of her time washing dishes, does that qualify as “occasional”? What about 30%? The regulation’s silence on this point is compelling evidence of its ambiguity. We therefore disagree with Judge Graber’s reading of the regulation. See Partial Concur. at 48–49. Had the DOL intended to unambiguously foreclose servers from being dual job employees regardless of the amount of time they spend on related, but untipped duties, the regulation would not include the temporal limitations it does. Instead, the dual jobs regulation would have read: “Such a situation is distinguishable from that of a waitress who spends her time serving customers or completing related, but untipped tasks, such as cleaning and setting tables, toasting bread, and making coffee.” By restricting related duties with limitations such as “occasionally,” “part of [the] time,” and “taking a turn,” the dual jobs regulation necessarily distinguishes between single-job employees who only occasionally complete related tasks, and dual-job employees who regularly do. 14 What the regulation leaves undefined is the point at which this transformation occurs.

The same is true of the regulation’s reference to “related duties,” 29 C.F.R. § 531.56(e), which suggests two distinctions: one between related and unrelated duties; and the other between duties related to a tipped occupation and duties that are part and parcel of a tipped occupation. The regulation states that cleaning tables, washing dishes, making coffee, and toasting bread are all duties related to a server’s occupation, but offers no guidance as to other duties, such as cleaning the restroom or chopping fruits and vegetables in the kitchen. See id. The regulation also leaves open the possibility that when a tipped employee engages in tasks related to her tipped occupation—but which are not actually synonymous with her tipped occupation—more than occasionally or part of the time, those related tasks form a separate, untipped job for which the employer is not entitled to take a tip credit. These interpretive gaps, including the regulation’s failure to “define ‘related duties,’” Fast, 638 F.3d at 877, all serve as additional evidence of the regulation’s ambiguity.

2.

Having concluded that the dual jobs regulation is ambiguous, we next consider whether the Guidance is “plainly erroneous or inconsistent with the regulation.” Auer, 519 U.S. at 461 (internal quotation marks omitted). The DOL’s interpretation is consistent with nearly four decades of interpretive guidance and with the statute and the regulation itself. Together, these factors strongly counsel in favor of applying Auer deference to the Guidance.

The dual jobs regulation relies on two undefined factors to determine whether an employee is a dual-job employee: (1) the relatedness of an employee’s duties to a tipped occupation and (2) the amount of time an employee spends on completing related but untipped duties. See 29 C.F.R. § 531.56(e) (clarifying that an employee who spends “part of her time” on duties “related” to her tipped occupation that are not themselves “directed toward producing tips” is not a dual jobs employee). In the decades following the regulation’s promulgation, the DOL continuously endeavored to provide employers with further guidance on the regulation in the form of opinion letters. These efforts eventually culminated in the creation of the Guidance in the DOL’s Field Operations Handbook (“FOH”) in 1988.15 See Brief for the Secretary of Labor as Amicus Curiae, Dkt. No. 45, at 16 (hereinafter “DOL Amicus Brief”) (“The FOH interpretation was based on, and is consistent with, the prior opinion letters.”).

The Guidance attempts to address the regulation’s ambiguity by establishing three definitions, each of which builds on an interpretation of the regulation. First, the Guidance limits “related duties” to those that are “incidental to the regular duties of the tipped employees and are generally assigned to the tipped employees.” FOH § 30d00(f)(2) (2016). Second, the Guidance establishes that a tipped employee who spends a “substantial amount of time,” defined as “in excess of 20 percent of the hours worked in the tipped occupation in the workweek,” on such related duties may not be paid the reduced tip credit wage. Id. § 30d00(f)(3). “All related duties count toward the 20 percent tolerance,” meaning that a server need not spend all of that time on one related task, such as washing dishes, to qualify as a dual job employee. Id. Third, the Guidance makes explicit the regulation’s suggestion that

13. Similarly, the regulation’s reference to a “counterman who also prepares his own short orders or who, as part of a group of counterfeitmen, takes a turn as a short order cook for the group,” 29 C.F.R. § 531.56(e) (emphasis added), as one example of a non-dual job employee offers no details on the meaning of “taking a turn.” There must be a point at which the counterman is no longer just taking a turn as a short order cook but instead actually working as a short order cook. The regulation, however, is devoid of even a hint as to what that point might be.

14. Consider, for instance, a server who spends 90% of her time wiping down tables, for which she receives no tips, and the remaining 10% of her time assisting customers. Under Judge Graber’s view, the dual jobs regulation would unambiguously consider this server a single-job, tipped employee because it is immaterial whether the server is spending her time on tipped duties or related duties. Partial Concur. at 51–53. We think this example is plainly inconsistent with the text of the dual jobs regulation. A server who spends 90% of her time on related duties is not spending “part of her time” on such tasks any more than she is “occasionally” engaging in untipped work.

15. The FOH is an “operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.” See Wage & Hour Div., Dep’t of Labor, Field Operations Handbook (Aug. 31, 2017), available at https://www.dol.gov/whd/FOH/index.htm. The FOH “reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.” Id.
occupations are defined by their tasks. See id. § 30d00(f)(4) ("For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations."). Accordingly, the Guidance recognizes that a server is no longer engaged in a tipped occupation once she starts cleaning bathrooms and washing windows, because those tasks fall within the purview of a separate, non-tipped occupation.16 See id.

Citing Probert v. Family Centered Servs. of Alaska, Inc., 651 F.3d 1007 (9th Cir. 2011), Defendants contend that the Guidance is not entitled to deference because the FOH includes a disclaimer that it "is not used as a device for establishing interpretive policy." Id. at 1012. Defendants’ argument fails because the DOL has adopted the Guidance’s interpretation in its amicus brief. See DOL Amicus Brief at 16; Fast, 638 F.3d at 877. It is well-settled law that courts may afford an agency’s interpretation Auer deference if the interpretation is advanced through an amicus brief. See Auer, 519 U.S. at 461; Barrientos v. 1801–1825 Morton LLC, 583 F.3d 1197, 1214 (9th Cir. 2009) ("Further, an agency’s litigation position in an amicus brief is entitled to deference if there is no reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter." (internal quotation marks omitted)).

We similarly reject as unpersuasive Defendants’ brief argument that the Guidance is not entitled to Auer deference because employers in this country did not have "notice that they must pay an employee … based on an agency’s internal advice given to its field investigators.” Christopher v. Smith-Kline Beecham Corp., 567 U.S. 142 (2012), held that Auer deference is not warranted when an agency’s interpretation would “impose potentially massive liability” without first providing regulated parties “fair warning of the [prohibited] conduct.” Id. at 155–56. There, the Court recognized that preventing “unfair surprise[s]” outweighed the “general merits of Auer deference,” particularly where the agency’s interpretation postdated the regulated parties’ conduct. Id. at 156, 159; see also Indep. Training & Apprenticeship Program v. Cal. Dep’t of Indus. Relations, 730 F.3d 1024, 1035 (9th Cir. 2013) ("[T]he Court has deemed Auer deference unsuitable when such deference would result in ‘unfair surprise’ to one of the litigants.").

Here, in contrast, the Guidance has been in place since 1988 and was published to the Internet pursuant to the Electronic Freedom of Information Act Amendments of 1996. See Wage & Hour Div., Dep’t of Labor, Field Operations Handbook (Aug. 31, 2017), available at https://www.dol.gov/whd/FOH/index.htm. The DOL also adopted the Guidance’s interpretation and the 20% benchmark in its amicus brief to the Eighth Circuit in Fast, which was filed on September 15, 2010—two years before Marsh began his employment with J. Alexander’s. See Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, Fast v. Applebee’s Int’l, Inc., 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725/26), 2010 WL 3761133. Defendants were therefore on notice at least as of September 15, 2010—if not before—that their conduct was not in compliance with the dual jobs regulation.

As a result, unlike the plaintiffs in SmithKline, Marsh’s theory of liability rests on an interpretation that predates Defendants’ conduct. This is not a case where the instant suit represents the first and only time the DOL has advanced the interpretation at hand. See, e.g., Emp’s Sols. Staffing Grp. II, LLC v. Office of Chief Admin. Hearing Officer, 833 F.3d 480, 488–90 (5th Cir. 2016) (concluding Auer deference was unwarranted because the proffered interpretation emerged from a single decision by the ALJ in the instant case). Nor is this a case where the agency failed to issue “interpretative guidance indicating [its] current position,” Perez v. Loren Cook Co., 803 F.3d 935, 943 (8th Cir. 2015) (en banc), considering the DOL adopted the Guidance in its 2010 amicus brief. Further, as we discuss later, the DOL has regularly promulgated regulations that use the 20% benchmark to distinguish between substantial and incidental amounts of time. We therefore conclude that the Guidance did not unfairly surprise Defendants as of September 15, 2010.17

16. Contrary to the dissent’s position, an agency need not explicitly identify in its guidance each ambiguous word it is defining in order to provide a valid interpretation of an ambiguous regulation. Dissent at 20–22. There is no “magic words” requirement under Auer. At any rate, the dissent’s claim that “the Rule fails to clarify any of the phrases in the dual job regulation” because the agency failed to identify each ambiguous term it was defining is unsupported by the facts. Dissent at 73. In its 2010 amicus brief adopting the Guidance, the DOL explained that the Guidance was intended to “affix[] a specific limit to the regulation’s tolerance for the ‘occasional’ performance of such related duties,” “identify a number of duties related to the tipped occupation,” and elaborate on the difference between a tipped and non-tipped occupation. See Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees at 9, 11–12, 29 n.9, Fast v. Applebee’s Int’l, Inc., 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725/26), 2010 WL 3761133.

17. It may be that employers “have had access to the DOL’s view on the 20 percent rule for decades,” as Plaintiffs claim, which would further cut against unfair surprise. On the record before us, however, it is unclear when the Guidance was first published online—only that it must have been after 1996. See Wage & Hour Div., Dep’t of Labor, Field Operations Handbook (Aug. 31, 2017), available at https://www.dol.gov/whd/FOH/index.htm (explaining that the DOL chose to publish its FOH “on the Internet pursuant to its obligation under FOIA [Freedom of Information Act] to make available administrative staff manuals and instructions to staff that affect members of the public, 5 U.S.C. 552(a)(2),” which was amended in 1996 to requires agencies to make such records available by computer telecommunications or other electronic means); see also H. Rep. No. 104-795, at 20 (1996) (clarifying that the 1996 amendments to 5 U.S.C. 552(a)(2) were intended to ensure that agency information would be made available “online”). It is therefore impossible to say, as the dissent does, that “th[e] 20-percent cap was not made public until decades later, when the DOL included it in an amicus brief.” Dissent at 61. We therefore do not reach whether Defendants were on notice before September 15, 2010.

18. The dissent asserts that it was “not until 2016 that employers learned they could not take a tip credit for any time” spent on unrelated tasks. Dissent at 82–83. The text of the dual jobs regulation, however, belies the dissent’s timeline, as does the DOL’s opinion letter dating
Defendants next contend that the Guidance is not entitled to deference because its 20% limitation on related duties is inconsistent with the dual jobs regulation itself. 19 We disagree. As the Eighth Circuit recognized in Fast, “[b]y using the terms ‘part of the time’ and ‘occasionally,’ the regulation clearly places a temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation.” 638 F.3d at 879 (internal alterations omitted); see also Knox v. Jones Grp., 201 F. Supp. 3d 951, 961 (S.D. Ind. 2016) (applying Auer deference because “[t]hrough its use of the terms ‘part of the time’ and ‘occasionally,’ the dual-jobs regulation embodies temporal limitations regarding the performance of related, non-tipped duties” (internal alteration omitted)); Flood v. Carlson Rests., Inc., 94 F. Supp. 3d 572, 583 (S.D.N.Y. 2015) (explaining that “district courts across the country have likewise endorsed the twenty percent rule”).

The dual jobs regulation states that a server who occasionally washes dishes is not a dual job employee. See 29 C.F.R. § 531.56(e). The Guidance states that a server who spends 20% of her time or less washing dishes is not a dual job employee. See FOH § 30d00(f)(3). There is nothing inconsistent between these two statements because the regulation does not limit the meaning of “occasionally” beyond its ordinary meaning of “now and then; here and there; sometimes.” Fast, 638 F.3d at 879–80 (quoting Webster’s Third New Int’l Unabridged Dictionary 1560 (1986)). True, the DOL could arguably have set the limit higher, but it did not and we are not at liberty to disturb the agency’s “fair and considered judgment on the matter in question.” Auer, 519 U.S. at 462.

Furthermore, the DOL’s 20% threshold is consistent with its treatment of other temporal limitations. This, too, counsels in favor of applying Auer deference. See Fast, 638 F.3d at 881 (deferring to the Guidance in part because the 20% threshold draws from numerous other FLSA provisions); cf. Friedman v. Sebelius, 686 F.3d 813, 825 (D.C. Cir. 2012) (granting the agency’s interpretation Auer deference even though “the regulations elsewhere distinguish between ‘acts’ and ‘omissions,’” and the agency interpreted a regulation’s use of only “acts” to include both acts and omissions). The DOL adopted the 20% rule in order to ensure conformity with “various other FLSA provisions, interpretations, and enforcement positions setting a 20 percent tolerance for work that is incidental to but distinct from the type of work to which an exemption applies.” 20 DOL Amicus Brief at 19 n.6. Because the DOL has consistently utilized the 20% threshold to distinguish between substantial and incidental or occasional work in a variety of contexts, it is especially appropriate to defer to the Guidance.

We find similarly unpersuasive Defendants’ contention that the Guidance’s focus on duties is “patently inconsistent” with the dual jobs regulation’s “occupation-based analysis.” Defendants’ argument rests on an artificial distinction between occupations and duties. One cannot define the former without some reference to the latter. 21 See Occupation, Black’s Law Dictionary (10th ed. 2014) (defining “occupation” to mean “an activity or pursuit in which a person engages” (emphasis added)). The tip credit regulation states that “[a]n employee who receives tips … is a ‘tipped employee’ … when, in the occupation in which he is engaged, the amounts he receives as tips [exceed the requisite amount].” 29 C.F.R. § 531.56(a) (emphasis added). The dual jobs regulation—a sub-provision of the tip credit regulation—elaborates that a tipped employee who occasionally performs “related” but untipped “duties” is not employed in “two occupations,” but that a server who works as a maintenance man is. Id. § 531.56(e).

The dual jobs regulation therefore contemplates a difference between tipped and untipped occupations, as defined by an employee’s duties. The Guidance makes that distinction explicit by sorting the duties accordingly: (1) an employee who engages in duties “directed toward producing tips” or spends 20% of her workweek or less on duties related to “the

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19. Although several of the Defendants briefly assert in one sentence that the Guidance has created a new cause of action and therefore violates the separation of powers principle, they have offered no supporting authority for that proposition and have failed to elaborate on their point. As such, this argument is waived. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1079 n.26 (9th Cir. 2008) (en banc) (“It is well-established that a bare assertion in an appellate brief, with no supporting argument, is insufficient to preserve a claim on appeal.”). Accordingly, we express no opinion as to whether the 20% rule is legislative, rather than interpretive, and therefore subject to the Administrative Procedure Act’s notice and comment requirement. See 5 U.S.C. § 553(b); see also Hocket v. U.S. Dep’t of Agric., 82 F.3d 165 (7th Cir. 1996); Catholic Health Initiatives v. Sebelius, 617 F.3d 490 (D.C. Cir. 2010).

20. See, e.g., 29 U.S.C. § 213(c)(6)(G) (permitting 17-year-old employees to drive automobiles or trucks on public roadways as part of their employment so long as the driving is “occasional and incidental,” defined as “no more than 20 percent of an employee’s worktime in any workweek”); 29 C.F.R. § 552.5 (explaining that “[c]asual babysitting services may include the performance of some household work not related to caring for the children: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment” (emphasis in original)); 29 C.F.R. § 552.6(b) (“The term companionship services also includes the provision of care … if it does not exceed 20 percent of the total hours worked per person and per workweek.”); 29 C.F.R. § 786.150 (“For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.”); 29 C.F.R. § 786.1 (same); 29 C.F.R. § 786.100 (same); 29 C.F.R. § 786.200 (same).

21. To paraphrase Shakespeare, a dishwasher by any other name—even a “server”—is still a dishwasher if she spends a substantial part of her time washing dishes.
regular duties of the tipped employees’ works in a tipped occupation and may receive the reduced tip credit cash wage; (2) on the other hand, an employee who engages in untipped “work that is not related to the tipped occupation” or spends more than 20% of her workweek on related duties that are not themselves directed toward producing tips must be treated as working in an untipped occupation and paid the full hourly minimum wage. FOH § 30d00(f) (emphasis added). The Guidance, far from creating a de facto new rule, closely hews to the framework suggested by the dual jobs regulation.

We also reject Defendants’ argument that Auer deference is inappropriate here because the DOL’s position has changed throughout the years. Before adopting the Guidance in 1988, the DOL issued a number of opinion letters to employers elaborating on the dual jobs regulation. Those opinion letters consistently emphasized the temporal nature of the dual jobs regulation. For instance, although the DOL explained in a 1980 opinion letter that servers who spent part of their time cleaning the salad bar and vacuuming the dining room carpet after closing time could be considered tipped employees, the agency was careful to note that it “might have a different opinion if the facts indicated that specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming.” U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter WH-502 (Mar. 28, 1980), available at 1980 WL 141336 (emphasis added). In a 1985 letter, the DOL reiterated that a server who spent “part of his or her time” on tasks such as toasting bread or making coffee could be treated as engaging in a single tipped occupation. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA-854 (Dec. 20, 1985), available at 1985 WL 1259240 (emphasis added). In that letter, the DOL advised the employer that it could not take a tip credit for any hours a server spent performing preparatory activities that consumed “a substantial portion of the waiter or waitress’ workday.” Id. The DOL focused in particular on the fact that the preparatory tasks typically consumed 30% to 40% of a given employee’s workday—a sign that the tasks were not “incidental to the [waiter] or waitress regular duties.” Id. We therefore agree with the Eighth Circuit that the Guidance “incorporates answers provided in prior opinion letters” and that the DOL’s position has remained consistent over the years.22

22. The DOL also issued an opinion letter in 1979 instructing an employer not to take a tip credit for any time a server spent preparing vegetables for the salad bar before the restaurant opened. See U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA-895 (Aug. 8, 1979). The DOL reasoned that because the salad preparation activities described were “essentially the activities performed by chefs,” the situation paralleled the dual jobs regulation’s hypothetical maintenance man/waiter example. Id. Accordingly, there was no need for a time analysis because the employee engaged in a second occupation any time she was tasked with performing unrelated duties, regardless of the time spent on such activities. See id. (rejecting the employer’s argument that because the work was “de minimis,” the employer was entitled to the tip credit).

23. The DOL issued an unpublished opinion letter in 2009 that “rejected the 20 percent tolerance for related, non-tipped duties.” DOL Amicus Brief at 24–25 (“The FOH interpretation was based on, and is consistent with, the prior opinion letters.”).

As a last-ditch attempt to dismantle the Guidance, Defendants protest that the 20% limitation is not entitled to Auer deference because it is “unworkable.” But, the DOL could have reasonably concluded otherwise. Employers are ultimately responsible for assigning duties and responsibilities. The allegations that would trigger a FLSA wage violation claim require more than de minimis claims based on seconds or minutes spent rolling silverware or sweeping a customer’s shattered glass. See Schaefer v. Walker Bros. Enters., Inc., 829 F.3d 551, 555 (7th Cir. 2016) (“[T]he possibility that a few minutes a day were devoted to keeping the restaurant tidy does not require the restaurants to pay the normal minimum wage rather than the tip-credit rate for those minutes.”).

Marsh has alleged far more than the occasional request to tend to related but untipped tasks: he has alleged a continuous practice of assigning him tasks such as cutting lemons and limes, cleaning soft drink dispensers, wiping tables, and taking out the trash. Moreover, Marsh was able to provide information on when he was expected to complete each task: “every opening shift,” “after most closing shifts,” or “after each shift.” The scheduled nature of these tasks makes them all the more easy to track.

As several district courts have concluded, it is not impracticable for an employer to keep track of time spent on related tasks by requiring employees to clock in any time spent rolling silverware or cleaning the restaurant before and after the restaurant closes or when business is slow. See, e.g., Irvine v. Destination Wild Dunes Mgmt., Inc., 106 F. Supp. 3d 729, 734 (D.S.C. 2015) (“In any case, since employers, in order to manage employees, must assign them duties and assess completion of those duties, it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their wages by 71%.”); Barnhart v. Chesapeake Bay Seafood House Assocs., LLC, Civil No. JFM-16-01277, 2017 WL 1196580, at *6 (D. Md. Mar. 31, 2017). Unlike the Plaintiffs in Pellow v. Bus. Representation Int’l, Inc., 528 F. Supp. 2d 1306 (S.D. Fla. 2007), Marsh does not concede that it is “impractical or impossible” to track his tasks. Id. at 1313–14. To the contrary, he asserts, consistent with several district court decisions, that “[s]egregating duties is simple,” because employers already have the ability to input codes for employees to clock in and out at different pay rates, see Driver v. AppleIllinois, LLC, 890 F. Supp. 2d 1008, see also Amicus Brief at 25 n.9. This letter, however, was withdrawn after two months with instructions that it not be relied upon as a statement of agency policy. Several courts addressing the 2009 opinion letter have therefore deemed it inconsequential, as do we. See, e.g., Irvine, 106 F. Supp. 3d at 735; Soto v. Wing ‘R Us Romeoville, Inc., No. 15-cv-10127, 2016 WL 4701444, at *3 n.3 (N.D. Ill. Sept. 8, 2016); cf. Rivera, 735 F.3d at 899 n.4 (deferring to the DOL’s interpretation despite a “brief[]” change in agency interpretation because “[t]he withdrawal of the brief-lived 2008 interpretation expressly stated that the 2008 interpretation may not be relied upon as a statement of agency policy” (internal quotation marks omitted)).
intrigue to be found in this case. The reality is much less exciting: confronted with an undefined reference to “tipped employees” in the FLSA, the DOL promulgated the dual jobs regulation to clarify that dual job employees do not count as tipped employees in certain circumstances. Employers had six years to challenge this regulation. See 28 U.S.C. 2401(a). They did not. Instead, they sought clarification on the dual jobs regulation, which the DOL provided first through its opinion letters and then through the Guidance.

Congress did not intend to give employers a blank check when it enacted the FLSA’s tip credit provision. Recognizing this and foreseeing the possibility that employers could misuse this provision to withhold wages from dual job employees like Marsh, who are titled “servers” or “bartenders,” but who function in actuality as bussers, janitors, and chefs at least part of the time, the DOL promulgated the dual jobs regulation and issued an interpretative guidance. Together, these two provisions clarify the boundaries of acceptable tip credit use and ensure that a server’s tips serve as a gift to the server, as opposed to a cost-saving benefit to the employer. Although the agency had a number of options available to resolve this issue, it is neither appropriate nor reasonable for us to override the DOL’s dual jobs regulation and its Guidance where, as here, the latter is consistent with the former and both are consistent with the purpose of the FLSA.

We therefore conclude that Marsh has stated two claims for relief under the FLSA: first, that he is entitled to the full hourly minimum wage for the substantial time he spent completing related but untipped tasks, defined as more than 20% of his workweek; and second, that he is entitled to the same for time he spent on unrelated tasks.26

REVERSED AND REMANDED.

GRABER, Circuit Judge, concurring in part and dissenting in part:

Plaintiff Alec Marsh claims that Defendant J. Alexander’s LLC failed to pay him appropriate wages both for non-tipped work related to his job as a server and for non-tipped work unrelated to his job as a server. The majority opinion concludes that both claims are cognizable and that the district court thus erred in dismissing Plaintiff’s case. In my view, though, only the latter claim—that Defendant denied Plaintiff wages for work unrelated to his tipped occupation—should survive. Accordingly, I would affirm in part and reverse in part.

I agree with the majority opinion that Defendant’s procedural challenge to 29 C.F.R. § 531.56(e) (“the dual jobs” regulation) is untimely. Perez-Guzman v. Lynch, 835 F.3d 1066, 1077 (9th Cir. 2016). I also agree that, as a substantive matter, the “dual jobs” regulation warrants deference under

26. Because Crystal Sheehan has alleged a willful violation of the FLSA, see 29 U.S.C. § 255(a), the statute of limitations may not have expired as to her claims. Her suit is remanded for the district court to address this question in the first instance.

Importantly, the Field Operations Handbook (“FOH”) provides two methods for determining when an employee is engaged in “dual jobs” for purposes of the regulation. FOH § 30d00(f) (2016) (the “Guidance”). The first looks to the amount of time that an employee spends doing work that relates to the employee’s tipped work but that does not produce tips. Under this method, if an employee spends more than 20% of his or her time engaged in related—but non-tipped—duties, the employee is engaged in “dual jobs.” The second method classifies an employee as working in “dual jobs” if the employee performs “work that is not related to [the employee’s] tipped occupation.” Id. § 30d00(f)(4) (emphasis added).

Plaintiff’s two claims track those two methods. That is, he claims that he was denied wages both for work related to his job as a server and for work unrelated to his job as a server. If both of the DOL’s interpretations of what constitutes a “dual job” under the regulation were entitled to deference, then both of Plaintiff’s claims would be cognizable.

The majority opinion concludes that both interpretations do, indeed, warrant deference and that, as a result, both claims survive. But, in my view, only one interpretation comports with the regulation—the interpretation that focuses on work unrelated to an employee’s tipped occupation. The other interpretation contained in the Guidance—the one that focuses on the amount of time spent engaged in related but non-tipped work—is not entitled to Auer deference. Plaintiff has thus stated a claim only insofar as he asserts that Defendant denied him wages for work unrelated to his job as a server. I would affirm the dismissal of Plaintiff’s claim that Defendant denied him appropriate wages for non-tipped work unrelated to his job as a server.

A. Auer governs this case.

This case requires us to do something that we have done for decades: determine whether an agency, in interpreting its own regulation, exceeded the bounds of its authority. We have a two-step test for making that determination. Auer, 519 U.S. at 461. We first ask whether the regulation in question is ambiguous. Id. If so, at the second step, we defer to the agency’s interpretation of its regulation so long as the interpretation is not “plainly erroneous or inconsistent with the regulation.” Id. (internal quotation marks omitted).

That test makes good sense. Agencies know the purpose of their own regulations. Martin v. Occupational Health & Safety Review Comm’n, 499 U.S. 144, 151 (1991). And because “applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives,” the Supreme Court presumes that agencies’ delegated lawmaking powers include the power to interpret their own regulations. Id. It is thus entirely reasonable to defer to an agency’s interpretation of its own words—given, of course, that we diligently examine agency action for plain error or inconsistency with the regulation.

Auer provides an appropriate and sufficient mechanism for accomplishing that task. Its two steps ensure that agencies stay within the confines of their own regulations—regulations that must, themselves, fill gaps that Congress meant to leave for the agencies to fill. Chevron, 467 U.S. at 842–43. Our job, which Auer helps us do, is to ensure that—like nesting dolls—every agency interpretation fits neatly within an agency regulation that fits neatly within the authority that Congress has granted to the agency. So long as we faithfully apply Auer (and its companion, Chevron), we perform that function and avoid the separation of powers concerns that the dissenting opinion describes.

B. The Guidance’s interpretation focusing on related work does not warrant Auer deference.

The “dual jobs” regulation is no model of clarity. But it plainly forecloses the DOL’s interpretation that an employee spending a certain amount of time doing related, but non-tipped, work qualifies as working a dual job. The regulation provides in full:

Dual jobs. In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R. § 531.56(e).

Viewing that regulation as a whole, it determines whether an employee performs “dual jobs” by looking to whether the employee performs tasks unrelated to his or her tipped occupation. That is, the regulation has nothing to do with the amount of time that an employee spends engaged in non-tipped tasks related to the tipped occupation.
The regulation’s first example—on which the remainder of the regulation is premised—makes that focus clear. It describes a situation in which an employee performs two different functions: that of a “maintenance man” and that of “waiter.” The example says nothing about the amount of time that the employee spends doing each kind of work. That is, the given employee would qualify as having “dual jobs” (only one of which is a tipped occupation) no matter how he split his time between the two jobs. We know, then, that he qualifies as having “dual jobs” not because he spends a certain amount of time as a maintenance man and a certain amount of time as a waiter, but because he performs tasks that are unrelated to one another.

The other two examples—the “counterman” and the “waitress” examples—confirm the regulation’s focus on that distinction. Importantly, the regulation presents those two examples as foils to the first example. See 29 C.F.R. § 531.56(e) (explaining that the situation of the maintenance man/waiter “is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses” and that the same situation “is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group” (emphases added)). That is, they are not separate examples of instances in which a person works “dual jobs.” The examples, instead, merely illuminate when employees have “dual jobs” by describing instances in which an employee is not engaged in “dual jobs.”

Read in context, the waitress example does not permit the conclusion that a waitress might work “dual jobs” because she spends a certain amount of time doing non-tipped tasks related to her work as a waitress. Rather, it stands for the notion that she is not performing two jobs, because her non-tipped work—unlike the waiter’s work as a maintenance man—relates to her tipped occupation. So, too, with the counterman example. Accordingly, the majority opinion errs in arguing that the “temporal” words found exclusively in those counterexamples muddle the regulation’s focus on unrelated work. Maj. op. at 27–31.

The regulation’s final sentence puts to rest any ambiguity. That sentence states, in reference to the counterexamples and in clear terms, that “[s]uch related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.” 29 C.F.R. § 531.56(e) (emphasis added). That final reference to “related duties” makes clear that the three examples exist to demonstrate the distinction between an employee who is engaged in duties related to an occupation that produces tips and an employee who is engaged in a job that is unrelated to a tipped occupation. The regulation’s final sentence thus confirms that one cannot reasonably read the waitress and counterman examples as standing for the notion that a certain amount of related, non-tipped work constitutes a separate job.

To defeat that reading, the majority opinion comes up with a hypothetical employee of its own. The majority opinion argues that, if one reads the regulation as focused exclusively on work unrelated to a tipped occupation, the regulation would wrongly categorize a “server who spends 90% of her time wiping down tables … and the remaining 10% of her time assisting customers” as working in a single, tipped job. Maj. op. at 31 n.14. That hypothetical, even if it points out a poor policy choice, does not change the focus of the “dual jobs” regulation itself. Congress has set requirements that must be met before an employer may take the tip credit. The employee must be a “tipped employee,” 29 U.S.C. § 203(m), must “customarily and regularly receive[] more than $30 a month in tips,” id. § 203(t), and must effectively make the minimum wage, Cumbie v. Woody Woo, Inc., 596 F.3d 577, 580 (9th Cir. 2010). The DOL, by promulgating regulations like the one at issue in this case, has elaborated on those requirements. Those regulations might, or might not, prevent employers from taking advantage of the tip credit with respect to employees like the one in the hypothetical. But they are the regulations that the DOL has chosen. Should the DOL wish to avoid, with certainty, results like the one that the majority opinion describes, the agency is free to create, through notice and comment, a new regulation providing that a certain amount of related work becomes a new job. But the “dual jobs” regulation, in its current form, does not do so.

In conclusion, the regulation, in its current form, conflicts with the Guidance’s interpretation with respect to work related to a tipped occupation, FOH § 30d00(f)(3). Accordingly, the Guidance does not warrant Auer deference on that point. Plaintiff thus cannot state a claim that Defendant wrongly denied him appropriate wages for the time that he spent doing work related to his role as a server, and the district court correctly dismissed that claim.

C. The Guidance’s interpretation focusing on unrelated work warrants Auer deference.

Because the DOL’s other interpretation of what constitutes a “dual job” is entitled to deference, Plaintiff’s other claim—that Defendant denied him wages for work unrelated to his job as a server—passes muster. The Guidance’s interpretation that an employee qualifies as working “dual jobs” if the employee engages in “work that is not related to [the employee’s] tipped occupation” warrants deference for the following reasons. FOH § 30d00(f)(4).

At Auer’s first step, the dual jobs regulation is ambiguous on the point that the Guidance attempts to address. The regulation, even with its clear focus on whether work is related or unrelated to tipped work, is unclear as to how “unrelated” an employee’s duties must be to qualify the employee as working “dual jobs.” Must the employee perform entirely different functions? Or does performing any duty unrelated to a tipped occupation count as working a dual, non-tipped job? Must the employee perform the duties at different times of day—maintenance work in the morning, and waiter work in the
afternoon—to qualify as having “dual jobs”? Or is it enough to perform unrelated duties at any time?

The Guidance answers those questions by explaining that an employee who performs any “work that is not related to [the employee’s] tipped occupation … is effectively employed in dual jobs.” FOH § 30d00(f)(4) (emphasis added). Although that interpretation is not the only one that the regulation would permit, it is not plainly erroneous or inconsistent with the regulation. The regulation’s focus on whether an employee performs non-tipped “related duties” permits the DOL to determine at what point “related duties” rise to the level of unrelatedness to constitute a separate job. The Guidance’s interpretation to that effect thus deserves Auer deference, and Plaintiff should have been allowed to move forward with his case, arguing that he was denied wages for work unrelated to his job as a server.

The counterman example does not, as the dissenting opinion suggests, plainly foreclose the Guidance’s “unrelated work” test. True, as the dissenting opinion notes, if the Guidance categorized the counterman’s work as a short order cook as unrelated to his work as a counterman, the Guidance would stand at odds with the regulation. But the Guidance does not provide a definition of “unrelated work” that conflicts with the counterman example.27 That example thus does nothing to discredit the Guidance’s test.

In summary, I would affirm the district court’s dismissal of Plaintiff’s claim that Defendant denied him wages for non-tipped work related to his occupation as a server, but I would reverse the district court with respect to Plaintiff’s claim that Defendant denied him appropriate wages for non-tipped work unrelated to his job as a server.

IKUTA, Circuit Judge, joined by CALLAHAN, Circuit Judge, dissenting:

In the guise of interpreting a regulation (that itself is far afield from the statute at issue), the Department of Labor (DOL) created detailed and specific legislation that effectively eliminated an employer’s statutory right to take a tip credit. This legislative act was accomplished without compliance with the Administrative Procedure Act (APA) — indeed without any notice to the regulated community at all, resulting in an unfair and unexpected imposition of staggering liability on employers. By deferring to the agency, and thus letting it improperly assume legislative authority, the majority fails in its duty to check the agency’s attempt to “exploit ambiguous laws as license for [its] own prerogative.” Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Because the DOL’s purported interpretation is no interpretation at all, and the majority’s holding to the contrary raises the worst dangers of improper Seminole Rock and Auer deference, I dissent.28

I

In order to understand what the DOL has accomplished by means of its undercover legislative enactment, erroneously upheld by the majority as an interpretation of a regulation, it is necessary to understand a bit of historical background.

The Fair Labor Standards Act of 1938 (FLSA) generally requires employers to pay a cash wage of $7.25 per hour to their employees. 29 U.S.C. § 206(a)(1). As originally enacted, the FLSA did not apply to tipped occupations. In 1966, however, Congress amended the FLSA to extend its coverage to workers employed in the hotel and restaurant industries. Or. Rest. & Lodging Ass’n v. Perez, 816 F.3d 1080, 1083 (9th Cir. 2016). Because the 1966 amendments brought many traditionally tipped employees within the FLSA’s protection, Congress designed the amendments “to permit the continuance of existing practices with respect to tips.” S. Rep. No. 89-1487 (1966), as reprinted in 1966 U.S.C.C.A.N. 3002, 3014.

Among other changes, the 1966 amendments added §§ 203(m) and § 203(t). See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 80 Stat. 830, 830. Section 203(m) allows employers to take a tip credit against the minimum wage requirement for tipped employees. 29 U.S.C. § 203(m). Section 203(t) states, in full:

(t) “Tipped employees” means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

Id. § 203(t). Read together, §§ 203(m) and (t) allow an employer to take a credit against the minimum wage for employees who are engaged in an occupation in which they are already compensated by tips. See id. §§ 203(m), (t). If the tip credit applies, the employee is guaranteed the minimum wage, but may keep tips above the minimum wage. Id. § 203(m).29

28. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (holding that the “administrative interpretation” of a regulation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”); see also Auer v. Robbins, 519 U.S. 452, 461 (1997) (affirming Seminole Rock). This principle of deference to agency interpretations is referred to hereafter as “Auer deference.”

29. The majority argues that employers “deprive servers the full value of their tips” by “crediting a server’s tips towards their obligations to pay full minimum wage for time employees spend working in a non-tipped occupation,” and that it is wrong for an employer to use an employee’s tips to pay minimum wage for “time an employee spends in a non-tipped occupation.” Maj. Op. at 11 n.2. These statements merely assume the majority’s conclusion that the statutory term “occupation” refers to minutes spent on tasks that generate tips, rather than referring to a job (such as a waiter, bartender, or short order cook) in which (as set forth in the relevant statute) the employee “customarily and regularly receives more than $30 a month in tips.” 29 U.S.C. §
After Congress amended FLSA to include employees in tipped occupations, the DOL promulgated, via notice and comment, regulations that basically tracked the statute. See 32 Fed. Reg. 222-227, § 531.56(a)-(d) (Jan. 10, 1967), currently promulgated at 29 C.F.R. § 531.56(a)-(d). These regulations interpreted § 203 by explaining how to calculate the amount of tips received by the employee. Id.

But after circulating these proposed regulations for public comment, and months after the notice-and-comment period ended, the DOL unexpectedly added the “dual jobs” regulation. See 32 Fed. Reg. 13,575, 13,580 (Sept. 28, 1967), currently promulgated at 29 C.F.R. § 531.56(e). Unlike the regulations issued for public comment, the dual jobs regulation did not track the statute. Instead, without explanation, the regulation introduced the never-before-seen concept of “dual jobs.” Id. The regulation states:

(e) Dual jobs. In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R. § 531.56(e).

The eleventh-hour addition of § 531.56(e) in the final rule was not the sort of deviation from the proposed rule that is allowed under the APA as a “logical outgrowth of the proposals on which the public had the opportunity to comment.” Hall v. EPA, 273 F.3d 1146, 1163 (9th Cir. 2001) (quoting Health Ins. Ass’n of Am., Inc. v. Shalala, 23 F.3d 412, 421 (D.C. Cir. 1994)). Rather, the proposed regulation never hinted at the idea of dual jobs. See 32 Fed. Reg. 222-1227 (Jan 10, 1967); Envtl. Integrity Project v. EPA., 425 F.3d 992, 996 (D.C. Cir. 2005) (“The ‘logical outgrowth’ doctrine does not extend to a final rule that finds no roots in the agency’s proposal because ‘[s]omething is not a logical outgrowth of nothing[,]’”) (first alteration in original) (quoting Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)). Instead, § 531.56(e) was the first sign of a slow but certain erosion of the tip credit rule.

In the years following the regulation, the DOL issued several opinion letters addressing the dual jobs regulation. These letters provided case-by-case guidance as to when there is a “clear dividing line” between the types of duties performed by tipped and non-tipped employees such that an employee should be deemed to hold two distinct jobs.

Apprently not satisfied with this case-by-case approach, the DOL decided to give its field investigators more expansive authority to cut back on employers’ opportunity to take a tip credit. Therefore, in 1988, the DOL promulgated a new rule in its internal and unpublished Field Operations Handbook (FOH). See U.S. Dep’t of Labor, Wage & Hour Division, Field Operations Handbook (FOH) 30d00(e) (1988) (hereinafter, “FOH”). This new rule strictly limited an employer’s statutory right to take a tip credit by applying a specific numerical cap apparently pulled from thin air. It said: “[W]here the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.” Id. This 20-percent cap was not made public until decades later, when the DOL included it in an amicus brief filed in the Eighth Circuit in 2010. See Sec’y of Labor’s Amicus Br., Fast v. Applebee’s Int’l, Inc., 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725, 10-1726), 2010 WL 3761133.

30. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA– 895 (Aug. 8, 1979) (hereinafter, “1979 Letter”) (holding that an employee who was required to report to work two hours before doors were opened to the public to prepare vegetables for a salad bar had two occupations, waitress and chef); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter WH–502 (Mar. 28, 1980), available at 1980 WL 141336, at *1 (hereinafter, “1980 Letter”) (holding that employees hired as waiters and waitresses, but who were also required to “clean the salad bar, place the condiment crockers in the cooler, clean and stock the waiters’ station, clean and reset the tables ... and vacuum the dining room carpet, after the restaurant is closed,” were engaged in two different occupations because there was no “clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitess duties”); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA–854 (Dec. 20, 1985), available at 1985 WL 1259240, at *2–3 (hereinafter, “1985 Letter”) (holding that an employee who was hired as a waiter but was assigned to arrive at the restaurant at least two hours before opening to perform general preparatory duties was employed in two different occupations).

31. Ironically, the Field Operations Handbook states it “is not used as a device for establishing interpretive policy.” FOH, Foreword, available at https://www.dol.gov/whd/FOH/index.htm; see also Probert v. Family Centered Servs. of Alaska, Inc., 651 F.3d 1007, 1012 (9th Cir. 2011) (“[I]t does not appear to us that the FOH is a proper source of interpretive guidance.”).

32. In the amicus brief filed in this appeal, the DOL states that it published the 20-percent cap rule in the 2010 amicus brief. Given the DOL’s failure to identify any earlier publication of this rule, the majority’s statement that “[i]t is therefore impossible to say” whether the FOH was made public at an earlier date, Maj. Op. at 36 n.17, is disingenuous.

203(). There is no dispute that the plaintiffs here held a job in which they received over the threshold amount of tips.
In 2012, the DOL added a new subsection to its rule (in addition to the 20-percent cap) which further limited the availability of a tip credit. See FOH 30d00(f)(4) (2012). The new subsection provided that employers could not take a tip credit for any time employees spent on tasks that did not directly relate to serving customers. Id. As a result, an employer would have to further track employees’ time to distinguish between related and unrelated duties. The additional subsection was not made public until the DOL included it in the amicus brief filed in this very case. The current version of the DOL’s instructions, which will be referred to here as the DOL Time-Tracking Rule (or the Rule), states in full:

(1) When an individual is employed in a tipped occupation and a non-tipped occupation, for example, as a server and janitor (dual jobs), the tip credit is available only for the hours spent in the tipped occupation, provided such employee customarily and regularly receives more than $30.00 a month in tips. See 29 CFR 531.56(e).

(2) 29 CFR 531.56(e) permits the employer to take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employee and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washes dishes or glasses.

(3) However, where the facts indicate that tipped employees spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.

(4) Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

FOH § 30d00(f) (Dec. 1, 2016).

In a nutshell, rather than interpreting the dual jobs regulation, the DOL Time-Tracking Rule effectively replaces the concept of a tipped occupation with a new regulatory framework. The Rule requires the employer to count the number of minutes the employee spends on: (1) serving customers; (2) performing duties related to serving customers; and (3) performing duties not directly related to serving customers. The Rule then allows an employer to take a tip credit for the minutes an employee spends on tasks in the first category, but not for the tasks in the second category if they take more than 20 percent of the employee’s time on the job, and never for tasks in the third category. Clearly, this guidance does not constitute an interpretation of the dual jobs regulation; it is a completely different approach to the tip credit.

II

Given the undercover nature of the DOL’s approach, we should first consider a threshold question: Is the Time-Tracking Rule actually an interpretation of the dual jobs regulation to which Auer deference applies? Or is it a legislative rule, not entitled to such deference? In failing to address this issue, the majority misses a key element of the necessary analysis. See Christensen v. Harris County., 529 U.S. 576, 588 (2000) (holding that it is improper to defer to an agency’s position if doing so would “permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation”).

A

Under Seminole Rock, an agency’s interpretation of its own regulation is generally controlling “unless it is plainly erroneous or inconsistent with the regulation.” 325 U.S. at 414; see also Auer, 519 U.S. at 461. But by its own terms, this deference applies only when an agency proffers an interpretation of its own regulation. Id. Deferential review under Auer is not appropriate “when the disputed administrative action does not represent an actual interpretation of the agency’s own regulations.” Mission Grp. Kansas, Inc. v. Riley, 146 F.3d 775, 781 (10th Cir. 1998); see also Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor v. Mangifest, 826 F.2d 1318, 1324 n.12 (3d Cir. 1987) (“We therefore believe that even in the case of interpretations of regulations, we must distinguish between a position and a reasoned interpretation and defer only to the latter.”) (emphasis added)).

Courts have made clear that an agency’s substantive pronouncements are not entitled to Auer deference, even if they purport to be interpretations of a regulation. In Gonzales v. Oregon, for instance, the Supreme Court declined to defer to the Attorney General’s pronouncement that using controlled substances to assist suicide was not a legitimate medical practice, even though the Attorney General claimed this pronouncement was an “interpretive rule” interpreting a 1971 regulation. 546 U.S. 243, 254–58 (2006). The Court reasoned that the relevant statute did not decide the assisted suicide issue, the 1971 regulation merely restated the statutory lan-

33. Following the decision in Seminole Rock, both the Supreme Court, see Thomas Jefferson, 512 U.S. at 512; Auer, 519 U.S. at 461, and appellate courts, see Mission Group, 146 F.3d at 780; Mangifest, 826 F.3d at 1323, considered the scope of judicial deference to agency interpretations of their own regulations. The majority’s statement that it is “puzzling” for the dissent to rely on pre-Auer opinions, Maj. Op. at 28 n.12, ignores the history of the very rule it purports to apply.
guage, and “[s]ince the regulation gives no indication how to decide [the assisted suicide] issue, the Attorney General’s effort to decide it now cannot be considered an interpretation of the regulation.” Id. at 257. Because the Attorney General’s pronouncement was not an interpretation of the regulation, it was owed no deference. 34 Id. at 257–58.

For the same reason, a court may not defer to a substantive rule masquerading as an interpretation even when the rule is consistent in some way with the regulation. “[M]ere linguistic consistency between the rule and the regulations cannot establish that the former is within the interpretive scope of the latter.” Mission Grp., 146 F.3d at 781. For instance, where a regulation uses open-ended language (such as a regulation requiring regulated entities to comply with “any additional conditions” specified by the agency), the agency may not subsequently issue a rule imposing substantive conditions on those entities “and claim authorization for that action under the plain terms of” the regulation. Id. at 778, 781–82. “Such a practice would make a mockery of Chevron, the APA, and judicial review.” Id. at 782.

The reason for requiring courts to determine, in the first instance, whether an agency’s pronouncement is a legitimate interpretation or merely a disguised substantive rule is clear. Under the APA, a substantive rule must be promulgated pursuant to notice-and-comment rulemaking. 5 U.S.C. § 553. Agencies may not make an end-run around this requirement by promulgating an ambiguous regulation, and then, without notice and comment, issuing a substantive rule that purports to resolve the regulation’s ambiguities. Such an approach would allow an agency to “bootstrap its way into the equivalent of Chevron deference” for its unreviewed position on what a regulation requires. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock’s Domain, 79 Geo. Wash. L. Rev. 1449, 1464 (2011); see also Mission Grp., 146 F.3d at 782 (warning that absent judicial review, “agencies could simply replace statutory ambiguity with regulatory ambiguity, thus creating Chevron deference for any administrative action that might be squeezed within the unrestricted terms of a promulgated regulation”). The mere fact that an agency has promulgated an ambiguous regulation does not mean that the agency has a blank check to promulgate substantive laws in the guise of interpretation. Christensen, 529 U.S. at 588. Accordingly, a court must differentiate “between a reasoned interpretation of a regulation’s language and a mere position about what the regulations require.” Mangifest, 826 F.2d at 1324.

Instead of giving careful consideration to the significant concerns raised by an agency’s promulgation of substantive rules in the guise of interpretation — concerns that have been noted by both the Supreme Court and our sister circuits — the majority asserts it has no obligation to do so because the Court has not enunciated a rule directly on point or created a “mandatory” threshold question. Maj. Op. at 28–29 n.12. But appellate courts do not just excerpt language from Supreme Court decisions and apply it by rote; rather, we must strive to understand the Court’s theory and reasoning, and work out how its jurisprudence applies in new contexts. By avoiding that duty here, the majority mistakenly fails to address the threshold question whether the Time-Tracking Rule qualifies as an interpretation. 35

B

Because a court must analyze whether an agency is interpreting an existing regulation or creating a new substantive rule in order to determine whether Auer deference applies, it is necessary to understand the difference between interpretive and substantive rules. 36

“[T]he critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’” Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1204 (2015) (quoting Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 99 (1995)). “[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule.” Hemp, 333 F.3d at 1087. This means that the substance of the interpretive rule “must flow fairly from the substance” of the existing law. Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 494 (D.C. Cir. 2010) (quoting Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules, and “Spurious” Rules: Lifting the Smog, 8 Admin. L. J. Am. U. 1, 6 n.21 (1994)).

By contrast, legislative rules “create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.” Hemp, 333 F.3d at 1087. Such a rule has several hallmarks. First, it has the “force of law,” meaning that “in the absence of the rule, there would not be an adequate legislative basis for enforcement action.” Id. (internal quotation marks omitted). Second, a rule is legislative if it does not afford an agency any significant discretion over enforcement. See Barahona-Gomez v. Reno, 167 F.3d 1228, 1235 (9th Cir. 1999); Mada-Luna v. Fitzpatrick, 813

34. The majority attempts to limit Gonzales to its facts, arguing that because the DOL’s dual jobs regulation does not merely parrot the language of the FLSA, Gonzales does not apply. Maj. Op. at 28–29 n.12. But this dismissive approach fails to engage with the Supreme Court’s reasoning regarding when an agency’s pronouncements are not entitled to deference.

35. The majority also errs in claiming that the defendants waived this argument. Maj. Op. at 28–29 n.12, 37 n.19. The defendants argued that the Time-Tracking Rule was invalid because through it the agency “created a new regulation or law” without opportunity for public comment, and thus violated the separation of powers “by making law disguised as an informal commentary,” and creating “new causes of action.” This is more than sufficient to raise the issue to the Court, which in any event may “identify and apply the correct legal standard, whether argued by the parties or not.” Thompson v. Runnels, 705 F.3d at 1089, 1098 (9th Cir. 2013).

36. Under the APA, 5 U.S.C. § 553(d)(a), an agency “need not follow the notice and comment procedure to issue an interpretive rule.” Hemp Indus. Ass’n v. Drug Enf’t Admin., 333 F.3d 1082, 1087 (9th Cir. 2003). But when an agency issues a legislative rule without following the APA procedure, it is invalid, id.; N.H. Hosp. Ass’n v. Azar, 887 F.3d 62, 70 (1st Cir. 2018), and therefore cannot receive deference under Auer; see Auer, 519 U.S. at 461; Christensen, 529 U.S. at 587–88.
includes a range of tasks not necessarily directed towards producing tips, the person is still considered a tipped employee engaged in a single job so long as the person “customarily and regularly receives at least $30 a month in tips.” Id.; cf. Schaefer v. Walker Bros. Enters., Inc., 829 F.3d 551, 555 (7th Cir. 2016) (“At some restaurants busboys remove dishes after diners have finished, while at others the servers perform this chore. So it is not helpful to ask … whether cooks or busboys or janitors do one or another task at other restaurants.”).

2

There is no reasonable view of the Time-Tracking Rule that permits the conclusion that it is an interpretation of the dual jobs regulation.

First, the Rule does not attempt to explain or derive a general principle from the regulation’s example of what constitutes two distinct jobs — a maintenance man and a waiter. Instead, the Rule effectively disregards this example and takes a different approach, holding that an employee is engaged in dual jobs: (1) if the employee has spent any time at all on tasks not related to obtaining tips; or (2) if the employee has spent time on tasks related to obtaining tips (but not directly serving customers), and this time in the aggregate accounts for 20 percent or more of the hours worked. Obviously, this description of time spent in different tasks over the course of the day is not a description of distinct jobs. There is no job that can be described as more-than-20-percent-of-time-spent-ontipped-related tasks, nor is there a job that can be described as the five or ten minutes spent here and there on unrelated tasks.

The Rule also effectively disregards the regulation’s examples of when an employee is engaged in a single job, despite being involved in a multitude of tasks. Under the dual jobs regulation, a waitress doing typical waitress duties remains a waitress, even if (in five-minute increments throughout her workweek) she spends 60 percent of her time waiting tables, 10 percent cleaning tables, 10 percent toasting bread, 10 percent making coffee, and 10 percent washing dishes. See 29 C.F.R. § 531.56(e). The dual jobs regulation — and common sense — tells us that the waitress is 100 percent engaged in the single tipped occupation of waitressing — she is not 60 percent a waitress, 10 percent a janitor, 10 percent a baker, 10 percent a barrista, and 10 percent a dishwasher. The Rule holds exactly the opposite: because such a waitress spends more than 20 percent of her time in tasks that are not themselves tipped, she is both engaged in the tipped occupation of waitress and engaged in the untipped occupation of … something else?

Similarly, the dual jobs regulation contemplates that an employee who has a job as a counterman, which may include both serving customers at the counter and working as a chef preparing short orders, is engaged in a single tipped occupation. See id. But because the Rule defines “related duties” to mean duties that “are not by themselves directed toward producing tips” and that meet certain other criteria, FOH §
30d00(f)(2), the time a counterman spends working as a chef preparing short orders (which is not a tip-generating task) is not part of the job of counterman if the cooking duty takes up more than 20 percent of the counterman’s time. See FOH § 30d00(f)(3). In other words, if the counterman spends more than 20 percent of his time preparing short orders, then under the Rule he has two jobs, even though the dual jobs regulation says he has only one. See 29 C.F.R. § 531.56(e).

Despite this clear disjuncture between the Rule and the regulation, the majority argues that the Rule must be upheld because the dual jobs regulation is ambiguous, and the Rule is not “plainly erroneous or inconsistent with the regulation.” Maj. Op. at 32 (quoting Auer, 519 U.S. at 461). The majority errs, however, because the Rule could qualify as a permissible interpretation of the dual jobs regulation only if the Rule could be fairly derived from the regulation. The majority fails to show how the Rule’s specific time-tracking requirements “flow fairly” from the dual jobs regulation, Catholic Health, 617 F.3d at 494, rather than being “a mere position about what the regulations require,” Mangifest, 826 F.2d at 1324.

First, the Rule fails to clarify any of the phrases in the dual job regulation that the majority claims are ambiguous. The majority states that the dual jobs regulation is ambiguous because it “does not offer a precise definition for ‘occupation’” and only provides examples. Maj. Op. at 28–29. But the Rule does not clarify this supposed ambiguity. Rather than construe the word “occupation,” the Rule uses the undefined term “tipped occupation” and focuses on the time employees spend in specified duties related or unrelated to the “tipped occupation.” FOH § 30d00(f)(3)–(4). The Rule’s time-tracking framework is obviously not a definition of an “occupation”; at a minimum, the term “occupation” does not mean how often a person performs a task. See Occupation, Webster’s Third New International Dictionary 1560 (3d ed. 2002) (defining the word to mean a “craft, trade, profession, or other means of earning a living”).

Second, the majority states that the dual job regulation is ambiguous because it does not explain what it means by the phrases “part of her time” and “occasionally” in the sentence explaining that a waitress does not have a dual job if she “spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses.” Maj. Op. at 29–30; 29 C.F.R. § 531.56(e). But the Rule does not provide guidance on what “part of her time” and “occasionally” mean in this context. Instead the Rule states merely that no tip credit may be taken for “duties related to the tipped occupation of an employee” (without providing any guidance on what constitutes such “related” duties) for those employees who “spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties,” and that no tip credit may be taken on work “that is not related to the tipped occupation.” FOH § 30d00(f)(2)–(4). These detailed instructions do not “flow fairly,” Catholic Health, 617 F.3d at 494, from the terms “part of her time” and “occasionally” in the dual jobs regulation.

The majority attempts to camouflage this failure of interpretation by arguing that “an agency need not explicitly identify in its guidance each ambiguous word it is defining in order to provide a valid interpretation of an ambiguous regulation.” Maj. Op. at 33 n.16. But this is contrary to the very nature of an interpretation: if the purported interpretation does not address some ambiguity in the regulation, what is the interpretation interpreting? It is not enough for an agency’s statement to be consistent with a regulation or express the agency’s position about what the regulation requires; rather, it must be a reasoned interpretation of the regulatory language. Mangifest, 826 F.2d at 72–74 & n.12.

Finally, the majority points out that the dual jobs regulation states that “related duties in an occupation that is a tipped occupation need not be directed toward producing tips.” 29 C.F.R. § 531.56(e), but contends that this rule is ambiguous because it does not define the term “related duties.” Maj. Op. at 31. But as noted above, the Rule does not define “related duties” either; it provides no guidance on how closely “related” to customer service a duty must be to constitute a “related duty.” See FOH § 30d00(f)(3). Accordingly, the Rule provides no guidance for interpreting the terms the majority identifies as ambiguous in the dual jobs regulation.

The majority not only fails to show that the Rule constructs ambiguous terms, it also fails to justify the Rule’s time-tracking framework as a fair interpretation of the dual jobs regulation as a whole. First, the regulation’s example of a waitress “who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses,” 29 C.F.R. § 531.56(e), establishes that an employee is not engaged in dual jobs merely because the employee has multiple duties. The Rule flips this determination, holding that an employee is engaged in dual jobs when the employee has multiple duties and spends more than 20 percent of the time on related but untipped duties. FOH § 30d00(f)(3)–(4). This reversal of the regulation’s example finds no support in the language of the regulation.

Similarly, the dual jobs regulation’s example of a counterman “who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group” establishes that an employee is not engaged in dual jobs merely because the employee takes a turn as a short order cook. 29 C.F.R. § 531.56(e). The regulation goes on to say that “[s]uch related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.” Id. The Rule again flips this determination, so that a counterman who engages in work as a short order...
cook is engaged in dual jobs if the counterman’s work as a short order cook is unrelated to tips (or takes more than 20 percent of his time). FOH § 30d00(f)(3)–(4). As noted above, this reversal of the regulation’s example contradicts the regulation because, under the regulation, working as a “short order cook for the group” is part of the single, tipped occupation of a counterman. See 29 C.F.R. § 531.56(e). The majority has failed to show how either of the Rule’s reversals of the regulation “flow fairly from the substance” of the regulation. See Catholic Health, 617 F.3d at 494.

D

Rather than being an interpretation of the dual jobs regulation, the Time-Tracking Rule has all the indicia of a legislative rule. See supra at 68–69. Without the Rule and its time-tracking requirements “there would not be an adequate legislative basis for enforcement action.” Hemp, 333 F.3d at 1087 (internal quotation marks omitted), merely because an employer takes a tip credit when an employee spends time on a range of duties typically included in a tipped occupation. Nor does the Rule give the DOL any discretion in enforcement. See Barahona-Gomez, 167 F.3d at 1235. An employer would be subject to liability whenever a minute-by-minute calculation of how employees spend their time during the course of the day shows that, per the Time-Tracking Rule, an employee was not paid minimum wages for minutes spent on related duties exceeding the 20-percent cap or for minutes spent on duties not related to tips.

Further, the DOL’s derivation of a 20-percent cap on related duties is precisely the type of arbitrary, numerical choice that should have been made through notice and comment. Catholic Health, 617 F.3d at 495; Hoctor, 82 F.3d at 170–71. The majority argues that the DOL had the authority to establish a 20-percent cap, because it is “consistent with its treatment of other temporal limitations,” in regulations it previously promulgated. Maj. Op. at 38. But the majority’s examples of the DOL’s prior temporal limitations were either legislatively enacted or promulgated through notice-and-comment rulemaking. See Maj. Op. at 39 n.20; 29 U.S.C. § 213(c)(6); 29 C.F.R. §§ 552.5, 552.6(b), 786.1, 786.100, 786.150, 786.200. Accordingly, the majority’s examples actually compel the opposite conclusion: the DOL recognized that a rule establishing a numerical 20-percent cap is a legislative rule that must be promulgated through the normal rulemaking process.

In short, the Time-Tracking Rule is purely a legislative rule: “under the guise of interpreting a regulation,” the DOL has created “de facto a new regulation.” Christensen, 529 U.S. at 587–88. As such, the Rule is not entitled to Auer deference. Moreover, because the DOL did not issue it through notice-and-comment rulemaking, it is invalid.

III

By mistakenly upholding the DOL’s legislative rule as an interpretation that is owed Auer deference, the majority runs squarely into the problems that the APA was enacted to prevent.

A

First, the DOL failed to get necessary input from the regulated public. “[T]he point of notice-and-comment rulemaking is that public comment will be considered by an agency and the agency may alter its action in light of those comments.” Hall, 273 F.3d at 1163 (9th Cir. 2001). The APA’s notice requirement is intended to “improve[] the quality of agency rulemaking by ensuring that agency regulations will be tested by exposure to diverse public comment.” Small Reformer Lead Phase-Down Task Force v. EPA., 705 F.2d 506, 547 (D.C. Cir. 1983) (internal quotations omitted).

Because it never sought or received such input, the DOL promulgated a Rule that not only eviscerates the statutory tip credit, but is unworkable as a practical matter. The facts of this case illustrate why the complexity of the time-tracking requirement makes it unreasonable. Here, Marsh claims that he brewed tea during every opening shift and as needed, which took about ten minutes to complete each time, for a total of forty minutes over the course of any given workweek. He also brewed coffee for each customer who ordered it, which took about five minutes to complete each time, and added up to approximately eighty minutes of any given workweek. Marsh cut, arranged, and stocked lemons and limes during every opening shift and throughout his shifts, each session taking approximately five minutes, for a total of forty

38. Because the Time-Tracking Rule provides a comprehensive approach to the tip credit, it is unlikely that subsection 4 of the Rule, FOH § 30d00(f)(4), is severable from the rest of the Rule, as Judge Graber suggests. Graber Conc. Diss. at 54–55. But even if subsection 4 is read by itself, it is not entitled to Auer deference. Subsection 4 provides:

Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

This is not an interpretation of the dual jobs regulation because, like subsection (3), subsection (4) adopts a minute-by-minute approach that contradicts the regulation’s occupation-based analysis. While the regulation applies only when an employee holds two distinct jobs, such as a maintenance man and a waiter, subsection (4) classifies the minutes an employee spends on tasks that are “not related to the tipped occupation” as a distinct job, regardless of the nature of the tasks or the amount of time spent performing them. The regulation’s assurance that a waitress may perform multiple tasks (including washing dishes or glasses and cleaning tables) and still be employed in a single tipped occupation, is at odds with subsection (4)’s statement that a server who spends any time washing windows is “effectively employed in dual jobs.” Nor does subsection (4) clarify any ambiguous terms in the dual jobs regulation; rather, it adds to the confusion by failing to explain why time spent washing windows, but not time spent washing dishes, is “not related” to the tipped occupation. Because subsection (4) merely presents the agency’s position, rather than an interpretation of the regulation, it is not entitled to deference.
minutes in any given workweek. Marsh cleaned the soft drink dispensers and their nozzles, replaced soft drink syrups, and stocked ice. Each task took about five minutes to complete, and over the course of a workweek these tasks respectively took twenty, ten, and forty minutes. J. Alexander’s also assigned Marsh cleaning duties, such as wiping tables (five to twenty minutes each time, for a total of one hour and forty minutes over the course of a week), taking out trash (ten minutes each time, for a total of twenty minutes over the course of a week), scrubbing walls when the restaurant was slow (one hour over the course of the week), sweeping floors (about ten minutes each time, for a total of forty minutes over the course of a week), and cleaning restrooms (ten minutes each time, for a total of thirty minutes over the course of a week). Given this distribution of multiple varied tasks over the course of a day, “nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts.” *Pellon v. Bus. Representation Int’l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), aff’d, 291 F. App’x 310 (11th Cir. 2008).

The majority claims that the Rule is not unworkable in this context, Maj. Op. at 42–44, but each of its arguments fails. First, the majority argues that defendants’ concerns are misplaced because “[t]he allegations, that would trigger a FLSA wage violation claim require more than de minimis claims based on seconds or minutes spent rolling silverware or sweeping a customer’s shattered glass.” Maj. Op. at 42–43. But Marsh and the other plaintiffs base their damages claims on exactly these sorts of allegations: minutes spent performing various tasks throughout the work day. And Marsh’s claims are exactly the sort addressed by the Rule, which insists that an employer must aggregate all “related duties” as part of “the 20 percent tolerance” and pay minimum wage for all time spent on such duties if over 20 percent, as well as pay minimum wage for all time spent on work “not related to the tipped occupation.” 29 C.F.R. § 516.28(a)(1)- (4). Cf. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 234 (2014) (rejecting the argument that a de minimis exception applied in a particular FLSA context, such that a court could ignore “a few seconds or minutes of work beyond the scheduled working hours” (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946))).

The majority next argues that it is not impracticable for an employer to keep track of time spent on various duties, because an employee could clock in and out, using different input codes, when engaged in different tasks, such as before and after the restaurant closes or when business is slow. Maj. Op. at 42–43. This assertion is belied by Marsh’s claims, which are primarily based on five and ten minute tasks performed throughout his shifts. Contrary to the majority’s argument, many of these tasks were not “scheduled,” Maj. Op. at 43, but occurred “as needed.” The variable nature of such duties further increases the difficulty of tracking Marsh’s time spent on each task.

Finally, the majority also claims that the Rule is not impracticable, “because employers are already required to maintain records of each hour an employee receives tips and each hour she does not, see 29 C.F.R. § 516.28(a).” Maj. Op. at 44. But the cited regulation requires employers to track only the “[h]ours worked each workday in any occupation in which the employee does not receive tips,” 29 C.F.R. § 516.28(a)(4) (emphasis added), and the “[h]ours worked each workday in occupations in which the employee receives tips,” 29 C.F.R. § 516.28(a)(5) (emphasis added). Employers do not have to track related duties within a tipped occupation — and certainly not duties as granular as breeding coffee or rolling silverware in napkins. *See id.* Thus the Time-Tracking Rule significantly expands employers’ time-tracking obligations.

**B**

Second, the DOL’s creation of a legislative rule without notice and comment — indeed, without any notice at all — imposed an unfair surprise on the regulated community. The Supreme Court has made clear that an agency cannot “impose potentially massive liability” on the regulated community without giving fair notice and forewarning. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

In *Christopher*, the Court considered an action in which pharmaceutical sales representatives sued their employers for overtime wages based on their claim they were not exempt “outside salesmen.” *Id.* While the case was pending before the Supreme Court, the DOL reinterpreted an ambiguous regulation to further support the employees’ claims. *Id.* at 154. The Court concluded that such interpretation was not entitled to *Auer* deference for several reasons, all of which apply here. *Id.* at 155–59.

For one, *Christopher* noted that the employees “invoke[d] the DOL’s interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced.” *Id.* at 155–56; *see also Auer*, 519 U.S. at 461–63. The same concern applies here. As noted above, the DOL announced its 20-percent rule in an amicus brief in 2010, and did not announce the full Time-Tracking Rule until this appeal. While the 2010 version of the FOH imposed the 20-percent cap on related work, it was not until 2016 that employers learned they could not take a tip credit for any time — no matter

39. The majority’s reliance on *Schaefar*, Maj. Op. at 42–43, as standing for this proposition that the FLSA has a de minimis exception is misplaced. In *Schaefar*, it was undisputed that the servers spent less than 20 percent of their time in related, untipped duties, and the only de minimis exception allowed by the court was for the negligible amount of time (minutes a day) that servers spent dusting picture frames. 829 F.3d at 555.

40. Therefore, the majority errs in claiming that notice predates the defendants’ conduct. Maj. Op. at 36. Although the DOL internally revised the Time-Tracking Rule in 2012, it did not publicize the revised guidance until it filed its amicus brief in this appeal in 2016 — more than two years after Marsh filed his initial complaint.
how minimal — an employee spends performing a task “not related to the tipped occupation.”41 § 30d00(f)(4). According to the Rule, any unrelated work (which it still leaves undefined) transforms the employee from a tipped employee to one employed in dual jobs. The unexpected liability such a “surprise switcheroo” can cause is evident here. See Envtl. Integrity Project, 425 F.3d at 996 (holding that notice-and-comment requirements prevent agencies from “pull[ing] a surprise switcheroo on regulated entities”). Marsh claims he is entitled to minimum wage for the 17.33 hours he spent each week performing tasks related to serving, and for the 5.5 hours he spent performing unrelated tasks. Multiplying the alleged unpaid wages for these hours over the entire time Marsh was employed, and aggregating the claims of all similarly situated employees, it is reasonable to assume that large employers will face staggering damages claims.

An analogous concern expressed by Christopher is that misplaced Auer deference “would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires” and “result in precisely the kind of unfair surprise against which our cases have long warned.” Christopher, 567 U.S. at 156 (alteration in original) (internal quotation marks omitted); see also Indep. Training & Apprenticeship Program v. Cal. Dep’t of Indus. Relations, 730 F.3d 1024, 1035 (9th Cir. 2013) (declining to defer to agency interpretations “where an agency pulls the rug out from under litigants that have relied on a long-established, prior interpretation of a regulation”). In Christopher, the fact that “the DOL never initiated any enforcement actions” or “otherwise suggested that it thought the industry was acting unlawfully,” highlighted the lack of notice. 567 U.S. at 157.

Again, the same factors apply here. As it has done on many earlier occasions, the DOL issued its Time-Tracking Rule through an unpublished internal manual, and then sought controlling deference via an amicus brief. See E.I. Du Pont De Nemours & Co. v. Smiley, No. 16-1189, 2018 WL 3148557, at *1 (U.S. June 28, 2018) (Gorsuch, J., respecting the denial of certiorari) (noting the DOL’s “aggressive” attempts to establish policy via amicus briefs in private litigation); Deborah Thompson Eisenberg, Regulation by Amicus: The Department of Labor’s Policy Making in the Courts, 65 Fla. L. Rev. 1223, 1243–50 (2013) (summarizing the DOL campaign to define the FLSA via interpretations advanced in amicus briefs and the resulting “wild flip-flops in the DOL’s position on certain issues during a short period of time”); Stephenson & Pogoriler, supra, at 1493 (“[G]ranting [Auer] deference to litigation briefs exacerbates the self-delegation problem by giving the agency even more freedom and incentive to promulgate open-ended rules to be clarified only later[,]”). Moreover, as the district court noted, the DOL has never initiated enforcement litigation based on the 20-percent rule, even though it initially circulated the FOH to investigators in 1988. Like in Christopher, there are massive numbers of tipped employees, and “the nature of their work has not materially changed for decades.” 567 U.S. at 158. Yet, despite consistent industry practices, the DOL never brought any enforcement action. Where, as here “an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.” Id.

In short, the DOL’s failure to engage in notice and comment before issuing the Time-Tracking Rule as its authoritative interpretation of the dual jobs regulation, raises the precise concerns that led the Supreme Court to reject Auer deference to stealth DOL rulemaking. Id. at 158–59. The majority errs in failing to do likewise.

IV

In recent years, a number of Supreme Court justices have noted grave concerns about the propriety and constitutionality of deferring to agency interpretations. See, e.g., Perez, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and concurring in judgment); id. at 1211–13 (Scalia, J., concurring in the judgment); id. at 1213–25 (Thomas, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring). As Justice Scalia observed, “[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”42 Talk America, 564 U.S. at 68 (Scalia, J., concurring).

The majority’s mistaken willingness to give Auer deference to the DOL’s legislative rulemaking in the guise of deferring to an “interpretation” highlights these concerns. By taking a hands-off approach to the DOL’s arrogation of power, the majority allows the DOL to promulgate what essentially amounts to secret legislation that eliminates the benefit conferred on employers by Congress and then enforce

41. The majority contends that the DOL’s 1985 opinion letter provides notice to employers that they could not take a tip credit for any unrelated work. Maj. Op. at 37 n.18. This is incorrect: the opinion letters articulated a multi-factor test for determining when an employee was engaged in two different occupations. Among other factors, the DOL considered whether there was a “clear dividing line” between two different types of duties, such as when one set of duties was performed in a distinct part of the workday. See 1980 Letter (articulating the “clear dividing line” standard); see also 1979 Letter (concluding that an employee has dual jobs where the duties unrelated to tip generation were temporally separated from tip-generating duties). In addition, the DOL considered whether an employer assigned a set of distinct duties to a single employee and whether these duties occupied a significant portion of the employee’s time. See 1985 Letter; 1980 Letter.

42. It is no help to argue, as Judge Graber does, that “[a]gencies know the purpose of their own regulations.” Graber Conc. Diss. at 49. The “implied premise of this argument — that what we are looking for is the agency’s intent in adopting the rule — is false.” Decker, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part). Because “[o]nly the text of a regulation goes through the procedures established by Congress for agency rulemaking,” it is the text that has “the force and effect of law, not the agency’s intent.” Perez, 135 S. Ct. at 1223–24 (Thomas, J., concurring in the judgment).
the rule via surprise amicus filings in private litigation — all without political accountability, input from the regulated community via notice and comment, or independent judicial review. See Gutierrez-Brizuela, 834 F.3d at 1152 (Gorsuch, J., concurring) ("[W]hen unchecked by independent courts exercising the job of declaring the law’s meaning, executives throughout history [have] sought to exploit ambiguous laws as license for their own prerogative."). This accumulation of power “subjects regulated parties to precisely the abuses that the Framers sought to prevent.” Perez, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment), and raises separation of power concerns, id. at 1220–21; Talk America, 564 U.S. at 68 (Scalia, J., concurring).

Allowing agencies to invent rules without notice “frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.” Talk America, Inc., 564 U.S. at 69 (Scalia, J., concurring). Here the DOL did just that, issuing a legislative rule that eviscerates a benefit conferred by Congress and results in a nightmare for the regulated community. Because there is no basis to defer to the DOL’s promulgation of this rule under Auer or any other theory, I dissent.

Cite as 18 C.D.O.S. 9476
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
ERNIE LEO ESTRADA, AKA Youngster, Defendant-Appellant.

No. 16-50439
United States Court of Appeals for the Ninth Circuit
D.C. No. 5:14-cr-00107-V AP-44

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
MARK ANTHONY RIOS, AKA Sharky, Defendant-Appellant.

No. 16-50492
United States Court of Appeals for the Ninth Circuit
D.C. No. 5:14-cr-00107-VAP-14

Appeal from the United States District Court for the Central District of California
Virginia A. Phillips, Chief Judge, Presiding
Argued and Submitted July 10, 2018
Pasadena, California
Filed September 18, 2018
Before: Marsha S. Berzon and N. Randy Smith, Circuit Judges, and P. Kevin Castel,*District Judge.
Opinion by Judge N. R. Smith

* The Honorable P. Kevin Castel, United States District Judge for the Southern District of New York, sitting by designation.

COUNSEL
Jay L. Lichtman (argued), Los Angeles, California, for Defendant-Appellant Ernie Leo Estrada.
William S. Harris (argued), Law Offices of Wm. S. Harris, South Pasadena, California, for Defendant-Appellant Mark Anthony Rios.
Elana Shavit Artson (argued) and Nathaniel B. Walker, Assistant United States Attorneys; Lawrence S. Middleton, Chief, Criminal Division; Nicola T. Hanna, United States Attorney; United States Attorney’s Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION
N.R. SMITH, Circuit Judge:
Ernie Estrada and Mark Rios ("Defendants") challenge the validity of a wiretap authorized by the district court.1 We affirm the district court’s order denying Defendants’ motion to suppress.

To obtain a wiretap, the government must submit an affidavit containing inter alia “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(1)(c). Here, the affidavits submitted by the Federal Bureau of Investigation ("FBI") in support of the wiretap authorization were “reasonably[ly] detail[ed],” see United States v. Garcia-Villalba, 585 F.3d 1223, 1229 (9th Cir. 2009), and did not contain a material misstatement or omission, see United States v. Rivera, 527 F.3d 891, 898 (9th Cir. 2008).

If the affidavit contains a “full and complete statement of the facts,” the district court must determine in its discretion whether the affidavit submitted by the government shows that the wiretap is necessary given the possible effectiveness of traditional investigative techniques.2 18 U.S.C. § 2518(1)(b) & (3)(c).

In this case, the district court did not abuse its discretion in determining that the FBI had made the requisite showing of necessity. In particular, it was not “illogical” or “implausible” to conclude that the possibility of using a high-level confidential informant was unlikely to result in the successful prosecution of every member of the conspiracy. See United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). The district court’s conclusion was supported by the facts in the record: (1) the informant cooperated only after he was arrested in a separate incident and may have been unwilling to provide further assistance out of fear of retaliation; (2) the informant could have jeopardized the investigation by tipping off his co-conspirators; (3) the informant could have misled the investigators in an attempt to thwart the investigation or for personal gain; and (4) without the corroborating evidence collected using the wiretap, the informant’s testimony may not have resulted in the successful prosecution of every member of the conspiracy.

I. FACTUAL AND PROCEDURAL BACKGROUND

The FBI began its investigation into the Westside Verdugo (a street gang subordinate to the Mexican Mafia) in early 2006.3 One of the primary goals of the investigation was to determine the nature, extent, and methods of the Westside Verdugo’s racketeering and narcotics-trafficking activities, including “the identities and roles of the suppliers, accomplices, aiders and abettors, co-conspirators, and participants.”

During the course of the investigation, the FBI became familiar with the operations of the Westside Verdugo and its connection with the Mexican Mafia. The FBI discovered that, through violence and other means, the Westside Verdugo had controlled the streets of San Bernardino, California and other areas within San Bernardino County for 40 years. The FBI also became aware that the Mexican Mafia (with the help of the Westside Verdugo) controlled the importation of drugs into the southern California prison system. In fact, all narcotics smuggled into the prisons were purportedly “taxed” one-third of the total quantity by the Mexican Mafia. The taxed quantities were then re-disbursed and sold with the proceeds going to Mexican Mafia members and some Westside Verdugo leaders. Westside Verdugo members allegedly participated in narcotics trafficking, extortion of non-gang drug dealers in their neighborhoods, and crimes of violence intended to enhance the reputation of the gang and to protect their territory from the encroachment of other gang members.

As part of its investigation, the FBI sought to obtain wiretaps4 on the telephones of several members of the Westside Verdugo including Jonathan Brockus.5 On August 26, 2010, Special Agent Matthew J. Tylman submitted a 113-page affidavit in support of the FBI’s request for wiretaps. The affidavit explained that Brockus had been involved with the Mexican Mafia and the Westside Verdugo since at least 2006. In fact, the affidavit revealed that Brockus played a significant role in the Mexican Mafia’s drug distribution activities in San Bernardino.

The affidavit also recounted recent interactions between Brockus and law enforcement. On April 7, 2010, San Bernardino Police officers conducted a routine traffic stop of Brockus and his girlfriend. During the traffic stop, officers found $2,200 in cash and arrested Brockus’s girlfriend because she was found in possession of methamphetamine. The officers also arrested Brockus and transported him to a detention center, where he was investigated further. During the subsequent custodial interrogation, Brockus claimed that the methamphetamine belonged to him and that his girlfriend should not go to jail. Brockus told the officers that he was the current Westside Verdugo “shot-call[er],” which involved collecting money from narcotics sales on behalf of Mexican

1. The district court that presided over Defendants’ criminal cases is the same district court that initially authorized the wiretaps.
2. As shorthand, we have referred to this standard as the “necessity requirement,” but the standard does not require that the wiretap be “necessary” in the strict sense of the word. See, e.g., Garcia-Villalba, 585 F.3d at 1228 (“The necessity requirement can be satisfied by a showing in the application that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case.” (quotation marks and citations omitted)).
3. The facts in this section are drawn primarily from the August 26, 2010 affidavit submitted by Special Agent Matthew J. Tylman in support of the FBI’s first wiretap application.
4. “Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, allows law enforcement agencies to conduct electronic surveillance of suspected criminal activities.” Garcia-Villalba, 585 F.3d at 1227. “In a request for a court-authorized wiretap, the government must provide an application that includes, inter alia, ‘a full and complete statement as to whether or not other investigative procedures have been tried and have failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.’” United States v. Canales Gomez, 358 F.3d 1221, 1224 (9th Cir. 2004) (quoting 18 U.S.C. § 2518(1)(c)).
5. Defendants challenge only the authorization of the wiretap related to Jonathan Brockus.
Mafia members as well as “secretary work,” which involved finding out, through incarcerated contacts, who controlled the “yards” at a particular prison. Brockus also told the officers that he was recently contacted by a man known to him only as “Champ.” Champ told Brockus that he was “collecting taxes” on behalf of Mexican Mafia member Sal Hernandez. Brockus told the officers that he had collected $1,000 from Westside Verdugo members and that he was supposed to give the money to Champ. Brockus was released from custody when he agreed to assist law enforcement authorities by identifying Champ.

On April 8, 2010, Brockus participated in a controlled delivery of $1,000 to Champ. After listening to a phone call between Brockus and Champ through Brockus’s speaker phone, law enforcement provided Brockus with $1,000 to conduct a controlled delivery. Brockus then drove away to complete the controlled delivery while officers conducted surveillance. However, instead of driving immediately to the agreed upon location, Brockus first drove home. Approximately forty-five minutes later, Brockus left his home and drove around for about one hour, using what law enforcement described as counter-surveillance techniques. These counter-surveillance efforts prevented the officers from covertly following and observing Brockus the whole time. As a result, the officers contacted Brockus by phone. Brockus stated that he was on his way to meet Champ at the agreed upon location. The controlled delivery was successfully completed, and the officers identified “Champ” as Randy Avalos.

Based on this incident and other facts revealed during the investigation, Special Agent Tylman made the following observations in the wiretap affidavit:

I believe that interviewing Brockus and the other Target Subjects would be unproductive because these individuals would be uncooperative, especially due to the fear of physical retaliation that the [Westside Verdugo] and [the Mexican Mafia] are known to impose on those who cooperate with law enforcement, including death. Also, although Brockus had cooperated with law enforcement during a custodial interview on April 7, 2010, as it pertained to his (Brockus) collection of money from [Westside Verdugo] gang members. [sic] I believe based on my involvement in this investigation and my training and experience that Brockus minimized his role in an on-going criminal conspiracy. For example, during the custodial interview Brockus admitted that he does collect money from [Westside Verdugo] gang members involved in the distribution of narcotics; however, Brockus was not forthcoming about the amounts of money he collects, when he collects the money and from whom he collects the money . . . . Brockus also never told the interviewing [Task Force Officers] about the types of narcotics being distributed in [Westside Verdugo] gang controlled neighborhoods or the individuals involved in transporting the narcotics to these neighborhoods. In addition, Brockus to date has never contacted law enforcement authorities to discuss his (Brockus) jail conversations with Sal Hernandez.6 I also believe based on my involvement in this investigation and my training and experience that Brockus, if contacted by law enforcement agents, will provide misinformation about rival gang members in an effort to mask his on-going criminal activities and direct law enforcement resources in a direction that would allow him (Brockus) to easily avert law enforcement detection. Based on the above reasons I believe conducting these interviews poses the risk of alerting associates, accomplices, and other conspirators to the existence of the investigation and thereby make them more cautious and more difficult to investigate. For these reasons, I believe interviews of subjects or associates at this point in the investigation will not further the investigation’s goals.

Based on Special Agent Tylman’s affidavit, the district court authorized a wiretap on Brockus’s telephone.

On July 8, 2010, law enforcement interviewed Brockus regarding the murder of Daniel Martinez. Brockus stated that he had no solid information regarding the identity of the murderer, but he “surmised” that Andrew Rodriguez (a member of the Mexican Mafia) may have ordered the murder.

The district court renewed the wiretap authorization on September 26, 2010, October 29, 2010, and December 6, 2010. The renewals were each granted based on a new affidavit by Special Agent Tylman. However, these affidavits did not mention the July interview.

As a result of the wiretap, the FBI intercepted incriminating conversations between Brockus and various members of the Westside Verdugo, including Defendants. On September 13, 2010, Estrada and Brockus exchanged a series of text messages in which Estrada attempted to purchase heroin from Brockus. Between October 14, 2010, and October 19, 2010, the FBI intercepted another conversation between Brockus and Estrada. In that conversation Brockus told Estrada that his heroin supplier had been arrested and that he needed to find a new one. Estrada then agreed to contact a supplier in Los Angeles. Estrada offered to provide Brockus a sample of the supplier’s heroin before Brockus decided to purchase a large quantity. The remainder of the conversation shows that Estrada went to Los Angeles, purchased two ounces of heroin from the supplier, and delivered it to Brockus in San Bernardino. On December 26, 2010, the FBI intercepted a series of text messages between Mark Rios and Brockus. At the time, Rios was incarcerated at the California Rehabilitation Center. Using coded language, the messages discussed the collection of drug proceeds at the prison yard. Then, on January 3, 2011, Rios spoke with Brockus over the phone regarding the distribution of drug proceeds and smuggled cell

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6. In May 2010, law enforcement obtained two recorded jail calls from Hernandez to Brockus in which the two discussed various illegal activities related to the Westside Verdugo and the Mexican Mafia.
phones to three Mexican Mafia members incarcerated at the California Rehabilitation Center. This conversation was also intercepted pursuant to the wiretap on Brockus’s cell phone.

On January 11, 2011 (after the expiration of the wiretap), the FBI interviewed Brockus regarding the drug conspiracy investigation. When he was informed of the purpose of the interview, Brockus provided information helpful to the investigation. Brockus eventually testified before a grand jury.

The grand jury returned an indictment, charging Defendants (along with 50 other individuals) with conspiracy to distribute and possession with intent to distribute heroin and methamphetamine.

Prior to trial, Defendants sought to suppress the incriminating statements that had been intercepted by the government. They claimed that the affidavits supporting the wiretap applications were deficient, but the district court denied the motion. Consequently, Defendants pleaded guilty and reserved the right to appeal the denial of their motion to suppress.

II. DISCUSSION

A. The Affidavits Contained a Full and Complete Statement of the Facts

On appeal, Defendants argue that the affidavits contained material omissions. We disagree.7

“We review de novo whether the information submitted in an affiant’s affidavit amounts to ‘a full and complete statement of the facts …’” United States v. Canales Gomez, 358 F.3d 1221, 1224 (9th Cir. 2004) (quoting 18 U.S.C. § 2518(1)(c)). Regarding an application for a wiretap, the affidavit is sufficient as long as it “as a whole speaks in case-specific language” even if “some language in the affidavit may be conclusory or merely describe[s] the inherent limitations of certain investigatory techniques.” United States v. Garcia-Villalba, 585 F.3d 1223, 1230 (9th Cir. 2009). Importantly, even when additional information could have been included, the affidavit is sufficient as long as it is “reasonabl[y] detail[ed].” Id. at 1229.

A false statement or omission in a supporting affidavit will invalidate a warrant only if the omission is material. United States v. Rivera, 527 F.3d 891, 898 (9th Cir. 2008). To determine whether a false statement is material, “the reviewing court should set the affidavit’s false assertions to one side and then determine whether the affidavit’s remaining content is still sufficient to establish [necessity].” See United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985).

1.

Defendants first argue that the affidavits improperly omitted information regarding the availability of state wiretaps. We disagree.

An application for a federal wiretap need not discuss the availability of state wiretaps, because “[t]he purpose of the necessity requirement is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.” Garcia-Villalba, 585 F.3d at 1227 (quoting United States v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1988)). A wiretap authorized by a state court is not a traditional investigative technique any more than a wiretap authorized by a federal court is a traditional investigative technique. Although the procedures for obtaining a federal and state wiretap may differ, Villa v. Maricopa County, 865 F.3d 1224, 1230 (9th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018), there is no meaningful difference in the level of intrusiveness. Indeed, because both methods are equally intrusive, they are subject to the same minimum requirements under federal law. See id.; 18 U.S.C. §§ 2516, 2518. Thus, failing to discuss the availability of state wiretaps was not a material omission.

2.

 Defendants next argue that the affidavits omitted information regarding Brockus. This argument is similarly unavailing.

The affidavits at issue in this case “did more than recite the inherent limitations of using confidential informants; [they] explained in reasonable detail why each confidential source or source of information was unable or unlikely to succeed in achieving the goals of the … investigation. That is sufficient.” Rivera, 527 F.3d at 899. The affidavits disclosed that Brockus had cooperated with the Government previously in a limited way, and gave specific reasons why using Brockus as an informant as to the conspiracy generally was not a viable option going forward.

Defendants, however, fault Special Agent Tylman for failing to mention in his warrant affidavit the July 2010 interview regarding the murder of Daniel Martinez. “However, we have not required such a level of detail in a wiretap application.” Id. Thus, “we conclude that this failure, given the level of detail in the affidavit as a whole, does not render the affidavit inadequate for purposes of § 2518(1)(c).” Id. Even if failing to discuss the interview were an omission, it was not material. The interview would have provided very little evidence that Brockus was willing and able to assist the FBI in taking down the Westside Verdugo and related Mexican Mafia members.

In the interview, Brockus “surmised” that a Mexican Mafia member may have ordered the murder of Martinez. If in fact Brockus knew who had ordered the murder, then his cooperation was less than complete and would indicate that he was not willing to cooperate. On the other hand, if Brockus did not know who ordered the murder, he likely didn’t have access to enough information to bring down the conspiracy because he had didn’t have complete knowledge of the Mexican Mafia’s activities in San Bernardino. Thus, as will be discussed below, the affidavits would have been “suf-
B. The District Court did not Abuse Its Discretion in Authorizing the Wiretap

We also disagree with Defendants’ argument that the district court abused its discretion in determining that the wiretaps were necessary.

“The judge authorizing a wiretap has considerable discretion.” United States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986). Thus, a district court’s determination that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous,” 18 U.S.C. § 2518(3)(c), “is reviewed under an abuse of discretion standard.” Canales Gomez, 358 F.3d at 1225. A district court abuses its discretion if it fails to apply the correct legal standard or if its application of the correct standard is “illogical, implausible, or without support in inferences that may be drawn from facts in the record.” United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

“[T]he wiretap should not ordinarily be the initial step in the investigation, but … law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap.” United States v. McGuire, 307 F.3d 1192, 1196–97 (9th Cir. 2002) (footnote omitted). Thus, “[w]hen reviewing necessity we employ a ‘common sense approach’ to evaluate the reasonableness of the government’s good faith efforts to use traditional investigative tactics or its decision to forego such tactics based on the likelihood of their success or the probable risk of danger involved with their use.” United States v. Gonzalez, Inc., 412 F.3d 1102, 1112 (9th Cir. 2005), amended on denial of reh’g, 437 F.3d 854 (9th Cir. 2006) (quoting United States v. Blackmon, 273 F.3d 1204, 1207 (9th Cir. 2001)). “The necessity for the wiretap is evaluated in light of the government’s need not merely to collect some evidence, but to ‘develop an effective case against those involved in the conspiracy.’” United States v. Decoud, 456 F.3d 996, 1007 (9th Cir. 2006) (quoting Brone, 792 F.2d at 1506). An “effective case” is a case in which the government has “evidence of guilt beyond a reasonable doubt.” McGuire, 307 F.3d at 1198.

Depending on the circumstances, the use of confidential informants can be an unreliable investigative method. “Indeed, we have previously explained that ‘[t]he use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril.’” Canales Gomez, 358 F.3d at 1226 (alteration in original) (quoting United States v. Bernal-Osorio, 989 F.2d 331, 333 (9th Cir. 1993)). “Not only common sense but also our precedent con

ferences that the existence of informants and undercover agents does not preclude a necessity finding.” McGuire, 307 F.3d at 1199. Thus, “[t]he government need not show that informants would be useless in order to secure a court-authorized wiretap.” Canales Gomez, 358 F.3d at 1226.

Moreover, the FBI was not conducting an ordinary criminal investigation; this was an investigation into an elaborate and widespread drug distribution conspiracy. “[T]he government is entitled to more leeway in its investigative methods when it pursues a conspiracy.” McGuire, 307 F.3d at 1198. “Unlike individual criminal action, which comes to an end upon the capture of the criminal, collective criminal action has a life of its own. Like the Hydra of Greek mythology, the conspiracy may survive the destruction of its parts unless the conspiracy is completely destroyed.” Id. at 1197–98. In addition, “any previous success from the use of confidential informants is … less persuasive in the context of an investigation of criminal conspiracy.” Canales Gomez, 358 F.3d at 1226. Thus, “we have ‘consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of … other satellite conspirators.’” McGuire, 307 F.3d at 1198 (alteration in original) (quoting United States v. Torres, 908 F.2d 1417, 1422 (9th Cir. 1990)).

Given this precedent, the district court did not abuse its discretion in concluding that using Brockus as a confidential informant was unlikely to result in the successful prosecution of each and every member of the conspiracy. Defendants argue that Brockus was in a unique position to “penetrate and dismantle” the conspiracy because he was essentially a ringleader, and that his prior cooperation showed that he was willing and able to cooperate with law enforcement. However, the affidavit gave three specific reasons why using Brockus as a confidential informant was unlikely to work particularly well.

First, Special Agent Tylman believed that Brockus would be uncooperative due to the fear of physical retaliation by the Mexican Mafia. We have recognized that using confidential informants to investigate the Mexican Mafia is particularly problematic. United States v. Rodriguez, 851 F.3d 931, 942 (9th Cir. 2017). Indeed, we have approved of the Government’s blanket explanation that confidential informants could not be used, because “the Mexican Mafia ‘ruthlessly punishes law enforcement cooperators,’ and the organization’s reputation ‘has caused and will continue to cause potential cooperators … to resist recruitment by law enforcement.’” Id. (alteration in original).

This justification applies to Brockus despite his past cooperation. Brockus’s cooperation was minimal and was obtained after he had been arrested. He participated in one controlled delivery of drug money in an apparent exchange for his girlfriend not being charged with a serious crime. Those circumstances do not indicate that Brockus would have cooperated of his own accord in a broad investigation of the Westside Verdugo and the Mexican Mafia conspiracy. The
July 2010 interview also does not demonstrate that Brockus was willing to cooperate because he did not give law enforcement any reliable information. Instead, he merely “surmised” that a certain member of the Mexican Mafia might have been responsible for ordering the murder of Daniel Martinez. The fact that the government eventually sought Brockus’s cooperation after the expiration of the wiretaps is not contrary to this reasoning. At that point, the government had a great deal of information that directly incriminated Brockus.

Second, if Brockus refused to cooperate, asking him to do so could have endangered the entire investigation. See Torres, 908 F.2d at 1422 (finding that certain investigative techniques could not be used, because they might alert the suspects to an ongoing investigation). As Special Agent Tylman noted, interviewing Brockus about the ongoing investigation would “pose[] the risk of alerting associates, accomplices, and other conspirators to the existence of the investigation and thereby make them more cautious and more difficult to investigate.” In fact, as the “shot caller” of the Westside Verdugo, Brockus was in the ideal position to thwart the investigation’s efforts, because he could direct his subordinates to take extra precautions to evade surveillance. The district court did not abuse its discretion when it agreed with Special Agent Tylman’s assessment.

Third, Special Agent Tylman noted that “Brockus, if contacted by law enforcement agents, [may have] provide[d] misinformation about rival gang members in an effort to mask his on-going criminal activities and direct law enforcement resources in a direction that would [have] allow[ed] him (Brockus) to easily avert law enforcement detection.” In other words, Brockus might feign cooperation in order to thwart the investigation or to further his own objectives within the Westside Verdugo. Again, as the “shot caller” of the Westside Verdugo, Brockus was in an ideal position to provide law enforcement with misleading and self-serving information. As a result, it was not illogical for the district court to conclude that attempting to use Brockus as an informant posed serious risks to the success of the investigation.

Further, an investigation of a conspiracy is successful only if it obtains “evidence of guilt beyond a reasonable doubt, not merely evidence sufficient to secure an indictment.” McGuire, 307 F.3d at 1198 (emphasis added). The Government is not required to investigate a conspiracy with one-hand tied behind its back. Rather, to obtain a wiretap, the Government need only show that traditional means of investigation are unlikely to result in evidence that each member of the conspiracy is guilty beyond a reasonable doubt. Decoud, 456 F.3d at 1007.

We take a “common sense approach” to evaluating the likelihood of success of using confidential informants. Gonzalez, 412 F.3d at 1112 (quoting Blackmon, 273 F.3d at 1207). In doing so, “[w]e have stressed repeatedly that informants as a class, although indispensable to law enforcement, are oftentimes untrustworthy.” Canales Gomez, 358 F.3d at 1226–27. We have also noted that:

On occasion, informants mislead investigators and prosecutors in order to feather their own nests. Indeed, juries in federal cases are routinely instructed that the testimony of witnesses receiving anything from the government in return for the witness’s cooperation must be examined with greater caution than that of other witnesses. There is not a trial lawyer alive who does not understand that juries are wary of any witness receiving a benefit for testifying. Here, the government is to be commended for its interest in wiretap evidence, which, compared to the word of an informant either in the field or in court, is the gold standard when it comes to trustworthy evidence. The truth-seeking function of our courts is greatly enhanced when the evidence used is not tainted by its immediate informant source and has been cleansed of the baggage that always comes with them. Moreover, wiretap evidence out of the mouths of defendants is valuable corroboration of informant testimony. Such evidence serves also to ensure that what investigators are being told by informants is accurate, a very valuable function that guards against the indictment of the innocent. Indeed, the Supreme Court has opined that a jury may understandably be unfavorably impressed with evidence of the police’s uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent.

Id. at 1227 (quotation marks and citations omitted). Because confidential informants may not be believed by a jury, id. at 1226–27, the testimony of a confidential informant (without significant corroborating evidence) often will not produce an effective case. The district court did not abuse its discretion in drawing that conclusion based on the specific facts presented in the affidavits. See Hinkson, 585 F.3d at 1251.

AFFIRMED.
MICHAEL DANIEL CUERO, Petitioner-

v.

SCOTT KERNAN*, Respondent-Appellee.

No. 12-55911
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:08-cv-02008-BTM-WMC
On Remand from the Supreme Court of the United States
Filed September 19, 2018
Before: Diarmuid F. O’Scannlain, Barry G. Silverman, and
Kim McLane Wardlaw, Circuit Judges.

* Scott Kernan has been substituted for his predecessor,
Matthew Cate, as Secretary, California Department of
Corrections and Rehabilitation.

ORDER

In light of Kernan v. Cuero, 138 S. Ct. 4 (2017), we affirm
the judgment of the district court.

AFFIRMED.
COUNSEL

Guy Hart, in propria persona, for Plaintiff and Appellant.
Sara Hart, in propria persona, for Plaintiff and Appellant.
Hall Huguenin, Howard D. Hall and Amanda V. Anderson for Defendant and Respondent.

OPINION

Following summary judgment against plaintiffs Sara and Guy Hart in this wrongful foreclosure action, defendant Nationstar Mortgage LLC obtained its attorney’s fees as prevailing party, based on a clause in the deed of trust. On appeal from the fee award, the Harts contend the clause in question is not an attorney’s fees provision. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. Summary of Litigation

Sara Hart is the mother of adult son Guy. They assert an interest in a house whose title is in the name of Sara’s other son, Don Hart. While the intra-family dispute raged on, nobody was paying the mortgage on the property, which had been taken out exclusively by Don. Nationstar, the successor to the lender, commenced foreclosure proceedings. Sara and Guy brought suit against Nationstar, alleging causes of action for: (1) a preliminary injunction halting the foreclosure sale; and (2) declaratory relief regarding Nationstar’s authority to conduct a foreclosure while the title dispute was pending. In their prayer for relief, they sought attorney’s fees.

2. Motion for Attorney’s Fees

After Nationstar obtained summary judgment, and while Sara and Guy’s appeal was pending, Nationstar sought its attorney’s fees as prevailing party on a contract with an attorney’s fees provision. Specifically, Nationstar relied on paragraph 9 of the deed of trust, which it asserted was an attorney’s fees provision.

Paragraph 9 provides, in full, as follows: “9. Protection of Lender’s Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender’s interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender’s actions can include, but are not limited to: (1) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys’ fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9. Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.”

1. Our discussion of the underlying action is taken from our prior opinion in the case, Hart v. Nationstar Mortgage (March 2, 2018, B278677).

2. We refer to the Harts by their first names; no disrespect is intended.

Nationstar obtained summary judgment on the basis that, as Sara and Guy are not borrowers, they had no rights under the deed of trust. Even if they had (or ultimately obtained) a title interest in the property, they would have no right to reinstate the loan and therefore could not stop the foreclosure. The court also rejected Sara and Guy’s attempt to assert Don’s rights in the action. Sara and Guy appealed; we affirmed.
Alternatively, Nationstar argued that Sara and Guy were estopped from arguing there was no contractual basis for fees, as they had sought an award of attorney’s fees in their complaint. Although Sara and Guy had, in fact, included a prayer for attorney’s fees in their complaint, they had not identified any contractual or statutory basis for that prayer.

3. Sara and Guy’s Opposition

Sara and Guy opposed, arguing, among other things, that the language of Paragraph 9 is not an attorney’s fees provision because it provides for attorney’s fees to become additional debt of the borrower, not for an award of fees in litigation. They argued that judicial estoppel did not apply because they had not specifically sought fees under contract, and, in any event, the legal authority on which Nationstar relied did not govern.

4. Trial Court’s Ruling and Appeal

The trial court granted Nationstar its attorney’s fees, concluding both that paragraph 9 of the deed of trust was an attorney’s fees provision and that Sara and Guy were judicially estopped from arguing to the contrary. The court awarded fees in the amount of $59,750.

Sara and Guy filed a timely notice of appeal.3

DISCUSSION

1. Standard of Review

We review a determination of the legal basis for an award of attorney’s fees de novo as a question of law. (California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc. (2002) 96 Cal.App.4th 598, 604.) “Attorney fees are not recoverable as costs unless a statute or contract expressly authorizes them. [Citation.]” (Ibid.)

2. Civil Code section 1717

Generally speaking, each party to a lawsuit must pay his or her own attorney’s fees unless a statute or contract provides otherwise. (Cargill, Inc. v. Souza (2011) 201 Cal. App.4th 962, 966.) “Where a contract specifically provides for an award of attorney fees, Civil Code section 1717 allows recovery of attorney fees by whichever contracting party prevails, regardless of whether the contract specifies that party. [Citation.]” (Ibid.)

In pertinent part, subdivision (a) of section 1717 provides, “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is deter-

3. Paragraph 9 is Not an Attorney’s Fees Provision

Pursuant to the language quoted above, section 1717 applies only where a “contract specifically provides that attorney’s fees . . . shall be awarded” to one party or the prevailing party. We must consider whether paragraph 9 of the deed of trust specifically so provides. By its plain language, it does not. The paragraph allows the lender to take numerous actions, including incurring attorney’s fees, to protect its interest. It then provides, in the language we emphasized above, that “any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument.” This is not a provision that attorney’s fees “shall be awarded”; it is, instead, a provision that attorney’s fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt.

Federal district courts which have considered the issue have reached the same conclusion. In Valencia v. Carrington Morg. Servs., LLC (D. Haw. June 25, 2013, No. 10-00558 LEK-RLP) 2013 U.S. Dist. LEXIS 88886, the court considered whether the same language justified an award of attorney’s fees and concluded that it did not. The court stated, “The Court notes, however, that the mortgage states that any amounts disbursed in protecting the Bank Defendants’ rights under the mortgage, including for attorneys’ fees, ‘shall become additional debt of Borrower secured by this Security Instrument . . . and shall be payable, with such interest, upon notice from Lender or Borrower requesting payment.’ [Citation.] As such, the mortgage does not entitle the Bank Defendants to recover attorneys’ fees as an award pursuant to the instant litigation. Rather, as provided in the mortgage, the Bank Defendants may convert the amounts spent on attorneys’ fees into additional debt secured by the mortgage.” (Id. at p. *28.) As Nationstar argued in obtaining summary judgment, the Harts were not borrowers.4

Recently, a district court in California applied the reasoning of Valencia, and that of an unpublished California Court of Appeal opinion, to conclude that paragraph 9 in the standard form deed of trust is not a litigation attorney’s fees provision.5 (Dufour v. Allen (C.D. Cal. Apr. 20, 2017, No. 14-cv-

4. For this reason, Nationstar is not aided by paragraph 14 of the deed of trust, which it raised for the first time at oral argument on appeal. That paragraph provides that the lender “may charge Borrower fees for services performed in connection with Borrower’s default, for the purpose of protecting Lender’s interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys’ fees, property inspection fees and valuation fees.” The Harts are not borrowers under the deed of trust.

5. Pursuant to California Rules of Court, rule 8.1115(a), we do not formally cite to the unpublished Court of Appeal opinion. However, the federal district court—which is not restricted in its use of unpublished California opinions—relied on it. Under these circumstances, we choose neither to ignore the unpublished opinion nor redact it from

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3. On appeal, Sara and Guy initially argued they could not be liable for attorney’s fees under a contract to which Don, and not they, were signatories. As there had been recent authority on the issue of whether paragraph 9 of the deed of trust constituted an attorney’s fees provision, we sought additional briefing on that issue. As we conclude that issue is dispositive, we need not address the non-signatory issue.
Recognize that the California unpublished case is not precedent. Nevertheless, we rec
motion.

The inference that Don will pay does not follow; the three Harts are fighting over title to the property, and the property is in foreclosure. It is not clear who, if anyone, will ultimately pay off the debt and, therefore, be responsible for the added sum of the attorney’s fees. In any event, even if Don is ultimately responsible for the fees, we see no inequity. Paragraph 9 is, in part, an indemnity clause whereby the signatory borrower agrees to be responsible for numerous expenses which the lender may incur as the result of third-party interference with the lender’s rights. Nationstar has cited no authority that such an indemnity agreement is so inequitable as to be unenforceable. In any event, we do not address whether paragraph 9 applies to Don in the context of the present litigation.

4. No Other Provision Justifies an Award of Fees

For the first time, on appeal, Nationstar argues that if attorney’s fees are not awardable under paragraph 9 of the deed of trust, they are awardable under paragraph 22.

Paragraph 22 of the deed of trust is an acceleration clause. It provides, in part, as follows: “22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 [governing acceleration on transfer of interest] unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

None of these cases hold that in an unsuccessful suit by a nonborrower against a lender, the lender may recover attorney’s fees against a nonborrower under paragraph 9 or its equivalent. Indeed none of these cases contain any analysis of paragraph 9 or similar language in another instrument. In contrast, the only cases which have considered the issue, Valencia and Dufour, are in agreement with our independent analysis of the language of the deed of trust: paragraph 9 simply does not provide for a separate award of fees per motion.

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Because this paragraph was only raised on appeal, Nationstar failed to provide evidence in the trial court that this paragraph applies. That is, there is no evidence that Nationstar gave proper notice of default, and that the borrower failed to cure the default, allowing acceleration. As such, Nationstar

05616-CAS(SSx)) U.S. Dist. LEXIS 61229.) After quoting from Valencia, the Dufour court stated, “Similarly, the deed of trust at issue in Tyler v. Wells Fargo Bank, N.A. (Cal. Ct. App. July 8, 2016, No. E063985) 2016 Cal. App. Unpub. LEXIS 5117, No. 2016 WL 3752394 included language identical to Section 9. [Citation.] Recognizing that Valencia was not binding precedent, the California Court of Appeal nevertheless found Valencia persuasive and ‘conclude[d], as in Valencia, that the [deed of trust] attorney fee provision does not provide an independent basis for awarding attorney fees.’ [Citation.] In both Valencia and Tyler, the court denied the lenders’ motions for attorneys’ fees. [Citations.]” (Id. at p. *16.) The Dufour court likewise concluded paragraph 9 of the deed of trust was not an attorney’s fees clause. (Id. at p. *17.)

There is no authority to the contrary. Nationstar relies on cases which have awarded attorney’s fees in litigation under paragraph 9 of the standard form deed of trust, but none of those cases actually analyzed of whether paragraph 9 specifically provided for an award of attorney’s fees. (E.g., Santa Clara Savings & Loan Assn. v. Pereira (1985) 164 Cal. App.3d 1089 [the borrowers challenged the fees awarded under language similar to paragraph 9; argument limited to whether borrowers had breached, not whether the provision allowed for an award of fees in litigation]; Boring v. Nationstar Mortg., LLC (E.D. Cal. Jun. 9, 2016, No. 2:13-cv-01404-GBCMK) 2016 U.S. Dist. LEXIS 75474 [fees were awarded under both paragraph 9 and the borrower’s note; borrower questioned whether Nationstar was the prevailing party, not whether the provision allowed for an award of fees in litigation]; Boza v. US Bank Nat’l Ass’n (C.D. Cal. July 25, 2013, No. LA CV12-06993 IAK (FMOx)) 2013 U.S. Dist. LEXIS 198318, aff’d. (2015) 606 Fed.Appx.357 [fees were awarded against borrower under the note, and two paragraphs of the deed of trust, including paragraph 9; no issue was raised as to whether paragraph 9 provided for an award of fees in litigation]; Whittle v. Wells Fargo Bank, N.A. (E.D. Cal. May 6, 2010, No. CV F 10-0429 LJO GSA) 2010 U.S. Dist. LEXIS 52923 [fees were awarded under the note and deed of trust; the borrower challenged whether the provisions encompassed the defense of his claims, not whether paragraph 9 provided for an award of fees in litigation].)

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Nationstar suggests that equitable considerations should guide us to a different result. Specifically, it argues that enforcing paragraph 9 as written would mean the attorney’s fees must be paid by Don, a nonparty to this litigation, rather than Sara and Guy, the individuals who caused the litigation to occur. The inference that Don will pay does not follow; the three Harts are fighting over title to the property, and the property is in foreclosure. It is not clear who, if anyone, will ultimately pay off the debt and, therefore, be responsible for the added sum of the attorney’s fees. In any event, even if Don is ultimately responsible for the fees, we see no inequity. Paragraph 9 is, in part, an indemnity clause whereby the signatory borrower agrees to be responsible for numerous expenses which the lender may incur as the result of third-party interference with the lender’s rights. Nationstar has cited no authority that such an indemnity agreement is so inequitable as to be unenforceable. In any event, we do not address whether paragraph 9 applies to Don in the context of the present litigation.

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cannot rely on this paragraph as an after-the-fact justification for the fees awarded by the trial court on a different basis.\(^6\)

5. Sara and Guy are Not Estopped to Deny Attorney’s Fees

Relying on *International Billing Services v. Emigh* (2000) 84 Cal.App.4th 1175, Nationstar argues that Sara and Guy are judicially estopped from denying there is a contractual basis for an attorney’s fees award, because they had pleaded a right to attorney’s fees.

In *International Billing Services*, the Third District Court of Appeal concluded there was, in fact, a contractual basis for the award of attorney’s fees at issue in the case. (*International Billing Services*, supra, 84 Cal.App.4th at p. 1183.) However, the court went on to state, in dicta, that a party could be judicially estopped to deny that a contract provided for an award of fees if that party had sought an award of fees under that contractual provision. (*Id.* at pp. 1186-1191.)

Preliminarily, *International Billing Services* is distinguishable. In that case, the party to be estopped had actually argued that the specific contractual provision at issue justified an award of fees. (*International Billing Services*, supra, 84 Cal.App.4th at p. 1186.) Here, in contrast, Sara and Guy had simply included a prayer for attorney’s fees in their complaint, without specifying whether they sought fees according to contract or statute, and certainly without identifying paragraph 9 of the deed of trust as an applicable attorney’s fees provision.

More importantly, however, is that *International Billing Services* is no longer good law. The court that issued the opinion subsequently backed away from it, holding that its dictum “sweeps too broadly.” (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 465.) The Third District concluded that its prior opinion did not make proper use of the doctrine of judicial estoppel. (*Id.* at p. 469.) It stated, “In sum, there is no sound policy or legal basis for the broad rule adopted by this court in *International Billing Services*. That rule would instead violate the very policy considerations it purports to serve. We agree with the many state court decisions refusing to apply estoppel against a losing party who sought attorney fees under circumstances where that party would not have been entitled to such fees had it prevailed.” (*Id.* at p. 470.)

In short, simply pleading a right to attorney’s fees is not a sufficient basis to judicially estop a party from challenging the opposing party’s alleged contractual basis for an award of attorney’s fees. The trial court erred in relying on judicial estoppel as an alternative basis for its fee award.

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\(^6\) Nationstar also seeks to justify the fee award under an attorney’s fees clause in the note signed by Don. Recognizing that the note was not before the trial court, Nationstar has moved this court to take additional evidence on appeal. We deny the motion. In any event, Sara and Guy did not sign the note and did not sue on the note. There is no basis to hold Sara and Guy liable for attorney’s fees based on a provision in a contract they did not sign and did not sue on.

DISPOSITION

The attorney’s fees award is reversed. Nationstar is to pay Sara and Guy’s costs on appeal.

RUBIN, J.

WE CONCUR: BIGELOW, P. J., GOODMAN, J.*

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
In re K.L., a Person Coming Under the Juvenile Court Law.

SISKIYOU COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent,
v.
A.A., Defendant and Appellant;
THE KARUK TRIBE, Intervener.

No. C079100
In The Court of Appeal of the State of California
Third Appellate District
(Siskiyou)
(Super. Ct. No. SCJVSQ1451514)
APPEAL from a judgment of the Superior Court of Alpine County, William J. Davis, Judge. Affirmed.
Filed September 18, 2018

COUNSEL
Matthew I. Thue for Defendant and Appellant.
Brian L. Morris, County Counsel, Dennis Tanabe, Dana Barton, and Natalie E. Reed, Deputy County Counsel for Plaintiff and Respondent.
Jedediah Parr, California Indian Legal Services for Intervener.

OPINION

Appellant, the noncustodial biological father of the minor, appeals from the juvenile court’s dispositional judgment, removing the minor from his mother and placing him with his presumed father, L.V. (Welf. & Inst. Code, § 395 [unless otherwise set forth, statutory section references that follow are to the Welfare and Institutions Code].) The Karuk Indian Tribe has intervened on appeal. They contend the juvenile court failed to comply with the procedural requirements of the Indian Child Welfare Act of 1978 (hereafter ICWA) in entering its dispositional judgment. (25 U.S.C. § 1912.) Finding the provisions of ICWA do not apply, we affirm the judgment.

FACTS AND PROCEEDINGS

In August 2014, the Siskiyou County Health and Human Services Agency (hereafter Agency) filed a section 300 petition on behalf of the two-year-old minor and his older half sibling, after mother was arrested for child cruelty and possession of a controlled substance. The minors were temporarily detained together in a nonrelative foster home. L.V. is the father of the minor’s half sibling. (The minor’s half sibling is not a subject of this appeal.) The petition alleged that the minor’s father’s identity was unknown. Shortly after the minor was born, L.V. took the minor into his home where he lived for several months. Initially, L.V. believed he was quite probably the minor’s father and treated him as such. When the minor was four months old, a DNA test, requested by mother, confirmed L.V. was not the minor’s biological father. Nonetheless, L.V. continued to treat the minor as his own. The juvenile court found L.V. to be the minor’s presumed father. The Agency thereafter placed the minor and his half sibling with L.V.

Shortly after these proceedings commenced, paternity test results revealed appellant, A.A., to be the minor’s biological father. Appellant had never met the minor and had only recently learned of the minor’s existence. Appellant is an enrolled member of the federally recognized Karuk Indian Tribe (hereafter the Tribe). (79 Fed. Reg. 4748, 4750 (Jan. 29, 2014).) The Agency sent ICWA notice to the Tribe. The Tribe confirmed that it was in the process of enrolling the minor and informed the juvenile court that it intended to intervene in the proceedings after its next council meeting on December 18, 2014.

The combined jurisdiction and dispositional hearing took place on December 8, 2014. The juvenile court acknowledged that the minor was an Indian child but, because the minor was being removed from one parent and placed with L.V., his presumed father, the juvenile court found the ICWA procedures, including expert testimony and placement preferences, were not triggered. The juvenile court sustained the allegations in the section 300 petition, declared the minor a dependent child of the court, placed the minor (along with his half sibling) with his presumed father, L.V., and ordered family maintenance services for L.V. Mother was also provided with reunification services. Because appellant was required to register as a sex offender, he was bypassed for reunification services pursuant to section 361.5, subdivision (b)(16). The case was then transferred to Humboldt County, where L.V. lives.

DISCUSSION

Appellant and the Tribe argue extensively that the ICWA required that the juvenile court’s order removing the minor from his mother and placing him with his presumed father be supported by the testimony of an expert witness and otherwise comply with the ICWA placement preference requirements. Since we agree with the juvenile court that the minor was not placed in “foster care” and the proceeding was not a “child custody proceeding” within the meaning of the ICWA, we hold that compliance with ICWA provisions was not required at disposition.

Congress passed the ICWA “to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children ‘in foster or adoptive homes which will reflect the unique values of Indian culture . . . ’” (In re Levi U. (2000) 78 Cal.App.4th 191, 195;

In furtherance of that policy, the ICWA provides for a heightened standard of proof prior to removal of a minor at disposition. Specifically, the ICWA provides that “[n]o foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (25 U.S.C. § 1912(e).) “Foster care placement” is expressly defined as “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand.” (25 U.S.C. § 1903(1)(i).) By its terms, foster care does not include placement with one of the parents. (See In re J.B. (2009) 178 Cal. App.4th 751, 758 [ICWA does not apply where juvenile court removed child and placed child in the father’s custody]; see also In re M.R. (2017) 7 Cal.App.5th 886, 904-905.)

Likewise, section 361, subdivision (c), provides that a dependent child may not be taken from a parent’s custody unless the circumstances listed in paragraphs (1) to (5) are found to be true by clear and convincing evidence, and, in an Indian child custody proceeding, paragraph (6), which requires a finding that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that finding is supported by testimony of a ‘qualified expert witness’ as described in Section 224.6.” (§ 361, subd. (c)(6).) An “Indian child custody proceeding,” “in turn, is defined by section 224.1, subdivision (d), as “a ‘child custody proceeding’ within the meaning of Section 1903 of the Indian Child Welfare Act, including a proceeding for temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement.” Thus, the plain language of section 361, subdivision (c)(6), establishes that the statute applies only in an “Indian child custody proceeding,” the definition of which expressly includes various proceedings, but not a proceeding for placement with a parent. (§ 224.1, subd. (d); 25 U.S.C. § 1903.)

We agree with respondent and the court in In re J.B., supra, 178 Cal.App.4th 751 that because the minor was placed with a parent, it was unnecessary to provide the testimony of an expert witness as provided for by the ICWA, or to make a finding pursuant to section 361, subdivision (c)(6). Placement with a parent is not a foster care placement or an Indian child custody proceeding. As noted in In re J.B., this reading of section 361, subdivision (c)(6), “comports with the remainder of the ICWA statutory scheme,” including the notice requirement, which “com[es] into play when the agency seeks foster care placement and the juvenile court has reason to believe the child is an Indian child.” (In re J.B., supra, 178 Cal.App.4th at pp. 758, 759, citing 25 U.S.C. § 1912(a).) It also comports with the legislative intent behind the ICWA, as well as the related California statutory scheme, which expressly focus on “the removal of Indian children from their homes and parents, and placement in foster or adoptive homes.” (Id. at pp. 759-760, citing 25 U.S.C. §§ 1901 & 1902; § 224, subd. (a)(1); Cal. Rules of Court, rule 5.480, italics omitted.)

We reject the Tribe’s argument that there is a direct conflict between the definition of “parent” under the ICWA and state law that requires resolution. The ICWA defines “parent” as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.” (25 U.S.C. § 1903(9).) State law recognizes nonbiological or adoptive “presumed” parents, such as L.V. in this case, which is indisputably more broad than the definition in the ICWA. (Fam. Code, § 7611.) The definition of “parent,” however, is not determinative here as to whether the proceeding is one for “foster care placement.” Even assuming the minor was removed from a parent as defined by the ICWA, he was not placed “in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand.” (25 U.S.C. § 1903(1)(i).) Thus, the ICWA was not triggered.

Appellant argues that placing the minor with a nonbiological, nonadoptive presumed parent is akin to placing the minor with a guardian. We disagree. Unlike guardians (and foster parents), a presumed parent has legal status as a “parent” and enjoys the full panoply of rights attendant to parenthood, including custody of his or her child. (In re Shereece B. (1991) 231 Cal.App.3d 613, 621-622; In re M.C. (2011) 195 Cal.App.4th 197, 211.) Our Supreme Court has applied the definitions of “parent” found in the United Parentage Act (Fam. Code, § 7600 et seq.) to dependency cases. (In re Zacharia D. (1993) 6 Cal.4th 435, 451; In re M.C., at p. 211.) A presumed parent is a person “presumed to be the natural parent of a child.” (Fam. Code, § 7611.) “Under the dependency law scheme, only mothers and presumed parents have legal status as ‘parents,’ entitled to the rights afforded such persons in dependency proceedings, including standing, the appointment of counsel and reunification services. [Citations.]” In re M.C., at p. 211.) Family Code, section 3010, expressly provides: “(a) The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child. [¶] (b) If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to custody of the child.” (Italics added.) By contrast guardians and foster parents lack the full panoply of rights afforded to a parent, and guardianships and foster care are subject to continued judicial involvement.1

1. Indeed, if a nonbiological presumed parent is akin to any other status, it would be most akin to an adoptive parent.
Appellant and the Tribe ask this court to expand the definition of foster care to include placement with a nonbiological presumed parent. They argue that the policy behind the ICWA supports such an expansion and that, because a nonbiological (and nonadoptive) parent is not a “parent” as defined by the ICWA, such an individual should be considered a guardian or foster parent. Indeed, appellant takes the position that placement with any non-Indian parent conflicts with ICWA’s goals of promoting the stability and security of Indian tribes and families and therefore, implicates ICWA, despite the definitions of “foster care” and “Indian child custody proceeding” set forth in the statutes.

We need not determine whether an expansion of the ICWA procedures, as proposed by appellant and the Tribe, would promote the purpose of the ICWA. The plain meaning of the statutory language in both the ICWA and the California statutes precludes such an expansion. “Foster care” and “Indian child custody proceeding” are defined and do not, by their terms, include a proceeding wherein the Agency seeks, and the juvenile court orders, placement of the minor with a presumed parent. (See In re J.B., supra, 178 Cal.App.4th at pp. 755-759.) By expressly including certain placements, other placements are impliedly excluded. (See Imperial Merchant Services, Inc. v. Hunt (2009) 47 Cal.4th 381, 389.) Indeed, had the Legislature meant to encompass the categories suggested by appellant and the Tribe, it could have easily so provided.

Our reasoning is consistent with In re J.B., supra, 178 Cal. App.4th 751, which discussed the legislative intent of the ICWA and held that placing a child with a previously noncustodial parent does not equate with removal of the child from its family and placement in a foster or adoptive home. (Id. at p. 760.) Although the biological ties to the minor of the parents were not discussed in that case, the reasoning nonetheless applies. As explained in In re J.B., “Placement with a parent is not foster care” and the definition of “Indian child custody proceeding” “expressly includes various proceedings, but not a proceeding for placement with a parent.” (Id. at p. 758.)

Our reasoning is also consistent with In re M.R., supra, 7 Cal.App.5th 886, which agreed with In re J.B., supra, 178 Cal.App.4th 751, that custody in favor of a parent does not equate with temporary placement with a guardian. (In re M.R., at p. 905.) The biological relationship of the previously noncustodial parent in In re M.R. had not been definitively established. Thus, the court stated it would “leave detailed discussion of whether ICWA applies where a child is removed from the custody of both of his biological parents, and placed in the custody of a third parent who is not a biological parent, for a case that presents those facts.” (Ibid.) Nonetheless, the court was not persuaded that the rule articulated in In re J.B, supra, should be limited to circumstances where it has been definitely established that the parent to whom custody is awarded is a biological parent. (Ibid.)

The issue now squarely presented, we conclude that the ICWA requires more than just removal from a parent -- it requires placement in one of the specified categories, none of which apply here. Nothing in the statutory language suggests that the ICWA applies when custody of an Indian child is transferred from one parent to another parent from whom no Indian ancestry flows. (Accord, In re J.B., supra, 178 Cal. App.4th at pp. 757-758.) The biological ties to the minor, or the Indian ancestry, of the previously noncustodial parent are not determinative. (See In re M.R., supra, 7 Cal.App.5th at p. 905.) “[T]he legislative intent behind ICWA expressly focuses on the removal of Indian children from their homes and parents, and placement in foster or adoptive homes.” (In re J.B., at p. 759.) By placing the minor with his previously noncustodial, nonbiological presumed father, the Agency was not seeking to place the minor in foster care or to terminate parental rights. This was not a proceeding for “foster care placement” within the meaning of section 1903 of the ICWA, nor was it an “Indian child custody proceeding,” within the meaning of sections 224.6 and 361, subdivision (c)(6). Thus, the finding under section 361, subdivision (c)(6) and the expert testimony to support it were not required.

Finally, appellant argues the juvenile court erred in by-passing him for reunification services. He bases his assignment of error, however, on the juvenile court’s failure to make “active efforts to avoid the breakup of the Indian family” as required by ICWA. (See 25 U.S.C. § 1912(d).) However, because ICWA was not implicated by the juvenile court’s dispositional judgment, as explained herein, we reject his contention.

**DISPOSITION**

The judgment is affirmed.

HULL, Acting P. J.

We concur: MURRAY, J., RENNER, J.
CEQA OVERVIEW

CEQA and its implementing regulations “embody California’s strong public policy of protecting the environment.” (Tomlinson v. County of Alameda (2012) 54 Cal.4th 281, 285.) “The basic purposes of CEQA are to: [¶] (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. [¶] (2) Identify ways that environmental damage can be avoided or significantly reduced. [¶] (3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible. [¶] [and] (4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.” (Id. at pp. 285-286.)

In furtherance of these goals, CEQA establishes a three-tier environmental review process. The first step is jurisdictional and requires a public agency to determine whether a proposed activity is a “project.” Under CEQA, a project is defined as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable...
indirect physical change in the environment, and . . . [¶] . . . [¶] . . . that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” (§ 21065.) A project may encompass “several discretionary approvals by governmental agencies” and does not mean “each separate governmental approval.” (Guidelines, § 15378, subd. (c).) Thus, “CEQA’s requirements [can]not [be] avoided by chopping a proposed activity into bite-sized pieces which, when taken individually, may have no significant adverse effect on the environment.” (POET, LLC v. State Air Resources Bd. (2017) 12 Cal. App.5th 52, 73.) If a proposed activity is a project, the agency proceeds to the second step of the CEQA review process.

At the second step, the agency must “decide whether the project is exempt from the CEQA review process under either a statutory exemption [citation] or a categorical exemption set forth in the CEQA Guidelines [citations].” (California Building Industry Assn. v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369, 382 (Bay Area Air).) Examples of categorical exemptions include the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing structures (the Class 1 categorical exemption; Guidelines, § 15301); minor alterations in the condition of land, water, or vegetation (the Class 4 categorical exemption; id., § 15304); and—of particular relevance to this appeal—the construction of a single-family residence (the Class 3 categorical exemption; id., § 15303).

Unlike statutory exceptions, categorical exemptions are subject to exceptions. For instance, the Class 3 categorical exemption that is at issue in this appeal does not apply—or, stated differently, CEQA review may apply—if a project “may cause a substantial adverse change in the significance of a historical resource.” (Guidelines, § 15300.2, subd. (f); Pub. Resources Code, § 21084, subd. (e).) For purposes of this decision, we will refer to this as the “historical resource” exception. The Class 3 categorical exemption also does not apply if “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (Guidelines, § 15300.2, subd. (c).) This exception is commonly referred to as the “unusual circumstances” exception.

If a project is categorically exempt and does not fall within an exception, “it is not subject to CEQA requirements and “may be implemented without any CEQA compliance whatsoever.” (County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 966.) But if a project is not exempt, the agency must then “decide whether the project may have a significant environmental effect.” (Bay Area Air, supra, 62 Cal.4th at p. 382.) Under CEQA, a project that causes a substantial adverse change in the significance of an historical resource is considered to be a project that significantly impacts the environment. (§ 21084.1; see § 21060.5 [defining the environment as “the physical conditions which exist within the area which will be affected by a proposed project,” including “objects of historic . . . significance.”].)

Finally, if the project may have a significant effect on the environment, the agency must proceed to the third step of the process and prepare an environmental impact report (EIR). (§§ 21080, subd. (d), 21082.2, subd. (d), 21100, subd. (a), 21151, subd. (a).)

At each stage of the CEQA review process, the public agency must evaluate the environmental impact of a project against a measure commonly referred to as the baseline, i.e., the environment’s state in the absence of the project. (North County Advocates v. City of Carlsbad (2015) 241 Cal. App.4th 94, 101 (Carlsbad); CREED-21 v. City of San Diego (2015) 234 Cal.App.4th 488, 504 (Creed-21).) “[T]he baseline normally consists of “the physical environmental conditions in the vicinity of the project, as they exist at the time . . . environmental analysis is commenced . . . .” (Carlsbad, at p. 101; see Association of Irritated Residents v. Kern County Bd. of Supervisors (2017) 17 Cal.App.5th 708, 725 [“[T]he text of CEQA and the Guidelines identify existing conditions as the starting point (i.e., baseline) for determining and quantifying the proposed project’s changes to the environment.”].)

II.
FACTUAL AND PROCEDURAL
BACKGROUND

A. The Windemere and historical designation efforts

The Windemere Cottage (Windemere) was a late Victorian-era beach bungalow in La Jolla designed by architects Joseph Falkenhain and Irving Gill. In 1927, the Windemere was moved from its original beachside location to Virginia Way. The Windemere exhibited features that were representative of early architecture in La Jolla, including a hipped roofline, eaves with exposed rafters, vertical board and batten redwood walls, and leaded, diamond-paned windows.

In 2010, the then-owner of the Windemere (the Prior Owner) nominated the Windemere for designation as a historical resource with the Historical Resources Board (the Board). The Board is the appointed body with authority over historical resources in San Diego, including the designation of historical sites, the establishment of historical districts, and the review of development projects that may affect historical resources. At the time, the Prior Owner intended “to restore the building to its 1894 Period of Significance.” However, in February 2011—before the Board ruled on the Windemere’s nomination—the Prior Owner sold the Windemere and the lot on which it was located to the Bottinis for $1.22 million. The Prior Owner also assigned the Bottinis her rights to the Windemere’s historical designation application and a property report that Legacy 106, Inc. (Legacy 106) had prepared in support of the application.

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2. All future references to Guidelines are to the Guidelines for Implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.).
After the sale, the Bottinis withdrew the pending nomination and submitted a single discipline preliminary review application to the Board to verify whether the Windemere was eligible for historical designation—not to pursue historical designation, but rather, to “determine the constraints on future development” of the property. Together with the application, the Bottinis submitted the Legacy 106 report and an addendum that the Bottinis had solicited to rebut the report. Based on these submissions and an on-site visit, the Board’s staff recommended that the Board deny historical designation. In the staff’s view, the Windemere had undergone too many alterations to warrant historical designation.

In September 2011, the Board held a public hearing to determine whether to grant the Windemere historical status. More than a dozen speakers, including members of the Save Our Heritage Organization (SOHO) and the La Jolla Historical Society (LJHS), spoke in favor of historical designation. Nevertheless, a divided Board narrowly declined to grant historical status to the Windemere. SOHO and LJHS requested reconsideration of the decision, but the Board denied the organizations’ request as untimely.

Shortly after the Board’s vote, a preservation officer from the State Office of Historic Preservation (the State) notified the Board that the State had received photographs and context statements about the Windemere and, based on these submissions, believed that the Windemere “appear[ed] eligible” for the California Register of Historical Resources (Register). The Register is “an authoritative guide in California to be used by state and local agencies, private groups, and citizens to identify the state’s historical resources and to indicate what properties are to be protected, to the extent prudent and feasible, from substantial adverse change.” (§ 5024.1, subd. (a.).) The letter did not indicate that the State had received a nomination and stated that the process by which properties may be nominated and stated that the State “encourages nominations of properties” to the Register.

B. The demolition of the Windemere

In November 2011, the Bottinis requested that the City’s Neighborhood Code Compliance Division (Code Compliance) determine whether the Windemere constituted a public nuisance. Together with their request, the Bottinis included a report from a structural engineering firm, which stated that the Windemere was “uninhabitable and no persons [should] be allowed to occupy” it. According to the report, the Windemere’s roof, framing, and single wall construction were incapable of supporting gravity and seismic/wind loads, the rear porch was rotted, portions of the residence were decayed due to age and neglect, and the Windemere was susceptible to collapse in the event of a minor seismic event.

The San Diego Municipal Code sets forth the criteria by which a structure may be categorized as “unsafe, dangerous, or substandard” and therefore, deemed a public nuisance. (Mun. Code, §§ 121.0402-121.0405.) If a property is found to be a public nuisance, Code Compliance must issue a notice of abatement to the property owner describing, among other things, the basis of the determination and actions that must be undertaken to abate the public nuisance. (Id., § 121.0406.) Failure to comply with an abatement order is punishable as a misdemeanor. (Id., §§ 12.0413, 121.0411.) The Municipal Code also establishes procedures that apply to abatement actions involving designated historical resources, which require a property owner to obtain a permit and ensure compliance with all applicable regulations and ordinances prior to the alteration, demolition, or relocation of the designated historical resource. (Id., § 121.0419.)

After reviewing the Bottinis’ request and conducting an on-site visit, Code Compliance sent the Bottinis a notice that declared the Windemere a public nuisance for six independent reasons, including the structure’s dilapidated state, unfitness for habitation, and susceptibility to fire, earthquake, and wind. The notice further stated as follows: “In order to comply with City regulations, you are required to obtain a Demolition Permit . . . [¶] In order to avoid abatement action, the Demolition Permit must be obtained and a Final Inspection Approval secured no later than February 15, 2012.”

The next day, the Bottinis procured a demolition permit and promptly bulldozed the Windemere. Because Code Compliance declared that the Windemere was a public nuisance, the Bottinis did not have to obtain a CDP for the demolition. (§ 30005, subd. (b); Mun. Code § 126.0704, subd. (f.).) Further, the abatement procedures for designated historical resources did not apply because neither the Board nor the State had designated the Windemere a historical resource at the time that Code Compliance rendered its public nuisance determination.

C. The CDP process and appeals

In August 2012, the Bottinis—now the owners of a vacant lot—applied to the Department for a CDP to construct a single-family home on their lot. As part of the permitting pro-

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3. The City requested judicial notice of the State’s official website, but does not discuss the basis or purpose for its request. Accordingly, we deny the City’s request.

4. The parties dispute whether Code Compliance ordered the Bottinis to obtain a demolition permit as the sole means by which to abate the public nuisance or whether the Bottinis, in the alternative, could have repaired the Windemere. Ultimately, we need not resolve this factual disagreement because it is undisputed that, at minimum, Code Compliance authorized the Bottinis to obtain a demolition permit and the City’s Development Services Department (Department) issued the Bottinis a demolition permit.

5. The City requested judicial notice of a video showing the Windemere’s demolition. We deny the request, as the City appears to be using the request as a guise to supplement the administrative record. (Jefferson Street Ventures, LLC v. City of Indio (2015) 236 Cal.App.4th 1175, 1190.) The City also requested judicial notice of a video of the City Council meeting at which the demolition video was displayed. We deny this request as unnecessary; the transcript for that meeting is already a part of the administrative record.
cess, the La Jolla Community Planning Association (Planning Association) reviewed the proposed construction project. During two public meetings, Planning Association members voiced concerns that the Bottinis may have engaged in improper project splitting under CEQA. Nevertheless, the Department’s environmental staff ultimately determined that the construction of the Bottinis’ home was categorically exempt from CEQA review as new residential construction on a vacant lot.

The Planning Association and LJHS appealed the Department’s decision to the City Council, claiming that the Department had failed to consider the “whole of the project” and alleging that the proper project baseline should have been set at a time before the Bottinis demolished the Windemere. Over the course of two meetings, the City Council heard testimony from supporters and opponents of the CEQA appeals. At the first meeting, Department staff and the deputy city attorney informed the City Council that the Bottinis had followed the Municipal Code “to the letter” in all the actions that they had undertaken. Still, the City Council deadlocked 4-4 on whether to grant the CEQA appeals. At the second meeting, one City Council member who had originally voted to deny the CEQA appeals switched his vote to grant the CEQA appeals “to get [the item off] the City Council’s docket and to get the [Bottinis] out of [the] purgatory” of another tied vote.

As a result, the City Council issued a resolution granting the CEQA appeals and remanding the project to the Department to reevaluate its environmental determination with a baseline of January 2010—a date that preceded the Bottinis’ purchase of the property. In its resolution, the City Council concluded that the Windemere’s “demolition should be included in the environmental analysis” of the Bottinis’ residential construction project. The City Council further concluded that the project was “not categorically exempt from environmental analysis” because two CEQA exceptions took precedence over the categorical exemption that governs the construction of single-family homes. Specifically, the City Council concluded that the redefined project (which now included the demolition of the Windemere), with its new baseline of January 2010 (when the Windemere still existed), would “have a significant effect on the environment due to unusual circumstances and may cause a substantial adverse change in the significance of a historic resource” pursuant to section 15300.2, subdivisions (c) and (f) of the CEQA Guidelines.

D. The superior court action

The Bottinis filed an action in the superior court, requesting issuance of a peremptory writ of mandamus directing the City to set aside its decision. In an amended petition, the Bottinis asserted causes of action against the City for inverse condemnation, equal protection, and due process violations. In their inverse condemnation cause of action, the Bottinis alleged that the City’s CEQA determination constituted a regulatory taking of their property because it delayed their plans to construct a home on their property and, as a result, required them to pay a mortgage for both their existing home and an empty lot. In their due process and equal protection causes of action, the Bottinis contended that the City acted without any rational basis and intentionally targeted the Bottinis for disfavored treatment because they had demolished the Windemere.

After briefing and argument, the trial court granted the Bottinis’ petition for a peremptory writ of mandamus. According to the court, the Bottinis’ project is “a separate project distinct from the demolition of the [Windemere].” The court determined that the project baseline should be set at the point at which the property was “an empty lot” because the “[Windemere] had been razed pursuant to [the] demolition permit eight months before the Bottinis submitted their project application.” On that basis, the court found that the City had abused its discretion in concluding that the project is not categorically exempt from CEQA review.

After further briefing and argument, the trial court granted summary judgment for the City on the Bottinis’ constitutional causes of action. Applying the inverse condemnation standards that the California Supreme Court discussed in

Landgate, Inc. v. California Coastal Com. (1998) 17 Cal.4th 1006 (Landgate),

the court concluded that the City was entitled to summary judgment on the Bottinis’ inverse condemnation cause of action because governmental review of a project “for compliance with CEQA is clearly a legitimate governmental purpose.” The court further concluded that the City was entitled to summary judgment on the Bottinis’ equal protection cause of action because no evidence demonstrated that the City had “intentionally discriminated” against the Bottinis or that the City lacked a rational basis for its decision. Finally, the court concluded that the City was entitled to summary judgment on the Bottinis’ due process cause of action because the Bottinis have no protected property interest where, as here, the decision maker (the City) has discretion to grant or deny the benefit at issue (the CEQA categorical exemption).

The City appealed the judgment insofar as it granted the Bottinis’ petition for a writ of mandamus and the Bottinis cross-appealed the judgment insofar as the trial court granted the City’s summary judgment motion.

III.

ANALYSIS

A. CEQA

1. Standard of review

“‘In considering a petition for a writ of mandate in a CEQA case, “[our] task on appeal is “the same as the trial court’s.”’ [Citation.]’ . . . Accordingly, we examine the [agen-

6. The City immediately appealed the trial court’s order granting the Bottinis’ petition for a peremptory writ of mandamus. In an unpublished decision, we dismissed the City’s appeal for lack of jurisdiction. (Bottini v. City of San Diego (Jan. 28, 2016, No. D067510).)
cy’s] decision, not the trial court’s [decision].” [Citation.]’ [Citations.]” (World Business Academy v. Cal. State Lands Com. (2018) 24 Cal.App.5th 476, 491 (World Business).) “[O]ur inquiry extends only to whether there was a prejudicial abuse of discretion” by the agency. [Citation.] “Such an abuse is established ‘if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.’ [Citations.]” [Citation.]” To the extent the question presented turns on an interpretation of CEQA, the Guidelines, or the scope of a particular exemption, it is one of law that we review de novo. [Citation.]” (World Business, supra, 24 Cal.App.5th at p. 492.)

2. Application

This case turns largely on the propriety of the parties’ delineing definitions of the project that is the subject of this dispute. The City, on the one hand, contends that the City Council correctly defined the project to include the demolition of the Windemere and properly set a baseline of January 2010, before the Windemere was demolished. Framed as such, the City claims that the City Council accurately determined that the project would result in a substantial adverse change in the significance of an historical resource (the Windemere) and that the project is therefore not categorically exempt from CEQA review. The Bottinis, on the other hand, contend that the project should be defined to include only the construction of their residence and claim that the baseline should be set in August 2012, when they applied for a CDP. According to the Bottinis, the City Council erred by considering the Windemere’s demolition as part of the project because the City itself had authorized the Bottinis to demolish the Windemere as a public nuisance, which they did several months before they submitted their CDP application.

Based on our review of the administrative record, we agree with the Bottinis and conclude that the City Council abused its discretion by determining that the project encompassed the demolition of the Windemere—an event that took place before the Bottinis filed their application to construct a residence. We also conclude that the City Council abused its discretion by setting a baseline in January 2010, a full year before the Bottinis acquired the property on which they planned to construct their residence. As we will discuss post, the City’s issuance of a permit authorizing the demolition of the Windemere served a public safety objective unthemed to the construction of the Bottinis’ residence and, in any event, fell outside of the CEQA review process altogether because it was ministerial. Further, at the time the Bottinis filed their request for a CDP, the Bottinis’ property was a vacant lot. Under CEQA, that environmental condition accurately reflects the baseline for the Bottinis’ construction project, not an environmental condition that presumes the continued existence of a cottage that, in reality, no longer existed at the time the Bottinis filed their application.

In short, the only project that remained for purposes of CEQA after the City’s Code Compliance Division authorized the Bottinis to demolish the Windemere was the construction of a single-family residence on a vacant lot—a categorically exempt act under CEQA.

a. Applicable project definition and baseline

As noted, the San Diego Municipal Code establishes procedures that Code Compliance must follow to identify unsafe, dangerous, or substandard structures, and to order their abatement “to protect and preserve the safety of the citizens and communities where these structures are located.” (Mun. Code, § 121.0401, subd. (a).) These procedures require Code Compliance to determine whether a given structure is unsafe, dangerous, or substandard, according to a detailed set of criteria. (Id., §§ 121.0403-121.0405.) In this case, Code Compliance concluded that the Windemere constituted a public nuisance for six independent reasons under those criteria and, on that basis, authorized the Bottinis to obtain a ministerial permit to demolish the Windemere.

The City contends that we should treat the Windemere’s demolition as part of the project under review because, in the City’s view, the public nuisance determination that resulted in the issuance of a demolition permit was a “faux ‘emergency’” that the Bottinis “cajoled,” “pressur[ed],” and “coerc[ed] Code Compliance” into making. We reject the City’s characterizations of the public nuisance determination, for a number of reasons.

As an initial matter, this CEQA action is not the appropriate forum to launch a retroactive, collateral attack on the validity of Code Compliance’s public nuisance determination. That public nuisance decision is final and is not the subject of this CEQA appeal. (A Local & Regional Monitor v. City of Los Angeles (1993) 16 Cal.App.4th 630, 647-649 [rejecting objector’s attempt to use an appeal arising from the certification of an EIR as a vehicle to collateral attack the validity of the City’s general plan].)

Even if this were the appropriate forum to rehash the merits of the public nuisance determination, the City has directed us to no evidence—let alone substantial evidence—that calls into question Code Compliance’s conclusion that the Windemere was a bona fide public nuisance. In fact, the City does not even attempt to articulate why it believes the public nuisance determination was incorrect. Instead, the City criticizes the Bottinis for removing various architectural features from the Windemere, which, in the City’s words, “weaken[ed] its structural integrity.” But the City does not accuse the Bottinis of violating any state laws or Municipal Code provisions by purportedly removing these architectural features. On the contrary, the City expressly concedes that the Bottinis were not required to obtain a building permit to engage in the conduct that the City alleges. Further, in arguing that the structural integrity of the Windemere was in fact “weaken[ed],” the City undercuts its own unsupported claim...
that the Windemere never should have been declared a public nuisance in the first place.

The City also has not directed us to any evidence to support its claim that the Bottinis “strong-armed” Code Compliance into making an unfounded public nuisance determination. On the contrary, when questioned at a City Council meeting, the deputy city attorney agreed with the Department’s assessment that the Bottinis had followed the Municipal Code “to the letter” by asking the Board to determine whether the Windemere was historical, notifying Code Compliance that the City had concluded that the Windemere was not historical, and requesting that Code Compliance make a public nuisance determination. Under these circumstances, we conclude that there is no substantial evidence that undercuts Code Compliance’s public nuisance determination or the legitimacy of the actions that the Bottinis undertook in connection with that determination.

We recognize, of course, that the public nuisance determination and the Windemere’s subsequent demolition necessarily affected the conditions of the property on which the Bottinis later requested permission to construct their residence. However, the ministerial demolition permit furthered a goal unrelated to the construction of the Bottinis’ residence—the protection and safety of the City’s citizens. (Mun. Code, § 121.0401, subd. (a).) Indeed, the public nuisance determination itself states that Code Compliance visited and analyzed the property “to determine the condition of the structure with regards to fire, life, health and safety regulations of the City of San Diego.” Further, the determination did not reference or authorize, let alone depend on, the subsequent issuance of a building permit to the Bottinis. (Adams Point Pres. Soc’y v. City of Oakland (1987) 192 Cal.App.3d 203, 207 [demolition was a separate project than the anticipated construction of a building on the demolition site because the demolition permit was not dependent on the issuance of a building permit].) Thus, the public nuisance determination confirms that the demolition permit served a purpose distinct from, and was not a part of, the project under review. (Banning Ranch Conservancy v. City of Newport Beach (2012) 211 Cal.App.4th 1209, 1226 [ordinances were separate projects because “[t]hey serve[d] different purposes”].)

Notwithstanding the public safety goals that the demolition permit advanced, the City contends that we still must treat the Windemere’s demolition and the construction of the Bottinis’ residence as a single cohesive project because the Bottinis purportedly knew before the demolition that they intended to construct a residence on the lot after the demolition. The City argues, for instance, that the construction of the Bottinis’ residence was not a mere “afterthought,” but rather, the Bottinis’ goal when they purchased the property. According to the City, we would permit the Bottinis to violate the rule against segmentation of projects if we were to overlook the Bottinis’ intent to construct a residence on the property. (Guidelines, § 15378, subd. (a) [project includes “the whole of an action”].)

Assuming that the Bottinis intended to construct a residence on the lot when they purchased it, that fact does not change the result of this case. That is because the demolition permit that Code Compliance authorized the Bottinis to obtain was, as all parties agree, ministerial. Whereas CEQA applies to certain nonexempt discretionary acts, it specifically excludes ministerial acts from its reach. (§ 21080, subd. (b) [excluding “[m]inisterial projects proposed to be carried out or approved by public agencies”].) This exclusion of ministerial acts “recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise.” (Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 117.) Because the demolition permit that Code Compliance authorized the Bottinis to obtain was ministerial, it fell outside of CEQA’s scope altogether and the demolition that occurred as a result was not subject to environmental review, either then or now. (Friends of Juana Briones House v. City of Palo Alto (2010) 190 Cal.App.4th 286, 292-293 [rejecting argument that CEQA required consideration of both demolition permit and anticipated construction because both projects were ministerial].)

Our decision in Creed-21 is particularly analogous to the case at hand. In Creed-21, the City of San Diego planned to replace storm drain pipes, construct storm drain infrastructure, and revegetate the affected area. (Creed-21, supra, 234 Cal.App.4th at p. 495.) The storm drain system failed before the City began its work, so the City constructed a new storm drain system under an emergency CEQA exemption. (Ibid.) After the emergency repair was complete, the City concluded that revegetation was the only act that required an environmental assessment, given that it was the sole component of the original project that had not been completed. (Id. at pp. 498-499.) In an appeal arising from a writ proceeding, we agreed. Specifically, we concluded that the work that the City had anticipated as part of its initially-defined project—the repair of the storm drain pipes and the construction of infrastructure—was “exempt from CEQA’s environmental review provisions” due to the emergency permit, and “therefore no environmental review of that work was required under CEQA either before or after it was completed.” (Id. at p. 506.)

The same is true here. The Bottinis very well may have purchased the Windemere and the lot on which it was located with the intention of constructing a new residence on that lot. Indeed, the Bottinis acknowledge that they filed a single discipline preliminary review application with the Board shortly after purchasing the property with the express purpose of “determin[ing] the constraints on future development” of the property. However, the City’s own historical designation and nuisance abatement provisions enabled the Bottinis to obtain a ministerial permit to demolish the existing structure on their property and pave the way for future construction—provisions that the Bottinis followed “to the letter,” according to the deputy city attorney. It is because of these Municipal
Code provisions, as well as the City’s sanctioning of the Bottinis’ conduct at each step of the process, that an intervening CEQA-exempt event—the City’s issuance of a ministerial demolition permit—occurred. As in Creed-21, this intervening event took place “outside of CEQA’s requirements and therefore no environmental review of that completed work is required.” (Creed-21, supra, 234 Cal.App.4th at p. 506.)

Our conclusion that the project in this case consists solely of the construction of the Bottinis’ residence comports with decisions from our court that have recognized that “CEQA generally applies prospectively to activities to be carried out in the future and not retrospectively to work already completed.” (Creed-21, supra, 234 Cal.App.4th at pp. 502-503, italics added; Riverwatch v. County of San Diego (1999) 76 Cal.App.4th 1428, 1452 (Riverwatch) (“We believe that in general preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of a project applicant.”).) Indeed, the baseline for purposes of CEQA normally reflects the environmental conditions as they exist “at the time . . . environmental analysis is commenced” precisely because a baseline that reflects current conditions—rather than past conditions—enables a lead agency to more accurately assess a project’s likely environmental impact before the project takes place. (Carlsbad, supra, 241 Cal.App.4th at p. 101; see Creed-21, at pp. 506-507.)

California courts have applied this principle in a variety of circumstances, even when a project applicant’s past conduct may have violated the law or escaped environmental review. (Riverwatch, supra, 76 Cal.App.4th at pp. 1451-1453 [measure of a project’s environmental impact should not include the applicant’s past unauthorized activities in the region]; Citizens for East Shore Parks v. State Lands Com. (2011) 202 Cal.App.4th 549, 561 [baseline “must include existing conditions, even when those conditions have never been reviewed and are unlawful”]; Fat v. County of Sacramento (2002) 97 Cal.App.4th 1270, 1279-1280 [baseline for pilots’ conditional use permit application was the year in which application was filed, even though the airport had expanded without CEQA review for decades]; Bloom v. McGurk (1994) 26 Cal.App.4th 1307, 1314-1316 [applying CEQA exemption to disposal facility’s request for a waste permit, even though there was no record that the facility’s prior activities had ever gone through an environmental review.]) Insofar as the City Council in this case set a baseline in the past to measure the environmental impacts flowing from the Bottinis’ prior conduct, these decisions demonstrate that the City’s decision was legally erroneous.

7. The City tries to distinguish this case from Creed-21 on the basis that the intervening event in Creed-21 was “a sudden, unexpected occurrence,” whereas the nuisance determination here purportedly was not. But in Creed-21 we did not base our holding on the “sudden” and “unexpected” nature of the intervening event. Rather, we based our decision on the fact that the intervening event was exempt from CEQA. So, too, is the ministerial permit at issue in this case. (§ 21080, subd. (b).) Accordingly, the City’s attempt to distinguish Creed-21 is unavailing.

Reasonable minds may differ as to whether the Board should have granted historical designation to the Windemere. But the Board did not do so. Reasonable minds may also differ as to whether the Bottinis should have attempted to repair the Windemere, rather than asking Code Compliance to declare it a public nuisance. But they did not. And Code Compliance did in fact authorize the Bottinis to obtain a ministerial demolition permit for the Windemere. While the City may wish to turn back the clock and undo these decisions, that goal cannot be accomplished in this case by simply redefining the Bottinis’ project and setting a CEQA baseline in the past, to a time when the Windemere still existed. The fact is that the Bottinis’ project for purposes of CEQA consists solely of the construction of a single-family residence and the proper baseline for that project is the physical environmental condition of the lot as it existed at the time the Bottinis filed their request for a CDP. In concluding otherwise, the City Council abused its discretion.

b. Class 3 categorical exemption

Because the City Council improperly defined the project and baseline, the City Council also erred in concluding that the project is not categorically exempt from environmental analysis under CEQA. The CEQA Guidelines categorically exempt the construction of a single-family residence from review under CEQA. (§ 15303, subd. (a); Association for Protection etc. Values v. City of Ukiah (1991) 2 Cal.App.4th 720, 727 (Ukiah) (“Guidelines section 15303 lists single-family residences as an example of a class 3 categorical exemption.”).) The project in this case consists of the construction of the Bottinis’ proposed residence, with baseline conditions reflecting a vacant lot. Accordingly, the Class 3 categorical exemption squarely applies, subject to any applicable exceptions that might nullify the categorical exemption.

From our review of the administrative record, we discern no exception that would take precedence over the Class 3 categorical exemption. In the proceedings before the City Council, the Council concluded that the historical resource exception applies. That exception provides as follows: “A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.” (Guidelines, § 15300.2.) However, with a properly defined project and baseline, substantial evidence does not support the City Council’s conclusion.

Assuming that the Windemere did in fact constitute a historic resource under CEQA,8 the Bottinis’ construction

8. CEQA establishes three types of historical resources—(1) mandatory historical resources, which include resources listed in, or determined to be eligible for listing in, the Register; (2) presumptive historical resources, which include resources in a local register of historical resources or identified as significant in surveys of historical resources; and (3) discretionary historical resources, which include resources that lead agencies in their discretion consider to be historical, even if the resources have been denied listing or have not yet been listed on a local register. (Valley Advocates v. City of Fresno (2008) 160 Cal.App.4th 1039, 1051-1062; § 21084.1; Guidelines, § 15064.5,
project will not cause a substantial adverse change in the Windemere’s significance. (San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356, 1392 [CEQA exception did not apply because “[a] change in physical conditions is a necessary predicate for a finding of environmental impact.”], italics added.) Rather, as discussed ante, by the time the Bottinis applied for a CDP in August 2012, the Windemere had already been demolished pursuant to Code Compliance’s December 2011 demolition authorization.

The City Council also concluded that the “unusual circumstances” exception applied. That exception precludes the application of a categorical exemption when a project will “have a significant effect on the environment due to unusual circumstances.” (Guidelines, § 15300.2, subd. (c).) The “unusual circumstances” exception typically requires a showing that: (1) the project has some feature that distinguishes it from others in the exempt class, such as its size or location and (2) there is a reasonable possibility of a significant effect on the environment due to that unusual circumstance. (World Business, supra, 24 Cal.App.5th at p. 498.)

Neither the City Council’s resolution nor the City’s appellate briefing has identified any distinguishing or unusual feature presented by the Bottinis’ construction project. The City points to the demolition of the Windemere as a distinguishing or unusual feature warranting application of the “unusual circumstances” exception. However, for the reasons just discussed, the demolition of the Windemere is not part of the project at issue. Accordingly, the Bottinis’ project—the construction of a single-family home—has no features that distinguish it from others in the exempt class, and substantial evidence does not support the City Council’s application of the “unusual circumstances” exception. (Ukiah, supra, 2 Cal.App.4th at p. 736 [the “potential environmental impacts” were “normal and common considerations in the construction of a single-family residence” and did not constitute unusual circumstances].)

c. Conclusion

For the foregoing reasons, we conclude that the “historical resources” and “unusual circumstances” exceptions do not apply to the Bottinis’ residential construction project for purposes of CEQA. Further, the City does not contend that any other CEQA exception applies. Accordingly, CEQA’s Class 3 categorical exemption applies to the Bottinis’ residential construction project and the trial court’s judgment is affirmed insofar as it granted the Bottinis’ petition for a peremptory writ of mandamus.

B. The Bottinis’ constitutional causes of action

Based on the City’s decision to grant the CEQA appeals and the residential construction delays resulting from that decision, the Bottinis also alleged three causes of action against the City for violations of the California Constitution’s takings, equal protection, and due process clauses. The trial court granted summary judgment in favor of the City on all three causes of action. For the reasons discussed post, we agree that no triable issue of material fact exists as to the Bottinis’ constitutional causes of action. We therefore affirm the trial court’s summary judgment ruling.

1. Standard of review

Summary judgment may be granted only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden of presenting evidence that negates an element of plaintiff’s claim or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to support an element of the claim. (Miller v. Department of Corrections (2005) 36 Cal.4th 446, 460; Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768.) If the defendant meets this burden, the burden shifts to the plaintiff to set forth “specific facts” showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review de novo the trial court’s grant of summary judgment. (Hughes v. Pair (2009) 46 Cal.4th 1035, 1039.) We take the facts from the record that was before the trial court when it ruled on the motion and consider all the evidence set forth in the moving and opposing papers, except those to which objections were made and sustained. (Lonicki v. Sutter Health Central (2008) 43 Cal.4th 201, 206; § 437c, subd. (c).) The court does not weigh the parties’ evidence; rather, it must consider all the evidence and “all inferences reasonably deducible from the evidence.” (§ 437c, subd. (c); Reid v. Google, Inc. (2010) 50 Cal.4th 512, 540-541; Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 856.) However, “any doubts as to the propriety of granting a summary judgment motion should be resolved in favor of the party opposing the motion.” (Reid, at p. 535; Miller v. Bechtel Corp. (1983) 33 Cal.3d 868, 874.)
2. Inverse condemnation

a. Legal standard

Both the United States and California Constitutions guarantee real property owners “just compensation” when their land is taken for a public use. (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.) These constitutional guarantees do “not prohibit the taking of private property, but instead place[] a condition on the exercise of that power.” (First English Evangelical Lutheran Church v. County of Los Angeles (1987) 482 U.S. 304, 314.) Stated differently, the state and federal takings clauses are “designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” (Id. at p. 315.)

“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.” (Lingle v. Chevron U.S.A., Inc. (2005) 544 U.S. 528, 537 (Lingle.) However, “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and . . . such ‘regulatory takings’ may be compensable” as a taking. (Id. at p. 537; Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 415 [‘‘While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’’].)

“Two categories of regulatory action are generally ‘deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. [Citation.] A second categorical rule applies to regulations that completely deprive an owner of ‘‘all economically beneficial us[e]’’ of her property. [Citation.]” (Dryden Oaks, LLC v. San Diego County Regional Airport Authority (2017) 16 Cal.App.5th 383, 394-395.)

In addition to these “relatively narrow” categories of regulatory takings, the United States Supreme Court recognized a third “essentially ad hoc” category of regulatory takings in Penn Cent. Transp. Co. v. New York City (1978) 438 U.S. 104, 124 (Penn Central). (Lingle, supra, 544 U.S. at p. 538.) In Penn Central, the Supreme Court identified three factors that are of “particular significance” for determining whether an ad hoc regulatory taking has occurred. The primary considerations are “ ‘the economic impact of the regulation on the claimant’ “ and the “ ‘extent to which the regulation has interfered with distinct investment-backed expectations.’ “ (Lingle, supra, 544 U.S. at pp. 538-539.) “In addition, the ‘character of the governmental action’ —for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’ —may be relevant in discerning whether a taking has occurred.” (Id. at p. 539.)

In this case, the trial court concluded that the City was entitled to judgment as a matter of law on the Bottinis’ inverse condemnation cause of action, which alleged that the delay arising from the City Council’s order granting the CEQA appeals violated the takings clause of the California Constitution. In granting summary judgment for the City, the court did not apply the Penn Central factors discussed ante. Instead, it applied the “substantially advances” standard that the California Supreme Court articulated in Landgate, supra, 17 Cal.4th 1006—a standard that asks whether the government’s conduct substantially advances a legitimate state interest.

On appeal, the City urges us to apply the “substantially advances” formula in evaluating the trial court’s summary judgment ruling. The Bottinis, on the other hand, contend that the “substantially advances” test is no longer good law and insist that we must apply the Penn Central test—a test that the Bottinis claim they have satisfied. Therefore, before we rule on the merits of the trial court’s summary judgment ruling, we must resolve the proper legal standard that governs when a plaintiff alleges a regulatory taking under the California Constitution—a task that we turn to now.

In Landgate, the California Coastal Commission denied a landowner’s request for a coastal development permit to build a residence on its property for several reasons, including the landowner’s failure to obtain a necessary lot line adjustment from the Commission. (Landgate, supra, 17 Cal.4th at pp. 1011-1013.) The trial court granted the landowner’s petition for writ of mandate compelling the Commission to set aside its decision on the basis that the Commission lacked jurisdiction to consider the lot line adjustment—that authority rested with the County of Los Angeles. (Id. at p. 1014.) The landowner also filed state and federal takings claims against the Commission, seeking damages for the delay caused by the Commission’s erroneous determination that it, rather than the County, had jurisdiction over the setting of the property’s lot lines. (Id. at p. 1013.) The trial court and the Court of Appeal found that the landowner was entitled to recover on its taking claims, but our Supreme Court reversed. (Id. at pp. 1015-1016, 1032.)

The Supreme Court cited Penn Central and its factors with approval, but did not in fact apply the Penn Central factors to the case before it. Instead, the Court—reciting language from a different United States Supreme Court case, Agins v. City of Tiburon (1980) 447 U.S. 255—found that a regulatory error alone does not amount to a taking if it is “part of a reasonable regulatory process designed to advance legitimate development permits. In land-use exception cases, there must be an “essential nexus” between a “legitimate state interest” that the government asserts will be furthered by the condition of a development permit and the exception, as well as “rough proportionality” between the development restriction and the impact that the state-imposed development condition is intended to mitigate. (Dolan v. City of Tigard (1994) 512 U.S. 374, 386, 391; Nollan v. Cal. Coastal Com. (1987) 483 U.S. 825, 837.) This standard does not apply because the Bottinis have not alleged a land-use exception.

10. A special regulatory takings test also applies to land-use exceptions, i.e., demands that governments make on landowners to dedicate a portion of their property to the public as a condition for securing
government interests . . . ” (Landgate, supra, 17 Cal.4th at p. 1021.) As the Landgate Court explained, “[t]he proper inquiry is . . . whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter.” (Id. at p. 1022.) Under that means-end standard, the Landgate Court concluded that the Commission’s permit denial, though erroneous, “appear[ed] to substantially advance legitimate governmental interests,” and that it therefore did not give rise to a takings claim. (Id. at p. 1023.)

However, in Lingle, the United States Supreme Court subsequently held that the “substantially advances” formula that it had set forth in Agins—the formula that the California Supreme Court had cited in Landgate—was “regrettably imprecise” and is “not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.” (Lingle, supra, 544 U.S. at p. 542.) As the unanimous Lingle Court explained, the aim of regulatory takings jurisprudence is to “identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” (Id. at p. 539.) To do so, courts must “focus[] directly upon the severity of the burden that government imposes upon private property rights.” (Ibid.) However, “the ‘substantially advances’ inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, [the “substantially advances”] test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.” (Id. at p. 542.)

The Lingle Court further found that the “substantially advances” test “asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause . . . . But such a test is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.” (Lingle, supra, 544 U.S. at p. 542.) Thus, the Lingle Court held “that the ‘substantially advances’ formula is not a valid takings test, and indeed conclude[d] that it ha[d] no proper place in [the Supreme Court’s] takings jurisprudence.” (Id. at p. 548.)

In the wake of Lingle, state and federal courts alike have recognized that the “substantially advances” formula that the United States Supreme Court articulated in Agins and the California Supreme Court applied in Landgate no longer constitutes a valid test by which to determine whether there has been a regulatory taking under the Fifth Amendment; instead, the Penn Central factors govern. (Lockaway Storage v. County of Alameda (2013) 216 Cal.App.4th 161, 189 [“In light of Lingle, we reject the [c]ounty’s contention that Landgate establishes an independent test for evaluating whether government action is a regulatory taking.”]; Allegretti & Co. v. County of Imperial (2006) 138 Cal.App.4th 1261, 1280 (Allegretti) [“Whether County’s Action Substantially Advances a State Interest Is No Longer A Valid Standard to Assess An Unconstitutional Taking Under the Fifth Amendment”]; Guggenheim v. City of Goleta (9th Cir. 2010) 638 F.3d 1111, 1117 [“Agins was overruled by Lingle”]; Crown Point Dev. Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 854 [“Agins’ ‘substantially advances’ language—i.e., that it is a ‘stand-alone regulatory takings test’—was rejected by the Supreme Court in Lingle.”])

To date, no published authority of which we are aware has expressly analyzed whether, in light of Lingle, the “substantially advances” formula remains a valid test by which to determine whether a regulatory taking has occurred under the takings clause of the California Constitution, as opposed to the Fifth Amendment to the United States Constitution. (Allegretti, supra, 138 Cal.App.4th at pp. 1281-1284 [declining to decide whether the “substantially advances” test is a viable regulatory takings test under the California Constitution].) We now answer that question in the negative and conclude that the Penn Central test endorsed in Lingle—and not the “substantially advances” formula—applies to ad hoc regulatory takings claims that arise under the California Constitution. We reach this conclusion for the following reasons.

First, the California Supreme Court has held that the takings clause in the California Constitution should be construed “congruently” with the federal takings clause, with minor differences that are not applicable here. (San Remo Hotel v. City and County of San Francisco (2002) 27 Cal.4th 643, 664; see also, e.g., Santa Monica Beach v. Superior Court (1999) 19 Cal.4th 952, 957, 962-975 [takings challenge to rent control regulation under both clauses considered without separate discussion of the state clause].) On that basis, at least one member of the California Supreme Court has explained that Lingle’s ruling—i.e., its clarification that the “substantially advances” formula is a due process test—applies to challenges arising under the California Constitution. (California Building Industry Assn. v. City of San Jose (2015) 61 Cal.4th 435, 485 (conc. opn. of Werdegar, J.) [“Had Lingle already been decided, we would have considered it in our analysis.”])

Second, the rationale underpinning the Lingle decision applies with equal force to the California takings clause as to the federal takings clause. “Indeed, it has long been recognized that the purpose of section 19 [of article I of the California Constitution], as well as the purpose of the takings clause of the Fifth Amendment to the United States Constitution, is to ensure that individual property owners are not compelled to bear burdens or incur costs that, in fairness and justice,
should be borne by the public at large.” (Williams v. Moulton Niguel Water Dist. (2018) 22 Cal.App.5th 1198, 1210.) But, as the Lingle Court described, the “substantially advances” formula neither elucidates the magnitude or character of the burden that the government regulation imposes upon private property rights nor provides information about how the regulatory burden is distributed among property owners. (Lingle, supra, 544 U.S. at p. 542.)

Finally, no published California Supreme Court or Court of Appeal decision of which we are aware has applied the “substantially advances” formula to regulatory takings claims—whether based on the United States or California Constitution—since the United States Supreme Court issued Lingle thirteen years ago. On the contrary, it appears that California courts have implicitly assumed that the Penn Central formula—not the “substantially advances” test—applies to ad hoc regulatory takings claims under both the state and federal takings clauses. (Los Altos El Granada Investors v. City of Capitola (2006) 139 Cal.App.4th 629, 651 [overturning trial court’s ruling that plaintiff’s state and federal takings claims were meritless because the trial court applied the “substantially advances” test, which is a “due process test”]; see Besaro Mobile Home Park, LLC v. City of Fremont (2012) 204 Cal.App.4th 345, 359 [applying Penn Central test to takings cause of action arising under California Constitution]; Garcia v. Four Points Sheraton LAX (2010) 188 Cal.App.4th 364, 389-390 [same]; Small Property Owners of San Francisco v. City & County of S.F. (2006) 141 Cal. App.4th 1388, 1402-1409 [same].)

Accordingly, and based on our Supreme Court’s instruction that we are to interpret the California Constitution’s takings clause congruently with the federal takings clause, we make explicit the conclusion that past decisions have implicitly assumed that the Penn Central formula—not the “substantially advances” test—not the “substantially advances” formula—applies to regulatory takings causes of action arising under the California Constitution.

b. Application

In the following section, we apply the Penn Central standard to the facts of the present appeal. As noted, the Penn Central test requires us to examine three factors to determine whether a regulatory taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with the claimant’s reasonable, distinct investment-backed expectations; and (3) the character of the government action. (Penn Central, supra, 438 U.S. at p. 124.)

For the first factor, “we ask whether the regulation ‘unreasonably impair[s] the value or use of [the] property’ in view of the owners’ general use of their property.” (Allegretti, supra, 138 Cal.App.4th at p. 1278.) In this case, the evidence suggests that the City Council’s decision had an adverse economic impact on the Bottinis. For example, the evidence shows that the Bottinis have had to pay a mortgage for both their existing home and an empty lot—at an additional cost of several thousand dollars per month—as a result of the construction delay caused by the City Council’s erroneous resolution granting the CEQA appeals. Further, it is doubtful that the Bottinis could have made an alternative use of the property during the period in which they sought to overturn the City Council’s decision, given that the lot is zoned exclusively for residential purposes. Thus, the economic impact factor weighs in favor of the Bottinis.

However, the second factor—the extent to which the City Council’s decision interferes with a reasonable investment-backed expectation—weighs strongly against the Bottinis. “A ‘reasonable investment-backed expectation’ must be more than a ‘unilateral expectation or an abstract need.’” (Ruckelshaus v. Monsanto Co. (1984) 467 U.S. 986, 1005 (Ruckelshaus); see also Allegretti, supra, 138 Cal.App.4th at p. 1279.) Instead, it “must be objectively reasonable.” (Colony Cove Props., LLC v. City of Carson (9th Cir. 2018) 888 F.3d 445, 452.) Additionally, “a reasonable expectation may [depend on] whether the landowner had constructive knowledge of the regulation when choosing to [acquire] the property.” (Shaw v. County of Santa Cruz (2008) 170 Cal. App.4th 229, 273 (Shaw).)

The only evidence relevant to the second factor that the Bottinis have submitted is a three-page declaration from Francis Bottini, which states in pertinent part as follows: “When we purchased the home, the [Prior Owner] represented in the listing that the existing residence could either be renovated or demolished and replaced . . . We relied on this representation in purchasing the property for $1.22 million because the existing residence appeared abandoned and not in good repair.” This does not establish that the Bottinis had a reasonable expectation to demolish the Windemere and construct a residence on the lot. Thus, the Bottinis’ expectations are not distinct and concrete, but are instead vague and abstract. (Allegretti, supra, 138 Cal.App.4th at p. 1279 & id. fn. 9 [“[Plaintiff]’s testimony was only that he had purchased the farm having been given ‘lots of reassurances that it could be a viable farming operation’”].

As an initial matter, Mr. Bottini’s declaration does not state that, at the time the Bottinis purchased the property at issue, they intended to demolish the Windemere and construct a residence on the lot. Thus, the Bottinis’ expectations are not distinct and concrete, but are instead vague and abstract. (Allegretti, supra, 138 Cal.App.4th at p. 1279 & id. fn. 9 [“[Plaintiff]’s testimony was only that he had purchased the farm having been given ‘lots of reassurances that it could be a viable farming operation’”].

Even if the Bottinis had articulated that they had a distinct expectation to demolish the Windemere and build a residence at the time they purchased the property, there is no basis for us to conclude that the Bottinis had a reasonable expectation that they would be permitted to engage in such conduct
without undertaking any form of environmental review. Indeed, Mr. Bottini’s declaration claims merely that the Prior Owner stated that the Windemere could “be renovated or demolished and replaced”—a representation that says nothing about whether environmental review would or would not be necessary.

Further, setting aside any representations that the Prior Owner may have made to the Bottinis, there is no evidence that the City informed the Bottinis before they purchased the property that they could demolish the Windemere and construct a residence without undergoing environmental review. This case thus stands in contrast to Lockaway Storage v. County of Alameda (2013) 216 Cal.App.4th 161 (Lockaway), on which the Bottinis rely. In that case, the County of Alameda informed a storage facility operator that it could build and operate a self-storage facility on a property that the operator had not yet acquired. (Id. at p. 168.) The operator then purchased the property and, after several years, the County reversed its stance. (Id. at p. 186.) On these facts, the court found that the operator had a reasonable investment-backed expectation. (Id. at pp. 185-186.) In this case, by contrast, there is no evidence suggesting that the Bottinis purchased the property in reliance on any representation made by the City.

In fact, at the time the Bottinis purchased the property, the Prior Owner’s nomination for the Windemere’s designation as a historical resource was still pending before the Board. Thus, when the Bottinis purchased the property, it was still possible that the Board would grant historical designation to the Windemere—and indeed, it nearly did. If that had happened, the Bottinis very likely would not have been able to demolish the Windemere and construct a new residence without satisfying the Municipal Code nuisance abatement procedures applicable to structures that have been designated as historical resources (Mun. Code, § 121.0419) and/or undergoing a full CEQA review (§§ 21060.5, 21084, subd. (e), 21084.1; Guidelines, § 15300.2, subd. (f)). In addition, Mr. Bottini himself testified during one of the City Council hearings that he “knew when [they] bought [the] house . . . it would be well over a year before [they would] be able to do anything to that house” because of the historical review nomination that was pending at the time. For all of these reasons, we conclude that the Bottinis lacked a reasonable and distinct investment-backed expectation.

Finally, the third Penn Central factor requires us to examine the “character” of the City’s action. (Penn Central, supra, 48 U.S. at p. 124.) The Lingle Court explained that whether the government’s conduct “amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’”—may be relevant in discerning whether a taking has occurred.” (Lingle, supra, 544 U.S. at p. 539.) In this case, the City did not physically invade or appropriate the Bottinis’ property. Accordingly, this factor does not support a taking. (Shaw, supra, 170 Cal.App.4th at p. 274 [holding that there was no regulatory taking, in part, because the government did not physically invade the property at issue]; Allegretti, supra, 138 Cal.App.4th at p. 1278 [same]; Rancho De Calistoga v. City of Calistoga (9th Cir. 2015) 800 F.3d 1083, 1091 [same].)

“We may dispose of a takings claim on the basis of one or two of [the Penn Central] factors.” (Allegretti, supra, 138 Cal. App.4th at p. 1277.) For the foregoing reasons—in particular, the lack of a distinct investment-backed expectation—we conclude that the trial court did not err in granting summary judgment for the City on the Bottinis’ inverse condemnation cause of action. (Ruckelshaus, supra, 467 U.S. at p. 1005 [disposing of takings claim relating to trade secrets solely on absence of reasonable investment-backed expectations].)

3. Due process

Under the California Constitution, a person may not be deprived of life, liberty, or property without due process of law. (Cal. Const., art. I, § 7, subd. (a).) “The concept of ‘due process of law’ guarantees both procedural and substantive rights.” (Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward (2011) 200 Cal.App.4th 81, 93 (Hayward).) Although the Bottinis’ complaint does not state whether they have asserted a procedural or substantive due process cause of action against the City, or both, their summary judgment briefing and appellate briefs focus on substantive due process concerns. Further, the Bottinis have not alleged or argued that the City denied them notice and an opportunity to be heard before depriving them of a protected liberty or property interest—the foundational requirements of procedural due process.31 (Alviso v. Sonoma County Sheriff’s Dept. (2010) 186 Cal.App.4th 198, 209.) We therefore construe the Bottinis’ cause of action as one sounding in substantive due process.

“Substantive due process protects against ‘arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards.’ [Citation.] To satisfy substantive due process concerns, ‘the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained. [Citations.]’ (Hayward, supra, 200 Cal.App.4th at p. 93.) ‘[R]ejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. [Citations.] Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation.’ (Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal.App.4th 687, 709.) Rather, “a

31. The Bottinis briefly argue that one of the City Council members who voted to grant the CEQA appeals formerly served as an officer of LJHS and therefore, had “biased views” that detract from the “legitimacy” of the City Council’s votes. However, the Bottinis relegated this undeveloped argument to a footnote. We therefore decline to consider it. (California School Bd. Assn. v. State of California (2011) 192 Cal.App.4th 770, 796, fn. 9.)
substantive due process violation requires some form of outrageous or egregious conduct constituting a ‘true abuse of power.’ “ (Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal.App.4th 837, 856 (Las Lomas).)

The Bottinis contend that a reasonable jury could conclude that the City Council’s decision to grant the CEQA appeals and remand the Bottinis’ CDP application to City staff for further environmental review was unreasonable, arbitrary, and capricious. The Bottinis further argue that a reasonable jury could find that the City Council acted as it did in order to punish the Bottinis for demolishing the Windemere.

We have no need to analyze whether a reasonable jury could reach these conclusions because, as the City correctly argues, the Bottinis have not identified any property interest or statutorily conferred benefit with which the City has interfered. (Concejo Wellness Center, Inc. v. City of Agoura Hills (2013) 214 Cal.App.4th 1534, 1562-1563 [affirming order dismissing due process claim brought under California Constitution because marijuana cooperative had no property right to operate dispensary]; Chan v. Judicial Council of California (2011) 199 Cal.App.4th 194, 201 [affirming order dismissing due process claim brought under California Constitution because plaintiffs had no property interest in remaining certified interpreters]; cf. Schultz v. Regents of University of California (1984) 160 Cal.App.3d 768, 783 [‘‘If a [plaintiff] cannot show a statutory interest subject to deprivation, we believe the [plaintiff] must still identify a property interest in order to invoke due process rights under the state Constitution.’”].)

The Bottinis raised this argument both in the trial court and on appeal; however, the Bottinis have not attempted to identify any interest or benefit of which the City has deprived them. Instead, relying on Galland v. City of Clovis (2001) 24 Cal.4th 1003 (Galland), the Bottinis suggest that they need not identify any right or statutorily conferred interest to prove a due process violation, as long as they can show that the City engaged in a “deliberate flouting of the law.” (Id. at p. 1035.) The Bottinis are mistaken.

Under Galland, a government entity may be found liable for a due process violation for conduct that deliberately flouts the law, but such conduct still must “obstruct the [plaintiff’s] constitutionally based property rights.” (Galland, supra, 24 Cal.4th at p. 1040, italics added; id. at p. 1033 [the “deliberate flouting” test is the “appropriate substantive due process standard for determining when an administrative body charged with implementing a law acts erroneously in such a way as to injure an individual’s economic and property interests.”], italics added; id. at p. 1034 [“A deliberate flouting of the law that trammels significant personal or property rights” qualifies as a due process violation], italics altered; id. at p. 1040 [“Administrative expenses can be charged directly to [the government] . . . only when the city imposes them in deliberate contravention of the law to obstruct the [plaintiffs’] constitutionally based property rights . . . .”], italics added.) Thus, the Bottinis can prevail only if they show that the City’s allegedly deliberate flouting of the law interfered with a property right or statutorily conferred interest. They have identified no such right or interest.

Nor is it apparent that the Bottinis could identify such a right or interest. The Bottinis have no right or statutorily conferred interest that entitles them to bypass CEQA review. (Las Lomas, supra, 177 Cal.App.4th at pp. 848-852 [project applicant had no due process right to force lead agency to complete and consider EIR under CEQA]; Sagaser v. McCarthy (1986) 176 Cal.App.3d 288, 308 [“The procedural rights created by CEQA . . . do not operate as constitutional safeguards nor create fundamental, substantive rights.”].) Indeed, even if a lead agency declares a project categorically exempt under CEQA (for example, under a Class 3 categorical exemption), the agency has discretion to apply an exception that overrides the categorical exemption. Nor do the Bottinis have a property right or statutorily conferred interest in a discretionary CDP that has not yet been issued. (Reddell v. California Coastal Com. (2009) 180 Cal.App.4th 956, 970-971 [“The Coastal Act sets only minimum standards and policies and creates no mandatory duty to issue development permits.”].

On these facts, we conclude that the trial court properly granted the City’s motion for summary judgment on the Bottinis’ substantive due process cause of action.

4. Equal Protection

The California Constitution, like its federal counterpart, guarantees the right to equal protection of the laws. (Cal. Const., art. I, § 7, subd. (a).) “Equal protection of the laws means that similarly situated persons shall be treated similarly unless there is a sufficiently good reason to treat them differently.” (People v. Castel (2017) 12 Cal.App.5th 1321, 1326.)

The Bottinis alleged a “class of one” violation, claiming that the City treated them differently from every other person seeking to build a single-family home insofar as the City required a full environmental review of a CEQA-exempt residential construction project. “To succeed on a class of one claim, a plaintiff must establish that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment.” (Gerawan Farming, Inc. v. Agricultural Labor Relations Bd. (2017) 3 Cal.5th 1118, 1144.) The third element is essentially the same rational basis test that courts typically apply in equal

12. We note that the Bottinis’ prayer for relief requests only monetary damages for the due process cause of action, coupled with a general request for attorney fees and costs. However, “[i]t is beyond question that a plaintiff is not entitled to damages for a violation of the due process clause or the equal protection clause of the state Constitution.” (Javor v. Taggart (2002) 98 Cal.App.4th 795, 807 (Javor)). Because we resolve this appeal based on the Bottins’ lack of a property interest or statutorily conferred benefit, we need not and do not address whether the Bottinis’ inability to recover damages constitutes an independent basis on which to affirm the summary judgment order.
Where the defendant is "the party moving for summary judgment[,] it has the burden of negating a necessary element of the plaintiff’s case or establishing an affirmative defense. [Citation.] In the area of economic regulation, a legislative classification does not deny equal protection if the ‘distinctions drawn by a challenged [act] bear some rational relationship to a conceivable legitimate state purpose.’ [Citation.] Thus, in a case where the state moves for summary judgment, the state meets its burden by demonstrating some conceivably rational basis for its classification. ‘A distinction . . . is not arbitrary if any set of facts reasonably can be conceived that would sustain it.’ [Citation.] The state need not prove such facts exist; the existence of facts supporting the . . . [classification] is presumed. [Citations.] Once the state posits a rational basis for its classification, the burden shifts to the plaintiff to demonstrate the classification bears no rational relationship to any conceivable legitimate state interest as a matter of law [citation] or to demonstrate there are triable issues of fact which, if resolved in favor of the plaintiff, would negate any rational basis for the classification.” (Wachs v. Curry (1993) 13 Cal.App.4th 616, 622, revd. on other grounds Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal.4th 974 (Wachs).)

In its motion for summary judgment and its appellate briefing, the City articulated just one basis for the City Council’s conduct, i.e., that the City Council rationally could have granted the CEQA appeals and required the Bottinis’ project to undergo environmental review because the City purportedly believed that “a potential statewide historic resource had been destroyed and the loss of a 100 year old beach cottage had evaded environmental review.”

There can be no dispute that the state has a legitimate interest in protecting California’s environmental resources and ensuring that statutorily mandated environmental reviews are conducted. (§ 21000 “[I]t is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage . . . .”.) The Bottinis do not contend otherwise.

However, the parties dispute whether the City’s decision was rationally related to achieving that interest. We conclude that it was. Although the Windemere no longer existed at the time the City Council issued its decision, thereby precluding any possibility that the Windemere could be preserved or relocated, the City could have reasonably believed that an “environmental review” of the Bottinis’ project would result in other forms of mitigation. (Napa Valley Wine Train, Inc. v. Public Utilities Com. (1990) 50 Cal.3d 370, 376, fn. 7, revd. on another point by Pub. Resources Code, § 21080.04, subd. (b) “[full environmental review” under CEQA includes “consideration of available measures to mitigate any environmental effects.”]) In fact, before the City Council granted the CEQA appeals and ordered a CEQA review of the project, the Bottinis themselves proposed mitigation measures that did not involve the preservation or relocation of the Windemere, including the creation of a plaque commemorating the Windemere and the donation of the Windemere’s architectural drawings to a historical society.13

Because the City satisfied its burden of articulating a rational basis for its decision, the burden shifted to the Bottinis to show that the City’s decision bore no rational relationship to a conceivable legitimate state interest as a matter of law, or to demonstrate that there were triable issues of fact which, if resolved in favor of the Bottinis, would negate any rational basis for the classification. (Wachs, supra, Cal.App.4th at p. 622.) The Bottinis argue that they satisfied that burden for two reasons.

First, the Bottinis contend that a triable issue of fact exists because the City patently misapplied CEQA, namely, by requiring an environmental assessment of a CEQA-exempt project. As discussed ante, we agree that the City misconstrued CEQA and, on that basis, we have affirmed the trial court’s order granting their petition for a peremptory writ of mandamus. However, we disagree that the City Council’s mere misinterpretation of CEQA establishes a triable issue of fact as to whether the City Council violated the Bottinis’ equal protection rights. The City Council articulated a rational basis for its decision, even though we have concluded that the expressed basis is erroneous. (Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, 1186 “[Plainly, the [c]ouncil erred in considering and deciding issues raised for the first time after the public hearing was over. Further, it may have misconstrued or misapplied the provisions of the zoning ordinance concerning lot coverage and usable open space. Nonetheless, the [c]ouncil’s ultimate decision to deny the permits did not lack a rational basis.”]; Shaw, supra, 170 Cal. App.4th at p. 278 “[T]he [c]ounty’s legal position, though

13. In relating the mitigation measures proposed by the Bottinis, we are not suggesting that these measures would constitute sufficient mitigation if a lead agency were to conclude that a project may cause a substantial adverse change in the significance of an historical resource. On the contrary, “preservation in place” is the preferred method of addressing environmental impacts affecting historical resources, unless the lead agency “determines that another form of mitigation is available and provides superior mitigation of the impacts.” (Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48, 87; see League for Protection of Oakland’s etc. & Historic Resources v. City of Oakland (1997) 52 Cal.App.4th 896, 909 [proposed measures to mitigate the demolition of an historical building, including a plaque and documentation of the building’s historical features, did not “begin to alleviate the impacts of [the building’s] destruction.”]) Rather, we simply conclude that, under the deferential rational basis test, the City Council could have reasonably concluded that mitigation measures other than preservation or relocation of the Windemere would be sufficient here, where preservation and relocation were no longer viable options.
later found to be erroneous, was nevertheless plausible” and therefore constitutional.\]

Second, the Bottinis argue that a reasonable jury could conclude that the City Council required an environmental assessment in order to punish the Bottinis for demolishing the Windemere. However, in making this argument, the Bottinis rely entirely on inference and have produced no evidence that the City Council ordered an environmental review in order to punish them. The Bottinis contend that an intent to punish can be inferred from one City Council member’s statement that an environmental assessment was needed to “do the right thing.” We disagree. A City Council member’s request that the City Council “do the right thing” in no way implies that the City Council member, let alone the entire City Council, sought to punish the Bottinis.

For all of these reasons, we conclude that the trial court did not err in granting summary judgment for the City on the Bottinis’ equal protection cause of action.\]

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

AARON, J.

WE CONCUR: HALLER, Acting P. J., GUERRERO, J.

14. As with their due process cause of action, the Bottinis seek only monetary damages, which cannot be recovered for alleged violations of the equal protection clause of the California Constitution. (Javor, supra, 98 Cal.App.4th at p. 807.) Our conclusion that the City had a rational basis for its decision obviates the need for us to determine whether the summary judgment ruling should be affirmed on this basis.

Cite as 18 C.D.O.S. 9504

THE PEOPLE, Plaintiff and Respondent,
v.
MICHAEL BANDA, Defendant and Appellant.

No. No. B284725
In The Court of Appeal of the State of California
Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. NA103745)
Filed September 18, 2018

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

IT IS ORDERED that the opinion filed on August 20, 2018, be modified as follows:

On the caption page, second paragraph, attorney Kenneth I. Clayman’s title is replaced with Public Defender.

On page three, first paragraph, line five the words “of that year” are replaced with “2017”.

On page four, footnote 3 is replaced with a new footnote, as follows: “In asking the trial court to take judicial notice of the court file, the People referenced only the probation report. In asking this Court before briefing was concluded to augment the record to include the sentencing hearing at which that report was discussed, the People asserted that the probation report had been “used by the prosecution as the basis for requesting denial of appellant’s motion to dismiss.” In fact, the police report was not referenced as relevant evidence until the court itself raised the issue at the end of the hearing.”

On page seven, under the heading Discussion, A. Proposition 64 the last paragraph is deleted.

On page 10, under the subheading 2. Proposition 36, delete the sentence: “Moreover, the statute here addresses the hearing issue, a fact the People failed to appreciate at the trial court; section 11361.8, subdivision (g), specifies that petitioner has a right to a hearing.”

On page 10, under subheading C., first sentence is replaced with “The only evidence relied on by the People at the trial court was the probation report; the People did not ask the court to consider any other evidence or documents.”
On page 16, under subheading 3., first paragraph, last sentence replace the word “proffered” with “relied on.”

On page 18, under subheading 4., the entire paragraph is replaced with: “The trial court, finding that Banda was ineligible for relief, did not make the determination required by section 11361.8, subdivision (b) whether dismissing the sentence “would pose an unreasonable risk of danger to public safety. The trial court did, however, reduce the conviction to a misdemeanor, as the People conceded. The People’s concession necessarily acknowledged that granting Banda relief would not pose an unreasonable risk of danger to public safety. The trial court could not have resentence otherwise, given the plain language of the statute.

With respect to dismissal, the People neither requested a different determination in their opposition to Banda’s petition in trial court, nor presented any evidence to support such a finding. (People v. Frierson (2017) 4 Cal.5th 225, 239 [facts pertaining to unreasonable risk must be proven by the People].) The People have not asserted in this court that the record would support such a finding. Accordingly, the People have forfeited the issue. (Landry v. Berryessa Union School Dist. (1995) 39 Cal. App.4th 691, 699-700 [“When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary. [Citations.]”).

On page 19, under subheading Disposition, delete the last sentence and replace with: “The order denying dismissal of the sentence is reversed and the matter remanded to the trial court.”

There is no change in the judgment.
Respondent’s petition for rehearing is denied.

ZELON, J., PERLUSS, P. J., WILEY, J. (Assigned)