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**Administrative Law**

**Trustee retaliated against ERISA trust fund employee for her cooperation with Department of Labor investigation (M.D. Smith, J.)**

**Acosta v. Brain**

9th Cir.; December 4, 2018: 16-56529

The court of appeals affirmed in part and reversed in part a district court judgment. The court held that the district court properly found that but for a trustee’s retaliatory conduct, an ERISA trust fund employee would not have been removed from her job.

In 2011, Scott Brain was a trustee of the Cement Masons Southern California Trust Funds. Melissa Cook was Brain’s girlfriend, and, along with her firm, Melissa W. Cook & Associates, PC, provided legal counsel to the Trust Funds. Cheryle Robbins was the director of the Trust Funds’ Audit and Collections (A&C) Department. Robbins cooperated in a Department of Labor (DOL) investigation of alleged misconduct by Brain. Brain learned of Robbins’ cooperation. With Cook’s assistance, he persuaded the trustees to hold a special meeting, the purported purpose of which was to discuss the outsourcing of the A&C Department’s functions. At that meeting, Cook informed the trustees of Robbins’ cooperation with the DOL, described Robbins’s conduct as inappropriate, and implied inaccurately that Robbins had initiated the DOL’s investigation. Cook urged that Robbins be placed on leave. The trustees voted unanimously to place Robbins on leave, Although Brain recused himself from the vote, he remained in the room during the discussion and vote. The trustees later voted to outsource the A&C Department, resulting in Robbins’ termination.

The Secretary of Labor initiated a civil enforcement action against Brain and Cook. After conducting a bench trial, the district court concluded that Brain, Cook, and Cook’s firm had violated ERISA §§510 and 404 and permanently enjoined them from serving as trustee or providing an services to the Trust Funds.

The court of appeals affirmed in part and reversed in part, holding that the district court did not err in concluding that Brain violated ERISA §510 by retaliating against Robbins for engaging in the protected activity of assisting the DOL investigation of Brain. Although Brain did not participate in the trustees’ vote placing Robbins on leave, the record supported the finding that but for Brain’s involvement, that vote would not have happened. Brain, with Cook’s assistance, orchestrated the trustees’ meeting, and lobbied the trustees in advance to vote against Robbins. His presence in the room constituted further persuasion because, as the district court found, he had the power to remove certain of the trustees or have them terminated from their jobs with the union. The district court nonetheless erred in finding a violation of 404 because the record failed to establish that Brain, who wore multiple hats with the union, was wearing his ERISA fiduciary hat when he organized Robbins’ ouster. The court accordingly also reversed the permanent injunction in its entirety as to both Brain and Cook. Judge Schroeder dissented in part, finding that Brain’s retaliatory conduct was clearly a breach of his duty as a fiduciary.

**Criminal Law**

**Charge of conspiracy to obstruct justice requires no showing of defendant’s violation of separate criminal statute (Premo, Acting P.J.)**

**People v. Garcia**

C.A. 6th; December 3, 2018; H043537

The Sixth Appellate District reversed a trial court order. The court held that a charge of conspiracy to obstruct justice need not be founded upon a separate, specific criminal statute in order to survive a Penal Code §995 motion to dismiss.

Jesse Garcia was charged by information with participating in a criminal street gang and conspiracy to obstruct justice. Garcia was accused of entering into an agreement with fellow gang members to lie to police and obstruct the homicide investigation, preventing police from discovering who committed the crime.

The trial court granted Garcia’s motion to dismiss the information under §995, finding that the charge of conspiracy to obstruct justice required evidence that Garcia was an accessory after the fact or obstructed a peace officer in the performance of his duties, which evidence the People failed to present. The People appealed.

The court of appeal reversed, holding that there is no requirement that a conspiracy to obstruct justice be founded upon a separate, specific criminal statute to survive a §995 motion to dismiss. Rather, there must merely be some showing that the defendant’s actions would obstruct justice. It goes without saying that affirmatively lying to police officers in the course of a criminal investigation for the purpose of shielding a fellow gang member from further scrutiny and potential prosecution would fit that definition. It thus made no difference whether Garcia’s statements to police would be sufficient to establish violations of §32 (accessory after the fact) or §148 (obstructing law enforcement officer in performance of his or her duties). The trial court erred in finding otherwise.
Criminal Law

Execution of jury waiver precludes any substantive change to prior strike allegation (Ramirez, P.J.)

**People v. Lavoie**

C.A. 4th; December 3, 2018; E068328

The Fourth Appellate District affirmed in part and reversed in part a judgment and remanded. In the published portion of its opinion, the court held that the trial court erred in allowing a substantive change to a prior strike allegation after the jury was discharged.

Joseph Lavoie accosted a stranger in a parked car, forced him to turn over his car keys at gunpoint, and absconded with the victim’s car. A jury found him guilty of robbery and other crimes. The prosecution also alleged two “strike” priors, two prior serious felony enhancements, and two prior prison term enhancements. The strike priors, as originally alleged, were two convictions for assault with a deadly weapon. Lavoie waived a jury trial on the priors. Before the trial court could take Lavoie’s admission of the various priors, the prosecutor interjected that the dates and county of conviction for certain of the priors needed to be corrected. Defense counsel concurred, and the court made the requested corrections.

The prosecutor thereafter interrupted again to say that one of the two prior “strike” allegations for assault with a deadly weapon should actually be for assault with a deadly weapon on prison in prison. Defense counsel did not object, and Lavoie admitted the strike allegations as amended. He was sentenced to a prison term of 71 years four months to life.

On appeal, Lavoie argued the trial court erred by allowing the prosecution to amend the prior conviction allegations after the jury had already been discharged.

The court of appeal reversed in part, holding that the trial court erred in allowing the “correction” of the offense charged in the strike prior. After a defendant’s jury waiver has been taken, the trial court may amend a prior conviction or prison term allegation only as to minor, clerical, or typographical errors. The amendment of a prior as to date or county of conviction falls within this category of “minor” corrections. The amendment of a prior conviction allegation to substitute an entirely different offense, however, cannot be deemed a minor correction. The trial court here accordingly erred trial court erred by allowing the prosecution to amend one of the prior strike allegations after the jury had been discharged. Trial counsel’s failure to object to the amendment constituted ineffective assistance of counsel. The court struck the amended strike allegation and remanded for resentencing. The court further directed that a copy of its opinion be sent to the State Bar.

Criminal Law

Statute criminalizing act of “encouraging or inducing” certain conduct unconstitutionally criminalizes protected speech (Tashima, J.)

**United States v. Sinening-Smith**

9th Cir.; December 4, 2018; 15-10614

The court of appeals affirmed in part and reversed in part a judgment of conviction. The court held that a statute criminalizing the act of “encouraging or inducing” an alien to reside in the country illegally unconstitutionally criminalizes protected speech.

Immigration consultant Evelyn Sinening-Smith held herself out as being able to assist clients with applying for “Labor Certification,” and then for a green card. Her clients were mostly natives of the Philippines, unlawfully employed in the home health care industry in the United States, who sought authorization to work and adjustment of status to obtain legal permanent residence. Sinening-Smith signed retainer agreements with her clients that specified the purpose of the retention as “assisting [the client] to obtain permanent residence through Labor Certification.” The problem was that the Labor Certification process expired on April 30, 2001. Aliens who arrived in the United States after December 21, 2000, were not eligible to receive permanent residence through the program. Sinening-Smith knew the program had expired, but nonetheless continued to sign retainer agreements with her clients and tell them that they could obtain green cards via Labor Certifications.

Sinening-Smith was charged with mail fraud and with violating 8 U.S.C. §1324(a)(1)(A)(iv)—encouraging or inducing an alien to reside in the country, knowing and in reckless disregard of the fact that such residence is in violation of the law. She was found guilty of two counts of violating §1324 and two counts of mail fraud.

The court reversed in part, holding that §1324(a)(1)(A)(iv) is unconstitutionally overbroad. By making it a crime to “encourage or induce,” subdivision (iv) abridges constitutionally-protected speech. No reasonable reading of the statute can exclude speech. To conclude otherwise, one would have to say that “encourage” does not mean encourage, and that a person cannot “induce” another with words. At the very least, it is clear that the statute potentially criminalizes the simple words—spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client—“I encourage you to stay here.” The statute thus criminalizes a substantial amount of constitutionally-protected expression. The burden on First Amendment rights is intolerable when compared to the statute’s legitimate sweep. The district court judgment with respect to the “encourage and induce” counts thus had to be reversed. The court vacated the judgment of sentence and remanded for resentencing.
Employment Litigation

County employee not “retired” until county retirement board approves retirement application (Richman, Acting P.J.)

Wilmot v. Contra Costa County Employees’ Retirement Association

C.A. 1st; November 1, 2018; A152100

The First Appellate District affirmed a judgment. The court held that a county employee could not properly be deemed retired until the county retirement board approved his retirement application, several months after it was submitted.

In December 2012, long-time Contra Costa County employee Jon Wilmot stopped working and submitted his application for retirement. In February 2013, Wilmot was indicted for stealing from the county for more than a decade. In April 2013, the county pension authority approved Wilmot’s retirement application, fixing his actual retirement date as the day he submitted his application. He began receiving monthly pension checks the same month, retroactive to December 2012. In December 2015, Wilmot pleaded guilty to embezzling county funds. The county pension authority thereafter reduced Wilmot's monthly check in accordance with the California Public Employees’ Pension Reform Act of 2013 (PEPRA), which took effect January 1, 2013, and which included a provision, codified at Gov. Code §7522.72(b)(1), mandating the complete or partial forfeiture of a public employee’s pension benefits/payments if convicted of “any felony under state or federal law for conduct arising out of or in the performance of his or her official duties.”

Wilmot filed suit, arguing that the adjustment of his retirement allowance was improper because §7522.72 does not apply retroactively to persons who retired prior to its effective date. The trial court denied Wilmot’s writ petition.

The court of appeal affirmed, holding that despite having ceased work in December, Wilmot did not officially retire until several months later. Neither finishing his last day of work nor submitting his application for pension benefits made Wilmot a retired employee for purposes of the County Employees Retirement Law of 1937 (CERL). Submitting retirement papers is only the start of the retirement process under CERL. The application is then reviewed, and, if correct in form, sent to the county retirement board for its approval. It was the county retirement board’s approval of Wilmot’s application that effectively transformed him from a public employee into a retired employee. That approval did not issue until April 2013, well after §7522.72 took effect.

Labor Law

Arbitrator’s correction of parties’ mutual mistake in labor agreement “drew its essence” from that agreement (Gettleman, J.)

ASARCO LLC v. United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union

9th Cir.; December 4, 2018; 16-16363

The court of appeals affirmed a district court judgment. The court held that an arbitrator acted within his authority in correcting what he perceived to be a mutual mistake in the parties’ labor agreement.

ASARCO LLC and the United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, AFL-CIO, CLC, had a labor agreement that included a no-add provision. A dispute arose between the union and ASARCO over ASARCO’s alleged failure to pay a required bonus to employees who participated in ASARCO’s pension plan. The dispute was submitted to an arbitrator, who determined that there was a mutual mistake as to the bonus requirement with regard to employees hired after July 1, 2011, who, under the terms of the parties’ agreement, were ineligible for the pension plan. The arbitrator ordered that the agreement be amended to provide that the new hires, although ineligible for the pension plan, remained eligible for the bonus.

ASARCO filed a petition to vacate arbitration award, arguing that the no-add provision in the labor agreement deprived the arbitrator of authority to amend the agreement. The district court confirmed the arbitration award, finding the arbitrator did not violate the no-add provision because the reformation corrected a defect in the underlying agreement.

The court of appeals affirmed, holding that the arbitrator’s decision was properly grounded in his reading of the agreement, and thus “drew its essence” from the agreement. Citing a substantial amount of evidence that he had heard, the arbitrator concluded that the parties, in negotiating the agreement, never discussed or even acknowledged that making new hires ineligible for the pension plan would also make them ineligible for the bonus. He deemed this an obvious mutual mistake, which he had the authority to correct, despite ASARCO’s protest. He acted within his authority in crafting a remedy to cure the parties’ mutual mistake. Judge Ikuta dissented, finding that the arbitrator, by adding to the pension provision, plainly exceeded the authority granted to him by the collective bargaining agreement.
Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 11454

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
EVELYN SINENENG-SMITH, Defendant-Appellant.

No. 15-10614
United States Court of Appeals for the Ninth Circuit
D.C. No. CR 10-414 RMW
Appeal from the United States District Court for the Northern District of California Ronald M. Whyte, Senior District Judge, Presiding
Argued and Submitted April 18, 2017
San Francisco, California
Reargued and Resubmitted February 15, 2018
Pasadena, California
Filed December 4, 2018
Before: A. Wallace Tashima, Marsha S. Berzon, and Andrew D. Hurwitz,* Circuit Judges.
Opinion by Judge Tashima

* Judge Reinhardt, who was originally a member of this panel, died after this case was reargued and resubmitted for decision. Judge Hurwitz was randomly drawn to replace him. Judge Hurwitz has read the briefs, reviewed the record, and watched video recordings of the oral arguments.

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OPINION
TASHIMA, Circuit Judge:

INTRODUCTION
Defendant-Appellant Evelyn Sineneng-Smith was convicted on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) & § 1324(a)(1)(B)(i).1 Section 1324(a)(1)(A)(iv) (“Subsection (iv)”) permits

1. Sineneng-Smith was also convicted of two counts of mail fraud in violation of 18 U.S.C. § 1341. We affirm those convictions in a
a felony prosecution of any person who “encourages or induces an alien to come to, enter, or reside in the United States” if the encourager knew, or recklessly disregarded “the fact that such coming to, entry, or residence is or will be in violation of law.” We must decide whether Subsection (iv) abridges constitutionally-protected speech. To answer this question, we must decide what “encourages or induces” means.

The parties have widely divergent views about how to interpret the statute. Sineneng-Smith and several amici contend that encourage and induce carry their plain meaning and, therefore, restrict vast swaths of protected expression in violation of the First Amendment. The government counters that the statute, in context, only prohibits conduct and a narrow band of unprotected speech.

We do not think that any reasonable reading of the statute can exclude speech. To conclude otherwise, we would have to say that “encourage” does not mean encourage, and that a person cannot “induce” another with words. At the very least, it is clear that the statute potentially criminalizes the simple words – spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client – “I encourage you to stay here.”

The statute thus criminalizes a substantial amount of constitutionally-protected expression. The burden on First Amendment rights is intolerable when compared to the statute’s legitimate sweep. Therefore, we hold that Subsection (iv) is unconstitutionally overbroad in violation of the First Amendment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Facts

Sineneng-Smith operated an immigration consulting firm in San Jose, California. Her clients were mostly natives of the Philippines, unlawfully employed in the home health care industry in the United States, who sought authorization to work and adjustment of status to obtain legal permanent residence (green cards). Sineneng-Smith assisted clients with applying for a “Labor Certification,” and then for a green card. She signed retainer agreements with her clients that specified the purpose of the retention as “assisting [the client] to obtain permanent residence through Labor Certification.” The problem was that the Labor Certification process expired on April 30, 2001: aliens who arrived in the United States after December 21, 2000, were not eligible to receive permanent residence through the program. See Esquivel-Garcia v. Holder, 593 F.3d 1025, 1029 n.1 (9th Cir. 2010). Sineneng-Smith knew that the program had expired. She nonetheless continued to sign retainer agreements with her clients and tell them that they could obtain green cards via Labor Certifications. And she also continued to sign new retainer agreements purportedly to assist additional clients in obtaining Labor Cer-

B. Procedural History

On July 14, 2010, a grand jury returned a ten-count superseding indictment charging Sineneng-Smith with, as relevant to this appeal, three counts of violating 8 U.S.C. § 1324(a) (1)(A)(iv) & § 1324(a)(1)(B)(i) – encouraging or inducing an alien to reside in the United States, knowing and in reckless disregard of the fact that such residence is in violation of the law.

Before trial, Sineneng-Smith moved to dismiss the immigration counts of the superseding indictment. Sineneng-Smith argued that: (1) her conduct was not within the scope of Subsection (iv); (2) Subsection (iv) is impermissibly vague under the Fifth Amendment; and (3) Subsection (iv) violates the First Amendment because it is a content-based restriction on her speech. The district court denied the motion to dismiss, but did not explicitly address the First Amendment argument.

After a twelve-day trial, the jury found Sineneng-Smith guilty on all three counts of violating Subsection (iv) and § 1324(a)(1)(B)(i), and all three counts of mail fraud. Sineneng-Smith then moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), renewing the arguments from her motion to dismiss and contending that the evidence elicited at trial did not support the verdicts. The district court concluded that sufficient evidence supported the convictions for two of the three § 1324 counts and two of the three mail fraud counts.2

Sineneng-Smith timely appealed, again arguing that the charges against her should have been dismissed for the reasons asserted in her motion to dismiss, and that the evidence did not support the convictions. We first held oral argument on April 18, 2017, and submitted the case for decision. Subsequent to submission, however, we determined that our decision would be significantly aided by further briefing. On September 18, 2017, we filed an order inviting interested amici to file briefs on the following issues:

1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?

2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the First

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2. The court sentenced Sineneng-Smith to 18 months on each of the remaining counts, to be served concurrently; three years of supervised release on the § 1324 and mail fraud counts, and one year of supervised release on the filing of false tax returns count, all to run concurrently. She was also ordered to pay $43,550 in restitution, a $15,000 fine, and a $600 special assessment.
Amendment or the Fifth Amendment, and if so, whether any permissible limiting construction would cure the constitutional vagueness problem?

3. Whether the statute of conviction contains an implicit mens rea element which the Court should enunciate. If so: (a) what should that mens rea element be; and (b) would such a mens rea element cure any serious constitutional problems the Court might determine existed?

We received nine amicus briefs, as well as supplemental briefs from both Sineneng-Smith and the government. On February 15, 2018, we again held oral argument and resubmitted the case for decision.

STANDARD OF REVIEW

The government urges us to review Sineneng-Smith’s First Amendment overbreadth claim for plain error, arguing that she waived the issue by not raising it until we requested supplemental briefing.

Although Sineneng-Smith never specifically argued overbreadth before our request for supplemental briefing, she has consistently maintained that a conviction under the statute would violate the First Amendment. Sineneng-Smith’s motion to dismiss argued that “[t]he crime alleged here is rooted in speech content – performing immigration consultancy work on behalf of aliens and their employers by petitioning the government on their behalf – not in conduct lacking any First Amendment protection.” Likewise, her opening brief on appeal reasserted a First Amendment challenge: “Such communication is ‘pure’ speech entitled to the highest level of protection.”

“Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” Yee v. City of Escondido, 503 U.S. 519, 534 (1992). Because Sineneng-Smith has asserted a First Amendment claim throughout the litigation, her overbreadth challenge “is – at most – a new argument to support what has been a consistent claim.” Citizens United v. FEC, 558 U.S. 310, 331 (2010) (internal quotation marks and citations omitted). We thus conclude that she preserved her overbreadth argument, and review it de novo.

ANALYSIS

The First Amendment dictates that “Congress shall make no law … abridging the freedom of speech.” “[A] law imposing criminal penalties on protected speech is a stark example of speech suppression.” Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

Of course, like most constitutional principles, the right to free speech “is not absolute.” Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002). For example, laws or policies that target conduct but only incidentally burden speech may be valid. See, e.g., Virginia v. Hicks, 539 U.S. 113, 122–23 (2003). Further, traditional narrow carve-outs to the First Amendment, “long familiar to the bar,” allow Congress to restrict certain types of speech “including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” United States v. Stevens, 559 U.S. 460, 468 (2010) (internal quotation marks and citations omitted).

Sineneng-Smith and several amici argue that the statute explicitly criminalizes speech through its use of the term “encourages or induces,” and that the speech restriction is content-based and viewpoint-discriminatory, because it criminalizes only speech in support of aliens coming to or remaining in the country. Alternatively, Sineneng-Smith asserts that even if the statute targets some conduct, it sweeps in too much protected speech and is therefore unconstitutional–overbroad. The government counters that Subsection (iv) should be read as referring only to conduct and, to the extent it affects speech, restricts only unprotected speech.

We address those competing constructions below, beginning with the topic of overbreadth.

I. FIRST AMENDMENT OVERBREADTH

Because of the “sensitive nature of protected expression,” New York v. Ferber, 458 U.S. 747, 768 (1982), “[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere,” Free Speech Coal., 535 U.S. at 244. To implement this protection, the general rules governing facial attacks on statutes are relaxed under the First Amendment. Typically, to succeed on a facial attack, a challenger would need “to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.” Stevens, 559 U.S. at 472 (internal quotation marks and citations omitted).

However, “[i]n the First Amendment context … a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” Id. at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, n. 6 (2008)). This exception to the typical rule is based on the idea that speakers may be chilled from expressing themselves if overbroad criminal laws are on the books. See Farber, 458 U.S. at 768–69 (citing Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 634 (1980)). To combat that chilling effect, even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment. See id.

3. We thank all amici for their helpful briefs and oral advocacy.

4. We follow the Supreme Court’s lead in assessing the statute’s overbreadth before engaging in the strict scrutiny analysis that would follow if we concluded that Subsection (iv) was a content-based restriction on speech. See Stevens, 559 U.S. at 474 (recognizing that the statute at issue explicitly regulated expression based on content, but analyzing the statute for overbreadth rather than for whether it survived strict scrutiny).
To determine whether Subsection (iv) is overbroad, we must first construe the statute. Next, we must ask whether Subsection (iv), as construed, restricts speech and, if so, whether that speech is protected. Finally, we must weigh the amount of protected speech that the statute restricts against the statute’s legitimate sweep.

Recognizing that striking down a statute as overbroad is “strong medicine,” and the justification for facially striking down a statute “attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from ‘pure speech’ toward conduct,” we conclude that the chilling effect of Subsection (iv) is both real and substantial. Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973). The only reasonable construction of Subsection (iv) restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits. Therefore, we hold that Subsection (iv) is facially invalid.

A. Construing the Statute

“The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.” United States v. Williams, 553 U.S. 285, 293 (2008). Subsection (iv) reads: “Any person who … encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law … shall be punished as provided in subparagraph (B).”5 Construing the statute also requires us to look beyond the plain text of Subsection (iv). See Stevens, 559 U.S. at 474. Thus, to interpret Subsection (iv), we analyze: the mens rea required for conviction; what “encourages or induces” means; whether “an alien” limits the scope of the statute; and whether “in violation of law” refers to both criminal and civil laws.

The government contends that a defendant runs afoul of Subsection (iv) only when she (1) knowingly undertakes; (2) a non-de minimis; (3) act that; (4) could assist; (5) a specific alien (6) in violating; (7) civil or criminal immigration laws.

While we endeavor to “construe[] [a statute] to avoid serious constitutional doubts,” we can only do so if the statute is “readily susceptible to such a construction.” Stevens, 559 U.S. at 481 (internal quotation marks and citations omitted).

5. The government argues that the “statute of conviction is not 8 U.S.C. § 1324(a)(1)(A)(iv), standing alone. Rather, the indictment charged and the jury found that Sineneng-Smith acted ‘for the purpose of commercial advantage or private financial gain’ under 8 U.S.C. § 1324(a)(1)(A)(i) … Accordingly, the ‘statute[s] of conviction’ are 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i).” Subsection (B)(i) is a commercial enhancement of Subsection (A)(iv). For the purposes of our overbreadth analysis, the commercial enhancement is irrelevant. Subsection (A)(iv) is the predicate criminal act; without the encouraging or inducing, Sineneng-Smith could not have been convicted. And, as the meaning of § 1324(a)(1)(A)(iv) does not vary depending upon whether the financial gain enhancement also applies, the chilling effect of the “encourage or induce” statute extends to anyone who engages in behavior covered by it, whether for financial gain or not.

“We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress’ incentive to draft a narrowly tailored law in the first place.” Id. (internal quotation marks and citations omitted).

The government’s interpretation of Subsection (iv) rewrites the statute. For the following reasons, we hold that to violate Subsection (iv), a defendant must knowingly encourage or induce a particular alien – or group of aliens – to come to, enter, or reside in the country in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws on the part of the alien. As properly construed, “encourage or induce” can mean speech, or conduct, or both, and there is no substantiality or causation requirement.

1. Mens Rea

We first address what mens rea is required to sustain a conviction under Subsection (iv). As an initial matter, the most natural reading of Subsection (iv) requires us to break it into two prongs for the purposes of determining the requisite mens rea: first, the “encourage or induce” prong; and, second, the violation of law prong. Subsection (iv) is silent about the mens rea required for the encourage prong, but explicitly provides that a defendant must “know[] or reckless[ly] disregard” the fact that an alien’s “coming to, entry, or residence is or will be in violation of law.” 8 U.S.C. § 1324(a)(1)(A)(iv).

a. Mens Rea for “encourage or induce” Prong

In United States v. Yoshida, the defendant was indicted for “knowingly encouraging and inducing” three aliens to enter the United States. 303 F.3d 1145, 1149 (9th Cir. 2002). On appeal, Yoshida argued that “there [was] insufficient evidence that she … knowingly encouraged or induced in some way [the aliens’] presence in the United States.” Id. at 1149–50. In affirming the conviction, we concluded that “[a] number of events revealed at trial creates a series of inescapable inferences leading to the rational conclusion that Yoshida knowingly ‘encouraged and induced’ [the aliens] to enter the United States.” Id. at 1150. We repeatedly emphasized the knowledge requirement. See id. (“The government also offered circumstantial evidence that Yoshida knowingly encouraged [the aliens] to enter the United States”); id. at 1151 (“a reasonable jury could easily conclude that Yoshida knowingly led the aliens to the flight”). Therefore, we think it clear that Subsection (iv) has a knowledge mens rea for the encourage prong.

b. Mens Rea for the Violation of Law Prong

Despite the fact that Subsection (iv) explicitly states that a defendant must “know[] or reckless[ly] disregard” the fact that an alien’s “coming to, entry, or residence is or will be in violation of law,” the government argues that we have increased that mens rea requirement to an “intent” to violate the
immigration laws. We disagree, but recognize that our prior cases provide some support for the government’s position.

The government’s argument is based on United States v. Nguyen, 73 F.3d 887 (9th Cir. 1995), in which we reviewed a conviction under subsection (i) of § 1324(a)(1)(A). Subsection (i) criminalizes “bring[ing]” an alien “to the United States … at a place other than a designated port of entry” when the defendant “know[s] that [such] person is an alien.” 8 U.S.C. § 1324(a)(1)(A)(i). “Read literally, then, the statute criminalizes bringing, purposely or otherwise, any alien, illegal or otherwise, into the country other than at a designated port of entry.” Nguyen, 73 F.3d at 890. In the absence of an explicit mens rea standard, we considered the legislative history of the statute and concluded that Congress did not intend to “dispense with a mens rea requirement for the felony offense.” Id. at 893. “Accordingly, we [held] that to convict a person of violating [§] 1324(a)(1)(A), the government must show that the defendant acted with criminal intent.”6 Id.

Subsequent cases adding a mens rea element to the other subsections of § 1324(a)(1)(A) adopted Nguyen’s criminal intent language. See United States v. Barajas-Montiel, 185 F.3d 947, 951–53 (9th Cir. 1999). Central to the government’s argument, in Yoshida we stated, “[w]e have held that ‘to convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent, i.e., the intent to violate United States immigration laws.’” Yoshida, 303 F.3d at 1149 (quoting Barajas-Montiel, 185 F.3d at 951).

However, the passing reference to “criminal intent” in Yoshida did not increase the mens rea of the violation of law prong to intent. We affirmed Yoshida’s conviction because “the jury had ample evidence before it to conclude, beyond a reasonable doubt, that Yoshida encouraged the aliens to enter the United States, with knowledge or in reckless disregard of the fact that the aliens’ entry was in violation of law.” Id. at 1151 (emphasis added). Not only does Yoshida foreclose the government’s argument that we have increased the mens rea level of Subsection (iv), it confirms that we have not read out of the statute the “reckless disregard” standard that appears explicitly in it.

2. “Encourages or Induces”

a. Our Construction of “encourage or induce”

Next, we turn to the meaning of “encourage or induce.” As always, we begin with the language of the statute to determine whether it has “a plain and unambiguous meaning with regard to the particular dispute in the case.” Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). A critical dispute in this case is whether, and to what extent, the words “encourage and induce” criminalize protected speech.

We have previously recognized that “encourage” means “to inspire with courage, spirit, or hope … to spur on … to give help or patronage to.” United States v. Thum, 749 F.3d 1143, 1147 (9th Cir. 2014) (alterations in original) (quoting United States v. He, 245 F.3d 954, 960 (7th Cir. 2001) (quoting Merriam Webster’s Collegiate Dictionary 381 (10th ed. 1996)). This definition is well-accepted. See, e.g., Encourage, Oxford English Dictionary Online (3d ed. 2018) (“to inspire with courage, animate, inspirit … [t]o incite, induce, instigate”). Similarly, induce means “[t]o lead (a person), by persuasion or some influence or motive that acts upon the will … to lead on, move, influence, prevail upon (any one) to do something.” Induce, Oxford English Dictionary Online (3d ed. 2018).

In isolation, “encourage or induce” can encompass both speech and conduct. It is indisputable that one can encourage or induce with words, or deeds, or both. The dictionary definitions do not, however, necessarily resolve the dispute in this case. We must also examine the context in which the words are used to determine whether we can avoid First Amendment concerns. See Williams, 553 U.S. at 294–95. We look to the principle of noscitur a sociis to determine whether the language surrounding “encourage or induce” provides those words with a more precise definition. Id. at 294.

In Williams, the Supreme Court analyzed whether 18 U.S.C. § 2252A(a)(3)(B)’s prohibition on “advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]” purported child pornography was overbroad. Id. at 293–94. In construing the statute, the Court narrowed the meanings of “promotes” and “presents” in light of their neighboring verbs. Id. at 294. The Court reasoned that “advertis[es],” “distribut[es],” and “solicit[es]” all had an obvious transactional connotation: “Advertising, distributing, and soliciting are steps taken in the course of an actual or proposed transfer of a product.” Id. “Promotes” and “presents,” on the other hand, are not obviously transactional. In context, however, the Supreme Court read them as having a transactional meaning as well. Id. at 294–95. Thus, the Court interpreted “promotes” to mean “recommending purported child pornography to another person for his acquisition,” and “presents” to “mean[] showing or offering the child pornography to another person with a view to his acquisition.” Id. at 295.

By contrast, Subsection (iv) does not have a string of five verbs – it is limited to only two: “encourages or induces.” Here, the proximity of encourage and induce to one another does not aid our analysis. As discussed above, both encourage and induce can be applied to speech, conduct, or both. Therefore, unlike the string of verbs in Williams, neither of these verbs has clear non-speech meanings that would inform and limit the other’s meaning. In other words, when read together, they do not provide a more precise definition or one that excludes speech. Nor are the words necessarily
transitional like those in Williams. Thus, the application of *noscitur a sociis* to the two operative verbs here, does not narrow our search; our conclusion that Subsection (iv) could cover speech, as well as conduct, remains.

Beyond their immediate neighbors in Subsection (iv), encourage and induce also “keep company” with the verbs in the other subsections of § 1324(a)(1)(A). The neighboring subsections prohibit: (i) “bring[ing]” an alien to the United States “at a place other than a designated port of entry;” (ii) “transport[ing] or mov[ing]” an alien in furtherance of a violation of the immigration laws; and (iii) “conceal[ing], harbor[ing], or shield[ing]” an alien in violation of the immigration laws. 8 U.S.C. § 1324(a)(1)(A)(i), (ii), & (iii). Bringing, transporting, moving, concealing, harboring, and shielding all clearly refer to some type of action.

The government contends, in light of these other verbs in the other subsections, that “encourage or induce” “should likewise be interpreted to require specific actions that facilitate an alien’s coming to, entering, or residing in the United States illegally. So understood, § 1324(a)(1)(A)(iv) serves as a ‘catch-all’ provision that covers actions other than ‘bring[-ing],’ ‘transporting,’ etc., that might facilitate illegal immigration.” (Citation omitted.) Conversely, Amicus American Civil Liberties Union contends that subsections (i)–(iii) criminalize so much conduct that the only thing left to criminalize in Subsection (iv) is pure speech.

The government’s proposed interpretation of “encourage or induce” in the context of §1324(a)(1)(A) is strained. While we agree that the statute is intended to restrict the facilitation of illegal immigration and that subsections (i)–(iii) prohibit specific actions, it does not follow that Subsection (iv) covers only actions. Instead, the structure of the section lends itself to the more obvious conclusion that the verbs in the subsections must mean different things because they form the basis of separate charges. *See Thum*, 749 F.3d at 1146–47.

In § 1324, “Congress created several discrete immigration offenses including,” among others, the crimes outlined in subsections (a)(1)(A)(i)–(iv). *United States v. Lopez*, 484 F.3d 1186, 1190–91, 1193–94 (9th Cir. 2007) (en banc); *see Thum*, 749 F.3d at 1146. We have held that construing § 1324(a)(1)(A) “so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant,” requires Subsection (iv) to be read as excluding the conduct criminalized in the remaining subsections. *Thum*, 749 F.3d at 1147 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). If encouraging or inducing cannot mean bringing, transporting, moving, concealing, harboring, or shielding, what is left?

The government offers a few limited examples of other actions that could potentially be covered under Subsection (iv), but not reached by subsections (i)–(iii). These examples include: (1) providing aliens with false documents; (2) selling a border-crossing kit to aliens, including a map of “safe crossing” points and backpacks filled with equipment designed to evade border patrol; (3) duping foreign tourists into purchasing a fake “visa extension;” or (4) providing a “package deal” to foreign pregnant women who wish to give birth in the United States that includes a year of room and board, a six-month tourist visa, and instructions on how to overstay the visa without detection. But we doubt Congress intended to limit Subsection (iv) to actions such as these, as the provision does not appear necessary to prosecute any of these actions. Subsection (i), (iii), and (v)(II), which, respectively, restrict bringing, shielding from detection, and aiding and abetting the commission of any of these acts, cover the examples raised by the government. Additionally, 8 U.S.C. § 1324c and 18 U.S.C. § 1546 provide broad criminal prohibitions against document fraud in violation of the immigration laws. These few, unpersuasive examples therefore do not convince us that “encourage” and “induce” can be read so as not to encompass speech, even though their plain meaning dictates otherwise.

In sum, the structure of the statute, and the other verbs in the separate subsections, do not convince us to stray from the plain meaning of encourage and induce – that they can mean speech, or conduct, or both. Although the “encourage or induce” prong in Subsection (iv) may capture some conduct, there is no way to get around the fact that the terms also plainly refer to First Amendment-protected expression. In fact, in Williams, one of the seminal overbreadth cases, Justice Scalia used the statement, “I encourage you to obtain child pornography” as an example of protected speech. 553 U.S. at 300. We see no reason why “I encourage you to overstay your visa” would be any different. And interpreting “encourage or induce” to exclude such a statement would require us to conclude that “encourage” does not mean encourage. The subsection is not susceptible to that construction. Subsection (iv), therefore, criminalizes encouraging statements like Justice Scalia’s example and other similar expression.

**b. Other Courts’ Construction of “encourage or induce”**

Only one other Circuit has considered a First Amendment overbreadth challenge to Subsection (iv), and that was in an unpublished disposition. In *United States v. Tracy*, the defendant “pled guilty to one count of conspiring to encourage non-citizens to enter the United States illegally ... but reserved the right to appeal the district court’s denial of his motion to dismiss that charge.” 456 F. App’x 267, 268 (4th Cir. 2011) (per curiam). The Fourth Circuit rejected the defendant’s argument “that speech that encourages illegal aliens to come to the United States is protected by the First Amendment in certain instances.” *Id.* at 272. Instead, the court stated “that speech that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment,” and concluded that the statute did not prohibit a substantial amount of protected speech. *Id.* (alteration and citations omitted). We will address the extent to which Subsection (iv) can be read to prohibit only aiding and abetting in more detail below, but
it is clear that Tracy recognized that the subsection reaches some speech. Id. (“[T]here may be some instances in which we might find that the statute chills protected speech.”).

Although not addressing Subsection (iv) from a First Amendment perspective, other courts have interpreted what “encourage or induce” means in the subsection. Somewhat recently, we touched upon the issue in Thum. Amici put quite a bit of stock in our use of a “broad” definition of “encourage” in Thum, but we agree with the government that Thum is inconclusive about whether “encourage” (or “induce”) includes speech.

In Thum, we considered whether the defendant encouraged or induced an alien to reside in the United States when the defendant escorted an alien from a fast food restaurant near the San Ysidro Port of Entry – on the U.S. side of the border – to a nearby vehicle headed north. 749 F.3d at 1144–45. In interpreting “encourage,” we relied on the general dictionary definition. Id. at 1147. We also recognized that we “ha[d] previously equated ‘encouraged’ with ‘helped.’” Id. (citing Yoshida, 303 F.3d at 1150). But the main question in that case was whether the defendant had done enough to encourage the alien to reside in the U.S. Thum, 749 F.3d at 1147. On that point, we agreed with the defendant that escorting an alien to a van bound for Northern California was at most “aid[ing] in the attempted transportation of the alien, which would be covered under 8 U.S.C. § 1324(a)(1)(A)(ii),” and did not “convince the illegal alien to stay in this country … or … facilitate the alien’s ability to live in this country indefinitely.” Id. at 1148 (internal quotation marks and citations omitted). Thum thus stands for the proposition that “[e]ncouraging an illegal alien to reside in the United States must mean something more than merely transporting such an alien within this country.” Id. at 1149.7 We did not address whether the statute reached speech. Many other courts have concluded that encourage can mean “to help.” See United States v. Lopez, 590 F.3d 1238, 1249–52 (11th Cir. 2009) (upholding a supplemental jury instruction which, in part, defined “encourage” as “to help”); United States v. Fujji, 301 F.3d 535, 540 (7th Cir. 2002); He, 245 F.3d at 957–58; United States v. Oloyede, 982 F.2d 133, 135–37 (4th Cir. 1993) (per curiam). However, as mentioned above, none of these cases considered a First Amendment challenge to Subsection (iv), nor do they foreclose the conclusion that “encourage or induce” can mean speech. To “help” is not a helpful limitation in terms of excluding expression, because speech can help someone decide to enter or to reside in the United States.

Additionally, the government cites out-of-circuit cases for the argument that encouraging or inducing “requires substantial assistance (or offers of assistance) that the defendant expects to make an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise would have been.” For example, in DelRio-Mocci v. Connolly Props. Inc., the Third Circuit read subsection (iv) as prohibiting a person from engaging in an affirmative act that substantially encourages or induces an alien lacking lawful immigration status to come to, enter, or reside in the United States where the undocumented person otherwise might not have done so. Thus, subsection (iv) has the distinct character of foreclosing the type of substantial assistance that will spur a person to commit a violation of immigration law where they otherwise might not have.

There is a lot to unpack in this interpretation of the statute, but at bottom, DelRio-Mocci added an act requirement, a substantiality requirement, and a causation requirement to the text of Subsection (iv). The Third Circuit adopted the substantiality requirement from its “harboring” decisions under § 1324(a)(1)(A)(iii), which hold that a defendant can only be convicted where his “conduct tend[s] to substantially facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting the alien’s unlawful presence.” Id. at 246–48 (quoting United States v. Ozelik, 527 F.3d 88, 97 (3d Cir. 2008) (internal quotation marks omitted)). The Ninth Circuit, however, does not have such a precedent and we do not think the statute is reasonably susceptible to this interpretation in the absence of statutory text to that effect. See Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1017 n.9 (9th Cir. 2013) (recognizing that the Ninth Circuit broadly defines harboring “to mean ‘afford shelter to’”) (quoting United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976)). We therefore reject the government’s proposed interpretation that “encourage or induce” must mean an act that provides substantial assistance (or non-de-minimis help) to an alien for entering or remaining in the country.

We also disagree with the Third Circuit that a causation requirement can be read into the statute. On its face “the plain language of the statute makes clear that the relevant inquiry is the conduct of the defendant,” and not the alien. See United States v. Dhingra, 371 F.3d 557, 561 (9th Cir.

7. Likewise, Yoshida does not aid our analysis. Yoshida, examining whether there was sufficient evidence to sustain the defendant’s conviction under Subsection (iv), held only that escorting aliens through an airport to a United States-bound flight constituted encouragement. Yoshida, 303 F.3d at 1150–51.
2004) (rejecting vagueness and overbreadth challenges to 18 U.S.C. § 2422(b), which prohibits “knowingly persuad[ing], induc[ing], entic[ing], or coer[cing] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense”).

One district court’s struggle to interpret Subsection (iv) illustrates our concerns. In Henderson, defendant was convicted pursuant to Subsection (iv) because she had “employed a person she came to learn was an illegal alien to clean her home from time to time and, when asked, advised the cleaning lady generally about immigration law practices and consequences.” 857 F. Supp. 2d at 193. Considering a post-verdict motion for judgment of acquittal, the district court reviewed the “Developing Appellate Case Law” to determine the scope of Subsection (iv), and adopted the Third Circuit’s test from DelRio-Mocci Id. at 204, 208.

In arguing against the motion, the government took “the position that giving illegal aliens advice to remain in the United States while their status is disputed constitutes felonious conduct under § 1324(a)(1)(A)(iv) because it constitutes encouragement or inducement under the statute.” 8 Doubling down, “the government contended that an immigration lawyer would be prosecutable for the federal felony created by § 1324(a)(1)(A)(iv) if he advised an illegal alien client to remain in the country because, if the alien were to leave, the alien could not return to seek adjustment of status.” Id. at 203.

The district court expressed discomfort with the government’s position and incredulity that the government would continue to pursue the felony prosecution. See id. at 193–94, 211–14. However, applying the DelRio-Mocci test, the district court concluded that “a jury could find that [defendant’s] employment together with her [immigration] advice could have caused [the alien], or a person in her position, to reside here when she otherwise might not have.” Id. at 208. The court denied the motion for acquittal, but granted defendant’s motion for a new trial in order to give new jury instructions. Id. at 210, 214.

Despite Henderson, the government now argues that “[n]o reported decision applies Subsection (iv) to efforts to persuade, expressions of moral support, or abstract advocacy regarding immigration.” Even if this were correct, it misses the point. “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” Stevens, 559 U.S. at 480. Thus, the absence of convictions based purely on protectable expression is not evidence that the statute does not criminalize speech. Just because the government has not (yet) sought many prosecutions based on speech, it does not follow that the government cannot or will not use an overbroad law to obtain such convictions. Further, the lack of convictions says nothing about whether Subsection (iv) chills speech. Indeed, Henderson exemplifies why we cannot take the government’s word for how it will enforce a broadly written statute, and suggests that any would-be speaker who has thought twice about expressing her views on immigration was not being paranoid.

3. “An alien”

The government contends that Subsection (iv) is limited to encouraging “a particular alien or aliens,” rather than “the general public.” For the purposes of this appeal, and to avoid serious constitutional concerns, we think the government’s proposed interpretation is reasonable, but not ultimately dispositive to our overbreadth analysis. And while it is easy to foresee arguments about what constitutes a group of particular aliens versus the “general public,” we accept that Subsection (iv) requires a defendant to direct his or her encouragement or inducement toward some known audience of undocumented individuals.

4. “In Violation of Law”

Recognizing the breadth of the statute, the government admits that “in violation of law” refers not only to criminal law, but also to civil violations of the immigration laws. We agree. Amicus Professor Eugene Volokh argues that we could narrow the scope of the statute by reading “violation of law” to mean only violations of the criminal law. But, because simple residence in the United States without legal status is not a crime, and the statute reaches inducing or encouraging an alien to “reside” in the United States, the subsection is not susceptible to this limiting construction. See Arizona v. United States, 567 U.S. 387, 407 (2012) (“As a general rule, it is not a crime for a removable alien to remain present in the United States.”). The proposed limiting construction would render “reside” superfluous.

5. Construction of the Statute

To recap, we interpret Subsection (iv) as follows: to violate the subsection, a defendant must knowingly encourage or induce a particular alien – or group of aliens – to come to, enter, or reside in the country, knowing or in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws. As construed, “encourage or induce” can mean speech, or conduct, or both, and there is no substantiality or causation requirement.

Ultimately, the government asks us to rewrite the statute. Under no reasonable reading are the words “encourage” and “induce” limited to conduct. We think the statute is only susceptible to a construction that affects speech. As an illustration – under the government’s reading of the statute, it would argue that a mother telling an undocumented adult child “If you leave the United States, I will be very lonely. I encourage you to stay and reside in the country” would not subject the mother to prosecution. But, in this example, the mother is

8. The defendant in Henderson does not appear to have made an explicit First Amendment argument.
merely repeating the words of the statute in an attempt to get her child to stay. We think any reasonable person reading the subsection would assume that the mother’s statement makes her vulnerable to prosecution, that the words of the statute have their plain meaning, and that a person can encourage or induce another by verbally, explicitly encouraging or inducing her.

B. Subsection (iv) Restricts Protected Speech

The conclusion that Subsection (iv) reaches speech does not end our inquiry. We must now examine: (1) whether the statute reaches protected speech and, if so, (2) whether the statute restricts a substantial amount of such speech in relation to the statute’s legitimate sweep. See, e.g., Hicks, 539 U.S. at 468. The most relevant exception to the First Amendment for this case is speech integral to criminal conduct, but incitement also deserves mention.

The government asserts that even if we interpret Subsection (iv) to reach speech, it does not constrain protected speech because the speech is integral to assisting others in violating the immigration laws. In the government’s reading, Subsection (iv) is analogous to an aiding and abetting statute. But, to repeat, continuing to reside in the U.S. is not a criminal offense; therefore, assisting one to continue to reside here cannot be aiding and abetting a crime. One amicus, supporting the constitutionality of the statute, reads it as a solicitation restriction.9

1. Incitement

Under the incitement exception to the First Amendment, the government may not “proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). “Abstract advocacy,” even of a crime, on the other hand, is protected speech. See Williams, 553 U.S. at 298–99. As we have construed Subsection (iv), it does not require that an alien imminently violate the immigration law. Nor does Subsection (iv) require that any encouragement or inducement make it “likely” that an alien will violate the immigration law. Plainly, the incitement doctrine is a poor fit for this particular statute, especially considering that other incitement cases typically involve incitements to violence, riot, or breach of the peace. See, e.g., Brandenburg, 395 U.S. at 447–48; see also Hess v. Indiana, 414 U.S. 105, 109 (1973); United States v. Poocha, 259 F.3d 1077, 1080–81 (9th Cir. 2001); id. at 1084–85 (Tashima, J., concurring in part and dissenting in part) (agreeing that speech must be likely to incite violence to be proscribed). If Subsection (iv) reaches any speech that is exempted from the First Amendment as incitement, it is an extremely narrow band of speech and does not significantly reduce the scope of the statute.

2. Speech Integral to Criminal Conduct

The government’s primary argument is that any covered speech is “integral” to a violation of the immigration law. “[Speech writing used as an integral part of conduct in violation of a valid criminal statute” does not enjoy First Amendment protection. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); id. at 498–502 (picketing for “the sole immediate purpose” of compelling a company to stop selling to nonunion peddlers was not protected speech because it was part of “a single and integrated course of conduct” in violation of criminal restraint of trade laws). For this reason, speech that aids and abets criminal activity does not necessarily benefit from First Amendment protection. United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985).

In Freeman, we reviewed “convict[ions] on fourteen counts of aiding and abetting and counseling violations of the tax laws, an offense under 26 U.S.C. § 7206(2).” Id. at 551. We held that the defendant was entitled to a jury instruction on a First Amendment defense as to twelve of the counts because, at least arguably, the defendant made statements about the “unfairness of the tax laws generally.” Id. at 551–52. Conversely, the defendant was not entitled to the First Amendment instruction on the remaining two counts because the defendant actually assisted in the preparation of false tax returns. Id. at 552. We reasoned that “[e]ven if the convictions on these [two] counts rested on spoken words alone, the false filing was so proximately tied to the speech that no First Amendment defense was established.” Id. As Freeman illustrates, although some speech that aids or abets a crime is so integral to the crime itself that it is not constitutionally protected, other speech related to criminal activity is not so integral as to be unprotected.

Based on Freeman, the government contends that any speech that Subsection (iv) reaches is integral to a violation of the immigration laws.10 However, there are relevant differ-

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9. Amicus Professor Eugene Volokh proposes construing the statute to restrict a defendant from “directly, specifically, and purposefully encouraging” criminal violations of the immigration laws. We do not think that the statute is reasonably susceptible to this interpretation. First, we decline to read a specificity or directness requirement into the statute because the plain meanings of encourage and induce do not include such principles. Second, Congress clearly knows how to write a solicitation statute as evidenced by 18 U.S.C. § 373(a): “Whoever … solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in” a violent felony is subject to prosecution. If Congress wanted Subsection (iv) to restrict only solicitation, it could have done so. Finally, as discussed above, we cannot limit “in violation of law” to criminal laws and, like Professor Volokh, we are not aware of any precedent for treating speech soliciting merely civil violations as a crime.

ences between an aiding and abetting statute and Subsection (iv). For one, as explained above, the statute is not limited only to speech that substantially assists an alien in violating the immigration laws. Freeman exposes the relevant distinction. The statute in Freeman prohibited “[w]illfully aid[ing] or assist[ing] in, or procur[ing], counsel[ing], or advis[ing] the preparation or presentation” of false tax returns. 26 U.S.C. § 7206(2). On the twelve counts for which the court reversed Freeman’s convictions, the court focused on the fact that Freeman may have generally advocated the filing of false returns. Id. at 551–52. On the other hand, for the two convictions that the court affirmed, it emphasized that Freeman “not only counseled but also assisted in the filing of false returns.” Id. at 552 (emphasis added). The assistance on the two affirmed counts, even if only words, was more directly related to the completed crime. Id. Thus, Freeman’s conclusion is that only some speech that the statute restricted was so related to the predicate crime that it was considered “integral.”

Likewise, here, the statute criminalizes speech beyond that which is integral to violations of the immigration laws.

Second, as the government recognizes, aiding and abetting convictions require the government to prove certain elements that are not present in Subsection (iv):

In this circuit, the elements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense.

Thum, 749 F.3d at 1148–49 (quoting United States v. Shorty, 741 F.3d 961, 969–70 (9th Cir. 2013)). The first obvious difference is that aiding and abetting requires the commission of a crime by another, but Subsection (iv) applies to both criminal and civil violations of the immigration laws. The government asserts that the civil/criminal distinction should not matter in the First Amendment context, but points to no case where a defendant was convicted for aiding and abetting a civil offense. We are not aware of any case that upholds a statute restricting such speech. Therefore, even if certain speech would constitute aiding and abetting when directed toward the commission of a crime, it would be constitutionally protected when aimed at inducing a civil violation of law. And because unauthorized presence in the country is a civil violation rather than a crime, Subsection (iv) reaches beyond speech integral to a crime.

Next, aiding and abetting requires that the accused “assisted or participated” in the commission of the offense. For the reasons described above, we cannot construe Subsection (iv) as applying only to assistance for or participation in a violation of the immigration law; it is enough to encourage.

Further, aiding and abetting requires that a principal actually commit the underlying offense. See id. at 1149. There is no such requirement in Subsection (iv). The government argues that this should not matter for the First Amendment analysis because, citing the Model Penal Code § 2.06(3)(a)(ii), Subsection (iv) resembles an attempted aiding and abetting statute. The government’s argument fails, however, because “[t]here is no general federal ‘attempt’ statute. [A] defendant … can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt.” United States v. Hopkins, 703 F.2d 1102, 1104 (9th Cir. 1983). Subsection (iv) does not restrict attempt, unlike the other subsections of the statute.

Most fundamentally, Subsection (iv) looks nothing like an aiding and abetting statute. Just two lines below Subsection (iv)’s text, Congress required that anyone who “aids or abets the commission of any of the preceding acts” shall be punished as a principal. 8 U.S.C. § 1324(a)(1)(A)(v)(II). Further, Congress authored a general aiding and abetting statute, 18 U.S.C. § 2, which states that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” Clearly, if Congress wanted Subsection (iv) to be an aiding and abetting statute, it would have included the words aiding and abetting. The statute instead manifests Congress’ intent to restrict a broader range of activity, and that activity stretches beyond unprotected speech.

C. Subsection (iv) Restricts A Substantial Amount of Protected Speech in Relation to its Legitimate Sweep

Because we conclude that Subsection (iv) reaches protected speech, we must now analyze whether the amount of protected speech the statute restricts is substantial in relation to its legitimate sweep. In plain terms, are the statute’s improper applications too numerous to allow the statute to stand? “The concept of ‘substantial overbreadth’ is not readily reduced to an exact definition.” Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984). But, “[c]riminal statutes must be scrutinized with particular care” and “those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” City of Houston v. Hill, 482 U.S. 451, 459 (1987). Although “substantial” does not have a precise meaning in this context, the Supreme Court has explained that a statute may be struck down if it is “susceptible of regular application to protected expression.” Id. at 467. In other words, “there must be a realistic danger that the
statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” Taxpayers for Vincent, 466 U.S. at 801.

It is apparent that Subsection (iv) is susceptible to regular application to constitutionally protected speech and that there is a realistic (and actual) danger that the statute will infringe upon recognized First Amendment protections. Some of the situations raised in the supplemental briefing and at oral argument demonstrate the improper scope of this statute. While we are aware that the Supreme Court is skeptical of “fanciful hypotheticals” in overbreadth cases, we do not think that the scenarios raised here are fanciful. See Williams, 553 U.S. at 301. We think that they are part of every-day discussions in this country where citizens live side-by-side with non-citizens. Buttressing our assessment that the following hypotheticals are not overly speculative, the government has already shown a willingness to apply Subsection (iv) to potentially protected speech. See Henderson, 857 F. Supp. 2d at 193–94, 203–04.12

We begin with an obvious example from one of the amicus briefs: “a loving grandmother who urges her grandson to overstay his visa,” by telling him “I encourage you to stay.” Nothing in Subsection (iv) would prevent the grandmother from facing felony charges for her statement. Again, in Williams, the Supreme Court used almost identical language – “I encourage you to obtain child pornography” – to describe abstract advocacy immune from government prohibition. 553 U.S. at 300. The government has not responded persuasively to this point; it simply argues that the grandmother would not be subject to criminal charges because her statement was “not accompanied by assistance or other inducements.” However, as we have detailed above, Subsection (iv) does not contain an act or assistance requirement.

Further, implying a mens rea requirement into the statute, and applying it only to speech to a particular person does not cure the statute’s impermissible scope. Just because the grandmother wanted her words to encourage her grandson and said them directly to him does not render those words less protected under the First Amendment. We think that situations like this one, where a family member encourages another to stay in the country, or come to the country, are surely the most common form of encouragement or inducement within Subsection (iv)’s ambit.

The government similarly dismisses “marches, speeches, publications, and public debate expressing support for immigrants,” as being subject to Subsection (iv)’s restrictions. Again, however, the government relies on its faulty construction of the statute to argue that such speech does not “assist” or “incentivize” an immigrant to come to, enter, or reside in the United States in violation of law. The statute, however, does not criminalize assistance or incentivizing; it makes it a felony to “encourage” or “induce.” A speech addressed to a gathered crowd, or directed at undocumented individuals on social media, in which the speaker said something along the lines of “I encourage all you folks out there without legal status to stay in the U.S!” We are in the process of trying to change the immigration laws, and the more we can show the potential hardship on people who have been in the country a long time, the better we can convince American citizens to fight for us and grant us a path to legalization,” could constitute inducement or encouragement under the statute. But, this general advocacy could not be considered incitement because there is no imminent breach of the peace. It would not be aiding and abetting or solicitation because it is general and is not advocating a crime. Instead, it is pure advocacy on a hotly-debated issue in our society. Such “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). Criminalizing expression like this threatens almost anyone willing to weigh in on the debate. Cf. Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1414 (9th Cir. 1996) (“Cities, counties, and states have a long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest, including … immigration.”).

Additionally, amici present several examples of professionals who work with immigrants whose speech might be chilled on account of Subsection (iv)’s breadth. The most common example cited is an attorney who tells her client that she should remain in the country while contesting removal – because, for example, non-citizens within the United States have greater due process rights than non-citizens outside the United States, or because, as a practical matter, the government may not physically remove her until removal proceedings are completed. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Under the statute’s clear scope, the attorney’s accurate advice could subject her to a felony charge. The government’s arguments to the contrary are unavailing. First, 13

12. Additionally, the City and County of San Francisco in its amicus brief represents that the government has repeatedly threatened its officials with violations of 8 U.S.C. § 1324. For example, “ICE Director Thomas Homan announced that he had asked Attorney General Sessions to determine whether sanctuary cities like San Francisco are ‘committing a statutory crime’ under section 1324.” Further, San Francisco relates that “Director Homan renewed his threat in even starker terms. According to Director Homan, ‘when a sanctuary city intentionally or knowingly shields an illegal alien from federal law enforcement, that is a violation of 8 U.S.C. 1324.’ Director Homan announced that he was ‘putting together a response plan’ with ‘the highest levels of the Department of Justice,’ and ominously declared, ‘This is not over.’” True, San Francisco reports that “[t]o the extent these threats have been tied to any specific prong of section 1324, they have been tied to the ‘harboring’ or ‘transporting’ prongs of that statute.” Id. But not all of the threats were tied to a specific subsection, and the government might well turn to Subsection (iv).

13. Speaking directly to a particular group of aliens, as opposed to the public at large, is within the scope of Subsection (iv) as we have construed it.

14. The Supreme Court has made clear that “cyberspace … and social media in particular” is “the most important place[,] … for the exchange of views.” Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
undoubtedly, the attorney would know that telling an immigrant she would have greater rights if she remained here or that she may not be removed while in removal proceedings would encourage the immigrant to stay. And, we do not think construing Subsection (iv) to reach advice from attorneys endangers statutes like 18 U.S.C. § 2(a), the general aiding and abetting statute. An attorney can knowingly encourage a course of action without aiding or abetting it. Moreover, as we have explained, remaining in the country while undocumented, without more, is not a crime. More fundamentally, though, the government has already shown its intent to prosecute those citizens (attorneys or sympathetic lay persons) who give even general immigration advice. See Henderson, 857 F. Supp. 2d at 193.

The foregoing examples are not some parade of fanciful horribles. Instead, they represent real and constitutionally-protected conversations and advice that happen daily. They demonstrate that Subsection (iv)’s impermissible applications are real and substantial. Because Subsection (iv)’s legitimate sweep – which only reaches conduct not criminalized in the other subsections of § 1324(a)(1)(A), and unprotected speech – is narrow, we hold that Subsection (iv) is overbroad under the First Amendment.15

CONCLUSION

Subsection (iv) criminalizes a substantial amount of protected expression in relation to the statute’s narrow legitimate sweep; thus, we hold that it is unconstitutionally overbroad in violation of the First Amendment. The judgment of the district court is REVERSED with respect to the “encourage or induce” counts, Counts 2 and 3 of the First Superseding Indictment. In accordance with the Memorandum disposition filed concurrently herewith, with respect to the mail fraud counts, Counts 5 and 6, the judgment of the district court is AFFIRMED.

Because two of the five counts of conviction are reversed, the sentence must be vacated and the case remanded for resentencing. See United States v. Carter, 2018 WL 5726694, at *8 (9th Cir. Nov. 2, 2018); United States v. Davis, 854 F.3d 601, 606 (9th Cir. 2017).

REVERSED in part, AFFIRMED in part, sentence VACATED and REMANDED for resentencing.

15. Because we strike down Subsection (iv) as overbroad, we need not reach the separate issue of whether the statute is void for vagueness.
A new opinion is filed simultaneously with the filing of this order, along with a new dissenting opinion. Accordingly, the Appellant’s petition for rehearing en banc is DENIED as moot. The parties may file petitions for rehearing and petitions for rehearing en banc in response to the new opinion, as allowed by the Federal Rules of Appellate Procedure.

OPINION

GETTLEMAN, District Judge:

This appeal involves the validity of an arbitration award. ASARCO asserts that the award is invalid because the arbitrator reformed the Basic Labor Agreement (“BLA”) between the Union and ASARCO in contravention of a no-add provision in that agreement. The Union argues that the arbitrator did not contravene the no-add provision because he was required to reform the BLA upon finding that the parties were mutually mistaken as to its terms when they agreed to it. The district court affirmed the award, holding that ASARCO properly preserved its objection to the arbitrator’s jurisdiction, but the arbitrator was authorized to reform the BLA, despite the no-add provision, based on a finding of mutual mistake. We affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

ASARCO is a miner, smelter, and refiner of copper and other precious metals with facilities in Arizona and Texas. ASARCO’s employees are represented by the Union. ASARCO and the Union are parties to the BLA, which was originally effective January 1, 2007, through June 30, 2010. The BLA was modified and extended through two Memoranda of Agreement (“MOA”) negotiated in 2010 and 2011. Article 9, Section B of the BLA provides that a Copper Price Bonus (“Bonus”) will be paid quarterly to employees who participate in ASARCO’s pension plan. The Bonus is calculated based on the price of copper and is significant, at times as much as $8,000 annually per employee. The 2011 MOA modified Article 12, Section Q of the BLA to make employees hired on or after July 1, 2011 ineligible for ASARCO’s pension plan, and thus ineligible for the Bonus. The Union, unaware of the link between the pension plan and the Bonus, filed a grievance disputing ASARCO’s refusal to pay the Bonus to employees hired after July 1, 2011. The case proceeded to arbitration.

At the beginning of the arbitration hearing the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance. The Union claimed there was a mutual mistake in the 2011 MOA: the parties failed to recognize that Article 9, Section C of the BLA tied eligibility for the Bonus to participation in the pension plan, and both parties intended for all employees to remain eligible for the Bonus when they negotiated the 2011 MOA. Accordingly, the Union argued that reformation of the BLA was the appropriate remedy. ASARCO offered no evidence to the contrary, but argued that the arbitrator lacked authority to reform the BLA because Article 5, Section I(6) (c) contained the following no-add provision: “The arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this Agreement.” After hearing six days of evidence the arbitrator concluded that neither party anticipated that the 2011 MOA modification would impact new hires’ eligibility for the Bonus. Because he found that the parties were mutually mistaken as to the terms of the 2011 MOA, the arbitrator ordered that the BLA be reformed to provide that new hires, though ineligible for ASARCO’s pension plan, remain eligible for the Bonus.

ASARCO filed a Petition to Vacate Arbitration Award in the United States District Court for the District of Arizona. ASARCO did not challenge the arbitrator’s findings of fact or conclusions of law, but argued that the no-add provision deprived the arbitrator of authority to reform the BLA. The district court confirmed the arbitration award, but rejected the Union’s argument that ASARCO had waived any argument regarding the limits of the arbitrator’s jurisdiction. In confirming the award, the district court noted the degree of deference due to the arbitrator’s decision and concluded that the arbitrator did not violate the no-add provision because the reformation corrected a defect in the BLA, which was the product of mutual mistake, to reflect the terms the parties had agreed upon. ASARCO timely appeals.

II. STANDARD OF REVIEW

Our review of a district court’s decision confirming an arbitration award is de novo. Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177, 1180 (9th Cir. 2001). “Our review of labor arbitration awards is, however, extremely deferential because ‘courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.’” Id. (quoting United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)) (internal alterations omitted). Unless the arbitrator has “dispensed his own brand of industrial justice” by making an award that does not “draw its essence from the collective bargaining agreement,” we must confirm the award. Id. at 1181 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)) (internal alterations omitted).

The context of collective bargaining warrants this extremely limited scope of review because the parties have agreed to have their disputes decided by an arbitrator chosen by them: “[I]t is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.” Id. “Indeed,
the mandatory and prearranged arbitration of grievances is a critical aspect of the parties’ bargain, the means through which they agree ‘to handle the anticipated unanticipated omissions of the collective bargaining agreement.’” Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int’l Ass’n of Machinists & Aerospace Workers, 886 F.2d 1200, 1205 (9th Cir. 1989) (en banc) (quoting St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 Mich.L.Rev. 1137, 1140 (1977)) (“Judicial Review”) (internal alterations omitted). Such omissions occur because “[u]nlike the commercial contract, which is designed to be a comprehensive distillation of the parties’ bargain, the collective bargaining agreement is a skeletal, interstitial document.” Id.

Consequently, “[t]he labor arbitrator is the person the parties designate to fill in the gaps; for the vast array of circumstances they have not considered or reduced to writing, the arbitrator will state the parties’ bargain.” Id. He is “‘their joint alter ego for the purpose of striking whatever supplementary bargain is necessary’ to handle matters omitted from the agreement.” Id. (quoting Judicial Review, 75 Mich.L.Rev. at 1140). Because of this role, the arbitrator “cannot ‘misinterpret’ a collective bargaining agreement,” id., and “even if we were convinced that the arbitrator misread the contract or erred in interpreting it, such a conviction would not be a permissible ground for vacating the award.” Va. Mason Hosp. v. Wash. State Nurses Ass’n, 511 F.3d 908, 913 (4th Cir. 2007) (footnote omitted). This deference applies “‘even if the basis for the arbitrator’s decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions.’” Federated Dep’t Stores v. United Foods & Commercial Workers Union, Local 1442, 901 F.2d 1494, 1496 (9th Cir. 1990) (quoting Stead Motors, 886 F.2d at 1209).

III. ANALYSIS

Although judicial review of arbitration awards is extremely limited, the Supreme Court and this Circuit have articulated three exceptions to the general rule of deference to an arbitrator’s decision: “(1) when the arbitrator’s award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) when the arbitrator exceeds the boundaries of the issues submitted to him; and (3) when the award is contrary to public policy.” Id. (internal quotation marks omitted).

Given the great deference due to arbitrator’s decisions, ASARCO wisely does not challenge the arbitrator’s findings of fact or conclusions of law, but instead argues that the arbitrator’s award does not warrant deference based on all three exceptions. The first two exceptions are interrelated, and we will address them simultaneously before turning to the third exception. ASARCO argues that the no-add provision in the BLA deprived the arbitrator of authority to reform the BLA, and the arbitrator’s award does not draw its essence from the BLA because it ignores this provision.

In deciding whether the arbitrator’s award draws its essence from the BLA, “the quality – that is the degree of substantive validity – of [his] interpretation is, and always has been, beside the point.” Sw. Reg’l Council of Carpenters v. Drywall Dynamics, Inc., 823 F.3d 524, 532 (9th Cir. 2016), cert. denied, 137 S. Ct. 829, 197 L. Ed. 2d 68 (2017). “Instead, the appropriate question for a court to ask when determining whether to enforce a labor arbitration award interpreting a collective bargaining agreement is a simple binary one: Did the arbitrator look to and construe the contract, or did he not?” Id. This is because “[i]t is only when the arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.” Id. at 531 (quoting Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001)) (internal alterations omitted). Accordingly, “the court’s inquiry ends if the arbitrator ‘made any interpretation or application of the agreement at all.’” Id. at 531–32. We therefore “must limit [our] review to whether the arbitrator’s solution can be rationally derived from some plausible theory of the general framework or intent of the agreement.” United Food & Commercial Workers Int’l Union, Local 588 v. Foster Poultry Farms, 74 F.3d 169, 173 (9th Cir. 1995), opinion amended on denial of reh’g. (9th Cir. Jan. 30, 1996).

We have no doubt that the arbitrator’s decision was grounded in his reading of the BLA. The arbitrator acknowledged that new hires were not entitled to the Bonus under the plain language of the BLA and that he could not find for the Union based solely on the language contained in the BLA. He also recognized that arbitrators do not generally have the authority to rewrite CBAs or ignore their provisions. He noted, however, that arbitrators can reform a contract to correct an obvious mutual mistake. Citing a substantial amount of evidence that he heard over six days, the arbitrator concluded that the parties presented precisely this scenario: in negotiating the 2011 MOA, they never discussed or even acknowledged that if the BLA were amended to make new hires ineligible for the pension plan, they would also be ineligible for the Bonus. Although he did not specifically cite the no-add provision when explaining the basis of his award, the arbitrator did quote it directly as relevant language of the BLA and noted that, absent a finding of mutual mistake, he would not have the authority to reform the BLA. 3.

3. As the parties note, this Court has retired the use of the term “plausibility” when describing judicial review of labor arbitration awards. See Drywall Dynamics, 823 F.3d at 532. This step was taken not to “propose any substantive change to the settled law in this area,” but rather to underscore the limited nature of the inquiry, which is whether “the arbitrator look[ed] at and construe[d] the contract.” Id.

4. Respectfully, the dissenting opinion is incorrect when it states that the arbitrator failed to discuss, or even mention, the no-add provision. In fact, the arbitrator discussed the no-add provision at length on pages 14 and 16 of the arbitration award, quoting it directly, and discussing the parties’ positions regarding its impact. The arbitrator then acknowledged that he lacked authority to rewrite the BLA or ignore its provisions absent a finding of mutual mistake.
Given the arbitrator’s extensive treatment of the BLA and acknowledgment of the no-add provision, we agree with the district court that the arbitrator’s decision was grounded in his reading of the BLA, and are “bound to enforce the award” even if “the basis for the arbitrator’s decision may be ambiguous.” W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 764, 103 S. Ct. 2177, 2182, 76 L. Ed. 2d 298 (1983); see also Drywall Dynamics, 823 F.3d at 533 (“[A]rbitrators have no obligation to give their reasons for an award at all...” and a court may not “infer the non-existence of a particular reason merely from the award’s silence on a given issue.”) (quoting Stead Motors, 886 F.2d at 1208, 1213); Stead Motors, 886 F.2d at 1208 (“[M]ere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.”) (quoting Enterprise Wheel, 363 U.S. at 598, 80 S. Ct. at 1361).

Upon concluding that the parties were mutually mistaken as to the impact of the 2011 MOA on new hires’ eligibility for the Bonus, the arbitrator was authorized to reform the CBA despite ASARCO’s protest. The standard arbitration clause in the BLA provided that the arbitrator had authority to decide all issues of contract interpretation, which, of course, would include the scope of the no-add provision. Additionally, the arbitrator was not strictly bound only to the provisions of the BLA in crafting a remedy, because “the arbitrator is entitled, and is even expected, to range afield of the actual text of the collective bargaining agreement he interprets.” Stead Motors, 886 F.2d at 1206. The arbitrator was entitled to rely on a number of resources, including “statutes, case decisions, principles of contract law, practices, assumptions, understandings, [and] the common law of the shop” in his effort to give meaning to the BLA. Hawaii Teamsters, 241 F.3d at 1183 (quoting McKinney v. Emery Air Freight Corp., 954 F.2d 590, 595 (9th Cir. 1992)).

Applying ordinary principles of contract law, the arbitrator concluded that the proper remedy for the parties’ mutual mistake was to reform the BLA to make it reflect the terms the parties actually agreed upon. See Caliber One Indem. Co. v. Wade Cook Fin. Corp., 491 F.3d 1079, 1083 (9th Cir. 2007) (reformation of contract is warranted to correct mutually mistaken terms). Even if we were to conclude otherwise, “where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.” Misco, 484 U.S. at 38, 108 S. Ct. at 371. Because the arbitrator was construing the BLA in light of the evidence presented to him and basic principles of contract law, his decision and award are due great deference. See W.R. Grace, 461 U.S. at 765, 103 S. Ct. at 2183 (“Regardless of what our view might be of the correctness of [the arbitrator’s] contractual interpretation, [ASARCO] and the Union bargained for that interpretation. A federal court may not second-guess it.”) (citation omitted). Although we could conceivably have reached a different result if we were to interpret the BLA ourselves, we conclude that the arbitrator’s award drew its essence from the BLA.

The cases ASARCO cites to support its argument that the no-add provision left the arbitrator powerless to remedy what he found to be an obvious mutual mistake fail to do so. First, ASARCO tells us that we need look only to one case to vacate the arbitrator’s award: West Coast Telephone. W. Coast Tel. Co. v. Local Union No. 77, Int’l Bhd. of Elec. Workers, AFL-CIO, 431 F.2d 1219 (9th Cir. 1970). In West Coast Telephone the employer sought to reform its CBA because it contained wage schedules for certain employees that reflected wages higher than what the employer and Union had agreed upon when bargaining. Id. at 1220. The employer was made aware of this discrepancy when the Union filed a grievance because the employees were being paid the agreed upon wage rather than the higher wage contained in the CBA. Id. The Union requested the dispute be submitted to arbitration under the terms of the CBA, but the company refused to arbitrate and instead filed suit in the district court seeking reformation. Id. The Union moved to compel arbitration. The district court denied the motion, and the Union appealed. Id. This court, without any explanation, affirmed: [T]he company seeks a change in the terms of the written agreement. It can be said with positive assurance that such an issue is not arbitrable under the agreement in question. The arbitration clause of the contract expressly provides that the arbitrator ‘shall have no power to destroy, change, add to or delete from its terms.’

Id. at 1221.

ASARCO’s reliance on West Coast Telephone is misplaced. West Coast Telephone did not grapple with courts’ deference to arbitrators’ decisions, nor did it hold that arbitrators may never, under any circumstances, reform contracts that contain no-add provisions.5 It simply held that the issue of contract reformation was not arbitrable under the facts of that case because the contract contained a no-add provision. That question is not before this court. Indeed, neither the district court nor this court in West Coast Telephone ever indicated whether the arbitration clause provided that the arbitrator was to decide all issues of contract interpretation. ASARCO attempts to discard this difference as one of inconsequential procedural posture, but here procedural posture makes all the difference. Having submitted the grievance to the arbitrator, and having argued to the arbitrator that the contract limited his authority to fashion a remedy, ASARCO must now somehow overcome the deference that is afforded the arbitrator’s decision. West Coast Telephone does not help in that regard.

5. West Coast Telephone did suggest that reformation is the appropriate remedy when the provisions of a contract do not reflect the parties’ agreed upon terms. See West Coast Telephone, 431 F.2d at 1221–22.
Even if this court were in the same posture as the court in West Coast Telephone, we would still defer to the arbitrator’s determination of whether and the extent to which the no-add provision limited the arbitrator’s ability to fashion a remedy. Int’l Assoc. of Machinists v. Howmet Corp., 466 F.2d 1249, 1252–53 (9th Cir 1972) (“a clause limiting the power of the arbitrator to add to, subtract from, or alter the provisions of the agreement does not affect the jurisdiction of the arbitrator, but merely limits his power to fashion an award.”) (citing Tobacco Workers Int’l Union, Local 317 v. Lorillard Corp., 448 F.2d 949, 955 (4th Cir. 1971)); see also Kraft Foods, Inc. v. Office and Prof’l Employees Int’l Union, AFL-CIO, CLC, Local 1295, 203 F.3d 98, 101 (1st Cir. 2000) (“While courts disagree on the extent to which a `no-modification’ clause bars arbitrators from looking beyond the language of the agreement to determine breach, courts agree that “the fashioning of an appropriate remedy is not an addition to the obligations imposed by the contract.””) (quoting Tobacco Workers Int’l Union, 448 F.2d at 956).

In the instant case, the dispute between the parties was unquestionably arbitrable. ASARCO argued to the arbitrator that he lacked contractual authority to fashion an award. The arbitrator disagreed. His decision is entitled to deference.

The other cases cited by ASARCO are equally inapt, if not more so. Not one of them concerns a mutual mistake made by two parties who have agreed to submit their dispute to an arbitrator, or what the proper remedy would be in such a situation. For the reasons discussed above, these facts matter. Additionally, ASARCO faults the Union for not seeking reformation of the BLA in the district court, but ASARCO knew all along that the Union sought reformation. It did not and now cannot present the issue to this court and hope for a better outcome.

Finally, ASARCO argues that the arbitrator’s award should be vacated because it violates public policy. The Union argues that ASARCO waived this argument by failing to present it in the district court. ASARCO concedes this fact, but urges that an argument first raised on appeal is not waived when the issue is purely one of law and the opposing party will not be prejudiced. See United States v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990). Regardless of whether ASARCO’s argument is waived, it fails.6 There is “a very limited ‘public policy exception’ to the stringent rule ordinarily requiring courts’ enforcement of arbitrators’ decisions interpreting and applying collective bargaining agreements.” Drywall Dynamics, 823 F.3d at 533 (citations omitted). Under this exception “a court may vacate an arbitration award that ‘runs contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.’” Id. at 534 (quoting E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 63, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000)) (internal alterations omitted).

According to ASARCO, the public policy interest served by the collective bargaining process demands that the award be vacated because courts should not confirm arbitration awards that distort the product of collective bargaining – the Collective Bargaining Agreement. Assuming ASARCO has stated an “explicit, well-defined, and dominant public policy,” its argument still fails for a very simple reason. The arbitrator did not distort the BLA; he reformed it so that it no longer distorted the agreement that the parties made during collective bargaining. For the reasons discussed above, the arbitrator was authorized to do so upon finding the parties were mutually mistaken about the terms they agreed to. The award does not violate public policy.

We conclude that the arbitrator was acting within his authority when he crafted a remedy to cure the parties’ mutual mistake.

AFFIRMED.

IKUTA, Circuit Judge, dissenting:

The “no-add” language in the collective bargaining agreement (the Basic Labor Agreement, or BLA) signed by ASARCO and United Steel (the Union) is unmistakably clear:

The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.

And yet, in defiance of this plain language, the majority holds today that the arbitrator does have the authority to rewrite the terms of the agreement under the circumstances of this case.

The majority’s conclusion is flat wrong. First, ASARCO did not clearly and unmistakably agree to let the arbitrator decide the scope of his own authority, and so the arbitrator lacked the power to decide whether the BLA authorized him to rewrite the BLA. Second, when mistakenly exercising authority he did not have, the arbitrator reached the wrong answer: the no-add provision makes clear that the arbitrator does not have the power to rewrite the BLA. Because the arbitrator ignored the no-add provision, his award fails to draw its essence from the BLA and is invalid. I dissent from the majority’s contrary conclusion.

I

ASARCO and the Union are parties to a collective bargaining agreement, the BLA, which provides for the arbitration of grievances. The BLA explains the scope of the arbitrator’s authority as follows:

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6. In light of our disposition, we need not address the Union’s alternative waiver argument. Further, as we point out in the text, the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance, supra section I. There is therefore no need for us to address the dissent’s discussion of this issue. See Dissent at section II.
The member of the Board [of Arbitration] chosen in accordance with Paragraph 7(a) below [providing for selection on a case-by-case basis] shall have the authority to hear and decide any grievance appealed in accordance with the provisions of the grievance procedure.

The BLA includes a “no add” provision that limits the arbitrator’s authority: “The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.”

A different section of the BLA provides that certain employees are entitled to a Copper Price Bonus, a quarterly bonus based on the price of copper. Only those employees covered by the pension plan are eligible for the Copper Price Bonus. When the BLA was updated in 2011, the Union and ASARCO added the following language:

Employees hired on and after the Effective Date [July 1, 2011] are not eligible to participate in the pension plan.

A dispute between ASARCO and the Union arose after the 2011 BLA was signed. Because the new employees were not covered by the pension plan, ASARCO took the position they were not eligible for the Copper Price Bonus. The Union disagreed and filed a grievance, which the parties submitted to arbitration.

The subsequent arbitration decision set forth a statement of the issue and summarized the positions of each party. According to the arbitration decision, the parties were unable to agree upon a statement of the issue before the arbitrator, and instead agreed to allow the arbitrator to frame the issue. The arbitrator determined that the proper statement of the issue was:

Are employees hired on and after July 1, 2011 entitled to receive the Copper Price Bonus?

The Union’s position in arbitration was that there was a mutual mistake which required a reformation of the BLA. Both parties had failed to recognize that eliminating the pension plan for new employees would make them ineligible for the Copper Price Bonus, the Union claimed, and neither party intended this result. Therefore, according to the Union, the BLA must be reformed to make such new employees eligible, and the no-add provision did not prevent this.

ASARCO’s position in arbitration was that the BLA clearly states that new employees are not eligible for the Copper Price Bonus, and the arbitrator must give effect to the BLA as written. With respect to the Union’s preferred remedy of reformation, ASARCO asserted that the arbitrator does not have the authority under the clear language of the BLA to order that new employees be made eligible for the Copper Price Bonus or to rewrite the BLA to make them eligible for the bonus. According to ASARCO, “a mistake does not authorize an arbitrator to exceed the authority granted to the arbitrator and limited by the parties themselves.”

Without addressing ASARCO’s position that the arbitrator lacked authority to rewrite the BLA, and without any discussion of the no-add provision or the limits of his jurisdiction, the arbitrator amended the pension provision to include five additional lines of text:

Employees hired on and after the Effective Date are not eligible to participate in the pension plan. However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA.

In reaching this conclusion, the arbitrator doubly erred. First, whether the arbitrator had the authority to resolve the parties’ dispute over the no-add provision is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. The arbitrator erred in implicitly concluding he had such authority. Second, the arbitrator’s decision to rewrite the BLA does not “draw its essence from the collective bargaining agreement,” Federated Emp’rs of Nev., Inc. v. Teamsters Local No. 631, 600 F.2d 1263, 1264 (9th Cir. 1979). For both reasons, the arbitrator’s award is unenforceable.

II

The arbitrator’s first and most crucial error was his implicit conclusion that he could resolve ASARCO’s argument about the scope of his authority. The majority compounds this error by silently assuming the same.

A

It is a “fundamental principle that arbitration is a matter of contract.” Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010). Accordingly, “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960); see also Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287, 299 (2010) (“The first principle that underscores all of our arbitration decisions: Arbitration is strictly ‘a matter of consent.’”). Thus, arbitration “is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

First Options considered three types of disputes that might be submitted to an arbitrator. First, the parties may

7. ASARCO reiterated this same position in its opening statement before the arbitrator. It asserted that the arbitrator had no jurisdiction to “add to or detract from or alter in any way the provisions of the agreement,” and urged the arbitrator to reject the Union’s argument that the arbitrator should reform the contract.
have a disagreement about the merits of one or several issues (the “Merits Question”). Second, they may disagree about whether their contract required them to arbitrate the merits of such issues (the “Arbitrability Question”). Third, they may disagree about whether a court or the arbitrator should decide the Arbitrability Question, i.e., the question whether the arbitrator has authority to decide that the parties agreed to arbitrate a specific dispute. Id. at 942. Because this third species of dispute raises the question whether the parties delegated the arbitrability decision to the arbitrator, it is sometimes referred to as the “Delegation Question.” The Supreme Court held that the arbitrability of any of these issues depends upon whether the parties agreed to submit the issue to the arbitrator. Id. at 944. This applies equally to the Delegation Question: If the parties disagree about whether the arbitrator should decide whether a particular dispute is arbitrable, the question “‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about that matter.” Id. at 943.

The Supreme Court has recognized that the third question—whether the parties agreed to let the arbitrator decide the arbitrability of a particular dispute (the Delegation Question)—“is rather arcane.” Id. at 945. Because “[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers,” courts should not interpret a contract’s “silence or ambiguity” on the Delegation Question as giving arbitrators the power to decide whether a specified question falls within their arbitral authority. Id. “[D]oing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” Id. as a result, unless the parties’ contract “clearly and unmistakably” provides that the arbitrator will decide whether the parties agreed to arbitrate a particular issue, a court will decide that question. Id. at 944; see also AT&T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 648 (1986) (holding that “the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination”); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1072 (9th Cir. 2013) (holding that “whether the court or the arbitrator decides arbitrability is ‘an issue for judicial determination unless the parties clearly and unmistakably provide otherwise’”).

First Options emphasized that courts should not be over-eager to find the requisite “clear[r] and unmistakab[le]” evidence of consent to arbitrate the question whether a particular issue is arbitrable. 514 U.S. at 944. “[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue.” Id. at 946. Clear and unmistakable consent cannot be implied from arguing arbitrability to the arbitrator because such conduct does not evince “a willingness to be effectively bound by the arbitrator’s decision on that point.” Id. Indeed, insofar as a party “forcefully object[s] to the arbitrators deciding their dispute … one naturally would think that they did not want the arbitrators to have binding authority over them.” Id. Said otherwise, the parties must expressly agree that the arbitrator (rather than a court) will decide the arbitrability of a particular issue; a court may not infer that the parties have given the arbitrator authority to decide the Delegation Question merely because they argued about it before the arbitrator.

Before First Options, we had adopted a different rule. See George Day Constr. Co. v. United Blvd. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace, Inc., 94 F.3d 1308, 1311 (9th Cir. 1996). Desert Palace reasoned that First Option’s holding applied only in the commercial context, not “in the collective bargaining context, where there is a strong federal policy favoring arbitration of labor disputes.” Id. at 1312 (emphasis omitted); see also Tristar Pictures, Inc. v. Dir.’s Guild of Am., Inc., 160 F.3d 537, 540 (9th Cir. 1998); Pacesetter Constr. Co. v. Carpenters 46 N. Cal. Cys. Conference Bd., 116 F.3d 436, 439 (9th Cir. 1997).

But Granite Rock superseded Desert Palace. In Granite Rock, the Supreme Court “reemphasiz[e]d the proper framework for deciding when disputes are arbitrable under [its] precedents,” and noted that “[i]t is well settled in both commercial and labor cases” that “a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.” Id. at 296–97 (citing First Options, 514 U.S. at 943; AT&T Tech., 475 U.S. at 648–649) (first emphasis added). Further, the Supreme Court stated that “the rule requiring ‘clear and unmistakable’ evidence of an agreement to arbitrate arbitrability” would apply to the labor dispute at issue in Granite Rock, but for the fact that the parties had already conceded that a court should decide the question of arbitrability. Id. at 297 n.5 (quoting First Options, 514 U.S. at 944).

8. By contrast, when “the parties have a contract that provides for arbitration of some issues,” a court presumes the parties intended to arbitrate related issues, First Options, 514 U.S. at 945. There is a “liberal federal policy favoring arbitration agreements,” pursuant to which, “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983). But “federal policy in favor of arbitration does not extend to deciding questions of arbitrability.” Oracle Am., Inc., 724 F.3d at 1072.
Because George Day is “clearly irreconcilable” with Granite Rock and First Options, it has been “effectively overruled.” Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Thus, the principles laid out in AT&T, First Options, and Granite Rock (that a court must decide the Delegation Question absent clear and unmistakable evidence that the parties authorized the arbitrator to decide that question) are controlling.

B

The application of the Supreme Court’s precepts to the facts of this case is relatively straightforward. Applying First Options’s framework, there were two disputes regarding the merits. ASARCO and the Union disputed both whether new employees were entitled to the Copper Price Bonus and whether the arbitrator had the authority to revise the BLA. Both of these issues are Merits Questions. While ASARCO agreed that it would arbitrate the dispute over the Copper Price Bonus, it did not agree to arbitrate its dispute about whether the arbitrator had the authority to revise the BLA (the Arbitrability Question). Rather, ASARCO repeated its position that the arbitrator had no such authority. Nor did ASARCO agree that the BLA gave the arbitrator the power to decide the scope of its authority to revise the BLA (the Delegation Question).

As explained in First Options, we must presume that the parties did not agree that the arbitrator should decide this Delegation Question, unless there is clear and unmistakable evidence to the contrary. There is no such evidence here.

Because arbitration is a matter of consent, we must first look to “the language of the contract” to “define[] the scope of disputes subject to arbitration.” EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002). While the BLA states that the arbitrator has the authority to “hear and decide any grievance appealed” by the parties, the BLA provides that the arbitrator lacks the authority to “add to, detract from or alter in any way the provisions” of the BLA. It is silent on the Arbitrability Question (whether ASARCO and the Union have agreed to arbitrate the question whether the arbitrator may “add to, detract from or alter in any way the provisions of” the BLA). It is equally silent on the Delegation Question (whether the parties have agreed that the arbitrator can determine the Arbitrability Question). Because the parties did not clearly and unmistakably agree to arbitrate the question whether the arbitrator has the authority to revise the BLA, that question “is to be decided by the court, not the arbitrator.” AT&T, 475 U.S. at 649.

In implicitly reaching a contrary conclusion, the majority asserts that “the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance.” Maj. Op. at 5. This characterization is wholly unsupported by the record. ASARCO did not stipulate that the arbitrator had the authority to decide whether it could reform the BLA. Rather, from the beginning ASARCO vociferously and repeatedly pointed out that the BLA precluded the arbitrator from reforming the contract. While the parties agreed to submit their grievance regarding whether new employees were eligible for the Copper Bonus to the arbitrator, and allowed the arbitrator to frame the Copper Bonus issue, the issue submitted to arbitration did not include the scope of the arbitrator’s authority to revise the contract. Rather, as the arbitrator himself explained, “the proper statement of the issue is as follows: Are employees hired on and after July 1, 2011 entitled to receive the Copper Price Bonus?”

Further, because ASARCO did not clearly agree to submit the question of the arbitrator’s authority to rewrite the BLA to arbitration, the court must decide the Delegation Question. I would reach this issue, and hold that the arbitrator had no authority to decide that ASARCO and the Union agreed to arbitrate the question whether the BLA could be revised. The parties’ contract clearly establishes that the arbitrator lacks the authority to modify the agreement even when there is a mutual mistake, see W. Coast Tel. Co. v. Local Union No. 77, Int’l Bhd. of Elec. Workers, AFL-CIO, 431 F.2d 1219, 1221 (9th Cir. 1970). There is no “clear and unmistakable” evidence that the parties contemplated that an arbitrator could reconsider the BLA’s prohibition of any arbitral revisions of the BLA and reach a different conclusion. I therefore would reverse the district court’s conclusion to the contrary.

III

Even if the majority were right in assuming that ASARCO had agreed to delegate to the arbitrator the question whether the arbitrator had the authority to rewrite the BLA, the majority errs in upholding the arbitration award here because the arbitrator plainly exceeded the authority granted to him by the BLA.

The BLA’s no-add provision says: “The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.” But the arbitrator amended the pension provision to include five additional lines of text:

Employees hired on and after the Effective Date are not eligible to participate in the pension plan. However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA.

Can he do that? We have said no: “an arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority.” Haw. Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177, 1181 (9th Cir. 2001). When issuing awards, “an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not

In reviewing an arbitral award, we are likewise bound by express limitations on an arbitrator’s authority. A court may not enforce an arbitration award if it does not “draw its essence from the collective bargaining agreement.” Federated Emp’rs, 600 F.2d at 1264. An arbitration award that violates “an express and explicit restriction on the arbitrator’s power” does not draw its essence from the agreement, but rather “demonstrates that the arbitrator ignored the essence of the agreement in making the award.” Id. at 1265. Because the arbitrator here ignored the essence of the agreement by violating an express and explicit restriction on his power, the award must be vacated. See id.

The majority abandons these principles today based on two unreasoned conclusions. First, the majority upholds the arbitrator’s award because it “was grounded in his reading” of the collective bargaining agreement. Maj. Op. at 10. On its face, this statement is dead wrong: the arbitrator did not even mention, let alone construe, the no-add provision in formulating his award.9 Unlike in Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 570 (2013), where the arbitrator based a potentially unreasonable construction of his authority on a “textual exegesis,” the arbitrator here made no effort to reconcile his decision to add five lines of text to the agreement with the contract’s no-add provision. The majority does not really dispute this point: it concedes that the arbitrator “did not specifically cite the no-add provision when explaining the basis of his award,” but concludes it was sufficient for the arbitrator to “quote it directly” in the section of the arbitration decision entitled “Relevant Language of the BLA,” which it deems to be an “acknowledgment of the no-add provision.” Maj. Op. at 10–11. But the arbitrator’s knowledge that the collective bargaining agreement contained a no-add provision is immaterial if the arbitrator failed to construe it. Obviously, a “few references” to a key issue in dispute does not show that the arbitrator “did anything other than impose its own policy preference.” Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 676 (2010). Here the arbitrator expressly stated he was reforming the agreement “in the interest of justice and fairness.” In other words, the arbitrator issued an award that “simply reflect[s] the arbitrator’s own notions of industrial justice.” E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000) (quoting United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)).

Second, the majority states that the arbitrator’s award is binding because arbitrators can reform a contract to correct a mutual mistake and “to make it reflect the terms the parties actually agreed upon.” Maj. Op. at 12. This sweeping assertion is inapposite here. While arbitrators may have power to reform an agreement where permitted to do so by the collective bargaining agreement, the arbitrator in this case clearly lacked that power. Rather, “the terms the parties actually agreed upon” in this collective bargaining agreement expressly state that the arbitrator may not add provisions to the agreement. Because “an arbitrator’s authority derives solely from the contract,” McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290 (1984), the arbitrator here could not add provisions to the agreement, even if there had been a mutual mistake. The majority fails to explain why the arbitrator here could exercise a power directly contrary to the express restrictions on the arbitrator’s authority.

Indeed, the majority cites no case supporting its proposition that an arbitrator can reform a contract based on mutual mistake when the parties expressly prohibit the arbitrator from adding to or modifying the agreement. To the contrary, we have held that a no-add provision prohibits an arbitrator from modifying an agreement even when there is a mutual mistake. See W. Coast Tel. Co., 431 F.2d at 1221. In West Coast Telephone, we considered a union’s demand to compel arbitration of the question whether its collective bargaining agreement should be reformed to reflect the parties’ intent. Id. at 1220. We concluded “with positive assurance” that the issue of reformation due to mutual mistake was not arbitrable because “[t]he arbitration clause of the contract expressly provides that the arbitrator ‘shall have no power to destroy, change, add to or delete from its terms.’” Id. at 1221. In other words, a no-add provision in a collective bargaining agreement precludes the arbitrator from rewriting the agreement.

The majority attempts to distinguish West Coast Telephone because it addressed whether a dispute over reformation was arbitrable, rather than whether the arbitrator lacked authority to reform the contract, and therefore does not definitively resolve the issue whether the arbitrator’s award here drew its essence from the agreement. Maj. Op. at 14. But West Coast Telephone’s holding was based on its conclusion that a no-add provision deprives the arbitrator of the authority to modify the agreement, and this ruling is binding on us. 431 F.2d at 1221. We need not consider whether we would defer to an arbitrator who erroneously construed a no-add provision as allowing reformation of a contract in a particular case. That issue is not before us because—as mentioned above—the arbitrator here did not construe the no-add provision. Because under our precedent the arbitrator’s modification was contrary to the no-add provision and is therefore not a “plausible interpretation” of the contract, and because there

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9. The Arbitration Award is divided into six sections entitled: “Background”; “Relevant Language of the BLA”; “Relevant Language of the 2011 Memorandum of Agreement”; “Statement of the Issue”; “Summary of the Position of the Parties”; and “Discussion and Award.” The no-add provision is mentioned in two sections of the Arbitration Award. The section entitled “Relevant Language of the BLA,” sets forth the text of four subsections of the collective bargaining agreement, including one entitled “Board of Arbitration” which explains the role of the arbitrator and contains the no-add provision. The “Summary of the Position of the Parties” sets forth the opposing positions of the Union and ASARCO regarding the effect of the no-add provision. The section entitled “Discussion and Award,” where the arbitrator provides his analysis and conclusion, does not discuss or mention the no-add provision.
is no basis for deferring to the arbitrator’s construction of the no-add provision in this case, his award must be vacated. 10

Federated Emp’rs, 600 F.2d at 1265.

The arbitrator here dispensed his own brand of industrial justice by exceeding the scope of his delegated powers and modifying the agreement “in the interest of justice and fairness.” Because “an arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority,” the award fails to draw its essence from the collective bargaining agreement. Haw. Teamsters, 241 F.3d at 1181.

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In short, the BLA deprives the arbitrator of the authority to rewrite the agreement, and also deprives the arbitrator of the authority to reconsider and reject this limitation on his authority. Either way, the arbitrator’s award is invalid. In holding otherwise, the majority today turns its back on Supreme Court principles and our own precedent. I dissent.

10. The majority states that we have “retired the use of the term ‘plausibility’ when describing judicial review of labor arbitration awards.” Maj. Op. at 10 n.3 (citing Sw. Reg’l Council of Carpenters v. Drywall Dynamics, Inc., 823 F.3d 524, 532 (9th Cir. 2016)). But of course “a three-judge panel may not overrule a prior decision of the court,” Gammie, 335 F.3d at 899, except under circumstances not met by Drywall. Accordingly, as the majority concedes, Drywall did not make any substantive change to the settled law in this area. Maj. Op. at 10 n.3.
Blair L. Byrum (argued), Trial Attorney; Thomas Tso, Counsel for Appellate and Special Litigation; G. William Scott, Associate Solicitor, Plan Benefits Security; Nicholas C. Geale, Acting Solicitor of Labor; United States Department of Labor, Washington, D.C.; for Plaintiff-Appellee.

OPINION

M. SMITH, Circuit Judge:

Defendant-Appellant Scott Brain, a former trustee of the Cement Masons Southern California Trust Funds (the Trust Funds), and Defendants-Appellants Melissa Cook and Melissa W. Cook & Associates, PC (collectively, the Cook Defendants), appeal from the decision of the district court (JDC) finding that they violated the Employee Retirement Income Security Act of 1974 (ERISA)—unlawful retaliation in violation of ERISA section 510, 29 U.S.C. § 1140, and breach of fiduciary duty in violation of ERISA section 404, 29 U.S.C. § 1104.

After conducting a bench trial, the district court concluded that Brain and the Cook Defendants violated ERISA sections 510 and 404. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court with respect to the ERISA section 510 claim, but reverse with respect to the ERISA section 404 claim, and vacate the district court’s entry of a permanent injunction against Brain and the Cook Defendants.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

The Trust Funds are five employee benefit trust funds established by Cement Masons Local 500, Cement Masons Local 600, and four employer contractor associations pursuant to collective bargaining agreements. Each of the Trust Funds has its own Board of Trustees. The Joint Board of Trustees (Joint Board), comprised of trustees for the five trusts, coordinates administration of the Trust Funds.

Brain was the business manager and financial secretary for the Cement Masons Local 600, a trustee for each of the Trust Funds, and a member of the Joint Board. Cook and her law firm served as counsel to the Trust Funds from August 2005 through May 2013.

The Trust Funds had an internal Audit and Collections Department (A&C Department) that was responsible for auditing employers and collecting overdue or otherwise unpaid employer contributions. Cheryle Robbins was the director of the A&C Department. The Trust Funds established a Joint Delinquency Committee (JDC), composed of trustees, to oversee the A&C Department, as well as the Cement Masons Southern California Administrative Corporation (Administrative Corporation) to employ A&C Department staff.

The Trust Funds hired Zenith American Solutions (Zenith), to provide third-party administrative services to the Trust Funds. Cory Rice was a Zenith employee who worked on the Trust Funds’ matters. The Trust Funds’ primary contact at Zenith was manager Bill Lee.

B. Robbins’s Concerns About Brain

Beginning in as early as 2006, Robbins expressed to several trustees her concerns that Brain was interfering with the A&C Department’s collection efforts. Robbins’s concerns stemmed from several incidents over a number of years. For example, Brain allegedly told certain contractors who owed smaller contributions to the A&C Department to “fly under the radar,” and he often interpreted certain agreements “in a manner that reduced the amount owed by covered contractors.”

C. The Audit of the A&C Department

In March and April of 2011, the JDC began to consider hiring an outside firm to audit the A&C Department. On September 8, 2011, the JDC convened and voted to move forward with an external audit. The JDC asked Cook to prepare audit procedures and solicit bids from auditing firms. Kathryn Halford, the Trust Funds’ collections counsel, and trustee David Allen, who had an accounting background, reviewed the audit procedures Cook drafted. Allen informed Cook and Halford of his concern that the proposed procedures violated Generally Accepted Accounting Procedures.

The district court found that the audit procedures “appear[ed] to have been created in an effort to influence the outcome by increasing the likelihood of a finding that the A&C Department was not well run.”

On October 13, 2011, the JDC decided on two finalists to perform the audit, Bond Beebe and Hemming Morse, and scheduled the firms to present at a JDC meeting on November 18, 2011.

D. Brain and Cook’s Romantic Relationship

By October 2011, or “very shortly thereafter,” the “close, personal relationship” between Brain and Cook became romantic. They misled other trustees about their relationship during this time, and Cook failed to disclose the relationship. They communicated extensively with each other, exchanging “a substantial amount of flirtatious comments,” and staying in constant contact during the events described below.

E. Robbins’s Protected Activity

On October 11, 2011, Robbins and Rice met with Allen to discuss Brain’s purported misconduct. At the time, Allen shared Robbins’s concerns and wanted Brain removed. Allen proposed drafting a letter to the president of the Operative Plasterers’ and Cement Masons International Association (OPCMIA or International Union), because the OPCMIA could remove Brain from his position as Local 600 Business Manager, which would result in Brain losing his position as
trustee. Subsequently, Rice sent Allen an email describing Brain’s alleged misconduct for use in the letter to the OPCMIA. In his email, Rice alleged that Brain acted “to reduce amounts owed to Fund” and “advise[d] contractor[s] how to handle audit[s],” and he expressed “concerns about our own trust attorney,” referring to Cook.

On October 14, 2011, DOL investigator Matt Chandler contacted Robbins and informed her that he was conducting a criminal investigation of Brain. Robbins was not the initial whistleblower to the DOL. Rather, Chandler’s call was the result of a complaint made by Thomas Mora, the OPCMIA vice president, at some point between March and May of 2011. Mora had concerns about Brain’s conduct based on conversations with Robbins, Halford, and two trustees. Robbins reported Chandler’s call to Halford and Allen, who in turn informed Cook on October 26, 2011.

F. The Plan to Remove Robbins

After learning about Robbins’s contact with the DOL, Cook and Brain called a special Joint Board meeting into session. Cook stated that the meeting’s purpose was to discuss whether to outsource the A&C Department’s work, but the district court found that Cook and Brain actually intended to remove Robbins.

Leading up to the special Joint Board meeting, Cook and Allen exchanged several text messages and phone calls about Robbins, and they discussed outsourcing the A&C Department’s work to Zenith. Although Allen had participated in the earlier effort to report Brain’s alleged misconduct to the OPCMIA, Allen distanced himself from Robbins after he learned about her contact with the DOL.

On November 11, 2011, Cook told Allen that she believed a special Joint Board meeting should take place immediately after the JDC meeting scheduled for November 18, 2011, and stressed that the meeting must occur before outsourcing the A&C Department’s work to Zenith. Allen then scheduled the meeting.

The district court found that in the few days prior to the meeting, “Brain and Cook were ‘firing up’ their allies for the actions that would be taken in response to Robbins’[s] contacts with the DOL, not for a more pedestrian discussion about a potential change to the performance of the functions of the A&C Department.” They wanted to “line up their votes at the meeting for the positions that they planned to advance,” and even jokingly referred to their scheme as “[r]evisionist history.”

At some point between November 14, 2011 and November 18, 2011, Robbins asked Chandler to issue a DOL subpoena for the ‘Trust Funds’ records, because both Cook and her personal counsel had instructed Robbins not to provide any records voluntarily to the DOL. She urged Chandler to move quickly because she feared she would lose her position.

On November 17, 2011, Robbins received a DOL subpoena and forwarded it to Cook and Halford, telling them that it concerned an investigation of Brain, not of the Trust Funds. Cook reacted furiously to the subpoena and began planning with associate counsel to “put [Robbins] on paid admin leave asap [sic],” stating that she “want[ed] [Robbins] out of there,” but “without violating erisa [sic].” Cook’s associate suggested “put[ting] [Robbins] on paid admin [sic] leave” because Robbins and the DOL may not be able to obtain “damages or equitable relief.” Cook’s associate concluded, “I think she should be put on paid leave to at least prevent her from taking out documents,” and recommended that the trustees “proceed with the independent audit” of the A&C Department and thereafter “dissolve” the Administrative Corporation and outsource the A&C Department’s work.

G. The November 18, 2011 Joint Board Meeting

The scheduled JDC meeting took place on November 18, 2011. The JDC selected Bond Beebe to perform an audit of the A&C Department.

The special Joint Board meeting immediately followed. First, the trustees voted to solicit bids to evaluate the cost of outsourcing the A&C Department’s services. Next, Cook informed the trustees of the DOL subpoena and Robbins’s contact with the DOL. Cook described Robbins’s conduct as inappropriate and made statements that implied inaccurately that Robbins had initiated the DOL’s investigation. Cook made clear she believed Robbins should be placed on leave, saying, “Come on. You’re all smart people here. Do the right thing.” Next, Brain asked Allen to share how Robbins had pressured him to write a letter to the OPCMIA to complain about Brain.

Brain recused himself from the vote, but remained in the room during the discussion and vote. Notably, Brain had the power to remove Local 600 trustees or have them terminated from their jobs with the union. The district court found that Cook and Brain’s critical statements of Robbins “created an environment that was hostile to her,” and “caused” the trustees to vote unanimously to put Robbins on leave “until … the matter pending before the DOL [was] resolved.”

H. Rice’s Termination

In early December 2011, Cook informed Lee of Rice’s role in the efforts to report Brain to the OPCMIA. Cook told Lee that because of Rice’s involvement with the letter, it would be in Zenith’s best interest to terminate Rice. Around the same time, Brain informed Lee that Zenith’s work was being put out to bid. Cook told Brain privately that she believed Rice and his mother, Louise Bansmer, also a Zenith employee, were “blindly loyal” to Robbins.

Although Lee did not believe that terminating Rice was in the Trust Funds’ best interest, and did not feel comfortable terminating him, Cook urged that Rice and Bansmer be “terminated together due to the mother/son connection” because she was fearful of retaliation by Rice. Cook also asked Lee to speak with Brain, who Lee believed had “doubts” and “major concerns” about Rice. Lee’s supervisor reminded Lee that Zenith had to do the right thing for its client, and that
she was not sure that retaining Rice was “the right thing[;] especially after your conversation with [Brain].” On January 4, 2012, Lee emailed the trustees to inform them that Zenith had terminated Rice and Bansi

I. Robbins’s Termination

Zenith submitted a bid to take over the A&C Department’s work on February 13, 2012, but Allen told Zenith to “sharpen [its] pencil” and submit a revised proposal. Allen suggested that Zenith could reduce the cost of its proposal by hiring replacement staff or lowering salaries of A&C Department staff and replacing them if they did not agree to salary reductions. Accordingly, Zenith submitted a revised proposal the next month:

If [Zenith] is able to hire qualified staff at a lower salary rate than the current staff[,] we will pass the savings on to the Trust Funds. If we are not able to lower salaries (through new people or reduced salaries of current staff) [,] our current fee quote would stand.”

During this time, Cook engaged in an unauthorized investigation of Robbins, despite being fully aware that the DOL investigation centered on Brain’s conduct only. Cook reviewed Robbins’s phone records, taking note of Robbins’s calls with various trustees and calls made in connection with the DOL’s investigation. Cook kept Brain apprised of her investigation—she referred to the phone records as a “treasure trove,” and to Robbins’s placement on administrative leave as when Robbins “got canned.”

Cook also asked the Bond Beebe auditor to review hard drives for emails between Robbins and various trustees, as well as emails relating to the DOL investigation or referring to Brain. In their emails discussing Robbins’s “termination,” Cook and Brain observed, “Its [sic] a lot of work covering [Robbins’s] tracks or lack thereof, would be more appropriate!”

Bond Beebe presented its audit findings to the Joint Board on April 12, 2012. In conducting its audit, Bond Beebe interviewed every A&C Department employee except for Robbins, the Department’s director. While Bond Beebe gave the A&C Department a “D” grade, it did not recommend outsourcing, but rather gave suggestions for operational improvements.

The trustees and Cook then discussed the audit results. “Cook encouraged the trustees to support outsourcing the services of the A&C Department and to eliminate Robbins.” Cook stated that the quality of Robbins’s work was subpar, and that Robbins “had to go.” After a short deliberation, the trustees voted to dissolve the A&C Department and outsource its functions to Zenith.

Cook urged Lee several times that Robbins should not return to her position as A&C Department director. Subsequently, Zenith hired every A&C Department employee except for Robbins. But Zenith never eliminated Robbins’s position. Instead, with Cook’s assistance, Zenith immediately began to look for Robbins’s replacement. The district court found that there was “no evidence that Lee or any other person at Zenith decided not to hire Robbins due to the quality of her work as director of the A&C Department.”

J. The Secretary’s Action

On May 21, 2014, the Secretary initiated the present civil enforcement action pursuant to ERISA section 502(a)(2) and (a)(5).

On November 24, 2014, the Secretary filed a Second Amended Complaint (SAC) against the Trust Funds, the Joint Board members, the Administrative Corporation, Zenith, Lee, and the Cook Defendants. The Secretary alleged that the defendants retaliated against Robbins and Rice for attempting to send a letter to OPCMIA regarding their concerns about Brain, and against Robbins for participation in a DOL investigation, in violation of ERISA section 510. The Secretary also alleged that Brain committed a breach of fiduciary duty in violation of ERISA section 404(a)(1)(A)–(B), and that the Cook Defendants knowingly participated in Brain’s breach. Finally, the SAC alleged that certain defendants were subject to co-fiduciary liability under ERISA section 405(a).

On August 24, 2015, the district court entered a Consent Judgment and Order reflecting a settlement between the Secretary and all defendants except for Briceno, Brain, and the Cook Defendants. In relevant part, the settlement provided Robbins with $400,000 in lost wages, plus certain benefits, and Rice with $56,000 in lost wages.

K. The District Court’s Judgment

The district court conducted a five-day bench trial in May 2016. On July 25, 2016, the district court issued its findings of fact and conclusions of law.

On October 14, 2016, the district court entered a final judgment and permanent injunction. The district court entered judgment in favor of the Secretary on the following claims: The district court found that (1) Brain and the Cook Defendants violated ERISA section 510 by causing Robbins to be placed on paid administrative leave in retaliation for protected conduct; (2) Brain and the Cook Defendants violated ERISA section 510 by causing the termination of Rice in retaliation for protected conduct and for an improper purpose; (3) Brain and the Cook Defendants violated ERISA section 510 by causing the removal of Robbins from her employment with the Administrative Corporation and by preventing her from performing any services or work for the Trust Funds, in retaliation for protected conduct; (4) Brain violated his fiduciary duties to the Trust Funds under ERISA section 404(a) (1)(A)–(B) when he caused Robbins to be placed on paid administrative leave in retaliation for protected conduct; and (5) the Cook Defendants violated ERISA section 404(a)(1)

1. The district court also entered judgment in favor of Brain, the Cook Defendants, and Briceno on several claims. These issues are not on appeal.
Here, the district court found—and Brain does not dispute—that the DOL contacted Robbins for information, which she provided, in connection with the DOL’s investigation of Brain. Robbins thus engaged in prototypical protected activity, and the district court did not err in concluding that Brain violated section 510.

Sidestepping the fact that Robbins participated in the DOL investigation, Brain argues that another activity Robbins participated in was not protected under ERISA. Specifically, Brain contends that Robbins’s participation in the effort to report Brain to the OPCMIA was not protected activity. We need not address this argument because Robbins’s participation in the DOL investigation was unmistakably protected under ERISA and constitutes an independently sufficient ground for the district court’s conclusion.

In any event, Brain’s argument is meritless. “One … ERISA-protected activity is protesting a legal violation in connection with an ERISA-governed plan.” Id. (citing Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993)). We have observed that “[section 510] is clearly meant to protect whistle blowers” because “[i]f one is … discharged for raising the problem [to the managers of an ERISA plan], the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.” Hashimoto, 999 F.2d at 411. Robbins’s letter writing falls within the ambit of “protesting a legal violation in connection with an ERISA-governed plan.” Teutsch, 835 F.3d at 945. Although the intended recipient of the letter—the president of the OPCMIA—was not an internal manager of the Trust Funds, the district court found that the OPCMIA “could have acted to remove Brain as a Local 600 Business Manager,” and that “[i]f it had done so, [Brain] would have lost his position as a trustee.” Since Robbins’s aim in writing the letter was to remove Brain from his position, the fact that the intended recipient of the letter was an outside party is inconsequential.2 Cf. id. at 940 (reviewing an ERISA retaliation claim where the plaintiff complained to the Riverside Sheriff’s Department, an outside party, about potential ERISA violations by the Riverside Sheriffs’ Association, an organization that administers an ERISA-governed plan).

2 There is a circuit split on the issue of whether “unsolicited internal complaints” constitute protected activity within meaning of ERISA section 510. Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 220–22 (3d Cir. 2010). While the Fifth, Seventh, and Ninth Circuits have recognized unsolicited employee complaints as protected activity for purposes of section 510 claims, the Second, Third, Fourth, and Sixth Circuits have reached a contrary conclusion. See id. (citing and discussing cases); see also Sexton v. Panel Processing, Inc., 754 F.3d 332, 340–42 (6th Cir. 2014) (same). Nonetheless, as we noted above, whether Robbins’s letter-writing was protected activity is ultimately immaterial, because Robbins’s cooperation with the DOL’s investigation provides an independent basis for the Secretary’s section 510 claim. Furthermore, Hashimoto is still the law in our court. Although Brain asks the panel to revisit Hashimoto, Brain has not identified “intervening higher authority” with which our prior authority is “clearly irreconcilable.” Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).
b. The District Court Did Not Err in Concluding that Robbins’s Protected Activity Was the But-For Cause of Robbins Being Placed on Leave.

We begin by addressing the threshold question of which standard of causation applies—the but-for standard or the substantial factor standard. In a past decision, we used language suggestive of the substantial factor standard in describing ERISA section 510. See Dytrt v. Mountain State Tel. & Tel. Co., 921 F.2d 889, 896 (9th Cir. 1990) (“[N]o action lies where the alleged loss of rights is a mere consequence, as opposed to a motivating factor behind the termination.”). However, in two recent decisions, the Supreme Court held that the use of “because” or “because of” in statutory text mandates but-for causation. See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (holding that the standard of causation in Title VII retaliation claims is but-for causation, because the statute prohibits retaliation against an employee “because” of certain protected activity); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–78 (2009) (holding that the standard of causation in an ADEA discrimination claim is but-for causation, because the statute prohibits retaliation against an employee “because of” age). Like Title VII and the ADEA, ERISA section 510 also uses “because.” 29 U.S.C. § 1140. Following Nassar and Gross, the district court concluded that the but-for causation standard applied. We assume, without deciding, that the higher but-for causation standard applies here.3

We now turn to the district court’s application of the but-for causation standard, and hold that the district court did not err in concluding that Brain and the Cook Defendants caused Robbins to be placed on leave.

Citing nonbinding authority, Brain argues that he is immune from liability because “when a majority of a group decides to take action for non-retaliatory reasons, none of the group is liable.” However, Brain sidesteps two important distinctions. Brain was not part of the group of trustees that voted to place Robbins on leave, but was responsible for setting the vote in motion. In addition, the Secretary was not the ultimate decisionmaker that lead to the adverse employment action.

We have recognized this so-called “cat’s-paw” theory in cases even more attenuated than the present one. In Poland v. Chertoff we held:

[I]f a subordinate, in response to a plaintiff’s protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate’s bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually indepen-

494 F.3d 1174, 1182 (9th Cir. 2007). Here, there is one less level of liability to establish, as the Secretary did not seek to impute Brain’s retaliatory motive upward to his employer. Rather, the Secretary sought to prove only Brain’s liability by showing that in response to Robbins’s protected activity, Brain, who had significant authority over the Board members, “set[] in motion a proceeding by an independent decisionmaker that [led] to an adverse employment action.” Id.

Contrary to Brain’s contention, the district court did not impermissibly water down the but-for causation standard. The fact that Brain was not the ultimate decisionmaker does not immunize him under a cat’s-paw theory of liability. At least four of our sister circuits have concluded that a cat’s-paw theory of liability for retaliation is compatible with the but-for causation standard, and still viable after Nassar. See Zamora v. City of Houston, 798 F.3d 326, 331–32 (5th Cir. 2015) (citing cases). As the Fifth Circuit observed,

Plaintiffs use a cat’s-paw theory of liability when they cannot show that the decisionmaker—the person who took the adverse employment action—harbored any retaliatory animus. Under this theory, a plaintiff must establish that the person with a retaliatory motive somehow influenced the decisionmaker to take the retaliatory action.

Put another way, a plaintiff must show that the person with retaliatory animus used the decisionmaker to bring about the intended retaliatory action.

Id. at 331. Noting that the Supreme Court in Staub v. Proctor Hospital, 562 U.S. 411, 416–17, 419–22 (2011), had previously “explicitly blessed the use of cat’s-paw analysis in the context of an employment claim requiring that the unlawful animus be a ‘motivating factor’ for the employer’s action,” the Fifth Circuit explained that Nassar did not eliminate the availability of the cat’s-paw theory. Id. at 332. Rather, “in Nassar, the Court changed only the strength of the causal link—between the supervisor’s actions and the adverse employment action—that the plaintiff must establish.” Id. “Nassar says nothing about whether a supervisor’s unlawful animus may be imputed to the decisionmaker; it simply requires that the supervisor’s influence with the decisionmaker be strong enough to actually cause the adverse employment action.” Id.

Here, the same reasoning applies. That the causal link between Brain’s actions and Robbins’s placement on administrative leave must be strong does not speak to the issue of whether Brain’s retaliatory motive may be imputed to the ultimate decisionmaker. Rather, Brain’s “influence with the decisionmaker [must] be strong enough to actually [have] cause[d] the adverse employment action.” Id.

3. We need not decide this question because the issue of which standard applies is not on appeal, and the application of the stricter but-for standard does not affect the resolution of this case.
Brain notes that only a minority of the trustees on the Joint Board cited Robbins’s protected activity as a basis for voting to place Robbins on leave. Crucially, Brain does not contest or even mention the district court’s findings of fact regarding how he and the Cook Defendants set in motion the vote to place Robbins on leave. His arguments effectively boil down to urging us to reweigh the evidence before the district court.

We decline to do so. The district court discounted the weight of the non-retaliatory reasons provided by the voting trustees, characterizing their explanations as “vague” and insufficient to state a legitimate, non-retaliatory reason for placing Robbins on leave. Moreover, the majority of the evidence stemmed from deposition testimony taken while the trustees were still named defendants in the action. The district court concluded that the fact that the witnesses still faced potential liability significantly affected the weight of their testimony.

Furthermore, the district court laid out lengthy findings of fact showing how Brain and the Cook Defendants set the vote in motion in order to retaliate against Robbins. Without recapitulating the district court’s findings in full, we note a few key ones. The district court found “substantial evidence that Cook and Brain frequently communicated through phone calls, text messages and emails during the weeks prior to the November 18, 2011 meeting at which Robbins was put on leave.” In fact, “Cook, Brain and Allen called th[e] special meeting” at which the vote to put Robbins on leave occurred. Not only did Brain have an incentive to retaliate, but Cook did as well, as they had begun a romantic relationship at the time.

Moreover, after Cook, Brain, and Allen called the special meeting, “Brain and the Cook Defendants coordinated efforts to talk with other trustees with whom they had positive relationships” before the meeting “in an effort to line up their votes at the meeting for the positions they planned to advance.” Brain and Cook sent messages to each other saying that they were “firing up” other trustees, “lining up [Brain’s] peeps [sic],” and informing the trustees of the actions planned for the meeting.

At the meeting itself, Brain and Cook took control by discussing Robbins’s contact with the DOL and the DOL subpoena, and making “statements critical of Robbins,” thus “creat[ing] an environment that was hostile to her.” Of note, they made statements suggesting that Robbins had in fact initiated contact with the DOL, rather than the other way around, in an effort to lead the trustees to “regard her as disloyal.” Cook encouraged the trustees to vote to place Robbins on leave, and Brain prompted Allen to discuss the draft letter to the OPCMIA and Robbins’s role in “pressuring” him repeatedly to write it.

Importantly, Brain remained in the room, although he abstained from voting. The district court found that “his mere presence could have influenced others,” as Brain had the power to remove Local 600 trustees or have them terminated from their jobs with the union.

“The district court, as the trier of fact in this matter, was in a superior position to appraise and weigh the evidence, and its determination regarding the credibility of witnesses is entitled to special deference.” Husain, 316 F.3d at 840. We decline Brain’s invitation to reweigh the evidence or second-guess the district court’s credibility determinations, as Brain has not argued, much less shown, that the district court clearly erred in its fact finding. The record is rife with evidence establishing but-for causation, and Brain’s attempts to recast the evidence are unavailing. We accordingly conclude that the district court properly applied the but-for standard of causation to the facts before it, and did not err in concluding that the standard was met.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT BRAIN BREACHED HIS FIDUCIARY DUTY IN VIOLATION OF ERISA SECTION 404.

Congress designed ERISA “‘to ensure that employees will not be left empty-handed’ by imposing fiduciary duties on those responsible for management of [private employee benefit] plans.” Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833, 836–37 (9th Cir. 2018) (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996)). There are two general categories of fiduciaries under ERISA—named (or statutory) and functional. Id. at 837.

[T]he term ‘named fiduciary’ means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

29 U.S.C. § 1102(a)(2). A party not named in the plan instrument can become a functional fiduciary. Id. § 1002(21)(A). Specifically,

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id.; see Santomenno, 883 F.3d at 837.

“Whether named or functional, an ERISA fiduciary has a ‘duty of care with respect to management of existing … funds, along with liability for a breach of that duty.’” Santo-

ERISA section 404(a)(1) outlines the “prudent man standard of care” that governs ERISA fiduciaries:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan ….


The Supreme Court has repeatedly emphasized the “two-hat” principle of fiduciary duties under ERISA. The Court has observed that “the analogy between ERISA fiduciary and common law trustee becomes problematic” after a certain point because, unlike a trustee at common law who “characteristically wears only his fiduciary hat when he takes action to affect a beneficiary,” a “trustee under ERISA may wear different hats,” and “may have financial interests adverse to beneficiaries.” Pegram v. Herdrich, 530 U.S. 211, 225 (2000). For example, a fiduciary, when acting as an employer, wears his or her employer hat, not his or her fiduciary hat:

Employers … can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (e.g., modifying the terms of a plan as allowed by ERISA to provide less generous benefits).

Id. Accordingly, “ERISA … require[s] … that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.” Id. (emphasis added).

Importantly, ERISA “does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only ‘to the extent’ that he acts in such a capacity in relation to a plan.” Id. at 225–26 (quoting 29 U.S.C. § 1002(21)(A)). Thus,

[in] every case charging breach of ERISA fiduciary duty, … the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary’s interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.

4. The district court concluded as follows:

The DOL has shown by a preponderance of the evidence that Brain breached his fiduciary duty by engaging in retaliatory conduct against Robbins, and that the Cook Defendants knowingly participated in that breach. The requirement in § 404 of ERISA that a fiduciary discharge duties “solely in the interest of the participants and beneficiaries” includes an obligation not to violate other ERISA provisions to the detriment of the plan participants and beneficiaries. The obligations of a fiduciary include a duty to “deal fairly” with others in transactions. See Peralta v. Hispanic Bus., Inc., 419 F.3d 1064, 1070 n.7 (9th Cir. 2005). This includes a duty not to interfere with the exercise by another person of his or her rights under ERISA.

The district court’s citation to a footnote in Peralta does not dispose of the threshold inquiry of whether Brain was performing a fiduciary function when placing Robbins on leave. In other words, there is
the district court did not address the threshold question of whether Brain was wearing his ERISA fiduciary hat when he took the actions alleged in the Secretary’s Complaint. Indeed, we lack basic information such as whether Brain was a named or a functional fiduciary, and the Secretary has not pointed to any evidence in the record—such as the written instrument governing the plan—to elucidate this issue.

Nor has the Secretary cited any authority establishing that placing Robbins, an employee of the Administrative Corporation, on leave was a fiduciary function under ERISA, rather than a corporate or business operations action. The case law weighs heavily against the Secretary’s position.6

Instead, the Secretary uses the phrase “management and administration” loosely to argue that Brain was acting as an ERISA fiduciary when he caused Robbins to be placed on leave. Not only does the Secretary ignore the threshold “two-hat” inquiry, but his overbroad approach also contravenes the Supreme Court’s express warning that the ERISA “statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only ‘to the extent’ that he acts in such a capacity in relation to a plan.” Pegrann, 530 U.S. at 225–26 (quoting 29 U.S.C. § 1002(21)(A)). Contrary to the Secretary’s approach, we must distinguish between a fiduciary “acting in connection with its fiduciary responsibilities” with regard to the plan, as opposed to the same individual or entity “acting in its corporate capacity.” Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1432 (9th Cir. 1986) (concluding that “[t]he decision to terminate the Plan was a business decision that properly rested with Ward’s corporate offices”). Only the former triggers fiduciary status; the latter does not. See id.; see also Lockhead Corp., 517 U.S. at 890 (“[O]nly when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,’ does a person become a fiduciary under [§ 1002(21)(A)].” (quoting Siskind v. Sperry Ret. Program, Unisys, 47 F.3d 498, 505 (2d Cir. 1995)).

Furthermore, the text of ERISA section 404 speaks plainly of fiduciary duties owed to participants and beneficiaries, but not to employees. Although section 404 is conjunctive, the Secretary tellingly focuses only on the first full clause of the statute, which requires that “a fiduciary … discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1). The statute does not stop there, however. It continues on, requiring a fiduciary to discharge his duties not only “solely in the interest of the participants and beneficiaries,” but also “for the sole purpose of ‘providing benefits to participants and their beneficiaries’ and ‘defraying reasonable expenses of administering the plan.’” 29 U.S.C. § 1104(a)(1)(A). The plain text of the statute thus underscores the fact that ERISA fiduciary duties run to the interests of participants and beneficiaries of an ERISA plan. Cf. Tibble v. Edison Int’l, 843 F.3d 1187, 1194 (9th Cir. 2016) (recognizing breach of fiduciary duty claim for “failure to exercise prudence” in monitoring and managing plan investments); Patelco Credit Union v. Sahni, 262 F.3d 897, 909 (9th Cir. 2001) (recognizing breach of fiduciary duty claim for self-dealing in plan administration). In contrast, the text says nothing about employees, let alone anything about fiduciary duties owed in the course of managing employees. Thus, the Secretary’s contention that Brain’s fiduciary duty of loyalty extended to all of “his dealings with people, like Robbins, who serve the plan and its administration,” is overbroad and is not based on recognized authority.

For the first time on appeal, the Secretary argues that Brain’s fiduciary duties extended to “decisions to hire, fire, or discipline plan service providers, such as Robbins and the A&C Department, and how to compensate them.” This argument is meritless. To start, the district court did not find that Brain breached his fiduciary duty by causing the A&C Department’s work to be outsourced to Zenith. Rather, the district court found that Brain breached his fiduciary duty by causing Robbins to be placed on leave. Even more fundamentally, the Secretary has not shown how Robbins’s position was akin to that of a professional service provider.6 E.g.,

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6. To the extent the Secretary argues that placing Robbins on leave somehow interfered with Robbins’s ability to carry out a fiduciary
Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (recognizing actuaries as service providers); Bui v. AT&T Co., 310 F.3d 1143, 1146 (9th Cir. 2002) (recognizing a company that “contracted to provide emergency medical advice and evacuation services” as a service provider). Professional service providers are typically designated through the relevant plan instruments and documents, see 29 C.F.R. § 2509.75-8, FR-14; Bui, 310 F.3d at 1150 (noting that the service provider was designated in the plan), none of which we have before us.

The Secretary further argues, again for the first time on appeal, that Brain’s decision to place Robbins on leave harmed plan participants and beneficiaries, as Cook received over $60,000 from the Trust Funds for her services. This argument also fails. First, and fundamentally, the Secretary’s argument does not satisfy the threshold “two-hat” inquiry. Second, the district court did not base its section 404 conclusion on the Trust Funds’ payments to Cook. Rather, it concluded that Brain violated section 404 by causing Robbins to be placed on leave.

Third, even if the fees could constitute harm to plan participants and beneficiaries, the Secretary makes no effort to prove the extent of the harm. The Secretary does not disaggregate the fees incurred from the alleged violation of section 404 from the proven violation of section 510. Indeed, the district court noted that the vast majority of the fees stemmed from charges incurred after Robbins was placed on leave, and included charges incurred as late as April 2013, indicating that most of the fees are not related to Robbins’s placement on leave.

Fourth, Brain and Cook’s retaliatory animus toward Robbins was, at bottom, personal: Robbins cooperated in a DOL criminal investigation of Brain, not the Trust Funds. Critically, the Secretary failed to allege or prove any standalone breach of fiduciary duty independent of Brain’s retaliatory conduct. The district court concluded that the Secretary unilaterally raised its section 404 claim that Brain failed to pursue all monies to which the Trust Funds may have been entitled from contractors, and failed to prove that Brain breached any fiduciary duty to investigate Robbins’s allegations against him.

We thus hold that the district court erred in concluding that Brain violated section 404. It also necessarily follows that the district court erred in concluding that the Cook Defendants violated section 404 by knowingly aiding Brain in violating section 404.

ERISA section 503(a)(2) provides that a civil action may be brought “by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [ERISA section 409].” 29 U.S.C. § 1132(a)(2). Section 409, in turn, provides for removal of a fiduciary who has breached his or her fiduciary duties under ERISA:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.


Expressly relying upon ERISA section 409, the district court entered a permanent injunction against Brain and the Cook Defendants. For the reasons discussed above, the Secretary did not establish that Brain and the Cook Defendants violated ERISA section 404. Because section 409 requires a breach of fiduciary duty, and because the Secretary did not prove that there was a breach of fiduciary duty in this case, we vacate the permanent injunction in its entirety as to Brain and the Cook Defendants.

IV. ERISA SECTION 502(A)(5) DOES NOT PROVIDE AN ALTERNATIVE BASIS FOR THE DISTRICT COURT’S PERMANENT INJUNCTION.

As a fallback position, the Secretary argues that notwithstanding the absence of a violation of section 404, a violation of section 510 may serve as an independent basis for the district court’s injunction. We disagree.

ERISA section 502(a)(5) provides that a civil action may be brought “by the Secretary (A) to enjoin any act or practice which violates any provision of [ERISA], or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of [ERISA].” 29 U.S.C. § 1132(a)(5). The permanent injunction removing Brain as a trustee and preventing him from serving as a fiduciary does not fall under section 502(a)(5)(A), as it is not an injunction prohibiting Brain from retaliating in violation of section 510.

The remaining option is for the permanent injunction to be permissible under section 502(a)(5)(B), which allows “appropriate equitable relief” either “to redress [the] violation” or “to enforce any provision of [ERISA].” Id. Under this provision, the Secretary “must prove both (1) that there
is a remediable wrong, i.e., that the plaintiff seeks relief
to redress a violation of ERISA ... ; and (2) that the relief
sought is ‘appropriate equitable relief.’” Gabriel v. Alaska
Elec. Pension Fund, 773 F.3d 945, 954 (9th Cir. 2014) ( cita-
fails if the plaintiff cannot establish the second prong, that
the remedy sought is ‘appropriate equitable relief,’ ... , regard-
less of whether ‘a remediable wrong has been alleged.’” Id.
(quoting Mertens, 508 U.S. at 254). Similarly, a claim fails if
the first prong—that there is a wrong remediable by the relief
sought—is unmet. See id.

Here, the Secretary argues that the district court’s per-
manent injunction falls within the relief contemplated by
ERISA section 503(a)(5)(B). Without a doubt, injunctions
are a type of traditional equitable relief appropriate under
section 503(a)(5). See Mertens, 508 U.S. at 256. However, no
aspect of the district court’s injunction redresses or en-
forces a violation of ERISA section 510.

First, section 409 expressly authorizes removal of a
trustee for a breach of fiduciary duty. In turn, section 502(a)(2)
expressly references section 409, providing that the Secretary
may bring a civil action to obtain “appropriate relief under
that removal is codified in its own statutory section, in con-
junction with the fact that section 502 references section
409 separately from the equitable relief available under sec-
tion 502(a)(5), indicates that section 409 authorizes a form
of relief distinct from that typically available under section
502(a)(5). Put differently, if section 502(a)(5) independently
allowed for removal of a trustee, even in the absence of a
proven breach of fiduciary duty, there would be no need for
sections 409 or 502(a)(2).

Next, the Secretary has cited no authority bringing re-
moval of a trustee within the realm of “appropriate equitable
relief” designed to “redress [a] violation of section 510 or to
“enforce” section 510. We have observed, for example, that
appropriate equitable relief for an employee who has suffered
retaliatory discharge may take the form of reinstatement to
her former position. See Teutscher, 835 F.3d at 946. In such a
scenario, reinstatement is a form of redress clearly designed
to make the discharged employee whole. In contrast, here,
the Secretary has not shown how removing Brain from his
trustee position redresses the retaliation that Robbins, who
received a settlement payout and benefits, suffered.

For the same reason, it is not apparent how enjoining
Brain from “applying for, or accepting any fiduciary position
with any ERISA-covered plan,” unless he first discloses the
terms of the district court’s judgment, redresses a violation
of section 510. The Secretary presents no viable reasoning
as to why Brain’s retaliation against an individual employee,
who has already been made whole, justifies enjoining Brain
from serving in a fiduciary capacity with other ERISA plans.

Nor is it apparent how removing Brain as a trustee and
permanently enjoining him from serving as a fiduciary for
the Trust Funds or any other ERISA plan enforces ERISA
section 510. The cases cited by the Secretary are easily dis-
tinguishable from this case for one crucial reason: They in-
volved breaches of fiduciary duty in violation of section 404.
See, e.g., Shaver, 332 F.3d at 1203–04 (instructing district
court to consider various equitable remedies, including re-
moval, should defendants be found to have breached their
fiduciary duties by failing to keep records essential to the
well-being of the plan); Martin v. Feilen, 965 F.2d 660, 672
(8th Cir. 1992) (affirming permanent injunction against de-
fendants who “repeatedly used their fiduciary control over
the [employee stock ownership plan’s] assets to profit from
self-dealing”); Beck v. Levering, 947 F.2d 639, 641 (2d Cir.
1991) (affirming removal of fiduciaries who engaged in ego-
rous self-dealing, using approximately $30 million of the
plans’ assets); Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th
Cir. 1983) (“Where there has been a breach of fiduciary duty,
ERISA grants to the courts broad authority to fashion rem-
edies for redressing the interests of participants and benefi-
ciaries.”). As we have explained, the Secretary has not proven
that a breach of fiduciary duty occurred here. It is incongru-
ous to order the removal of a trustee—equitable relief spe-
cially designed to remedy a breach of fiduciary duty—when
there has been no breach of fiduciary duty.

Lastly, the Secretary fails to explain how enjoining the
Cook Defendants from providing services to the Trust Funds
constitutes “appropriate equitable relief,” where the Secretary
did not prove that the Cook Defendants aided in any breach
of fiduciary duty. As with the injunction against Brain, the
injunction against the Cook Defendants does not “redress” or
otherwise “enforce” a violation of section 510. See 29 U.S.C.
§ 1132(a)(5).

We cannot conclude in the Secretary’s favor without con-
struing ERISA section 502 in an impermissibly broad man-
er. See Gabriel, 773 F.3d at 953–54. The Supreme Court
has cautioned that ERISA section 502 “does not ... authorize
‘appropriate equitable relief’ at large, but only ‘appropriate
equitable relief’ for the purpose of ‘redress[ing] any [viola-
tions or ... enforc[ing] any provisions’ of ERISA.” Harris
Thomas, 516 U.S. 349, 353 (1996)). Because the Secretary
has not shown how the district court’s permanent injunction
redresses a violation of section 510 or otherwise enforces
section 510, section 502(a)(5) does not supply an alternative
basis to uphold any aspect of the injunction.8

7. In Gabriel, we discussed ERISA section 502(a)(3)(B), 29
U.S.C. § 1132(a)(3)(B), which shares language nearly identical to
provides for enforcement by a private plaintiff; the latter provides for
enforcement by the Secretary.

8. In contrast, the district court properly ordered the Cook Defen-
dants to disgorge $61,480.62 they received in connection with their
section 510 violation. ERISA permits equitable relief against nonfi-
duciaries in the form of restitution or disgorgement. See Gabriel, 773
F.3d at 957; Concha v. London, 62 F.3d 1493, 1504 (9th Cir. 1995)
V. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE COOK DEFENDANTS WERE NOT IMMUNE UNDER THE ATTORNEY IMMUNITY DOCTRINE.

The Cook Defendants argue that they are immune from liability pursuant to the attorney immunity doctrine. Their arguments are meritless.

First, the plain text of the ERISA statute makes it unlawful for “any person” to retaliate in violation of section 510. 29 U.S.C. § 1140; see Tinge v. Pixley-Richards W., Inc., 953 F.2d 1124, 1132 n.4 (9th Cir. 1992) (observing that because section 510 refers to “any person,” not just an employer, “an insurer who coerces an employer to fire an employee must be covered by this language”). Second, none of the cases the Cook Defendants rely upon involve violations of section 510. Most of them involve state-law causes of action, such as professional negligence. See, e.g., Goodman v. Kennedy, 556 P.2d 737, 742–44 (Cal. 1976) (concluding that attorneys did not owe a duty of care to non-client plaintiffs); Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 636–37 (Ct. App. 1991) (concluding that an attorney could not be sued for professional negligence by a third-party to whom the attorney owed no duty of care); Whitehead v. Rainey, Ross, Rice & Binns, 997 P.2d 177, 181 (Okla. Civ. App. 1999) (holding that attorneys providing “proper and legal” advice to clients, although such advice “might potentially harm some third party,” were not liable to non-client plaintiffs under a common-law professional negligence claim). The Secretary did not sue the Cook Defendants under a common-law cause of action, but rather under a statute that authorizes “any person” to be liable.

The Cook Defendants’ remaining citations to federal cases are wholly inapposite because they involve other statutory causes of action. See, e.g., Heffernan v. Hunter, 189 F.3d 405, 407 (3d Cir. 1999) (rejecting conspiracy claim brought under 42 U.S.C. § 1985, which sought to hold an attorney and client liable for conspiring to intimidate a plaintiff from serving as a witness in federal court); Travis v. Gary Cnty. Mental Health Ctr., Inc., 921 F.2d 108, 111 (7th Cir. 1990) (another § 1985 conspiracy claim). Here, the Secretary did not pursue a § 1985 conspiracy claim against Brain and the Cook Defendants, but rather sought to hold them individually liable under ERISA section 510.

VI. THE COOK DEFENDANTS’ REMAINING ARGUMENTS ARE MERITLESS.

Finally, the Cook Defendants assert a litany of challenges to the district court’s findings of fact, attempting to relitigate this case on appeal. We reject their invitation to reweigh the evidence or second-guess the district court’s careful credibility determinations, which warrant significant deference on appeal. See Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985); Husain, 316 F.3d at 840. The Cook Defendants have not shown that the district court committed any errors in its findings of fact, much less clear error. Without recapitulating the district court’s thorough and amply supported findings of fact, we briefly list and reject the Cook Defendants’ challenges to the district court’s findings.

The district court did not err in finding that Cook’s actions extended well beyond providing legal advices or that her “actions and advice as counsel were both substantially affected by her relationship with Brain.” Nor did the district court err in finding that the November 18, 2011 Joint Board meeting was called in response to the DOL investigation, and that Cook played a key role in bringing about the meeting for retaliatory purposes.

The district court did not err in finding Robbins credible at trial—the district court thoughtfully excised from its consideration portions of Robbins’s testimony that it deemed incredible, but properly considered the remainder of Robbins’s testimony. The district court also did not err in concluding that Robbins had a good-faith belief that Brain was engaged in conduct that violated ERISA or in finding that the audit procedures Cook drafted were “designed with the expectation that the results of the audit would be unfavorable to Robbins.” Furthermore, the district court did not err in finding that the Cook Defendants caused the A&C Department’s work to be outsourced to Zenith, that the non-retaliatory reasons offered by Brain and the Cook Defendants in support of the outsourcing decision were pretextual, and that Cook caused Zenith not to hire Robbins. Finally, the district court did not err in concluding that Cook retaliated against Rice.

CONCLUSION

For the foregoing reasons, we affirm the district court with respect to the ERISA section 510 claim, as described herein, but reverse with respect to the ERISA section 404 claim, and vacate the district court’s entry of a permanent injunction against Brain and the Cook Defendants.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, VACATED AND REVERSED IN PART.

SCHROEDER, Circuit Judge, dissenting in part:

The district court conducted a five-day bench trial. In comprehensive findings of fact and conclusions of law, the
The district court ruled that Scott Brain violated ERISA by retaliating against the whistleblower, Robbins, who had reported Brain’s interference with Fund contributions. I agree with the majority’s affirmation of this ruling. Yet the majority inexplicably then concludes that the retaliatory act, placing Robbins on administrative leave, was not a breach of Brain’s fiduciary duty, and the majority vacates the court’s injunction against Brain’s returning to work for the Funds. As to this, I cannot agree.

The majority reaches its anomalous result by asking, and then answering incorrectly, a question that no one in this case heretofore has thought necessary to ask: whether Brain was acting as an employer or a fiduciary. In my view, and the district court’s view, he was clearly acting as a fiduciary.

There is not the slightest indication in this record that the decision to place Robbins on administrative leave was for any reason other than to cover up Brain’s misconduct in cheating the Funds. Nor can there be any legal question that such misconduct was a breach of Brain’s fiduciary duty to administer the Funds in the exclusive interest of the beneficiaries and participants. See 29 U.S.C. § 1104(a)(1)(B); see also Rest. 3d. Trusts § 78(1) (“a trustee has a duty to administer the trust solely in the interest of the beneficiaries … .”). The district court correctly found that the defendants could not articulate any “legitimate, nondiscriminatory reason for placing Robbins on leave.”

There are, of course, cases in which what were primarily business decisions were challenged because of collateral effects on a fund. See, e.g., Husvar v. Rapoport, 430 F.3d 777, 782 (6th Cir. 2005) (noting plaintiffs never “allege that the defendants themselves mismanaged any fund . . . the complaint is replete only with allegations that the individual defendants mismanaged the company”); Martin v. Feilen, 965 F.2d 660, 666 (8th Cir. 1992) (no fiduciary breach where employers merely “engaged in unwise business transactions”) (quotation marks omitted); Flanigan v. Gen. Elec. Co., 242 F.3d 78, 88 (2d Cir. 2001); Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1499 (3d Cir. 1994); Dezingski v. Weirton Steel Corp., 875 F.2d 1075, 1080 (4th Cir. 1989) (a business decision’s incidental effect on the trust funds does not trigger ERISA protections). These are cases that the majority cites. Yet there is no law to support characterizing a fiduciary’s efforts to cover up trust fund mismanagement as business, rather than fiduciary decisions.

Unlike traditional business and personnel decisions that only tangentially affect ERISA plan management, dismissing Robbins was inextricably intertwined with the “control over plan management or Administration.” See Lockheed Corp. v. Spink, 15 U.S. 882, 890 (1996) (citation and quotations omitted). The meeting during which the vote to expel Robbins occurred was a meeting of trustees discussing their obligations as trustees. Robbins blew the whistle on Brain’s Fund mismanagement – Brain’s decision to oust her was a calculated move to insulate the Fund mismanagement from further scrutiny. The majority’s conclusion that Brain wore only his “employer” hat is therefore untenable.

The majority’s approach conflicts with ERISA’s goal to safeguard trust funds, and the Supreme Court’s implementing directive to construe broadly the fiduciary duties incumbent in administering an ERISA trust. See Varity Corp. v. Howe, 516 U.S. 489, 504 (1996) (fiduciary duties extend to all activities that are “ordinary and natural means of achieving the objective of the plan.”) (citation and internal quotation marks omitted); see also Peralta v. Hispanic Bus., Inc., 419 F.3d 1064, 1071 (9th Cir. 2005) (narrow interpretations of these fiduciary duties “conflict with ERISA’s purpose”); Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1468 (9th Cir. 1995) (Ninth Circuit’s policy is to “interpret[] the fiduciary duty broadly”); Martori Bros. Distrib. v. James-Massengale, 781 F.2d 1349, 1359 (9th Cir.) (ERISA’s primary goal is preventing fund mismanagement), amended, 791 F.2d 799 (9th Cir. 1986).

The district court correctly concluded that Brain violated his fiduciary duty when he retaliated against Robbins for blowing the whistle on his Fund mismanagement, and Brain should not be allowed to do so again. I respectfully dissent from the majority’s contrary decision.
California Courts of Appeal

Cite as 18 C.D.O.S. 11487

JON WILMOT, Plaintiff and Appellant, v.
CONTRA COSTA COUNTY EMPLOYEES’ RETIREMENT ASSOCIATION et al., Defendants and Respondents.

No. A152100
In The Court of Appeal of the State of California
First Appellate District
Division Two
(Contra Costa County Super. Ct. No. MSN161730)
Filed November 1, 2018
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ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on November 1, 2018, was not certified for publication in the Official Reports. For good cause, the request for publication by Inter-vener, State of California is granted.

Pursuant to California Rules of Court, rules 8.1105 and 8.1120, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports

Acting P.J.

OPINION

A long-time county employee decided to retire, and in December 2012, he submitted his application for retirement to the county’s retirement authority. On January 1, 2013, the California Public Employees’ Pension Reform Act of 2013 (Pension Reform Act or PEPRA) took effect. Included in that measure is a provision that mandates the complete or partial forfeiture of pension benefits/payments if a public employee is convicted of “any felony under state or federal law for conduct arising out of or in the performance of his or her official duties.” (Gov. Code, 1 § 7522.72, subd. (b)(1).)

In February 2013, the employee was indicted for stealing from the county for more than a decade. In April 2013, the county pension authority approved the employee’s retirement application, fixing the employee’s actual retirement on the day he submitted that application in December 2012. Also in April 2013, the employee began receiving monthly pension checks starting from December 2012. In December 2015, the employee pled guilty to embezzling county funds for a 12-year period ending in December 2012. Thereafter, the county pension authority reduced the employee’s monthly check in accordance with the forfeiture provision.

Among the questions presented are whether applying the forfeiture provision applies to the employee at all, and whether reduction of his pension benefits amounts to an unconstitutional impairment of his employment contract with the county, or also constitutes imposition of an ex post facto law. We conclude the provision does apply to the former employee. Because we decide this as a matter of statutory construction, there is no need to consider the possibility of a constitutional violation for someone in a different situation.

BACKGROUND

The salient facts are without dispute.

Plaintiff Jon Wilmot commenced employment with the Contra Costa County Fire Protection District in 1985. By 2012, he had risen to the rank of captain. During this period, he was a member of the retirement program established by Contra Costa County in accordance with the County Employees Retirement Law of 1937 (CERL) (Stats. 1937, ch. 677, codified in 1947, § 31450 et seq.), which is administered by the Board of Retirement of the Contra Costa County Employees’ Retirement Association. The association and its governing board will hereafter be designated as CCERA.

By the end of 2012, Wilmot had decided to retire. His final day on the job was December 12, and he submitted his “application for a service retirement” (§§ 31663.25–31663.26) to CCERA the following day.

On January 1, 2013, the Pension Reform Act became effective, thus adding section 7522.72. The relevant language is subdivisions (b)(1) and (c)(1), which originally provided in pertinent part:

“(b)(1) If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and

1. Statutory references are to this code unless otherwise indicated.
Wilmot submitted his retirement application.

“(c)(1) A public employee shall forfeit all the retirement benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The retirement benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee’s conviction. Retirement benefits attributable to service performed prior to the date of the first commission of the felony for which the public employee was convicted shall not be forfeited as a result of this section.” (Stats. 2012, ch. 296, § 15.)

On March 19, 2013, CCERA received Wilmot’s “Choice of Retirement Allowance.” The following month CCERA sent him his first monthly pension check for $8,758.46. In April 2013, CCERA formally approved Wilmot’s retirement application, fixing his date of retirement as December 13, 2012.

But Nemesis was already on her way.

At some point not established by the record, authorities learned that Wilmot had, for a considerable part of his tenure, been stealing property and equipment from Contra Costa County Fire Protection District. In February 2013, the District Attorney filed four felony charges. In December 2015, Wilmot entered a plea of no contest to a single charge that the District Attorney of the County of Contra Costa County filed in connection with reducing Wilmot’s monthly pension check $8,758.61 to $2,858.56.

These changes were adopted in August 2016, following a contested public hearing. Wilmot was advised by letter that “the [CCERA] Board of Retirement” “determined pursuant to … Section 7522.72 to adjust your retirement allowance effective September 1, 2016.”

The next month Wilmot commenced this action with a petition for a writ of traditional mandate and declaratory relief. The basis of Wilmot’s position—in the trial and on appeal—was succinctly stated in his petition: “Respondents’ application of the felony forfeiture provision appearing in … section 7522.72 to Petitioner is improper because the statute does not apply retroactively to persons such as Petitioner who retired prior to its effective date. Moreover, even if … section 7522.72 was intended to apply retroactively to persons who retired prior to its effective date, the statute cannot lawfully do so because Petitioner’s pension benefit became due and payable upon his retirement and the Legislature cannot lawfully alter an existing retiree’s pension benefit once the benefit came due and payable. The Legislature also lacks authority to enhance the punishment for past conduct by enacting an ex post facto law. By applying … section 7522.72’s forfeiture provision to Petitioner, Respondents ignored the terms of the statute itself, unlawfully impaired Petitioner’s constitutionally protected pension benefits, and violated Petitioner’s constitutional right to be free from an ex post facto application of the law.” The Attorney General was allowed to intervene to defend the constitutionality of section 7522.72.

Following extensive briefing and argument, the trial court (Hon. Charles Treat) denied the petition with a thoughtful order that merits quotation at length:

“Wilmot asserts a number of interconnected arguments why the Board’s determination is incorrect, and he cannot be subjected to PEPPRA’s forfeiture provisions. First, he argues that he is not a ‘public employee,’ or ‘member’ subject to § 7522.72. It is undisputed that § 7522.72 did not come into effect until January 1, 2013. As of that date (Wilmot argues), he was no longer a ‘public employee,’ because he had retired effective the preceding December 13. That, he reasons, made him a retiree, not ‘employee,’ because he had retired effective the preceding December 13. That, he reasons, made him a retiree, not a public employee, not ‘member.’

2. Two 2013 amendments made the language nongender-specific (Stats. 2013, ch. 528, § 76) and expanded the forfeiture in subdivision (c)(1) to “rights” as well as benefits (Stats. 2013, ch. 528, § 13).

3. Wilmot was subsequently ordered to pay almost $33,000 to the district as criminal restitution. Included in the materials submitted to CCERA in connection with reducing Wilmot’s monthly pension check was a two-page inventory of the “CCCFPD Property Recovered from Wilmot Truck Date: 12/12/12,” together with an 11-page undated inventory of “Property Recovered from Houses.” The alert reader will note that at least one of these “recoveries” occurred the day before Wilmot submitted his retirement application.

4. It appears that Wilmot was also receiving benefits from CalPERS for a period of service with a different public employer. After CCERA informed CalPERS of its action, CalPERS followed and “amended” Wilmot’s “retirement benefit” downward. The decision by CalPERS has never been at issue in this litigation.
a ‘public employee’ (and hence also not a ‘member’). Accordingly, by its own textual definition of its coverage, § 7522.72 does not apply to him, and does not authorize or work any forfeiture of his pension rights.

“Wilmot’s following arguments are variations on the same theme. His second argument is that if § 7522.72 could be read as applying to a person who had retired before 2013, it would be at best ambiguous in that respect. Thus, he invokes the principle of refusing to read a statute to apply retroactively—meaning, as Wilmot uses the term, as applicable to a person already retired as of the effective date of the statute. Third, he argues that if the statute did dictate a forfeiture as to pension rights that had accrued prior to the statute’s enactment, it would represent an unconstitutional interference with vested pension rights already in existence on the statute’s first effective date.

“Wilmot’s arguments potentially raise a number of textual and logical difficulties. The Court need not decide all these difficulties, however, because all of Wilmot’s arguments (except his ex post facto argument, discussed below) all fail at their critical initial premise. All of the above arguments assume that as of January 1, 2013, Wilmot was already formally retired. It is from this premise that he argues (1) that as of that date he was not a ‘public employee’ or ‘member’, (2) that application of the statute to him would be retroactive, and (3) that his pension rights were constitutionally vested. If, to the contrary, Wilmot was not yet retired but still employed as of January 1, 2013, the preceding arguments all fall apart. It was for this reason that the Court called for supplemental briefing as to whether Wilmot was ‘retired’ on December 13, 2012, the date he selected as his retirement date, or April 10, 2013, the date the [CCERA] Board acted on [Wilmot’s] application.

“In his supplemental brief, Wilmot argues: ¶ ‘Under [CERL], a member who has provided the qualifying number of years of service and has attained the required age is ‘retired upon filing with the board a written application setting forth the date upon which the member desires his or her retirement to become effective . . .’ (§§ 31672(a), 31663.26(a). . . .) Thus, a qualifying member is ‘retired’ as of the effective date identified on the submitted application. [CERL] grants the member—not the retirement board or the employer—the right to select their own date of ‘retirement’ . . .' [¶] . . . [¶]

“But these Government Code provisions do not say that the member is retired upon his application. They say that he may be retired. (See . . . § 31672(a) ‘A member . . . may be retired upon filing with the board a writen [ten application . . .’]; § 31663.25(a) ‘Except as provided in Section 31663.26, a safety member . . . may be retired upon filing with the board a written application . . .’; § 31663.26 ‘Notwithstanding Section 31663.25, a safety member . . . may be retired upon filing with the board a written application . . .’) (emphasis added.) Wilmot selectively quotes around the actual verb.

“The entity that retires the member is the Board. (See . . . § 31670 (‘Retirement of a member who has met the requirements for age and service shall be made by the board pursuant to this article . . .’) (emphasis added). Wilmot argues that this is a mere ministerial act. But no matter how ministerial that act may be, in that the Board merely confirms [Wilmot’s] age and service, under the plain statutory language retirement cannot occur until the Board so acts. Moreover, while the formal act of retirement is no doubt more or less ministerial in most cases, it may not always be so. For example, suppose that Wilmot’s embezzlement conviction had occurred in March 2013 rather than December 2015. In that case, at the time the Board acted on Wilmot’s retirement, it would have been obligated to assess whether Wilmot’s conviction subjected him to the forfeiture provisions of § 7522.72, and to carry out those provisions if applicable. That is not the actual timing of this case—but it points out why the official date of the Board’s action matters, and why a member cannot be deemed formally retired until the Board does act. Here, that did not occur until after January 1, 2013.

“The only case law that any party has cited as closely on point is MacIntyre v. Retirement Board of S.F. (1941) 42 Cal.App.2d 734 [(MacIntyre)]. There, two police officers filed applications for retirement. After the first application (but before the second), a verified complaint was filed, charging both officers with various forms of misconduct. The charges resulted in the officers’ dismissals, and the denial of any pension rights to them. The court rejected their argument that their pension rights had vested when they met the requisites for retirement—age, years of service, and contribution—so that their pension rights could not be denied due to any subsequent determinations. And more specifically, the court rejected the argument that either officer was already retired by the time of his dismissal, because of the filing of their applications for retirement. ‘The filing of an application does not ipso facto retire the applicant. It is necessary that an order of retirement be duly made.’ (Id.

5. A “safety member” is defined in CERL as “[a]ny person employed by a county . . . whose principal duties consist of active law enforcement or active fire suppression . . . or active lifeguard service . . . or juvenile hall group counseling and group supervision . . .” (§ 31469.3, subd. (b).)
at 736.) MacIntyre is not directly controlling here, as the city and officers there were operating under different applicable statutes (and the decision does not delve into the statutory language). The case illustrates, however, that where the relevant statutory language dictates that ‘retirement’ occurs upon board action and not simply upon the filing of an application, that formality must be taken seriously.

“Accordingly, even assuming arguendo that § 7522.72 applies only to persons who were not yet retired as of January 1, 2013, the undisputed facts here show that Wilmot himself was not yet formally retired as of that date. The act that (by Wilmot’s logic) transformed him from a ‘public employee’ and ‘member’ into a retiree/former employee was not his selection of December 13, 2012 as the effective date of his retirement, but the Board’s approval of that retirement on April 10, 2013.

“That leaves Wilmot’s ex post facto argument, which is not dependent on the timing of his retirement. Rather, the contention looks only to the dates of the commission of Wilmot’s crime (2000 to 2012) and the date of the effectiveness of PEPRA ([January 1,] 2013). The argument is that a crime, committed no later than 2012, is being penalized by a forfeiture statute enacted only after the crime had been committed and completed.

“On its face, § 7522.72 is a civil statute, not subject to the prohibition on ex post facto laws. See Cal. Const. art. 1, § 9; Conservatorship of Hofferber (1980) 28 Cal.3d 161, 180 (‘The ex post facto clauses [of the U.S and California Constitutions] apply only to penal statutes.’). The State concedes that civil penalties can in some cases violate the ex post facto clause if the punishment amounts to a criminal proceeding. (See People v. 25651 Minoa Dr. (1992) 2 Cal.App.4th 787, 796–797.) But the test for such a finding is two-fold and not in Wilmot’s favor: 1) Did the state intend to establish a criminal or civil penalty?; And 2) If the intent was a civil penalty, was the statutory scheme so punitive in purpose or effect as to negate that intention? (See [United States] v. One Assortment of 89 Firearms (1984) 465 U.S. 354, 362.)

“The Court is satisfied that there is no ex post facto violation here. Wilmot concedes that the Legislature intended to enact a civil penalty, not a criminal one. The statutory scheme is not so punitive as to negate that intention. PEPRA’s forfeiture provisions do not function to impose a punitive fine on Wilmot, let alone to subject him to imprisonment or the like. Rather, what PEPRA accomplishes is to take back from Wilmot what he never rightly earned in the first place—namely pension rights for a period when he was violating his trust as an employee by embezzling from his employer. (See also MacIntyre[, supra], 42 Cal.App.2d at [pp.] 735–[7]36.)

“This ruling makes it unnecessary to rule on objections to the parties’ respective requests for judicial notice. The proffered documents are adduced only as bearing on the proper construction of § 7522.72, in particular as to whether it does or does not apply to a person who was already retired as of the end of 2012. That is the question that the Court has declined to decide, because it turns out that Wilmot himself was not retired as of the end of 2012. For the sake of completeness, however, the Court will sustain the Board’s and State’s objections. There is no sufficient foundation that the documents objected to represented a considered, official, and final position from the agencies they came from—let alone any indication that they have anything to do with the intention of the Legislature when it enacted § 7522.72. Moreover, the CALPERS documents do not purport to say anything one way or the other as to the question at issue here—the applicability of PEPRA’s felony forfeiture provisions to pre-enactment retirees.”

**DISCUSSION**

**Legal Principles**

This Appellate District is no stranger to the Pension Reform Act. Three of its five divisions have given their opinion on whether its application to current employees constitutes an unconstitutional impairment of their contracts of employment. Our Supreme Court will have the last word on this subject. (Marin Assn. of Public Employees v. Marin County Employees’ Retirement Assn. (2016) 2 Cal.App.5th 674 (Marin), review granted Nov. 22, 2016, S237460; Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn. (2018) 19 Cal.App.5th 61, review granted Apr. 12, 2017, S239958; Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn. (2018) 19 Cal.App.5th 61, review granted Mar. 28, 2018, S247095.)

Here, we return to the Pension Reform Act, particularly as it applies to public employees covered by a pension system administered under CERL. We have already examined the genesis of the Pension Reform Act, and the general operation of CERL programs in Marin, supra, 2 Cal.App.5th 674, 680–683. Unlike the rather generalized and abstract setting we found there, we must now get involved with the actual particulars of the pension application process.

In Marin, we addressed one specific change in the Pension Reform Act, namely, the Legislature’s goal of curbing the perceived abuse of “pension spiking.” It is another perceived abuse at issue here—the first statewide adoption of what is known as a “pension forfeiture” provision (see generally Jacobs, Friel, O’Callaghan, Pension Forfeiture: A Problematic Sanction for Public Corruption (1997) 35 Am.Crim.L.Rev. 57) to public employees. Such measures were an early fea-
ture of municipal pension schemes, and the general principle that pension rights could be lost by criminal behavior had been judicially ratified by California courts. However, there was a qualification: crimes committed after retirement were excluded. (E.g., Wallace v. City of Fresno (1954) 42 Cal.2d 180; Lawrence v. City of Los Angeles (1942) 53 Cal.App.2d 6; MacIntyre v. Retirement Board of S.F. (1941) 42 Cal. App.2d 734.)

In 2005, in the wake of several notorious incidents of financial corruption and mismanagement, the Legislature passed a measure allowing for the limited forfeiture of pension benefits for “any elected public officer who takes public office, or is reelected to public office, on or after January 1, 2006” upon conviction of a specified crime. (Stats. 2005, ch. 322 [adding former § 1243]; see Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011) p. 39.)

Section 7522.72 applies to “a public employee first employed by a public employer … before January 1, 2013,” Section 7522.74 applies to those persons whose employment commenced “on or after January 1, 2013.”

As pension forfeiture provisions go, California’s is rather temperate. It is not triggered by just any conviction, or even any felony conviction, but only a felony conviction that is job-related. Pension benefits are not lost entirely, but only for the period of the felonious behavior. The employee’s contributions for that period are not kept, but are returned. (§ 7522.72, subd. (d)(1).) If the conviction is reversed, the employee may redeposit her contributions and “[r]ecover the forfeited rights and benefits.” (Id., subd. (h).)

**Application**

Wilmot asserts in effect there is but a single legal error, namely, after December 13, 2012, he was retired, no longer an active, working public employee, and therefore beyond the reach of section 7522.72.

This case is a perfect example of how a word can have an everyday meaning, and a very different legal definition. Most people would ordinarily think if a person who has worked at the same job for 30 years or so, submits the appropriate paperwork for retirement and completes the last day of work, then that person can legitimately think of himself as retired. However, for public employees in California, particularly employees covered by CERL, retirement is hardly that simple.

Judge Treat’s ruling was quoted almost in full because it addresses the points raised here—and because it is correct. Finishing the last day of work does not automatically make a public employee a “retired” former employee. Submitting your application for pension benefits does not make you retired for purposes of CERL. We only briefly augment Judge Treat’s reasoning.

Wilmot attacks that reasoning as “fundamentally flawed” because Judge Treat “failed to appreciate the distinction between an individual’s employment status and their retirement status.” In his words, these are “separate and distinct conditions” “acknowledged by Section 7522.72 itself.” However, resort to the language of a single provision may be deceptive and misleading. It also goes against the sensible principle cautioning courts that they should not “construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.” (People v. Valencia (2017) 3 Cal.5th 347, 384.) Given that we are dealing with an extensive statutory scheme of almost fiendish complexity, it is appropriate to take this canon of statutory construction to heart, particularly because section 7522.72 is not even in CERL (which commences with section 31450 and concludes with section 31898, and which occupies the better part of two volumes of West’s Annotated California Codes).

At first glance, Wilmot’s distinction between “employment status” and “retirement status” has a natural attraction because it accords with the common understanding of what retirement means. It might also appear that CCERA unwittingly bolstered Wilmot’s position by dating his retirement to December 13, 2012 and, eventually, paying him pension benefits from that date. Thus, Wilmot can in effect say: “See, even CCERA accepts that I retired on December 13th.” Wilmot’s reasoning is sound, but conditionally so, being subject to the proviso identified by Judge Treat.

The person who has stopped working naturally would no longer think of herself as being a public employee, but as a former public employee, a retired public employee. But this is a false dichotomy. The issue is not how such a person characterizes herself, but how CERL does.

Submitting retirement papers is only the start of the retirement process under CERL. The application is then reviewed, and, if correct in form, sent to the county retirement board for its approval. The need for this hiatus is obvious. It allows for a change of mind by the employee. The retirement board has to verify the employee’s history. (Flethez v. San Bernardino County Employees Retirement Assn. (2017) 2 Cal.5th 630, 636 [“a county retirement board … must ‘investigate’ ap-

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6. The United States has had such a provision since 1954. (See Hess v. Hampton (D.D.C.) 338 F.Supp. 1141, 1142, fn. 1.) In the private sector, “employee pensions that have vested (i.e., the employee has satisfied the statutory age and/or years-of-service requirements) are protected from forfeiture for misconduct under the anti-alienation and anti-forfeiture provisions of ERISA … as interpreted by the United States Supreme Court in Guidry v. Sheet Metal Workers Nat’l Pension Fund [(1990) 493 U.S. 365].” (Jacobs, Friel, O’Callaghan, Pension Forfeiture: A Problematic Sanction for Public Corruption, supra, 35 Am.Crim.L.Rev. 57, 58–59.)

7. The Legislature had already provided that “any person who is receiving an allowance from a public retirement system, who is receiving an allowance from a public retirement system, who is retired for purposes of CERL. We only briefly augment Judge Treat’s reasoning.

Wilmot asserts in effect there is but a single legal error, namely, after December 13, 2012, he was retired, no longer an active, working public employee, and therefore beyond the reach of section 7522.72.

This case is a perfect example of how a word can have an everyday meaning, and a very different legal definition. Most
applications and pay[...] benefits only to those members who are eligible for them’’); cf. § 31541, subd. (a) [retirement board may ‘‘correct the errors or omissions of any active or retired member’’].) The employee’s ‘‘final compensation’’ (see § 31462.05, subd. (d)) must be computed. Whether the employee has a ‘‘prior service pension’’ (see §§ 31664, 31664.1, 31664.2, 31676, 31677) with another employer, or was employed as a safety member by a different agency (§§ 31664.5, 31672.5), may also have to be considered. Depending on the agency involved, there may be a policy requiring that the employee’s vacation or leave time be exhausted (if only for accounting purposes) before a replacement may be hired. (Cf. § 21163 [‘‘the retirement of a [CalPERS] member who ... is entitled to sick leave ... shall not become effective until the expiration of the sick leave’’].) The retirement board would also be ‘‘required to determine whether items of remuneration paid to employees qualify as ‘compensation’ under section 31460 and ‘compensation earnable’ pursuant to section 31461, and therefore must be included as part of a retiring employee’s ‘final compensation’ (§ 31462 or § 31462.1) for purposes of calculating the amount of a pension.’’ (Marin, supra, 2 Cal.App.5th 674, 680, quoting In re Retirement Cases (2003) 110 Cal.App.4th 426, 433.) There may be other factors reflected in the memorandum of understanding negotiated between public agencies and employees under the Meyers-Milias-Brown Act (§ 3500 et seq.), which often address points relevant to compensation and pensions and might therefore have to be consulted. All this takes time.

Judge Treat cited a number of statutes establishing that the employee’s application is merely pending until approved by a retirement board. Other statutes are more emphatic, leaving no doubt that the decisive retirement event is that approval. (See § 31497.3, subd. (a) [‘‘Retirement of a member ... who has met the requirements for age and service shall be made by the board, at which time the member ... becomes a retired member;’’ italics added], § 31499.4, subd. (a) [same], § 31511.4, subd. (a) [same], § 31486.4, subd. (a) [‘‘Retirement of a member or former member who has met the requirements for age and service shall be made by the board, at which time the member or former member becomes a retired member;’’ italics added], § 31491, subd. (a) [same], § 31499.14, subd. (a) [same].) Wilmot is simply wrong in stating ‘‘No CERL provision states that retirement occurs ‘upon board action.’’”

True, there are statutes with language that a vested employee “may be retired upon filing with the board a written application” (e.g., §§ 31491, subds. (c), (d); 31497.3, subds. (c), (d); 31499.4, subds. (c), (d)), but the same statutes also specify that the decisive act is approval of that application by the board: “Retirement of a member ... shall be made by the board, at which time the member or former member becomes a retired member” (§ 31491, subd. (a), italics added, § 31497.3, subd. (a), 31499.4, subd. (a).) Wilmot attacks as “incorrect[... ]” and a “misconstruction.” Judge Treat’s conclusion that it was CCERA’s approval of his retirement application that “transformed him from a ‘public employee’ and ‘member’ into a retiree/former employee.” The verb may not fit perfectly, but it does capture the essence of the process.

Wilmot notes that “[t]he distinction between an individual’s employment status and retirement status makes sense.” It is but a truism to say that employment and retirement are different things. It does not follow that CCERA was, in plaintiff’s characterization, “dictat[ing]” his status. CCERA was merely following established procedures, admittedly one with a new wrinkle. If there was any dictating, it was done by CERL, and the Legislature. Indeed, by insisting that he “was in fact retired” when he submitted his retirement application, it is Wilmot who is doing the dictating by deciding which parts of CERL apply to him.

Wilmot asserts that MacIntyre involved a municipal charter pension system, and thus does not give guidance to how CERL should be construed. We do not agree. As already shown, the municipal pension system in MacIntyre operates in much the same manner as does CERL. The excerpt from MacIntyre quoted by Judge Treat—“The filing of the [pension] application does not ipso facto retire the applicant. It is necessary that an order of retirement be duly made” (MacIntyre, supra, 42 Cal.App.2d 734, 736)—is a spot-on description of how CERL operates. If anything, section 7522.72 is more measured than the San Francisco provision, for where the police officers committed only “conduct unbecoming an officer, disobedience of orders and insubordination” (MacIntyre, at p. 735), Wilmot was convicted by his own admission of long-term felonious thievery from his employer. Also, unlike the dismissed officers in MacIntyre, Wilmot was not stripped of all pension benefits.

Wilmot is simply mistaken when stating “the Supreme Court has made it clear that, in accordance with a retirement system’s relevant governing provisions, an employee is entitled to a pension at the moment the employee has submitted an application for it after attaining the minimum age and completing the prescribed period of service.” (Italics added.) He points to no decision with such a holding.}

9. The only real expression on the subject by our Supreme Court is Wallace v. City of Fresno, supra, 42 Cal.2d 180. Wallace, who retired as chief of police, had his pension payments stopped when he was convicted of a federal crime. The forfeiture provision was added after Wallace entered the police department, but long before he retired. In a relatively brief opinion, the Supreme Court concluded the termination of Wallace’s pension was invalid.

“No case in this state has passed upon the specific question of the reasonableness of an amendment, made before an employee is eligible to retire, which provides for termination of pension rights if he is convicted of a felony after retirement. In order to determine this question we must look to the general principles set forth in the Kern v. City of Long Beach (1947) 29 Cal.2d 848 and Packer v. Board of Retirement (1950) 35 Cal.2d 212 cases where it was pointed out that a city may

8. This may be especially true if the employee is seeking disability retirement. (See Katosh v. Sonoma County Employees’ Retirement Assn. (2008) 163 Cal.App.4th 56 [employee’s disability retirement effective when accrued sick leave exhausted].)
the language of section 7522.72 in particular, nor CERL in general, lends the slightest support to the idea that a corrupt public employee, knowing that law enforcement is closing in, has only to throw his retirement application in a mailbox to make accrued pension benefits untouchable. (Cf. Kern v. State Emp. Retirement System (Ill. 1978) 382 N.E.2d 243, 246 ["under plaintiff’s theory, an employee need only retire prior to his conviction … to render the entire [forfeiture] statute meaningless"]; accord, Woods v. City of Lawton (Okla. 1992) 845 P.2d 880, 883; Public Emp. Retirement System v. Dodd (W.Va. 1990) 396 S.E.2d 725, 731; Garay v. Dept. of Management Services (Fla.Dist.Ct.App. 2010) 46 So.3d 1227, 1228.)

To sum up: a public employee who has submitted application for retirement, and who is no longer actually working, is in a state of limbo until the application is approved by the retirement board. It is only with that approval that the employee can be considered a “retired member” for purposes of CERL. On January 1, 2013, when the Pension Reform Act and section 7522.72 took effect, Wilmot’s application had been submitted but not yet approved by CCERA. Because Wilmot did not become officially retired until April 2013, he was subject to the new forfeiture provision. Because he was still an employee, there can be no question of retroactive application.

Wilmot’s position that he is being “divested” of his vested pension benefits is built on two assumptions. The first is that he was “retired” when he sent in his pension application and no longer went to work. The preceding discussion has established that this initial conclusion is faulty. The second assumption is that pension benefits, whenever acquired during the course of employment, thereupon become “vested,” by which Wilmot means fixed and not subject to alteration. However, our Supreme Court has repeatedly held that anticipated pension benefits are subject to “reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits … .” (Miller v. State of California (1977) 18 Cal.3d 808, 816 [emphasis added], quoting Wallace v. City of Fresno, supra, 42 Cal.2d 180, 183; accord, e.g., Betts v. Board of Administration (1978) 21 Cal.3d 859, 863; Packer v. Board of Retirement, supra, 35 Cal.2d 212, 218; Kern v. City of Long Beach, supra, 29 Cal.2d 848, 854–855; cf. Terry v. City of Berkeley (1953) 41 Cal.2d 698, 702 [citing Packer as “authority for the proposition that reasonable changes detrimental to [a public employee] may be made” up to the time “the pension [is] due and payable.”].)

Although the Attorney General clearly wants to have the constitutionality of the Pension Reform Act vindicated, he and CCERA acknowledge the case can be resolved as a matter of straightforward statutory construction. With due regard for Wilmot’s apparently unique set of circumstances, we see no need to go further and explore the possibility of a constitutional violation.

**DISPOSITION**

The judgment is affirmed.

Richman, Acting P.J.

We concur: Stewart, J., Miller, J.

the one which is used by CERL, is whether one is or is not a “retired member,” and CERL is explicit on how that status is acquired.

11. At the end of his brief, Wilmot argues that Judge Treat “improperly excluded relevant evidence showing that section 7522.72 was intended to apply solely to current public employees’ on PEPRA’s operative date.” “We apply the abuse of discretion standard in reviewing a trial court’s ruling denying a request for judicial notice (i.e., we affirm the ruling unless the information . . . . was so persuasive that no reasonable judge would have denied the request for judicial notice).” (CREED-21 v. City of San Diego (2015) 234 Cal.App.4th 488, 520.) Wilmot makes no genuine effort to disprove Judge Treat’s ruling that the proffered “documents do not purport to say anything one way or the other as to the question at issue here—the applicability of PEPRA’s felony forfeiture provisions to pre-enactment retirees.” The documents are therefore not so persuasive on that issue that any reasonable judge would have granted Wilmot’s request.
Defendant accosted a stranger in a parked car, forced him to turn over his car keys at gunpoint, and told him, “This ain’t your car no more.” He also took the victim’s cell phone. When defendant was arrested, he was in possession of a handgun with a 15-round-capacity magazine.

After a jury trial, defendant was found guilty on three counts: (1) second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), with a personal firearm use enhancement (Pen. Code, § 12022.53, subd. (b)); (2) unlawful possession of a firearm (Pen. Code, § 29800, subd. (a)(1)); and (3) receiving a large-capacity magazine (Pen. Code, §§ 16740, 32310, subd. (a)).

In a bifurcated proceeding, after waiving a jury trial, defendant admitted two “strike” priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), two prior serious felony enhancements (Pen. Code, § 667, subd. (a)), and two prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).

As a result, defendant was sentenced to a total of 71 years 4 months to life.
B. Defendant’s Waiver of a Jury Trial.

The trial on the priors was bifurcated. After the jury retired to deliberate, defendant waived a jury trial on the priors. In taking defendant’s waiver, the trial court stated:

“THE COURT: . . . [¶] . . . [T]here are two prison priors alleged in the information and two strike priors. They are one and the same. You know that. But they are alleged in a different fashion. You understand that; right?

“THE DEFENDANT: Yes.”

As noted, however, this was not correct.

Later that day, the jury returned its verdict of guilt and was discharged.

C. The Trial Court’s Advisements.

On the date set for a court trial on the priors, defense counsel indicated that defendant was willing to admit them. The trial court advised defendant:

“THE COURT: . . . [Y]ou are charged with two priors. One way is a prison prior pursuant to 667.5(b). The other way is a serious felony, 667(a). And the third way is strike priors. So there are three ways the priors are alleged.

“Understood?

“THE DEFENDANT: Yes, sir.

“THE COURT: The 667.5(b) priors add an additional year if convicted of those. The serious felonies add five, and the strike prior adds a life term.

“Understood?

“THE DEFENDANT: Yes.”

The trial court went on:

“THE COURT: All right. You have a right to have me decide whether or not these priors are true, and whether or not you committed these priors.

“Do you wish to waive or give up that right?

“THE DEFENDANT: Yes.

“THE COURT: . . . [Y]ou have a right to cross-examine any and all witnesses the People put up to prove that these priors exist, and that they are your priors.

“Do you wish to waive or give up that right; is that right?

“THE DEFENDANT: That is correct.

“THE COURT: You have a right to show that these priors don’t exist or they’re not your priors.

“You wish to waive or give up that right; is that correct?

“THE DEFENDANT: Yes.

“THE COURT: And, lastly, you have a right to testify at that trial in any defenses that they aren’t your priors or they don’t exist.

“You wish to waive or give up that right; is that correct, sir?

“THE DEFENDANT: Yes.”

D. The Amendment of the Information and Defendant’s Admissions.

Next, the trial court started to ask defendant to admit the prison priors. Defendant volunteered, however, and both counsel confirmed, that the date March 5, 2010 was erroneous and should have been July 24, 2013. The trial court therefore ordered:

“THE COURT: As to the second-prior offense, as to the second-serious prior offense, as [to] the second strike, on People’s motion, I shall, by interlineation, strike ‘March 5, 2010,’ and substitute in that place ‘July 24th, 2013,’ as to all three.”

This was a mistake. It was the first strike that needed to be amended, not the second strike.

The trial court resumed asking defendant to admit the prison priors. This time, however, defendant volunteered, and the prosecutor confirmed, that the place of the July 24, 2013 conviction was also erroneous and should be San Diego County. The trial court ordered:

“THE COURT: . . . I’m going to amend the second-prior offense, as to the second-serious prior offense, and second strike to allege that the convictions were had in the County of San Diego, state of California.”

This was another mistake. Once again, it should have amended the first strike, not the second strike.

The trial court resumed asking defendant to admit the prison priors, which he did. Next, it asked him to admit the prior serious felonies, which he also did.

Finally, it began asking him to admit the strikes. At this point, it seemed to realize that it was actually the first strike that needed to be amended. It ordered:
“THE COURT: The first strike prior, I shall amend the date by interlineation and striking ‘April 20th, 26th’ — whatever it is — ‘2007,’ to ‘July 24th, 2013’.”

It went back to asking defendant to admit the strikes. The prosecutor interrupted, however, to say that the second strike should actually be for assault with a deadly weapon in prison. The trial court stated:

“THE COURT: . . . The second-strike prior shall be amended as assault with a deadly weapon in prison, in violation of 4501 of the Penal Code.”

Again, this was a mistake (this time induced by the prosecutor), because there was nothing wrong with the second strike. It was the first strike that needed to be amended.

The trial court went back to asking defendant to admit the strikes. However, it expressed confusion about where the first strike occurred. The prosecutor said, “[T]he prior from February 25th of 2010, that’s Riverside County. And the conviction from July 24th of 2013 is San Diego.” The trial court did not expressly order any more amendments.

The trial court’s interlineation of the information did not entirely track its orally ordered amendments. After the interlineations, the strike allegations looked like this:

“FIRST PRIOR, a conviction on or about April 26, 2007 7/24/13 in the Superior Court of the State of California, for the County of Riverside, for the crime of ASSAULT WITH A DEADLY WEAPON . . . weapon in prison in violation [of] Penal Code section 245 4501, subdivision (a), subsection (1) . . . .

“SECOND PRIOR, a conviction on or about Riv Febru ary 25, 2010 in the Superior Court of the State of California, County of Riverside, for the crime of ASSAULT [sic] WITH A DEADLY WEAPON . . . , in violation of Penal Code section 245, subdivision (a), subsection (1) [?] SD . . . .”

Thus, the first strike was correctly alleged, except that the place should have been San Diego County. The second strike was also correctly alleged, except that it had no date or Penal Code section and it had the extraneous notations “Riv” and “SD.”

Defendant admitted the strikes as follows:

“THE COURT: . . . Is it true . . . that on or about July 24, 2013, in the county of San Diego, you were convicted of assault with a deadly weapon, in violation of 4501 of the Penal Code, a strike?

“THE DEFENDANT: Yes.

2. At this point, “4501” was written in but then crossed out again.

“THE COURT: Is it also true that on or about February the 25th of 2010 in the . . . county of Riverside, you were convicted of the crime of assault with a deadly weapon, in violation of section 245, subdivision (a), subsection (1), a strike?

“THE DEFENDANT: Yes.”

Defense counsel never objected.

II

AMENDMENT OF THE INFORMATION AFTER THE JURY WAS DISCHARGED

Defendant contends that, once the jury was discharged, the trial court lost the power to amend the information. He asks us to reach this issue despite his trial counsel’s failure to object to the amendment. In the alternative, he contends that his trial counsel’s failure to object constituted ineffective assistance.

Defendant relies on People v. Tindall (2000) 24 Cal.4th 767. There, the jury found the defendant guilty of the charged offense. He waived a jury trial on the prior conviction allegations, and the trial court discharged the jury. Thereafter, however, the prosecution discovered additional prior convictions. Thus, it moved to amend the information. (Id. at p. 770.) The trial court granted the motion over the defendant’s opposition. (Id. at pp. 770-771.) A new jury found the prior conviction allegations to be true. (Id. at p. 771)

The court phrased the issue before it as follows: “[W]hether a postverdict amendment to an information to add prior conviction allegations is permissible before sentencing but after the jury has been discharged.” (People v. Tindall, supra, 24 Cal.4th at pp. 769-770.)

It then held: “[I]n the absence of a defendant’s forfeiture or waiver, [Penal Code] section 1025, subdivision (b) requires that the same jury that decided the issue of a defendant’s guilt ‘shall’ also determine the truth of alleged prior convictions. Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged. Thus, under the circumstances of this case, we find that the postdischarge amendment, which increased defendant’s prison sentence from four years to 25 years to life, was erroneous.” (People v. Tindall, supra, 24 Cal.4th at p. 782.)

On reading Tindall, one might well ask: Why did the defendant still have the right to have the same jury decide the amended prior conviction allegations under Penal Code section 1025, when he had already waived his right to a jury trial on the priors?

We have found only one post-Tindall case that deals with the amendment of prior conviction allegations after the jury has been discharged. Fortunately, it answers this question.
In People v. Gutierrez (2001) 93 Cal.App.4th 15, the defendant waived a jury trial on allegations that he had prior convictions in California. The jury found him guilty and was discharged. The trial court then found the prior conviction allegations true. (Id. at p. 20.) Later, the prosecution moved to amend the information to allege a prior conviction in Nevada. (Ibid.; see also p. 21.) The defendant objected, but the trial court granted the motion. A new jury found the new prior conviction allegation true. (Id. at p. 21.)

The appellate court held that the trial court erred by allowing the amendment. (People v. Gutierrez, supra, 93 Cal. App.4th at pp. 21-24.) It declared, “Tindall applies here.” (Id. at p. 23.) It noted that the defendant was arguing that “he waived his right to the same jury only on the alleged priors, and not on the post-jury-verdict added prior. . . . Basically, he claims the waiver was not voluntar[y] and knowingly entered as to the unalleged prior.” (Ibid.) “Defendant essentially argues . . . that a waiver as to alleged priors has no effect with respect to newly discovered unalleged priors.” (Ibid.) It then stated, “We agree with defendant’s interpretation . . . .” (Ibid.) “Defendant only waived his statutory right to have the same jury decide . . . the truth issue on the California prior allegations. Defendant did not object to the discharge of the jury because the Nevada state robbery conviction had not yet been alleged.” (Id. at p. 24.)

Under Gutierrez, then, a waiver of a jury trial on the prior convictions that are alleged in the original information is not effective — as a matter of law — as to entirely new prior conviction allegations that are added by amendment later.

Earlier case law flecks out this reading of Gutierrez. It has been held that, if prior conviction allegations are amended in substance after a defendant has already waived a jury trial on them, then the waiver goes out the window. (People v. Hopkins (1974) 39 Cal.App.3d 107, 116-117; People v. Luick (1972) 24 Cal.App.3d 555, 557-559; see also People v. Walker (1959) 170 Cal.App.2d 159, 165-166 [amendment of allegations regarding the offense].) However, if the amendment is only typographical, the jury waiver may stand. (People v. Gary (1968) 263 Cal.App.2d 192, 197; see also People v. Williams (1980) 106 Cal.App.3d 15, 19 [amendment of allegations regarding the offense]; People v. Smylie (1963) 217 Cal.App.2d 118, 122 [same].)

Consistent with this case law, the People argue that “the corrections to the priors were so minor that there was no violation of Penal Code section 1025.” (Capitalization altered, bolding omitted.) In support, they cite People v. McQuiston (1968) 264 Cal.App.2d 410. There, the defendant was charged with petty theft with a prior. The alleged prior was for petty theft on April 20, 1954 in Los Cerritos. At the beginning of trial, this allegation was amended to a conviction for petty theft on February 7, 1951 in Long Beach. (Id. at pp. 412, 416-417.) Ultimately, the trial court ruled that there was insufficient evidence to support the amended allegation; thus, the defendant was found guilty of only misdemeanor petty theft. (Id. at pp. 412, 413.)

On appeal, however, the defendant argued that “since she was not rearraigned on the amended information and did not enter a plea thereto, it was error to proceed with the trial.” (People v. McQuiston, supra, 264 Cal.App.2d at p. 416.) The appellate court disagreed: “The charge remained the same, and it is apparent from the record that the error in date and court was the result of a simple clerical or typographical mistake . . . . While the statute [citation] requires rearraignment and a new plea on an amended information, it is well established that where the amendment relates only to minor changes it is not mandatory. [Citations.] Here the timely correction of the mistake did not change the nature of the offense charged, only the date [citations] and place of the conviction [citations]. (Id. at p. 417.)

Defendant responds that McQuiston is irrelevant, for three reasons. First, he argues that Tindall did not make any exception for “minor” amendments. Tindall, however, was expressly limited to its facts. It involved an amendment that was indisputably substantial — it increased the defendant’s sentence from only 4 years to 25 years to life. Moreover, the court held only that allowing the amendment was erroneous “under the circumstances of this case.” (People v. Tindall, supra, 24 Cal.4th at p. 782, italics added.) Even had it not, “[i]t is axiomatic that cases are not authority for propositions not considered.” [Citation.] ‘The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.’ [Citation.]” (People v. Jennings (2010) 50 Cal.4th 616, 684.)

An exception for minor amendments follows from the reasoning in Tindall, as elaborated in Gutierrez. Tindall held that the amendment there resulted in a violation of the defendant’s statutory right to have the same jury determine both guilt and the truth of the prior conviction allegations. This implicitly (but necessarily) means that the defendant’s waiver of a jury trial on the original prior conviction allegations did not extend to the amended allegations. Gutierrez made this explicit. However, in both Tindall and Gutierrez, the amendment was substantial — it added new prior conviction allegations, and thus it exposed the defendant to additional punishment. As discussed, when a defendant has waived a jury trial on prior conviction allegations, and when the prior conviction allegations are amended typographically and not substantially, the waiver remains binding. This is an exception to Tindall.

Second, defendant points out that McQuiston was decided before Tindall. Tindall, however, did not expressly overrule McQuiston nor any of the cases dealing with minor amendments that McQuiston cited. Moreover, because Tindall involved a substantial amendment, and because it was limited to its facts, it did not overrule these cases implicitly, either.

Third, defendant argues that McQuiston is not on point, because there, the amendment occurred before the jury was discharged; hence, the case did not raise any question as to whether the amendment violated the defendant’s statu-
tory rights under Penal Code section 1025. Indeed, the trial court dismissed the amended allegation as not supported by substantial evidence. Thus, as the appellate court noted, any issues regarding the amended allegation itself were moot. (People v. McQuiston, supra, 264 Cal.App.2d at p. 413.)

We agree that McQuiston did not deal with the precise issue that is before us. Nevertheless, it is an overarching rule that “[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” (Pen. Code, § 960.) McQuiston is one instance of the application of this general principle; People v. Gary, supra, 263 Cal.App.2d 192, holding that a jury waiver remains effective after a minor or typographical amendment, is another. We conclude that Penal Code section 960 also qualifies Tindall.

We turn, then, to whether the amendments here were substantial, on the one hand, or minor, clerical, or typographical on the other hand.

Two of the amendments (of the second prison prior and the second prior serious felony) changed the date and place of the conviction from March 5, 2010 in Riverside County to July 24, 2013 in San Diego County. However, they did not change the offense (assault with a deadly weapon). Under McQuiston, such an amendment as to date and place is minor. Defendant does not claim and, on this record, cannot show that these amendments had a prejudicial effect on his defense, on his decision to waive a jury trial, on his decision to admit the priors, or otherwise.

The third amendment (of the first strike prior) was different. It changed the date, the place, and the offense. In short, it substituted an entirely different conviction, involving different underlying conduct. If this is minor, we cannot imagine what would it would take to be major. (See People v. McQuiston, supra, 264 Cal.App.2d at p. 417 “since the amendment related only to minor changes and did not alter the nature of the charge alleged, it was not error to fail to arraign defendant on the amended information or take her plea,” italics added; see also People v. Burnett (1999) 71 Cal.App.4th 151, 164-178 [trial court erred by allowing prosecution to amend so as to convict defendant of possession of different gun than shown at the preliminary hearing, though on same date].)

The People argue that defendant had notice of the true date, place, and nature of the prior convictions because he had received the “prior conviction packets” in discovery. This argument falls short, for three reasons.

First and foremost, the People do not explain why Tindall would not apply, even assuming defendant did have notice. Tindall turns on the statutory right to a trial by the same jury, not on the right to notice. At most, it could be argued that if, when defendant waived a jury trial, he already had notice that the People intended to rely on the convictions alleged in the amended information, then his waiver remained in effect even after the amendment. However, the People cite no authority for this proposition.

Second, the record does not show when the prosecution produced prior conviction packets to the defense. It shows only that defense counsel did receive them; he discussed them with defendant on the date set for a court trial on the priors. If the prosecution did not produce them until after the jury was discharged, then defendant was still deprived of his right to the same jury under Penal Code section 1025.

Third, even after defendant received the packets, he had no way of knowing that the prosecution intended to rely on the actual July 24, 2013 conviction in San Diego County for assault in prison to prove up the alleged April 26, 2007 conviction in Riverside County for assault with a deadly weapon. The probation report shows that defendant did in fact have an April 26, 2007 juvenile adjudication in Riverside County for a violation of Penal Code section 245, subdivision (a)(1). He would naturally have assumed that the allegation related to this.

The People also argue that defendant had notice that they would be relying on the conviction for assault in prison, because (1) it was alleged as a prior serious felony enhancement and a prior prison term enhancement (although with the wrong date and place), and (2) it was reflected in the prior conviction packets (with the right date and place). Defendant did not have the necessary notice, however, that they would be relying on it as a strike. (See People v. Mancebo (2002) 27 Cal.4th 735, 742-749; People v. Nguyen (2017) 18 Cal. App.5th 260, 265-270.)

The People also point out that the trial court told defendant that the same two priors were alleged three ways: as prison priors, as prior serious felonies, and as strikes. Moreover, defendant said he understood. However, the trial court’s statement did not correctly describe the information as it stood at that point. Moreover, the statement was unclear. Which two priors were alleged three ways? The information alleged three different priors. Was defendant supposed to ignore the March 5, 2010 prior (later amended to a July 24, 2013 prior) and to assume it was the April 26, 2007 prior that was alleged three ways? Or vice versa? Or something else? Defendant cannot be understood as agreeing that he already knew what the prosecution would seek to charge him with later. Thus, the trial court erred by allowing the prosecution to amend the first strike prior allegation after the jury had been discharged.

The error, however, was not preserved for appeal. Trial counsel’s failure to object constituted a forfeiture. (People v. Saunders (1993) 5 Cal.4th 580, 589-592.) In Saunders, the trial court erred by discharging the jury after it found the defendant guilty but before it determined the truth of the prior conviction allegations. (Id. at p. 586.) The Supreme Court held that the defendant forfeited this error by failing to object to the discharge of the jury. (Id. at p. 591.) Here, by contrast, defendant had no reason to object to the discharge of the jury; at that point, he had waived a jury on the original prior conviction allegations, and the allegations had not yet
been amended. Nevertheless, he had an obligation to object as soon as the error did become apparent. ""An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . "" [Citation.]" (Id. at pp. 589-590.) Like the defendants in both Tindall and Gutierrez, he could have objected when the prosecution asked to amend the information.

As mentioned, defendant contends that his trial counsel’s failure to object constituted ineffective assistance. "An attorney’s performance is constitutionally deficient if (1) it falls below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. [Citation.] . . . "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.' [Citations.]" (People v. Grimes (2016) 1 Cal.5th 698, 735.)

Here, there could be no satisfactory explanation for defense counsel’s failure to object. (See People v. Peyton (2009) 176 Cal.App.4th 642, 654 [there could be no satisfactory explanation for failure to object to adding new count].) Why on earth would you let your client receive a 25-years-to-life sentence, if you could avert that simply by objecting? Certainly the People do not suggest any explanation.

In sum, then, we conclude that the trial court properly allowed the prosecution to amend the second prison prior enhancement and second prior serious felony. However, defense counsel rendered ineffective assistance by failing to object to the amendment of the first strike. Accordingly, the first strike must be stricken and we must remand for resentencing.

[ PARTS III, IV, AND V., See FOOTNOTE*, Ante ]

VI

DISPOSITION

The true finding on the first strike is reversed and stricken. The sentence is reversed. In all other respects, the judgment is affirmed. On remand, the trial court must resentence defendant in accordance with this opinion.

The clerk of this court is directed to send a copy of this opinion to the State Bar as soon as the remittitur issues. (Bus. & Prof. Code, § 6086.7, subd. (a)(2).)

RAMIREZ P. J.

We concur: MILLER J., RAPHAEL J.
I. FACTUAL AND PROCEDURAL BACKGROUND

A. Preliminary hearing testimony and evidence

On January 14, 2006, Chau Nguyen was sitting in his car in the driveway of his residence when someone shot him twice in the head, killing him. The contemporaneous police investigation did not uncover any viable leads and no arrests were made.

San Jose Police Detective Erin Fong was assigned the case in 2010, and in July of that year, she learned that an informant claimed to have material information about Nguyen’s murder. On July 27, 2010, Fong interviewed the informant, Alfonso Chavoya, who was in custody in an unrelated case.

In that interview, Chavoya told Fong that in late 2005 or early 2006, he went to see his girlfriend, Vicky Garcia, at her house. When he arrived, he did not see Vicky, so he wandered through the house looking for her. As he entered the back bedroom, he saw two men, Augustin Rocha and Garcia, cleaning a gun. Chavoya said that both Rocha and Garcia were members of Triple L and their gang monikers were “Sad Boy” and “Jeez,” respectively. According to Chavoya, the gun he saw them cleaning was a .22 revolver. In addition to cleaning the exterior of the handgun, Chavoya saw Garcia wiping the bullets before loading them into the weapon. When Rocha and Garcia noticed that Chavoya was watching them, they told him to get out of the bedroom.

Chavoya told Fong he left the room as directed, and left the house, too, because he could not find Vicky. He returned about 9:30 that evening. He and Vicky were in the living room when Rocha ran in, followed by Garcia. Rocha was saying something like “‘What do I do?’ ” and Garcia yelled “‘Where is the gun?’ ” and “‘Get rid of it.’ ” The two men went down the hallway to talk to Vicky’s mother, who took “‘Where is the gun?’” and “‘Get rid of it.’” The two men when Fong identified them with photographs of the victim, the victim’s house and the surrounding area, as well as photographs of Rocha and Felisa. Garcia said she did not recognize the area where the victim lived. Garcia denied knowing anything about Nguyen’s murder, and denied knowing either Rocha or Felisa, even when Fong identified them by name. Fong said that Rocha also went by “Sad Boy” or “Adrian,” but Garcia denied knowing anyone who went by those names. Garcia was not “extremely cooperative” during the half-hour interview and provided no information to Fong about the murder.

Following the interview, police intercepted a phone call between Garcia and Cruz Castro.3 Garcia told Cruz that his parole agent told him he had to talk to homicide investigators that afternoon. He asked Cruz what his “boundaries are for that interview and if he should go.” Cruz told Garcia he had to go, but “[a]ll you do is just, like, you don’t know nothing.” Cruz also told Garcia that, after he met with police, Garcia needed to report “‘to [his] homies’ . . . [and] let them know what’s happening with you.” Cruz advised Garcia that “‘if it starts getting sticky [during the interview], just clam up.’” Garcia said he was “‘just going to straight up [say] I don’t know nothing.’”

At the interview, Fong informed Garcia she was investigating a cold case homicide and his name, along with other names, had come up during that investigation. She showed him photographs of the victim, the victim’s house and the surrounding area, as well as photographs of Rocha and Felisa. Garcia said he did not recognize the victim, though he recognized the area where the victim lived. Garcia denied knowing anything about Nguyen’s murder, and denied knowing either Rocha or Felisa, even when Fong identified them by name. Fong said that Rocha also went by “Sad Boy” or “Adrian,” but Garcia denied knowing anyone who went by those names. Garcia was not “extremely cooperative” during the half-hour interview and provided no information to Fong about the murder.

Based on the information provided by Chavoya, Fong obtained a court order to monitor and record Garcia’s phone. Due to the length of time that had elapsed since the murder, Fong attempted to instigate conversation about the crime among the subjects by calling them in for interviews, interviewing their family members, and distributing flyers in the neighborhood promising a reward in exchange for information regarding the homicide. Fong spoke to Garcia’s cousin, Louie, as well as Garcia’s parole agent. On February 10, 2011, Fong asked Garcia’s parole agent to tell Garcia that San Jose Police wanted to talk to him the following day about a homicide case.

The morning of February 11, police intercepted a phone call between Garcia and Cruz Castro.3 Garcia told Cruz that his parole agent told him he had to talk to homicide investigators that afternoon. He asked Cruz what his “boundaries are for that interview and if he should go.” Cruz told Garcia he had to go, but “[a]ll you do is just, like, you don’t know nothing.” Cruz also told Garcia that, after he met with police, Garcia needed to report “‘to [his] homies’ . . . [and] let them know what’s happening with you.” Cruz advised Garcia that “‘if it starts getting sticky [during the interview], just clam up.’” Garcia said he was “‘just going to straight up [say] I don’t know nothing.’”

At the interview, Fong informed Garcia she was investigating a cold case homicide and his name, along with other names, had come up during that investigation. She showed him photographs of the victim, the victim’s house and the surrounding area, as well as photographs of Rocha and Felisa. Garcia said he did not recognize the victim, though he recognized the area where the victim lived. Garcia denied knowing anything about Nguyen’s murder, and denied knowing either Rocha or Felisa, even when Fong identified them by name. Fong said that Rocha also went by “Sad Boy” or “Adrian,” but Garcia denied knowing anyone who went by those names. Garcia was not “extremely cooperative” during the half-hour interview and provided no information to Fong about the murder.

Following the interview, police intercepted a phone call between Garcia and Frank Garcia, aka “Punch.” Garcia told Frank that he had just talked to the police about a homicide and that he had previously “cleared it with the big homie.” After asking Frank to “guess what it is,” Garcia asked if Frank “remember[ed] what [Rocha] did?” Frank asked why they wanted to talk to Garcia about that, since he “didn’t do nothing.” Garcia said he did not know, but he was “stressing the fuck out.” He told Frank that when the police said they knew that he (Garcia) and Felisa used to date, Garcia replied, “I don’t know what the fuck you’re talking about.” Frank

2. Since Vicky shares the same last name as the defendant, we henceforth refer to her by her first name.

3. Fong testified that Vicky’s house was within walking distance of the house where Nguyen was murdered.

4. According to Fong, she had the revolver sent to the crime lab for testing but, for reasons which are not disclosed in the record, the crime lab was unable to determine whether the revolver was used in Nguyen’s murder.

5. As discussed below, another person interviewed by police in this case shares Castro’s surname, so we refer to both men by their first names.
asked if someone was “telling on” Garcia, and Garcia said
that someone “pointed the finger towards me.”

Fong interviewed Felisa on February 15, 2011. In that in-
terview, Felisa said that she and Garcia “drank beer and had
sex,” but never had any conversations.

On February 23, 2011, Fong interviewed Garcia a sec-
time. Garcia again denied knowing Rocha, Felisa, or
Nguyen, and denied recognizing any of those people when
showed their photographs. Fong asked if he had any affilia-
tion with Triple L, but Garcia said he did not. Fong then told
Garcia that in 2005 he and Rocha had been stopped by police
together. Garcia replied that Rocha “looked familiar” and he
“must have kicked it with him.”

Fong also showed Garcia a photograph of his brother,
Sammy Garcia, and Garcia identified him properly. He de-
ied that Sammy was involved with Triple L, however. Fong
displayed a photograph of Garcia’s aunt, Suzanne, who Cha-
voya said had burned Rocha’s sweater on the night of the
murder. Garcia acknowledged the photo was of his aunt,
though he refused to say her name.

In March 2012, Fong interviewed Jose Castro about the
2006 homicide. Jose admitted he had been an active member
in Triple L in 2006. About three or four months after the kill-
ing, Jose was walking down the street when he saw Rocha,
also a member of Triple L, driving by. Rocha pulled over to
talk to him and admitted shooting Nguyen. Rocha told Jose
he tried to carjack “an Asian dude,” and shot him in the head.
Afterward, he ran through the nearby creek to get to Garcia’s
house. Jose said that Garcia was in Triple L as well, and Jose
believed that Garcia and Rocha were “tight.”

After qualifying as a gang expert, Fong testified it was
her opinion that Triple L was a criminal street gang, and that
Garcia and Rocha were active participants in that gang. Fong
also opined that, by withholding information about Rocha’s
involvement in the 2006 homicide from police, Garcia was
acting to benefit Triple L.

B. Information and section 995 motion

On January 29, 2015, Garcia was charged by information
with one felony count of participating in a criminal street
gang (§ 186.22, subd. (a), count 1) and one felony count of
conspiracy to obstruct justice (§ 182, subd. (a)(5), count 2).
In the course of the conspiracy, Garcia allegedly made false
statements to police during his February 2011 interviews
when he denied knowing anything about the 2006 homicide,
denied knowing Felisa, and denied knowing Rocha. The in-
formation further alleged Garcia had three prison prior con-
victions under section 667.5, subdivision (b).

Garcia moved to dismiss the information pursuant to sec-
tion 995. On March 1, 2016, the trial court granted the mo-
tion and dismissed the case.6

The People timely appealed.

6. Although the motion to dismiss was principally directed at
count 2, the People conceded that count 1 could not stand on its
own and must be dismissed if the trial court granted the motion as to count
2.

II. DISCUSSION

A. Applicable legal principles and standard of
review

Pursuant to section 995, a court properly sets aside all or
part of an information upon finding that the defendant “had
been committed without reasonable or probable cause.”
(§ 995, subd. (a)(2).) “ ‘Reasonable or probable cause’
means such a state of facts as would lead a [person] of
ordinary caution or prudence to believe, and conscientiously
entertain a strong suspicion of the guilt of the accused.”
( People v. Mower (2002) 28 Cal.4th 457, 473.) The showing
required at this stage “is exceedingly low” ( Salazar v. Su-
pe rior Court (2000) 83 Cal.App.4th 840, 846), and an informa-
tion “should be set aside only when there is a total absence
of evidence to support a necessary element of the offense
charged.” ( Id. at p. 842, quoting People v. Superior Court
(Jurado) (1992) 4 Cal.App.4th 1217, 1226.)

In reviewing a section 995 motion “the appellate court in
effect disregards the ruling of the superior court and directly
reviews the determination of the magistrate holding the defen-
dant to answer.” ( People v. Latiwa (1983) 34 Cal.3d 711, 718;
accord, Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1072
(Lexin.).) Insofar as the motion “rests on consideration of the
evidence adduced, we must draw all reasonable inferences
in favor of the information [citations] and decide whether
there is probable cause to hold the defendant[ ] to answer, i.e.,
whether the evidence is such that ‘a reasonable person could
harbor a strong suspicion of the defendant’s guilt.’ ” ( Lexin,
supra, at p. 1072.) But “where the facts are undisputed, the
determination of probable cause ‘constitute[s] a legal con-
clusion which is subject to independent review on appeal.’ ”
( People v. Superior Court (Bell) (2002) 99 Cal.App.4th 1334,
1339, quoting People v. Watson (1981) 30 Cal.3d 290, 300.)

B. Adequacy of the record

Before turning to the substantive question presented, we
address Garcia’s claim that the appeal must be rejected due to
the People’s failure to provide an adequate record for review.
Garcia asserts that his section 995 motion was argued to the
trial court on four separate dates in 2016, specifically Febru-
ary 4, February 5, February 18 and March 1, but the record on
appeal contains only the reporter’s transcript from the final,
dispositive March 1 hearing.

It is well-settled that, on appeal, the burden is on the ap-
pellant to provide an adequate record, and “[i]n numerous
situations, appellate courts have refused to reach the mer-
its of an appellant’s claims because no reporter’s transcript of
a pertinent proceeding or a suitable substitute was pro-
vided.” ( Foust v. San Jose Construction Co., Inc. (2011) 198
Cal.App.4th 181, 186.) That rationale for this general rule
is grounded in “the cardinal rule of appellate review that a
judgment or order of the trial court is presumed correct
and prejudicial error must be affirmatively shown.” ( Id. at p.
187.) When the record on appeal does not include the materi-
als necessary to demonstrate prejudicial error, the appellate
court cannot conduct the meaningful review necessary to decide the matter.

In this case, however, the record on appeal is adequate, despite the failure to include reporter’s transcripts from the three February 2016 hearings. That is because the standard of review in appeals from orders granting section 995 motions makes the trial court’s ruling, let alone the arguments of counsel leading up to that ruling, almost entirely irrelevant. (Lexin, supra, 47 Cal.4th at p. 1072.) We instead review the determination of the magistrate holding the defendant to answer based on the evidence adduced at the preliminary hearing. (People v. Laiwa, supra, 34 Cal.3d at p. 718.) Accordingly, we find the record on appeal adequate for our review.

C. Conspiracy to obstruct justice

In this case, we must decide whether the evidence presented at the preliminary hearing was “such that a reasonable person could harbor a strong suspicion of the defendant’s guilt.” (Lexin, supra, 47 Cal.4th at p. 1072.) We think it was.

Section 182, subdivision (a)(5), makes it a criminal act for two or more persons to conspire “to pervert or obstruct justice, and the due administration of the laws.” A conviction for conspiracy requires proof of four elements: (1) an agreement between two or more people, (2) who have the specific intent to agree or conspire to commit an offense, (3) the specific intent to commit that offense, and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy.” (People v. Vu (2006) 143 Cal.App.4th 1009, 1024.) As explained by the California Supreme Court in Lorenson v. Superior Court (1950) 35 Cal.2d 49, many of the offenses, such as “[b]ribery, . . . perjury, falsifying evidence, and other acts which would have been considered offenses against the administration of justice at common law are made criminal by legislative enactment.” (Id. at p. 59.) Unlike those more specific statutes, section 182, subdivision (a)(5) “is a more general section making punishable a conspiracy to commit any offense against public justice.” (Lorenson, supra, at p. 59.)

In this case, the People presented evidence at the preliminary hearing which showed that, prior to being interviewed by police, Garcia spoke with Cruz, a fellow gang member who appeared to have some authority within the gang. In that conversation, Garcia agreed that, during the police interview, he would tell police he did not know anything about the murder. He further agreed that, after the interview, he would “report to [his] homies.”

At his first interview with police, Garcia falsely stated he did not know Rocha or Felisa. After the interview, he spoke with another gang member, Frank, and, in that conversation, implied that the police interview was about “what [Rocha] did.” Garcia told Frank that, when confronted by police with their knowledge that he and Felisa used to date, he again denied knowing what they were talking about.

In his second interview with police, Garcia continued to deny knowing Rocha or Felisa, again denying recognizing the victim, and denied any affiliation with Triple L. It was only when confronted with evidence that he and Rocha had been stopped by police together that he said Rocha “looked familiar.” He persisted in downplaying their relationship though, saying they were casual acquaintances at most.

As outlined above, in reviewing this evidence, we “draw all reasonable inferences in favor of the information [citations] and decide whether there is probable cause to hold the defendant[] to answer, i.e., whether the evidence is such that ‘a reasonable person could harbor a strong suspicion of the defendant’s guilt.’ ” (Lexin, supra, 47 Cal.4th at p. 1072.) We think probable cause is clear and that a reasonable person would harbor a strong suspicion of Garcia’s guilt. To recap: (1) Garcia entered into an agreement with Cruz; (2) with the specific intent to agree to obstruct the police investigation and protect his fellow gang member; (3) with the specific intent to obstruct the investigation; and (4) made false statements to the police in order to obstruct the investigation into Nguyen’s murder. (See People v. Vu, supra, 143 Cal.App.4th at p. 1024 [elements of conspiracy].)

Garcia argues, citing People v. Redd (2014) 228 Cal.App.4th 449 (Redd), that the trial court properly dismissed the case against him because in order to bring an action for conspiracy to obstruct justice under section 182, subdivision (a)(5), there must be some reference to a defined criminal offense. Garcia reads this decision too broadly.

In Redd, the defendant, an inmate, was charged with conspiring to obstruct justice based on a scheme in which he arranged to have a prison cook smuggle tobacco into the prison for him. (Redd, supra, 228 Cal.App.4th at p. 454.) On appeal, defendant argued that bringing tobacco into a prison “does not pervert or obstruct justice or the due administration of the laws.” (Id. at p. 460.) The court agreed, noting that the sweeping language of section 182, subdivision (a)(5) must be “‘given content by the cases,’ ” so that the statute “‘give[s] adequate guidance to those who would be law-abiding, . . . advise[s] defendants of the nature of the offense with which they are charged, or . . . guide[s] courts in trying those who are accused.’ ” (Redd, supra, at p. 463, quoting Davis v. Superior Court (1959) 175 Cal.App.2d 8, 14.) Accordingly, it was incumbent on the prosecution to explain how conspiring to smuggle tobacco into a prison “constitute[s] a perversion or obstruction of justice or the due administration of the laws.” (Redd, supra, at p. 463.) Because there was no separate statute prohibiting the act of bringing tobacco into a state prison nor was there any claim by the prosecution that doing so would be a crime under common law, the court found that there was “insufficient evidence” to support defendant’s conviction under section 182, subdivision (a)(5). (Redd, supra, at p. 464.)

There is nothing in Redd which requires that a conspiracy to obstruct justice be founded upon a separate, specific criminal statute to survive a section 995 motion to dismiss.
Rather, there must be some showing that the defendant’s actions would obstruct justice. It goes without saying that affirmatively lying to police officers in the course of a criminal investigation for the purpose of shielding a fellow gang member from further scrutiny and, potentially, prosecution would fit that definition. Accordingly, it makes no difference whether Garcia’s statements to police would be sufficient to establish violations of section 32 (accessory after the fact) or section 148 (obstructing law enforcement officer in performance of his or her duties), as the trial court seemed to suggest. Based on the foregoing, the trial court erred in granting Garcia’s section 995 motion.

III. DISPOSITION

The order dismissing the information is reversed.

Premo, Acting P.J.

WE CONCUR: Mihara, J., Grover, J.