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SUMMARIES

Class Actions

Class action alleging violation of Golden Gate Bridge users’ privacy rights constitutes “local controversy” excepted from removal under CAFA (Schroeder, J.)  

_Kendrick v. Conduent State and Local Solutions, Inc._

9th Cir.; December 13, 2018; 18-16988

The court of appeals affirmed a district court remand order. The court held that a class action alleging the misuse of Golden Gate Bridge users’ private information constituted a local controversy excepted from removal under Class Action Fairness Act (CAFA).

Sumatra Kendrick and Michelle Kelly filed a putative class action in San Francisco Superior Court against the Golden Gate Bridge, Highway and Transportation District, the Bay Area Toll Authority, and Conduent State and Local Solutions, Inc., a private company that contracted to operate the Golden Gate Bridge toll system. Plaintiffs alleged that defendants violated the privacy of a class of persons using the Golden Gate Bridge, in violation of Cal. Street and Highway Code §31490 and other state laws, by collecting their personally identifiable information when they drove over the bridge and sharing this information with various unauthorized third parties. Conduent removed the case to federal district court under CAFA.

Plaintiffs moved for remand, arguing that removal was precluded under 28 U.S.C. §1332(d)(5)(A) because Conduent, even though a private company, was acting on behalf of the state. Section 1332(d)(5)(A) provides that CAFA does not apply to proposed classes where “the primary defendants are states, state officials or other governmental entities...” The district court granted remand, finding that because Conduent was acting as a state entity, §1332(d)(5)(A) precluded removal.

The court of appeal affirmed, holding that even though Conduent’s status as an instrumentality of the state was determinable, removal was nonetheless precluded under §1332(d)(4), the “local controversy” exception. Section 1332(d)(4) applies when: (1) more than two-thirds of the proposed plaintiff class(es) are citizens of the state in which the action was originally filed, (2) there is at least one in-state defendant against whom “significant relief” is sought and “whose alleged conduct forms a significant basis for the claims asserted” by the proposed class, (3) the “principal injuries” resulting from the alleged conduct of each defendant were incurred in the state of filing, and (4) no other class action “asserting the same or similar factual allegations against any of the defendants” has been filed within three years prior to the present action. The court acknowledged that Kelly had filed a class action in state court alleging similar theories on September 7, 2016, some 14 months before this case was filed, which case was removed to federal court on November 28, 2016, but disagreed with the district court that Kelly’s filing was disqualifying. Kelly voluntarily dismissed her individual claims shortly after removal and became a plaintiff in Kendrick’s case. The district court subsequently ordered joinder of the two cases. Kelly’s case thus never proceeded independently. When the district court remanded this case to state court, it remanded one case that included all the parties and potential parties to both the Kelly and Kendrick actions. Under these circumstances, the “no prior class action” prerequisite to removal, intended to ensure that controversies giving rise to multiple class actions be heard in one proceeding, was satisfied. Judge Watford dissented, finding that Kelly’s prior filing precluded remand under §1332(d)(4).

Consumer Protection

Abuse of discretion to tie Song-Beverly attorney fee award to amount of prevailing plaintiff’s damages (Fields, J.)  

_Warren v. Kia Motors America, Inc._

C.A. 4th; December 12, 2018; E068348

The Fourth Appellate District affirmed in part and reversed in part trial court orders. The court held that the trial court erred in reducing the prevailing plaintiff’s attorney fee award in an action brought under the Song-Beverly Consumer Warranty Act in order to tie the fee award to the plaintiff’s damages award.

Shirlean Warren sued Kia Motors America, Inc. under the Song-Beverly Consumer Warranty Act. The case was tried to a jury, which rendered judgment in favor of Warren and awarded her $17,455.57 in damages. Warren moved for $526,582.89 in attorney fees ($351,055.26 in lodestar fees, times a multiplier of 1.5), plus $40,151.11 in costs and expenses.

The trial court awarded Warren $115,848.24 in attorney fees and $24,436.65 in costs. The court calculated the fee award by applying a negative multiplier of 33 percent (33%) to the lodestar figure of $351,055.26. In calculating Warren’s costs, the court disallowed $9,832.46 in prejudgment interest and $5,882 for court reporters’ trial transcripts.

The court of appeal reversed in part, holding that the trial court abused its discretion in applying a 33% negative multiplier to Warren’s requested lodestar attorney fees of $351,055. Part of the court’s expressed purpose in applying the negative multiplier was to tie the attorney fee award to a proportion of Warren’s modest damages award. This was error. It is inappropriate and an abuse of a trial court’s discretion to tie an attorney fee award to the amount of the prevailing buyer/plaintiff’s damages or recovery in a Song-Beverly
Act any time,” “in any manner, at any place, for any purpose,” owners of water rights the right to use their Mill Creek water misinterpreted the decree. First, the decree expressly grants finding that the decree did not give Orange Cove these rights. California Daily Opinion Service

Energy and Natural Resources

Water rights decree grants right to use water “at any time” and “in any manner” (Hull, Acting P.J.)

Orange Cove Irrigation District v. Los Molinos Mutual Water Company

C.A. 3rd; December 12, 2018; C078323

The Third Appellate District reversed a judgment. The court held that a 1920 decree adjudicating water rights does not limit owners’ rights to use their water when and how they choose.

In 1920, the Tehama County Superior Court issued a stipulated decree adjudicating water rights in Mill Creek, which drains a watershed of some 135 square miles. By succession of interest, Los Molinos Mutual Water Company is the current water master of Mill Creek. As water master, it diverts and apportions the water during the irrigation season and delivers it to its shareholders and the other owners of decreed water rights through a system of canals and ditches. In 2000, Orange Cove Irrigation District acquired decreed rights to a portion of the water diverted from Mill Creek. A dispute arose between Los Molinos and Orange Cove over Orange Cove’s proposed use of that water. Orange Cove filed suit, seeking a declaration that it had the right under the 1920 decree (1) to use water appropriated to it on a year around basis and not only during the irrigation season; (2) to use or transfer its water outside of the creek’s watershed; and (3) to make these changes in the use and location of use without obtaining prior approval of Los Molinos or the trial court.

The trial court rendered judgment in favor of Los Molinos, finding that the decree did not give Orange Cove these rights.

The court of appeal reversed, holding that the trial court misinterpreted the decree. First, the decree expressly grants owners of water rights the right to use their Mill Creek water “at any time,” “in any manner, at any place, for any purpose,” subject only to any “agreement or arrangement such party may make with any other person or corporation.” Nothing in the decree prohibits owners from diverting or using Mill Creek water outside of the irrigation season. Similarly, nothing in the decree prohibits owners from diverting water outside of the creek’s watershed. Water diverted from Mill Creek may be used anywhere. The historical use of water within Los Molinos’s service area does not alter the decree’s express and unambiguous terms. Finally, an owner does not require the prior approval of either Los Molinos or the trial court to change its water use. In finding otherwise, the trial court created a condition that does not exist in the decree.

Family Law

Dependency court’s express finding of no risk to minor children undermined exercise of dependency jurisdiction (Manella, P.J.)

In re Israel T.

C.A. 2nd; November 21, 2018; B286821

The Second Appellate District reversed a dependency court order. The court held that the dependency court’s express finding that parents posed no risk to their minor children undermined the court’s exercise of dependency jurisdiction.

The Los Angeles County Department of Children and Family Services initiated dependency proceedings as to the minor children of Vicente and Isabel T. after police discovered baggies of what appeared to be cocaine or methamphetamine residue in their home. Vicente and Isabel denied any drug use. Their adult son, who lived in the home, confirmed that his parents did not use drugs.

At hearing, the dependency court found true under Welf. & Inst. Code §300(b) that there was “a…risk that the children will suffer…physical harm,” and that Vicente and Isabel “created an endangering home environment for the children in that trace amounts of methamphetamine were found in the children’s home within access of the children.” In making its findings, the court struck the word “substantial” before the word “risk,” and struck the word “serious” before the word “physical harm.” Turning to disposition, the court noted that Vicente and Isabel continued to care for the children and to meet their special needs, that there was “no evidence of abuse or neglect,” and that Vicente and Isabel had not been charged with any drug offenses. The court stated: “I don’t believe these parents constitute any kind of risk to the children.” Proceeding under §360(b), the court ordered Vicente and Isabel to participate in random drug testing for the next six months, to complete a parenting class, and to permit no illegal drugs or substances in their home. The county was authorized to make unannounced home calls to monitor the family and as-
sist the parents. The court released Israel and Isabel to the care of Vicente and Isabel.

The court of appeal reversed the jurisdictional order, holding that it was unsupported by the dependency court findings. The dependency court’s own comments in returning the children to their parents refuted any inference that it found the parents posed a serious risk to their children’s physical wellbeing. Although the county argued that the evidence of drug residue in the home supported a finding that the children were at substantial risk of serious harm, the dependency court’s failure to make such a finding rendered it immaterial that the evidence might have supported such a finding.

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**Family Law**

**Issuance of prior domestic violence restraining order does not compel issuance of renewed order (Simons, Acting P.J.)**

**In re Marriage of Martindale and Ochoa**

C.A. 1st; December 7, 2018; A152825

The First Appellate District affirmed a trial court order. The court held that the granting of a prior domestic violence restraining order did not, standing alone, compel the issuance of a renewed order.

In 2013, Heather Martindale filed a request for a domestic violence restraining order against husband Raymond Ochoa. At hearing, she testified that Ochoa was often jealous and he threatened to “hurt,” “kill,” and “destroy” her, and sometimes physically restrained her when they argued. The court granted a three-year restraining order. In 2016, Martindale requested a permanent renewal of the prior order. At hearing, Martindale alleged, among other things, Ochoa’s deliberate violation of the restraining order on three occasions. Ochoa denied having deliberately violated the restraining order, testifying that on each of the three occasions that he inadvertently found himself in Martindale’s proximity, he immediately left. He also presented testimony from a local gym employee confirming that Martindale intentionally put herself in a situation where she could encounter Ochoa, by joining his gym. On this record, Martindale failed to demonstrate a reasonable apprehension of future abuse.

**Family Law**

**Noncompliance with UCCJEA notice requirements precluded finding that foreign nation’s child custody proceeding substantially complied with UCCJEA (Grimes, J.)**

**W.M. v. V.A.**

C.A. 2nd; December 13, 2018; B287735

The Second Appellate District reversed a trial court order and remanded. The court held that lack of compliance with Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) notice requirements precluded a finding that another nation’s exercise of jurisdiction over a child custody case was “substantially in conformity with” the UCCJEA.

On June 7, 2017, a Belarus court issued a decree finding the place of residence of baby L. to be the place of residence of the baby’s mother, V.A., in Belarus. On July 20, 2017, baby L.’s father, W.M., who was unaware of the Belarus decree, filed a family court petition in California, seeking legal and physical custody of baby L. A few days later, the trial court granted father’s ex parte request for temporary emergency orders on child custody and visitation. V.A. responded with a motion to quash the orders on the ground that California did not have jurisdiction to issue child custody orders in this case.

The trial court granted V.A.’s motion to quash, finding that the Belarus residency action was a child custody proceeding within the meaning of the UCCJEA, and the Belarus court had jurisdiction “substantially in conformity with” the UCCJEA. Based on these findings, the court found it could not exercise its jurisdiction.

The court of appeal reversed, holding that the family court erred in finding that the Belarus decree was substantially in conformity with UCCJEA requirements. The UCCJEA, at Fam. Code 3425(a), mandates that “before a child custody determination is made,” notice and an opportunity to be heard must be given to all persons entitled to notice. Here, W.M. received no notice of the Belarus action. Notice was also not given “in a manner reasonably calculated to give actual notice,” as required under §3408(a). The Belarus court accord-
ingly did not have “jurisdiction substantially in conformity” with UCCJEA standards. The family court therefore erred in granting mother’s motion to quash and refusing to exercise its jurisdiction.

Government

Restrictions on contraceptive care under ACA warrant preliminary injunctive relief as to plaintiff states only (Wallace, J.)

State of California v. Azar

9th Cir.; December 13, 2018; 18-15144

The court of appeals affirmed in part and vacated in part a district court order, and remanded. The court held that although preliminary injunctive relief was appropriate as to the five individual states challenging the enforcement of interim final rules (IFRs) limiting Affordable Care Act (ACA) coverage for contraceptive care, a nationwide injunction was unwarranted.

Federal agencies issued two IFRs exempting employers with religious and moral objections from the ACA requirement that group health plans cover contraceptive care without cost sharing. California, Delaware, Maryland, New York, and Virginia sued to enjoin the enforcement of the IFRs, contending that the IFRs will cause them to suffer actual injury in the form of additional state expenditures because women who lose coverage will seek contraceptive care through state-run programs or programs that the states are responsible for reimbursing. They alleged that the IFRs are invalid under the Administrative Procedure Act (APA) because they were enacted without notice and comment.

Finding venue proper in the Northern District of California, the district court found that plaintiffs had standing to sue and had established a likelihood of prevailing on the merits of their APA. It granted a nationwide preliminary injunction.

The court of appeals affirmed in part, holding that the district court properly found proper venue, standing, and a likelihood of prevailing on the merits, but abused its discretion in issuing a nationwide injunction. The scope of the district court’s remedy must be no broader and no narrower than necessary to redress the injury shown by plaintiffs. Although plaintiffs argue that complete relief to them would require enjoining the IFRs in all of their applications nationwide, the record belies that contention. To the contrary, an injunction that applies only to the plaintiff states would provide complete relief to them by preventing the economic harm extensively detailed in the record. Although that record was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states. The injunction thus needed to be narrowed to redress only the injury shown as to the plaintiff states. The court vacated that portion of the injunction barring enforcement of the IFRs in other states and remanded. Judge Kleinfeld dissented, finding that plaintiffs lack standing because the injury complained of is self-inflicted—it arises solely because of plaintiff states’ legislative decisions to pay the costs of contraceptive services from their public fiscs.
STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK, Plaintiffs-Appellees,
v.
ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; R. ALEXANDER ACOSTA, in his official capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; STEVEN TERNER Mnuchin, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY, Defendants,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND, Intervenor-Defendant-Appellant.

No. 18-15166
United States Court of Appeals for the Ninth Circuit
D.C. No. 4:17-cv-05783-HSG

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK, Plaintiffs-Appellees,
v.

No. 18-15255
United States Court of Appeals for the Ninth Circuit
D.C. No. 4:17-cv-05783-HSG

Appeals from the United States District Court for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding
Argued and Submitted October 19, 2018
San Francisco, California
Filed December 13, 2018
Opinion by Judge Wallace
COUNSEL

State Of California; State Of Delaware; Commonwealth Of Virginia; State Of Maryland; State Of New York, for Plaintiffs-Appellees.

Alex M. Azar II, Secretary of the United States Department of Health and Human Services; U.S. Department Of Health & Human Services; R. Alexander Acosta, in his official capacity as Secretary of the U.S. Department of Labor; U.S. Department Of Labor; Steven Terner Mnuchin, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. Department Of The Treasury, for Defendants.

OPINION

WALLACE, Circuit Judge:

The Affordable Care Act (ACA) and the regulations implementing it require group health plans to cover contraceptive care without cost sharing. Federal agencies issued two interim final rules (IFRs) exempting employers with religious and moral objections from this requirement. Several states sued to enjoin the enforcement of the IFRs, and the district court issued a nationwide preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292, and we affirm in part, vacate in part, and remand.

I.

A.

To contextualize the issues raised on appeal, we briefly recount the history of the ACA’s contraceptive coverage requirement. The ACA provides that:

a group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA] ... .

42 U.S.C. § 300gg–13(a)(4). HRSA established guidelines for women’s preventive services that include any “[FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling.” Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725-01, 8,725 (Feb. 15, 2012). The three agencies responsible for implementing the ACA—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, agencies)—issued regulations requiring coverage of all preventive services contained in HRSA’s guidelines. See, e.g., 45 C.F.R. § 147.130(a)(1)(iv) (DHSS regulation).

The agencies also recognized that religious organizations may object to the use of contraceptive care and offering health insurance that covers such care. For those organizations, the agencies provided two avenues. First, group health plans of certain religious employers, such as churches, are categorically exempt from the contraceptive coverage requirement. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Second, nonprofit “eligible organizations” that are not categorically exempt can opt out of having to “contract, arrange, pay, or refer for contraceptive coverage.” Id. To be eligible, the organization must file a self-certification form stating (1) that it “opposes providing coverage for some or all of any contraceptive services required to be covered under [the regulation] on account of religious objections;” (2) that it “is organized and operates as a nonprofit entity;” and (3) that it “holds itself out as a religious organization.” Id. at 39,892. The organization sends a copy of the form to its insurance provider, which must then provide contraceptive coverage for the organization’s employees and cannot impose any charges related to the coverage. Id. at 39,876. The regulations refer to this second avenue as the “accommodation,” and it was designed to avoid imposing on organizations’ beliefs that paying for or facilitating coverage for contraceptive care violates their religion. Id. at 39,874.

The agencies subsequently amended the accommodation in response to several legal challenges. First, certain closely-held for-profit organizations became eligible for the accommodation. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318-01, 41,343 (July 14, 2015); see also Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014). Second, instead of directly sending a copy of the self-certification form to the insurance provider, an eligible organization could simply notify the Department of Health and Human Services in writing, and the agencies then would inform the provider of its regulatory obligations. 80 Fed. Reg. at 41,323; see also Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014).

Various employers then challenged the amended accommodation as a violation of the Religious Freedom Restoration Act (RFRA). Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (per curiam). The actions reached the Supreme Court, but, instead of deciding the merits of the claims, the Supreme Court vacated and remanded to afford the parties “an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage.” Id. (internal quotation marks and citation omitted). The agencies solicited comments on the accommodation in light of Zubik, but ultimately declined to make further changes to the accommodation. Dep’t of Labor, FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 36, at 4, www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.
B.

On May 4, 2017, the President issued an executive order directing the secretaries of the agencies to “consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to” the ACA’s contraceptive coverage requirement. Promoting Free Speech and Religion Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017). On October 6, 2017, the agencies effectuated the two IFRs challenged here, without prior notice and comment. The religious exemption IFR expanded the categorical exemption to all entities “with sincerely held religious beliefs objecting to contraceptive or sterilization coverage” and made the accommodation optional for such entities. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,807–08 (Oct. 13, 2017). The moral exemption IFR expanded the categorical exemption to “include additional entities and persons that object based on sincerely held moral convictions.” Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,849 (Oct. 13, 2017). It also “expand[ed] eligibility for the accommodation to include organizations with sincerely held moral convictions concerning contraceptive coverage” and made the accommodation optional for those entities. Id.

California, Delaware, Maryland, New York, and Virginia sued the agencies and their secretaries in the Northern District of California. The states sought to enjoin the enforcement of the IFRs, alleging that they are invalid under the Administrative Procedure Act (APA), the Fifth Amendment equal protection component of the Due Process Clause, and the First Amendment Establishment Clause. The district court held that venue was proper and that the states had standing to challenge the IFRs. The district court then issued a nationwide preliminary injunction based on the states’ likelihood of success on their APA claim—that the IFRs were procedurally invalid for failing to follow notice and comment rulemaking. After issuing the injunction, the district court allowed Little Sisters of the Poor, Jeanne Jugan Residence (Little Sisters) and March for Life Education and Defense Fund (March for Life) to intervene in the case.

The agencies, Little Sisters, and March for Life appeal from the district court’s order on venue, standing, and nationwide preliminary injunction.

II.

Venue is reviewed de novo. Immigrant Assistance Project of the L.A. Cty. Fed’n of Labor (AFL-CIO) v. INS, 306 F.3d 842, 868 (9th Cir. 2002). Standing is also reviewed de novo. Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 506 (9th Cir. 1991). Findings of fact used to support standing are reviewed for clear error. Id.

A preliminary injunction is reviewed for abuse of discretion. Pimentel v. Dreyfus, 670 F.3d 1096, 1105 (9th Cir. 2012). In reviewing the injunction, we apply a two-part test.

First, we “determine de novo whether the trial court identified the correct legal rule to apply to the relief requested.” Id. (quoting Cal. Pharmacists Ass’n v. Maxwell-Jolly, 596 F.3d 1098, 1104 (9th Cir. 2010)).

Second, we determine “if the district court’s application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” Id. (quoting Cal. Pharmacists, 596 F.3d at 1104). The scope of the preliminary injunction, such as its nationwide effect, is also reviewed for abuse of discretion. United States v. Schiff, 379 F.3d 621, 625 (9th Cir. 2004).

III.

A.

We first address whether the appeal is moot. We have authority only to decide live controversies, and because mootness is a jurisdictional issue, we are obliged to raise it sua sponte. Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc). We determine “questions of mootness in light of the present circumstances where injunctions are involved.” Mitchell v. Dupnik, 75 F.3d 517, 528 (9th Cir. 1996). More specifically, the question before us is “whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.” Gator.com, 398 F.3d at 1129 (quoting West v. Sec’y of the Dep’t of Transp., 206 F.3d 920, 925 n.4 (9th Cir. 2000)).

On November 15, 2018, the agencies published final versions of the religious and moral exemption IFRs. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018). The final rules are set to supersede the IFRs and become effective on January 14, 2019. Id. The district court’s preliminary injunction rested solely on its conclusion that the IFRs are likely to be procedurally invalid under the APA. If the final rules become effective as planned on January 14, there will be no justiciable controversy regarding the procedural defects of IFRs that no longer exist. Indeed, we have previously dismissed a procedural challenge to an interim rule as moot after the rule expired. Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir. 2002); see also NRDC v. U.S. Nuclear Regulatory Comm’n, 680 F.2d 810, 814–15 (D.C. Cir. 1982) (holding that procedural challenge to a regulation promulgated in violation of notice and comment requirements was rendered moot by re-promulgation of rule with prior notice and comment); The Gulf of Me. Fishermen’s All. v. Daley, 292 F.3d 84, 88 (1st Cir. 2002) (“[P]romulgation of new regulations and amendment of old regulations are among such intervening events as can moot a challenge to the regulation in its original form”).

However, it is not yet January 14. We agree with the parties that mootness is not an issue until the final rules super-
sede the IFRs as expected on January 14, 2019. The IFRs have not been superseded yet, and the procedural validity of the IFRs is a live controversy. We can still grant the parties effective relief. Mootness, if at all, will arise only after our decision has issued. Accordingly, we have jurisdiction to decide this appeal.

B.

We hold that venue is proper in the Northern District of California. A civil action against an officer of the United States in his or her official capacity may “be brought in any judicial district in which … the plaintiff resides if no real property is involved in the action.” 28 U.S.C. § 1391(e)(1). There is no real property involved here. The inquiry thus turns on which judicial district(s)—for a state with multiple districts like California—a state is considered to reside. This is a question of first impression in this circuit.

The agencies argue that California resides only in the Eastern District of California, where the state capital is located. The agencies cite 28 U.S.C. § 1391(c), which defines residency for “a natural person,” “an entity,” and “a defendant not resident in the United States.” Relevant here, “an entity with the capacity to sue and be sued … whether or not incorporated” is deemed to reside “only in the judicial district in which it maintains its principal place of business.” Id. § 1391(c)(2). The agencies argue that California is an “entity” and that its capital Sacramento, located in the Eastern District of California, is the principal place of business for the state.

The agencies’ argument is unconvincing. We must “interpret [the] statute[s] as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.” United States v. Thomsen, 830 F.3d 1049, 1057 (9th Cir. 2016) (citation omitted and alterations in original). The venue statute explicitly refers to the incorporation status of the “entity,” indicating that the term refers to some organization, not a state. See 28 U.S.C. § 1391(c)(2) (“an entity … whether or not incorporated”). The legislative history confirms this interpretation. According to the House Report underlying section 1391(c)(2), the section is a response to “division in authority as to the venue treatment of unincorporated associations” and that the section, as stated, would treat equally corporations and unincorporated associations like partnerships and labor unions. See H.R. Rep. No. 112-10, at 21 (2011). These types of entities do not encompass sovereign states. Finally, we highlight that the statute explicitly distinguishes between states and entities. 28 U.S.C. § 1391(d); see also Spencer Enters., Inc. v. United States., 345 F.3d 683, 689 (9th Cir. 2003) (“[U]se of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words”). The agencies therefore improperly assume, without support from the text or legislative history, that “entity” encompasses a state acting as a plaintiff.

Instead, we interpret the statute based on its plain language. A state is ubiquitous throughout its sovereign borders. The text of the statute therefore dictates that a state with multiple judicial districts “resides” in every district within its borders. See Alabama v. U.S. Army Corps of Eng’rs, 382 F. Supp. 2d 1301, 1329 (N.D. Ala. 2005) (holding that, for purposes of 28 U.S.C. § 1391(e), “common sense dictates that a state resides throughout its sovereign borders”); see also Atlanta & F.R. Co. v. W. Ry. Co. of Ala., 50 F. 790, 791 (5th Cir. 1892) (discussing that “the state government … resides at every point within the boundaries of the state”). Any other interpretation limiting residency to a single district in the state would defy common sense. See Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 900 (9th Cir. 2005) (“[C]ourts will not interpret a statute in a way that results in an absurd or unreasonable result”). Venue is thus proper in the Northern District of California.

C.

We hold that the states have standing to sue. The states bear the burden of establishing “the irreducible constitutional minimum” of standing. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted). The states must have suffered an injury-in-fact that is fairly traceable to the challenged conduct and that is likely to be redressed by a favorable judicial decision. Id. The states must also demonstrate standing for each claim they seek to press. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). Standing as to one claim does not “suffice for all claims arising from the same ‘nucleus of operative fact.’” Id.

The district court held that the states had standing to assert their procedural APA claim. To establish an injury-in-fact, a plaintiff challenging the violation of a procedural right must demonstrate (1) that he has a procedural right that, if exercised, could have protected his concrete interests, (2) that the procedures in question are designed to protect those concrete interests, and (3) that the challenged action’s threat to the plaintiff’s concrete interests is reasonably probable. Citizens for Better Forestry v. U.S. Dept’ of Agric., 341 F.3d 961, 969–70 (9th Cir. 2003); see also Spokeo, 136 S. Ct. at 1540 (describing the applicable standards for Article III standing in the context of statutory procedural rights). “[D]epression of a procedural right without some concrete interest that is affected by the deprivation … is insufficient to create Article III standing.” Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009). Relaxed standards apply to the traceability and redressability requirements. See NRDC v. Jewell, 749 F.3d 776, 782–83 (9th Cir. 2014) (en banc) (“One who challenges the violation of ‘a procedural right to protect his concrete interests can assert that right without meeting all the normal standards’ for traceability and redressibility.” (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992))). The plaintiff need not prove that the substantive result would have been different had he received proper procedure; all that is
necessary is to show that proper procedure could have done so. *Citizens for Better Forestry*, 341 F.3d at 976.

The states argue that the agencies issued the religious and moral exemption IFRs without notice and comment as required under the APA. They argue that the deprivation of this procedural right affected their economic interests. According to the states, the IFRs expanded the number of employers categorically exempt from the ACA’s contraceptive coverage requirement, and states will incur significant costs as a result of their residents’ reduced access to contraceptive care. The states specifically identify three ways in which the IFRs will economically harm them. First, women who lose coverage will seek contraceptive care through state-run programs or programs that the states are responsible for reimbursing. Second, women who do not qualify for or cannot afford such programs will be at risk for unintended pregnancies, which impose financial costs on the state. Third, reduced access to contraceptive care will negatively affect women’s educational attainment and ability to participate in the labor force, affecting their contributions as taxpayers. Because we conclude that the record supports the first theory, we do not reach the alternative theories. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1161 & n.5 (9th Cir. 2017) (per curiam) (holding that the plaintiffs had standing and declining to reach alternative theories of standing).

Appellants do not dispute that the states were denied notice and opportunity to comment on the IFRs prior to their effective date. They do not dispute that the notice and comment process could have protected and was designed to protect the states’ economic interests. Instead, the appellants dispute whether the threat to the states’ economic interests is reasonably probable. They argue that the allegations of economic injury are based on a speculative chain of events unlikely to occur. Cf. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013) (rejecting standing where “respondents’ speculative chain of possibilities does not establish that injury … is certainly impending or is fairly traceable”). Appellants highlight how the states have failed to prove (1) that employers will take advantage of the expanded religious and moral exemptions, (2) that women will lose contraceptive coverage as a result, and (3) that states will then incur economic costs.

We hold that the states have standing to sue on their procedural APA claim. The states show, with reasonable probability, that the IFRs will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states. See *Citizens for Better Forestry*, 341 F.3d at 969. Just because a causal chain links the states to the harm does not foreclose standing. See *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (“A causal chain does not fail simply because it has several ‘links,’ provided those links are not hypothetical or tenuous” (internal quotation marks and citation omitted)). The states need not have already suffered economic harm. See *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (requiring only that the protected concrete interest be “threatened”).

There is also no requirement that the economic harm be of a certain magnitude. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (explaining that injuries of only a few dollars can establish standing).

First, it is reasonably probable that women in the plaintiff states will lose some or all employer-sponsored contraceptive coverage due to the IFRs. The agencies’ own regulatory impact analysis (RIA)—which explains the anticipated costs, benefits, and effects of the IFRs—estimates that between 31,700 and 120,000 women nationwide will lose some coverage. See 82 Fed. Reg. at 47,821, 47,823. Importantly, when making these estimates, the agencies accounted for key factors likely to skew the estimate, including that some objecting employers will continue to use the accommodation instead of the new, expanded exemptions. See id. at 47,818 (estimating that 109 entities—of the 209 entities who have litigated the contraceptive care requirement and are currently using the accommodation process—would seek exemption); id. (“We expect the 122 nonprofit entities that specifically challenged the accommodation in court to use the expanded exemption”). The record also includes names of specific employers identified by the RIA as likely to use the expanded exemptions, including those operating in the plaintiff states like Hobby Lobby Stores, Inc. Appellants fault the states for failing to identify a specific woman likely to lose coverage. Such identification is not necessary to establish standing. For example, in *Sierra Forest Legacy v. Sherman*, California challenged a forest-management plan that changed the standards governing logging on a parcel of land. 646 F.3d 1161, 1171–72 (9th Cir. 2011). The state’s standing to do so was based on future injury resulting from any logging under the plan. Id. at 1178 (maj. op. of Fisher, J.). We emphasized that the state’s standing to challenge the plan “is not defeated by its not having submitted affidavits establishing approval of specific logging projects under” the plan because “there is no real possibility that the [relevant agency] will … decline to adopt” any project under the plan. Id. at 1179. The same is true here. Evidence supports that, with reasonable probability, some women residing in the plaintiff states will lose coverage due to the IFRs.

Second, it is reasonably probable that loss of coverage will inflict economic harm to the states. The RIA estimates the direct cost of filling the coverage loss as $18.5 or $63.8 million per year, depending on the method of estimating. 82 Fed. Reg. at 47,821, 47,824. More importantly, the RIA identifies that state and local programs “provide free or subsidized contraceptives for low-income women” and concludes that this “existing inter-governmental structure for obtaining contraceptives significantly diminishes” the impact of the expanded exemptions. Id. at 47,803. The RIA itself thus assumed that state and local governments will bear additional economic costs.

The declarations submitted by the states further show that women losing coverage from their employers will turn to
state-based programs or programs reimbursed by the state. For example, California offers the Family Planning, Access, Care, and Treatment (Family PACT) program to provide contraceptive care to those below 200% of the federal poverty level. As attested to by program administrators, loss of coverage due to the IFRs will result in increased enrollment to Family PACT. Increased enrollment translates into, for example, the state reimbursing Planned Parenthood about $74.96 for each enrollee who receives contraceptive care. The states provided similar evidence for New York, Maryland, Delaware, and Virginia, which all have state-funded family planning programs.

Appellants dispute various factual findings underlying standing, but they do not explain how those findings are clearly erroneous. Appellants also argue that four of the plaintiff states—California, Delaware, Maryland, and New York—will not suffer harm because they have state laws that independently require certain employer-provided plans to cover contraceptive care. Those state laws do not apply to self-insured (also called self-funded) plans. See 29 U.S.C. § 1144(a) (preempting “any and all state laws” on this subject). Evidence shows that millions of people are covered, in each of the four states, under self-insured plans. For example, Hobby Lobby Stores, Inc. covers its employees through self-insured plans. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124 (10th Cir. 2013), aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). Appellants’ argument does not even apply to Virginia, which does not have any state law requiring coverage for contraceptive care.

Accordingly, the states have shown that the threat to their economic interest is reasonably probable, and they have established a procedural injury. Cf. East Bay Sanctuary Cov. v. Trump, No. 18-17274, 2018 WL 6428204, at *12 n.8 (9th Cir. Dec. 7, 2018) (order) (holding that the plaintiffs “have adequately identified concrete interests impaired by the Rule and thus have standing to challenge the absence of notice-and-comment procedures in promulgating it”). “[T]he causation and redressability requirements are relaxed” once a plaintiff has established a procedural injury, Citizens for Better Forestry, 341 F.3d at 975 (quoting Pub. Citizen v. Dep’t of Transp., 316 F.3d 1002, 1016 (9th Cir. 2003)), and both requirements are met here. The injury asserted is traceable to the agencies’ issuing the IFRs allegedly in violation of the APA’s requirements, and granting an injunction would prohibit enforcement of the IFRs. The states have thus established standing.1

The dissent raises a theory not advanced by any party. According to the dissent, the states’ economic injuries, if any, will be self-inflicted because the states voluntarily chose to provide money for contraceptive care to its residents through state programs. The dissent argues that the states lack standing because such “self-inflicted” injuries are not traceable to the agencies’ conduct, citing Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam). In Pennsylvania, the plaintiff states challenged other states’ laws that increased taxes on nonresident income. 426 U.S. at 662–63. The plaintiff states provided tax credits to their residents for taxes paid to other states. Id. at 662. Accordingly, the defendant states’ tax increases also increased the amount of tax credits provided by the plaintiff states, and the plaintiff states lost revenue. Id. In denying leave to file bills of complaint invoking the Supreme Court’s original jurisdiction, the Court held that the plaintiff states could not “demonstrate that the injury for which [they sought] redress was directly caused by the actions of another State” because the injuries to the plaintiff states’ fiscs “were self-inflicted … and nothing prevents [them] from withdrawing [the] credit for taxes paid to [defendant states].” Id. at 664.

We question whether the holding of Pennsylvania applies outside the specific requirements for the invocation of the Supreme Court’s original jurisdiction. Courts regularly entertain actions brought by states and municipalities that face economic injury, even though those governmental entities theoretically could avoid the injury by enacting new legislation. See, e.g., South Dakota v. Dole, 483 U.S. 203 (1987) (addressing South Dakota’s challenge to highway funding conditioned on a minimum drinking age, even though South Dakota could have avoided the injury by changing its minimum drinking age); Gladstone Realtors v. Village of Bellwood, 414 U.S. 91, 110–11 (1979) (holding that a municipality suffered an injury from a reduction in its property tax base, even though nothing required the municipality to impose property taxes). But we need not decide whether Pennsylvania’s “self-infliction” doctrine applies to the ordinary injury-in-fact requirement of Article III standing because, as explained below, the injury here is not “self-inflicted” within the meaning of Pennsylvania.

The Supreme Court later held, in Wyoming v. Oklahoma, that Wyoming had standing to challenge an Oklahoma statute that decreased Wyoming’s revenue—from tax on coal mined in Wyoming—by requiring Oklahoma power plants to burn at least 10% Oklahoma-mined coal. 502 U.S. 437, 447–48 (1992). The Court highlighted that Wyoming suffered a “direct injury in the form of a loss of specific tax revenues” from the reduced demand for Wyoming coal caused by the Oklahoma statute. Id. at 448.

Both Pennsylvania and Wyoming involved harm to the plaintiff states’ fiscs that were, as described by the dissent, “self-inflicted.” What distinguishes the two cases, and what caused the Supreme Court to reach different results, is that the plaintiff states’ laws in Pennsylvania directly and ex-

1. In addition to establishing constitutional standing, “[a] plaintiff must also satisfy the non-constitutional standing requirements of the statute under which [it] seeks to bring suit.” City of Sausalito, 386 F.3d at 1199. In a single sentence, Little Sisters argues that the states lack statutory standing. This argument is waived. See Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) (“We review only issues which are argued specifically and distinctly in a party’s opening brief … [and a] bare assertion does not preserve a claim” (citation omitted)); Bilyeu v. Morgan Stanley Long Term Disability Plan, 683 F.3d 1083, 1090 (9th Cir. 2012) (holding that “statutory standing may be waived”).
plicitly tied the states’ finances (revenue loss caused by tax credit) to another sovereign’s laws (other states’ taxes on nonresident income). See Maryland v. Louisiana, 451 U.S. 725, 742 n.18 (1981) (“In Pennsylvania, the only reason that the complaining States were denied tax revenues was because their legislatures had determined to give a credit for taxes paid to other States, and, to this extent, any injury was voluntarily suffered”). Wyoming did not involve such state laws; the tax on Wyoming-mined coal was not so tethered to the legislative decisions of other sovereigns. The same is true of the contraceptive coverage laws of the plaintiff states here. Accordingly, we are not convinced that Pennsylvania controls in this case. Cf. Texas v. United States, 809 F.3d 134, 138–59 (5th Cir. 2015), as revised (Nov. 25, 2015); Texas v. United States, 787 F.3d 733, 749 n.34 (5th Cir. 2015).

D.

We affirm the preliminary injunction insofar as it bars enforcement of the IFRs in the plaintiff states, but we otherwise vacate the portion of the injunction barring enforcement in other states. The scope of the injunction is overbroad.

A preliminary injunction is a matter of equitable discretion and is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter v. NRDC, 555 U.S. 7, 22 (2008) (citation omitted). ‘A party can obtain a preliminary injunction by showing that (1) it is ‘likely to succeed on the merits,’ (2) it is ‘likely to suffer irreparable harm in the absence of preliminary relief,’ (3) ‘the balance of equities tips in [its] favor,’ and (4) ‘an injunction is in the public interest.’” Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017) (alteration in original) (quoting Winter, 555 U.S. at 20). When the government is a party, the last two factors merge. Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014).

I.

Likelihood of success on the merits is “the most important” factor; if a movant fails to meet this “threshold inquiry,” we need not consider the other factors. Disney, 869 F.3d at 856 (citation omitted). The district court held that the states are likely to succeed on the merits of their APA claim. We agree.

The APA requires that, prior to promulgating rules, an agency must issue a general notice of proposed rulemaking, 5 U.S.C. § 553(b), and “give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments.” Id. § 553(c). A court must set aside rules made “without observance of [this] procedure.” Id. § 706(2)(D). Again, the parties do not dispute that the religious and moral exemption IFRs were issued without notice and comment. The only remaining issue is whether prior notice and comment was not required because an exception to this rule applied.

Exceptions to notice and comment rulemaking “are not lightly to be presumed.” Marcello v. Bonds, 349 U.S. 302, 310 (1955). “[I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.” Paulsen v. Daniels, 413 F.3d 999, 1005 (9th Cir. 2005). Failure to follow notice and comment rulemaking may be excused when good cause exists, 5 U.S.C. § 553(b) (B); when a subsequent statute authorizes it, id. § 559; and when it is harmless, id. § 706. Appellants argue that each of these three exceptions applies here.

We begin by examining whether the agencies had good cause for bypassing notice and comment. An agency may “for good cause find[] … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). “[T]he good cause exception goes only as far as its name implies: It authorizes departures from the APA’s requirements only when compliance would interfere with the agency’s ability to carry out its mission.” Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992). Good cause is to be “narrowly construed and only reluctantly countenanced.” Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984) (citation omitted). As such, the good cause exception is usually invoked in emergencies, and an agency must “overcome a high bar” to do so. United States v. Valverde, 628 F.3d 1159, 1164–65 (9th Cir. 2010). Because good cause is determined on a “case-by-case” basis, based on “the totality of the factors at play,” Valverde, 628 F.3d at 1164 (quoting Alcaraz, 746 F.2d at 612), prior invocations of good cause to justify different IFRs—the legality of which are not challenged here—have no relevance. 2

In the past, we have acknowledged good cause where the agency cannot “both follow section 553 and execute its statutory duties.” Riverbend, 958 F.2d at 1484 n.2 (quoting Levesque v. Block, 723 F.2d 175, 184 (1st Cir. 1983)). We have also acknowledged good cause where “‘delay would do real harm’ to life, property, or public safety.” East Bay Sanctuary Covenant, 2018 WL 6428204, at *20 (quoting Valverde, 628 F.3d at 1165); see also Haw. Helicopter Operators Ass’n v. FAA, 51 F.3d 212, 214 (9th Cir. 1995) (good cause shown based on threat reflected in an increasing number of helicopter accidents); Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (upholding good cause determination that the rule was “necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States”).

The agencies here determined that “it would be impracticable and contrary to the public interest to engage in full notice and comment rulemaking before putting these [IFRs] into effect.” See, e.g., 82 Fed. Reg. at 47,815; see also 82 Fed. Reg. at 47,856. They recited the immediate need to (1) reduce the legal and regulatory uncertainty regarding the accommodation in the wake of Zubik, (2) eliminate RFRA violations

2. The Little Sisters argue that if the court invalidates the IFRs here, the court must also invalidate prior ones related to the exemption and accommodation. This argument is unpersuasive. Whether or not those IFRs were promulgated with good cause, they are not before us at this time.
by reducing the burden on religious beliefs of objecting employers, and (3) reduce the costs of health insurance.\footnote{3} 82 Fed. Reg. at 47,813–15; 82 Fed. Reg. at 47,855–56. These general policy justifications are insufficient to establish good cause.

First, an agency’s desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause. See Valverde, 628 F.3d at 1167 (concluding that an agency’s “interest in eliminating uncertainty does not justify its having sought to forego notice and comment”). “If ‘good cause’ could be satisfied by an Agency’s assertion that ‘normal procedures were not followed because of the need to provide immediate guidance and information[,] … then an exception to the notice requirement would be created that would swallow the rule.’” \textit{Id.} (alterations in original) (quoting \textit{Zhang v. Slattery}, 55 F.3d 732, 746 (2d Cir. 1995)); see also Envl. Def. Fund, Inc. v. EPA, 716 F.2d 915, 920–21 (D.C. Cir. 1983) (“[I]t was not at all reasonable for [the agency] to rely on the good cause exception” simply because of “an alleged pressing need to avoid industry compliance with regulations that were to be eliminated”). Furthermore, the agencies’ request for post-promulgation comments in issuing the IFRs “casts further doubt upon the authenticity and efficacy of the asserted need to clear up potential uncertainty,” \textit{Valverde}, 628 F.3d at 1166, because allowing for post-promulgation comments implicitly suggests that the rules will be reconsidered and that the “level of uncertainty is, at best, unchanged,” \textit{United States v. Reynolds}, 710 F.3d 498, 510 (3d Cir. 2013) (citing \textit{United States v. Johnson}, 632 F.3d 912, 929 (5th Cir. 2011)). This explanation therefore fails. It is always the case that an agency can regulate—or in this case, de-regulate—faster by issuing an IFR without notice and comment.

Second, we of course acknowledge that eliminating RFRA violations by reducing the burden on religious beliefs is an important consideration for the agencies. Any delay in rectifying violations of statutory rights has the potential to do real harm. See \textit{Buschmann v. Schweiker}, 676 F.2d 352, 357 (9th Cir. 1982) (“The notice and comment procedures in Section 553 should be waived only when delay would do real harm”). Whether the accommodation actually violates RFRA is a question left open by the Supreme Court.\footnote{4} See \textit{Zubik}, 136 S. Ct. at 1560. But we need not determine whether there is a RFRA violation here because, even if immediately remedying the RFRA violation constituted good cause, the agencies’ reliance on this justification was not a reasoned decision based on findings in the record. See \textit{Valverde}, 628 F.3d at 1165, 1168 (agencies must provide “rational justification” and identify “rational connection between the facts found and the choice made to promulgate the interim rule” (internal quotation marks and citation omitted)). In January 2017, the agencies explicitly declined to change the accommodation in light of \textit{Zubik} and RFRA. They then let nine months go by and failed to specify what developments necessitated the agencies to change their position and determine, in October 2017, that RFRA violations existed. \textit{Cf. id.} at 1166 (reasoning that agency finding of urgent need was inadequate when agency had allowed seven months to pass without action). The agencies provided no explanation, legal or otherwise, for their changed understanding. \textit{Cf. Encino Motorcars, LLC v. Navarro}, 136 S. Ct. 2117, 2125–26 (2016) (holding that an agency’s unexplained change in position does not warrant deference); \textit{East Bay Sanctuary Covenant}, 2018 WL 6428204, at *20 (concluding that “speculative” reasoning is insufficient to support good cause). The IFRs are devoid of any findings related to the issue. Indeed, the agencies cited no intervening legal authority for their justification, in contrast to when they issued an IFR in light of \textit{Wheaton}. Given these failures, the agency action cannot be upheld on unexplained about-face.

The agencies further argue that the new IFRs will decrease insurance costs for entities remaining on more expensive grandfathered plans—which are exempt from the contraceptive coverage requirement—to avoid becoming subject to the requirement. 82 Fed. Reg. at 47,815; 82 Fed. Reg. at 47,855-56. This is speculation unsupported by the administrative record and is not sufficient to constitute good cause. See \textit{Valverde}, 628 F.3d at 1167 (“[C]onclusory speculative harms the [agency’s] cites are not sufficient” (citation omitted)).

We also highlight that there was no urgent deadline to issue the IFRs that interfered with the agencies from complying with the APA.\footnote{5} Congress had not imposed a deadline here on agency decisionmaking that interfered with compliance. The President’s executive order merely asks the agencies to “consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate.” 82 Fed. Reg. at 21,675. Neither did the Supreme Court mandate any deadline when it remanded the last challenge to the accommodation in order to give parties “an opportunity to arrive at an approach going forward.” \textit{Zubik}, 136 S. Ct. at 1560.

The agencies cite two cases in support of their good cause claim: \textit{Priests For Life v. U.S. Dep’t of Health & Human Servs.}, 772 F.3d 229 (D.C. Cir. 2014), \textit{vacated and remanded sub nom. Zubik}, 136 S. Ct. at 1557; and \textit{Serv. Employees Int’l Union, Local 102 v. Cty. of San Diego}, 60 F.3d 1346 (9th Cir.

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\footnote{3} Little Sisters argues that the agencies had good cause because the prior regulatory regime violated the Free Exercise Clause and the Establishment Clause. This assertion was not part of the agencies original good cause findings, and we may not consider it now. See \textit{Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.}, 463 U.S. 29, 50 (1983) (“[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself”).

\footnote{4} Before \textit{Zubik}, eight courts of appeals (of the nine to have considered the issue) have found that the regulatory regime in place prior to the IFRs did not impose a substantial burden on religious exercise under RFRA. See, e.g., \textit{E. Tex. Baptist Univ. v. Burwell}, 793 F.3d 449 (5th Cir. 2015), \textit{vacated}, \textit{Zubik}, 136 S. Ct. at 1561.

\footnote{5} We also point out that the agencies have not displayed urgency in reaching final resolution of this case. After filing this appeal from the district court’s order granting a preliminary injunction, the agencies filed a stipulation staying further district court proceedings pending resolution of the appeal. Before the district court, this case has remained in abeyance for nearly a year.
1994). Both are distinguishable. The D.C. Circuit in *Priests for Life* rejected the plaintiffs’ argument that the government lacked good cause to promulgate IFRs without notice and comment, 772 F.3d at 276–77. In so holding, it emphasized that the IFRs modified existing regulations that “were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues” as the challenged IFRs. *Id.* at 276 (emphasis added); see also *id.* (describing the modifications in the new IFRs as “minor”). The IFRs here do not present minor changes. They substantially expanded the categorical exemption and effectively made accommodations voluntary. The IFRs also introduced an entirely new moral exemption that had never been the subject of previous regulations. These substantial changes came after the agencies previously determined that no change to the religious accommodation process was needed in light of RFRA. In *Serv. Employees Int’l Union*, we held that resolving uncertainty caused by conflicting judicial decisions is sufficient good cause. 60 F.3d at 1352 n.3. In that case, resolving uncertainty was sufficient because the agencies found that conflicting decisions were poised to cause “enormous” and “unforeseen” financial liability “threaten[ing] [the] fiscal integrity” of state and local governments. *Id.* When issuing the IFRs here, the agencies cited no such comparable financial threat.

Accordingly, based on the totality of the circumstances, the agencies likely did not have good cause for bypassing notice and comment.

We next turn to whether the agencies had statutory authority for bypassing notice and comment. The APA cautions “that no subsequent statute shall be deemed to modify it ‘except to the extent that it does so expressly.’” *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025 (9th Cir. 1992) (quoting 5 U.S.C. § 559); see also *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (defining the inquiry as “whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm”). The agencies point to three statutory provisions enacted as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These provisions specify:

The Secretary, consistent with section 104 of the Health [Insurance] Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter. The Secretary may promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter.

26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92. When enacting the ACA, Congress codified the contraceptive coverage requirement in the same chapters of the United States Code as those provisions. The agencies argue that the provisions authorize them to issue IFRs implementing the ACA without notice and comment.

Their argument likely fails. The identified provisions authorize agencies to issue IFRs, but they are silent as to any required procedure for issuing an IFR. They do not provide that notice and comment is supplanted or that good cause is no longer required. They neither contain express language exempting agencies from the APA nor provide alternative procedures that could reasonably be understood as departing from the APA. *See Castillo-Villagra*, 972 F.2d at 1025 (holding that a subsequent statute must “expressly” modify the APA). These provisions thus stand in contrast to other provisions that we have found to be express abdications of the APA. *See, e.g., id.* (holding that APA was supplanted by statute that stated “the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section” (internal quotation marks omitted)); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 n.18 (D.C. Cir. 1994) (holding that APA was supplanted by statute that stated “[t]he Secretary shall cause to be published in the Federal Register a notice of the interim final DRG prospective payment rates” (emphasis added)).

The agencies insist that we must read HIPAA’s use of the word “interim” as singlehandedly authorizing the agencies to issue IFRs without notice and comment whenever the agencies deem it appropriate. Otherwise, the agencies warn, we will be rendering superfluous the second sentence of the quoted provisions. We disagree.

The first sentence of the quoted provisions authorizes the issuance of regulations “consistent with section 104 of the Health [Insurance] Portability and Accountability Act of 1996.” Section 104 of HIPAA, entitled “Assuring Coordina-

6. Section 104 states:

The Secretary of the Treasury, the Secretary of Health and Human Services, and the Secretary of Labor shall ensure, through the execution of an interagency memorandum of understanding among such Secretaries, that—

(1) regulations, rulings, and interpretations issued by such Secretaries relating to the same matter over which two or more such Secretaries have responsibility under this subtitle (and the amendments made by this subtitle and section 401) are administered so as to have the same effect at all times; and

(2) coordination of policies relating to enforcing the same requirements through such Secretaries in order to have a coordinated enforcement strategy that avoids duplication of enforcement efforts and assigns priorities in enforcement.

Secretary could issue an interim final rule. In this procedural posture, we need not delimit the full scope of the second sentence of the quoted provisions. For present purposes, it suffices to observe that we need not give the second sentence the agencies’ expansive interpretation in order for the second sentence to retain independent effect.

Accordingly, the agencies likely did not have statutory authority for bypassing notice and comment.

We last turn to whether bypassing notice and comment was harmless. The court “must exercise great caution in applying the harmless error rule in the administrative rulemaking context.” Riverbend, 958 F.2d at 1487. “[T]he failure to provide notice and comment is harmless only where the agency’s mistake ‘clearly had no bearing on the procedure used or the substance of decision reached.’” Id. (quoting Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764–65 (9th Cir. 1986)).

The circumstances here are similar to those in Paulsen, 413 F.3d at 1006. There, the Bureau of Prisons “failed to provide the required notice-and-comment period before effectuating [an] interim regulation, thereby precluding public participation in the rulemaking.” Id. We held the error not harmless because “petitioners received no notice of any kind until after the Bureau made the … interim rule effective.” Id. at 1007. We further emphasized that “an opportunity to protest an already-effective rule” did not render the violation harmless. Id. (emphasis added). We distinguished from prior cases where “interested parties received some notice that sufficiently enabled them to participate in the rulemaking process before the relevant agency adopted the rule.” Id. (citing cases). The agencies’ actions here are analogous. No members of the public received notice of the IFRs or were able to comment prior to their effective dates.

Appellants argue that the states “were afforded multiple opportunities to comment on the scope of the exemption and accommodation during multiple rounds of rulemaking.” These “opportunities” refer to public comment on prior rules regarding the religious exemption and accommodation. Appellants’ argument does not convince us. As previously discussed, those prior rules were materially different from the IFRs here, which dramatically expanded the scope of the religious exemption and introduced a moral exemption that was not the subject of any previous round of notice and comment rulemaking. The public had no such notice or opportunity to comment on these potential changes, thus denying it the safeguards of the notice and comment procedure. This denial is comparable to failing to provide prior notice and comment before finalizing a rule that is not a “logical outgrowth” of the proposed rule, which an agency may not do without considering “whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.” NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002) (citation omitted); see also CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009) (holding that notice of a proposed rule is sufficient to uphold a final rule if interested parties “should have anticipated” the content of the rule). Accordingly, the prior “opportunities” are irrelevant.

The agencies argue that the states have failed to identify any specific comment that they would have submitted. There is no such requirement for harmless error analysis. The agencies also argue that the states had an opportunity to comment on the IFRs post-issuance and that the agencies will consider the comments before issuing final rules. This argument also fails. “The key word in the title ‘Interim Final Rule’ … is not interim, but final. ‘Interim’ refers only to the Rule’s intended duration—not its tentative nature.” Career Coll. Ass’n v. Riley, 74 F.3d 1265, 1268 (D.C. Cir. 1996). We reiterate that “an opportunity to protest an already-effective rule” does not render an APA violation harmless. Paulsen, 413 F.3d at 1007 (emphasis added).

Accordingly, bypassing notice and comment likely was not harmless.

2.

A plaintiff seeking preliminary relief must “demonstrate that irreparable injury is likely in the absence of an injunction.” Winter, 555 U.S. at 22 (emphasis omitted). The analysis focuses on irreparability, “irrespective of the magnitude of the injury.” Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 725 (9th Cir. 1999).

The district court concluded that the states are likely to suffer irreparable harm absent an injunction. This decision was not an abuse of discretion. As discussed in our standing analysis, it is reasonably probable that the states will suffer economic harm from the IFRs. Economic harm is not normally considered irreparable. L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980). However, such harm is irreparable here because the states will not be able to recover monetary damages connected to the IFRs. See 5 U.S.C. § 702 (permitting relief “other than money damages”); see also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1091 (9th Cir. 2015) (reaffirming that the harm flowing from a procedural violation can be irreparable). That the states promptly filed an action following the issuance of the IFRs also weighs in their favor. Cf. Oakland Tribune, Inc. v. Chronicle Publ’g Co., Inc., 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm”).

Again, appellants argue that the economic harm is speculative, which “does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.” See Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted). As we previously explained in our analysis of standing, the harm is not speculative; it is sufficiently concrete and supported by the record. Appellants also dispute the factual findings underlying the district court’s holding of irreparable harm, but again fail to explain how the district court erred under our standard of review.
Because the government is a party, we consider the balance of equities and the public interest together. Jewell, 747 F.3d at 1092.

The IFRs are an attempt to balance states’ interest in “ensuring coverage for contraceptive and sterilization services” with appellants’ interest in “provid[ing] conscience protections for individuals and entities with sincerely held religious [or moral] beliefs in certain health care contexts.” 82 Fed. Reg. at 47,793. The district court concluded that the balance of equities and the public interest tip in favor of granting the preliminary injunction. The district court did not abuse its discretion.

The public interest is served by compliance with the APA: “The APA creates a statutory scheme for informal or notice-and-comment rulemaking reflecting a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations.” Alcaraz, 746 F.2d at 610 (internal quotation marks and citation omitted). It does not matter that notice and comment could have changed the substantive result; the public interest is served from proper process itself. Cf. Citizens for Better Forestry, 341 F.3d at 976 (stating, in standing context, that “[i]t suffices that the agency’s decision could be influenced” by public participation (alterations and citation removed) (emphasis in original)). The district court additionally found that the states face “potentially dire public health and fiscal consequences as a result of a process as to which they had no input” and highlighted the public interest in access to contraceptive care. This finding is sufficiently supported by the record.

We acknowledge that free exercise of religion and conscience is undoubtedly, fundamentally important. Regardless of whether the accommodation violates RFRA, some employers have sincerely-held religious and moral objections to the contraceptive coverage requirement. Cf. Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (“[A]lthough the plaintiff’s free exercise claim is statutory rather than constitutional, the denial of the plaintiff’s right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily”). Protecting religious liberty and conscience is obviously in the public interest. However, balancing the equities is not an exact science. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) (“Balancing the equities … is lawyers’ jargon for choosing between conflicting public interests”). We do not have a sufficient basis to second guess the district court and to conclude that its decision was illogical, implausible, or without support in the record. Finalizing that issue must await any appeal from the district court’s future determination of whether to issue a permanent injunction.

E.

The district court enjoined enforcement of the IFRs nationwide because the agencies “did not violate the APA just as to Plaintiffs: no member of the public was permitted to participate in the rulemaking process via advance notice and comment.” The district court abused its discretion in granting a nationwide injunction. See Stormans, Inc. v. Selecky, 586 F.3d 1109, 1140 (9th Cir. 2009) (“[A]n overbroad injunction is an abuse of discretion”) (quoting Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991)). We vacate the portion of the injunction barring enforcement of the IFRs in non-plaintiff states.

Crafting a preliminary injunction is “an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.” Trump v. Int’l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017). “The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.” Id. (citation omitted). Although “there is no bar against … nationwide relief in federal district court or circuit court,” such broad relief must be “necessary to give prevailing parties the relief to which they are entitled.” Bresgal v. Brock, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (emphasis in original removed in part); see also Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (“[I]n injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs” before the court). This rule applies with special force where there is no class certification. See Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501 (9th Cir. 1996) (“[I]n injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification”).

Before we examine the scope of the injunction here, we highlight several concerns associated with overbroad injunctions, particularly nationwide ones. Our concerns underscore the exercise of prudence before issuing such an injunction. First, “nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals.” L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011). The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives. See Califano, 442 U.S. at 702 (highlighting that nationwide injunctions “have a detrimental effect by foreclosing adjudication by a number of different courts and judges”); United States v. Mendoza, 464 U.S. 154, 160 (1984) (concluding that allowing nonmutual collateral estoppel against the government would “substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue” and “deprive [the Supreme] Court of the benefit it receives from permitting

7. Indeed, Congress has recently proposed a bill that would prohibit injunctions involving non-parties “unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.” H.R. 6730, 115th Cong. (2018)
several courts of appeals to explore a difficult question before [the Supreme Court grants certiorari]; *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court”).

The detrimental consequences of a nationwide injunction are not limited to their effects on judicial decision-making. There are also the equities of non-parties who are deprived the right to litigate in other forums. See Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2125 (2017) (“A plaintiff may be correct that a particular agency action is unlawful or unduly burdensome, but remedying this harm with an overbroad injunction can cause serious harm to nonparties who had no opportunity to argue for more limited relief”). Short of intervening in a case, non-parties are essentially deprived of their ability to participate, and these collateral consequences are not minimal. Nationwide injunctions are also associated with forum shopping, which hinders the equitable administration of laws. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 458-59 (2017) (citing five nationwide injunctions issued by Texas district courts in just over a year).

These consequences are magnified where, as here, the district court stays any effort to prepare the case for trial pending the appeal of a nationwide preliminary injunction. We have repeatedly admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction. See, e.g., *Melendres v. Arpaio*, 695 F.3d 990, 1002-03 (9th Cir. 2012); *Global Horizons, Inc. v. U.S. Dep’t of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007). “Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits.” *Id.* at 1003 (quoting *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982)). The district court here failed to give any particular reason for the stay, and this case could have well proceeded to a disposition on the merits without the delay in processing the interlocutory appeal. “Given the purported urgency of” implementing the IFRs, the agencies and intervenors might “have been better served to pursue aggressively” its defense of the IFRs in the district court, “rather than apparently awaiting the outcome of this appeal.” *Global Horizons*, 510 F.3d at 1058.

In light of these concerns, we now address the preliminary injunction issued here. The scope of the remedy must be no broader and no narrower than necessary to redress the injury shown by the plaintiff states. The plaintiff states argue that complete relief to them would require enjoining the IFRs in all of their applications nationwide. That is not necessarily the case. See *L.A. Haven Hospice*, 638 F.3d at 665 (vacating the nationwide portion of an injunction barring the enforcement of a facially invalid regulation); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (vacating nationwide portion of injunction barring enforcement of executive order). The scope of an injunction is “dependent as much on the equities of a given case as the substance of the legal issues it presents,” and courts must tailor the scope “to meet the exigencies of the particular case.” *Int’l Refugee Assistance Project*, 137 S. Ct. at 2087 (citations omitted). The circumstances of this case dictate a narrower scope.

On the present record, an injunction that applies only to the plaintiff states would provide complete relief to them. It would prevent the economic harm extensively detailed in the record. Indeed, while the record before the district court was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states. See *City & Cty. of San Francisco*, 897 F.3d at 1231, 1244–45 (holding that the district court abused its discretion in issuing a nationwide injunction because the plaintiffs’ “tendered evidence is limited to the effect of the Order on their governments and the State of California” and because “the record is not sufficiently developed on the nationwide impact of the Executive Order”). The injunction must be narrowed to redress only the injury shown as to the plaintiff states.9

Accordingly, we conclude that the scope of the preliminary injunction is overbroad and that the district court abused its discretion in that regard. District judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts, from Alaska to Puerto Rico to Maine to Guam.

IV.

We affirm that venue is proper in the Northern District of California. We affirm that the plaintiff states have standing to sue. Although we affirm the preliminary injunction, the record does not support the injunction’s nationwide scope. We vacate the portion of the injunction barring enforcement of the IFRs in other states and remand to the district court. This panel will retain jurisdiction for any subsequent appeals arising from this case. Costs on appeal are awarded to Plaintiffs-Appellees. The mandate shall issue forthwith.

**AFFIRMED IN PART, VACATED IN PART, and REMANDED.**

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8. The district court stayed the case pending the outcome of this appeal based on the parties’ stipulation. The order staying the case provides no other justification or analysis supporting the stay.

9. Appellants did not clearly raise other arguments in support of a narrower injunction, including the potential for “substantial interference with another court’s sovereignty.” *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008), and the lack of need for courts to apply the law uniformly. Accordingly, we do not address them.

Kleinfeld, Senior Circuit Judge, dissenting:
I respectfully dissent. The plaintiff state governments lack standing, so the district court lacked jurisdiction. The reason they lack standing is that their injury is what the Supreme Court calls “self-inflicted,” because it arises solely from their legislative decisions to pay these moneys. Under the Supreme Court’s decision in Pennsylvania v. New Jersey, we are compelled to reverse.

Pennsylvania sued New Jersey on the theory that a new New Jersey tax law caused the Pennsylvania fisc to collect less money. Pennsylvania granted a tax credit for income taxes paid to other states, and New Jersey under its new tax law had begun taxing the New Jersey-derived income of nonresidents. Maine, Massachusetts, and Vermont sued New Hampshire on similar grounds. The concrete financial injury was plain in all these cases. Like the plaintiff states’ injury in the case before us, the reason why was the plaintiff states’ laws.

The Court in Pennsylvania invoked the long established principle that under Massachusetts v. Missouri, the injuries for which redress was sought had to be “directly caused” by the defendant states. They were held not to be “directly caused” so in Pennsylvania because the monetary losses resulted from the plaintiff states’ own laws. Though it was undisputed that the defendant states’ tax schemes had cost the plaintiff states money, the defendant states were held not to have “inflicted any injury,” because the monetary harms were “self-inflicted:

The injuries to the plaintiffs’ fiscs were self-inflicted, resulting from decisions made by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No state can be heard to complain about damage inflicted by its own hand.

California and the other plaintiff states in the case before us have pointed out that their legislative schemes were in place before the federal regulatory change that will cost them money. But Pennsylvania does not leave room for such a “first in time, first in right” argument. Vermont’s law, for instance, long preceded New Hampshire’s, but the court held that any “injury” was “self-inflicted” because Vermont need not have extended tax credits to its residents at all.

The states could also have prevented their financial injury by changing their laws. As the concurring opinion put it, “[t]he appellants therefore, [we]re really complaining about their own statute[s].” Pennsylvania differs from the case before us because the dispute was between coequal sovereigns in Pennsylvania, heard under the Court’s original jurisdiction, and here it is between state governments and the federal government. But Pennsylvania’s rejection of “self-inflicted” injury has been applied outside the original jurisdiction context. There is no conflict between the federal and state laws, so the sovereign rights of the plaintiff states cannot establish standing. Though the plaintiff states may under their own laws spend additional money to provide benefits to some women that they would not have had to pay for before the federal change, they remain free to decide whether to do so.

As the majority acknowledges, the “irreducible minimum” for standing is that “the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” All three minima are perhaps debatable, but causation, that is, “traceability,” is controlled by Pennsylvania. That case establishes that harm to the fisc of a plaintiff state because of its own statute is “self-inflicted,” and therefore not “traceable to the challenged conduct of the defendant.” Traceability fails if the expense to the state results from its own law and without that state legislative choice, could be avoided. The federal regulatory change itself imposes no obligation on the states to provide money for contraception. The plaintiff states choose to provide some contraception benefits to employees of employers exempted by the federal insurance requirement, so the narrowing of the federal mandate may lead to the states spending more because some employers may spend less. Nor can the plaintiff states invoke the doctrine of parens patriae to gain standing.

11. Id. at 662.
12. Id. at 663.
13. Id.
14. Id.
15. 308 U.S. 1, 15 (1939).
17. Id.
18. Id.
19. Id.
20. Id.
23. Id. at 667.
25. Sturgeon v. Masica, 768 F.3d 1066, 1074 (9th Cir. 2014), vacated and remanded sub nom. Sturgeon v. Frost, 136 S. Ct. 1061 (2016) (rejecting “standing based simply on purported violations of a state’s sovereign rights” and requiring “evidence of actual injury” where state failed to “identify any actual conflict between [federal agency regulations] and its own statutes and regulations”); Sturgeon v. Frost, 872 F.3d 927, 929 (9th Cir. 2017), cert. granted, 138 S. Ct. 2648 (2018) (explaining prior holding as to state standing was “unaffected by the Supreme Court’s vacatur of [the] prior opinion”); Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 270 (4th Cir. 2011) (holding state lacked standing where it failed to identify enforcement of state statute that “conflict[ed]” with the individual mandate of the ACA).
27. Pennsylvania, 426 U.S. at 664; Spokeo, 136 S. Ct. at 1547.
28. See Massachusetts v. EPA, 549 U.S. 497, 520 n.17 (2007) (explaining that state actions against the federal government “to protect [its] residents from the operation of federal statutes” are precluded); Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1178 (9th Cir. 2011).
I recognize that the Fifth Circuit took a different view in different circumstances in *Texas v. United States*.

There, the Fifth Circuit held that states did indeed have standing to challenge a new federal program relating to immigration. Texas was held to have standing because federal regulatory change on its administration of drivers’ licenses — requiring it to issue drivers’ licenses to illegal aliens — would cost it money. The Fifth Circuit rejected application of the *Pennsylvania* “self-inflicted injury” rule, but stressed that its decision “is limited to these facts.” It is not plain that the Fifth Circuit would extend its view of standing to the quite different facts before us. The regulatory change regarding contraception poses no challenge to the sovereign authority of California to provide contraceptive benefits or not, but the regulatory change in Texas did limit the legislative choices Texas could make without “running afoul of preemption or the Equal Protection Clause.” Nor can we be sure that Texas is good law. The Supreme Court granted certiorari on the question whether “a State that voluntarily provides a subsidy” has standing to challenge a federal change that would expand its subsidy, and other issues. The Court was “equally divided,” so the questions were not answered.

The majority errs in treating *Wyoming v. Oklahoma* as though it overruled *Pennsylvania*. It does not say so. And the Court doubtlessly would have said so had that been its intent. Nor is the self-inflicted injury doctrine even relevant to *Wyoming*, which is doubtless why *Wyoming* does not discuss *Pennsylvania*. In *Pennsylvania*, the plaintiff states could have avoided any lost revenue by changing their own laws granting tax credits for taxes paid to the defendant states.

By contrast, Wyoming could not prevent the expense to its fisc by changing its own law. Wyoming lost severance tax revenue because the new Oklahoma law required major Oklahoma coal consumers to replace a substantial part of the Wyoming coal they burned with Oklahoma coal, so less coal was mined in Wyoming. Since the Wyoming legislature could not change the Oklahoma law, the harm to Wyoming’s fisc was not self-inflicted. The Oklahoma law, expressly targeted Wyoming, caused the injury. In our case, as in *Pennsylvania*, the plaintiff states elected to pay money in certain circumstances, and can avoid the harm to their fiscs by choosing not to pay the money.

I agree with the federal position that the plaintiff states lack standing to bring this case in federal court. Because such a conclusion would preclude us from reaching the other issues in the case, I do not speak to them in this dissent. Nor do I address additional reasons why the plaintiff states may lack standing, since the “self-inflicted injury” disposes of the question without them.

("California, like all states, ‘does not have standing as *pares patriae* to bring an action against the Federal Government.’") (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982))).

29. 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015).
30. Id. at 162.
31. Id. at 155-57.
32. Id. at 154.
33. Id. at 153; see also *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An amicus curiae generally cannot raise new arguments on appeal.") (citations omitted)).

37. Of course, it does not matter when jurisdiction is raised, since we must raise it whenever its absence appears likely. See *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 891 n.9 (9th Cir. 2018) ("Because Article III standing is jurisdictional, we must *sua sponte* assure ourselves."). And the majority errs in saying that the self-inflicted harm doctrine was not raised by the parties. See *Reply Br. of March for Life at 29, Dkt. No. 95*. Much of the briefing before us addresses standing, and the appellee states were also provided an opportunity to address self-inflicted injury at oral argument. And it does not matter that the self-inflicted injury doctrine arose in the context of a case taken under the Court’s original jurisdiction, because it is a straightforward application of the generally applicable causation requirement for standing. See *Clapper*, 568 U.S. at 416 (applying *Pennsylvania*’s “self-inflicted” doctrine outside the original jurisdiction context); *Texas*, 809 F.3d at 158-59 (same).
38. *Wyoming*, 502 U.S. at 447; see also *Texas*, 809 F.3d at 158 (“Wyoming sought to tax the extraction of coal and had no way to avoid being affected by other states’ laws that reduced demand for that coal.” (emphasis added)).
39. Id. at 445, 445-47.
40. Id. at 443.
SUMATRA KENDRICK, an individual, Plaintiff-Appellee,

v.

CONDUENT STATE AND LOCAL SOLUTIONS, INC., FKA Xerox State and Local Solutions, Inc., Defendant-Appellant, and

BAY AREA TOLL AUTHORITY, a California public corporation; GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT, a California public corporation, Defendants.

No. 18-16988
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:18-cv-00213-RS
Appeal from the United States District Court for the Northern District of California
Richard Seeborg, District Judge, Presiding
Argued and Submitted November 14, 2018
San Francisco, California
Filed December 13, 2018
Before: Mary M. Schroeder and Paul J. Watford, Circuit Judges, and David A. Ezra,* District Judge.

Opinion by Judge Schroeder

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

COUNSEL

Sumatra Kendrick, an individual, for Plaintiffs-Appellees.

Conduent State And Local Solutions, Inc., Fka Xerox State and Local Solutions, Inc., for Defendants.

OPINION

SCHROEDER, Circuit Judge:

This is an appeal under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), from an order granting plaintiffs’ motion to remand to the state court. The plaintiffs seek to maintain this action in state court on behalf of a class of users of the Golden Gate Bridge. They brought the action against the Bay Area Toll Authority (“BATA”) and the Golden Gate Bridge Highway and Transportation District (“GGB”), both entities of the state of California, and against Conduent State and Local Solutions, Inc. (“Conduent”), a private company that has contracted with the state entities to operate the bridge’s toll system. Plaintiffs’ principle claims allege defendants are in violation of California privacy statutes prohibiting the collection of personal data. Conduent appeals the remand. While remand orders generally are not reviewable, 28 U.S.C. § 1447(d), we have discretion to review actions removed under CAFA, 28 U.S.C. § 1453(c). We granted Conduent’s petition to appeal.

Although the district court found that most of the requirements for maintaining the case in federal court under CAFA were met, including the size of the class and the amount in controversy, it ruled that the principal defendants were not subject to CAFA jurisdiction. The defendants included two state entities and Conduent, which the district court held was acting for the state. Conduent appeals and BATA and GGB, while agreeing they belong in state court, have filed an amicus brief in support of Conduent’s remaining in federal court.

Conduent argues that the case against it belongs in federal court because the district court’s conclusion that Conduent is a state actor was flawed. Conduent points to the language of a CAFA exception that provides CAFA does not apply to proposed classes where “the primary defendants are states, state officials or other governmental entities against whom the district court may be foreclosed from ordering relief.” 28 U.S.C. § 1332(d)(5)(A). Although the other two defendants are clearly governmental entities within the meaning of the statutory exception, Conduent contends it is not such an entity. Conduent therefore argues that the district court erred and the case against Conduent must stay in federal court, even though this results in the case being litigated simultaneously in both state and federal court. There is no dispute that the plaintiffs’ case against the public entities, BATA and GGB, is now properly in state court on claims similar to those against Conduent, nor is there any dispute that Conduent is a “primary defendant.”

The elements of CAFA jurisdiction are established in 28 U.S.C. § 1332(d)(2). A district court shall have jurisdiction over a class action when: (1) the amount in controversy exceeds five million, and (2) any class member is a citizen of a state different from any defendant. Id. CAFA creates an exception from federal court jurisdiction for cases targeting state, local, and other governmental entities that may claim immunity. Id. § 1332(d)(5)(A); see Bridewell-Sledge v. Blue Cross of California, 798 F.3d 923, 927-928 (9th Cir. 2015). The exception is aimed at entities that may try to take advantage of Eleventh Amendment immunity by removing to federal court. S. Rep. No. 109-14, at 41-42 (2005). The Senate Report describes what Congress intended to do:

[P]revent states, state officials, or other governmental entities from dodging legitimate claims by removing class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief. This provision will ensure that cases in which such entities are the primary targets will be heard in state courts that do not face the same constitutional impediments to granting relief.
This case began in state court. Plaintiffs/Appellees Sumatra Kendrick and Michelle Kelly filed this putative class action in San Francisco Superior Court on November 21, 2017. They alleged Defendants invaded their privacy and collected their personally identifiable information when they drove over bay area toll bridges and then shared this information with various unauthorized third parties including car rental companies, banks, credit bureaus, and law enforcement agencies, in violation of California Streets and Highway Code § 31490, and they asserted other related California claims. Section 31490 states in relevant part that “a transportation agency may not sell or otherwise provide to any other person or entity personally identifiable information of any person who subscribes to an electronic toll or electronic transit fare collection system or who uses a toll bridge, toll lane, or toll highway that employs an electronic toll collection system.” Id. § 31490(a).

Conduent removed the entire case from San Francisco Superior Court to the Northern District of California under CAFA, 28 U.S.C. § 1332(d). Plaintiffs/Appellees moved to remand, arguing, among other things, that removal is precluded under 28 U.S.C. § 1332(d)(5)(A) because Conduent is acting on behalf of the state even though it is a private company. The California agencies, BATA and GGB, were undisputedly state entities, and the district court concluded that Conduent was as well, because it was exercising the authority of the state with respect to the alleged violation of plaintiffs’ privacy rights:

[P]laintiffs allege that Conduent, BATA, and GGB are inextricably intertwined such that the actions of one entity can be imputed to the others. As the assessment of tolls on state-owned bridges arguably exercises the coercive power of the state, to the extent plaintiffs accuse Conduent of acting in concert with government agencies to violate class members’ rights, they have alleged state action on the face of the complaint.

The district court stated that Conduent had the burden of satisfying § 1332(d)(5)(A) and because that burden was not met, removal was improper. Accordingly, the district court remanded the case to state court, where it has been assigned to the same judge presiding over related actions. The state court proceedings have been stayed pending this appeal.

In this appeal Conduent argues the district court erred because it relied on 42 U.S.C. § 1983 case law to determine that Conduent was a state actor, and that the district court failed to address the language of CAFA’s statutory exception relating to “other governmental entities against whom the District Court may be foreclosed from ordering relief.”

Conduent’s position is that as a private entity it is outside the scope of § 1332(d)(5)(A). It accurately points out that Section 1983 cases are not controlling because the § 1983 state actor analysis looks to an actor’s role and conduct while the CAFA inquiry goes to the nature of the entity itself. The district court’s exclusive reliance on § 1983 case law was not appropriate. The issue is whether Conduent may be considered an instrumentality of the state.

The district court’s analysis, however, also focused to some extent on the relationship between Conduent and the state entities ultimately responsible under California law for collecting bridge tolls. Conduent is an entity acting on behalf of the state to perform toll related functions required by state statute. California law expressly establishes civil penalties for the evasion of bridge tolls, California Vehicle Code § 40250, recognizes the existence of contractual arrangements for processing toll delinquencies with entities which it describes as “issuing agency[,]” § 40252, and defines an “issuing agency” as “an entity, public or private, authorized to collect tolls.” Id. § 40250(e)(1).

The Eleventh Amendment of the United States Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. This means that private individuals may not sue non-consenting state entities in federal court. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). The state need not be named as a defendant. The Supreme Court has held that “the reference to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.” Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997).

To determine whether an entity is able to invoke such immunity our Court has said we generally look to a number of factors:

(1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.

Beentjes v. Placer County Air Pollution Control Dist., 397 F.3d 775, 778 (9th Cir. 2005) (quoting Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988)). We examine these factors by looking at the way state law treats the entity, Mitchell, 861 F.2d at 201.

On this record, Conduent satisfies the second factor of performing a central government function and it has not asserted that it lacks any of the other characteristics. Conduent performs the government function of processing bridge tolls, collecting fines and imposing penalties in the name of the state. This record does not reflect whether it may satisfy the other factors. We have observed, however, that the Mitchell factors are not particularly useful when applied to a private
entity because a private entity cannot be an arm of the state when the relationship to the sovereign is only by contract. See Del Campo v. Kennedy, 517 F.3d 1070, 1077 (9th Cir. 2008). Here Plaintiffs contend the relationship is more than contractual because the state has enacted a special statutory scheme for the collection of bridge tolls and has recognized the entities with whom the state contracts for such purposes as “an issuing agency.” Our case law provides no clear answer as to whether Conduent qualifies as a governmental entity within the meaning of CAFA.

Conduent contends that even if it is a government entity, it waived any immunity it might have had by removing the case to federal court. See Lapides v. Bd. of Regents of Univ. System, 535 U.S. 613, 624 (2002). In deciding whether the governmental entity exception applies, however, the existence or waiver of immunity is not the issue; the only issue is whether the entity is such that a claim of immunity may be made. Moreover the Supreme Court’s holding in Lapides’ was limited. A state waives Eleventh Amendment immunity by removal only for state-law claims “in respect to which the State has explicitly waived immunity from state-court proceedings.” Id. at 617. Here, the record does not reflect that Conduent waived immunity in state court. Accordingly, Lapides is not dispositive. See id. at 617-618 (“[I]n or do we address the scope of waiver by removal in a situation where the State’s underlying sovereign immunity from suit has not been waived or abrogated in state court.”)

We need not decide whether the district court erred in remanding on the “other governmental entity” ground pursuant to § 1332(d)(5)(A) because there is a further justification for the remand. The plaintiffs correctly contend that the result is required by provisions of CAFA calling for local actions to be heard in state court. The local controversy exception is one of several exceptions to CAFA removal jurisdiction. See Bridewell-Sledge, 798 F.3d at 928. It is defined at 28 U.S.C. § 1332(d)(4). The provision instructs that a district court is required to decline jurisdiction over a class action when: (1) more than two-thirds of the proposed plaintiff class(es) are citizens of the state in which the action was originally filed, (2) there is at least one in-state defendant against whom “significant relief” is sought and “whose alleged conduct forms a significant basis for the claims asserted” by the proposed class, (3) the “principal injuries” resulting from the alleged conduct of each defendant were incurred in the state of filing, and (4) no other class action “asserting the same or similar factual allegations against any of the defendants” has been filed within three years prior to the present action. Id. § 1332(d)(4)(A). The exception’s purpose is to ensure that class actions with a local focus remain in state court rather than being removed to federal court because state courts have a strong interest in resolving local disputes. Bridewell-Sledge, 798 F.3d at 928.

Most of these requirements are met. Plaintiffs submitted evidence indicating that more than two-thirds of the traffic on the Golden Gate Bridge during rush hour is comprised of California citizen motorists. 28 U.S.C. § 1332(d)(4)(A)(i). They seek relief from two in-state defendants, BATA and GGB, for injuries incurred in California. Id. The district court refused to remand under this exception, however, because it held the fourth requirement was not met. One of the plaintiffs in this case, Michelle Kelly, had previously filed a class action in state court on September 7, 2016, and removed to federal court on November 28, 2016, alleging similar theories. The district court viewed that filing as qualifying. We conclude it is not because that case never proceeded independently and essentially became part of this case. This is reflected in a close examination of the proceedings in both state and federal court.

Shortly after Kelly filed her case in state court as a putative class action, it was removed to federal court, where Kelly voluntarily dismissed the case as to her claims only. When this, the Kendrick case, was filed in state court, Kelly became a plaintiff in it. When the Kendrick case in turn was removed to federal court, the district court ordered it joined with the remainder of the Kelly case as a related case. See N.D. Cal. Civ. L.R. 3.12; see also Fed. R. Civ. P. 42. So when the district court remanded this case to state court, it remanded one case that included all the parties and potential parties to both the Kelly and Kendrick actions.

As we pointed out in Bridewell-Sledge, the reason for the no prior class action prerequisite to remand is to ensure that controversies giving rise to multiple class actions be heard in federal court in one proceeding. Id. at 932. In Bridewell-Sledge there was no “other class action” because the prior action and the pending action had been consolidated. There can be no “other class actions” in this case either, since the earlier Kelly action has been effectively succeeded by this one, in which Kelly is a named party. There is here, as in Bridewell-Sledge, every practical reason why the local action rule should apply, and it supports the district court’s remand order. As in Bridewell-Sledge, we are dealing with a single case, not two different class actions proceeding on different tracks before different judges. Therefore, no “other class action” has been filed within the meaning of the statute. See 28 U.S.C. § 1332(d)(4)(A)(ii); Bridewell-Sledge, 798 F.3d at 928-931.

The history, language, and purpose of CAFA reflects it is to provide a federal forum for national issues, but keep smaller and more local issues in state court. The Golden Gate Bridge may be a national treasure, but whether collection of its tolls is a controversy that belongs in federal court is a different question. Congress has provided that when the controversy is localized, the case belongs in state court. See Bridewell-Sledge, 798 F.3d at 933. This is essentially a dispute between those who use the bridge to travel between Marin County, California and San Francisco, California, and defendants who are charged with operating the bridge on behalf of the State of California. The district court properly ruled that the case against Conduent, the toll collector, be-
But, for reasons that remain a mystery, Congress used the provision that says CAFA jurisdiction shall not extend to any class action in which “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.” 28 U.S.C. § 1332(d)(5)(A). Although the majority does not squarely resolve the issue, I think it’s clear that this provision does not divest the court of jurisdiction. Everyone agrees that there are three primary defendants in this action: Bay Area Toll Authority; Golden Gate Bridge, Highway and Transportation District; and Conduent State and Local Solutions, Inc. The first two defendants are indisputably entities of the State of California against whom the district court may be foreclosed from ordering relief, as they might be entitled to assert Eleventh Amendment immunity in federal court. Conduent, however, is not a state entity. It is a private corporation that contracts with the State to collect tolls on public bridges in the Bay Area. We have held that Eleventh Amendment immunity does not extend to private corporations, even when they contract with the State to perform central governmental functions. Del Campo v. Kennedy, 517 F.3d 1070, 1076–79 (9th Cir. 2008). As a result, Conduent does not qualify as a governmental entity “against whom the district court may be foreclosed from ordering relief.” 28 U.S.C. § 1332(d)(5)(A).

The plaintiffs contend that § 1332(d)(5)(A) should be interpreted to preclude CAFA jurisdiction even if just one of the primary defendants is a governmental entity that may be immune from suit in federal court. That reading certainly seems better suited to carrying out the purpose of this provision, which is to ensure that class actions targeting defendants who would be entitled to Eleventh Amendment immunity will remain in state court, where the claims against all of the defendants can be resolved in a single forum. When a class action will have to proceed against one or more of the primary defendants in state court anyway (because those defendants can’t be sued in federal court), it makes little sense for the same claims to be litigated simultaneously against the remaining defendants in a parallel federal court proceeding. But, for reasons that remain a mystery, Congress used the phrase “the primary defendants” in § 1332(d)(5)(A), rather than “a primary defendant.” Courts have rightly held that in this context “the primary defendants” must be read to mean all primary defendants. Woods v. Standard Insurance Co., 771 F.3d 1257, 1263–64 (10th Cir. 2014); Frazier v. Pioneer Americas LLC, 455 F.3d 542, 546–47 (5th Cir. 2006). Since Conduent is a primary defendant but not one “against whom the district court may be foreclosed from ordering relief,” § 1332(d)(5)(A) does not preclude CAFA jurisdiction.

To uphold the district court’s remand order, the majority relies instead on a different provision of CAFA, known as the local controversy exception. 28 U.S.C. § 1332(d)(4)(A). That provision is designed to ensure that class actions involving residents predominately of a single State will be litigated in the courts of that State. Everyone agrees that the first three requirements of the local controversy exception are met. The only issue is whether the last condition is satisfied. Remand is required under that condition only if, during the three-year period preceding the filing of this action, “no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.” § 1332(d)(4)(A)(ii).

The phrase “other class action” is not defined. But the phrase does not seem to contemplate some esoteric concept, so I assume it means simply a class action other than the one that is now in federal court. My colleagues appear to accept that reading. We disagree only on how to characterize the relationship between this action and the earlier class action filed by named plaintiff Michelle Kelly.

In my view, if this action were merely a continuation of Kelly’s earlier-filed action, we could fairly say that Kelly’s earlier action shouldn’t count as an “other class action.” See Vodenichar v. Halcón Energy Properties, Inc., 733 F.3d 497, 506–10 (3d Cir. 2013). But Kelly’s earlier action and this action strike me as entirely distinct. Kelly voluntarily dismissed the earlier action shortly after the defendants removed it to federal court. At that point the action was effectively terminated.

Roughly a year later, Kelly and a new named plaintiff, Sumatra Kendrick, filed this action in state court. The claims they assert undoubtedly arise out of the same factual allegations that formed the basis for Kelly’s earlier action. But neither Kendrick nor Kelly have claimed that Kelly’s earlier action “essentially became part of this case.” Maj. op. at 11. In fact, they have stated basically the opposite. When the defendants removed this action to federal court and asked that it be assigned to the same judge who presided over Kelly’s earlier action, Kendrick and Kelly asserted that the two actions were not even “related” for purposes of the local court rule allowing such reassignment. They stressed that the two actions “do not involve the same claims” and that “the earlier filed action has been administratively closed.” The district court ultimately disagreed with that view and found the cases to be related, but it did not order this action “joined with the remainder of the Kelly case as a related case.” Maj. op. at 11. This action could not be joined with any aspect of Kelly’s earlier action because that action had been voluntarily dismissed.
I am not saying that the result reached by my colleagues is an imprudent one. It seems silly to hold that Kelly’s filing of the earlier action precludes remand under the local controversy exception, given the decidedly local nature of the claims at issue. For whatever reason, though, Congress dictated that remand is required only if “no other class action” has been filed in the preceding three years, and here another class action was filed during that period. I would therefore hold that the district court erred by remanding this case to state court.
In re the Marriage of HEATHER MARTINDALE and RAYMOND OCHOA.

HEATHER MARTINDALE, Appellant, v. RAYMOND OCHOA, Respondent.

No. A152825
In The Court of Appeal of the State of California First Appellate District Division Five (Sonoma County Super. Ct. No. SFL-65050)
Filed December 7, 2018
Modified and Certified for Pub. December 13, 2018

COUNSEL
Greg Jilka for Appellant.

ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PUBLICATION
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed December 7, 2018 be modified as follows:

(1) On page 7, after the sentence “We also agree courts ordinarily should not entertain new evidence regarding the underlying incidents, because the issue in the renewal proceedings is ‘reasonable apprehension’ of future abuse.” (Ritchie v. Konrad (2004) 115 Cal.App.4th 1275, 1290 (Ritchie).) Appellant contends the trial court abused its discretion. We affirm the denial of renewal of the restraining order.

(2) All further footnotes should be renumbered accordingly.

The opinion in the above-entitled matter, filed on December 7, 2018, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports.

There is no change in the judgment.

Acting P.J.

BACKGROUND

The parties had a daughter together in 2009 and married in 2011. Appellant commenced dissolution proceedings in November 2013. Appellant was represented by counsel and respondent represented himself.

In December 2013, appellant filed a request for a domestic violence restraining order. The trial court, who was the same judge that issued the order at issue in the present appeal, held a hearing on the request in March 2014. Appellant testified to various instances of domestic abuse over the course of her relationship with respondent. He was often jealous and threatened to “hurt,” “kill,” and “destroy” her. Sometimes he would physically restrain her when they argued. On a number of occasions, respondent damaged property. In 2007, respondent raped her after an argument. Appellant contends the trial court abused its discretion. We affirm the denial of renewal of the restraining order.
In December 2016, appellant requested a permanent renewal of the March 2014 restraining order. Respondent, now represented by counsel, opposed the request. At the hearing on the renewal request, appellant testified regarding her fear of respondent and submitted into evidence the transcript of the March 2014 hearing resulting in issuance of the initial restraining order. She testified she installed cameras and other security measures at home. Her fear was amplified due to respondent’s failure to acknowledge the past abuse and a police report he made in late 2014 alleging possible child abuse by appellant. With respect to the 2014 child abuse report, appellant averred in a November 2014 declaration that a sheriff’s deputy told her respondent had reported physical abuse of their daughter. The deputy testified at the 2017 renewal hearing that respondent had “showed me his cell phone which had some videotape of his daughter on it” in which she “seemed upset and said that her mommy hits her on her tummy and her bottom and her arms.” The next day, respondent left a message for the deputy “saying that he wanted to cancel the report.” Respondent testified he tried to put the report “on hold” because he was concerned about child protective services taking their daughter away from appellant, because he believed the child would not be placed with him. The deputy testified he went to appellant’s home to investigate the claim and the child told the deputy appellant “did hit her on the bottom.” The disposition of the complaint was “unfounded.”

Appellant also alleged respondent violated the 2014 restraining order on four occasions. First, she encountered him at a farmer’s market in June 2014 and requested his removal by law enforcement. She claimed respondent was drinking alcohol and he protested his removal from the event. However, the sheriff’s deputy who was involved in the incident testified respondent said he was unaware of appellant’s presence, he left without objection, and there was no sign he had been drinking.

Second, appellant claimed respondent violated the restraining order in April 2015 by remaining at a bar called the Glen Ellen Lodge after seeing her there. She testified respondent entered the bar, walked past her, and “glared” at her from the other end of the bar. However, another patron testified respondent did not see appellant when he came into the bar and that respondent left immediately (within seconds of entering the bar) when appellant saw him and referred to the restraining order. Appellant then proceeded to talk badly of respondent to the other patron. Respondent testified he left as soon as he noticed appellant was present.

Third, appellant testified that in June 2015 patio furniture and a bicycle were removed from her property. A bicycle lock was cut in the process. Respondent testified he had arranged for two friends to pick up the items because he had been told at a settlement conference he had to remove the property. He admitted he did not seek appellant’s permission to pick up the property that day. The sheriff’s deputy who investigated the incident testified that a neighbor told him the men who came to appellant’s property did not sound like respondent and that appellant told him respondent was supposed to pick up some furniture.

Finally, appellant testified she saw respondent in a high school parking lot in December 2016, when she was picking up her older children. Respondent testified he had gone to the high school to pick up the children of a friend and that he did not see appellant or her children at the school. He had only been to the high school on that one occasion in the preceding three years.

Respondent testified regarding his efforts to avoid appellant. He testified that he avoided going to the town of Sonoma for social activities due to the restraining order and that he had not been to any of his daughter’s events during the three years of the order. He confirmed appellant was not a member when he joined his gym, Sonoma Fit. He saw her at the gym on three subsequent occasions and each time he immediately stopped working out and left the gym. A Sonoma Fit employee testified that appellant asked whether respondent was a member before she joined, which contradicted appellant’s testimony that she did not know he was a member when she joined.

In September 2017, the trial court denied appellant’s request for renewal of the restraining order in a detailed written decision. The court stated it was “cognizant of the basis upon which the initial [r]estraining order was granted,” but observed, “[t]he granting of the original [r]estraining order does not confirm that this Court made a finding that every allegation made by [appellant] was true, but that this court found a sufficient factual basis to determine that spousal abuse had occurred.” In regards to the testimony presented at the hearing on the renewal request, the court stated it “generally found [respondent] to be the more credible witness.” In denying the renewal request, the court found “that the factual testimony at the original trial resulting in the granting of the current restraining order is insufficient to provide a basis by itself to support the necessary findings to order the continuation of this restraining order.”

The present appeal followed.

DISCUSSION

The Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.)1 exists “to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence.” (§ 6220.) As provided in section 6345, subdivision (a), a domestic violence prevention restraining order “may be renewed upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the

1. All undesignated section references are to the Family Code.
motion of a party. The request for renewal may be brought at any time within the three months before the expiration of the orders.”

In Ritchie, supra, 115 Cal.App.4th 1275, the court of appeal held that, in deciding whether to grant a renewal request under section 6345, “[a] trial court should renew the protective order, if, and only if, it finds by a preponderance of the evidence that the protected party entertains a ‘reasonable apprehension’ of future abuse.” (Ritchie, at p. 1290.) “It is not enough this party entertain a subjective fear the party to be restrained will commit abusive acts in the future. The ‘apprehension’ those acts will occur must be ‘reasonable.’ That is, the court must find the probability of future abuse is sufficient that a reasonable woman (or man, if the protected party is a male) in the same circumstances would have a ‘reasonable apprehension’ such abuse will occur unless the court issues a protective order.” (Id., at p. 1288.) “In evaluating whether the requesting party has a reasonable apprehension of future abuse, ‘the existence of the initial order certainly is relevant and the underlying findings and facts supporting that order often will be enough in themselves to provide the necessary proof to satisfy that test.’” (Lister v. Bowen (2013) 215 Cal. App.4th 319, 333, quoting Ritchie, at p. 1291; see also Cueto v. Dozier (2015) 241 Cal.App.4th 550, 559–560 (Cueto).) “We review an appeal from an order denying a request to renew a domestic violence restraining order for abuse of discretion. [Citations.] . . . [A]n abuse of discretion occurs where ‘ ‘the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ ” However, the question of ‘whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law [citation] requiring de novo review.’ ” (Cueto, supra, 241 Cal.App.4th at p. 560.) The trial court’s order “is presumed to be correct, and all intimations and presumptions are indulged to support it on matters as to which the record is silent. [Citations.] It is the appellant’s burden to affirmatively demonstrate error.” (In re Marriage of Gray (2002) 103 Cal. App.4th 974, 977–978.)

Appellant contends the trial court abused its discretion in denying her request for lifetime renewal of the restraining order. Her primary contention is that the court failed to give “conclusive” effect to the evidence that supported issuance of the restraining order. In the renewal proceedings, appellant claimed the facts underlying issuance of the original order were alone sufficient to meet her burden of proof. On appeal, appellant argues respondent is collaterally estopped from denying the facts underlying the original order.

Although appellant’s 2014 testimony plainly supported issuance of the original restraining order, appellant’s collateral estoppel argument is misplaced, because the doctrine only applies where “the issue decided in the prior case is identical with the one now presented.” (Stolz v. Bank of America (1993) 15 Cal.App.4th 217, 222.) As the trial court below stated, “The granting of the original restraining order does not confirm that this Court made a finding that every allegation made by [appellant] was true, but that this court found a sufficient factual basis to determine that spousal abuse had occurred.” That is, the “issue” decided in the prior proceeding was whether appellant established a basis for issuance of a restraining order, not whether all the incidents to which she testified were true.

The one case appellant cites that addresses this issue is Ritchie, supra, 115 Cal.App.4th at page 1290, in which the court of appeal observed that “the trial court should not permit the restrained party to challenge the truth of the evidence and findings underlying the initial order . . . This would contradict principles of collateral estoppel and undercut the policies supporting those principles. But this does not mean the trial court should be prohibited from looking behind the order itself when evaluating whether that order, often three years old, should be extended another three years or even, as here, permanently.” We certainly agree that the restrained party is collaterally estopped from challenging the sufficiency of the evidence to support issuance of the initial restraining order. We also agree courts ordinarily should not entertain new evidence regarding the underlying incidents, because the issue in the renewal proceedings is “‘reasonable apprehension’ of future abuse.” (Ibid.) But Ritchie does not hold that a court hearing a renewal request must accept the truth of every piece of evidence presented in support of the original order.

In any event, appellant cites to nothing in the record showing that the trial court permitted respondent to present evidence challenging the basis for the initial restraining order. The court discussed the Ritchie decision with counsel during the renewal hearing and observed, “I think at this hearing there is no ability of the restrained party to question the accuracy or the factual basis upon which the trial court made its findings. Those findings were heard. The Court made a finding of domestic violence.” The trial court then expressly stated, “So at this time I’m ordering that the parties may not go back and try to prove that the initial restraining order was based on incorrect evidence.” The court expressed a willingness to consider further briefing on the issue, but appellant cites to nothing indicating the court changed its ruling. Neither does appellant cite any part of the record suggesting the trial court did not take seriously the conduct underlying the initial order, or that the court discounted and failed to consider any specific incidents to which appellant testified in 2014.

Instead, the record shows the trial court denied the renewal request based on additional evidence developed at the hearing on the request. The court emphasized all the evidence showing respondent’s “intentional avoidance of unintended

2. We observe that, because Ritchie’s interpretation of the statute on this point “was not necessary to its resolution” of the case, “it was dicta rather than a holding.” (In re D.Y. (2018) 26 Cal.App.5th 1044, 1055.) The issue in Ritchie was whether the trial court erred in “grant[ing] the renewal . . . on the assumption petitioner was entitled to that order ‘just upon request.’ ” (Ritchie, supra, 115 Cal.App.4th at p. 1279.)
contact” and respondent’s testimony “that he goes out of his way to not be in areas where it would occur to him [appellant] might be present.” The court noted that, when respondent inadvertantly was in the vicinity of appellant, respondent “acted appropriately and left as soon he was aware of [appellant] being present.” The court also observed, “The fact that [appellant] was willing to apply for membership and then use the gym knowing that [respondent] was a member causes this Court to question her claim of fearing [respondent].” Further, the court found that appellant, “perhaps unintentionally, uses the restraining order to defame or harass [respondent].” The court referred to appellant’s negative comments to another patron about respondent during the incident at the Glen Ellen Lodge, observing “[i]t seems inconsistent that if someone is fearful of domestic violence from someone that they would then take the opportunity to publicly defame that person to a friend of the person of whom they purport to be afraid.” The court concluded “that the factual testimony at the original trial resulting in the granting of the current restraining order is insufficient to provide a basis by itself to support the necessary findings to order the continuation of this restraining order.”

Appellant disputes the trial court’s view of the evidence, but we are required to defer to the court’s credibility determinations and make all reasonable inferences in support of the court’s findings. (Cueto, supra, 241 Cal.App.4th at p. 560.) Specifically, appellant argues the trial court should have concluded respondent’s child abuse allegation supported appellant’s claim of apprehension of future abuse. But the evidence supported an inference that respondent attempted to withdraw the claim not because it was unfounded but because respondent decided he did not want child protective services to get involved. Appellant also argues she did show some concern about avoiding respondent at the gym where they were both members. But reasonable inferences support the trial court’s assessment that her willingness to join the gym undermined her claim of fear. Appellant claims her “aggressive behavior” at a bar where she encountered respondent “demonstrates anger and not the absence of fear,” but reasonable inferences support the trial court’s assessment of the incident. In general, the court’s determination that respondent’s testimony was more credible than appellant’s testimony influenced the court’s assessment of the evidence and we are obligated to defer to that determination.4

Cueto, supra, 241 Cal.App.4th 550, is distinguishable. In that case, as in the present case, the initial restraining order was issued due to substantial violent conduct that alone could support renewal of the order. (Id. at p. 562.) The court of appeal found the trial court abused its discretion in denying the renewal order. (Id. at p. 563.) But the trial court in Cueto “relied largely on the lack of any violation of the restraining order.” (Id. at p. 562.) In the present case, in contrast, the trial court had evidence of affirmative efforts by respondent to avoid appellant, as well as evidence that appellant intentionally put herself in a situation where she could encounter respondent (by joining Sonoma Fit) and used the restraining order to defame respondent (the incident at the Glen Ellen Lodge). Moreover, in Cueto, the restrained party failed to attend anger management classes he had been directed to attend (ibid.); appellant has not pointed to any analogous failures by respondent. Finally, the trial court in Cueto told the previously-restrained party that “if there is ‘any contact,’ the [trial] court would ‘strongly consider another restraining order.’ ” (Ibid.) This admonishment suggested that the party seeking renewal of the restraining order had demonstrated reasonable apprehension of future abuse. (Ibid.) Again, appellant points to nothing comparable in the present case.5

DISPOSITION
The trial court’s order is affirmed and the matter is remanded for further proceedings consistent with this decision. Costs on appeal are awarded to respondent.

SIMONS, Acting P.J.

We concur. NEEDHAM, J., BRUINERS, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

3. In her opening brief, appellant argues the trial court erred in denying her request to strike the testimony of the Sonoma Fit employee who testified about appellant’s enrollment at the gym. Appellant contends the testimony should have been stricken under Evidence Code section 771, because the employee used gym records to refresh her recollection but did not produce the records at trial. However, the trial court did strike the portion of her testimony “dealing with the dates,” because the employee said that the records provided the “exact dates” when the parties joined the gym. Appellant has not shown error. Evidence Code section 771, subdivision (a) only requires the striking of testimony “concerning [the] matter” that was refreshed by the writing. Under the trial court’s ruling, the testimony still stands that appellant knew respondent was a member when she enrolled, which was the relevant information.

We also reject appellant’s similar claim that testimony of the sheriff’s deputy who received respondent’s child abuse allegation should have been stricken because he used his report to refresh his recollection but did not produce the report in court. Any error was harmless, because the child abuse allegation is part of the evidence appellant employed to argue in favor of the renewal request.

4. We reject appellant’s suggestion that the vigorous litigation surrounding the renewal request, and the evidence developed in that context, shows the parties have not “moved on with their lives so far that the opportunity and likelihood of future abuse has diminished.” (Ritchie, supra, 115 Cal.App.4th at p. 1291.) The trial court was entitled to credit the evidence respondent had moved on and was avoiding contact with appellant.

5. We reject appellant’s request that further proceedings should be heard by a different trial court judge. Appellant has not shown any bias or appearance of bias on the part of the trial court judge below. (See Nevarez v. Tonna (2014) 227 Cal.App.4th 774, 786.) Furthermore, appellant’s May 16, 2018 motion for sanctions against respondent and his appellate counsel is denied.
In re ISRAEL T. et al., Persons Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent,

v.

VICENTE T., Defendant and Appellant.

No. B286821
In The Court of Appeal of the State of California
Second Appellate District
Division Four
(Los Angeles County Super. Ct. Nos. DK23385, DK23385A, DK23385B)
APPEAL from an order of the Superior Court of Los Angeles County, Stanley Gensler, Judge. Reversed.
Filed November 21, 2018
Certified for Publication December 13, 2018

COUNSEL

Keiter Appellate Law and Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel and Veronica Randazzo, Deputy County Counsel, for Plaintiff and Respondent.

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter, filed on November 21, 2018, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be certified for publication in its entirety in the Official Reports and it is so ordered.

MANELLA, P. J., COLLINS, J., MICON, J.**

** Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

OPINION

Appellant Vicente T. (Father), the father of Israel and Isabel T., appeals the juvenile court’s jurisdictional order. The court asserted that the children fell under Welfare and Institutions Code section 300, subdivision (b), but found no substantial risk of serious harm to the children from the parents’ actions, and at the dispositional phase, returned the children to the custody of the parents, finding that the parents did not constitute “any kind of risk to the children.” Father contends the court’s findings do not support the assertion of jurisdiction. We agree and reverse the jurisdictional order.

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the Department of Children and Family Services (DCFS) on June 17, 2017. Officers from the Bell Gardens Police Department observed Father exchanging money for a Styrofoam cup at a fast food restaurant. Suspecting a drug transaction and observing Father commit several traffic violations as he drove away, police stopped him. Father exited his car and ran to his home. Mother came out of the home, took a cup from Father’s car, and ingested something contained inside it. Father and Mother were arrested. Officers conducted a search of the family home, finding baggies with trace amounts of a substance believed to be cocaine on the floor, a small baggie containing an off-white crystal substance resembling cocaine or methamphetamine on a closet shelf, and a large zip-lock bag containing marijuana. They informed DCFS, who detained Israel and Isabel, then five and three, and placed them with paternal relatives.

Interviewed by the caseworker, Father and Mother denied using or selling drugs. They claimed that any hard drugs found in the home were planted by the police officers, and that the marijuana belonged to Father’s adult son, who had a medical marijuana card. The caseworker said they were cooperative and found them to be dedicated and consistent with respect to visitation. Father and Mother saw the children and assisted with their care every day, and continued to participate in their activities and school programs. Their involvement was particularly important to Israel, who suffered from autism and required structure and a regular daily routine. In addition, Father and Mother volunteered to enroll in services, including parenting classes and drug testing.

At the jurisdictional hearing, Father’s adult son testified the marijuana found in the home was his. He said that he stored it in a box above his closet, out of the reach of his younger siblings, and that he generally locked his room when he left it. He further testified he did not use marijuana in the family’s home or in the presence of his siblings. He denied observing Father or Mother use drugs of any kind.

1. Undesignated statutory references are to the Welfare and Institutions Code.
2. One of the baggies was tested and found to contain .06 grams of methamphetamine. The DCFS detention report stated that the police recovered “a pound of cocaine and marijuana inside the children’s home.” Nothing in the police report supports that contention. Neither Mother nor Father were charged with drug-related offenses.
3. Father tested negative for all substances in July 2017; Mother missed her scheduled test.
Counsel for DCFS asked the court to find jurisdiction based on drugs being left within access to the children. Counsel for the children agreed that the presence of two baggies containing drug residue on the floor was sufficient to support jurisdiction. Counsel for Father contended that the matter should be dismissed because DCFS failed to meet its burden of proof. Counsel for Father also argued that the matter should be dismissed for lack of sufficient evidence. Counsel began to argue that the court should consider Father’s negative drug test and willingness to test further in making its jurisdictional finding. The court interrupted her, saying: “[t] hose are dispo issues.”

The court found true under section 300, subdivision (b) that there was “a … risk that the child[ren] will suffer … physical harm,” and that Father and Mother “created an endangering home environment for the children in that trace amounts of methamphetamine were found in the children’s home within access of the children.” In making its findings, the court struck the word “substantial” before the word “risk,” and struck the word “serious” before the word “physical harm.” In doing so, the court stated: “I am amending [the petition] so it will invite reversal at the Court of Appeal.”

Turning to disposition, the court noted that Father and Mother continued to care for the children and to meet their special needs, that there was “no evidence of abuse or neglect,” and that Father and Mother had not been charged with any drug offenses. The court stated: “I don’t believe these parents constitute any kind of risk to the children.” The court proceeded under section 360, subdivision (b). It ordered Father and Mother to participate in random drug testing for the next six months, to complete a parenting class, and to permit no illegal drugs or substances in their home.

DCFS was authorized to make unannounced home calls to monitor the family and assist the parents. The court released Israel and Isabel to the care of Father and Mother. This appeal followed.

DISCUSSION

A child may be adjudged a dependent of the court under subdivision (b) of section 300 if the “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or … by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness … .” (§ 300, subd. (b)(1).) A true finding under this subdivision requires evidence of “‘serious physical harm or illness’” to the child, or “‘a substantial risk’ of such harm or illness.” (In re D.L. (2018) 22 Cal.App.5th 1142, 1146.) Proof of this element “effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future . . . .” (Ibid., italics omitted, quoting In re B.T. (2011) 193 Cal.App.4th 685, 692.) Evidence of past conduct may be probative of current conditions. (In re D.L., supra, at p. 1146; accord, In re James R. (2009) 176 Cal.App.4th 129, 135-136, abrogated in part on another ground in In re R.T. (2017) 3 Cal.5th 622.)

DCFS bears the burden of proving that the minor comes under the juvenile court’s jurisdiction by a preponderance of the evidence. (In re M.R. (2017) 7 Cal.App.5th 886, 896; see § 355, subd. (a).) On appeal, “we must uphold the court’s [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.” (In re J.N. (2010) 181 Cal.App.4th 1010, 1022.)

Father contends that the court rejected the statutorily required elements in finding that any risk of harm was not serious or substantial, and that its failure to make the requisite findings requires reversal. We agree.

Respondent contends the issue has been forfeited because of the general rule that a parent may not challenge the sufficiency of the factual allegations in a dependency petition on appeal if he or she did not raise the issue in the court below. (See, e.g., In re John M. (2012) 212 Cal.App.4th 1117, 1123; In re Christopher C. (2010) 182 Cal.App.4th 73, 82.) Here, Father is not challenging the sufficiency of the petition, but the court’s failure to make the findings required by statute. In finding jurisdiction warranted under section 300, subdivision (b), the court struck the language stating that the children were at “substantial” risk of “serious” physical harm. Section 300, subdivision (b), requires the court to find that “the child has suffered, or there is substantial risk that the child will suffer, serious physical harm or illness . . . .” As numerous courts have said, “section 300, subdivision (b) . . . ‘means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness.’” (Maggie S. v. Superior Court (2013) 220 Cal.App.4th 662, 673, italics

4. Section 360, subdivision (b) provides: “If the court finds that the child is a person described by Section 300, it may, without adjudicating the child a dependent child of the court, order that services be provided to keep the family together and place the child and the child’s parent or guardian under the supervision of the social worker for a time period consistent with Section 301.” As explained in In re Adam D. (2010) 183 Cal.App.4th 1250, 1260: “If the court agrees to or orders a program of informal supervision [under section 360, subdivision (b)], it does not dismiss the dependency petition or otherwise set it aside. The true finding of jurisdiction remains. It is only the dispositional alternative of declaring the child a dependent that is not made.” (Quoting Seiser & Kumli, Cal. Juvenile Courts Practices and Procedure (2009) § 2.124[2], pp. 2-282-2-284.) A court’s decision to proceed with informal supervision under section 360, subdivision (b) thus represents “a final judgment” and “an appealable order,” permitting the parents to contest the underlying jurisdictional finding on appeal. (In re Adam D., supra, at p. 1261.)

5. Under section 360, subdivision (c), if during that time, the family is “unable or unwilling to cooperate with the services being provided [under subdivision (b)],” DCFS may file a new petition “alleging that a previous petition has been sustained and that disposition pursuant to subdivision (b) has been ineffective in ameliorating the situation requiring the child welfare services, and the court may hold a new disposition hearing.

6. In In re Adam D. (2010) 183 Cal.App.4th 1250, 1260, the court explained: “If the court agrees to orders a program of informal supervision [under section 360, subdivision (b)], it does not dismiss the dependency petition or otherwise set it aside. The true finding of jurisdiction remains. It is only the dispositional alternative of declaring the child a dependent that is not made.” (Quoting Seiser & Kumli, Cal. Juvenile Courts Practices and Procedure (2009) § 2.124[2], pp. 2-282-2-284.) A court’s decision to proceed with informal supervision under section 360, subdivision (b) thus represents “a final judgment” and “an appealable order,” permitting the parents to contest the underlying jurisdictional finding on appeal. (In re Adam D., supra, at p. 1261.)
By striking the language that stated the children were at substantial risk of serious harm, the court made clear that it did not believe the parents posed the level of risk to the children that must be found to warrant assertion of jurisdiction under subdivision (b) of section 300. This was confirmed by the court’s comment moments later, when it stated it did not believe Father and Mother posed “any … risk” to the children. Accordingly, its finding that jurisdiction was warranted must be reversed.

Respondent cites In re Alexzander C. (2017) 18 Cal. App.5th 438 (Alexander C.), where the juvenile court similarly excised the words “serious” and “physical” from the petition, finding only a “risk of harm” to the child. The Court of Appeal concluded the father forfeited any issue pertaining to the language of the petition or the court’s findings by failing to object at the jurisdictional hearing. (Id. at p. 446, fn. 3.) There, however, the juvenile court’s dispositional order found by clear and convincing evidence that substantial danger existed to the physical health of the children, and that there were no reasonable means to protect them without removal from their parents’ custody. (Id. at p. 451.) Thus, regardless of the words used by the juvenile court in its jurisdictional finding, there could be no question that the court had concluded the parents’ actions posed a significant risk to the physical safety of their children.

Here, in contrast, the court’s own comments in issuing the order under section 360, subdivision (b) and returning the children to their parents refute any inference that it found the parents posed a serious risk to their children’s physical wellbeing. The court’s statement -- “I don’t believe these parents constitute any kind of risk to the children” -- could not have been clearer. Thus, while the Alexander C. court could confidently rely on the record before it to conclude the court had concluded the parents’ actions posed a significant risk to the children’s physical health (the predicate for both its jurisdictional and dispositional orders), the record here supports only a contrary conclusion.

Respondent contends that the record supports the finding that the children were at substantial risk of serious harm due to the evidence that baggies containing methamphetamine residue were on the floor of the family home. If the record does not show that the court did, in fact, make the requisite findings, it is immaterial whether the evidence might have supported such findings. The test for substantial evidence is applied to the court’s actual finding. (See In re Abram L. (2013) 219 Cal.App.4th 452, 463 [inappropriate for appellate court to imply findings where juvenile court failed to make express findings required by statute]; Kemp Bros. Construction, Inc. v. Titan Electric Corp. (2007) 146 Cal.App.4th 1474, 1478 [where respondent argues for affirmance based on substantial evidence, record must show the court actually performed its factfinding function].) On this record, we cannot confidently say the court made the findings required by statute.

**DISPOSITION**

The jurisdictional finding is reversed.

MANELLA, P. J.

We concur: COLLINS, J., MICON, J.*

* Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
This is a child custody proceeding arising under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, Fam. Code, § 3400 et seq.).\(^1\) The proceeding raises questions of jurisdiction as between California and Belarus. Under the UCCJEA, a California court otherwise having jurisdiction cannot exercise its jurisdiction if a child custody proceeding has already been commenced in a court of another state “having jurisdiction substantially in conformity with” the UCCJEA. (§ 3426, subd. (a), hereafter section 3426(a), sometimes referred to as the “simultaneous proceedings” statute.)

On June 7, 2017, a Belarus court issued a decree finding the place of residence of baby L. to be the place of residence of the baby’s mother, V.A., in Belarus. On July 20, 2017, baby L.’s father, W.M., who was unaware of the Belarus decree, filed a petition in the superior court, seeking legal and physical custody of baby L. A few days later, the trial court granted father’s ex parte request for temporary emergency orders on child custody and visitation. Mother responded with a motion to quash the orders on the ground that California does not have jurisdiction to issue child custody orders in this case.

The trial court granted mother’s motion to quash. The court found the Belarus residency action was a child custody proceeding within the meaning of the UCCJEA, and the Belarus court had jurisdiction “substantially in conformity with” the UCCJEA. Based on these findings, the court found it could not exercise its jurisdiction.

We conclude the trial court erred. The UCCJEA mandates that “[b]efore a child custody determination is made,” notice and an opportunity to be heard must be given to all persons entitled to notice. (§ 3425, subd. (a).) Because father received no notice of the Belarus action, and because notice was not given “in a manner reasonably calculated to give actual notice” (§ 3408, subd. (a)), the Belarus court did not have jurisdiction in conformity with UCCJEA standards. The trial court therefore erred in granting mother’s motion to quash and refusing to exercise its jurisdiction.

Factual and Legal Background

Mother is a professional tennis player who was born in Belarus and is a resident of Belarus and Monaco. Since the beginning of her career in 2003, she has spent much of her time travelling and competing in international tennis tournaments. Mother and father met in late 2015 in Hawaii, where father, a United States citizen, then lived. Their relationship produced baby L., who was born in Santa Monica in December 2016.

In March 2017, when baby L. was 10 weeks old, the family travelled to Belarus, where they stayed until June 7, 2017, when they travelled to Mallorca for a tennis tournament and then on to London where mother competed at Wimbledon.

On May 25, 2017, while the parties were together in Belarus, mother filed an application in the Belarus courts to determine baby L.’s place of residence. The application stated that mother’s relationship with father was “in decline, the defendant scandalized, raised his voice, threatened to take away the child,” and “[n]ow we have a dispute about the place of residence of the child.” She asked the court to determine baby L.’s residence “by my place of residence” at an apartment in Minsk.

On May 29, 2017, the Belarus court issued a letter addressed to father at the Minsk apartment. (Father had a visa allowing him to be in Belarus, and the Minsk apartment was father’s registered address in Belarus.) The court’s May 29 letter advised father of mother’s claim “regarding determination of place of residence of [baby L.]” and that a hearing would be held on June 7, 2017.

On June 7, 2017, the Belarus court held a hearing. Neither mother nor father attended, having left early that morning for Paris. Baby L.’s maternal grandmother, A.V.A., appeared at the hearing for mother, and no one appeared for father. (Father claimed he was completely unaware of the hearing, while mother says she told father about it. The trial court credited father’s testimony, and concluded father “was un-
The June 7, 2017 Belarus decree found that plaintiff’s mother “takes care of the child herself from the moment of his birth;” “in spite of the itinerant nature of work, the child is always with her”; and in addition, A.V.A. “helps her to care for her child.” The court found mother was a Belarus citizen, had a permanent place of residence in Minsk, and the child was documented by a Belarusian passport, registered at the mother’s place of residence. The court found defendant (father) owned no housing accommodation himself, and was registered at mother’s place of residence. The court found mother and father “have a dispute about the place of residence of the child.” The court decided “[t]o determine the place of residence of [baby L.], born [in December 2016], by the place of residence of his mother, at the address [in Minsk].”

In July 2017, while in London, mother and father had “an awful disagreement” and ended their relationship. Father returned to the United States on July 12, 2017, and mother travelled to the United States with baby L. a few days later, to prepare and train for the U.S. Open in August. (Mother owns a single-family home in Manhattan Beach. She has a P1 visa for athletes that authorizes her presence in the United States to compete and for other related activities; she is not a permanent resident.)

On July 20, 2017, father filed his petition in Los Angeles, and on July 26, 2017, he sought temporary emergency orders on child custody and visitation. That day, mother responded by arguing the court did not have jurisdiction over child custody because neither of the parties (nor baby L.) resided in California, and all issues should be determined in Belarus. The court issued temporary orders that day, preventing the parties from removing baby L. from Los Angeles County, requiring surrender of baby L.’s passports, and giving father temporary physical custody with visitation for mother.

On July 28, 2017, mother filed her motion to quash, stating she had filed a court action in Belarus in May 2017; the court had already determined, on June 7, 2017, that baby L. was a resident of Belarus; and mother was “in the process of initiating custody proceedings there.”

Also on July 28, 2017, mother filed a statement of claim in the Belarus court (referred to as the visitation action), asking the court to allow father to visit his son once a month at the address of the baby’s residence in Belarus in the presence of mother.

On July 31, 2017, the Belarus court issued a letter addressed to father at the Minsk apartment, notifying him of mother’s claim “regarding definition of order of communication with the child,” and that a hearing would be held on August 3, 2017.

On August 3, 2017, the Belarus court held a hearing and decided that father could “communicate[] with [baby L.] once a month in the presence of [mother] at the address of [baby L.’s] residence” in Minsk, or in any other place as agreed by the parties.

On August 9, 2017, the California court made various orders setting discovery, briefing and hearing schedules on the jurisdiction issue, and temporary orders that alternated physical custody of baby L. between mother and father (with security guard monitors outside mother’s home during nights when she had custody of baby L.).

On August 15, 2017, the parties stipulated to a temporary order detailing the terms of their shared physical custody of baby L. and various child abduction prevention orders, including security guard monitoring and surrender of baby L.’s passports. This order was renewed several times during the litigation.

On January 12, 2018, the trial court granted mother’s motion to quash. The trial court found, among other things, the Belarus residency action was a child custody proceeding, and the Belarus court had jurisdiction “substantially in conformity with” the UCCJEA. The court vacated its orders concerning mother’s right to travel out of the jurisdiction with baby L. and other orders restraining mother and baby L., but stayed the effect of its order for three weeks, allowing father time to seek an additional stay from this court.

Father filed a timely notice of appeal, and then a petition for writ of supersedeas. We granted the writ (over a dissent), staying the trial court’s order pending resolution of the appeal. Our order, however, vested the superior court with jurisdiction to grant any subsequent temporary custody, visitation, or support orders, including travel orders for the removal of baby L. from California for domestic or international travel.

DISCUSSION

We begin with a description of the statutory background and pertinent provisions of the UCCJEA, and then turn to its application in this case.

1. The UCCJEA

The statutory background of the UCCJEA is described in In re Marriage of Paullier (2006) 144 Cal.App.4th 461, 469.
(Paillier). In 1973, California adopted a predecessor statute.\(^3\) (Ibid.) In 1997, the National Conference of Commissioners on Uniform State Laws approved a revised version, the UC-CJEA. (10 Witkin, Summary of Cal. Law (11th ed. 2017) Parent & Child, § 308, p. 402.) California adopted the UCCJEA in 1999. (Ibid.) “Its purpose, in addition to harmonizing inconsistent case law under the [predecessor act], was to ‘bring[,] a uniform procedure to the law of interstate enforcement’ by ‘provid[ing] … a remedial process to enforce interstate child custody and visitation determinations.’ ” (Paillier; at p. 469.) The UCCJEA takes a strict ‘first in time’ approach to jurisdiction.” (Paillier, supra, 144 Cal.App.4th at p. 469.) In general, once the court of an “appropriate state” – one having jurisdiction under section 3421, subdivision (a) – has made a child custody determination, “that court obtains ‘exclusive, continuing jurisdiction’ … .” (Paillier; at p. 469.)

Under section 3421, a court “has jurisdiction to make an initial child custody determination” if it is the child’s home state (id., subd. (a)(1)). If there is no home state (as in this case), the court has jurisdiction to make an initial child custody determination if the child and at least one parent “have a significant connection with this state other than mere physical presence,” and “[s]ubstantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships.” (§ 3421, subd. (a)(2)(A)&(B).) And, under section 3425, “[b]efore a child custody determination is made under [the UCCJEA], notice and an opportunity to be heard in accordance with the standards of Section 3408 must be given to all persons entitled to notice … .” (§ 3425, subd. (a), hereafter section 3425(a).)

The notice required for the exercise of jurisdiction when a person is outside the state “may be given in a manner prescribed … by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.” (§ 3408, subd. (a), hereafter section 3408(a).)\(^5\)

California courts must treat a foreign country as if it were a state for purposes of applying the general and jurisdictional provisions (§§ 3400-3430) of the UCCJEA. (§ 3405, subd. (a).) A California court need not apply the UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights. (§ 3405, subd. (c).) With that exception, “a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA] must be recognized and enforced under Chapter 3 [enforcement].” \(^6\) (Id., subd. (b).)

Finally, a California court “may not exercise its jurisdiction under this chapter [§§ 3421-3430] if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with [the UCCJEA] … .” (§ 3426(a).)

2. This Case

We preface our discussion with some observations that may facilitate an understanding of the error that undermined the trial court’s otherwise thorough and lucid resolution of the many issues and arguments the parties raised in this case.

The flaw in the trial court’s analysis was the failure to consider section 3425 – the jurisdictional provision requiring notice and an opportunity to be heard “[b]efore a child custody determination is made under [the UCCJEA].” (§ 3425(a), italics added.) Instead, the trial court apparently concluded that so long as the Belarus court “ha[d] jurisdiction to make an initial child custody determination” under the section 3421 standards – that is, “a significant connection” of the child and a parent to Belarus, and substantial evidence in Belarus concerning the child – then no more was required to conclude that Belarus “ha[d] jurisdiction substantially in conformity with [the UCCJEA].” (§ 3426(a).)

As we explain further post, that is not correct. Adequate notice is always a factor fundamental to jurisdiction, and custody proceedings under the UCCJEA are no exception to that principle.

a. The standard of review

The role of the appellate court, “once the [trial] court has evaluated witnesses’ credibility, resolved conflicts in the evidence and made its findings, is to ensure that the provisions of the UCCJEA have been properly interpreted and that substantial evidence supports the factual basis for the [trial] court’s determination whether California may properly exercise subject matter jurisdiction in the case.” (In re Aiden L. (2017) 16 Cal.App.5th 508, 520.) Accordingly, we review matters of statutory construction de novo, and review the trial court’s factual findings for substantial evidence.

b. Contentions and conclusions

Father raises only two issues on appeal: whether the Belarus residency action was a child custody proceeding as defined in the UCCJEA, and whether Belarus had jurisdiction substantially in conformity with the UCCJEA. We need not examine the first point, because the jurisdictional point is dispositive. Belarus did not have jurisdiction to make a child custody determination because it did not give father “notice

\[^{3}\text{Civil Code former section 5150 et seq., added by Statutes 1973, chapter 693, section 1, pages 1251-1259.}\]
\[^{4}\text{The UCCJEA “does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.” (§ 3425, subd. (b).)}\]
\[^{5}\text{“Proof of service may be made in the manner prescribed … by the law of the state in which the service is made.” (§ 3408, subd. (b).)}\]
\[^{6}\text{Under section 3443, a California court “shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with [the UCCJEA] or the determination was made under factual circumstances meeting the jurisdictional standards of [the UCCJEA] … .” (Id., subd. (a).)}\]
and an opportunity to be heard” (§ 3425(a)) in a manner “reasonably calculated to give actual notice” (§ 3408(a)).

i. The law on jurisdiction

The fundamental principle here is simple. A court cannot make a child custody determination without first having the jurisdiction to do so. That is so generally, and it is so under the UCCJEA. There is no authority to the contrary.

Jurisdiction does not consist only of so-called “subject matter” jurisdiction. Venerable authorities explain that, unless a defendant submits to the court’s jurisdiction, “a court’s power, i.e., jurisdiction to render judgment in an action, requires … jurisdiction of the subject matter of the action, territorial jurisdiction of the action, and adequate notice to the defendant.” (2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 7, p. 580, citing Rest.2d, Judgments, § 1; cf. Gami et v. Blanchard (2001) 91 Cal.App.4th 1276, 1286 (“A judgment entered without notice is void and can be attacked at any time.”)

The same principles govern under the UCCJEA: “Even though the court has jurisdiction of the subject matter under the traditional bases (domicile or physical presence [citation]) or under the alternative bases prescribed by the [UCCJEA], jurisdiction of the parties depends upon sufficient notice. A custody proceeding is in personam, not in rem; hence, the process requirements of personal actions apply, and notice of the proceeding must be given to the parents.” (2 Witkin, Cal. Procedure, supra, § 279, p. 886, italics added.)

Further: “[A] parent’s right to notice of custody proceedings affecting his or her child is constitutionally compelled, and a custody order made in the absence of such notice is invalid.” (2 Cal. Fam. Law Prac. & Proc. (2d ed. 2017) § 32.40[1].)

The principle is likewise clear from the UCCJEA on its face: “Before a child custody determination is made under [the UCCJEA], notice and an opportunity to be heard in accordance with the standards of Section 3408 must be given to all persons entitled to notice ….” (§ 3425(a).)

ii. The facts in this case

That brings us to the factual question in this case: Did the Belarus court give father notice and an opportunity to be heard at the June 7, 2017, hearing in accordance with the standards of section 3408? Those standards require that notice be given to father “in a manner reasonably calculated to give actual notice.” (§ 3408(a).)

On this point, the trial court – applying the section 3408 standard and recognizing that actual notice is not required – expressly stated that it would not enforce the June 7, 2017 decree. After first stating it would not enforce the Belarus court’s August 3, 2017 visitation decree (“[t]he process went from application [mailed July 31] to judgment [August 3] in record-breaking time”), the court stated:

“The Court will also not enforce the June 7, 2017 decree either, although the question is a closer one… [I]t remains the case that the order was made without notice or an opportunity to be heard.”

Substantial evidence supports the trial court’s conclusion that the June 7, 2017 decree was made without notice to father. That evidence consists of father’s testimony that he had no notice of the June 7, 2017 hearing, and the testimony of father’s expert on Belarusian law, Dr. Aliaksandr Danilevich. The trial court stated that it “credit[ed] [father’s] testimony that he had no notice and Dr. Danilevich’s testimony concerning Belarus law.” The court described Dr. Danilevich’s testimony:

“Dr. Danilevich testified that under Belarus law, notice is typically made by registered mail (sent by the court) with a return receipt.” While that manner of notice was “certainly reasonable,” the trial court found that “[t]he problem here is that there is absolutely no evidence that any return receipt was submitted for either application [referring to the applications resulting in the June 7 and the August 3 decrees].” And: “Dr. Danilevich also testified that where the registered mail option was uncertain, the court had the ability to give notice by email, fax, or other means. However, again, there is no evidence that the Belarus court made any attempt to do so. And, while it is true that the Belarus court likely did not have [father’s] email address, [mother] had it. She could have provided that information to the Belarus court, especially given that she knew for a certainty that the mailed notice addressed to an apartment in Minsk where [father] had never actually lived would never reach [father].”

The trial court also described father’s testimony. Father stated, among other things, “that he had no idea there was going to be a hearing on June 7, 2017, which was the day that he and [mother] left Belarus for Paris.” The court stated it “believes [father] when he states that he would not have left the country on the same day as a court hearing involving his son was going to go forward.”

7. While the trial court did not specifically cite it, Dr. Danilevich also testified that under Belarus law, the petitioner in a case “has to provide the court with all contacting [data], all possible contacting data, phone number, e-mails, all the – of the party to give to the court the possibility [to] contact him or her in any way. Different ways.”

Mother’s expert, Dr. Alena Babkina, testified to the contrary, that under Belarus law mother had no obligation to provide the court with father’s e-mail address, and she complied with her duty to provide information about father by providing his official address. But as mother herself tells us, the disputed meaning of a foreign law is a question of fact for determination by the trial court. (See, e.g., Estate of Schluttig (1950) 36 Cal.2d 416, 424 [where “the issue to be determined involved questions as to the existence, translation, interpretation and effect of [foreign] laws,” and the trial court heard “highly conflicting testimony by experts upon the laws of those countries and their application under given circumstances,” the determination of the issue “was one of fact, and the finding of the trial court, if supported by substantial evidence, will not be disturbed on appeal.”])

8. The court also described father’s testimony as stating “that he never got the notice in the mail at the apartment in Minsk,” that he was “given a different, and innocuous reason” for the fact that baby L.’s maternal grandmother (who attended the hearing for mother) was staying behind in Belarus, and that father “produced a contemporaneous email that supports his version of events.”
Mother recognizes that section 3425(a) “requires notice and opportunity to be heard before a court may exercise its jurisdiction to make a custody order.” She does not dispute that father and Dr. Danilevich testified as described by the trial court. Nor does she suggest that their testimony is not substantial evidence father had no notice of the June 7, 2017 proceeding. Mother also acknowledges that a determination of “substantial conformity” with the UCCJEA “requires analyzing the facts and circumstances under which the sister-state [here, Belarus] exercised jurisdiction.”

Despite her understanding of these principles, mother contends that “Belarus procedures satisfy the notice requirements for an exercise of jurisdiction,” and the trial court determined that “the notice procedures under Belarusian law” were reasonably calculated to give actual notice. Neither claim has merit.

The fundamental flaw in mother’s analysis is her reliance on Belarus procedures, rather than on whether and how the procedures were employed in the particular case. Yes, the trial court found that Belarus procedures could theoretically be applied so that notice is given “in a manner reasonably calculated to give actual notice.” (§ 3408(a)) But theory does not satisfy section 3408. As the trial court put it, “as a theoretical matter,” both of the notice methods to which Dr. Danilevich and Dr. Babkina testified “at least potentially on their face may satisfy section 3408. But that does not answer the question when applied to this specific case.” We agree, it does not.

Section 3408 expressly states that notice “must be given in a manner reasonably calculated to give actual notice.” (§ 3408(a), italics added.) The trial court found that notice compliant with section 3408 standards was not given. The court quoted the section 3408 standards at the beginning of its notice discussion, and in the end, after again referring to section 3408, stated that “it remains the case that the [June 7, 2017] order was made without notice or an opportunity to be heard.” That being so, the Belarus court had no jurisdiction to make a child custody determination.

We note two further points. Mother tells us that jurisdiction is “a separate concept from enforcement,” so while notice “was insufficient for enforcement purposes,” there were “sufficient standards for due process under the Belarusian legal system” for jurisdictional purposes. This is just another way of saying that if notice procedures are theoretically adequate, a court may exercise jurisdiction in a particular case despite a lack of notice. As we see it, that is not correct. Moreover, basic principles of statutory construction do not allow us to construe provisions of the same statute without regard to the statute as a whole. “[A]ll parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others.” (City of Huntington Beach v. Board of Administration (1992) 4 Cal.4th 462, 468.) To suggest that a court may make a child custody determination under lesser notice standards than those required for enforcement of a sister state’s custody determination would not comport with this principle of statutory construction.

Finally, mother relies heavily on AO Alfa-Bank v. Yakovlev (2018) 21 Cal.App.5th 189 (AO Alfa-Bank). That case states the principle that “due process does not require actual notice; it requires only a method of service ‘reasonably calculated’ to impart actual notice under the circumstances of the case.” (Id. at p. 195, italics added.) That is undoubtedly so; indeed, that principle is the same principle stated in section 3408, and the trial court here recognized and applied that principle. AO Alfa-Bank – which is not a child custody case – does nothing to advance mother’s position.

In AO Alfa-Bank, the parties, in the surety agreement that generated the lawsuit, agreed that notices would be sent to the defendant at his residence in Russia (the same address as the address he registered with the government), and he was contractually obligated to notify the plaintiff of any new address within five days. He did not do so before (or after) he fled the country to seek asylum in the United States, and the plaintiff did not know he had fled the country until years after it filed suit. (AO Alfa-Bank, supra, 21 Cal.App.5th at pp. 195-196.) The Russian court file showed, among other things, two summons letters in succeeding months, as well as two telegrams sent from the court to the defendant’s Moscow residence in later months. (Id. at pp. 204-205.) The court found that “[u]nder these circumstances, we conclude the procedure used was reasonably calculated to apprise [the defendant] of the pendency of the action and afford him an opportunity to respond.” (Id. at p. 209, italics in original; id. at p. 210 (“Critical to our conclusion is the fact that under the surety agreement, [the defendant] was required to keep his official registered address up to date.”).) In short, under those circumstances, notice was reasonably calculated to give actual notice. (Id. at p. 202.)

There is no similarity with the circumstances in this case. Moreover, AO Alfa-Bank demonstrates the proper approach to the issue: “We first consider whether the evidence establishes proper service under Russian law. [Citations.] If it does, we then consider whether such service was reasonably calculated, under all the circumstances, to impart actual notice.” (AO Alfa-Bank, supra, 21 Cal.App.5th at p. 203.) Here, substantial evidence clearly supports the trial court’s finding that the notice standards in section 3408 of the UCCJEA were not met.

Because the Belarus court did not provide notice to father consistent with the standards specified in section 3408, and because notice is required before a court may make a child custody determination (§ 3425(a)), the Belarus court did not “have[j]urisdiction substantially in conformity with [the
UCCJEA]” under section 3426(a). Accordingly, the California court has “first in time” jurisdiction, and the trial court erred in ceding jurisdiction to the Belarus court under section 3426(a). Mother’s motion to quash the trial court’s orders on the ground that California does not have jurisdiction to issue child custody orders in this case should have been denied.

DISPOSITION

The order refusing to exercise jurisdiction and granting mother’s motion to quash is reversed, and the matter is remanded to the trial court for further proceedings. Father shall recover his costs on appeal.

GRIMES, J.

WE CONCUR: BIGELOW, P. J., STRATTON, J.

Cite as 18 C.D.O.S. 11738

ORANGE COVE IRRIGATION DISTRICT, Plaintiff, Cross-complainant and Appellant,

v.

LOS MOLINOS MUTUAL WATER COMPANY, Defendant, Cross-defendant and Respondent.

No. C078323, C078888
In The Court of Appeal of the State of California
Third Appellate District
(Tehama)
(Super. Ct. No. CI3811)
APPEAL from a judgment of the Superior Court of Tehama County, John J. Garaventa, Judge. Reversed.
Filed December 12, 2018

COUNSEL


Gallery & Barton, Jesse William Barton for Defendant, Cross-defendant and Respondent.

OPINION

The owner of an appropriative right to water in a creek sought declaratory relief to determine whether, under the judicial decree that established the right, it may (1) use water appropriated to it on a year around basis and not only during the irrigation season; (2) use or transfer its water outside of the creek’s watershed; and (3) make these changes in the use and location of use without obtaining prior approval of the creek’s water master or the superior court.

The trial court declared the decree did not give the owner these rights. We reverse the judgment.

FACTS AND PROCEEDINGS

Mill Creek drains a watershed of approximately 135 square miles. It begins at the base of Mt. Lassen and travels in a westerly direction until it drains into the Sacramento River near the towns of Tehama and Los Molinos in Tehama County. In a year of normal rainfall, Mill Creek’s volume is approximately 250 cubic feet per second (cfs) when the irrigation season begins.

By a stipulated decree issued in 1920, the Tehama County Superior Court adjudicated water rights in Mill Creek. It declared the natural flow of the water up to a total rate of 203 cfs had been appropriated by the parties appearing before it for use upon their and other persons’ lands. The decree
entitled these original owners of the water rights and their successors to continue diverting from Mill Creek a total of 203 cfs of water, and it allotted them shares in the amount of water each could divert. It entitled the owners to use or dispose of their share of water in any manner, at any place, or for any purpose, or in accordance with whatever agreement the owners may make with any other person or entity.

As part of the decree, the court also appointed a water master of Mill Creek to implement its order. The decree gave the water master exclusive authority to divert and apportion the water during the irrigation season according to the decree’s terms, measure the diversions, and control and supervise the diversions and the gates and ditches used to divert the water.

By succession of interest, respondent Los Molinos Mutual Water Company (Los Molinos) is the current water master of Mill Creek. It also holds water rights entitling it to receive approximately 140 cfs of the 203 cfs diverted from the creek. As the water master, it diverts and apportions the water during the irrigation season and delivers it to its shareholders and the other owners of decreed water rights through a system of canals and ditches.

Typically, Los Molinos has delivered Mill Creek water from April to October each year primarily to irrigate pastures and orchards and for watering stock. Due to limitations in its conveyance system, Los Molinos combines the diverted water and delivers it on a rotational basis instead of simultaneously. Each rotation takes generally 12 to 14 days, but it takes longer during a drought or later in the season as Mill Creek flows decrease. By the middle of July, all of Mill Creek’s available surface water, by then down to a volume of less than 100 cfs, is being diverted. By August, the owners’ demand exceeds the supply of water. In September, the rotation period can exceed 18 days due to the lack of water. Meeting the water needs of all the owners becomes impossible because deliveries may occur less than twice a month.

In October, water demand decreases as harvest occurs, but there is almost no flow in Mill Creek downstream from Los Molinos’s last diversion dam except for a small amount bypassed by Los Molinos and another rights holder at the request of the state to support salmon migration.

As rains begin in November, Los Molinos shuts down its system of canals and ditches for maintenance and repair while flows in Mill Creek begin to increase.

The record indicates Mill Creek is usually low in October, but flows increase afterward. A study prepared for the State Water Resources Control Board found that from 1998 to 2012, average daily flows in Mill Creek below Los Molinos’s last diversion dam were greater than 50 cfs only 28 percent of the month of October, but were greater than 85 cfs approximately 98 percent of the time from November 1 through May 31.

With limited exceptions, Los Molinos does not divert or deliver any water again until April, when the cycle repeats. It does not provide irrigation water in the winter months because pasture vegetation and orchard trees are dormant and irrigation is not necessary. It has never delivered water 365 days a year for any purpose.

Appellant Orange Cove Irrigation District (District) supplies water for parts of Fresno and Tulare Counties in Central California. It receives its water from the federal Central Valley Project under a contract with the United States Bureau of Reclamation.

In 2000, the District acquired decreed rights to Mill Creek water. Its rights authorized it to receive approximately 10.5 cfs of the diverted 203 cfs. The District’s predecessors in interest historically used the water to irrigate land within Los Molinos’s service area. The District acquired only the rights to the water; it did not purchase any land within the Mill Creek watershed.

The District acquired the water rights to offset fees imposed on its purchase of federal water. Federal law imposed a surcharge on the District’s purchase of Central Valley Project water to fund environmental restoration projects. (Pub.L. No. 102-575, §§ 3406(b)(1), (c)(1); 3407(b) (Oct. 30, 1992) 106 Stat. 4706.) The District hoped to offset the surcharge by having Los Molinos hold its water rights in trust and use the water to increase flows in Mill Creek to improve salmon migration. For a variety of reasons, however, the District was not able to use its Mill Creek water rights as planned.

In 2009, the District determined to put its water rights to other uses, including municipal, industrial, agricultural or environmental uses by a downstream user. In the meantime, the District issued Los Molinos a license to continue using its share of Mill Creek water.

In 2010, the District granted an option to a private developer to purchase some of its Mill Creek water rights. The developer intended to use the water for a redevelopment project in Napa County. Los Molinos submitted comments as part of the redevelopment project’s environmental review. It stated it had always been its understanding and practice “that the rights adjudged in the 1920 decree are seasonal in nature, and limited to the irrigation season, which typically lasts from April to October.” Ultimately, the developer did not exercise its option to acquire the District’s rights.

Following Los Molinos’s comments on the project, District representatives met with Los Molinos representatives to discuss the District’s plan to transfer its water rights to a person or entity located outside the Mill Creek watershed for any reasonable use. Los Molinos, acting as water master, stated it would not agree to implement any transfer of Mill Creek water that was (1) outside of what it considered to be the irrigation season; (2) to be used outside of the Mill Creek watershed; or (3) not approved by the superior court as being consistent with any applicable law.

In 2013, the District revoked Los Molinos’s license to use its Mill Creek water rights and stated it intended to make alternative beneficial use of them “within the basin of origin, downstream of the historic point of diversion.”
In response, Los Molinos said it “will not agree to transfer any of the water claimed by [the District] unless and until a Tehama County judge determines the water rights can be transferred in the manner requested by [the District] consistent with the requirements and limitations (e.g. season of use, purpose of use, amount of use, place of use, point of diversion, etc.) contained in the [1920] Decree and California Water Code section 1706.”

The District brought this action against Los Molinos for declaratory relief. It sought a declaration that (1) the 1920 decree authorized it to use its water rights year round and not just during the irrigation season; (2) the decree did not prohibit it from transferring its rights for use outside the Mill Creek watershed; (3) Los Molinos as water master was not authorized to grant or deny prior approval for the District’s proposed transfer of water rights on the basis the transfer will result in injury to another as defined in Water Code section 1706; (4) Los Molinos was not authorized by the decree to determine the quantity of water the District may transfer; (5) Los Molinos was not authorized by the decree to refuse to effectuate a proposed transfer of water on condition the Superior Court approved the transfer; and (6) Los Molinos breached its duties by refusing to effectuate the District’s proposed transfer. The District also sought attorney fees.

Following a trial based on stipulated facts, the trial court entered judgment against the District. The court ruled the decree (1) authorized the water right owners to use their water only during the irrigation season; (2) did not authorize the owners to use their water at any place; and (3) required any change to the purpose or place for using the water to be approved by Los Molinos or the court. The court reformed the decree’s section III entitled “The parties and their successors to divert from [Mill Creek] in the aggregate all of the water flowing therein ‘at all times’ ‘at all stages of the flow’ whenever such gross flow shall not exceed a total of two hundred and three (203) cubic feet per second, and at all other times of the day the water flowing therein up to a total of two hundred and three (203) cubic feet per second.” (III, italics added.)

The court ruled the District was not authorized by the decree to grant or deny prior approval for the District’s proposed transfer of water. The court reformed the decree to authorize each party to use its water “for useful and beneficial purposes” at any time, at any place, and for any purpose, while also requiring the water master to apportion and measure the diverted water only during the irrigation season. The trial court also held Los Molinos did not breach its duties under the decree. The District filed a notice of appeal against the judgment.

The trial court also awarded attorney fees to Los Molinos. In its judgment, it cited no authority for awarding the fees. However, at a later hearing on a motion for fees brought by Los Molinos, the court awarded fees of $53,248.75 under Code of Civil Procedure section 1021.5. The District filed a separate notice of appeal from this order. We have consolidated the appeals for purposes of argument and decision.

**DISCUSSION**

**I**

**Denial of Declaratory Relief**

The District contends the trial court misinterpreted the 1920 decree. It claims the decree’s plain language, its structure, and the rights owners’ historical conduct establish the decree (1) authorizes the District to use its water rights any time of year and not only during the irrigation season; (2) authorizes the District to use its water rights outside of the Mill Creek watershed and Los Molinos’s service area; and (3) does not require it to obtain prior approval from Los Molinos or the superior court to change the purpose or place for using the water. We agree.

**A. The Decree**

To analyze the parties’ arguments, we first review the decree in detail. Doing so, we see its potentially conflicting nature of granting owners the right to use their water at any time, at any place, and for any purpose, while also requiring the water master to apportion and measure the diverted water only during the irrigation season. To resolve this conflict, we are tasked to interpret the decree as a whole so as to give effect to the mutual intentions of the court that approved it and the parties who agreed to it. (State of California v. Continental Ins. Co. (2012) 55 Cal.4th 186, 195; Dow v. Lassen Irrigation Co. (2013) 216 Cal.App.4th 766, 780-781.)

The decree resulted from a stipulation by the parties in Los Molinos Land Co. v. Clough (Super. Ct. Tehama County, 1920, No. 3811). Prior to that action, Los Molinos’s predecessor in interest and the other eight parties to the decree had appropriated and diverted water from Mill Creek (then known as the Los Molinos River) in the aggregate amount of 203 cfs. (Decree, § I.) The water had been used by the parties “for the benefit of the several tracts of land” they owned and “certain other tracts of land” they did not own. (§ I.) The water continued to be needed “for useful and beneficial purposes” upon those lands. (§ I.)

The decree’s section III entitled the parties and their successors “to divert from [Mill Creek] in the aggregate all of the water flowing therein whenever [sic] gross flow shall not exceed a total of two hundred and three (203) cubic feet per second, and at all other times all of the water flowing therein up to a total of two hundred and three (203) cubic feet per second.” (III, italics added.)

The decree allotted to each of the parties a specific share of the 203 cfs and prioritized the order in which each could receive the water. (§ IV.) No matter the share, section IV of the decree authorized each party to divert its share whenever water was running in Mill Creek. Seven of the nine parties were entitled to divert their shares “at all stages of the flow” in the creek. The District’s water rights originated from one of these original parties, Mary Runyon. The decree granted the remaining two parties the right to divert water “at all times.” For these other parties, the decree authorized diversions no matter how much water was flowing in the creek.

In addition to delineating the parties’ water rights, the decree vested broad discretion in each of the parties to decide how it diverted its share of the water and how and where it used its water. Regarding the diversion of water, section VII of the decree states: “Each of said parties is and will be at all times entitled to take and divert from [Mill Creek] the quantity of water herein and hereby allotted to such party at such point or points on said river as such party may see fit, and by such means as such party may see fit to adopt, or to procure such quantity of water to be diverted from said river for the
benefit of such party under any arrangement with any other person or corporation, or by or through any diversion works constructed or operated by any other person or corporation.” (§ VII, italics added.)

Section VII of the decree granted the parties discretion to determine how and where to use their water as follows: “Each of said parties is and will be at all times entitled to use or dispose of the share allotted to such party of the water of said river in any manner, at any place, or for any purposes which such party may desire, or in accordance with whatever agreement or arrangement such party may make with any other person or corporation.” (§ VII, italics added.)

The decree sought to equalize each party’s rights, subject to the draw priorities it established, and it superseded any rights of priority held by riparian users. Section VII states the quantities of water each party is entitled to divert from Mill Creek include whatever quantities the parties are entitled to divert “by virtue of owning land riparian thereto” or by virtue of any grant from a riparian owner or any appropriation of water previously made. Section VII continues: “Except as herein expressly declared, no priority of right in respect to the waters of said river exists as between said parties, the right of each of them in respect to said water being on a parity with the rights of all of the others of said parties, and all of them being entitled to exercise simultaneously and continuously their several rights as herein defined.” (§ VII, italics added.)

The decree entitled certain of the parties to continue using a diversion ditch to receive their Mill Creek water. The ditch, known as Runyon Ditch, conveys diverted Mill Creek water to parties south of the creek. (§§ VII, X, XIV.) Los Molinos’s and the District’s predecessors in interest were two of those parties and also co-owners of the ditch. The decree’s section VIII entitled the ditch’s co-owners to continue using Runyon Ditch to receive diverted Mill Creek water. (§ VIII.)

We note that, according to the District’s option agreements with the developer mentioned above, the rights it acquired were derived from those referred to in the decree “as the rights of Mary Runyon, et al., on the Runyon Ditch and/or Buena Vista Lateral . . . .” The Buena Vista Lateral or ditch system transports water from Runyon Ditch. It appears the Runyon rights are pre-1914 rights, as the decree states the water rights of Ms. Runyon and certain other parties are subject to an indenture dated April 21, 1911, in which Ms. Runyon both received and transferred rights. (§ V.) The parties also assume in their arguments that the rights associated with the 1920 decree are pre-1914 rights. Appropriative rights obtained before 1914 are not subject to the state’s statutory scheme for acquiring appropriative water rights. (Nicoll v. Rudnick (2008) 160 Cal.App.4th 550, 557.)

In order to carry out its provisions, the decree established the position of water master. It appointed Los Molinos’s predecessor in interest as the water master of Mill Creek and also of Runyon Ditch. (§§ VIII, X, XIV.) For ease of reference, we will refer to the water master and Los Molinos interchangeably, as Los Molinos holds that responsibility today.

Unlike its provisions allowing the owners to exercise their rights at any time and in any manner, the decree established the irrigation season as the time of year when the water master was required to perform its duties on Mill Creek. We quote section X of the decree: “As [the Mill Creek] Water Master [Los Molinos] shall at all times during the irrigation season of each calendar year make or cause to be made in conformity with the provisions of this decree the necessary apportionment of the water then flowing in [Mill Creek] among the several ditches and canals then being maintained or operated by or for the parties . . . . and shall discharge all such other duties as normally belong to the office of Water Master. As such Water Master it shall at all such times have and exercise control over and superintend any and all diversions of water from said river by all such ditches and canals, and the opening and closing or changing or regulating of any and all gates or other appliances whereby such diversions of water from said river shall be effected; and for that purpose shall have authority to enter upon any land of any of said parties upon which there shall be any ditch, canal, [etc.] for the diversion or conveyance of water, and to direct and superintend the placing and installation of proper gates for controlling the diversion of water from said river and proper devices for the measurement and registration of the quantities of water being from time to time diverted and conveyed by such ditches, canals or other means.” (§ X, italics added.)

The decree also requires Los Molinos to measure the flows during the irrigation season. Under the decree’s section XII, Los Molinos is to “take or cause to be taken at intervals of not exceeding one week throughout the period of time between the first day of May in each calendar year and the close of the irrigating season of such year, accurate measurements of the gross flow of [Mill Creek], and also of the quantity of water flowing in each ditch or canal . . . . and shall keep accurate records of such measurements in permanent form . . . .” (§ XII, italics added.)

The decree imposes similar responsibilities on Los Molinos as water master of Runyon Ditch. The decree requires Los Molinos to perform its duties on Runyon Ditch at all times and whenever requested, but it is to deliver water using the ditch to the extent the owner is entitled to the water from Mill Creek at the time of delivery. Of relevance here, section XIV of the decree requires Los Molinos “at all times [to] take proper steps to control and restrict and keep account of the quantities of water from time to time being diverted from said Runyon Ditch by any and all persons so that there shall at all times remain in said ditch sufficient water to make up the aggregate of the quantities of water [to which the other owners] shall be entitled to have flowing in said ditch at such times. It shall, whenever requested by any person entitled to receive water from said Runyon Ditch, open and close the diversion gates on said Runyon Ditch in such way as to supply to such person the quantity of water desired not exceeding the quantity to which such person may at such time be entitled by reason of his rights in respect to the waters of
The District contends the trial court’s interpretation is incorrect. It claims the interpretation is contrary to the decree’s plain language, which in sections III and VII allows owners to use their rights at all times. It also argues the interpretation is inconsistent with the decree’s structure. It claims that as constructed, the decree does not suggest one should look to the limitations on the duties of the water master to define the rights of the owners. The District further contends the parties’ conduct before this action arose shows the exercise of water rights was not limited to the irrigation season. Los Molinos has delivered water in every month of the year when needed, and other decreed rights to Mill Creek water were used outside of the irrigation season to enhance the creek’s salmon and steelhead runs or respond to drought.

We agree with the District that the trial court misinterpreted the decree.

‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.’ (Bank of the West v. Superior Court [(1992)] 2 Cal.4th 1254, 1264.) ‘Such intent is to be inferred, if possible, solely from the written provisions of the contract.’ (AIU Ins. Co. v. Superior Court (1990) 51 Cal.3d 807, 822.) ‘If contractual language is clear and explicit, it governs.’ (Bank of the West v. Superior Court, supra, 2 Cal.4th at p. 1264.) ‘The “clear and explicit” meaning of these provisions, interpreted in their “ordinary and popular sense,” unless “used by the parties in a technical sense or a special meaning is given to them by usage”’ ([Civ. Code.,] § 1644), controls judicial interpretation. (Id., § 1638.)’ ([Citations.])” (Waller v. Truck Ins. Exchange, Inc. [(1995)] 11 Cal.4th 18.) “(State of California v. Continental Ins. Co., supra, 55 Cal.4th at p. 195.)

‘The courts give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.’ (Civ. Code, §§ 1649; see AIU Ins. Co. v. Superior Court, [supra], 51 Cal.3d 822.)” (Bank of the West v. Superior Court, supra, 2 Cal.4th at pp. 1264-1265.) ‘The mutual intention to which the courts give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.’ (Civ. Code, §§ 1649; see AIU Ins. Co. v. Superior Court, [supra], 51 Cal.3d 822.)” (Bank of the West v. Superior Court, supra, 2 Cal.4th at pp. 1264-1265.)

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The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.’ (Civ. Code, § 1641.)

‘Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.’ (Code Civ. Proc., § 1858.)

The decree grants the owners the right to use their Mill Creek water at any time, subject to one exception. They may divert their water “whenever” water is flowing in the creek. (§§ 1309, 1315.) They may divert their shares “at all stages of the flow” and “at all times,” and by such means as they see fit. (§§ 1309, 1315.) They are “at all times entitled to use or dispose” of their
The decree grants the owners the right to use their water at
any time, limited only by the decree’s terms regarding the
water master’s responsibility during the irrigation season. In
fact, the decree sets forth how the owners may obtain water
outside of the irrigation season. It expressly grants the own-
ers the right to divert their share of the water “by such means
as such party may see fit to adopt, or to procure such quantity
of water to be diverted from said river for the benefit of such
party under any arrangement with any other person or corpo-
ration, or by or through any diversion works constructed or
operated by any other person or corporation.” (§ VII.)

Los Molinos argues the decree’s structure reflects the
owners’ intent to prohibit diversions outside of the irriga-
tion season. It asserts the decree’s first part defines only
individual rights to quantities of water, and the second part
imposes a collective limitation on when the water could be
used by requiring the measurement and apportionment to oc-
cur only during the irrigation season and only through the
water master.

Los Molinos’s understanding of the decree’s structure is
incorrect. The decree’s first part sections I through IX, does
more than just allot quantities of water. It also settles and
equalizes all competing claims and grants the parties the right
to divert and use the water as they see fit. Indeed, the decree
prohibits the owners from amending these provisions that
define and adjudge the extent of the owners’ rights. (§ XIII.)

The decree’s second part, sections X through XVII, es-
ablishes the water master and defines its responsibilities.
In more specific terms than the decree’s first part, this part
imposes on the water master the duties of diverting the water
and measuring the flows during the irrigation season, and
operating and maintaining the diversion system of canals,
ditches, and gates. These duties conflict with the first part’s
grant of authority to the owners to divert the water, but only
to the extent the owners seek to divert water during the ir-
rigation season. The second part does not conflict with the
owners’ rights outside of the irrigation season.

Los Molinos argues its and the owners’ historical conduct
and the District’s conduct prior to this action show all parties
believed the decreed water rights would exist only during the
irrigation season. It claims any deliveries of water it made
outside of the normal irrigation season were limited and were
only for irrigation purposes. It has never delivered water 365
days of a year.

The historical conduct as outlined above shows the owners
exercised their water rights primarily during the irrigation
season, but it does not show the owners could not exercise
their rights outside of the irrigation season.

Los Molinos admits there have been times during dry or
wet years when the “irrigation season,” as Los Molinos de-
fines it, has either expanded or contracted based upon water
demands. At times it has delivered water for stock watering
as early as January or as late as December. For example, in
2014, an exceptionally dry year, it delivered water for a two-
week period in January and February for stock watering and
irrigation purposes. It stopped when rains came and enough
water had been delivered.
More significantly, Los Molinos’s conduct as a water rights owner and the conduct of another owner show that at least these owners believe they may control and exercise their rights outside of the irrigation season, even to put their water to a use other than irrigation. Los Molinos has entered into agreements with the state to keep water in Mill Creek it was otherwise entitled to divert for agricultural purposes in order to enhance flows for fish migration, including during times outside of the normal irrigation season. In 1990, the state agreed to provide ground water to Los Molinos in exchange for Los Molinos bypassing an equivalent amount of Mill Creek surface water to support fish migration. In this agreement, Los Molinos also agreed the state could divert and use its water downstream for fish and wildlife purposes. Los Molinos participated in this agreement as a water rights owner; as the water master, it only coordinated the releases. It and the state renewed the agreement in 2007. In the 2007 version, Los Molinos specified it would release its water in the spring and also from October 15 through November 30.

In 1996, Jones, Inc., a landowner within Los Molinos’s service area and an owner of water rights, agreed to forgo any deliveries of its water throughout the year so the water could be used to aid fish migration in Mill Creek. Los Molinos agreed to add this water to the amount it previously agreed to bypass under the 1990 agreement. Also in this 1996 agreement, Los Molinos agreed to bypass an additional 10 cfs of its Mill Creek water from October 15 through December 31. This agreement was valid for 11 years.

In 2008, The Nature Conservancy purchased water rights from Jones, Inc. It continues to bypass its share of water in the spring and from October 15 to November 30 to support fish migration. Los Molinos also continues to bypass its additional 10 cfs of water.

During the drought year of 2014, Los Molinos and The Nature Conservancy entered into agreements with the state to bypass water which was otherwise available for agricultural use from October 15 through December 31 of that year to support fish migration.

These bypass agreements show Los Molinos interprets the decree to give it, as an owner of water rights, the authority to access and direct the use of its appropriated water outside of the irrigation season. This is consistent with the express language of the decree entitling the owners to divert and use their water at any time, and is the same right the District seeks to exercise.

Los Molinos asserts these agreements merely require it to operate its dams in a certain manner; they are not claims of water rights outside the irrigation season. That assertion is not correct. By these agreements, Los Molinos controlled and exercised its water rights outside of the irrigation season. It admitted it exercised these rights as an owner, not as the water master.

The decree’s express language, as well as its structure and historical implementation, lead us to conclude the District is authorized to divert its water outside of the irrigation season.

C. Using Water Outside of Los Molinos’s Service Area

The District sought a declaration that the decree did not prohibit it from using its water outside of the Mill Creek watershed. Although the trial court noted the decree authorized owners to use their Mill Creek water “at any place, or for any purpose,” it ruled the decree prevented the District from diverting water outside the basin unless it or Los Molinos approve it.

The court relied on provisions in the decree it believed showed that the original owners and the superior court contemplated diversions only from Mill Creek, not diversions of Mill Creek water from another waterway or location downstream. Section VII authorized the parties to divert “from said river” their allotments “at such point or points on said river, as such party may see fit . . . .” (§ VII, italics added.) The same section declared the diversion rights given to the parties included whatever water the parties were entitled “to divert from said river by virtue of owning land riparian thereto . . . .” (Ibid., italics added.) Each party is entitled to use or dispose of its share “of the water of said river . . . .” (Ibid., italics added.) These provisions led the court to state the decree did not authorize an owner to move the diversion point to some location not on Mill Creek.

The trial court set forth additional reasons for its interpretation. It said if water was diverted at a location outside of Mill Creek, the water master could not enforce the decree’s terms. The decree’s section X gives the water master authority during the irrigation season to enter upon the lands of the owners on which there is a canal, gate, or other structure used for conveying water in order to control all diversions “from said river” and the placement and operation of gates and measurement devices that are used for “such diversions of water from said river . . . .” (§ X.) The court said the water master had neither the ability nor the authority to travel to locations outside its system to install measuring devices to ensure the transferee of the District’s water rights was diverting the proper amount of water. The court believed conveying water outside the system would render the water master impotent.

The court also indicated that transferring the water out of the Mill Creek basin would harm other users. The decree adjudged both appropriative rights and riparian rights. Riparian rights, however, could not be transferred apart from the riparian land. The court said the District moving its rights out of the watershed would be inconsistent with riparian rights and result in harm to others.

The trial court believed that interpreting the decree to allow an owner to use water outside of the service area would create an absurdity. It explained: “The intended purpose of the Decree was to allocate water among the various parties. If the Water Master or the Court would now permit the transfer of this scarce resource out of the basin when the system barely functions because of the short water supply, the system would become compromised and conflicts would arise. ‘The court shall avoid an interpretation which will make a
contract extraordinary, harsh, unjust, inequitable or which would result in absurdity.’ [Citations.] [¶] The Court finds that the Decree does not empower all water right holders to use their water at any place.”

The District claims the trial court interpreted the decree incorrectly for a number of reasons. The decree expressly authorizes the District to use its share of the water allotted to it “in any manner, at any place, or for any purpose . . .” (§ VII.) Nowhere does the decree limit water use to the creek’s watershed or Los Molinos’s service area.

The District also faults the trial court for finding a risk of harm to other owners when the District has yet to propose a specific diversion or use. The stipulated facts did not specify a particular change of use or allege a specific injury. Also, the court found a change of use would result in conflicts over an inadequate delivery system without citing to evidence of any specific injury. Because the case was not an adjudication of a specific change of use, the District claims the court’s finding of injury is premature.

The District claims the parties’ conduct shows that water is used outside of the Mill Creek watershed regularly. Most of Los Molinos’s northern service area is outside of the creek’s watershed. Also, Los Molinos agreed that as part of the 1990 and 2007 bypass agreements, the bypassed water could be used by the state and diverted downstream after it reached the Sacramento River, outside of Los Molinos’s service area.

The District further argues the trial court’s concern with possible injury to riparian rights is unfounded. The parties to the decree agreed to a single set of rules to govern both riparian and decreed rights, allocating each party a share of the flow and expressly eliminating any priority of riparian rights over decreed rights.

We note that the parties argue over whether the issue is the right to use water outside of the Mill Creek watershed or Los Molinos’s service area. Because the service area may include areas both inside and outside of the watershed, we focus on the right to use water outside of the service area.

We agree with the District that the trial court’s interpretation of the decree is incorrect.

The decree expressly authorizes each water rights owner to use its share of the water allotted to it “in any manner, at any place, or for any purpose” or according to whatever agreement it enters into with others. (§ VII.) Nowhere does the decree limit water use to the creek’s watershed or Los Molinos’s service area.

The decree’s provisions regarding where the water can be diverted do not change the District’s right to choose where the water will be used. In 1920, “it had long been the law of California (as it still is today) ‘that the person entitled to the use of water may change the place of diversion, or the place where it is used, or the use to which it was first applied, if others are not injured by such change.’ (Ramelli v. Irish (1892) 96 Cal. 214, 217; see generally Hutchins, The California Law of Water Rights [(1956)] p. 177 [change in place of use].)” (Barnes v. Hussa (2006) 136 Cal.App.4th 1358, 1367-1368.)

Water Code section 1706 and its predecessor statute codified this rule. Accordingly, although the decree contemplated the water would be diverted only from Mill Creek, the law allows the District to use the water elsewhere if it can do so without injuring the rights of others to the water. (Id. at p. 1369.)

Even if the water can be diverted only from Mill Creek, nothing in the decree stops an owner from using the water elsewhere after it has been diverted. An owner could construct a means to convey the water from the point of diversion on Mill Creek to the water’s eventual place of use. The diversion requirement does not compel an owner to use its water only within Los Molinos’s service area.

Contrary to the trial court’s reasoning and Los Molinos’s argument, allowing an owner to use its water outside of Los Molinos’s service area does not thwart the water master from performing its duties and enforcing the decree. Whether an owner leaves its water in the creek to be diverted downstream or conveys it somewhere after Los Molinos diverts it, Los Molinos can still measure the water to ensure the owner does not receive more than its allotted share. It need only calculate the proper allocation and either leave that amount in the creek or superintend the appropriated amount through its system of canals and ditches to the owner’s property or conveyance system, where it can measure the volume delivered. Nothing requires it to follow the water outside of its service area. Under either circumstance, it is able to ensure the owner diverts no more than its allotted share.

The trial court’s finding of harm was speculation. No facts of any actual transfer were before the court from which it could find injury would occur. The trial called only for a legal interpretation of the decree. Of course, an actual transfer of rights by the District must not harm any other legal user (Wat. Code, § 1706), but such a determination cannot be made where no transfer is proposed.

Los Molinos contends the trial court’s interpretation correctly protects riparian rights. If the court treated the riparian rights as appropriative and freely transferable, it could give riparian right holders the authority to transfer their rights even though riparian rights are annexed to the land. Los Molinos asserts that the District argues the decree effectively created new, undefined rights.

Los Molinos’s argument is a red herring in at least three respects. First, the transferability of riparian rights is not before us. The District’s water rights are appropriative, not riparian. Whether the decree’s authorization to use the water at any place was intended to vest in riparian owners a right to transfer their water rights apart from their riparian land is a question we need not decide in order to determine as an

1. Water Code section 1706 states: “The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.” (Wat. Code, § 1706.)
The abstract question of interpretation whether owners of appropriative rights may use their water in any place.

Second, as already stated, Water Code section 1706 provides that owners of appropriative rights may change the place of diversion even though riparian owners may not. (Wat. Code, § 1706.) No court has interpreted that statute to require riparian rights also to be transferable.

Third, the riparian owners under the decree have no priority of right. The decree expressly equalized the owners’ rights to the water and eliminated any priority riparian owners may have had to it under common law. Thus, in the abstract, an owner’s riparian rights do not prevent the District from using its water outside of Los Molinos’s service area.

Los Molinos further claims the court’s holding is incorrect. The court created a condition that does not exist in the decree, and it did so based on a misunderstanding of the extent of control the decree grants to Los Molinos and of the operation of Water Code section 1706. Nothing in the decree subjects changes to use or location to the water master’s or court’s prior approval. Los Molinos’s authority is as “prescribed and defined” in the decree (§ X) and nowhere does the decree prescribe or define any authority by Los Molinos to approve a proposed change in the use, location, or point of diversion. The decree vests the superior court with continuing jurisdiction, but the court’s continuing authority is limited to addressing petitions by the water master or rights owners to define the water master’s power, replace the water master, or modify any provision of the decree except those that establish the owners’ water rights. (§ XIII.) The decree does not authorize the court to exercise its continuing jurisdiction over an owner’s decision to change its use or location of using the water.

The trial court held any change of use or the place of use required prior approval by the court or the water master. The court’s interpretation is incorrect. The owners have made changes to their use of water without seeking prior approval. Neither Los Molinos, Jones, Inc., nor The Nature Conservancy sought prior approval from Los Molinos or the court before changing the use of their water from irrigation to fish enhancement.

We agree with the District that the trial court’s holding is incorrect. The court created a condition that does not exist in the decree, and it did so based on a misunderstanding of the extent of control the decree grants to Los Molinos and of the operation of Water Code section 1706.

D. Prior Approval by Los Molinos or the Superior Court

The trial court held any change of use or the place of use required prior approval by the court or the water master. The court’s interpretation is incorrect. The owners have made changes to their use of water without seeking prior approval. Neither Los Molinos, Jones, Inc., nor The Nature Conservancy sought prior approval from Los Molinos or the court before changing the use of their water from irrigation to fish enhancement.

The trial court implied the water master had authority to approve changes in use because it controls the apportionment and delivery system. The effect of the court’s ruling, however, is to vest authority over an owner’s water right in the water master. The owners gave the water master limited authority to control diversions during the irrigation season and to control the system of canals and ditches the water master uses to deliver the water according to the terms of the decree. The owners did not vest in the water master the authority to control the water right or the discretion to determine where, how, or in what manner an owner exercised his water right. The water rights belong to the owners, not the water master.

Moreover, Water Code section 1706 does not provide the water master with the discretion it seeks. The trial court interpreted the statute to place the burden on the District to establish a proposed change will not injure other owners before making the change, but this misreads the statute. Nothing in the statute requires a water right owner to seek prior approval before changing its use. Indeed, this court has held that a party who claims another party’s change of use injures its right to water bears the burden of proving the injury. (Barnes v. Hussa, supra, 136 Cal.App.4th at pp. 1365-1366.) Owners of pre-1914 appropriative rights are entitled to proceed...
with a change of use, location, or point of diversion until the change is enjoined. (Slater, Cal. Water Law & Policy (2011) § 2.26, p. 2-121.)

Los Molinos argues the District has not cited any provisions in the decree that give the owners any retained authority to do anything it may not. If, Los Molinos contends, the decree does not give it the authority to deny changes it believes are inconsistent with the decree or would impair its obligations, then this ability “must have been given to the Decreed water users,” but no such provision exists in the decree. Instead, the decree enjoins the owners from interfering with any other owner’s rights or the water master’s work in carrying out the decree. Because the owner’s “privileges” must yield to this injunction, Los Molinos contends it has the ability to prevent the exercise of that “privilege.”

Los Molinos’s argument is not persuasive. Nothing in the injunction contained in the decree expressly or implicitly gives Los Molinos the authority to approve or deny proposed changes of use. Under the decree and Water Code section 1706, Los Molinos and the other parties to the decree may seek to enjoin a change upon a showing of injury. But nothing in the decree or the law requires the District to obtain approval from Los Molinos or the superior court before changing its use or location of using its water.

II
Appeal from Attorney Fee Award

Because we reverse the trial court’s judgment denying the District’s requests for declaratory relief, we must reverse the attorney fee award premised upon Los Molinos being the successful party in the judgment. (See City of Sacramento v. State Water Resources Control Bd. (1992) 2 Cal.App.4th 960, 978-979 [reversing attorney fee award under Code of Civil Procedure section 1021.5 premised on the parties prevailing on the judgment reversed].)

DISPOSITION

The judgment denying declaratory relief and the order awarding attorney fees are reversed. Costs on appeal are awarded to the District. (Cal. Rules of Court, rule 8.278(a).)

HULL, Acting P. J.

We concur: BUTZ, J., RENNER, J.

COUNSEL

Rosner, Barry & Babbitt, Hallen D. Rosner, Shay Dinata-Hanson, and Michelle A. Cook for Plaintiff and Appellant.

Bowman and Brooke, Brian Takahashi, Joyce Peim; SJL Law, Julian G. Senior, Stefanie G. Jo, and Marcelo Lee for Defendant and Respondent.

OPINION

1. INTRODUCTION

A jury awarded plaintiff and appellant, Shirlean Warren, $17,455.57 in damages pursuant to the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) (the Song-Beverly Act), commonly known as California’s “lemon law.” (Goglin v. BMW of North America, LLC (2016) 4 Cal.App.5th 462, 467, fn. 5 (Goglin).) As part of the judgment, the court awarded Warren $115,848.24 in attorney fees and $24,436.65 in costs and expenses. (§ 1794, subd. (d).)

In this appeal, Warren challenges her attorney fee award and her costs and expenses award. In the trial court, Warren requested $526,582.89 in attorney fees ($351,055.26 in lodestar fees, times a multiplier of 1.5) and $40,151.11 in costs and expenses. The court applied a negative multiplier of 33 percent (33%) to the lodestar figure of $351,055.26, resulting in the $115,848.24 attorney fee award ($351,055.26 times .33 equals $115,848.24). The court disallowed two items listed in Warren’s memorandum of costs: (1) $9,832.46 in prejudgment interest on the $17,455.57 judgment; and (2) $5,882 for court reporters’ trial transcripts. ($40,151.11, less $5,882, less $9,832.46, equals $24,436.65.)

Warren claims the court abused its discretion in applying a 33% negative multiplier to her requested lodestar attorney fees. Warren argues that, by applying the negative multiplier,
the court erroneously limited her attorney fee award to a proportion of her $17,455.57 damages award, and thus used a prohibited means of determining reasonable attorney fees. She also claims she was entitled to recover prejudgment interest on her damages award and that the court erroneously struck the $5,882 expense for trial transcripts from her cost bill.

We conclude that Warren has not shown she was entitled to prejudgment interest on her jury award as a matter of right. (§ 3287, subd. (a).) Nor has Warren shown that the court abused its discretion in refusing to award any prejudgment interest. (§ 3287, subd. (b).) We agree, however, that Warren was entitled to recover the $5,882 expense that her attorneys incurred for trial transcripts. (§ 1794, subd. (d).)

We also conclude the court abused its discretion in applying the 33% negative multiplier to Warren’s requested lodestar attorney fees of $351,055. Part of the court’s expressed purpose in applying the negative multiplier was to tie the attorney fee award to a proportion of Warren’s modest damages award. This was error. Thus, we reverse the attorney fee award and the cost award, and we remand the matter to the trial court to determine a reasonable attorney fee award and to increase the cost award by $5,882.

II. BACKGROUND

A. The Litigation Through the Jury Award

In January 2011, Warren purchased a 2010 Kia Forte priced at $16,375, with express warranties. Warren’s total purchase price for the vehicle was $24,737.45, including taxes, fees, and all finance charges on a five-year loan. Within the first year of its purchase and at 26,600 miles, Warren began having “problems” with the vehicle. Through May 8, 2013, Warren took the vehicle to a Kia-authorized repair facility a total of 14 times. On May 8, Warren traded in the vehicle and purchased a 2013 Kia Forte.

Sometime between May 8, 2013, and June 12, 2014, Warren learned that she could request a “buyback” of her 2010 Kia Forte pursuant to the Song-Beverly Act. On June 12, Warren called Kia’s call center, requested a buyback, and was told that her request would be “escalated” or referred to the regional office for review. On June 17, the regional call center called Warren and left a voice mail, telling Warren the case had been “escalated” to their department, they wanted to increase the cost award by $5,882.

At a mandatory settlement conference in January 2016, the parties did not settle the case and it was ordered to trial. Despite Altman Law’s May 2015 association as lead trial counsel, OM Law attended trial readiness conferences on January 11 and 12, and February 25, 2016. In June 2016, OM Law associated Wirtz Law APC (Wirtz Law) “to join the case as lead trial counsel and prepare the case for trial” “due to Altman Law’s busy trial calendar involving other cases against Kia that caused scheduling conflicts with Kia.” An attorney from Wirtz Law attended trial readiness conferences on June 16, 20, and 23, and July 14, 18, and 21, 2016. Attorneys for Kia appeared at each trial readiness conference and reported that Kia was not ready for trial because its trial attorney, Brian Takahashi, was engaged in another trial.

2. The record does not include a reporter’s transcript of the jury trial. Thus, we describe the facts of the litigation as best we can discern from the record on appeal. (Duale v. Mercedes-Benz USA, LLC (2007) 148 Cal.App.4th 718, 722 (Duale).)
Bryan C. Altman of Altman Law attended the first day of trial on June 29, 2016, with two attorneys from Wirtz Law, Richard M. Wirtz and Amy R. Smith. Mr. Takahashi appeared for Kia, and jury selection began. The parties were unable to empanel a jury due to the upcoming July 4 holiday, however, so the court and counsel agreed to continue trial to July 18. The court ordered all counsel to be present on July 18, but Mr. Takahashi was engaged in another trial on July 18 and was later ordered to pay Wirtz Law $2,861.24 in sanctions for his failure to appear on July 18.

Trial resumed on July 25 and was conducted over eight days on July 25 through 28 and August 1 through 4, 2016. Three attorneys represented Warren at trial: Mr. Wirtz and Ms. Smith from Wirtz Law, and Roger Kirnos, who “frequently associates or specially appears for purposes of trial” for OM Law clients. Julian Senior represented Kia at trial.

On August 4, 2016, the jury returned a special verdict and awarded Warren total damages of $17,455.57. Although it found Kia willfully failed to repair the vehicle, the jury did not award Warren a civil penalty. (§ 1794, subd. (c).) Judgment was entered on September 9, 2016. The judgment indicates that, absent the parties’ agreement, the court would determine the amounts of Warren’s attorney fees, costs, and expenses pursuant to noticed motions, and amend the judgment to include these amounts.

B. Warren's Requested Costs and Expenses

In October 2016, Warren filed a memorandum of costs or cost bill, seeking a total of $40,151.11 in costs and expenses. Kia moved to tax costs, challenging several of the items requested in the cost bill. The court struck two items from the cost bill: (1) Warren’s prejudgment interest claim of $9,832.46 on the $17,455.57 award, and (2) $5,882 for the costs of court reporter’s transcripts of the trial. Thus, Warren was awarded $24,436.65 in total costs and expenses.

C. The Motion for Attorney Fees

In December 2016, Warren filed a motion for attorney fees, seeking $351,055.26 in lodestar fees (the number of attorney hours worked times the attorneys’ hourly rates), plus a lodestar multiplier of 1.5, or an additional $175,257.63, for total requested fees of $526,582.89. The $351,055.26 lodestar figure is comprised of $111,480 for OM Law, $56,576.50 for Altman Law, and $182,998.76 for Wirtz Law. In her motion, Warren argued that the nature and complexity of her case, the skills of her attorneys, and her contingency fee arrangements with her attorneys warranted all of the requested fees. Warren also argued that Kia had engaged in “aggressive” and “scorched earth” litigation tactics, necessitating many of the requested lodestar fees.

An attorney from each of Warren’s three law firms submitted supporting declarations: Steve Mikhov of OM law, Mr. Altman of Altman Law, and Mr. Wirtz of Wirtz Law. Each declaration included billing statements describing each attorney task performed, the date the task was performed, the time spent on the task, the attorney’s hourly rate, the amount charged for the task, along with the total hours worked by each attorney and the total amounts charged for each attorney.

OM Law charged for 348.4 hours at hourly rates of $225 to $500, resulting in total fees of $111,480. Eleven attorneys, including Messrs. Mikhov and Kirnos, worked on the case for OM Law. Mr. Mikhov claimed the hourly rates charged were reasonable because they were consistent with the rates charged by other attorneys who litigate consumer matters, and he submitted evidence that OM Law had been awarded fees in other cases based on similar rates. Mr. Mikhov also argued that lemon law cases are not “simple actions”; rather, they require “a specialized understanding of the full scope of consumer protection laws,” the “intricacies of automobiles and a lexicon associated with them,” and knowledge of “manufacturers’ and dealers’ protocols for repairing vehicles.” Mr. Mikhov also pointed out that OM Law’s billing reflected a substantial amount of uncharged time.

Altman Law charged for 136.17 total hours at hourly rates of $650 for Mr. Altman and $450 for two associates, resulting in its total bill of $56,576.50. Mr. Altman acknowledged that some of the work he and his associates performed “was duplicative or ultimately unnecessary insofar as [he] was not trial counsel at the trial”; thus, he deducted $30,598.50 from his invoice which represented “significant work performed in preparation for trial” that was not being charged.

Wirtz Law charged for 508.40 total hours, including 188 hours for Mr. Wirtz at an average hourly rate of $451.50, and 247.4 hours for Ms. Smith at an average hourly rate of $333.23. These hourly rates charged are lower than Mr. Wirtz’s usual hourly rates of $500 and Ms. Smith’s usual hourly rate of $400, when these attorneys’ uncharged time was taken into account. Two other attorneys at Wirtz Law charged for a total of 73 hours at average hourly rates of $247.13 and $300, also lower than these attorneys’ usual hourly rates of $300 and $400 due to uncharged time. A paralegal worked 7.50 hours at no charge and a legal support person worked 4.30 hours for a total charge of $400.

Wirtz Law’s total bill of $182,998.76 included a deduction of $2,861.24 for the sanctions Kia paid to Wirtz Law; otherwise the bill would have been $185,860. As indicated,

3. The jury found the 2010 Kia Forte had defects which substantially impaired its use, value, and safety and which Kia failed to repair after a reasonable number of attempts or opportunities; Kia failed to promptly replace or repurchase the vehicle; Warren paid $18,378.26 for the vehicle (including finance charges, sales, tax, license fees, registration fees, and other fees) and incurred incidental and consequential damages of $2,707.10. The jury also found the cash value of the vehicle before it was submitted for repair was $16,375 and that Warren put 26,600 miles on the vehicle. The jury calculated the value of the vehicle’s use as $3,629.79, resulting in total damages of $17,455.57 ($18,378.26 plus $2,707.10 minus $3,629.79 equals $17,455.57).

4. Wirtz Law and Altman Law charged for time in one-tenth hour increments; OM Law charged in one-quarter hour increments.
Wirtz Law served as lead trial counsel and was brought into the case shortly before trial. Its work mainly consisted of attending six trial setting conferences, reviewing pleadings and documents, communicating with attorneys at OM Law, preparing the case for trial, and attending and conducting the trial. Mr. Wirtz presented a United States Consumer Law Attorney Fee Survey Report indicating that the hourly rates charged by Wirtz Law were commensurate with the rates charged by California attorneys who practice consumer law.

In opposing the motion, Kia claimed the hours and rates charged by Warren’s three law firms were excessive, given that this was a “simple lemon law case,” and 16 attorneys from three different law firms had worked on the case. Kia argued this was a “classic case of excessive billing due to staffing a case with too many attorneys resulting in duplicative, inefficient work.” Kia asked the court to limit the attorney fee award to $180,000 for all three firms.

D. The Trial Court’s Rulings on the Attorney Fee and Cost Motions

A combined hearing on the attorney fee motion and the motion to tax costs was held on March 20, 2017. Following the hearing, the court took the matter under submission and ultimately awarded Warren $115,848.24 in attorney fees and $24,436.65 in costs. The trial judge who ruled on the motions (Judge Pacheco) was the same judge who had presided at trial.

At the hearing, Warren’s counsel, Mr. Kirnos, pointed out that trial courts in three other recent cases had awarded similar amounts of attorney fees against Kia, namely, $270,000, $280,000, and a “conditional ruling” awarding $350,000. Mr. Kirnos also pointed out that, in Goglin, supra, 4 Cal.App.4th at pages 473 and 474, the trial court awarded $180,000 in attorney fees, and the Goglin court upheld the trial court’s approval of a $575 hourly attorney fee rate as appropriate.

Mr. Kirnos stressed that “drastic” reductions had been made to the attorneys’ billings in order to eliminate duplicative work and account for “the musical chairs” that were played to get the case to trial. He also cited several examples of Kia’s “scorch” and “burn” litigation tactics which caused Warren to incur substantial fees, including a motion for summary judgment and a requested spoliatio instruction, both of which Mr. Kirnos argued were “dead on arrival.” Mr. Kirnos said he had never been involved in a case that had been as “heavily litigated” as this one, and he argued this was not “an easy case to try.” The court noted there was a “disconnect” between the verdict amount of “$17,000,” the over $500,000 in requested attorney fees, and said it believed its tentative award of $115,848.24 in attorney fees was “generous.” The court said: “Well, I guess in the back of my head I’m thinking, okay. The verdict is $17,000. The attorney fee request is $500,000. So somehow there’s a disconnect, in the back of my head, that a $17,000-dollar case results in a $500,000-dollar request in attorney fees. . . . That seems like an exorbitant amount of money. . . . [¶] . . . [¶] . . . I thought I was generous at [§]115[,000].”

In response, Mr. Kirnos told the court, “proportionality is inappropriate”—that is, it is error to tie an attorney fee award to the verdict. The court responded, “I’m not saying that [proportionality is] the basis of my ruling;” but the disconnect between the verdict and the fee request does not “rub right” with the court. The court acknowledged there were “a lot of witnesses and a lot of testimony” at trial, and all three firms “did a lot of work,” but stressed it was “three firms that did a lot of work, three firms.” (Italics added.) The court asked Mr. Kirnos whether $350,000 in attorney fees would have been incurred by a single law firm, and Mr. Kirnos explained that two firms are usually involved in a consumer warranty case that goes to trial—the firm that initially takes the case, “works on settlements, deals with motions to compel,” and takes “some of the depositions.” Then a second firm “get[s] in at the end” and tries the case with a “very senior trial attorney” like Messrs. Wirtz or Altman.

In ruling on the motion, the court wrote: “The three firms billed a total of $351,055.26. This is an excessive amount for a non-complex case. The court will exercise its discretion and reduce this amount to 33%, or $115,848.24, of the original requested amount. This amount, while still much more than the $17,455.57 award, more accurately reflects the reasonable amount of attorneys fees in a case which was not particularly complex and which was handled by counsel experienced in this area of law. Plaintiff has not demonstrated that this many attorneys, at these high rates, were necessary or reasonable to justify her requested billed amount. Additionally, despite counsel’s argument that they carefully avoided duplication between the 3 firms, the court is not convinced that the repetitiveness of these types of cases would necessarily require the amount of time requested.” (Italics added.)

Next, the court addressed the requested lodestar multiplier of 1.5. The court acknowledged that case law required the court to first “determine a touchstone or lodestar figure based on a careful compilation of the actual time spent and reasonable hourly compensation for each attorney,” and that the lodestar figure “may then be augmented or diminished by taking various relevant factors into account, including (1) the novelty and difficult[y] of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the award.”

The court explained: “[T]he initial [lodestar] amount is based on the reasonable rate for noncontingent litigation of the same type, which amount may then be enhanced (e.g.[,] through the use of a so-called multiplier to account for factors such as the contingent nature of the case[.]) The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk
or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.” The court concluded, “despite [Warren’s] arguments with respect to the contingency risk and difficulty of lemon law cases, the fact remains that this was a relatively straightforward case handled by not one, not two[,] but three law firms who claim a specialty in these matters. They were certainly not precluded from taking other work. Given these facts the court finds that no [positive] multiplier shall be applied.”

III. DISCUSSION

A. The Court Abused Its Discretion in Applying a 33% Negative Multiplier to Warren’s Lodestar Attorney Fees of $351,055.26

1. Applicable Legal Principles, Overview

The Song-Beverly Act is “manifestly a remedial measure, intended for the protection of the consumer.” (Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal.4th 985, 990.) To this end, section 1794, subdivision (d) provides that a prevailing buyer in an action arising under the Song-Beverly Act shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney’s fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action.” (Italics added.) In enacting this provision, the “Legislature has provided injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible.” (Murillo v. Fleetwood Enterprises, Inc., supra, at p. 994, italics added.)

The “plain wording” of section 1794, subdivision (d) requires the trial court to “base” the prevailing buyer’s attorney fee award “upon actual time expended on the case, as long as such fees are reasonably incurred—both from the standpoint of time spent and the amount charged.” (Robertson v. Fleetwood Travel Trailers of California, Inc. (2006) 144 Cal. App.4th 785, 817.) Likewise, when the prevailing buyer has a contingency fee arrangement, he or she is entitled to recover “reasonable attorney fees for time reasonably expended.” (See Nightingale v. Hyundai Motor America (1994) 31 Cal. App.4th 99, 105, fn. 6.) This is consistent with California’s approach to determining a reasonable attorney fee in various statutory and contractual contexts, which approach “ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.” (PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095, italics added.)

The lodestar figure may then be adjusted based on factors specific to the case, in order to fix the fee at the fair market value of the legal services provided. (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132 [“The lodestar is the basic fee for comparable legal services in the community.”]; Serrano v. Priest (1977) 20 Cal.3d 25, 49.) These case-specific, lodestar adjustment factors may include, without limitation: “(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. [Citation.]” (Ketchum v. Moses, supra, at p. 1132.) The “procedural demands” of the case may also be considered. (Nightingale v. Hyundai Motor America, supra, 31 Cal.App.4th at p. 104.)

The lodestar adjustment method “anchors the trial court’s analysis to an objective determination of the value of the attorney’s services,” and thus ensures that the amount awarded is not arbitrary. (PLCM Group, Inc. v. Drexler, supra, 22 Cal.4th at p. 1095.) A prevailing buyer in an action arising under the Song-Beverly Act has the burden of establishing that his or her requested attorney fees were “allowable,” “reasonable in amount,” and “reasonably necessary to the conduct of the litigation.” (Goglin, supra, 4 Cal.App.5th at p. 470.)

We review the trial court’s attorney fee award under the Song-Beverly Act for an abuse of discretion, and in doing so we are guided by settled principles. (Goglin, supra, 4 Cal. App.5th at p. 470.) “We presume the trial court’s attorney fees award is correct, and [w]hen the trial court substantially reduces a fee or cost request, we infer the court has determined the request was inflated.” [Citation.] “The “experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.””’ [Citation.] (Ibid.)

2. Analysis

Warren claims the court abused its discretion in applying a negative 33% multiplier to her lodestar figure of $351,055.26, resulting in a fee award of $115,848.24, or one-third of the lodestar fees billed by Warren’s three law firms. She argues that when, as here, an across-the-board percentage cut is applied to a “voluminous fee application,” the cut is “subject to heightened scrutiny” on appeal. (Kerkeles v. City of San Jose (2015) 243 Cal.App.4th 88, 102 (Kerkeles.).)

Additionally, Warren claims that a court abuses its discretion when it ties an attorney fee award to a proportion of the prevailing buyer’s damages award in an action arising under the Song-Beverly Act. She claims a rule of proportionality is inconsistent with the legislative policy, expressed in section 1794, subdivision (d), of allowing a prevailing buyer to recover a reasonable attorney fee, and that such a rule of proportionality should be prohibited because it will “make it difficult, if not impossible” for individuals with meritious lemon law claims to obtain redress from the courts. (Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal.App.4th 140, 164 (Graciano.).)

We agree that these claims have merit. As we explain, it is inappropriate and an abuse of a trial court’s discretion to tie
an attorney fee award to the amount of the prevailing buyer/plaintiff’s damages or recovery in a Song-Beverly Act action, or pursuant to another consumer protection statute with a mandatory fee-shifting provision. (See Graciano, supra, 144 Cal.App.4th at p. 164.) Thus, when a trial court applies a substantial negative multiplier to a presumptively accurate lodestar attorney fee amount, the court must clearly explain its case-specific reasons for the percentage reduction. (Kerkeles, supra, 243 Cal.App.4th at pp. 102-104.) If, as occurred here, the reasons for the reduction include tying the fee award to some proportion of the buyer’s damages recovery, the court abuses its discretion.

Graciano is instructive on the application of a proportionality rule, or the practice of tying an attorney fee award to the plaintiff’s damages or settlement recovery. The plaintiff, Graciano, was awarded substantially reduced attorney fees, not under the Song-Beverly Act, but under two other consumer protection statutes with mandatory fee shifting clauses—the Automobile Sales Finance Act (ASFA, § 2981 et seq.) and the Consumers Legal Remedies Act (CLRA, § 1750 et seq.) (Graciano, supra, 144 Cal.App.4th at p. 145.) Graciano appealed, claiming among other things that the trial court erroneously “capped” her attorney fee award to a percentage of her settlement recovery, and the Graciano court agreed. (Id. at pp. 145, 161-164.)

A jury had awarded Graciano $11,191.40 for the defendant’s ASFA and CLRA violations, and, for purposes of punitive damages, found the defendant violated the CLRA by engaging in conduct with malice, oppression, and fraud. (Graciano, supra, 144 Cal.App.4th at p. 147.) Before the jury began deliberating Graciano’s punitive damages claim, the parties settled the case for a $45,000 payment to Graciano in exchange for her dismissal of all her claims with prejudice. (Ibid.) Graciano then sought $249,365.36 in attorney fees and costs under the CLRA and AFSA. (Ibid.) She claimed lodestar fees of $109,468.50, times a multiplier of 2.0 due to the contingent nature of her attorneys’ representation, the delay in paying her attorneys, the results achieved, and the complexity of the issues. (Ibid.)

The trial court awarded Graciano only $27,570 in attorney fees, even though she had prevailed on her ASFA and CLRA claims. (Graciano, supra, 144 Cal.App.4th at p. 147.) In calculating the $27,570 fee, the trial court reduced the hourly rates of Graciano’s three attorneys to a blended rate of $250, less than their requested hourly rates of $350, $275, and $270, then applied the $250 rate to the total hours expended of 367.6, resulting in a revised lodestar figure of $91,900. (Id. at p. 148.) Next, the trial court applied a negative multiplier of .30, resulting in the $27,570 fee award ($91,900 times .30 equals $27,570). (Id. at p. 162.) The trial court noted that the settlement was for $45,000 plus any attorney fees the court might award, and contingency fee agreements commonly required the plaintiff to pay approximately 40 percent of the recovery. (Ibid.) Thus, if $45,000 represented Graciano’s 60 percent portion of the total settlement, then 40 percent of the settlement would be $30,000 ($75,000 times .40 equals $30,000; $75,000 times .60 equals $45,000). The application of the .30 negative multiplier to the adjusted lodestar figure of $91,900 resulted in the fee award of $27,570, which the trial court found was “within the market place range of fees.” (Ibid.)

The Graciano court found two problems with the trial court’s fee analysis which are potentially relevant here on remand. First, the trial court’s reduction of the attorneys’ requested hourly rates to $250 was an abuse of the trial court’s discretion. (Graciano, supra, 144 Cal.App.4th at pp. 154.) Graciano’s attorneys had adduced unchallenged evidence that their requested hourly rates were “well within the range charged” by attorneys engaged in similar practice areas and were appropriate and reasonable in the relevant geographical area. (Id. at p. 155.) The defendant did not dispute this evidence, but argued the court should base the hourly rates on Imperial County standards. (Ibid.) The trial court limited the hourly rates to $250 because this was the hourly rate set or allowed for expert testimony in Imperial County, pursuant to local rule 3.12. (Id. at pp. 155-156.) This was an abuse of discretion, both because the trial court did not objectively determine “the prevailing rate in the community for comparable professional legal services” (Id. at p. 156; PLCM Group v. Drexler, supra, 22 Cal.4th at p. 1096 [reasonable hourly rate is that prevailing in community for similar work]) and because “Graciano’s unrebutted declarations established the prevailing rates in the region for attorneys with comparable skills and expertise, and her evidence compelled a finding that the requested hourly rates were within the reasonable rates for purposes of setting the base lodestar amount.” (Graciano, supra, at p. 156, italics added.)

Second, the Graciano court faulted the trial court’s application of the .30 negative multiplier to the adjusted lodestar fees of $91,900, because the trial court’s goal was to arrive at a reasonable contingency fee of approximately 40 percent of Graciano’s settlement recovery of $45,000 plus attorney fees. (Graciano, supra, 144 Cal.App.4th at pp. 148, 161-164.) The court explained that, “because this matter involve[d] an individual plaintiff suing under consumer protection statutes involving mandatory fee-shifting provisions, the legislative policies are in favor of Graciano’s recovery of all attorney fees reasonably expended, without limiting the fees to a proportion of her actual recovery.” (Id. at p. 164, italics added.)

The court drew a direct analogy to attorney fee applications in civil rights cases: “The circumstances here are analogous to those addressed by the United States Supreme Court in the civil rights context: ‘A rule that limits attorney’s fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress’ purpose in enacting [42 United States Code section] 1988. Congress enacted [42 United States Code section] 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. [Citation.] These victims ordinarily cannot
afford to purchase legal services at the rates charged by the private market. . . . Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.’ [Citation.] ‘A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.’ [Citation.]’ (Ibid.)

Graciano’s reasoning applies with equal force here, a case involving a prevailing buyer seeking attorney fees under the Song-Beverly Act, another consumer protection statute which, like the CRLA and the ASFA, includes a mandatory fee-shifting provision. (§ 1794, subd. (d).) Here, unlike the trial court in Graciano, the trial court did not reduce the requested hourly rates of Warren’s attorneys and did not attempt to calculate a contingency fee award based on Warren’s $17,455.57 damages award. But the trial court’s comments at the hearing and in its written ruling on the attorney fee motion indicate that the court applied a 33% negative multiplier to Warren’s requested lodestar fees of $351,055.26, with at least the partial goal of arriving at an attorney fee award that was roughly proportional to or more in line with Warren’s modest $17,455.57 damages award. This part of the court’s analysis was ‘clearly wrong’ and an abuse of the court’s discretion. (Goglin, supra, 4 Cal.App.5th at p. 470.)

That said, the court’s other reasons for selecting the negative 33% multiplier were appropriate. (Ketchum v. Moser, supra, 24 Cal.4th at p. 1132 [court may consider various case-specific factors in adjusting lodestar figure to arrive at reasonable fee].) As indicated, in its ruling on the attorney fee motion the court observed: “The three firms billed a total of $351,055.26. This is an excessive amount for a non-complex case. The court will exercise its discretion and reduce this amount to 33%, or $115,848.24, of the original requested amount. This amount, while still much more than the $17,455.57 award, more accurately reflects the reasonable amount of attorneys fees in a case which was not particularly complex and which was handled by counsel experienced in this area of law. Plaintiff has not demonstrated that this many attorneys, at these high rates, were necessary or reasonable to justify her requested billed amount. Additionally, despite counsel’” [sic] argument that they carefully avoided duplication between the 3 firms, the court is not convinced that the repetitiveness of these types of cases would necessarily require the amount of time requested.” (Italics added.)

The court properly declined to reduce the requested hourly rates of Warren’s attorneys and properly anchored its attorney fee award to Warren’s requested lodestar fees of $351,055.26. Warren adduced unrebutted evidence that her attorneys’ requested hourly rates were within the range of the hourly rates charged by other plaintiffs’ attorneys practicing consumer law. (Graciano, supra, 144 Cal.App.4th at p. 156 [reasonable hourly rate is that prevailing in community for similar work]; Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 396 [verified attorney time records are presumptively correct].) Kia did not rebut Warren’s evidence that her attorneys’ hourly rates were reasonable. Rather, Kia claimed the hourly rates of Warren’s plaintiff’s attorneys should be limited to the lower hourly rates charged by Kia’s defense attorneys. This was not a good comparison, given that Warren’s plaintiff’s attorneys’ work pursuant to contingency arrangements and Kia’s defense attorneys do not. Kia also generally criticized each time entry of Warren’s attorneys as excessive and also generally criticized the overall time Warren’s attorneys spent on the case as excessive. But the aggregate hours expended by Warren’s attorneys may appropriately be adjusted by applying a negative multiplier to the lodestar figure. (Graciano, supra, at pp 159-161 [negative multipliers are appropriate in cases involving mandatory fee-shifting statutes].)

The problem with the trial court’s analysis is that we are unable to distinguish the extent to which the court’s choice of the 33% negative multiplier was based on the court’s expressed and erroneous goal of arriving at a fee award that was roughly proportional to Warren’s modest $17,455.57 damages award. The court erred to the extent it selected the negative multiplier to make the fee award roughly proportionate to Warren’s modest damages award. But the court was within its discretion to the extent it selected the multiplier to arrive at a reasonable fee based on the factors specific to the case, including the excessive time spent on the “not so complex case” by Warren’s attorneys in the aggregate.

It is clear that Warren’s excessive lodestar fee occurred principally because her original attorneys, OM Law, were unable or unwilling to try the case. As a result, OM Law had to bring in not one, but two other law firms, namely, Altman Law after it became clear the case had to be tried, and Wirtz Law after Mr. Altman was unavailable after the trial was continued. Warren also had three attorneys representing her at the eight-day trial. As the court found, this was excessive and resulted in duplicative charges beyond the uncharged time reflected in counsel’s billing statements. That said, the delay in the trial and the need to bring in Wirtz Law, and Mr. Wirtz as Warren’s lead trial counsel, was due to Kia, whose initial trial attorney, Mr. Takahashi, was sanctioned for not being available when the trial was to resume. Warren also adduced unrebutted evidence that Kia engaged in “scorched earth” litigation tactics that were responsible for many of the hours Warren’s attorneys expended before trial. On remand, the court should consider all of these and other relevant circumstances in selecting an appropriate multiplier in order to determine a reasonable fee award for Warren. (Nightingale v. Hyundai Motor America, supra, 31 Cal.App.4th at p. 104 [complexity of case and its procedural demands are relevant in selecting lodestar multiplier].)

We have effectively applied “heightened scrutiny” to the court’s selection of the 33% negative multiplier to Warren’s lodestar figure. This was appropriate. In consumer law cases,
as in civil rights cases, when a “‘voluminous fee application’” is made, as it was here, the court may, as it did here, “‘make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure.’” (Kerkeles, supra, 243 Cal.App.4th at p. 102; Gates v. Deukmejian (9th Cir. 1992) 987 F.3d 1392, 1399.) But the court must clearly explain its reasons for choosing the particular negative multiplier that it chose; otherwise, the reviewing court is unable to determine that the court had valid, specific reasons for its across-the-board percentage reduction. (Kerkeles, supra, at pp. 102-104 [“We can’t defer to reasoning that we can’t review . . . .”].) Here, the trial court clearly explained its reasons for selecting the 33% negative lodestar multiplier. But that explanation shows the court chose the multiplier, in part, to arrive at a fee award that was roughly proportionate to Warren’s $17,455.57 damages award. As discussed, this was error and must not be repeated on remand. (See Mountjoy v. Bank of America, N.A. (2016) 245 Cal.App.4th 266, 280-281 [70 percent negative lodestar multiplier erroneously applied based on evidence that 70 percent of counsel’s time entries were “flawed”].)

B. Warren’s Trial Transcripts Expense of $5,882 Was Erroneously Excluded From Her Cost and Expense Award, but Her Prejudgment Interest Claim Was Properly Denied

Warren sought to recover $40,151.11 in costs and expenses from Kia. (§ 1794, subd. (d).) The court granted Kia’s motion to tax costs in part by striking two items of requested costs and expenses: (1) $5,882 for the cost of court reporter trial transcripts; and (2) $9,832.46 for prejudgment interest on the $17,455.57 jury award from the date Warren purchased the vehicle in January 2011. These deductions resulted in a total cost and expense award of $24,436.65.

Warren claims the court erroneously disallowed both items. We agree that the $5,882 claim for trial transcripts was erroneously disallowed. (§ 1794, subd. (d).) But we disagree that Warren was entitled to prejudgment interest on any part of her $17,455.47 jury award. As the trial court found, Warren’s damages of $17,455.47 were neither certain nor capable of being made certain when she purchased the vehicle or at any other point prior to trial. (§ 3287, subd. (a).) For the same reasons, the court did not abuse its discretion in refusing to award Warren prejudgment interest on the award from the date she filed her complaint. (Id., subd. (b).)

1. The $5,882 Trial Transcripts Expense Should Have Been Allowed

In disallowing Warren’s $5,882 claim for trial transcripts, the court reasoned that, under Code of Civil Procedure section 1033.5, certain cost items, including the cost of “[t]ranscripts of court proceedings not ordered by the court” “are not allowable as costs” under Code of Civil Procedure section 1032 unless the item is “expressly authorized by law.” (Code Civ. Proc., § 1033.5, subd. (b)(5).) The court noted that Civil Code section 1794, subdivision (d) does not “expressly authorize” reimbursement for trial transcripts which are not court-ordered, even though the statute “refers generally to reimbursement of costs and expenses.” This was error.

As explained in Jensen v. BMW of North America, Inc. (1995) 35 Cal.App.4th 112, in enacting Civil Code section 1794, subdivision (d) the Legislature intended the phrase “costs and expenses” to cover items not included in “the detailed statutory definition of ‘costs’” set forth in Code of Civil Procedure section 1033.5. (Jensen v. BMW of North America, Inc., supra, at pp. 137-138.) Civil Code section 1794, subdivision (d) provides, in relevant part: “If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses . . . determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action.” (Italics added.)

Additionally, it is indisputable that Warren “reasonably incurred” the $5,882 cost of the trial transcripts “in connection with the . . . prosecution of [the] action.” (§ 1794, subd. (d).) This was an eight-day jury trial. As a practical matter, Warren would have been unable to defend the jury award without the trial transcripts. At the very least, Warren would have incurred additional expenses and great difficulty in defending the award without the trial transcripts, in the event Kia challenged the jury award in posttrial proceedings or on appeal. For these reasons, the $5,882 item for trial transcripts was erroneously excluded from Warren’s cost and expense award.

2. Warren’s Prejudgment Interest Claim Was Properly Denied

Warren sought prejudgment interest of $9,832.46 on her $17,455.57 jury award, calculated at the legal rate of 10 percent per annum, from January 11, 2011, the date she purchased her vehicle, through September 9, 2016, the date judgment was entered. (§ 3287 subd. (a).) Alternatively, she sought prejudgment interest of $3,384.24, calculated at 10 percent per annum from October 1, 2014, the date she filed her complaint, to the date judgment was entered.

(a) Section 3287, Subdivision (a)

Section 3287, subdivision (a) allows a person to recover prejudgment interest on “damages certain, or capable of being made certain by calculation” from the day such damages are certain or capable of being made certain.6 “[T]he court
has no discretion, but must award prejudgment interest upon request, from the first day there exists both a breach and a liquidated claim.” (North Oakland Medical Clinic v. Rogers (1998) 65 Cal.App.4th 824, 828.) Prejudgment is an element of damages, not a cost. (Id. at p. 830.) The Song-Beverly Act does not preclude an award of prejudgment interest under section 3287, subdivision (a). (Doppes v. Bentley Motors, Inc. (2009) 174 Cal.App.4th 1004, 1010.) Warren claims the entire $17,455.57 amount of her jury award was certain or capable of being made certain “by looking at the sale contract.” We disagree.

In denying Warren’s prejudgment interest claim, the trial court relied on Duale, supra, 148 Cal.App.4th 718. We agree that Duale is on point and persuasive. The Duale court concluded that the lower court had properly disallowed prejudgment interest on the plaintiff’s jury award under the Song-Beverly Act because the amount of the award was dependent upon the jury’s resolution of several disputed warranty-related issues, and thus, the amount of the award could not have been determined before trial. (Duale, supra, at p. 729.) The parties in Duale disputed, and the jury in Duale had to determine “(1) whether any of the many defects alleged in the complaint represented a nonconformity, (2) whether any such nonconformity ‘substantially impaired [the] use, value, or safety’ of the vehicle,” and (3) for any such nonconformity, the mileage at which the plaintiffs first presented the car to the defendant for repair. (Ibid.; see §§ 1793.2, subd. (d)(2)(C), 1794, subd. (b).) Thus, the Duale plaintiffs’ breach-of-warranty damages could not have been determined before trial, and an award of prejudgment interest was therefore inappropriate. (Duale, supra, at p. 729.)

As the Duale court explained: “‘“Damage[s] are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage.”’ [Citations.]’ Thus, “[t]he test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether defendant actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount. [Citation.]’ [Citations.] ‘The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, “depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor.”’ [Citations.]’ Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate. [Citation.]’ [Citation.]’ (Duale, supra, 148 Cal.App.4th at p. 729.)

The trial court here disallowed Warren’s prejudgment interest claim for the same reasons cited in Duale. In denying Warren’s prejudgment interest claim, the court found the jury had to determine “(1) whether any of the many defects alleged in the complaint represented a nonconformity, (2) whether any such nonconformity substantially impaired [the] use, value, or safety of the vehicle, and (3) then to determine—for any such nonconformity—the mileage at which [Warren] first presented the car to [Kia] for repair.” (See Duale, supra, 148 Cal.App.4th at p. 729.) Warren has not shown that these warranty-related issues were not disputed at trial. Indeed, the record does not include any trial transcripts, even though Warren’s counsel spent $5,882 to obtain trial transcripts. In addition, the jury’s special verdict supports the trial court’s finding that these warranty-related issues were disputed at trial, and therefore, that Warren’s breach-of-warranty damages could not have been determined at any point before trial, including “by looking at the sale contract.”

Even if Warren’s breach-of-warranty damages were certain or capable of being made certain either from the sales contract or other information available to Kia before trial, Warren has not shown that her incidental and consequential damages of $2,707.10—a key component of her $17,455.57 jury award—were certain or capable of being made certain before trial—based on any information available to Kia. As indicated, prejudgment interest is not authorized under section 3287, subdivision (a) where the amount of the damages is either disputed or cannot be determined from information available to the debtor. (Duale, supra, 148 Cal.App.4th at p. 729.)

Warren necessarily incurred her incidental and consequential damages for Kia’s breach of the vehicle’s express or implied warranties after she purchased the vehicle. Thus, those damages could not be ascertained “by looking at the sale contract.” In addition, Kia’s Code of Civil Procedure section 998 offer (which the trial court later found was uncertain and invalid) indicated Kia was unaware of the amount of Warren’s incidental and consequential damages when Kia made the offer in October 2015. Warren has pointed to no evidence that Kia was informed of the amount of her incidental and consequential damages before trial, or that Kia possessed any information upon which it could have calculated those damages before trial. (Cf. Leaf v. Phil Rauch, Inc. (1975) 47 Cal.App.3d 371, 375-377 [plaintiffs entitled to prejudgment interest under Civ. Code, § 3287, subd. (a), where all of their

7. In its special verdict, the jury found: (1) Warren’s vehicle had (unspecified) defects which substantially impaired its use, value, or safety, and which Kia failed to repair after a reasonable number of attempts or opportunities; (2) Kia failed to promptly replace or repurchase the vehicle; (3) Warren paid $18,378.26 for the vehicle through the time of trial (including finance charges, sales tax, license fees, registration fees, and other fees); and (4) Warren incurred incidental and consequential damages of $2,707.10. The jury also found that the cash value of the vehicle before it was submitted to Kia for repair was $16,375, and Warren put 26,600 miles on the vehicle. The jury thus calculated the value of the vehicle’s use as $3,629.79, resulting in total damages of $17,455.57 ($18,378.26 plus $2,707.10 minus $3,629.79 equals $17,455.57).

8. See footnote 7, ante.
damages for breach of a vehicle sales contract, including their breach of warranty and their incidental and consequential damages, were ascertainable at or after they rescinded the sales contract.) Thus, the trial court properly denied Warren’s prejudgment interest claim under Civil Code section 3287, subdivision (a).

(b) Section 3287, Subdivision (b)

Warren also claims the court abused its discretion in refusing to award her prejudgment interest under section 3287, subdivision (b), which provides: “Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.” “The trial judge, not the jury, determines a prejudgment interest award on unliquidated damages.” (North Oakland Medical Clinic v. Rogers, supra, 65 Cal.App.4th at p. 829.)

At the hearing on Kia’s motion to tax costs and Warren’s motion for attorney fees, Warren’s counsel asked the court to exercise its discretion and award Warren prejudgment interest under section 3287, subdivision (b). Although the trial court did not address subdivision (b) of section 3287 in denying Warren’s prejudgment interest claim, Warren offers no reason why the court abused its discretion in refusing to award her prejudgment interest, on any part of her $17,455.47 jury award, at any time on or after October 1, 2014, the date Warren filed her complaint. Thus, no abuse of discretion has been shown.

IV. DISPOSITION

The orders awarding attorney fees, costs, and expenses are reversed, and the matter is remanded to the trial court with directions to (1) increase Warren’s cost and expenses award by the $5,882 expense incurred for trial transcripts, and (2) determine a reasonable attorney fee award consistent with the views expressed in this opinion. Warren shall recover her costs and attorney fees on appeal. (Graciano, supra, 144 Cal. App.4th at p. 165 [“‘Statutory authorization for the recovery of attorney fees incurred at trial necessarily includes attorney fees incurred on appeal unless the statute specially provides otherwise’”]; Cal. Rules of Court, rule 8.278.)

CERTIFIED FOR PUBLICATION

FIELDS J.

We concur: MILLER Acting P. J., SLOUGH J.

Cite as 18 C.D.O.S. 11756

NEXT CENTURY ASSOCIATES, LLC, Plaintiff and Appellant,
V. COUNTY OF LOS ANGELES, Defendant and Respondent.

No. B284092
In The Court of Appeal of the State of California
Second Appellate District
Division One
(Super. Ct. L.A. County No. BC569076)
Filed December 14, 2018

ORDER MODIFYING OPINION

THE COURT*:

It is ordered that the opinion, filed herein on , 2017, be modified as follows:

Delete the first two paragraphs on page 13, under Discussion section A and replace with:

“ ‘Where a taxpayer challenges the validity of the valuation method used by an assessor, the trial court must determine as a matter of law ‘whether the challenged method of valuation is arbitrary, in excess of discretion, or in violation of the standards prescribed by law.’ [Citation.] Our review of such a question is de novo.’ ” (Charter Communications Properties, LLC v. County of San Luis Obispo (2011) 198 Cal.App.4th 1089, 1101 (Charter Communications).) Here, as noted above, both Next Century and the Assessor used similar DCF analyses, and no one challenges that method of valuation. It is expressly permitted by regulation. (Cal. Code Regs., tit. 18, §§ 2, subd. (b), 3, subd. (e), 8.)

But where, as here, “ ‘the taxpayer challenges the application of a valid valuation method, the trial court must review the record presented to the Board to determine whether the Board’s findings are supported by substantial evidence but may not independently weigh the evidence. [Citations.] This court . . . reviews a challenge to application of a valuation method under the substantial evidence rule.’ ” (Charter Communications, supra, 198 Cal.App.4th at p. 1101.) Other factual determinations by the Board also are reviewed under the substantial evidence standard. (Farr v. County of Nevada (2010) 187 Cal.App.4th 669, 679–680 (Farr).)

There is no change in the judgment.

*ROTHSCHILD, P. J., BENDIX, J., CURREY, J.**
** Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cite as 18 C.D.O.S. 11757

CHRISTYNA ARISTA, Individually and as Personal Representative, etc. et al.,
Plaintiffs and Appellants,

v.

COUNTY OF RIVERSIDE, Defendant and Respondent.

No. E068432
In The Court of Appeal of the State of California
Fourth Appellate District
Division Two
(Super.Ct.No. RIC1502475)
Filed December 13, 2018

ORDER MODIFYING OPINION; AND
DENIAL OF PETITION
FOR REHEARING

[NO CHANGE IN JUDGMENT]

The petition for rehearing filed by respondent on November 29, 2018, is denied. The opinion filed in this matter on November 20, 2018, is modified as follows:

I. The second-to-last sentence of the last paragraph on page 4—“Santiago Trail was a maintained fire access road that accommodates four-wheel drive or off-road vehicles” is modified to read: “Santiago Trail is a maintained fire access road that accommodates four-wheel drive or off-road vehicles.”

II. In the Discussion, section B, subsection 2, a new paragraph is inserted at the start of that subsection as follows:

“2. LAW

Under the provisions of the California Tort Claims Act, ‘a public employee is liable for [an] injury caused by his act or omission to the same extent as a private person,’ except as otherwise specifically provided by statute. [Citation.] In addition, the Tort Claims Act further provides that ‘[a] public entity is liable for [an] injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would … have given rise to a cause of action against that employee,’ unless ‘the employee is immune from liability.’” (Lugtu v. California Highway Patrol (2001) 26 Cal.4th 703, 715.) In the instant case, because the Family alleged the law enforcement officers were “acting within the scope of [their] employment when [they] engaged in the conduct [and omissions] at issue in this case, the initial question of duty, and [the County’s] potential liability … turns on ordinary and general principles of tort law.” (Id. at pp. 715-716.)"
The subsection then continues with the next paragraph, which begins “The elements of a wrongful death cause of action are ... .”

III. In the Discussion, section B, subsection 3, the fourth paragraph is modified to read as follows:

“Assuming the foregoing facts are true, Sheriff’s Department personnel (the deputies), through their actions, undertook the responsibility of rescuing the victim because the deputies were actively involved in all aspects of locating the victim, and by appointing an Incident Commander, the deputies signaled that they were taking control of the rescue. Therefore, the deputies had the duty to exercise due care in performing the rescue, which means (a) using reasonable care not to increase the risk of harm, and (b) following through in a reasonable manner after inducing reliance on the rescue.

IV. In the Discussion, section B, subsection 3, the first sentence of the seventh paragraph is replaced with the following sentence: “We examine whether the SAC alleges that the deputies induced reliance on their rescue efforts.”

V. In the Discussion, section B, subsection 3, the eighth paragraph is modified to read as follows:

“Wife did not organize her own search team until after learning that the deputies would be delaying their efforts. That Wife did not start her efforts until hearing of the deputies’ delay suggests Wife was relying on the deputies’ search efforts. Accordingly, the Family has sufficiently pled that the deputies undertook rescue efforts and induced reliance on those efforts. In sum, the trial court erred by ruling the deputies did not owe a duty of care.”

VI. In the Discussion, section B, subsection 3, the first sentence of the ninth paragraph is replaced with the following sentence: “The County’s demurrer to the negligence-based causes of action was focused solely upon the issue of duty; the County did not argue the issues of breach, causation, and damages”

VII. In the Discussion, section D, the second sentence of the second paragraph is replaced with the following sentence: “Thus, the NIED cause of action relies upon the duty to conduct the search with reasonable care. (See generally Huggins v. Long Drug Stores California, Inc. (1993) 6 Cal.4th 124, 129-130 [discussing direct and bystander liability, and the respective duties owed, in NIED claims].)”

VIII. In the Discussion, a new section “E” is added, as follows:

“E. IMMUNITY

The County contends the deputies and the County are immune from liability pursuant to Health and Safety Code, section 1799.107, subdivision (b).

The law provides, “[N]either a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.” (Health & Saf. Code, § 1799.107, subd. (b).)

“Bad faith” is not defined in the statute. (Health & Saf. Code, § 1799.107.) “[C]ase law has defined gross negligence as ‘“the want of even scant care or an extreme departure from the ordinary standard of conduct.’”” (Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1185-1186.) In the SAC, the Family alleged (1) a ping of the victim’s cell phone revealed the phone was in the area of Santiago Peak; (2) Lieutenant Hall said to Deputy Zaborowski “he was ‘not sure what we’re doing here,’ that [the victim] was ‘probably just running around on his wife’ and was ‘just covering his tracks,’ suggesting that [the victim] was not missing, but instead involved in some adulterous affair”; and (3) Lieutenant Hall told Wife, “‘[I]f it was a child, [he] would send a helicopter out there right now.’”

The facts pled by the Family, when accepted as true, support a finding of a want of even scant care. The allegation that Lieutenant Hall would have sent a helicopter for a child reflects there were resources that could have been deployed the night of March 1 to further the search efforts that had been undertaken. The allegation that Lieutenant Hall believed the victim was having an affair reflects that, despite having resources to continue searching for the victim, Lieutenant Hall chose to suspend the search overnight because he believed the victim was not missing. The allegation that the victim’s cell phone was in the area of Santiago Peak, reflects there was reason to believe the victim was missing, but Lieutenant Hall carelessly disregarded that evidence and chose to postpone search efforts until the morning. Because the allegations, when accepted as true, support a finding of a want of even scant care, we conclude the immunity of Health and Safety Code section 1799.107 does not apply at this stage of the proceedings.”

IX. In the Discussion, section “E” is relettered section “F.”

X. In the Discussion, section “F” is relettered “G.”

Except for these modifications, the opinion remains unchanged. The modifications do not effect a change in the judgment.
CERTIFIED FOR PUBLICATION

MILLER J.

We concur: McKINSTER Acting P. J., FIELDS J.