NINTH CIRCUIT COURT OF APPEALS

Song v. Sessions
BIA Immigration Law 12011
Undisputed evidence of arrest and torture compelled finding of persecution for “anti-government” beliefs (Nguyen, J.)

Benjamin v. B & H Education, Inc.
N.D. CA Employment Litigation 12014
Cosmetology students’ practical training did not qualify them as employees entitled to compensation (Schroeder, J.)

CALIFORNIA COURTS OF APPEAL

Department of Finance v.
Commission on State Mandates (County of San Diego) C.A. 3rd Government 12021
Conditions imposed on permittees by regional water quality control board were compensable state mandates (Nicholson, J.)

People v. Perez
C.A. 3rd Criminal Law 12032
Mere fact of gang affiliation insufficient to support gang enhancement (Raye, P.J.)

Rossetta v. CitiMortgage, Inc.
C.A. 3rd Creditors’ & Debtors’ Rights 12044
Lender assumed duty of care in agreeing to consider borrower’s application for loan modification (Renner, J.)

OFFICE OF ATTORNEY GENERAL

Opinion of Xavier Becerra
Government 12053
The Attorney General granted a proposed relator leave to sue in quo warranto to determine whether Sandra Meraz is unlawfully serving as a board trustee of the Deer Creek Storm Water District because she was appointed to fill a vacancy by the remaining members of the district board, rather than by the Tulare County Board of Supervisors, but denied leave to sue to determine whether Kayode Kadara is unlawfully serving as a board trustee of the Deer Creek Storm Water District because he is not a “freeholder” of land within the district.

California Forms Books

- Business Litigation
- Employment Law
- Insurance Defense
- Medical Malpractice
- Products Liability

TRIED. TRUSTED. TRUE.
Available online, on CD, and in print.

Download sample forms FREE at: http://at.law.com/books

The California Daily Opinion Service contains all opinions by:

- U.S. SUPREME COURT
- U.S. NINTH CIRCUIT COURT OF APPEALS AND BANKRUPTCY APPELLATE PANEL
- CALIFORNIA SUPREME COURT
- CALIFORNIA COURTS OF APPEAL (ALL DISTRICTS)
- CALIFORNIA ATTORNEY GENERAL

All content in the California Daily Opinion Service is property of The Recorder and shall not be republished or photocopied without express written consent. Copyright 2017. ALM Media Properties, LLC. All rights reserved.

Before citing the California Daily Opinion Service, counsel should verify the continuing publication status of a case. Exhibits and appendices to opinions will be included whenever possible if they are reproducible and merit inclusion. While every effort is made to report accurately, minor errors may occur. To report errors, or for other inquiries, please contact: casesums@alm.com.

SUPPLEMENT TO THE RECORDER, SAN FRANCISCO, CA
Lender assumed duty of care in agreeing to consider borrower’s application for loan modification (Renner, J.)

Rossetta v. CitiMortgage, Inc.

C.A. 3rd; December 18, 2017; C078916

The Third Appellate District affirmed in part and reversed in part a judgment. In the published portion of its opinion, the court held that when a lender agrees to consider a borrower’s application for a loan modification, the Biakanja factors weigh in favor of imposing a duty of care.

Antoinette Rossetta contacted lender CitiMortgage, Inc. regarding modification of her home loan. Rossetta was current on her mortgage payments, but facing financial difficulties. CitiMortgage advised Rossetta that it would consider modification only if she was at least three months delinquent, and thus in default. Rossetta allowed her account to go into default, and then contacted CitiMortgage again. Over the next several months, she submitted her application more than once, was told repeatedly that loan modification had been approved, but was ultimately denied a modification. Rossetta ultimately filed for bankruptcy protection. Rossetta sued CitiMortgage for negligence and other causes of action, alleging that it acted unreasonably by dragging Rossetta through a seemingly endless application process, requiring her to submit the same documents over and over again, losing or mishandling documents, misstating the status of various applications, and ultimately denying them for bogus reasons.

The trial court sustained CitiMortgage’s demurrer without leave to amend.

The court of appeal reversed in part, holding that Rossetta stated a viable cause of action for negligence. Assessing the six factors set forth in Biakanja v. Irving (1958) 49 Cal.2d 647, the court found that each of them weighed in favor of finding a duty of care on the part of CitiMortgage. It was, among other things, entirely foreseeable that CitiMortgage’s failure to timely and carefully process Rossetta’s loan application would result in significant harm to Rossetta. CitiMortgage was not acting merely as lender when it encouraged Rossetta to default on her loan. In directing Rossetta in this manner, CitiMortgage not only enhanced its already overwhelming bargaining power, but exceeded its role as conventional lender. When a lender agrees to consider a borrower’s application for a loan modification, the Biakanja factors weigh in favor of imposing a duty of care. Acting Presiding Justice Mauro concurred, writing separately to explain that a lender’s mere receipt or review of a borrower’s loan modification application is not enough, standing alone, to create a changed relationship giving rise to a duty of care.
Employment Litigation

Cosmetology students’ practical training did not qualify them as employees entitled to compensation

Benjamin v. B & H Education, Inc.

9th Cir.; December 19, 2017; 15-17147

The court of appeals affirmed a district court judgment. The court held that the hands-on training that cosmetology students received, which included working in the school clinic, did not qualify the students as employees entitled to compensation.

Jacqueline Benjamin and others were students of cosmetology schools operated by B & H Education, Inc. (B&H). They sued B&H for violation of the Fair Labor Standards Act (FLSA), arguing that despite their purported status as students, much of their time was spent on menial and unsupervised work for which they were entitled to compensation.

The district court granted summary judgment for B&H, finding that the students, and not the schools, were the primary beneficiaries of their own labors because at the end of their training they would qualify to practice cosmetology. Moreover, state law requires clinical training that includes maintenance of a clean and sanitary work environment and does not require that all client work be supervised.

The court of appeals affirmed, holding that the district court properly applied the primary beneficiary test in determining whether plaintiffs needed to be regarded as employees under the FLSA.

The primary beneficiary test includes at least seven factors. Applying them to the facts of this case, most if not all militated toward a finding that plaintiffs were not employees. First, it was undisputed that they entered into their training knowing they would not receive remuneration, and they did not expect otherwise. They received hands-on training in the clinic and academic credit for the hours they worked. Their clinical work corresponded to their academic commitments. Further, nothing in the record suggested they were required to participate in their programs for longer than was necessary to complete their hourly requirements for state certification. They also did not routinely displace the work of paid employees. Finally, they had no expectation of employment with B&H upon graduation. The record established that plaintiffs were the primary beneficiaries of their labors. The time spent working provided them with the hands-on training they needed to sit for their state licensing exams. They were thus not employees under the FLSA.

Government

Conditions imposed on permittees by regional water quality control board were compensable state mandates

Department of Finance v. Commission on State Mandates (County of San Diego)

C.A. 3rd; December 19, 2017; C070357

The Third Appellate District reversed a judgment and remanded. The court held that the conditions imposed on permittees by a regional water quality control board were state, and not federal, mandates.

In 2007, the Regional Water Quality Control Board, San Diego Region, issued a permit to the County of San Diego and the cities located in the county. The permit required the permittees to implement various programs to manage their urban runoff. The permittees estimated complying with these requirements would cost them more than $66 million over the life of the permit. The permittees filed a claim with the Commission on State Mandates, arguing that the permit requirements were compensable state mandates. The Commission agreed, ruling that the requirements were state, and not federal, mandates.

The State petitioned the trial court for a writ of administrative mandate, arguing the permit requirements were federal mandates, were not a new program or higher level of service, and thus were not compensable. The trial court granted the petition in part, finding that the Commission applied an incorrect standard when it determined the permit conditions were not federal mandates.

The court of appeal reversed, holding that the Commission’s analysis was correct. The issue raised here was the same as that addressed in Department of Finance v. Commission on State Mandates (2016) 1 Cal.5th 749, in which the Supreme Court held that federal requirement that a storm water discharge permit reduce pollution impacts to the “maximum extent practicable” was not a federal mandate, but rather vested the regional water quality control board with discretion to choose which conditions to impose to meet the standard. The court concluded that the permit conditions resulting from the exercise of that choice were state mandates. Applying that reasoning here, the outcome was the same. No federal law, regulation, or administrative case authority expressly required the conditions imposed by the regional board. The requirement to reduce pollution impacts to the “maximum extent practicable” was not a federal mandate, but instead vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice were state mandates.
Immigration Law

Undisputed evidence of arrest and torture compelled finding of persecution for “anti-government” beliefs
(Nguyen, J.)

Song v. Sessions

9th Cir.; December 18, 2017; 14-71113

The court of appeals granted a petition for review of an order of the Board of Immigration Appeals. The court held that an asylum applicant’s undisputed account of being arrested and tortured compelled a finding that he was persecuted in his home country for “anti-government” beliefs.

When Xinbing Song lived in China, his local government notified him of plans to demolish the building in which he owned a unit. The compensation offered was far below that mandated by law. Song led the building residents in a protest. He was arrested, jailed, beaten, and tortured. When his family eventually obtained his release for medical reasons, he was ordered to report to the police weekly. Fearing he would be arrested and tortured again, Song fled to the United States, where he applied for asylum. The immigration judge who heard Song’s case credited his testimony, but found he was ineligible for asylum because the matter at issue had to do with eminent domain and the compensation offered by the government for Song’s unit. The IJ found it was thus not a matter that was political in nature.

The Board of Immigration Appeals upheld the IJ’s decision.

The district court granted Song’s petition for review, holding that the evidence compelled a finding that Song was persecuted by Chinese authorities on account of an imputed or actual political opinion. It was not Song’s rejection of the government’s offer of compensation, but his instigation of a protest by building residents that led to his being labeled by police as “anti-government,” ultimately resulting in his arrest. While held in jail, he was beaten and tortured. The government officials’ disproportionate punishment for what was essentially a disturbing the peace charge supported a finding that the persecution was because of an imputed political opinion.
I.

Before arriving to the United States, Song lived in China’s Hunan province. In June 2009, Song’s local government notified him that it planned to demolish and rebuild a building in which Song had owned a commercial unit since 1997. Such local demolition projects, designed to increase infrastructure and commercial development, have resulted in the forced relocation of millions of Chinese citizens.

Forced demolition was the leading cause of social unrest and public discontent in China in 2010. Affected residents often were not paid market value for their property, and sometimes received even less compensation than the government initially promised. Nearly 70% of respondents in one study reported that they had encountered problems with demolition and relocation, either relating to compensation or forced eviction. Government officials frequently colluded with property developers to pay those subjected to forced eviction as little as possible. Yet few legal remedies were available to displaced residents, and local officials sometimes retaliated against those who tried to protest.

Song’s local government offered him 6,500 Yuan per square foot in compensation for his property. Song believed the offer violated a local regulation that provided for compensation of at least 10,000 Yuan per square foot. Song attempted to negotiate with government officials, but he was told that he would not receive more than 6,500 Yuan per square foot.

Song’s neighbors in the building also disagreed with the offered compensation. Song went door to door in his neighborhood and organized a protest. On July 29, 2009, Song and over one hundred of his neighbors blocked the entrance to a neighborhood and organized a protest. On July 29, 2009, Song and over one hundred of his neighbors blocked the entrance to a


3. See also id.

4. The regulation stated, “Pursuant to the Official Document No. SZ(Z(2003))58 of Shangqiu City People’s Government, the compensation of the store front properties shall be set as RMB11,000 - 13,000 Yuan per square meter, and residential properties shall be set as RMB3,000-4,000 Yuan per square meter.” The first floor of Song’s building was commercial, and the upper floors were residential.

5. Given the text of the regulation, supra, n.4, it appears Song may have confused whether the compensation was per square foot or square meter in his testimony. The distinction is not relevant to the outcome here.
local government building. The protestors held a banner that said “opposed to forced demolition” and chanted slogans like “give me my fair compensation,” “please do what is just,” and “return to me what is mine.”

A few minutes into Song’s protest, security guards and an unidentified, non-uniformed employee came out of the government building and asked for the leader of the protest. Song told the employee the protestors were people “subject to the [government’s] eminent domain measure.” One of the security guards went back inside and, a few minutes later, a government official came out of the building. The official asked who was in charge and why the protestors were there “to cause trouble and make problems.” Song told the official he and two other neighbors were in charge and that the group was “just [t]here to obtain justice and fairness.” When Song declined to disperse the protestors unless they were given “a fair remedy and justice,” the official responded, “Do you realize the consequences of your actions?”

Song and the other leaders followed the government official into the building. Once inside, the government official recorded the leaders’ names and other identifying information. The official said the protest could not continue because it was “anti-government” and “not right.” The official said the government would issue a written decision on the city’s demolition plans in the next week. Song informed the official that if he and his neighbors did not receive an adequate answer, the protestors would return.

Song received a letter from the local government on August 5, 2009, that the demolition would proceed. Song continued his protest of the forced demolition by hanging a banner from his unit expressing his opposition. The banner stated that Song would rather die than give up his property. Song also moved his belongings into and began sleeping in one of the upstairs residential apartments, then vacated by its tenants because of the demolition notice.

Twelve days later, Song was arrested. Two police officers entered the apartment, overpowered his efforts to resist, and took Song to a detention center. He was charged with interfering with official duties. During the three days Song was jailed, police tortured and beat him, and encouraged his cell mates to do the same. Song was forced to spend an entire night in a squatting position. The police also interrogated him about his alleged crime. When asked why he had gathered the crowd of protestors, Song maintained that the compensation the government had offered was not fair and was inconsistent with government regulation.

Despite crediting Song’s unrefuted testimony and admitting a 2010 Human Rights Report from the U.S. Department of State that documented the unrest caused by eminent domain disputes, the IJ denied Song’s application for relief and ordered his removal to China. The IJ found that this case “has to do with eminent domain and the compensation that the government offered the respondent and the other property owners for property that the government intended to demolish,” which is “not a matter that is political in nature.” The IJ also found “nothing in this record to suggest that the respondent was being punished because he was voicing political objections to the way that the government was running.”

The BIA upheld the IJ’s decision, finding that Song failed to show that he was eligible for asylum because he “did not establish a nexus to a protected ground based on his personal dispute with the Chinese government over the value of his land.” The BIA agreed with the IJ that Song’s actions “were motivated by a desire for increased compensation for his property, not by political views.”

A petitioner is eligible for asylum when his imputed or actual political opinion was one central reason for his past persecution. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1); Navas v. INS, 217 F.3d 646, 655–56 (9th Cir. 2000). We uphold the BIA’s determination of ineligibility if the findings are “supported by reasonable, substantial, and probative evidence on the record.” Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000).

The IJ and BIA also denied Song’s applications for withholding of removal and CAT protection. The government contends that Song has waived any challenge to his eligibility for these other forms of relief. We agree as to the CAT claim because Song did not address the IJ’s finding that the persecution he experienced did not rise to the level of torture. However, Song did not waive his withholding of removal claim. The IJ denied this claim for the same reason she denied asylum, and Song extensively addressed this issue on appeal.
Cir. 2000) (quoting INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992)). However, where the evidence “compels the conclusion that the findings and decisions are erroneous,” we must overturn the BIA’s decision and grant the petition for review. Id.

There is no dispute here that Song experienced past persecution at the hands of the local government. He was tortured and beaten by police, and by his cell mates at the encouragement of the police. He was forced to stay in a squatting position all night, and, when he refused to cooperate with interrogators, he was beaten until he could not walk. See Li v. Holder, 559 F.3d 1096, 1107 (9th Cir. 2009) (“It is well established that physical violence is persecution under 8 U.S.C. § 1101(a)(42)(A).”). This appeal turns instead, then, solely on whether the persecution Song suffered was on account of an imputed or actual political opinion.

IV.

“If the persecutor attributed a political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant’s political opinion as required under the [Immigration and Nationality] Act.” Sangha v. INS, 103 F.3d 1482, 1489 (9th Cir. 1997). The record compels the conclusion that the government officials at the protest and the police who arrested Song imputed to him an anti-government, anti-eminent domain political opinion, and that that imputation was one central reason for his persecution.

From the government’s perspective, Song was the leader of a large group of local residents protesting the government’s eminent domain policy. Song organized over one hundred people to block the entrance of a government building. He identified himself as a leader of the protest and told a government employee that the protestors were there specifically because they were subject to the government’s eminent domain policy. He refused to disperse the crowd until the residents’ concerns about the forced demolition of their building were heard. The Chinese government was familiar with such protests; the 2010 Human Rights Report confirms that forced relocation protests were “common” and that there was “widespread” animosity toward forced demolitions. It was in this context that government officials approached Song.

But we need not rely solely on the political atmosphere here to find that the government officials imputed a political opinion to Song; the officials said so themselves. A government official accused Song and the other protestors of being “anti-government.” Police officers expressed the same view when they accused Song of holding anti-government views in response to Song’s assertion that the compensation he was offered was not consistent with government regulation. Thus, it is clear that the government officials and police attributed a particular view—one of being anti-government and anti-eminent domain—to Song. See Singh v. Ilchert, 69 F.3d 375, 379 (9th Cir. 1995) (finding persecution on account of political opinion when the persecutors’ statements indicated they were acting because of the victim’s political beliefs).

When Song intensified his protest of the forced demolition, so too did the government intensify its response. The police arrested, beat, and tortured Song when he hung a banner stating he would rather die than give up his property and refused to vacate. Song was jailed for three days. He was only released when his family was able to pay 10,000 Yuan and the injuries he had sustained from the beatings and torture required medical aid. The police required Song to report regularly to them after his release and continually sought him after he left the country. The government officials’ disproportionate punishment for what was essentially a disturbing the peace charge also supports a finding that the persecution was because of an imputed political opinion. See Li, 559 F.3d at 1109 (observing that “disproportionately severe punishment” can transform an ordinary prosecution into persecution (internal quotation marks omitted)); cf. Baghdasaryan v. Holder, 592 F.3d 1018, 1024–25 (9th Cir. 2010) (concluding that petitioner suffered harm due to his political opinion when militia beat him and accused him of “raising his head” against a corrupt government official).

Whether or not Song viewed himself, his protest, or his refusal to vacate as anti-government, the government officials made clear that they viewed them as such. Cf. Cordon-Garcia v. INS, 204 F.3d 985, 991 (9th Cir. 2000) (reversing BIA’s determination that persecution was not on account of political opinion where victim’s actions “demonstrated to the [persecutor] that she planned to continue alignment with a cause obviously at odds with [his] goals”). Accordingly, we find that the record compels the conclusion that the government imputed an anti-eminent domain opinion to Song, and persecuted him for that opinion.

In concluding otherwise, the IJ and BIA took a very narrow view of what could qualify as an actual political opinion in the asylum context. We have held that “[a] political opinion encompasses more than electoral politics or formal political ideology or action.” Ahmed v. Keisler, 504 F.3d 1183, 1192 (9th Cir. 2007). The record makes clear that Song not only sought additional compensation for himself, but also staged a public protest of more than one hundred neighbors and a sit-in refusal to vacate his building, accompanied by a statement that he would die for the cause, in opposition to the demolition. The IJ and BIA narrowly focused on Song’s “desire for increased compensation for his property” without taking into account the full spectrum of Song’s actions.

* * *

The evidence before the IJ and BIA compels the conclusion, at the very least, that Chinese authorities persecuted Song because of a political opinion they imputed to him. We therefore grant the petition for review, vacate the BIA’s denial.

---

9. The IJ so found, and the BIA did not review nor dispute that finding. Nor have the parties raised the issue on appeal. Specifically, the government has not argued that it can rebut the presumption of a well-founded fear of future persecution based on past persecution. See 8 C.F.R. § 208.13(b)(1).
of asylum, and remand to the Attorney General to exercise his discretion whether to grant asylum.

PETITION GRANTED.

CITE AS 17 C.D.O.S. 12014

JACQUELINE BENJAMIN, individually and on behalf of all others similarly situated; BRYAN GONZALEZ, individually and on behalf of all others similarly situated; TAIWO KOYEJO, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

B & H EDUCATION, INC. Defendant-Appellee.

No. 15-17147
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:13-cv-04993-VC
Appeal from the United States District Court for the Northern District of California
Vince Chhabria, District Judge, Presiding
Argued and Submitted September 11, 2017
San Francisco, California
Filed December 19, 2017

Opinion by Judge Schroeder

*The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

COUNSEL

Bryan J. Schwartz (argued) and Logan Talbot, Bryan Schwartz Law, Oakland, California; Leon Greenberg and Dana Sniegocki, Law Office of Leon Greenberg, Las Vegas, Nevada; Chaya M. Mandelbaum and Michelle G. Lee, Rudy Exelrod Zieff & Lowe LLP, San Francisco, California; for Plaintiffs-Appellants.

Robert Lane Morris (argued), Soltman Levitt Flaherty & Wattles LLP, Thousand Oaks, California, for Defendants-Appellees.

OPINION

SCHROEDER, Circuit Judge:

Plaintiffs are students of cosmetology and hair design at schools in California and Nevada operated by defendant B&H Education, Inc., under the name of Marinello Schools of Beauty. Plaintiffs claim that they are employees within the meaning of the Fair Labor Standards Act ("FLSA"), and under California and Nevada state law, on the ground that much of their time is spent in menial and unsupervised work, and that they are therefore entitled to compensation.
The District Court granted summary judgment for B&H on the FLSA claim, holding that under the test applicable to such claims, the Plaintiffs, not the schools, are the primary beneficiaries of their own labors because at the end of their training they qualify to practice cosmetology. Moreover, state law requires clinical training that includes maintenance of a clean and sanitary work environment and does not require that all client work be supervised. The District Court also granted summary judgment for B&H on Plaintiffs’ claims under California and Nevada state law. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Marinello Schools of Beauty is a for-profit school that offers discounted cosmetology services to the public through salons staffed by vocational students who do not receive compensation. Marinello is licensed to operate in California and Nevada, and provides both classroom instruction and clinical experience for students. Students must complete a minimum number of instruction hours before participating in the clinic and working on customers. See Cal. Code Regs., tit. 16, § 950.12; Nev. Rev. Stat. § 644.408.

Cosmetologists are required under California and Nevada law to be individually licensed. Cal. Code Regs., tit. 16, § 976; Nev. Rev. Stat. § 644.190(2). State law requires that, before applicants may take the licensing exam, they must take part in hundreds of hours of classroom instruction, including observing demonstrations, and practical training that includes performing services on a person or mannequin. See Cal. Code Regs., tit. 16, §§ 950.2, 928(a); Nev. Rev. Stat. §§ 644.200, 644.204, 644.400(2). The state licensing exam tests sanitation and cleaning knowledge as well as cosmetology skills. Cal. Bus. & Prof. Code § 7338; Nev. Rev. Stat. §§ 644.240, 644.244. Students at Marinello attend lectures, review course materials, take tests, and practice cosmetology on customers in the clinic under some instructor supervision, thereby allowing them to earn academic credit toward qualifying them to take the state licensing exam. In the clinic, students not only practice cosmetology itself, including hair, skin, and nail treatments, but perform selected duties that include sanitizing their work stations, laundering linens, dispensing products, greeting customers, making appointments, and selling products.

Plaintiffs in this case are Jacqueline Benjamin and Taiwo Koyejo, cosmetology students at Marinello in California, and Bryan Gonzalez, a hair design student at Marinello in Nevada. In January 2015, Plaintiffs filed a Second Amended Collective and Class Action Complaint in the District Court for the Northern District of California. Plaintiffs claimed that, rather than properly educate and train them in cosmetology, B&H exploited the Plaintiffs for their unpaid labor. B&H did this, Plaintiffs claimed, by not paying them for their work in Marinello’s salons, by leaving them unsupervised in the salon, and by requiring them to perform services that they already could do as opposed to services that they needed to learn for the licensing exams. Plaintiffs also claimed B&H unlawfully kept the salon’s profits, Plaintiffs’ tuition fees, the money Plaintiffs spent when required to purchase Marinello’s salon supplies to service paying customers, as well as heavy fines that B&H imposed on Plaintiffs for tardiness and absences during scheduled salon shifts. Plaintiffs sought payment for minimum and overtime wages, premium wages for missed meal and rest breaks, civil penalties for violating wage laws, restitution of fines, and reimbursement for supply purchases. Plaintiffs also requested declaratory judgment that B&H’s practices violated federal and state law.

Plaintiffs moved for summary judgment, asserting that the students were employees under federal and state law. B&H filed a cross-motion for summary judgment, contending the Plaintiffs were students, not employees. In response to B&H’s cross-motion for summary judgment and to support the allegations of the complaint, Plaintiffs relied in part on witness declarations from three individuals who Plaintiffs had not disclosed to B&H pursuant to Federal Rule of Civil Procedure 26. The District Court therefore ordered the declarations stricken pursuant to Rule 37. The District Court then granted B&H summary judgment and denied Plaintiffs’ motion for summary judgment. Applying the primary beneficiary test set forth in Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015), amended and superseded by 811 F.3d 528 (2d Cir. 2016), and Schumann v. Collier Anesthetia, P.A., 803 F.3d 1199 (11th Cir. 2015), the District Court held that Plaintiffs were not employees under federal or state law because Plaintiffs were the primary beneficiaries of the educational program and they had not shown that Marinello subordinated the educational function of its clinics to its own profit-making purposes.

Plaintiffs appeal, challenging the District Court’s rulings under both federal and state law, as well as the Rule 37 ruling.

**DISCUSSION**

**I. FEDERAL LAW UNDER THE FLSA**

The essence of Plaintiffs’ claim is that they should be treated as employees rather than students. Therefore, our analysis under federal law must begin with the distinction that has developed between students, or interns, on the one hand and employees on the other. The seminal case is Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (Portland Terminal), involving trainees working alongside railroad workers, and it has remained the guiding source of the principles governing cases involving claims of both trainees and students seeking to be treated as employees.

In Portland Terminal, the Supreme Court had to interpret bare bones provisions of the FLSA to determine whether railroad trainees were employees. 330 U.S. at 152–53. The FLSA defines an employee to be “any individual employed by an employer”; it defines “employed” as “to suffer or permit to work.” 29 U.S.C. § 203(e)(1), (g). The United States Department of Labor (“DOL”) sought an injunction against a railroad for failing to pay its trainees minimum wages under
the FLSA. Because the trainees were performing work for the railroad, DOL contended they were required to be paid by the railroad as employees. See Portland Terminal, 330 U.S. at 149. The railroad responded that it was providing training that benefitted the trainees, because the training they were receiving would qualify them to serve and be compensated as employees. Id. at 149–50. After reviewing the factors it deemed relevant, the Court ruled in favor of the railroad. Id. at 153. It reasoned that the trainees, not the railroad, were the direct beneficiaries of the system and were therefore not employees of the railroad. Id.

A number of important factors contributed to that conclusion. The railroad provided a week-long practical training course to the trainees, who were all prospective yard brakemen. Id. at 149–50. At the completion of the training, the railroad certified the trainees as qualified to be railroad employees. Id. at 150. The trainees did not displace regular employees, and the trainees’ work sometimes impeded the railroad’s business. Id. at 149–50. The railroad’s supervisors often oversaw the trainees’ work, and the trainees never expected any remuneration for the training period. Id. at 150. Once certified, the trainees’ names were placed on a list of qualified workers from which the railroad could draw for paid work when needed. Id. In short, the trainees derived a major benefit by becoming qualified to do paid work, where the railroad bore some burden and inconvenience in the short run. In finding that the trainees were not employees under the FLSA, the Court observed that “the railroads receive no ‘immediate advantage’ from any work done by the trainees . . . .” Id. at 153. The Court held the trainees were not employees. Id.

It is important for our purposes that in so holding, the Court expressly compared the trainees to students in an educational setting, emphasizing that students are not employees. The Court noted that the FLSA’s definition cannot be read so broadly as to include all students as “employees of the school or college they attend” and that had the “trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the [FLSA].” Id. at 152–53.

Since Portland Terminal, the Supreme Court has, in a handful of cases outside the educational context, further refined the employment relationship test under the FLSA, finding that the “test of employment under the [FLSA] is one of ‘economic reality.’” Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 301 (1985) (quoting Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (holding that the test of employment under the FLSA is the economic reality test)) (Alamo); accord Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (noting that whether an individual is an employee under the FLSA depends not on “isolated factors but rather upon the circumstances of the whole activity”).

In Alamo, the Supreme Court’s most recent discussion of the economic realities test in the employment context, the DOL sued a non-profit religious foundation for violating the minimum, overtime, and record-keeping provisions of the FLSA. 471 U.S. at 291–92. The religious foundation ran several commercial businesses, including service stations, clothing and grocery stores, hog farms, a motel, construction companies, candy companies, and record-keeping companies. Id. at 292. Staffing the foundation’s businesses were “volunteers,” who were former drug addicts, derelicts, or criminals that the foundation had converted and rehabilitated. Id. In exchange for their services, the volunteers received food, clothing, shelter, and other benefits from the foundation, but no cash salaries. Id. The Court held that the “volunteers” were actually employees under the economic realities test. Id. at 301, 306. Two factors were particularly significant. First, the volunteers were entirely dependent economically upon the foundation for long periods of time, and in some cases several years. Id. at 301. Second, the volunteers expected to receive in-kind non-cash benefits in exchange for their services, which amounted to “wages in another form.” Id. Because the volunteers “work[ed] in contemplation of compensation,” they were employees under the FLSA. Id. at 306. The Court looked to the economic reality of the situation and held it involved work for compensation and hence employment.

While our Court has not previously addressed a situation involving interns or vocational students under the FLSA, we have followed Alamo and Portland Terminal by applying a four-part economic reality test looking to the totality of the circumstances when determining whether individuals are employees under the FLSA. We have considered situations involving prison inmates and homeless persons in rehabilitation programs. See Hale v. Arizona, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc); see also Williams v. Strickland, 87 F.3d 1064, 1065 (9th Cir. 1996). In such cases, we looked to the overall economic realities of the relationship: “whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records.” Hale, 993 F.2d at 1394 (citing Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)). We held that neither the prison inmates nor the rehabilitation participants were employees. Id. at 1395; Strickland, 87 F.3d at 1067. This is because there was no bargained-for compensation relationship in either case. The prisoners worked because they had to work. Hale, 993 F.2d at 1394. And the rehabilitation participants had no expectation of compensation other than treatment. Strickland, 87 F.3d at 1067.

The DOL, the agency that administers and enforces the FLSA, has struggled with formulating the appropriate test or guidelines to apply in dealing with issues relating to interns/employees. On the basis of Portland Terminal, the DOL issued informal guidance in 2010 as to whether unpaid interns
are employees under the FLSA. See Wage & Hour Div., U.S. Dep’t of Labor, Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (Apr. 2010), https://www.dol.gov/whd/regs/compliance/whdfs71.pdf. Under the DOL’s six-factor test, an intern is an employee unless all of the following factors are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Id.

The leading recent Court of Appeals decision to consider the DOL test however, rejected it as “too rigid” and too dependent on the particular facts of Portland Terminal. Glatt, 811 F.3d at 536. The court in Glatt also rejected the plaintiffs’ main argument, one that essentially turned Portland Terminal on its head. Portland Terminal had said that because “the railroads receive no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the [FLSA’s] meaning.” 330 U.S. at 153. The plaintiffs in Glatt, however, argued that if the employers received any economic benefit, the plaintiffs were employees. 811 F.3d at 535. The Second Circuit ruled such a position was not consistent with Portland Terminal. Id. at 537.

The Second Circuit in Glatt vacated the district court’s order, that had adopted the DOL test, in favor of a different test. Id. at 538. The appellate court held that the appropriate test for determining whether interns should receive compensation under the FLSA and New York labor law should be what it termed the “primary beneficiary test.” Id. at 536. The Second Circuit’s opinion set forth a list of seven non-exhaustive factors for courts to weigh and balance under the test. Id. at 536–37. The factors are:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.

5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlemen to a paid job at the conclusion of the internship.

Id.

The Second Circuit explained it chose the primary beneficiary test due to the test’s three important features. Id. at 536. First, the test “focuses on what the intern receives in exchange for his [or her] work,” which incorporates Portland Terminal’s focus on the interest of trainees. Id. Second, the test allows courts flexibility in examining the economic reality between the intern and the employer, which follows the Supreme Court’s economic reality test cases. Id. And third, the test acknowledges the distinction between intern-employer relationships, in which interns typically expect to receive educational or vocational benefits, and employee-employer relationships, in which employees do not necessarily expect to receive such benefits. Id.

Other courts have adopted either Glatt’s primary beneficiary test or have established a similar test in cases involving interns or trainees. See Schumann, 803 F.3d at 1211–12 (expressly adopting the Glatt primary beneficiary test); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011) (discussing relevant factors for courts to consider when analyzing “which party derives the primary benefit from the relationship”) (Laurelbrook).
The cases have arisen in a variety of contexts. In Glatt, the plaintiffs were unpaid interns working for a film production company, and the interns argued that they were owed compensation as employees under the FLSA and New York labor law. 811 F.3d at 531–33. During their internships, five of the ten interns enrolled in a degree program, and the other five interns were not. Id. at 532–33. After adopting the primary beneficiary test, the Second Circuit remanded the case for the district court to apply it. Id. at 538.

In Schumann, nursing students sought wages under the FLSA for work performed in the school’s clinic, which was a prerequisite to obtaining a master’s degree in the students’ program. 803 F.3d at 1202. The Eleventh Circuit adopted Glatt’s primary beneficiary test and remanded the case to the district court to determine whether the students were employees based on the test. Id. at 1211–13.

In Laurelbrook, the DOL had sought an injunction against a religious school for allegedly violating the FLSA, arguing that students who were engaged in practical, vocational training to learn various trades and serve sanitarium patients, were employees. 642 F.3d at 519–21. The Sixth Circuit upheld the district court’s conclusion that the students were not employees, noting that the school benefitted from receiving payment for students’ services, and that the hours students worked allowed the sanitarium to satisfy its licensing requirements, but that the students, not the school, were the primary beneficiaries. Id. at 530–32. The benefits to the school were offset by the burdens, because students did not reduce the number of compensated workers, and instructors had to spend extra time supervising students at the expense of performing productive work. Id. at 530–31. The students, on the other hand, received the important benefits of gaining hands-on, practical training that allowed them to be competitive in a variety of vocations upon graduation, to learn how to operate tools used in the trades they were studying, to earn credit for courses approved by the state accrediting agency, and to develop a strong work ethic and leadership skills. Id. at 531. Therefore, the Sixth Circuit concluded the students were the primary beneficiaries and hence were not employees.

The primary beneficiary analysis by our sister circuits in Glatt, Schumann, and Laurelbrook represent applications of the Supreme Court’s economic realities test, and the courts evaluated the totality of the circumstances of each case as the Supreme Court has directed. See Rutherford Food Corp., 331 U.S. at 730; Schumann, 803 F.3d at 1210; Glatt, 811 F.3d at 536; Laurelbrook, 642 F.3d at 522. Glatt in particular provides a helpful list of factors for courts to consider in the specific context of student workers. We agree with those decisions that the primary beneficiary test best captures the Supreme Court’s economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA.

II. APPLYING THE PRIMARY BENEFICIARY TEST

The primary beneficiary test as articulated in Glatt includes at least seven factors. Applying them to the facts of this case, most if not all militate toward concluding that Plaintiffs are students. With respect to the first, there is no dispute that Marinello students signed on knowing they would not receive remuneration and did not expect compensation. Under the second and third factors, Marinello students received hands-on training in the clinic and academic credit for the hours they worked. The students’ clinical work corresponded to their academic commitments under the fourth factor because clinical work allowed students to clock the hours they needed to sit for the state licensing exams. See Cal. Code Regs., tit. 16, §§ 950.2, 928(a); Nev. Rev. Stat. §§ 644.200, 644.204, 644.400. Fifth, nothing in the record suggests that Marinello required its students to participate in their programs for longer than was necessary to complete their hour requirement for the state exams. Under the sixth factor, students did not routinely displace the work of paid employees as the school maintained staff to instruct students, run clinics, operate front desks, inventory and stock the dispensary, handle the logistical needs of the clinics, and perform nighttime janitorial services. Finally, students had no expectation of employment with Marinello upon graduation.

In summary, application of the Glatt factors establishes that students were the primary beneficiaries of their labors. Their participation in Marinello’s clinic provided them with the hands-on training they needed to sit for the state licensing exams. Applying the primary beneficiary test we must conclude they were not employees under the FLSA.

Plaintiffs nevertheless urge us to apply the DOL test in determining the employment relationship in this case. We agree with the Second Circuit in Glatt, however, that the DOL’s test is not appropriately utilized as a test applicable to a variety of circumstances, as it is so closely tied to the facts in Portland Terminal. As the Second Circuit said, the DOL’s test “is essentially a distillation of the facts discussed in Portland Terminal,” Glatt, 811 F.3d at 536, and thus “too rigid” to comport to our case law, which applies a totality of the circumstances approach to determining the employment relationship under the FLSA. See, e.g., Hale, 993 F.2d at 1394.

Even if we were to apply the DOL test, however, it would not in all likelihood materially change the result in this case. Applying the DOL criteria in this case, we view the training provided to Plaintiffs to be in an educational environment, because state law requires students to clock hundreds of hours of instruction and practical training in order to qualify for taking the licensing exams. Students benefit because the students learn skills tested on the licensing exams and are able to sit for the exams. Students do not displace regular employees, they are not entitled to a job at the end of their clinical experience, and they have understood they would not receive compensation. Under the DOL test as applied to the
facts before us, we would similarly conclude Plaintiffs are not employees.

III. STATE LAW CLAIMS

The Plaintiffs argue that even if they are not employees under the FLSA, they should be paid under Nevada and California law. With respect to Nevada, however, the parties agree that the test for determining whether an employment relationship exists is the same as it is under the FLSA. See Terry v. Sapphire Gentlemen’s Club, 336 P.3d 951, 957 ( Nev. 2014). We therefore apply the primary beneficiary test to the Nevada law claims as well, and the students’ claim under Nevada law fails for the same reasons that the FLSA claim fails.

California law is a little different, since California courts have distinguished California’s wage law from the FLSA with respect to the definition of employment. See Martinez v. Combs, 231 P.3d 259, 274 (Cal. 2010). “Employees” are entitled to recover unpaid minimum and overtime wages pursuant to California Labor Code § 1194 under the terms of the applicable wage order that is issued by the Industrial Welfare Commission (“IWC”), the body in charge of regulating California’s minimum wage laws. Id. at 271, and to which the California Supreme Court defers, id. at 275. The IWC wage orders include a definition of employer as one who “employs or exercises control over the wages, hours, or working conditions of any person.” Id. at 274 (quoting Cal. Code Regs., tit. 8, § 11140(2)(G)).

Plaintiffs rely on Martinez and its deference to the IWC to argue that they must be employees subject to a wage order. But Martinez does not help them. In Martinez, the California Supreme Court held that produce merchants were not liable to seasonal agricultural workers for minimum wages under § 1194. Id. at 282–87. The workers had harvested strawberries for a farm operator who then sold the strawberries to the merchants. Id. at 262–63. The workers sought compensation from the merchants because the farm operator who hired the workers went bankrupt. Id. at 263. In reaching its holding, the court defined the employment relationship under § 1194 by looking to the applicable wage order. Id. at 278. The California Supreme Court held the merchants were not the workers’ employer, which required control over hours and working conditions. Id. at 285–87. The farm operator was the employer.

Plaintiffs contend that under this definition they are employees because Marinello controls what they do. See id. at 278. The control test, however, does not assist us in the educational context, where the school is in charge. As the District Court noted in this case, schools typically exercise significant control over their students, but that does not make them employers. Moreover, none of the California cases cited by Plaintiffs involve an educational context. All involved employees claiming they were being paid less than minimum wages. See Torres v. Air to Ground Servs., Inc., 300 F.R.D. 386, 391, 391 (C.D. Cal. 2014) (plaintiffs were paid by Air to Ground Services to clean FedEx planes); Betancourt v. Advantage Human Resourcing, Inc., No. 14-cv-01788-JST, 2014 WL 4365074, at *1  (N.D. Cal. Sept. 3, 2014) (plaintiff was hired by a temporary staffing agency); Arredondo v. Delano Farms Co., 922 F. Supp. 2d 1071, 1073–74 (E.D. Cal. 2013) (plaintiffs worked for farm labor contractors plaintiffs claimed violated wage and hour laws); McDonald v. Ricardo’s on the Beach, Inc., No. CV 11-9366 PSG (MRWx), 2013 WL 153860, at *1 (C.D. Cal. Jan. 15, 2013) (plaintiff was a paid hourly employee at two family restaurants he claimed were violating wage law); Rodriguez v. SGLC, Inc., No. 2:08-cv-01971-MCE-KJN, 2012 WL 5704403, at *1–2 (E.D. Cal. Nov. 15, 2012) (plaintiffs were paid Mexican farm laborers admitted to work in the United States under temporary visas, and they sued their two employers for failure to pay sufficient wages); Gonzalez v. Millard Mall Servs., Inc., No. 09cv2076-AJB(WVG), 2012 WL 727867, at *1 (S.D. Cal. Mar. 6, 2012) (plaintiffs were janitors claiming they were employees of two affiliated companies); Castaneda v. Ensign Grp., Inc., 177 Cal. Rptr. 3d 581, 582 (Cal. Ct. App. 2014) (plaintiff was employee of nursing facility suing the facility’s corporate owner for unpaid minimum and overtime wages); Guerrero v. Superior Court, 153 Cal. Rptr. 3d 315, 319 (Cal. Ct. App. 2013) (plaintiff paid to provide in-home support services sued employers for wage and hour law violations).

In this case, the California Supreme Court would have no reason to look to the wage order definition of employer to determine whether these plaintiffs are students or employees. The test it establishes for employment is one of “control” that cannot be usefully applied to a school. As we have seen, the test is frequently applied to determine which entity is liable to an employee for minimum wages. A typical plaintiff is an employee seeking a deeper pocket. See, e.g., Martinez, supra; Castaneda, supra. Here, Plaintiffs were never hired by any entity as an employee. They are not entitled to be paid any wages.

We further conclude that the California Supreme Court would not apply the DOL factors that the federal courts have rejected as too rigid, but would instead apply a test more similar to the FLSA primary beneficiary test. This is because such a test is better adapted to an occupational training setting than the DOL factors. See Schumann, 803 F.3d at 1209, 1211–12; Glatt, 811 F.3d at 536–37; Laurelbrook, 642 F.3d at 528–29. Plaintiffs’ California state law claim thus fails for the same reasons as the federal law claim fails.

We recognize that Plaintiffs are doubtless unhappy with the quality of the education they received. The appropriate remedy, however, is not for courts to order students to be paid as employees. The state boards in Nevada and California provide their own mechanisms for disciplining schools for unsatisfactory performance. In California, for instance, the State Board of Barbering and Cosmetology may revoke, suspend, or deny approval of a school for repeated failure to comply with the Board’s regulations. See Cal. Bus. & Prof. Code § 7362(c)(3). Similarly, in Nevada, the State Board of Cosmetology may take disciplinary action against a school of
cosmetology for failure to comply with the Board’s require-
ments and regulations. See Nev. Rev. Stat. § 644.430(1)(a),
(2). There may also be remedies under state tort or contract
law for recovery of improper fees, tuition, or penalties paid
to the schools. Our Court’s role in this appeal is only to deter-
dine under applicable federal or state law whether Plaintiffs
are employees, and they are not.

IV. FEDERAL RULE OF CIVIL
PROCEDURE 37

The final matter we must address is a discovery dispute.
Plaintiffs offered three declarations to support their motion
for summary judgment, but they came from witnesses who
had not been listed as witnesses pursuant to Rule 26. The
court struck the declarations as a sanction under Rule 37(c)
(1). The District Court’s order was not an abuse of discretion.
See Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d
1101, 1105–06 (9th Cir. 2001) (reviewing the imposition of a
Rule 37 discovery sanction for abuse of discretion).

Plaintiffs argue that they identified one of the witnesses
in an interrogatory response’s catchall reference to “other
current and former Student-Employees of Marinello,” but
this does not satisfy the requirements for a Rule 26 disclo-
disclose “the name and, if known, the address and telephone
number of each individual likely to have discoverable infor-
mation—along with the subjects of that information—that
the disclosing party may use to support its claims or defenses,
unless the use would be solely for impeachment”). For the
other two witnesses, Plaintiffs argued that they mentioned the
witness names in an interrogatory response, but this was also
insufficient. See Lujan v. Cabana Mgmt., Inc., 284 F.R.D.
50, 72–73 (E.D.N.Y. 2012) (collecting cases holding that
mentioning a witness’ name in an interrogatory response is
insufficient for Rule 26 purposes).

Plaintiffs have not shown that their failure to disclose was
substantially justified or harmless, as required under Rule
37(c)(1), when they waited until the motion for summary
judgment stage to identify likely witnesses. Luke v. Fam-
ily Care & Urgent Med. Clinics, 323 F. App’x 496, 498–99
(9th Cir. 2009); Yeti by Molly, Ltd., 259 F.3d at 1105–07; see
also Medina v. Multaler, Inc., 547 F. Supp. 2d 1099, 1105
n.8 (C.D. Cal. 2007) (“[F]ailure to disclose . . . a likely wit-
ness before defendants’ summary judgment motion was filed
prejudiced defendants by depriving them of an opportunity
to depose him.”). There was no error in the District Court’s
refusal to consider the declarations.

Finally, however, even if the stricken witness declarations
had been considered, they would in all likelihood have made
no material difference to the District Court’s ruling on the
summary judgment motions. The information contained in
the witness declarations added little more than colorful il-
lustration to the allegations of the complaint that were in-
adequate as a matter of law to make out an employment
relationship.

V. CONCLUSION

The District Court correctly determined that the Plaintiffs
were not employees of the schools in which they enrolled
for training as cosmetologists. Plaintiffs are not entitled to
recover wages, the only relief they seek here. Further, the
District Court did not err in its handling of discovery issues.
Its judgment must therefore be affirmed.

AFFIRMED.
California Courts of Appeal

Cite as 17 C.D.O.S. 12021

DEPARTMENT OF FINANCE et al.,
Plaintiffs and Respondents,
v.
COMMISSION ON STATE MANDATES,
Defendant;
COUNTY OF SAN DIEGO et al., Real Parties in Interest and Appellants.

No. C070357
In The Court of Appeal of the State of California
Third Appellate District
(Sacramento)
(Super. Ct. No. 34-2010-80000604-CU-WM-GDS)
APPEAL from a judgment of the Superior Court of
Sacramento County, Allen Sumner, Judge. Reversed with directions.
Filed December 19, 2017

COUNSEL

Thomas E. Montgomery, County Counsel, Timothy M. Barry, Chief Deputy, James R. O’Day, Senior Deputy, Office of the County Counsel, County of San Diego; Best Best & Krieger, Shawn Hagerty; and Lounsbery Ferguson Altona & Peak, Helen Holmes Peak for Real Parties in Interest and Appellants.

Shanda M. Beltran and Andrew W. Henderson for Building Industry Legal Defense Foundation as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Somach Simmons & Dunn, Theresa A. Dunham, and Nicholas A. Jacobs for the California Stormwater Quality Association as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Morrison & Foerster and Robert L. Falk for Santa Clara Valley Urban Runoff Pollution Prevention Program as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Pamela J. Walls, County Counsel, Karin Watts-Bazan, Principal Deputy County Counsel, Office of the County Counsel, County of Riverside, for Riverside County Flood Control and Water Conservation District and County of Riverside as Amici Curiae on behalf of Real Parties in Interest and Appellants.

Meyers Nave Riback Silver & Watson and Gregory J. Newmark for Alameda Countywide Clean Water Program as Amicus Curiae on behalf of Real Parties in Interest and Appellants.


No appearance for Defendant.

OPINION

The California Constitution requires the state to provide a subvention of funds to compensate local governments for the costs of a new program or higher level of service the state mandates. (Cal. Const., art. XIII B, § 6 (section 6).) Subvention is not available if the state imposes a requirement that is mandated by the federal government, unless the state order mandates costs that exceed those incurred under the federal mandate. (Gov. Code, § 17556, subd. (c).) The Commission on State Mandates (the Commission) adjudicates claims for subvention.

In Department of Finance v. Commission on State Mandates (2016) 1 Cal.5th 749 (Department of Finance), the California Supreme Court upheld a Commission ruling that certain conditions a regional water quality control board imposed on a storm water discharge permit issued under federal and state law required subvention and were not federal mandates. The high court found no federal law, regulation, or administrative case authority expressly required the conditions. It ruled the federal requirement that the permit reduce pollution impacts to the “maximum extent practicable” was not a federal mandate, but rather vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice were state mandates.

In this appeal, we face the same issue. The parties and the permit conditions are different, but the legal issue is the same—whether the Commission correctly determined that conditions imposed on a federal and state storm water permit by a regional water quality control board are state mandates. The Commission reached its decision by applying the standard the Supreme Court later adopted in Department of Finance. The trial court, reviewing the case before Department of Finance was issued, concluded the Commission had applied the wrong standard, and it remanded the matter to the Commission for further proceedings.

Following the analytical regime established by Department of Finance, we reverse the trial court’s judgment. We conclude the Commission applied the correct standard and the permit requirements are state mandates. We reach this conclusion on the same grounds the high court in Department of Finance reached its conclusion. No federal law, regulation, or administrative case authority expressly required the conditions. The requirement to reduce pollution impacts to the “maximum extent practicable” was not a federal mandate, but instead vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice in this instance were state mandates.
We remand the matter so the trial court may consider other issues the parties raised in their pleadings but the court did not address.

BACKGROUND

In Department of Finance, the Supreme Court explained the storm water discharge permitting system and the constitutional reimbursement system in detail. We quote from the opinion at length:

A. The storm water discharge permitting system

“The Operators’ municipal storm sewer systems discharge both waste and pollutants.[1] State law controls ‘waste’ discharges. (Wat. Code, § 13000 et seq.) Federal law regulates discharges of ‘pollutant[s].’ (33 U.S.C. § 1311(a).) Both state and later-enacted federal law require a permit to operate such systems.

“California’s Porter-Cologne Water Quality Control Act (Porter-Cologne Act or the Act; Wat. Code, § 13000 et seq.) was enacted in 1969. It established the State Water Resources Control Board (State Board), along with nine regional water quality control boards, and gave those agencies ‘primary responsibility for the coordination and control of water quality.’ (Wat. Code, § 13001; see City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 619 (City of Burbank).) The State Board establishes statewide policy. The regional boards formulate and adopt water quality control plans and issue permits governing the discharge of waste. (Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 875 (Building Industry).)

“The Porter-Cologne Act requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. (Wat. Code, § 13260, subd. (a)(1).) The regional board then ‘shall prescribe requirements as to the nature’ of the discharge, implementing any applicable water quality control plans. (Wat. Code, § 13263, subd. (a).) The Operators must follow all requirements set by the Regional Board. (Wat. Code, §§ 13264, 13265.)

“The federal Clean Water Act (the CWA; 33 U.S.C. § 1251 et seq.) was enacted in 1972, and also established a permitting system. The CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. (City of Burbank, supra, 35 Cal.4th at p. 620.) The CWA prohibits pollutant discharges unless they comply with (1) a permit (see 33 U.S.C. §§ 1328, 1342, 1344); (2) established effluent limitations or standards (see 33 U.S.C. §§ 1312, 1317); or (3) established national standards of performance (see 33 U.S.C. § 1316). (33 U.S.C. § 1311(a).) The CWA allows any state to adopt and enforce its own water quality standards and limitations, so long as those standards and limitations are not ‘less stringent’ than those in effect under the CWA. (33 U.S.C. § 1370.)

“The CWA created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (33 U.S.C. § 1342(a) (1), (2).) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA.[2] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (33 U.S.C. § 1342(b)) and suspend its own issuance of permits (33 U.S.C. § 1342(c)(1)).[3]

“California was the first state authorized to issue its own pollutant discharge permits. (People ex rel. State Water Resources Control Bd. v. Environmental Protection Agency (9th Cir. 1975) 511 F.2d 963, 970, fn. 11, revd. on other grounds in EPA v. State Water Resources Control Board (1976) 426 U.S. 200 [48 L.Ed.2d 578].) Shortly after the CWA’s enactment, the Legislature amended the Porter-Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was ‘in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter-Cologne Act].’ (Ibid.) The Legislature provided that chapter 5.5 be ‘construed to ensure consistency’ with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements ‘ensur[ing] compliance with all applicable provisions of the [CWA] . . . together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.’ (Wat. Code, § 13377, italics added.)[4] To align the state and federal permitting systems, the legislation provided that the term ‘‘waste discharge requirements’’ under the Act was equivalent to the term ‘‘permits’’ under the CWA. (Wat. Code, § 13374.) Accordingly, California’s permitting system now regulates

1. “The systems at issue here are ‘municipal separate storm sewer systems,’ sometimes referred to by the acronym ‘MS4.’ (40 C.F.R. § 122.26(b)(19) (2001) [1].) A ‘municipal separate storm sewer’ is a system owned or operated by a public agency with jurisdiction over disposal of waste and designed or used for collecting or conveying storm water. (40 C.F.R. § 122.26(b)(8) (2001) [1].) Unless otherwise indicated, all further citations to the Code of Federal Regulations are to the 2001 version.”

2. “For a state to acquire permitting authority, the governor must give the EPA a ‘description of the program [the state] proposes to establish,’ and the attorney general must affirm that the laws of the state ‘provide adequate authority to carry out the described program.’ (33 U.S.C. § 1342(b).)

3. “The EPA may withdraw approval of a state’s program (33 U.S.C. § 1342(c)(3)), and also retains some supervisory authority: States must inform the EPA of all permit applications received and of any action related to the consideration of a submitted application (33 U.S.C. § 1342(d)(1)).”

4. The federal CWA does not prevent states from imposing any permit requirements that are more stringent than the CWA requires. (33 U.S.C. § 1370.)

5. “The CW A created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (33 U.S.C. § 1342(a) (1), (2).) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA.[2] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (33 U.S.C. § 1342(b)) and suspend its own issuance of permits (33 U.S.C. § 1342(c)(1)).[3]”

6. “California was the first state authorized to issue its own pollutant discharge permits. (People ex rel. State Water Resources Control Bd. v. Environmental Protection Agency (9th Cir. 1975) 511 F.2d 963, 970, fn. 11, revd. on other grounds in EPA v. State Water Resources Control Board (1976) 426 U.S. 200 [48 L.Ed.2d 578].) Shortly after the CWA’s enactment, the Legislature amended the Porter-Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was ‘in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter-Cologne Act].’ (Ibid.) The Legislature provided that chapter 5.5 be ‘construed to ensure consistency’ with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements ‘ensur[ing] compliance with all applicable provisions of the [CWA] . . . together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.’ (Wat. Code, § 13377, italics added.)[4] To align the state and federal permitting systems, the legislation provided that the term ‘‘waste discharge requirements’’ under the Act was equivalent to the term ‘‘permits’’ under the CWA. (Wat. Code, § 13374.) Accordingly, California’s permitting system now regulates

“In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-stormwater discharges into the storm sewers, and must ‘require controls to reduce the discharge of pollutants to the maximum extent practicable.’ (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase ‘maximum extent practicable’ is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

“EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)-(vi), (2)(i)-(viii).) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (Ibid.)” (Department of Finance, supra, 1 Cal.5th at pp. 755-757, original italics.)

B. The permit before us

In 2007, the Regional Water Quality Control Board, San Diego Region (the San Diego Regional Board), issued a permit to real parties in interest and appellants, the County of San Diego and the cities located in the county (the “permittees” or “copermittees”). The permit was actually a renewal of an NPDES permit first issued in 1990 and renewed in 2001. The San Diego Regional Board stated the new permit “specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP).” The San Diego Regional Board found that although the permittees had generally been implementing the management programs required in the 2001 permit, “urban runoff discharges continue to cause or contribute to violations of water quality standards. This [permit] contains new or modified requirements that are necessary to improve Copermittees’ efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards.”

The permit requires the permittees to implement various programs to manage their urban runoff that were not required in the 2001 permit. It requires the permittees to implement programs in their own jurisdictions. It requires the permittees in each watershed to collaborate to implement programs to manage runoff from that watershed, and it requires all of the permittees in the region to collaborate to implement programs to manage regional runoff. The permit also requires the permittees to assess the effectiveness of their programs and collaborate in their efforts.

The specific permit requirements involved in this case require the permittees to do the following:

1. As part of their jurisdictional management programs:

   (a) Sweep streets at certain times, depending on the amount of debris they generate, and report the number of curb miles swept and tons of material collected;

   (b) Inspect, maintain, and clean catch basins, storm drain inlets, and other storm water conveyances at specified times and report on those activities;

   (c) Collaboratively develop and individually implement a hydromodification management plan to manage increases in runoff discharge rates and durations;

   (d) Collectively update the best management practices requirements listed in their local Standard Urban Storm Water Mitigation Plans (SUSMP’s) and add low impact development best management practices for new real property development and redevelopment;

   (e) Individually implement an education program using all media to inform target communities about municipal separate storm sewer systems (MS4’s) and impacts of urban runoff, and to change the communities’ behavior and reduce pollutant releases to MS4’s;

2. As part of their watershed management programs, collaboratively develop and implement watershed water quality activities and education activities within established schedules and by means of frequent regularly scheduled meetings;

3. As part of their regional management programs:

   (a) Collaboratively develop and implement a regional urban runoff management program to reduce the dis-
charge of pollutants from MS4’s to the maximum extent practicable;

(b) Collaboratively develop and implement a regional education program focused on residential sources of pollutants;

(4) Annually assess the effectiveness of the jurisdictional, watershed, and regional urban runoff management programs, and collaboratively develop a long-term effectiveness assessment to assess the effectiveness of all of the urban runoff management programs; and

(5) Jointly execute a memorandum of understanding, joint powers authority, or other formal agreement that defines the permittees’ responsibilities under the permit and establishes a management structure, standards for conducting meetings, guidelines for workgroups, and a process to address permittees’ noncompliance with the formal agreement.

The permittees estimated complying with these conditions would cost them more than $66 million over the life of the permit.

C. Reimbursement for state mandates

“[W]hen the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must ‘reimburse that local government for the costs of the program or increased level of service.’ (Cal. Const., art. XIII B, § 6, subd. (a) (hereafter, section 6).)[8]” (Department of Finance, supra, 1 Cal.5th at pp. 758-759.)

“Voters added article XIII B to the California Constitution in 1979. Also known as the ‘‘Gann limit,’’ it ‘restricts the amounts state and local governments may appropriate and spend each year from the ‘proceeds of taxes.’ ‘(City of Sacramento v. State of California (1990) 50 Cal.3d 51, 58-59 (City of Sacramento)).’ Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to adopt and levy taxes. Articles XIII A and XIII B work in tandem, together restricting California governments’ power both to levy and to spend for public purposes.’ (Id. at p. 59, fn. 1.)

“The ‘concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.’ (County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.) The reimbursement provision in section 6 was included in recognition of the fact ‘that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments.’ (County of San Diego v. State of California (1997) 15 Cal.4th 68, 81 (County of San Diego).) The purpose of section 6 is to prevent ‘the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are “ill equipped” to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.’ (County of San Diego, at p. 81.) Thus, with certain exceptions, section 6 ‘requires the state “to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.” ’ (County of San Diego, at p. 81.)

A significant exception to section 6’s subvention requirement is at issue here. Under that exception, “reimbursement is not required if ‘[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.’ (Gov. Code, § 17556, subd. (c).)

“The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims (Gov. Code, § 17500 et seq.) and created the Commission to adjudicate them (Gov. Code, §§ 17525, 17551). It also established ‘a test-claim procedure to expeditiously resolve disputes affecting multiple agencies.’ (Kinlaw v. State of California (1991) 54 Cal.3d 326, 331 (Kinlaw).)

“The first reimbursement claim filed with the Commission is called a test claim. (Gov. Code, § 17521.) The Commission must hold a public hearing, at which the Department of Finance (the Department), the claimant, and any other affected department or agency may present evidence. (Gov. Code, §§ 17551, 17553.) The Commission then determines whether a state mandate exists and, if so, the amount to be reimbursed. (Kinlaw, supra, 54 Cal.3d at p. 332.) The Commission’s decision is reviewable by writ of mandate. (Gov. Code, § 17559.)” (Department of Finance, supra, 1 Cal.5th at pp. 758-759.)

D. The test claim and the writ petition

In 2008, the permittees filed a test claim with the Commission. They contended the permit requirements mentioned above constituted new or modified requirements that were compensable state mandates under section 6. The State, the San Diego Regional Board and the Department of Finance (collectively the “State”) claimed the requirements were not compensable because they were mandated by the federal CWA’s NPDES permit requirements.
In 2010, the Commission ruled all of the targeted requirements were state mandates and not federal mandates. The Commission found the requirements were not federal mandates because they were not expressly specified in, or they exceeded the scope of, federal regulations. The Commission determined the permittees were entitled to subvention by the state for all of the requirements except two. The Commission ruled the requirements to develop a hydromodification plan and to include low impact development practices in the SUSMPS were not entitled to subvention because the permittees had authority to impose fees to recover the costs of those requirements.

The State petitioned the trial court for a writ of administrative mandate. It contended the Commission erred because the permit requirements are federal mandates and are not a new program or higher level of service. It also contended the Commission erred in concluding the County of San Diego did not have fee authority to pay for all of the permit conditions.

The County of San Diego filed a cross-petition for writ of mandate to challenge the Commission’s decision that the conditions requiring a hydromodification plan and low impact development practices were not reimbursable.

The trial court granted the State’s petition in part and issued a writ of mandate. It concluded the Commission applied an incorrect standard when it determined the permit conditions were not federal mandates. It held the Commission was required to determine whether any of the permit requirements exceeded the “maximum extent practicable” standard imposed by the CWA. “The Commission never undertook this inquiry,” the court stated. “Instead, it simply asked whether the permit conditions are expressly specified in federal regulations or guidelines. This is not the test. The fact that a permit condition is not specified in a federal regulation or guideline does not determine whether the condition is ‘practicable,’ and thus required by federal law. The mere fact that a permit condition is not promulgated as a federal regulation does not mean it exceeds the federal standard.”

The trial court remanded the matter to the Commission to reconsider its decision in light of the court’s ruling. The court did not address the fee issues raised by the petition and cross-petition.

The permittees appeal from the trial court’s judgment.9 10

D I S C U S S I O N

I

Standard of Review

While this appeal was pending, the Supreme Court issued Department of Finance. There, the high court had to answer the same question we must answer: are certain requirements imposed by the San Diego Regional Board in an NPDES permit federal mandates and not reimbursable state mandates? Although the high court reviewed conditions different from those before us, it established the law we must apply to resolve this appeal.11

As to the standard of review, “[t]he question whether a statute or executive order imposes a mandate is a question of law. [(City of San Jose v. State of California (1996) 45 Cal.App.4th 1802, 1810.]] Thus, we review the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties’ obligations under those permits, and independently determine whether it supports the Commission’s conclusion that the conditions here were not federal mandates. (Ibid.)” (Department of Finance, supra, 1 Cal.5th at p. 762.) To do this, we must determine “whether federal statutory, administrative, or case law imposed, or compelled the [San Diego] Regional Board to impose, the challenged requirements on the [permittees].” (Id. p. 767.)

II

Analysis

Under the test announced in Department of Finance, we conclude federal law did not compel imposition of the permit requirements, and they are subject to subvention under section 6. This is because the requirement to reduce pollutants to the “maximum extent practicable” was not a federal mandate for purposes of section 6. Rather, it vested the San Diego Regional Board with discretion to choose how the permittees must meet that standard, and the exercise of that discretion resulted in imposing a state mandate. We also find no federal law, regulation, or administrative case authority that, under the test provided by Department of Finance, expressly required the conditions the San Diego Regional Board imposed.

A. The Department of Finance decision

We first describe Department of Finance, its context, its holding, and its analysis. Prior to its Department of Finance decision, the California Supreme Court declared in City of Sacramento, supra, 50 Cal.3d 51 that “certain regulatory standards imposed by the federal government under ‘cooperative federalism’ schemes” are federal mandates and not

9. The permittees request we take judicial notice of the NPDES permit the San Diego Regional Board issued to them in 2013 that allegedly contains less specific conditions. The State requests we take judicial notice of an NPDES permit issued by the EPA in 2011 to the District of Columbia that includes a condition similar to one above. We grant that request.


11. At our request, the parties briefed the effect of Department of Finance on this appeal.
reimbursable under section 6. (Id. at pp. 73-74.) In that case, the court held federal legislation requiring local governments to provide unemployment insurance protection to their employees was a federal mandate. It was a federal mandate because failing to extend the protection would have resulted in the state’s businesses facing additional unemployment taxation and penalties by both state and federal governments. (Id. at p. 74.) “[T]he state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state ‘without discretion’ to depart from federal standards.” (Ibid.)

The City of Sacramento court refused to announce a “final test” for determining whether a requirement imposed under a cooperative federal-state program was a federal mandate. (City of Sacramento, supra, 50 Cal.3d at p. 76.) Instead, it required courts to determine whether a requirement was a federal mandate on a case-by-case basis. It stated: “Given the variety of cooperative federal-state-local programs, we here attempt no final test for ‘mandatory’ versus ‘optional’ compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9, subd. (b) [of the California Constitution]: neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.” (City of Sacramento, supra, at p. 76.)

In Department of Finance, the Supreme Court changed course and announced a test for determining whether a requirement imposed on a permit under a cooperative federal-state program is a federal mandate. To determine whether a requirement imposed under the CWA and state law on an NPDES permit is a federal mandate, a court applies the following test: “If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a ‘true choice,’ the requirement is not federally mandated.” (Department of Finance, supra, 1 Cal.5th at p. 765.) If the state in opposition to the petition contends its requirements are federal mandates, it has the burden to establish the requirements are in fact mandated by federal law. (Id. at p. 769.)

In Department of Finance, the high court held conditions imposed on an NPDES permit issued by the Regional Water Quality Control Board, Los Angeles Region (the Los Angeles Regional Board), to Los Angeles County and various cities were not federal mandates and were subject to subvention under section 6. The permit conditions required the permittees to install and maintain trash receptacles at transit stops, and to inspect certain commercial and industrial facilities and construction sites. (Department of Finance, supra, 1 Cal.5th at p. 755.) The Commission determined each of the conditions was a compensable state mandate, and the Supreme Court, reversing the Court of Appeal, upheld the Commission’s decision.

The high court ruled federal law did not compel the conditions to be imposed. The court stated: “It is clear federal law did not compel the [Los Angeles] Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its own permitting system rather than allowing the EPA to do so under the CWA. (33 U.S.C. § 1342(a).) . . . [T]he state chose to administer its own program, finding it was ‘in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation’ under state law. (Wat. Code, § 13370, subd. (c), italics added.) Moreover, the [Los Angeles] Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA’s regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2) (iv.) This case is distinguishable from City of Sacramento, supra, 50 Cal.3d 51, where the state risked the loss of subsidies and tax credits for all its resident businesses if it failed to comply with federal legislation. Here, the State was not compelled by federal law to impose any particular requirement. Instead, . . . the [Los Angeles] Regional Board had discretion to fashion requirements which it determined would meet the CWA’s maximum extent practicable standard.” (Department of Finance, supra, 1 Cal.5th at pp. 767-768, original italics.)

The State contended the Commission decided the existence of a federal mandate on grounds that were too rigid. It argued the Commission should have accounted for the flexibility in the CWA’s regulatory scheme and the “maximum extent practicable” standard. It also should have deferred to the terms of the permit as the best expression of what federal law required in that instance since the terms were based on the agencies’ scientific, technical, and experiential knowledge.

The Supreme Court rejected both arguments. The court stated: “We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the [Los Angeles] Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. (City of Burbank, supra, 35 Cal.4th at pp. 627-628.) It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.

“We also disagree that the Commission should have deferred to the [Los Angeles] Regional Board’s conclusion that the challenged requirements were federally mandated. That
determination is largely a question of law. Had the [Los Angeles] Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board’s expertise in reaching that finding would be appropriate. The board’s legal authority to administer the CWA and its technical experience in water quality control would call on sister agencies as well as courts to defer to that finding. The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated. Certainly, in a trial court action challenging the board’s authority to impose specific permit conditions, the board’s findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., City of Rancho Cucamonga v. Regional Water Quality Bd. (2006) 135 Cal.App.4th 1377, 1384, citing Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817-818.) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board’s decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (Rancho Cucamonga, at p. 1387; Building Industry, supra, 124 Cal.App.4th at pp. 888-889.)

“Reimbursement proceedings before the Commission are different. The question here was not whether the [Los Angeles] Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California’s constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.” (Department of Finance, supra, 1 Cal.5th at pp. 768-769, fn. omitted, original italics.)

Addressing the permit’s specific requirements, the Supreme Court determined they were not mandated by federal law but instead were imposed pursuant to the State’s discretion. Regarding the site inspection requirements, the court found neither the CWA’s “maximum extent practicable” standard, the CWA itself, nor the EPA regulations “expressly required” the inspection conditions. (Department of Finance, supra, 1 Cal.5th at p. 770.) The court also determined that in this instance, state and federal law required the Los Angeles Regional Board to conduct the inspections. By exercising its discretion and shifting responsibility for the inspections onto the permittees as a condition of the permit, the Los Angeles Regional Board imposed a state mandate. (Id. at pp. 770-771.)

The State argued the inspection requirements were federal mandates because EPA regulations contemplated that some kind of operator inspections would be required. The court was not persuaded: “That the EPA regulations contemplated some form of inspections . . . does not mean that federal law required the scope and detail of inspections required by the Permit conditions.” (Department of Finance, supra, 1 Cal.5th at p. 771, fn. omitted.)

As for the trash receptacle requirement, the Supreme Court agreed with the Commission that it was not a federal mandate because neither the CWA nor the federal regulation cited by the state “explicitly required” the installation and maintenance of trash receptacles. (Department of Finance, supra, 1 Cal.5th at p. 771.)

The State argued the condition was mandated by the EPA regulations that required the permittees to include in their application a description of practices for operating roads and procedures for reducing the impact of discharges from MS4’s. The Supreme Court rejected this argument: “While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv)). No regulation cited by the State required trash receptacles at transit stops.” (Department of Finance, supra, 1 Cal.5th at pp. 771-772.)

In addition, the court found evidence the EPA had issued NPDES permits in other cities that did not require trash receptacles at transit stops. “The fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument that the requirement was federally mandated.” (Department of Finance, supra, 1 Cal.5th at p. 772.)

B. Applying Department of Finance to this appeal

Having reviewed Department of Finance, we now turn to apply its ruling and analysis to the permit requirements before us. Again, our task is two-fold. We must determine first whether the CWA, its regulations and guidelines, and any other evidence of federal mandate such as similar permits issued by the EPA, required each condition. If they did, we conclude the requirement is a federal mandate and not entitled to subvention under section 6. Second, if the condition was not “expressly required” by federal law but was instead imposed pursuant to the State’s discretion, we conclude the requirement is not federally mandated and subvention is required. The State has the burden to establish the requirements were imposed by federal law. It has not met its burden here.

1. The “maximum extent practicable” standard

The State contends the permit requirements were federal mandates because it had no discretion but to impose conditions that satisfied the “maximum extent practicable” standard. We disagree with the state’s interpretation of its discretion. The “maximum extent practicable” standard by its nature is discretionary and does not by itself impose a federal mandate for purposes of section 6. Before Department of Finance was issued, the State argued here that the Clean

Water Act’s “maximum extent practicable” standard was a federal mandate because it is flexible and contemplates that specific measures will be implemented to meet the unique requirements of any particular waterway and water quality. Department of Finance rejected this argument for purposes of subvention under section 6. “The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA’s regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).)” (Department of Finance, supra, 1 Cal.5th at pp. 767-768.)

There is no dispute the CWA and its regulations grant the San Diego Regional Board discretion to meet the “maximum extent practicable” standard. The CWA requires NPDES permits for MS4’s to “require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” (33 U.S.C.S. § 1342(p)(3)(B)(iii), italics added.)

EPA regulations also describe the discretion the State will exercise to meet the “maximum extent practicable” standard. The regulations require a permit application by an MS4 to propose a management program. This program “shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. . . . Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable.” (40 C.F.R. § 122.26(d)(2)(iv), italics added.) This regulation implies the San Diego Regional Board has wide discretion to determine how best to condition the permit in order to meet the “maximum extent practicable” standard.

Yet the State argues the San Diego Regional Board really did not exercise discretion in imposing the challenged requirements. It contends the Supreme Court in Department of Finance did not look for differences between federal law and the terms of the permit. Rather, the court allegedly searched the record to see if the Los Angeles Regional Board exercised a true choice in imposing permit conditions or if it instead imposed requirements necessary to satisfy federal law. Applying that test here, the State asserts the San Diego Regional Board in this case did not exercise a true choice in imposing any of the permit requirements because it was required to impose requirements that satisfied the “maximum extent practicable” standard. Indeed, the San Diego Regional Board here made a finding its requirements were “necessary” in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in Department of Finance did not expressly make.

The State also contends the San Diego Regional Board did not make a true choice because the permittees in their permit application proposed methods of compliance, and the San Diego Regional Board made modifications “so those methods would achieve the federal standard.” The State asserts the permit requirements were not state mandates because they were based on the proposals in the application, “not the [San Diego] Regional Board’s preferences for how the copermittees should comply.”

The State misconstrues Department of Finance in numerous respects. First, the Supreme Court did in fact look for differences between federal law and the terms of the permit to determine if the condition was a federal mandate. The high court stated that, to be a federal mandate for purposes of section 6, the federal law or regulation must “expressly” or “explicitly” require the specific condition imposed in the permit. (Department of Finance, supra, 1 Cal.5th at pp. 770-771.)

Second, the Supreme Court found the “maximum extent practicable” did not preclude the State from making a choice; rather, it gave the State discretion to make a choice. “The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA’s regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).)” (Department of Finance, supra, 1 Cal.5th at pp. 767-768.) As the high court stated, except where a regional board finds the conditions are the only means by which the “maximum extent practicable” standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard. (Id. at p. 768.)

That the San Diego Regional Board found the permit requirements were “necessary” to meet the standard establishes only that the San Diego Regional Board exercised its discretion. Nowhere did the San Diego Regional Board find its conditions were the only means by which the permittees could meet the standard. Its use of the word “necessary” did not equate to finding the permit requirement was the only means of meeting the standard. “It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.” (Department of Finance, supra, 1 Cal.5th at p. 768.)

The use of the word “necessary” also does not distinguish this case from Department of Finance. By law, a regional board cannot issue an NPDES permit to MS4’s without finding it has imposed conditions “necessary to carry out the provisions of [the Clean Water Act].” (33 U.S.C. § 1342(a)(1).) That requirement includes imposing conditions necessary to meet the “maximum extent practicable” standard, and the regional board in Department of Finance found the conditions it imposed had done so. The Los Angeles Regional Board stated: “This permit is intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm
water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the U.S. subject to the Permittees’ jurisdiction.” It further stated: “[T]his Order requires that the [Storm Water Quality Management Plan] specify BMPs [best management practices] that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable.”

Third, the Supreme Court in Department of Finance rejected the State’s argument that the permit application somehow limited a board’s discretion or denied it a true choice. “While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv)).” (Department of Finance, supra, 1 Cal.5th at pp. 771-772.)

The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce storm water pollutants to the maximum extent practicable. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

2. No express demand by federal law

The State contends federal law nonetheless required the conditions it imposed. It relies on regulations broadly describing what must be included in an NPDES permit application by an MS4 instead of express mandates directing the San Diego Regional Board to impose the requirements it imposed. To be a federal mandate for purposes of section 6, however, the federal law or regulation must “expressly” or “explicitly” require the condition imposed in the permit. (Department of Finance, supra, 1 Cal.5th at pp. 770-771.) This is the standard the Commission applied and found the State’s claims unwarranted. We do as well. The State cites to no law, regulation, or EPA case authority presented to the Commission or the trial court that expressly required any of the challenged permit requirements. We briefly review the requirements.

a. Street sweeping and cleaning storm water conveyances

The State contends the requirements for street sweeping and cleaning of the storm sewer system are federal mandates because EPA regulations required the permittees to describe in their permit application their practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems. (40 C.F.R. § 122.26(d)(2)(iv)(A)(3).) This regulation does not expressly require the scope and detail of street sweeping and facility maintenance the permit imposes. Because the State imposed those specific requirements, they are not federal mandates and must be compensated under section 6.

The permit requires the permittees to sweep streets a certain number of times depending on how much trash and debris they generate. Streets that consistently generate the highest volume of trash must be swept at least twice per month. Streets that generate moderate volumes of trash must be swept at least monthly, and those that generate low volumes of trash must be swept at least annually. Permittees must annually report the total distance of curb miles swept and the tons of material collected.

The permit also requires the permittees to implement a schedule of maintenance activities for their storm sewer systems and facilities, such as catch basins, storm drain inlets, open channels, and the like. At a minimum, the permittees must inspect all facilities at least annually and must inspect facilities that receive high volumes of trash at least once a year between May 1 and September 30. The permit requires any catch basin or storm drain inlet that has accumulated trash greater than 33 percent of its design capacity to be cleaned in a timely manner. Any facility designed to be self-cleaning must be cleaned immediately of any accumulated trash. The permittees must keep records of their maintenance and cleaning activities.

We see nothing in the regulation requiring permittees to describe in their application their street and facility maintenance practices a mandate to impose the specific requirements actually imposed in the permit.

b. Hydromodification plan

The State claims the requirement to develop a hydromodification plan (HMP) arises from EPA regulations requiring the permit applicant to include in its application a description of planning procedures to develop and enforce controls “to reduce the discharge of pollutants from [MS4’s] which receive discharges from areas of new development and significant redevelopment.” (40 C.F.R. § 122.26(d)(2)(iv)(A)(2). The permit requires the HMP to establish standards of runoff flow for channel segments that receive runoff from new development. It must require development projects to implement control measures so that the flows from the completed project generally do not exceed the flows before the project was built. The HMP must include other performance criteria as well as a description of how the permittees will incorporate the HMP requirements into their local approval process.

The regulation cited by the State does not require an HMP. Nor does it restrict the San Diego Regional Board from exercising its discretion to require a specific type of plan to address the impacts from new development. The San Diego Regional Board admittedly exercised its discretion on this condition. It determined the permittees’ application was insufficient and it required them to collaborate to develop an HMP. The requirement is thus a state mandate subject to subvention.
c. Low impact development practices in the SUSMP

The State relies upon the same regulation to support the low impact development requirements as it did for the HMP. (40 C.F.R. § 122.26(d)(2)(iv)(A)(2).) The permit requires the permittees to implement specified low impact development best management practices at most new development and re-development projects. These practices include designing the projects to drain runoff into previous areas on site and using permeable surfaces for low traffic areas. The practices also require projects to conserve natural areas and minimize the project’s impervious footprint where feasible.

The permit also requires the permittees to develop a model SUSMP to establish low impact development best management practices that meet or exceed the requirements just mentioned. The model must include siting, design, and maintenance criteria for each low impact development best management practice listed in the model SUSMP. Again, nothing in the application regulation required the San Diego Regional Board to impose these specific requirements. As a result, they are state mandates subject to section 6.

d. Jurisdictional and regional education programs

The State claims regulations requiring the permittees to describe in their permit application the educational programs they will conduct to increase the public’s knowledge of storm water pollution imposed a federal mandate. (40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (B)(6), (D)(4).) The regulations require the application to include descriptions of proposed educational activities to reduce pollutants associated with the application of pesticides, herbicides and fertilizer (40 C.F.R. § 122.26(d)(2)(iv)(A)(6)), to facilitate the proper management and disposal of used oil and toxic materials (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)), and to reduce pollutants in storm runoff from construction sites. (40 C.F.R. § 122.26(d)(2)(iv)(D)(4).)

The permit requires each permittee to do much more. Each must implement an education program using all media as appropriate to “measurably increase” the knowledge of MS4’s, impacts of urban runoff, and potential best management practices, and to “measurably change” people’s behaviors. The program must address at a minimum five target communities: municipal departments and personnel; construction site owners and developers; industrial owners and operators; commercial owners and operators; and the residential community, the general public, and school children. The program must address each target community where appropriate on a number of specified topics. It must educate them on federal, state, and local water quality laws and regulations, including the storm water discharge permitting system. It must address general runoff concepts, such as the impacts of urban runoff on receiving waters, the distinctions between MS4’s and sanitary sewers, types of best management practices, water quality impacts associated with urbanization, and non-storm water discharge prohibitions. It must discuss specific best management practices for such activities as good housekeeping, proper waste disposal, methods to reduce the impacts from residential and charity car washing, non-storm water disposal alternatives, preventive maintenance, and equipment and vehicle maintenance and repair. The program must also address public reporting mechanisms, illicit discharge detection, dechlorination techniques, integrated pest management, the benefits of native vegetation, water conservation, alternative materials and designs to maintain peak runoff values, traffic reduction, and alternative fuel use. The permit also requires additional specific topics to be addressed that are relevant to each particular target community.

The San Diego Regional Board imposed an educational program and a list of topics that surpasses what the regulations required the permittees to propose in their application. Nothing in the regulations required the San Diego Regional Board to impose the educational requirements in the scope and detail it did. As a result, they are state mandates subject to section 6.

e. Regional and watershed urban runoff management programs

To claim the requirements to develop regional and watershed urban runoff management programs are federal mandates, the State relies on the regulation requiring permit applications to propose a management program as part of their application. The regulation authorizes the applicants to propose a program that imposes controls beyond a single jurisdiction: “Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls.” (40 C.F.R. § 122.26(d)(2)(iv), italics added.)

The permit requires the permittees to collaborate, develop, and implement watershed and regional urban runoff management programs. As part of the watershed management program, the permittees must, among other things, annually assess the water quality of receiving waters and identify the water quality problems attributable to MS4 discharges. They must develop and implement a list of water quality activities and education activities and submit the list for approval by the San Diego Regional Board. The permit describes what information must be included on the list for each activity, and it requires the permittees to implement each of them.

The permit requires the permittees, as part of developing a regional management program, to implement a residential education program as described above, develop standardized fiscal analysis of the programs in their jurisdictions, and facilitate the assessment of the jurisdictional, watershed, and regional programs’ effectiveness.

The regulation relied upon by the State does not mandate any of these watershed and regional management requirements. It clearly leaves to the San Diego Regional Board the discretion to require controls on a systemwide, watershed, or jurisdictional basis. The State exercised that discretion in im-
posing the controls it imposed. They thus are state mandates subject to section 6.

f. Program effectiveness assessments

Federal regulations require a permit application to include, as part of assessing the effectiveness of controls, “[e]stimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.” (40 C.F.R. § 122.26(d)(2)(v).)

The regulations also require the operator of an MS4 to submit a status report annually. The report must include: “(1) The status of implementing the components of the storm water management program that are established as permit conditions; [¶] (2) Proposed changes to the storm water management programs that are established as permit conditions; [¶] (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application; [¶] (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; [¶] (5) Annual expenditures and budget for year following each annual report; [¶] (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; [and] [¶] (7) Identification of water quality improvements or degradation.” (40 C.F.R. § 122.42(c).)

The State contends these regulations mandated the San Diego Regional Board to impose the assessment requirements the permit contains, but the permit imposes additional obligations. The permit requires the permittees to assess, among other things, the effectiveness of each significant jurisdictional activity or best management practice and each watershed water quality activity and the implementation of the jurisdictional and watershed runoff management plans. They must identify and utilize “measureable targeted outcomes, assessment measures, and assessment methods” for each of these items. They must utilize certain predefined “outcome levels” to assess the effectiveness of each of the items. They must also collaborate to develop a long-term effectiveness assessment based on the same outcome levels.

While the regulations required estimated reductions in the amount of pollutants and a report on the status of implementing controls and their effectiveness, the San Diego Regional Board exercised its discretion to mandate how and to what degree of specificity those assessments would occur. The regulations did not require the San Diego Regional Board to impose the assessment systems and procedures it actually imposed. Accordingly, those systems and procedures are state mandates subject to section 6.

g. Permittee collaboration

EPA regulations require the permittees, as part of their application, to show they have legal authority, either by statute, ordinance, or contract, to control through interagency agreements among themselves the contribution of pollutants from a portion of the municipal system to another portion in a different jurisdiction. (40 C.F.R. § 122.26(d)(2)(i)(D).)

The State claims this regulation mandated the San Diego Regional Board to require the permittees to collaborate and, in particular, execute an agreement that establishes a management structure. Under the terms of the permit, the management structure must, among other things, define the permittees’ responsibilities; promote consistency, development, and implementation of regional activities; establish standards for conducting meetings, making decisions and sharing costs; and establish a process for addressing noncompliance with the agreement.

The EPA regulation did not impose on the San Diego Regional Board a mandate to define the terms and organization of a management structure that would allow the permittees to control pollutants that cross borders. The regulation required the San Diego Regional Board to assure itself the permittees had the authority to address runoff pollution regionally, but it did not require the San Diego Regional Board to define how the permittees would organize themselves to do so. The conditions of the San Diego Regional Board went beyond what was federally required, and are thus state mandates subject to section 6.

In short, there is no federal law, regulation, or administrative case authority that expressly mandated the San Diego Regional Board to impose any of the challenged requirements discussed above. As a result, their imposition are state mandates, and section 6 requires the State to provide subvention to reimburse the permittees for the costs of complying with the requirements.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are awarded to real parties in interest and appellants. (Cal. Rules of Court, rule 8.278(a.).)

NICHOLSON, J.

We concur: BLEASE, Acting P. J., BUTZ, J.
THE PEOPLE, Plaintiff and Respondent, v. TINO ALEXANDER PEREZ, Defendant and Appellant.

No. C078452
In The Court of Appeal of the State of California
Third Appellate District
(Sacramento)
(Super. Ct. No. 13F02646)
APPEAL from a judgment of the Superior Court of Sacramento County, Raoul M. Thorbourne, Judge. Reversed in part and affirmed in part. Filed December 18, 2017

COUNSEL

Timothy E. Warriner, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

At trial, this case was about the five eyewitness identifications of the shooter at a party for the California State University, Sacramento golf team. On appeal, the major issues involve defendant Tino Alexander Perez’s gang affiliation and whether there is sufficient evidence to support the jury finding that he specifically intended to benefit the Norteño street gang. The reason for the chasm between the trial and the appeal is the unusual fact pattern for a gang case—while the shooter was a validated and heavily tattooed gang member, there is no evidence the party was in gang territory, there were no rival gangs present or involved, there were no gang epithets or gang attire, and there is no evidence the shooting was in retaliation or for revenge. On appeal, defendant challenges the imposition of the gang enhancement on a number of grounds. He also objects to the admission of text messages exchanged between one of the victims and defendant’s girlfriend, the prosecutor’s closing argument, and the finding the four attempted murders were willful, deliberate, and premeditated. We find there is insufficient evidence to support the gang enhancement and the life terms for willful, deliberate, and premeditated attempted murder are unauthorized. We therefore strike the gang enhancement and the four life terms and remand for resentencing on counts one through four, but in all other respects, we affirm the judgment.

FACTS

Evidence Supporting the Substantive Crimes

Because defendant does not challenge the eyewitness identifications on appeal, we need not describe each witness’s account of what transpired on the night of May 10, 2013. Suffice it to say, the evidence that defendant shot four college students at the party is overwhelming and the jury convicted him of four counts of willful, deliberate, and premeditated attempted murder and assault with a firearm as well as enhancements for the personal use of a firearm and the infliction of great bodily injury. The evidence consists of five eyewitnesses who positively identified defendant as the shooter,\(^1\) incriminatory jail house calls, and a gun and ammunition that match photographs of a gun and ammunition on defendant’s cell phone. The evidence that the shooting was related to defendant’s gang affiliation, as described post, is much, much thinner.

Four close friends, Dwayne Hines, Kevin Booze, Jacarri Brown, and Jahi Vaughn arrived together at the party hosted by the California State University, Sacramento (Sac State) golf team. Their friend, Brandon Garcia, arrived sometime later. Hines attended Sacramento City College and the others were students at Sac State. Vaughn did not testify. The others testified they saw defendant at the party. He stood out with a dark-colored hat, hair shaved on the sides but with a long ponytail, and lots of tattoos, including an owl figure and the number “90” around his neck, a diamond on his forearm, an image of the State of California on his face, and skeletons on his fingers. Booze attempted to socialize with him and defendant told him, “I’m E.”

The party wound down around midnight and many of the partygoers mingled on the court in front of the house. Hines, Booze, and Vaughn began walking to their car when they heard shots and returned to find their friends. Booze and Brown intervened in a heated argument between a Hispanic woman and an African-American man, and the man walked away. But defendant approached and appeared very agitated and angry. The woman reassured him that Booze and Brown had been helping her. She stated, “It’s okay, baby. They’re cool. Like, they helped me out.” But defendant pulled out a gun from his waistband and began shooting.

Vaughn, the first to be shot, was shot in the leg. Defendant shot Hines in the thigh before Hines jumped behind a parked truck for cover. As Booze tried to run away, defendant shot him below the buttocks and in his calf. Brown and García hid behind a car, but defendant pursued them shooting over the top of the car in their direction. Brown felt a bullet whiz by his shoulder. As he made a run for the bushes, defendant shot him in the right leg.

\(^1\) An expert in experimental psychology specializing in human perception and memory explained to the jury many of the pitfalls in eyewitness identifications and lineup procedures diminishing the reliability of identifications, despite multiple witnesses and their abiding confidence in the accuracy of their memories.
Another Sac State student who had attended the party saw defendant shooting and tackled him. Garcia jumped in as well and disarmed him. Defendant broke free and ran down the street and into a car with a number of Hispanic females.

At the crime scene, police officers collected a black Holt pistol grip, a bullet, a blood-stained wristwatch, and nine casings. The bullet that was removed from Brown’s leg and the bullet recovered from the scene were both .22-caliber Winchester ammunition. All nine casings were also .22-caliber Winchester ammunition and they were all fired from the same revolver.

Defendant’s cell phone stored many incriminating photographs. There were photos of defendant flashing gang signs. There were photos of a box of .22-caliber Winchester ammunition. And there was a photo of defendant’s wallet next to a .22-caliber long rifle revolver. The revolver had a black grip that appeared to be the same as the black pistol grip recovered from the scene.

Defendant had a propensity for incriminating himself. His phone calls from jail were recorded. When asked what happened, in one call defendant responded: “Yeah, I shot four people, bro. [¶] That’s what they’re charging me with. . . . I didn’t kill nobody but them niggers got hit with bullets . . . .” In another call, he admitted being present at the party. “You remember that party that we went to when I went with my brother and all them and we end up fighting after the party . . . .”

Defendant’s girlfriend, Sara-Tessa Hayes, was a classmate of Jacarri Brown. In September 2013, they exchanged text messages about the shooting. Hayes sent the following message: “Well, the man that you picked out of the lineup is my son’s dad. You sent him to jail two weeks before our baby was born. You took everything away from us. My son was born underdeveloped with a lot of medical problems, so my boyfriend can’t be there for a sick baby, and I can’t even go back to work because it’s just me to take care of my son’s medical needs. They want to give Tino -- that means my son grows up without his dad. So I just thought you should know what you did to me and my family, and had it been the other way around, Tino wouldn’t have gone out like no snitch. What you did was wrong. Good night.”

Brown offered to contribute financially for the care of the baby. In a later text message, Hayes wrote: “Instead of showing concern, he changed the subject and asked me to lie and tell you that you must have recognized him from when he would come to Sac State to see me and to make sure you don’t testify because they are getting ready for trial.” She apologized for everything she had said previously and stated: “[Y]ou didn’t ruin my family. He ruined us himself. I was just too shortsighted and lonely to realize it. I’m just not making excuses for him anymore.” She concluded, “He did what he did and it was wrong, just like you said.”

Evidence Supporting the Gang Enhancement

The attorneys entered into the following stipulation: “Norteños are a criminal street gang. It is an ongoing organization, association, or group of three or more persons, whether formal or informal that has a common name or common identifying sign or symbol. The chief primary activities of the Norteños are murder, attempted murder, robbery, assault, assault with a firearm, and kidnapping. The members of the Norteños, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. The pattern of criminal activity has occurred after September 26, 1988. The defense stipulates that this agreement satisfies the elements located in the jury instructions concerning what is needed to prove that the Norteños are a criminal street gang. The defense disputes whether the defendant is a member of the Norteños.”

Detective John Sample opined that defendant was a Varrio Garden Land Norteño (VGLN) based on (1) his interviews of defendant’s brother; (2) his review of eight police reports involving defendant, four of those reports documenting defendant in the company of Norteños; (3) his search of defendant’s cell phone and monitoring of his Facebook account; and (4) his examination of photographs of defendant’s tattoos. Detective Sample testified that VGLN is affiliated with the Norteño Broderick Boys of West Sacramento, where defendant’s family lives. He explained that a person must satisfy only two of 10 criteria to be validated as a gang member. Defendant was validated in 2010 as a Norteño gang member. He was housed with “northerners” at the county jail.

Detective Sample described three tattoos connoting a gang affiliation, two on defendant’s chest and back that were not visible at the party and one on his hands that had been covered up. “Nutty North” appeared on his chest and the word “Nuttty” appeared on a portion of his back. The latter tattoo looked like it was incomplete. One dot and four dots signified the number 14 and the 14th letter of the alphabet is “N.” According to Detective Sample, the four dots had been covered and could be perceived by gang members as disavowing the gang. Covering tattoos and forsaking gang colors are two ways a gang member can drop out and distance himself from a gang. Defendant was not wearing red at the party. Detective Sample acknowledged that gang membership was an “ever-changing situation.”

Detective Sample gave the jury a basic primer on the sociology and psychology of gangs. Central to gang membership and cohesiveness, according to the detective, is instilling fear in the community and among rival gang members as a vehicle to achieve respect. He opined, therefore, that defendant intended to benefit the gang with his shooting rampage because it would instill fear in the minds of the students and thereby enhance the gang’s reputation.

Two other officers testified to personal contacts they had with defendant. In 2008 one officer detained defendant with two validated members of the Broderick Boys. Although
The defendant denied being in a gang, the officer observed tattoos on both of his hands. In 2012 another officer observed defendant with three individuals, two who were validated members of the Norteno gang, in a car that contained a firearm in the trunk and a bag of ammunition tucked in between the seats where defendant had been seated. Defendant again denied gang membership, but the officer testified defendant remained a validated Norteno gang member based on his tattoos, his association with Norteños, and his wearing of gang colors.

The defense subpoened two female students who had attended the May 10 golf team party to testify to the appearances of other Mexicans at the party. Neither witnessed the shooting; one had left before it began and the other was in the house when it occurred. Both were interviewed by the defense over a year after the shooting and neither had a clear recollection of the other partygoers. Neither talked to any of the Mexicans they vaguely recalled. Unlike the small get-togethers they usually had, the party grew to about 150 people.

Jordan Bidlack admitted to stereotyping. She described four or five Mexican males she saw at the party, and although she could only recall one tattoo on one of them, she assumed they all had tattoos. She specifically remembered the one tattoo on the neck region. She thought they were “sketchy” so she did not talk to them and she tried to stay away from them. To her, they did not fit the “Sac State mold.” They dressed similarly and were “roughly shorter than a lot of the student athletes” attending the party. More than one had a rattail. She did not recognize any of the six photographs in the photo lineup the defense investigator showed her and she could not remember any of their facial features.

Ellese Dias, a former member of the golf team, was also at the party with her boyfriend before the shooting began. She too testified that the party grew larger throughout the evening and many people stuck out “as not fitting the typical mold of Sac State students.” She described seven to 10 Mexicans, dressed similarly, but admitted she did not interact with them. They were primarily in white T-shirts and jeans or shorts. She estimated that seven to eight of the Mexicans had excessive tattoos. Like Bidlack, she was unable to identify anyone in the photographic lineup the defense investigator showed her and she could not remember that three of the Mexicans had long hair.

A jury found defendant guilty of four counts of attempted murder (Pen. Code, §§ 664/187, subd. (a)) and four counts of assault with a firearm (§ 245, subd. (a)(2)). The jury found that each of the attempted murders was willful, deliberate, and premeditated. As to the attempted murder counts, the jury found he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to the assault with a firearm counts, the jury found he personally inflicted great bodily injury (§ 12022.7, subd. (a)). And as to all the counts the jury found defendant acted to benefit a criminal street gang (§ 186.22, subd. (b)(1)) and he personally used a firearm (§§ 12022.5, subds. (a) & (d), 12022.53, subd. (b)).

DISCUSSION

I

Gang Enhancement

Defendant contends the evidence was insufficient to sustain the jury’s finding that he committed the substantive offenses for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1), which provides: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . .” “Like a conviction unsupported by substantial evidence, a true finding on a gang enhancement without sufficient support in the evidence violates a defendant’s federal and state constitutional rights and must be reversed.” (People v. Franklin (2016) 248 Cal.App.4th 938, 947 (Franklin).)

The evidence must establish both of the two prongs to the gang enhancement under section 186.22, subdivision (b)(1). “First, the prosecution is required to prove that the underlying felonies were ‘committed for the benefit of, at the direction of, or in association with any criminal street gang.’ (§ 186.22[, subdivision ](b)(1).) Second, there must be evidence that the crimes were committed ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ ” (People v. Rios (2013) 222 Cal.App.4th 542, 561 (Rios).)

In deciding whether substantial evidence supports both prongs, we apply the familiar standard of review for challenges to the sufficiency of the evidence. (In re Daniel C. (2011) 195 Cal.App.4th 1350, 1359.) We review the entire record in search of reasonable and credible evidence of solid value, viewing all the evidence in the light most favorable to the prosecution, and drawing all reasonable inferences in favor of the jury’s findings. (People v. Ramon (2009) 175 Cal. App.4th 843, 850 (Ramon); In re Frank S. (2006) 141 Cal. App.4th 1192, 1196.) We cannot, however, go beyond reasonable inferences into the realm of speculation, conjecture, surmise, or guesswork. (Ramon, at p. 851.) “A trier of fact may rely on inferences to support a conviction only if those inferences are ‘of such substantiability that a reasonable trier of fact could determine beyond a reasonable doubt that the inferred facts are true.’ ” (Rios, supra, 222 Cal.App.4th at p. 564.)

Not every crime committed by a gang member is gang related. (People v. Albillar (2010) 51 Cal.4th 47, 60 (Albillar); Rios, supra, 222 Cal.App.4th at p. 565.) Nor can a crime be found to be gang related simply because the perpetrator

2. Further undesignated statutory references are to the Penal Code.
is a gang member with a criminal history. (In re Frank S., supra, 141 Cal.App.4th at p. 1199.) Although a lone actor is subject to a gang enhancement, merely belonging to a gang at the time of the commission of the charged conduct does not constitute substantial evidence to support an inference the sole actor specifically intended to promote, further, or assist any criminal conduct by gang members. (Rios, at p. 566) Otherwise, as the court observed in Rios, “gang enhancement would be used merely to punish gang membership.” (Id. at p. 574.) Rarely is the perpetrator’s intent proven by direct evidence; usually it must be inferred from the facts and circumstances surrounding the case. (Id. at pp. 567-568.)

A cottage industry of gang experts has grown to meet a perceived need to assist juries in understanding all things gang related. While a gang expert is prohibited from opining on a defendant’s specific intent when committing a crime, the prosecution can ask hypothetical questions based on the evidence presented to the jury whether the alleged crime was committed to benefit a gang and whether the hypothetical perpetrator harbored the requisite specific intent. (People v. Vang (2011) 52 Cal.4th 1038, 1045-1046.) A hypothetical question must pose facts shown by the evidence because “[a] hypothetical question not based on the evidence is irrelevant and of no help to the jury.” (Id. at p. 1046.)

Indeed, there are caveats to the sufficiency of gang expert testimony to support the imposition of a gang enhancement. General opinion testimony when offered by a gang expert “‘opens the door for prosecutors to enhance many felonies as gang-related’ (In re Frank S., supra, 141 Cal.App.4th at p. 1199), by expanding the gang enhancement statute to cover virtually any crime committed by someone while in the company of gang affiliates, no matter how minor the crime, and no matter how tenuous its connection with gang members or core gang activities.” (In re Daniel C., supra, 195 Cal. App.4th at p. 1364.) Moreover, “purely conclusory and factually unsupported opinions” that the charged crimes are for the benefit of the gang because any violent crime enhances the gang’s reputation is insufficient to support a gang enhancement. (People v. Ramirez (2016) 244 Cal.App.4th 800, 819-820 (Ramirez).)

That is not to belittle or understate the central role of gang experts in establishing both prongs of the section 186.22 enhancement. It is certainly true “‘[e]xpert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]” (People v. Vang, supra, at p. 1048.) “Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[ ]criminal street gang’ within the meaning of section 186.22[, subdivision ][b](1).” (Albillar, supra, 51 Cal.4th at p. 63.) The facts in Albillar, however, stand in stark contrast to the facts before us and, on those facts, the Supreme Court’s deference to the gang expert’s testimony is unremarkable.

In Albillar, three 20-something gang members, heavily tattooed with gang signs, assisted each other in raping a 15-year-old girl in their apartment, which was cluttered with gang paraphernalia including gang clothing, photographs of the defendants and fellow gang members wearing gang clothing and flashing gang signs, papers with gang graffiti, and a phone list of fellow gang members. (Albillar, supra, 51 Cal.4th at pp. 51-52, 62.) The Supreme Court summarized the gang expert’s testimony this way: “Because each defendant was a member of the Southside Chiques, he could and did rely on the others’ cooperation in committing the offenses against Amanda M.: Albert suppressed his own personal interest in having sex with the victim and immediately yielded to the others when they asked if they could ‘get in’; without another word being spoken, Albert and Madrigal held the victim’s legs down while Alex raped her; Albert and Alex blocked the door while Madrigal raped her; and Alex and Madrigal remained in the apartment while Albert raped her. Defendants knew, because of the nature of the gang, that no one would be a ‘rat,’ which would be ‘one of the worst things, if not the worst thing the gang can have within itself.’” (Id. at p. 61.)

The gang expert testified that, not only did gang members work in association, but also that the rapes were perpetrated to benefit the Southside Chiques gang. (Albillar, supra, 51 Cal.4th at p. 63.) He responded to a hypothetical based on the facts of the charged crimes where the victim knew that at least two of the perpetrators were gang members. The expert stated that “More than likely this crime is reported as not three individual named Defendants conducting a rape, but members of [Southside] Chiques conducting a rape, and that goes out in the community by way of mainstream media or by word of mouth. That is elevating [Southside] Chiques’ reputation to be a violent, aggressive gang that stops at nothing and does not care for anyone’s humanity.” (Id. at p. 63.)

Here, by contrast, the only shred of evidence possibly connecting the shooting to VGLN is the fact defendant was a tattooed, validated gang member and there were four to 10 other Mexicans at the party, some of whom had tattoos. Most striking is the absence of gang evidence. Unlike the defendants in Albillar, there is no evidence that any of the visible tattoos on defendant or any of the tattoos on the other Mexican partygoers were gang related and there is no evidence that any of the other Mexicans were present during the shooting, let alone assisting defendant in any way. There is no evidence the other Mexicans at the party were members of any gang whatsoever. There is no evidence that any participant shouted out a gang name or threw up a gang sign. There is no evidence defendant or any of the other Mexicans were wearing gang colors. There is no evidence any of the students at the party knew defendant was a member of a gang. There is no evidence that any rival gang members were present at the party or that the shooting was done in retaliation or retribution for prior gang activity. There is no evidence the shooting occurred in gang
territory. None of the students who testified at trial attributed the shooting to a gang. Thus, there was no eyewitness testimony that even hinted the shooting was gang related.

The only evidence offered in support of the gang enhancement was the testimony of Detective Sample, the prosecution’s gang expert. He too was asked a hypothetical based on the prosecution’s evidence. The prosecutor inquired: “And if a Norteno gang member crashes a party, after the party shoots a gun several times in the air, and then proceeds to shoot several college students for trying to assist a friend of that gang member, would you think that that shooting of the college students was for the benefit of and in association with or at the direction of the Nortenos?”

Detective Sample answered affirmatively and explained his rationale. “Again, we talked about the reputation for Nortenos. You have a violent act, like this shooting, especially in a public setting, that’s going to instill fear in anybody who knows about that shooting occurring. That fear is going to be now attributed to the reputation of the Nortenos.

“And an individual who committed that crime being a specific Norteno, he also will receive that same benefit as an enhanced reputation. He’s going to be more feared. He’s also going to enhance his reputation in the gang as somebody not to be trifled with and is to be feared.

“So overall the crime would be that violent reputation would transpose itself straight on to the Norteno gang.”

In this gang expert’s view, therefore, essentially any shooting by a gang member is gang related because the use of violence enhances the gang member’s reputation, and thereby inures to the gang’s benefit by instilling fear in the community. Many courts have soundly rejected such a sweeping generalization untethered, as it is, to specific evidence of both prongs of the gang enhancement. (See, e.g. Ramirez, supra, 244 Cal.App.4th at p.819; In re Daniel C., supra, 195 Cal. App.4th at p. 1363; People v. Ochoa (2009) 179 Cal.App.4th 650, 662 (Ochoa); Ramon, supra, 175 Cal.App.4th at p. 853.)

And the glaring absence of evidence connecting the shooting to a gang, other than the mere fact the perpetrator was a gang member, leaves the evidence woefully short of the sufficiency needed to sustain the enhancement. In short, the prosecution’s evidence, including the gang expert’s speculation about the hypothetical benefit to the Nortenos and the hypothetical shooter’s specific intent to promote, further, or assist the gang is far more analogous to cases in which the evidence was found insufficient to support the enhancement than to the abundance of gang-related evidence in Albilar; supra, 51 Cal.4th 47.3

3. We characterize the evidence as abundant in Albilar in comparison to the prosecution’s meager gang-related evidence in the case before us, but we note that the dissenting justices found even that evidence insufficient to sustain the gang enhancement because the three gang members were family members, the rapes occurred in the family apartment, which was not in gang territory, and rapes were not condemned, let alone celebrated, within the Hispanic gang culture. (Albilar, supra, 51 Cal.4th at pp. 69, 71 (conc. & dis. opn. of Werdegar, J.).)

In In re Frank S., a minor was charged with the possession of a dirk or dagger and a small bundle of methamphetamine, as well as false representation to a police officer. (In re Frank S., supra, 141 Cal.App.4th at p. 1195.) He was also carrying a red bandana. (Ibid.) He was alone at the time he was stopped on his bicycle with the knife and told the police officer he had been jumped two days earlier and needed the knife for protection against “the Southerners.” (Ibid.) During intake, he described himself as an affiliate of the Norteños. (Ibid.) The gang expert opined that the knife benefits the Nortenos because “it helps provide them protection should they be assaulted by rival gang members.” (Id. at p. 1199.) The court found the evidence insufficient to support the gang enhancement, emphasizing the lack of gang-related evidence. “The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense.” (Ibid.) The court rejected the notion that the gang expert’s opinion that the minor harbored the specific intent to use the knife for a gang-related purpose and that the knife, under these circumstances, benefited the Norteños, constituted substantial evidence to support the enhancement. (Ibid.)

In Ochoa, the gang expert testified the carjacking and weapon possession benefited the gang “by providing general transportation to the gang’s members, by enabling transportation of narcotics for sale by the gang, by providing economic benefit to the gang by sale of the vehicle, by elevating defendant’s status within the gang, and by raising the gang’s reputation in the community.” (Ochoa, supra, 179 Cal.App.4th at p. 656.) He acknowledged, however, there was no evidence the defendant transported any gang members or claimed responsibility for the carjacking in the name of the gang. (Ibid.) The defendant, a self-identified member of the Moreno Trece, was alone when he approached the victim sitting in his mother’s car, pointed a gun at his face, and demanded that he give him the car. (Id. at p. 653.) The expert’s testimony, “as to how defendant’s crimes would benefit Moreno Valley 13, was based solely on speculation, not evidence.” (Id. at p. 663.)

The court found the evidence insufficient to sustain the gang enhancement. The opinion provides a penetrating summary of what was lacking. “Defendant did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes. There was no testimony that the victim saw any of defendant’s tattoos. There was no evidence the crimes were committed in Moreno Valley 13 gang territory or the territory of any of its rivals. There was no evidence that the victim of the crimes was a gang member or a Moreno Valley 13 rival. Defendant did not tell anyone, as the defendant did in People v. Ferraez [(2003) 112 Cal.App.4th 925], that he had special gang permission to commit the carjacking. [ Citation.]
Defendant was not accompanied by a fellow gang member.” (Ochoa, supra, 179 Cal.App.4th at p. 662, fn. omitted.)

In re Daniel C. distinguishes the sufficiency of the evidence to support the first prong from the second prong of the gang enhancement. There was substantial evidence to support the first prong, that is, that the robbery was committed “in association with” (§ 186.22, subd. (b)(1)) a criminal street gang because the defendant, a gang member, was accompanied by an admitted Norteño and another young affiliate of the gang. (In re Daniel C., supra, 195 Cal.App.4th at pp. 1358-1359.) They all wore red. (Id. at p. 1359.) But the court found the evidence was insufficient that the defendant committed his crime “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Id. at p. 1361.) Again the deficiency was in the gang expert’s testimony.

“Here, [the gang expert] based his opinion that appellant committed the robbery to further the interests of the Norteño gang on the premise that it was a violent crime, and gangs commit violent crimes in order to gain respect and to intimidate others in their community. But, nothing in the record indicates that appellant or his companions did anything while in the supermarket to identify themselves with any gang, other than wearing clothing with red on it. No gang signs or words were used, and there was no evidence that [the assistant manager of the supermarket] or any of the other persons who witnessed the crime knew that gang members or affiliates were involved. Therefore, the crime could not have enhanced respect for the gang members or intimidated others in their community, as suggested by [the gang expert.]” (In re Daniel C., supra, 195 Cal.App.4th at p. 1363.)

The gang expert testimony also came up short in Rios. “The only facts that the prosecution asked the expert to consider in the hypothetical were (1) the person was a gang member and (2) he possessed a gun. In our view this was insufficient to impose the gang enhancement (§ 186.22[, subd. ](b)(1)) on the carrying a loaded firearm in a vehicle count (former § 12031, subd. (a)(1); count 1). Although Al-billar instructs that the prosecution may rely on the charged offense as the criminal conduct supporting the enhancement when the defendant acts in concert with others, in a case such as this, where the defendant acts alone, the combination of the charged offense and gang membership alone is insufficient to support an inference on the specific intent prong of the gang enhancement. Otherwise, the gang enhancement would be used merely to punish gang membership. “As the court stated in Rodriguez, ‘[m]ere active and knowing participation in a criminal street gang is not a crime.’ (People v. [Rodriguez] (2012) 55 Cal.4th [1125.,] 1130.) We therefore hold that the expert testimony in response to the hypothetical in this case was insufficient to support an inference that defendant carried the gun in the vehicle with the specific intent required for the gang enhancement.” (Rios, supra, 222 Cal. App.4th at pp. 573-574.)

The evidence missing was the same as in In re Frank S., Ochoa, and the case before us. “[T]here was no evidence that defendant was in Norteño territory or rival gang territory when he stole the car; that he called out a gang name, displayed gang signs or otherwise stated his gang affiliation; or that the victims of the car theft were rival gang members or saw his tattoos or gang clothing.” (Rios, supra, 222 Cal. App.4th at p. 574.)

A pattern emerges in the challenges to gang expert testimony. Echoing the testimony offered in In re Frank S., Ochoa, and Rios, the gang expert in Franklin also opined that the defendant made criminal threats, assaulted, and falsely imprisoned his victim for the benefit of a criminal street gang, particularly by instilling fear in the victims and their larger community. (Franklin, supra, 248 Cal.App.4th at pp. 943, 950.) But there was no evidence that any of the defendant’s fellow gang members were aware of the crimes or participated in them. There was no evidence showing the defendant committed the crimes in association with other gang members. Given the lack of evidentiary support for the gang expert’s testimony, the court struck the gang allegations. (Id. at p. 952.)

The Attorney General argues that Detective Sample’s testimony provides ample evidence defendant specifically intended to promote, further, or assist the commission of crimes by other gang members. The Attorney General cites to Detective Sample’s testimony that defendant stood out because he had tattoos on his face, neck, arms, and fingers, the other Mexicans also had tattoos and dressed similarly to defendant, and he fired gunshots to intimidate the college students and to further the gang’s reputation. Cumulatively, this testimony is as unsubstantiated and insubstantial as the gang expert testimony found lacking in In re Frank S., Ochoa, Rios, and Franklin.

Essentially, Detective Sample testified to no more than the fact a Mexican tattooed gang member was involved in a shooting and possibly three of the other Mexicans at the party, who appeared to be his companions, all had tattoos. Although the Attorney General characterizes the tattoos as “gang tattoos” there was no evidence whatsoever that any of his Mexican companions’ tattoos were gang related. Nor were any of defendant’s visible tattoos. Rather the Attorney General ascribes a gang connotation to any tattoo, an inference based solely on impermissible speculation. Given that defendant had tattooed over the gang-related symbols on his fingers and the Nutty North tattoo was not visible to the partygoers, we conclude the mere presence of tattoos was insufficient to sustain a gang enhancement.

And, as in all of the cited cases, there simply was no other evidence to support the enhancement. Missing was all evidence typical of crimes committed for the benefit of the gang and intended to promote, further, or assist the commission of crimes by gang members—gang colors, gang clothing, gang accoutrements, gang signs, gang epithets, help by other gang members. Here there is no evidence any of the college
students knew of defendant’s gang affiliation. The evidence consists only of a gang member committing a violent crime alone. The courts in the above-cited cases have found such a dearth of evidence insufficient for all the reasons we have discussed at length and we follow their lead in striking the gang enhancement for lack of substantial evidence to support it. 4

II

Premeditated Attempted Murder Life Terms

Pursuant to section 664, attempted murder is punishable with a term of five, seven, or nine years, unless the fact that the attempted murder was willful, deliberate, and premeditated is alleged in the accusatory pleading and found true by the trier of fact, in which case the defendant is subject to life imprisonment. Defendant contends his life sentence was unauthorized and violated his constitutional right to due process because the prosecutor failed to allege the attempted murder counts were committed willfully, deliberately, and with premeditation as required by section 664. He is correct and the Attorney General does not contend otherwise. But the Attorney General insists defendant forfeited his objection by failing to challenge the issue in the trial court. The question is whether the mere mention of the possibility of an enhanced sentence for premeditated attempted murder during the court’s discussion of unrelated jury instructions imparts the notice required by due process as described in People v. Houston (2012) 54 Cal.4th 1186 (Houston) or whether we should adopt the rationale of People v. Arias (2010) 182 Cal. App.4th 1009 (Arias) in holding the sentence was unauthorized in light of the prosecution’s failure to satisfy the express statutory requirement coupled with the failure to advise defendant of the potential enhanced penalty.

We begin with Arias. Arias, a gang member, shot three African-American males in gang territory, one of whom died. (Arias, supra, 182 Cal.App.4th at pp. 1012-1014.) His defense, like defendant’s, was misidentification. (Id. at p. 1015.) Arias was charged with one count of first degree murder and two counts of attempted first degree murder, but the information did not allege that the attempted murders were willful, deliberate, and premeditated. (Id. at p. 1017.) The prosecution never sought to amend the information. (Ibid.) As here, the judge did instruct “that if the jury found defendant guilty of attempted murder, it must make a separate determination of whether the prosecution proved the attempted murder was done willfully and with premeditation and deliberation.” (Ibid.) The jury did not make any express findings as to premeditation and deliberation, but did find defendant guilty of two counts of “first degree attempted murder.” (Ibid.) The trial court sentenced Arias to life in prison pursuant to section 664 for the attempted murder convictions. (Arias, at p. 1017.)

Like defendant, Arias argued the life term was unauthorized. The Court of Appeal agreed. The prosecution, the court explained, “failed to comply with the unambiguous pleading requirement set forth in section 664, subdivision (a).” (Arias, supra, 182 Cal.App.4th at p. 1017.) Following the reasoning of the Supreme Court in People v. Mancebo (2002) 27 Cal.4th 735 (Mancebo), the court struck the life sentences based on the plain meaning of the statute and due process considerations. “[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.” (Ibid. at p. 747.)

Mancebo was a one strike case that did not involve section 664. But, like section 664, the pertinent one strike statute provided enhanced penalties only if any of the qualifying circumstances “is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact.” (§ 667.61, subd. (o); Mancebo, supra, 27 Cal.4th at p. 742.) The information generally alleged the existence of multiple victims, albeit not specifically within the one strike law allegations. (Mancebo, at p. 745.) At sentencing, in order to impose a one strike law sentence and a firearm enhancement without improper double use of one finding, the trial court utilized the multiple victim circumstance under section 667.61, subdivision (e)(5). (Mancebo, at pp. 739-740.)

The court found the sentence was unauthorized. Nothing in the charging documents or pleadings “informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a).” Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) and use the circumstance of gun use to secure additional enhancements under section 12022.5(a).” (Mancebo, supra, 27 Cal.4th at p. 745.)

Similarly, no information or other pleading gave Arias notice of the life term he could receive if convicted of attempted first degree murder. The court found the lack of notice more egregious than in Mancebo. “As we have pointed out, the lack of notice was greater in [Arias’s case] because nothing in the information gave [him] reason to suspect the enhanced punishment statute for attempted murder applied to him.” (Arias, supra, 182 Cal.App.4th at p. 1020.) The court rejected the Attorney General’s characterization as an imperfection in the form of the pleading. “This was no mere formal defect in the information. Rather, defendant was not given notice of the special sentencing enhancement that would be used to increase his punishment from a maximum of nine years to a life term. Nor is this error reviewable under the abuse of discretion or harmless error analysis applicable to situations in which the information was amended during trial.

---

4. Because we must strike the gang enhancement for insufficiency of the evidence, we need not address the multiple other challenges to the gang enhancement defendant raises.
Defendant’s charging document was never amended.” (Ibid.) In short, the prosecution had not complied with the notice requirements imposed by section 664, the defendant had no actual notice of his risk of an enhanced sentence, the life terms were stricken, and the case was remanded for resentencing. (Arias, at pp. 1020-1021.)

Here, the Attorney General insists the issue was forfeited, despite the flagrant deficiency in the accusatory pleading in violation of section 664, based on the holding in Houston, supra, 54 Cal.4th 1186. An unhappy alumnus returned to the high school he had attended three years earlier and shot and killed four people, including one of the teachers who had given him a failing grade, and wounded many others. (Id. at pp. 1192, 1194.) On appeal, he too argued he was improperly given life sentences because the indictment failed to allege that the attempted murders were willful, deliberate, and premeditated. (Id. at p. 1225.) The Supreme Court upheld the life terms on facts very different from those presented in Arias. The issue, it turns out, is rooted in due process concerns and the fundamental right of a criminal defendant to have sufficient notice of the potential punishment he faces. In Houston, unlike Arias, the issue arose midtrial and the defendant was given explicit notice of the possible enhanced punishment. (Houston, at pp. 1226-1227.)

Again, the prosecution failed to comply with section 664’s pleading requirement. But there the similarity ends. In Houston, the trial court raised the issue at the end of the first day of the defendant’s presentation of his case. (Houston, supra, 54 Cal.4th at p. 1226.) The court discussed the issue at some length and put the defendant on notice that the verdict forms would ask the jury to distinguish the two types of attempted murder. “‘And the final thing that is not completely clear in the verdict form, because I don’t think I had it clear in my mind when I was putting it together, is the distinction between the two kinds of attempted murder, and if I understand what the prosecution is doing in [the attempted murder counts], I believe the prosecution is intending to charge premeditated attempted murder. [] If that’s not right, you should tell me now, or as soon hereafter as you are able to, because it would help me. []’ In other words, the type of attempted murder [that is] punished by life imprisonment rather than five, seven, nine.’” (Ibid.)

A week later, the trial court announced it would include deliberate and premeditated attempted murder as a special finding. (Houston, supra, 54 Cal.4th at p. 1226.) After the close of evidence, the trial court instructed the jury to determine whether the attempted murders were willful, deliberate, and premeditated. (Ibid.) The defendant registered no objection. The Supreme Court concluded: “‘On the facts here, defendant received adequate notice of the sentence he faced, and the jury made an express finding that the attempted murders were willful, deliberate, and premeditated. A timely objection to the adequacy of the indictment would have provided an opportunity to craft an appropriate remedy. Because defendant had notice of the sentence he faced and did not raise an objection in the trial court, he has forfeited this claim on appeal.” (Id. at p. 1228.)

The Supreme Court did not overrule Arias. The court noted that the jury had been properly instructed but conceded it was unclear from the record when the trial court issued its proposed instructions and special findings and, most importantly, whether the potential life terms were discussed. (Houston, supra, 54 Cal.4th at p. 1229.) Apparently, the Supreme Court was undecided whether Arias received adequate notice, and therefore, it left the case intact.

The Attorney General maintains that defendant received notice comparable to the shooter in Houston. The Attorney General points out that during a discussion whether the court should give the jury an unanimity instruction, the prosecutor mentioned, “We haven’t discussed voluntary manslaughter, but let’s say with the two attempted murder[s], they can find him guilty of attempted murder with premeditation or guilty of regular attempted murder, and they can disagree on for which victim it was premeditated attempted murder and which one was just normal attempted murder. So I can see in that situation where that instruction [on unanimity] would apply.” In the Attorney General’s view, in essence, the prosecution can ignore its responsibility to plead premeditated attempted first degree murder as required by section 664, and a defendant forfeits his or her right to challenge the deficiency as long as the prosecutor at some point during trial mentions or alludes to the two types of attempted murder. Such a rule would eviscerate section 664, do violence to the meaning and rationale of Houston, and undermine any fair-minded understanding of notice and due process.

We begin with emphasis on the plain meaning of the statute. The Legislature clearly states that a sentence with a maximum term of nine years cannot be enhanced to a life term unless “the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.” (§ 664, subd. (a).) Here no one disputes that the prosecution failed to allege the fact that the attempted murders were willful, deliberate, and premeditated. Thus, according to the terms of the statute, life terms cannot be imposed. This conclusion is consistent with the holdings in Arias and Mancebo.

Nor do we believe that Houston dictates a different result. In Houston, the trial court directly and plainly informed the defendant that it was planning to instruct the jury on the two options for attempted murder. Not only did the trial court expressly raise the issue, but it invited a response from the parties. Receiving none, it again informed the defendant that it had prepared a verdict form directing the jury to make a special finding whether the attempted murders were willful, deliberate, and premeditated. Having been given notice twice during the trial that he would be subject to an attempted first degree murder verdict, the court then instructed on the additional elements necessary to find premeditated attempted murder. As a result, even though the prosecution violated section 664’s directive to give the defendant advance notice
in the accusatory pleading, the court found that he was given ample notice of the charges against him and the opportunity to object.

Here, by contrast, it is not even clear on the record whether defendant was present when the prosecutor, not the judge, while arguing the propriety of an unanimity instruction, made an off-hand reference to the two types of attempted murders and the possibility the jury might convict him of different degrees for different victims. Unlike the trial court in Houston, which clearly telegraphed the issue for the defendant, the prosecutor’s brief allusion to the attempted murder counts when discussing an unrelated jury instruction did not give defendant fair notice that his sentences could jump from a maximum of nine years to a life term for each of the four counts. In short, we find Houston factually inapposite.

Both Arias and Houston recognize the due process implications of a failure to comply with section 664. While the Supreme Court was willing to forgive the prosecutor’s transgression in Houston, it was precisely because the trial court had provided what the prosecutor had failed to do; that is, the court was satisfied the defendant was accorded fair notice of the charges he faced and an adequate opportunity to object or to tailor his defense. In Arias, however, the court struck the life term when the violation of section 664 compromised the defendant’s right to due process. Here, too, the violation of section 664 deprived defendant of fair notice that he would be subject to a life term if the jury found him guilty of premeditated attempted murder. Because there is no showing in this record that defendant was present, was informed of the charges against him, or that he waived his right to object, we conclude that, as in Arias, we must strike the four life terms. The sentence was unauthorized and we can find no forfeiture on these facts.

III

Text Messages

It is important to put defendant’s next issue into context because, as framed, it appears disproportionately impactful. Five eyewitnesses identified defendant as the shooter. One of the five, Jacarri Brown, was a friend and classmate of Hayes, defendant’s girlfriend. Two weeks after the shooting, Hayes gave birth to defendant’s son, who was born with special needs. Apparently overwhelmed and distraught, she sent a series of text messages to Brown. She did not testify at trial.

Brown, however, did testify. He provided a detailed description of the events leading up to, and including, the shooting. It was during cross-examination that defense counsel explored Brown’s relationship with Hayes, including their numerous and lengthy text messages. He asked a series of questions to expose Brown’s potential bias. “Do you recall that after Tino Perez was arrested that Sara-Tessa Hayes confronted you about your identification of Tino Perez?” “And she texted you, correct?” “And you texted her back, correct?” “It wasn’t just one text to her. It was more than ten texts, right?” “And they weren’t short texts . . . . They were long texts, correct?” “She was accusing you of being a liar for falsely accusing Tino Perez, right?”

Brown testified Hayes, in the text messages, confronted him about his identification of defendant. He reported that Hayes “was asking me what had happened that night and she knew he was there.” But he denied that she was accusing him of “being a liar for falsely accusing” defendant or for falsely identifying him. According to Brown, “[t]here came a point where she told me I was snitching and that he wouldn’t have done that to me if it was the other way around.” Brown assured Hayes he would help take care of the baby while defendant was in prison.

Defense counsel further probed as to why Brown had kept the text messages secret and had not divulged them to the police. When asked if he had saved the text messages, Brown stated that he was not sure. Brown found all the saved text messages and, during the lunch break, the judge and lawyers went over them. The court found some of text messages relevant, and others, irrelevant. The court then informed the jury, “So we’re going to recall Mr. Brown for a limited purpose of going over some of the information in these text messages as counsel views them, that they wanted to put them in, and I have at least ruled that they are relevant in the sense that you should at least listen to them and ultimately do with them as you deem appropriate.”

The prosecution thereafter recalled Brown to testify to their contents. In one text message, Hayes wrote: “Well, the man that you picked out of the lineup is my son’s dad. You sent him to jail two weeks before our baby was born. You took everything away from us. My son was born underdeveloped with a lot of medical problems, so my boyfriend can’t be there for a sick baby, and I can’t even go back to work because it’s just me to take care of my son’s medical needs. They want to give Tino — that means my son grows up without his dad. So I just thought you should know what you did to me and my family, and had it been the other way around, Tino wouldn’t have gone out like no snitch. What you did was wrong. Good night.”

Brown suggested that they end their conversation. Sometime later, Hayes apologized, again by text message. The messages read: “I’m sorry for everything I said to you before,” and “you didn’t ruin my family. He ruined us himself. I was just too shortsighted and lonely to realize that. I’m just not making excuses for him anymore. He did what he did and it was wrong, just like you said,” and “instead of showing concern, he changed the subject and asked me to lie and tell you that you must have recognized him from when he would come to Sac State to see me and to make sure you don’t testify because they are getting ready for trial.” Defense counsel registered his objections to the admissibility of all of these text messages.

Later during the trial, the prosecutor wanted to recall Brown to expand on the content of one of the text messages. The court denied the prosecutor’s request.
On appeal, defendant challenges the admissibility of the text messages on four grounds: lack of foundation, hearsay, more prejudicial than probative, and an ineffective limiting instruction. Evidentiary rulings are reviewed for an abuse of discretion. (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

Defendant first contends the prosecution failed to introduce a sufficient foundation to authenticate the text messages. He complains the prosecution did not call Hayes to testify that she wrote the texts and insists that “in a technological era where impersonation is often a simple task,” the admissibility of text messages raises troubling concerns about authenticity, thereby impinging on his right to due process and a fair trial. We turn to well established rules of authentication and defer to the trial court’s broad exercise of discretion. (*In re K.B.* (2015) 238 Cal.App.4th 989, 995.)

While the scope of the trial court’s discretion is exceedingly broad, the scope of the foundational question presented is quite narrow. “The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. ‘As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document’s weight as evidence, not its admissibility.’ ” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.)

“Importantly, ‘the fact that the judge permits [a] writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic.’ [Citation.] Thus, while all writings must be authenticated before they are received into evidence ([Evid. Code, § 1401], the proponent’s burden of producing evidence to show authenticity ([Evid. Code, § 1400]) is met ‘when sufficient evidence has been produced to sustain a finding that the document is what it purports to be. [Citation.]’ [Citation.] The author’s testimony is not required to authenticate a document ([Evid. Code, §§ 1411]; instead, its authenticity may be established by the contents of the writing ([Evid. Code, §§ 1421] or by other means ([Evid. Code, § 1410] no restriction on the ‘means by which a writing may be authenticated’)).” (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434-1435.)

Brown testified that screenshots of his phone showed “CSUS, Sara.” He identified an exhibit depicting screen shots of their text messages on his phone. He also described the content of their texts in his testimony, content which supported the trial court’s exercise of discretion in finding a sufficient foundation for admissibility. There was no abuse of discretion in admitting the text messages for the jury to ultimately decide on their authenticity.

Defendant also contends the text messages are inadmissible hearsay. Brown’s texts do not constitute hearsay because he testified at trial and authored his own text messages. (*Evid. Code, § 1200, subd. (a).*) The text messages from Hayes were not admitted for the truth of the matters asserted but to rehabilitate Brown’s testimony on redirect. On cross-examination, defense counsel insinuated that Brown had hopes of starting a romantic relationship with Hayes, thereby establishing a motive for misidentifying her boyfriend as the shooter and thereby removing him from the scene. Without understanding the stream of text messages to provide context, the cross-examination cast doubt on Brown’s credibility as an eyewitness. Thus, the trial court did not abuse its discretion by admitting the text messages for the permissible nonhearsay purpose of rehabilitating Brown’s credibility. The fact the court may have also admitted the evidence on erroneous grounds is inconsequential because there was a legitimate basis for admitting the evidence. (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

Even if the evidence surmounts the authentication and hearsay obstacles, defendant maintains the trial court abused its discretion by allowing evidence that was substantially more prejudicial than probative and, therefore, violated Evidence Code section 352 and his right to due process. He argues that Hayes’ representations that defendant had asked her to lie, that he was present at the party, and that he had ruined her family were unduly prejudicial, particularly because she did not testify and he did not have the opportunity to cross-examine her.

But defendant forgets that he opened the door to the admission of the text messages when, during cross-examination, he impugned Brown’s credibility by creating the impression Brown had something to hide given his secret text messaging with Hayes. As previously discussed, the text messages were admitted to rehabilitate his credibility. The trial court certainly did not abuse its discretion by allowing the admission of the text messages and the questioning of Brown about them on redirect to provide the jury with the whole story and not the misleading impression defense counsel had generated during cross-examination.

Lastly, defendant contends the limiting instruction was useless. During the prosecutor’s closing argument, defense counsel objected and the trial court admonished the jury that the texts were not admitted for their truth. Defendant argues the limiting instruction was given too late, and because it contradicted an earlier instruction, it was ineffectual. It is true that the court initially, after a laborious process of determining which texts were relevant and which were not, told the jurors they could “do with them as you deem appropriate.” We do not, however, believe the earlier comment pertaining to relevancy contaminated the court’s later, careful admonition that the text messages were not admitted for their truth. The messages themselves were admissible as discussed *ante*, were not unduly prejudicial, and the limiting instruction properly guided the jury not to consider them for the truth of their comments. There was no abuse of discretion.
IV

Prosecutorial Misconduct

Defendant accuses the prosecutor of undermining the presumption of innocence, misstating the reasonable doubt standard, disparaging the defense function, and mischaracterizing the purpose for which the text messages were admitted during closing argument. The arguments, in defendant’s view, constitute prosecutorial misconduct. He further argues that his lawyer and the court let him down as well; his lawyer by failing to object to the improper argument except to the prosecutor’s remarks about the text messages, a dereliction of duty that deprived him of his constitutional right to competent counsel, and the trial court by denying his motion for a new trial based on the improper argument about the text messages. We find nothing deceptive or reprehensible in the closing argument and nothing so egregious it rendered the trial fundamentally unfair. As a result, his lawyer had no reason to object and the trial court properly denied the motion for a new trial.

Under federal jurisprudence, a prosecutor’s misconduct constitutes a deprivation of due process when the pattern of conduct is so egregious that it infects the trial with unfairness. (People v. Bennett (2009) 45 Cal.4th 577, 594-595.) Under state jurisprudence, the misconduct must involve the use of deceptive or reprehensible methods to persuade the court or the jury. (People v. Cash (2002) 28 Cal.4th 703, 733.) When the alleged misconduct involves argument to the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (People v. Berryman (1993) 6 Cal.4th 1048, 1072.)

Defendant first objects to the following argument by the prosecutor: “It’s time for him to take responsibility for what he did. Because the way our justice system works is this. When you’re accused of a crime, no matter how guilty you know you are, you have the right in our country to have 12 citizens from the community leave their job, leave their retirement and have to sit through a boring trial and hear the evidence. No matter how guilty you know you are. Every person in this country has that right. And you’ve given him that right. You’ve done that.”

Defendant contends it is reasonably likely that the jurors understood the prosecutor’s argument to mean the presumption of innocence is a farce, nothing more than a legal fiction. We disagree. The prosecutor said nothing to denigrate the presumption of innocence and no reasonable juror was likely to construe the argument in the manner defendant suggests. Based on the overwhelming evidence of guilt that the prosecutor had already laid out for the jury in meticulous detail including the five eyewitness identifications, defendant’s jailhouse telephone call during which he admitted shooting four people, and his recorded police interview during which he lied to the officer, the prosecutor assured the jurors that defendant had been accorded his fundamental right to a fair trial. The prosecutor emphasized that a criminal defendant has that right to a fair trial even if he knows he is guilty. This argument does not suggest defendant is not presumed innocent, only that he retains the right to a determination of his guilt or innocence by his peers even though he may be guilty. The argument is neither deceptive nor reprehensible.

Next defendant contends the prosecutor twice misstated the reasonable doubt standard, once during his initial closing argument and again during rebuttal. The prosecutor argued: “Rule number two, you cannot go back there and play devil’s advocate. This is not a game. This is a real life courtroom. You can’t go back there and start a sentence with ‘what if.’ You can’t go back there and say, ‘Hey, I feel that he’s guilty, but let’s just throw out this hypothetical.’ You are judges of facts. You base your decision on the facts that you have before you.”

During rebuttal, the argument spoke more directly about reasonable doubt. He explained: “Reasonable doubt. You already have the description of what reasonable doubt is. But I want to make sure we all know. It is not beyond all possible doubt. It is not I’m 100 percent sure that it happened.

“Because this is not Back to the Future. I can’t call Marty McFly and we get into a car and we all look down and see exactly what happened. This is not A Christmas Story where there’s Ebenezer Scrooge and we can have an angel taking us to the scene. We weren’t there. So reasonable doubt is I’m 100 percent sure it happened. That is not reasonable doubt.

“You can have doubt and still find someone guilty.”

We begin with the prosecutor’s explanation of reasonable doubt. Many courts have admonished prosecutors not to stray from the time-tested description of reasonable doubt embodied in the standardized jury instructions. (People v. Centeno (2014) 60 Cal.4th 659, 667; People v. Medina (1995) 11 Cal.4th 694, 744-745; People v. Johnson (2004) 119 Cal. App.4th 976, 985-986.) Here the prosecutor reminded the jurors they had been given such an instruction. CALCRIM No. 220 states: “The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.” The prosecutor then attempted to paraphrase CALCRIM No. 220 that the evidence need not eliminate all possible doubt, which is an accurate statement of the law.

But defendant contends the prosecutor’s argument diluted his burden of proof by essentially suggesting the jurors did not need to be convinced defendant was guilty, and could convict him even if they had a reasonable doubt, because absolute certainty was impossible. Defendant’s argument is quite a stretch; one we do not believe reasonable jurors would make. Nothing in the argument or instructions hinted that the jurors did not need to be convinced that defendant was guilty. To the contrary, they were properly instructed on the prosecution’s burden of proof, the elements of the offense, and, most importantly, that the instructions prevailed over any contradictory comments by the attorneys. The prosecutor’s reminder, consistent with CALCRIM No. 220, that the evidence need not eliminate all possible doubt, did not
mean they could find defendant guilty even if they had a reasonable doubt. Defendant’s contention to the contrary is unreasonable.

The prosecutor’s initial closing argument, in context, is even more innocuous. At the outset, he attempted to establish some basic ground rules for the jury to follow. The first rule, the prosecutor argued to the jury, was that they alone were the arbiters of the facts and the facts determined guilt or innocence. It is the prosecutor’s second rule that has come under fire. Again the emphasis was on the jury’s essential role as fact finder and he instructed the jurors to base their decision on the facts they had before them. The second rule, insofar as it embodied this basic principle, is above reproach. Where the prosecutor’s argument may have been slightly misleading is when he told them not to play devil’s advocate, not to ask “what if” questions, and not to throw out hypotheticals. It is true, as defendant suggests, that the jurors should ask hard questions and it is entirely appropriate for them to consider hypothetical “what ifs.” But the thrust of the argument, and the reason for the prosecutor’s rules, was that the jury’s essential role was to decide what the facts were and those facts, not hypotheses or personal opinions, were determinative of guilt or innocence. In this context, we conclude the argument does not constitute deceptive or reprehensible conduct nor infect the trial with fundamental unfairness. At its worse, it might have been slightly confusing; but it does not come close to constituting prosecutorial error.

The prosecutor also argued that “[o]nly in the mind of a defense attorney will they say, if you didn’t say it when you’re in the hospital right after you got shot, then you can’t ever change your story. You can’t ever add anything. Because if you do, that means you’re lying. Only in the mind of a defense attorney would they say that.” Without citation to any authority, defendant analogizes the prosecutor’s disparagement of defense counsel to misstating the prosecution’s burden of proof. He contends that the prosecutor was asking the jury to disregard a legitimate argument because it came from an “‘illegitimate’ or ‘suspect’ source”—a defense attorney. Defendant is mistaken.

The prosecutor’s argument had absolutely nothing to do with the burden of proof and no reasonable juror would draw such an inference. Advocates are given a wide latitude in argument, and this latitude applies to the prosecution as well as to the defense. During cross-examination the defense attorney insinuated that the eyewitness accounts provided at the hospital were more reliable than the enhanced accounts they later provided. Thus, the prosecutor was mocking the notion that any subsequent change in their descriptions indicated they were lying by stating that “only in the mind of a defense attorney” would subsequent elaboration constitute deception. Closing argument is not for the fainthearted. We find nothing untoward in the prosecutor’s fiery argument and, certainly, no misconduct so serious as to jeopardize defendant’s right to due process.

Finally, we return to the text message issue now in the guise of prosecutorial misconduct. In this iteration, defendant contends the prosecutor improperly argued that the text messages were true. Read in context, his argument was ambiguous. His emphasis was the important fact that Brown had first testified to the existence and content of the text messages before discovering they had been saved on his phone and the content of the messages when introduced into evidence corroborated his earlier testimony. “True” in that sense meant the text messages actually existed and they were consistent with Brown’s testimony.

If, however, the argument is construed to mean the statements attributed to defendant in the messages were true, then the argument allows for the improper use of blatant hearsay. But, to his credit, defense counsel raised a timely and vehement objection to the argument and insisted the misconduct merited a new trial. The trial court gave a curative limiting instruction and denied the motion for a new trial. The limiting instruction clearly and decisively distinguished between the fact the existence of the text messages was true and corroborated Brown’s testimony and admonished the jury they were not to consider the truth of the hearsay evidence itself. In light of the following curative instruction there was no prosecutorial misconduct:

“Folks, what we were discussing, the text messages that you heard, I allowed them in mainly because when Jacarri Brown was on the witness stand and he was being cross-examined by [defense counsel], who asked him about his contact or lack thereof with the defendant and the defendant’s girlfriend, there was some discrepancy regarding whether or not or the extent of which he had those contacts.

“And over lunch apparently he found these other texts and I allowed you to hear that just in order then to show that what Jacarri Brown testified to when he was being cross-examined by [defense counsel] was, in fact, true. All right. That he did have these contacts. I did not allow that in for its truth; i.e., that the statements attributed to the defendant in these texts were actually uttered by the defendant.

“That was only -- they were only allowed in for the purpose of supporting Jacarri’s statement that he did have these exchanges with the defendant’s friend because he was being asked about that by [defense counsel]. And then he had some evidence to corroborate his answers that he did have these contacts and that’s why I allowed that in.

“But the statements that she attributes to the defendant at that time and that she said, those are all hearsay, so those were admitted for a limited purpose, not for its truth. I just want to make that clear.”

Defendant urges us to remand the case to the trial court because the court was under the misapprehension that it had given a previous limiting instruction to the jury when it had not. A remand is unnecessary. The instruction quoted above was given immediately after the defense objected to the prosecutor’s argument and promptly and properly rectified any misunderstanding the argument may have generated. We
conclude the argument did not constitute misconduct, the jury was properly instructed, and the defendant received a fair trial.

**DISPOSITION**

The gang enhancement and four life terms are stricken and the case is remanded for resentencing on counts one through four. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur: BLEASE, J., HULL, J.

Cite as 17 C.D.O.S. 12044

**ANTOINETTE ROSSETTA,** Plaintiff and Appellant,

v.

**CITIMORTGAGE, INC. et al.**, Defendants and Respondents.

No. C078916

In The Court of Appeal of the State of California
Third Appellate District
(Nevada)
(Super. Ct. No. CU14-080227)
APPEAL from a judgment of the Superior Court of Nevada County, Thomas M. Anderson, Judge. Affirmed in part and reversed in part.
Filed December 18, 2017

**CERTIFIED FOR PARTIAL PUBLICATION***

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion, with the exception of parts A, B, C, D, E, G, and H of the discussion, is certified for publication.

**COUNSEL**

United Law Center, Danny A. Barak and Jonathan A. Sanders for Plaintiff and Appellant.
Aldridge Pite, Duncan Peterson, Christopher L. Peterson, Danielle M. Graham and Cuong M. Nguyen for Defendants and Respondents.

**OPINION**

Plaintiff Antoinette Rossetta appeals from a judgment dismissing her second amended complaint after the trial court sustained a demurrer by defendants CitiMortgage, Inc. (CitiMortgage) and U.S. Bank National Association as Trustee for Citicorp Residential Trust Series 2006-1 (2006-1 Trust).

The complaint asserts causes of action for intentional misrepresentation, negligent misrepresentation, breach of contract, promissory estoppel, negligence, intentional infliction of emotional distress, and unlawful business practices in violation of the Unfair Competition Law arising from loan modification negotiations spanning more than two years. Rossetta also appeals from the trial court’s dismissal of a cause of action for conversion that appeared in an earlier iteration of the complaint to which CitiMortgage and the 2006-1 Trust

1. Unless otherwise indicated, all subsequent references to the “complaint,” are to the second amended complaint filed on August 11, 2014.
(collectively, CitiMortgage, unless otherwise indicated) also successfully demurred.

We conclude (1) the trial court erred in sustaining the demurrer to the causes of action for negligence and violations of the Unfair Competition Law, (2) the trial court properly sustained the demurrer to the causes of action for intentional misrepresentation and promissory estoppel, but should have granted leave to amend to give Rossetta an opportunity to state a viable cause of action based on an alleged oral promise to provide her with a Trial Period Plan (TPP) under the Home Affordable Mortgage Program (HAMP) in April 2012, and (3) the trial court properly sustained the demurrer to the causes of action for negligent misrepresentation, breach of contract, intentional infliction of emotional distress and conversion without leave to amend. Accordingly, we affirm in part and reverse in part.

I. BACKGROUND

A. The Loan and Deed of Trust

Rossetta purchased a home in Grass Valley in 2001. She refinanced the purchase through American Brokers Conduit (ABC) in 2005. The new loan was secured by a deed of trust designating Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary acting as the nominee for ABC and ABC’s successors and assigns. The loan was subsequently sold to CitiMortgage.

Although CitiMortgage started accepting Rossetta’s mortgage payments in March 2006, MERS did not record an assignment of deed of trust until October 12, 2012. As we shall discuss, Rossetta challenges the assignment of the deed of trust.

B. Rossetta Defaults

Rossetta was laid off from her job on or about March 1, 2010. Approximately two weeks later, she learned she had a recurrence of breast cancer. Rossetta made complete payments on her mortgage during this difficult period using severance pay from her former job. In May 2010, Rossetta contacted CitiMortgage to discuss other options. According to the complaint, Rossetta “was told that [CitiMortgage] would be unable to assist her unless she was at least three months delinquent in her monthly mortgage payments, and thus in default.”

Rossetta went into default in June 2010. Around the same time, she executed a power of attorney authorizing her fiancé, Brian Roat, to act on her behalf.

C. Rossetta Attempts to Secure a Loan Modification

Rossetta or Roat telephoned CitiMortgage in July 2010. Either Rossetta or Roat spoke with a CitiMortgage representative named Brian (last name unknown) or Charlie Welch. The representative told Rossetta or Roat that “nothing could be done to assist [Rossetta] with a HAMP loan modification until she was three months delinquent and therefore in [default].” On July 23, 2010, Rossetta received a letter from CitiMortgage stating she was not eligible for a HAMP modification because “‘default is not imminent.’ ” By then, however, Rossetta was already in default, and had even received correspondence to this effect from CitiMortgage.

Roat telephoned CitiMortgage again on August 1, 2010. A customer service representative collected basic information from Roat and informed him that Rossetta may now qualify for a HAMP modification. The following day, Rossetta received an electronic communication from CitiMortgage regarding a permanent loan modification. The complaint describes the communication as an email, and attaches a copy as Exhibit B.

The complaint alleges: “[Rossetta] has attached as Exhibit ‘B’ an email from [CitiMortgage] stating the specific terms of the permanent loan modification agreement.” Elsewhere, the complaint alleges: “[O]n August 2, 2014[,] [CitiMortgage] emailed [Rossetta] that [the terms of the permanent loan modification were as follows: (1) 480 month term; (2) .02% interest rate; (3) a principal reduction in the amount of $95,477.81. (See Exhibit ‘B’). The email also stated that the loan modification documents were being sent to [Rossetta],”

As we shall discuss, Exhibit B does not support Rossetta’s characterization.

On August 3, 2010, Rossetta spoke with Helen, a CitiMortgage representative who declined to give her last name. The complaint is ambiguous as to what, precisely, Helen said. At one point, the complaint suggests that Helen told Rossetta “she was approved for a trial plan modification and a permanent loan modification upon successful completion of the trial plan payments.” Later, the complaint suggests that Helen told Rossetta “she would be approved for a permanent loan medication [sic] upon completion of the trial modification plan payments/repayment plan payments.” Later still, the complaint suggests that Helen told Rossetta “she was approved for a HAMP loan modification.”

On August 9, 2010, CitiMortgage sent Rossetta a letter stating, in part: “Your request for a repayment plan has been approved.” The letter attaches an agreement contemplating

2. ABC is not a party to this appeal.

3. “MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records.” (Citation.) Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. (Citation.) Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as “nominees” for the lender, and granted the authority to exercise legal rights of the lender.” (Saterbak v. JPMorgan Chase, N.A. (2016) 245 Cal.App.4th 808, 816, fn. 6.)

4. The operative complaint alleges that CitiMortgage was “the servicer of the Subject Loan.”

5. We describe the relevant features of HAMP below.
three monthly payments of $1,209 for September, October and November 2010. Rossetta agreed to the terms of the repayment plan on August 15, 2010. Neither the letter nor accompanying agreement makes any mention of HAMP or any other loan modification program. Nevertheless, the complaint alleges that Rossetta believed she would receive a permanent loan modification upon completion of the repayment plan.

Rossetta made the three monthly payments contemplated by the repayment plan. She did not receive a permanent loan modification. When Rossetta approached CitiMortgage, she was told to continue making monthly payments of $1,209.

On January 3, 2011, Rossetta received a letter from CitiMortgage stating that her application for a HAMP modification had been denied for failure to provide necessary documentation. Rossetta alleges she provided all requested documents. She also alleges that CitiMortgage lost or mishandled her loan modification application, causing significant delays and increasing fees and penalties.

Around this time, Roat spoke with an unidentified CitiMortgage representative and learned that Rossetta’s application was denied because she failed to produce a statement from the State of California declaring her permanently disabled. Rossetta contends the State of California does not issue such a statement, adding that “[CitiMortgage] requested a nonexistent document to further delay the process and frustrate [Rossetta].”

Rossetta entered into forbearance agreements with CitiMortgage in January and February 2011. She applied for another HAMP modification in July 2011. Rossetta alleges that CitiMortgage requested the same documents over and over again, confirming her suspicion that application materials had been misplaced or mishandled. Among other things, Rossetta notes that CitiMortgage demanded she produce her entire loan application on two separate occasions, requesting duplicates of other previously submitted documents by fax. Rossetta alleges she promptly responded to all such requests. She further alleges that CitiMortgage lost or mishandled her documents, delaying the loan modification process and causing her harm.

Rossetta’s personal circumstances changed during the pendency of the application. Specifically, she stopped receiving disability insurance and began receiving unemployment insurance. As a result, CitiMortgage demanded that Rossetta submit a new application and supporting documents. Rossetta complied and submitted the requested documents on October 12, 2011.

On November 1, 2011, Rossetta returned to work at a reduced salary. Once again, the change in circumstances prompted a demand for additional documents. Once again, Rossetta complied.

On January 18, 2012, Rossetta received a letter stating that her application for a HAMP modification had been denied. This time, Rossetta was told that she had an excessive forbearance amount ($33,000) on her account. Rossetta alleges the forbearance amount would have been significantly less had she been given a permanent loan modification “over a year earlier as had been represented.”

Rossetta continued to seek mortgage relief. On April 6, 2012, Roat spoke with CitiMortgage representative Konnor Sincox. According to the complaint, Sincox told Roat that Rossetta “was approved for another trial loan modification and that upon completion, [she] would receive a permanent loan modification with a 2% fixed interest rate for five years and a principal reduction.” Elsewhere, the complaint alleges that Sincox represented that Rossetta “had been approved for another trial loan modification and that she would receive it as soon as the loan modification application and required documents were received from [her].” Although Sincox did not specifically say so, Rossetta believed she would be receiving a trial period plan under HAMP (HAMP TPP), as she had previously been under consideration for a HAMP modification. According to the complaint, “Sincos indicated that the loan modification documentation would not be provided in advance, but rather, would come after the trial payment period.”

Following Roat’s conversation with Sincox, Rossetta once again sent the requested documents. Despite Roat’s conversation with Sincox, CitiMortgage never sent Rossetta a HAMP TPP or permanent loan modification agreement. According to the complaint, Rossetta and Roat continued their effort to obtain a permanent loan modification for the rest of the year, without success. Rossetta filed for bankruptcy protection in December 2012.

D. Assignment of Deed of Trust

On October 12, 2012, MERS assigned its interest in the deed of trust to CitiMortgage. Approximately one year later, Rossetta commissioned a “forensic audit” of the loan. According to the complaint, “[t]he audit revealed that the Assignment of Deed of Trust to [defendant CitiMortgage] was invalid as void because the [2006-1 Trust] had a closing date of August 30, 2006.” Although the first amended complaint and second amended complaint identify the 2006-1 Trust as a “purported beneficiary of the [s]ubject [l]oan,” neither pleading alleges that CitiMortgage or any other entity ever attempted to assign the loan to the 2006-1 Trust.

CitiMortgage assigned the deed of trust to U.S Bank National Association, as Trustee for Prof-2013-M4 REMIC Trust I (M4 REMIC Trust 1) on April 1, 2012. Rossetta challenges the assignment from CitiMortgage to the M4 REMIC Trust 1 on the sole ground that the earlier assignment from MERS to CitiMortgage was void.

E. The Instant Action

Rossetta commenced this action against CitiMortgage and its successor in interest, Fay Servicing, LLC (Fay) on January 27, 2014. Rossetta filed a first amended complaint
on April 24, 2014. The first amended complaint asserted causes of action for intentional misrepresentation, negligent misrepresentation, breach of contract, promissory estoppel, negligence, intentional infliction of emotional distress, conversion, violations of the Unfair Competition Law and conspiracy. The first amended complaint also sought declaratory relief. CitiMortgage demurred.

The trial court sustained the demurrer without leave to amend as to the cause of action for conversion and request for declaratory relief, both of which were based on the allegation that the assignment of the deed of trust to CitiMortgage was void. The trial court sustained the demurrer to Rossetta’s remaining causes of action with leave to amend, observing: “[T]he tenor of the demurrer is not so much what the pleading says, as what it does not. Plaintiff’s counsel, who successfully prevailed in Bushell v. JPMorgan Chase Bank, N.A. (2013) 220 Cal.App.4th 915 [(Bushell)], cited by them in their opposition, is certainly conversant about the requirements of pleading a similar case such as this one. Notwithstanding, the allegations here fail to properly differentiate between and/or connect the trial payment plans and forbearance agreements alleged with HAMP modification, rendering analysis incomplete because the parties and court cannot determine if, for example, the Bushell / West [v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780 (West)] line of cases applies (HAMP cases) or whether the analysis must be done without reference to HAMP under traditional common law principles. As argued by the defendants, forbearance plans do not create a binding contract for modification. Of course, this Court cannot determine whether such obscurity is intentional or inadvertent. However, in permitting amendment, the Court can state its expectation that plaintiff clearly set forth the context of each representation and agreement in any further pleading, or risk suffering the conclusion that further amendment would be pointless.” (Italics added.)

Rossetta filed the operative complaint on August 11, 2014. As noted, the complaint asserts causes of action for intentional misrepresentation, negligent misrepresentation, breach of contract, promissory estoppel, negligence, intentional infliction of emotional distress, violations of the Unfair Competition Law, and conspiracy. CitiMortgage demurred to the complaint on September 15, 2014. The trial court sustained the demurrer without leave to amend. This appeal followed.

II. DISCUSSION

F. Negligence

Next, the complaint alleges CitiMortgage negligently mishandled Rossetta’s loan modification applications. The elements of a cause of action for negligence are (1) the existence of a duty to exercise due care, (2) breach of that duty, (3) causation, and (4) damages. (See Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 500.) Whether a duty of care exists is a question of law to be decided on a case-by-case basis. (Lueras, supra, 221 Cal.App.4th at p. 62.)

As a “general rule,” lenders do not owe borrowers a duty of care unless their involvement in a transaction goes beyond their “conventional role as a mere lender of money.” (Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal.App.3d 1089, 1096 (Nymark).) “Even when the lender is acting as a conventional lender,” however, “the no-duty rule is only a general rule.” (Jolley, supra, 213 Cal.App.4th at p. 901.) Thus, “Nymark does not support the sweeping conclusion that a lender never owes a duty of care to a borrower.” (Ibid.)

In order to determine whether a duty of care exists, courts balance the Biakanja factors, “among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant’s conduct and the injury suffered, [5] the moral blame attached to the defendant’s conduct, and [6] the policy of preventing future harm.” (Nymark, supra, 231 Cal.App.3d at p. 1098, citing Biakanja, supra, 49 Cal.2d at p. 650.)

California courts of appeal have not settled on a uniform application of the Biakanja factors in cases that involve a loan modification. Although lenders have no duty to offer or approve a loan modification (Lueras, supra, 221 Cal.App.4th at p. 68; Jolley, supra, 213 Cal.App.4th at p. 903), courts are divided on the question of whether accepting documents for a loan modification is within the scope of a lender’s conventional role as a mere lender of money, or whether, and under what circumstances, it can give rise to a duty of care with respect to the processing of the loan modification application. (Compare Lueras, supra, 221 Cal.App.4th at p. 67 [residential loan modification is a traditional lending activity, which does not give rise to a duty of care] with Alvarez v. BAC Home Loans Servicing, L.P. (2014) 228 Cal.App.4th 941, 948 (Alvarez) [servicer has no general duty to offer a loan modification, but a duty may arise when the servicer agrees to consider the borrower’s loan modification application], Daniels, supra, 246 Cal.App.4th at pp. 1180-1183 [following Alvarez and applying Biakanja factors to conclude that lender owed borrowers a duty of care in the loan modification process] and Jolley, supra, at p. 906 [commercial lending creates a special relationship, thereby creating a duty of care].)

Federal district courts in California have also reached different results. (Compare, e.g., Marques v. Wells Fargo Bank, N.A. (N.D. Cal. Oct. 13, 2016, No. 16-cv-03973-YGR) 2016)

7. “Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.” (Applied Equipment Corp. v. Litton Sau- di Arabia Ltd. (1994) 7 Cal.4th 503, 510-511.)

8. Biakanja v. Irving (1958) 49 Cal.2d 647 (Biakanja)
in a position creating a need for a loan modification, then no moral blame would be attached to the lender’s conduct.” (Lueras, supra, 221 Cal.App.4th at p. 67.) Accordingly, the court concluded the Biakanja factors weighed against the imposition of a common law duty of care. (Ibid.) However, the court recognized that “a lender does owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale.” (Id. at p. 68.)

Rossetta contends the trial court erred in relying on Lueras, claiming that Alvarez is the better reasoned decision. In Alvarez, the plaintiffs alleged the lender breached its duty of care by failing to review their loan modification applications in a timely manner, foreclosing on their properties while they were under consideration for a HAMP modification, misplacing their applications, and mishandling them by relying on incorrect salary information. (Alvarez, supra, 228 Cal.App.4th at p. 945.) The Court of Appeal for the First District, Division Three, acknowledged the general rule, but observed that, “‘Nymark and the cases cited therein do not purport to state a legal principle that a lender can never be held liable for negligence in its handling of a loan transaction within its conventional role as a lender of money.’” (Id. at p. 946, citing Jolley, supra, 213 Cal.App.4th at p. 902.)

Applying the Biakanja factors, the court found: “The transaction was intended to affect the plaintiffs and it was entirely foreseeable that failing to timely and carefully process the loan modification applications could result in significant harm to the applicants.” (Alvarez, supra, 228 Cal.App.4th at p. 948.) With regard to the connection between the defendant’s conduct and the injury suffered, the court found: “‘Although there was no guarantee the modification would be granted had the loan been properly processed, the mishandling of the documents deprived [the plaintiffs] of the possibility of obtaining the requested relief.’” (Id. at p. 949.)

With respect to blameworthiness, the court found: “The borrower’s lack of bargaining power, coupled with conflicts of interest that exist in the modern loan servicing industry, provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification.” (Ibid.) Finally, the court found that the policy of preventing future harm strongly favored the imposition of a duty of care after the California Homeowner Bill of Rights was effectuated on January 1, 2013. (Id. at p. 950.) Accordingly, the court concluded that when a lender agrees to consider a borrower’s application for a loan modification, the Biakanja factors weigh in favor of imposing a duty of care. (Id. at p. 948.)

Pending guidance from our Supreme Court, we are persuaded by the reasoning in Alvarez. We find support for our conclusion in Meixner v. Wells Fargo Bank, N.A. (E.D. Cal. 2015) 101 F.Supp.3d 938, in which the federal district court, addressing the split in authority, observed: “Alvarez identified an important distinction not addressed by the Lueras reasoning—that the relationship differs between the lender
and borrower at the time the borrower first obtained a loan versus the time the loan is modified. The parties are no longer in an arm’s length transaction and thus should not be treated as such. While a loan modification is traditional lending, the parties are now in an established relationship. This relationship vastly differs from the one which exists when a borrower is seeking a loan from a lender because the borrower may seek a different lender if he does not like the terms of the loan.” (Id. at p. 954.)

Based on the foregoing, we are convinced that a borrower and lender enter into a new phase of their relationship when they voluntarily undertake to renegotiate a loan, one in which the lender usually has greater bargaining power and fewer incentives to exercise care. (See Alvarez, supra, 228 Cal. App.4th at p. 949 [during loan modification negotiations, “borrowers are captive, with no choice of servicer, little information, and virtually no bargaining power . . . [while] servicers may actually have positive incentives to misinform and under-inform borrowers”].) We do not hold that a duty of care arises merely because a lender receives or considers a loan modification application. Nor do we hold, as the concurring opinion suggests, that a duty of care may arise solely by virtue of the parties’ changing relationship. Rather, we conclude that the change in the parties’ relationship can and should be factored into our application of the Biakanja factors. To this end, we find it significant that CitiMortgage allegedly refused to consider Rossetta’s loan modification application until she was three months behind in her mortgage payments. By making default a condition of being considered for a loan modification, CitiMortgage did more than simply enhance its already overwhelming bargaining power; it arguably directed Rossetta’s behavior in a way that potentially exceeds the role of a conventional lender. (See, e.g., Gerber v. Wells Fargo Bank, N.A. (S.D. Cal. July 31, 2013, No. 13-CV-614-MMA (DHB)) 2013 U.S. Dist. LEXIS 107744, *32-33.) At a minimum, the alleged policy of making default a condition of being considered for a loan modification informs our application of the Biakanja factors (see Ko v. Bank of America, N.A. (C.D. Cal. Oct. 19, 2015, No. SACV 15-00770-CJC (DFMx)) 2015 U.S. Dist. LEXIS 142040, *28-99 (Ko)), to which we now turn.

With respect to the first factor, the loan modification transaction was plainly intended to affect Rossetta. CitiMortgage’s decision on her application for a modification plan would likely determine whether or not Rossetta could keep her house. (Alvarez, supra, 228 Cal.App.4th at p. 948; Daniels, supra, 246 Cal.App.4th at p. 1182.) We conclude the first Biakanja factor weighs in favor of finding a duty of care.

With respect to the second factor, the potential harm to Rossetta was readily foreseeable. “Although there was no guarantee the modification would be granted had the loan been properly processed, the mishandling of the documents deprived Plaintiff of the possibility of obtaining the requested relief.” (Alvarez, supra, 228 Cal.App.4th at p. 948, citing Garcia v. Ocwen Loan Servicing, LLC (N.D. Cal. May 10, 2010, No. C 10-0290 PVT) 2010 U.S. Dist. LEXIS 45375, *9.) Furthermore, by making default a condition of being considered for a loan modification, CitiMortgage increased the likelihood that Rossetta would incur additional expenses of default during the lengthy loan modification process, thereby increasing the foreseeable potential harm. (Ko, supra, 2015 U.S. Dist. LEXIS 142040, *29-30 [“By creating an inducement for plaintiffs to default (and incur associated fees and interest payments) for there to be even a possibility of a modification, [the lender] has increased the foreseeability that a borrower would be harmed by the additional expenses of default incurred during a negligent implementation of the modification”].) We conclude the second Biakanja factor weighs in favor of finding a duty of care.

With respect to the third factor, Rossetta alleges she suffered injury in the form of damage to her credit, increased interest and arrears, and foregone opportunities to pursue unspecified other remedies. These allegations adequately establish injury at this stage of the proceedings. (See Daniels, supra, 246 Cal.App.4th at p. 1182.) We conclude the third Biakanja factor weighs in favor of finding a duty of care.

We have difficulty evaluating the fourth factor—the closeness of the connection between CitiMortgage’s conduct and Rossetta’s injuries—on the pleadings. On the one hand, the complaint alleges Rossetta’s default was “imminent,” suggesting she would have suffered damage to her credit and increased interest and arrears regardless of CitiMortgage’s conduct. On the other hand, the complaint alleges Rossetta was current on her mortgage payments through May 2010, when she learned she could not be considered for a loan modification unless she defaulted. We do not know when Rossetta would have defaulted if left to her own devices, and “it is very likely that a borrower induced to default before it becomes absolutely necessary suffers associated injuries involving increased fees and an increased possibility of losing the home.” (Ko, supra, 2015 U.S. Dist. LEXIS 142040, *30.) Construing the complaint liberally, as we must, we conclude the fourth Biakanja factor weighs in favor of finding a duty of care.

With respect to the fifth factor, we agree with the Alvarez court’s analysis. Although the court was unable to assess the lender’s blameworthiness on the pleadings, the court nevertheless found it “highly relevant” that the borrowers’ “ability to protect [their] own interests in the loan modification process [was] practically nil” and the bank held “all the cards.” (Alvarez, supra, 228 Cal.App.4th at p. 949.) There, as here, the borrowers were “captive, with no choice of servicer, little information, and virtually no bargaining power.” (Ibid.) Following Alvarez, we conclude the borrower’s lack of bargaining power, coupled with the lender’s alleged incentive to unnecessarily prolong the loan modification process, “provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification.” (Ibid.) Additionally, we note that “the moral blame attached to the defendant’s conduct . . . is heightened when the defendant first induces a
borrower to take a vulnerable position by defaulting and then subjects the borrower’s loan application to a review process that does not meet the standard of ordinary care.” (Ko, supra, 2015 U.S. Dist. LEXIS 142040, *30.) Accordingly, we conclude the fifth Biakanja factor weighs in favor of finding a duty of care.

Finally, with respect to the sixth factor, the legislature has enacted the California Homeowner Bill of Rights, which “demonstrates ‘a rising trend to require lenders to deal reasonably with borrowers in default to try to effectuate a workable loan modification’ ” and “‘expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure, so that homes will not be lost.’” (Alvarez, supra, 228 Cal.App.4th at p. 950; see also Civ. Code, § 2923.6 [encouraging lenders to offer loan modifications to borrowers in appropriate circumstances].) Imposing a duty of care in the particular circumstances of this case would serve the policies underlying these legislative preferences, and prevent future harm to borrowers, by giving lenders an incentive to handle loan modification applications in a timely and responsible manner. (Alvarez, supra, at p. 950.) We conclude the sixth Biakanja factor weighs in favor of finding a duty of care.

The complaint alleges CitiMortgage acted unreasonably by dragging Rossetta through a seemingly endless application process, requiring her to submit the same documents over and over again (including a “nonexistent” statement of permanent disability income), losing or mishandling documents, misstating the status of various applications, and ultimately denying them for bogus reasons. Having carefully weighed the Biakanja factors, we conclude these allegations adequately allege a cause of action for negligence that is sufficient to survive demurrer.

Relying on Civil Code section 2923.6, subdivision (g), CitiMortgage argues: “[CitiMortgage] was under no duty to review further loan modification application [sic] from [Rossetta] after it denied [Rossetta] for a HAMP loan modification in writing in 2012, which [Rossetta] failed to appeal.” We assume without deciding that Civil Code section 2923.6, subdivision (g), offers an affirmative defense to negligence in loan modification cases. Even so assuming, facts necessary to establish the affirmative defense do not appear in the complaint. CitiMortgage’s contention that Rossetta failed to appeal from the denial of her loan modification applications suffers from the same defect. Whatever the merits of these arguments, they are inappropriate for resolution at the demurrer stage. (Noguera v. North Monterey County Unified Sch. Dist. (1980) 106 Cal.App.3d 64, 66 [matters outside the complaint will not be considered in evaluating a demurrer]; see also Matoes v. Wagoner (1905) 147 Cal. 739, 744 [where only part of the facts necessary to an affirmative defense appear in a complaint, the complaint is not rendered vulnerable to a general demurrer].) We therefore conclude the trial court erred in sustaining the demurrer to Rossetta’s negligence cause of action.

I. Conversion

Finally, Rossetta contends the trial court erred in sustaining the demurrer to the cause of action for conversion in the first amended complaint. Rossetta’s conversion cause of action is based on the theory that the assignment of the deed of trust to CitiMortgage in October 2012 was invalid. The trial court correctly sustained the demurrer to Rossetta’s conversion cause of action.

“An essential step in the process of securitizing a loan is the transfer of the promissory note and deed of trust into a trust.” (Mendoza v. JPMorgan Chase Bank, N.A. (2016) 6 Cal.App.5th 802, 806.) The complaint implies that Rossetta’s claim for declaratory relief was “moot.” Without deciding whether this claim is properly characterized as moot, we accept Rossetta’s conversion cause of action.

The parties devote considerable attention to the question, left open by our Supreme Court’s recent opinion in Yvanova v. New Century Mortgage Co. (2016) 62 Cal.4th 919, as to whether a borrower has standing to bring a preemptive action challenging the validity of a deed of trust assignment.

9. Civil Code section 2923.6, subdivision (g), which has an effective date of January 1, 2013, provides: “In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower’s financial circumstances since the date of the borrower’s previous application and that change is documented by the borrower and submitted to the mortgage servicer.”

10. During oral argument, Rossetta’s counsel informed the court that the claim for declaratory relief was “moot.” Without deciding whether this claim is properly characterized as moot, we accept Rossetta’s representation that the claim has been abandoned.

11. “Mortgage-backed securities are created through a complex process known as ‘securitization.’ (See Levitin & Twomey, Mortgage Servicing (2011) 28 Yale J. on Reg. 1, 13 [‘a mortgage securitization transaction is extremely complex . . .’]). In simplified terms, ‘securitization’ is the process where (1) many loans are bundled together and transferred to a passive entity, such as a trust, and (2) the trust holds the loans and issues investment securities that are repaid from the mortgage payments made on the loans. [Citation.] Hence, the securities issued by the trust are ‘mortgage-backed.’” (Glaski v. Bank of America (2013) 218 Cal.App.4th 1079, 1082, fn. 1.)
to a foreclosing party. (Id. at pp. 924, 943 [holding that a borrower has standing to challenge a nonjudicial foreclosure based on errors in the assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust, but leaving open the question whether a borrower has standing in the pre-foreclosure context]; and compare Saterbak v. JPMorgan Chase Bank, N.A., supra, 245 Cal.App.4th at p. 815 [holding California law precludes borrowers from bringing preemptive actions to determine whether foreclosing parties have authority to foreclose because such actions ‘‘would result in the impermissible interjection of the courts into a nonjudicial scheme [i.e. nonjudicial foreclosures] enacted by the California Legislature’’] with Lundy v. Selene Finance, LP (N.D. Cal. Mar. 17, 2016, No. 15-cv-05676-JST) 2016 U.S. Dist. LEXIS 35547, *39-40 [predicting that the California Supreme Court would likely limit a bar on pre-foreclosure suits only to “plaintiffs who lack any ‘specific factual basis’ for bringing their claims.”]). We need not decide whether Rossetta has standing to challenge alleged deficiencies in the assignment of the deed of trust from MERS to the 2006-1 Trust because, on the face of the complaint, there was no such assignment. We therefore conclude the trial court properly sustained the demurrer to the cause of action for conversion without leave to amend.

III. DISPOSITION

The judgment of dismissal in favor of CitiMortgage is reversed. The order sustaining the demurrer is affirmed in part and reversed in part. The order is reversed as to the causes of action for negligence (fifth cause of action) and violations of the Unfair Competition Law (seventh cause of action). The trial court is directed to grant Rossetta leave to amend the causes of action for intentional misrepresentation (first cause of action) and promissory estoppel (fourth cause of action). In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

RENNER, J.

I concur: MURRAY, J.

Mauro, Acting P. J., Concurring.

I agree with the majority opinion in all respects except for part II. F. of the Discussion pertaining to negligence. As to that part, I concur in the ultimate conclusion—that Rossetta has stated a cause of action for negligence—but I write separately because I believe a lender’s mere receipt or review of a borrower’s loan modification application is not enough to create a changed relationship that may give rise to a tort duty of care. More is required to impose a tort duty on a lender.

Rossetta alleges in her second amended complaint that CitiMortgage negligently mishandled her loan modification applications. As the majority opinion explains, the elements of a cause of action for lender negligence begin with whether the lender had a duty to exercise due care. (See Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 500.) (Maj. opn., ante, at p. 31.)

This court has recognized the long-standing general rule that “a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” (Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal.App.3d 1089, 1096 (Nymark.).) In Nymark, this court explained: “ ‘Liability to a borrower for negligence arises only when the lender “actively participates” in the financed enterprise “beyond the domain of the usual money lender.” ’ [Citations.]” (Ibid., quoting Wagner v. Benson (1980) 101 Cal.App.3d 27, 35; see also Connor v. Great Western Sav. & Loan Assn. (1968) 69 Cal.2d 850, 864 (“Great Western became much more than a lender content to lend money at interest on the security of real property. It became an active participant in a home construction enterprise.”).) Although courts have since sought to clarify the Nymark holding (see, e.g., Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 901 (Jolley) [“the no-duty rule is only a general rule”]), there remains a recognition that something beyond the scope of conventional lending must occur to move a lender’s contractual relationship with the borrower into the realm of tort responsibility.

Based on Rossetta’s well-pleaded allegations, which we must accept as true in reviewing an order sustaining a demurrer without leave to amend (People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 300), I agree with the majority that CitiMortgage engaged in acts and omissions that went beyond the scope of conventional lending, thereby giving rise to a duty of due care in this case. But I do not agree that a lender’s mere receipt or review of a borrower’s loan modification application creates a changed relationship that may give rise to a tort duty of care. (Cf. Maj. opn., ante, at pp. 32 [“courts are divided on the question of whether accepting documents for a loan modification is within the scope of a lender’s conventional role as a mere lender of money, or whether, and under what circumstances, it can give rise to a duty of care with respect to the processing of the loan modification application.”]; 35 [describing the decision in Alvarez v. BAC Home Loans Servicing, L.P. (2014) 228 Cal. App.4th 941 to hold that “when a lender agrees to consider a borrower’s application for a loan modification, the Biakanja factors weigh in favor of imposing a duty of care”]; 35 [“we are persuaded by the reasoning in Alvarez.”]; 36 [“we are convinced that a borrower and lender enter into a new phase of their relationship when they voluntarily undertake to renegotiate a loan”]; [“we conclude that the change in the parties’ relationship can and should be factored into our application of the Biakanja factors.”]). Rather, I believe the lender’s willingness to receive or review a loan modification application is more like a nonbinding “invitation to treat” in contract law. As the majority acknowledges, the lender has no duty to offer or approve a loan modification (Lueras v. BAC Home Loans...

Here, however, Rosetta alleges CitiMortgage did more than merely receive or review her loan modification applications. She alleges CitiMortgage refused to consider her for a loan modification unless she was three months behind in her mortgage payments, required her to submit duplicate or non-existent documents, lost or mishandled her documents, and misstated the status of her applications, causing her damages. Under the circumstances, Rosetta states a cause of action for negligence.

MAURO, Acting P. J.
Proposed relator VIRGIL COTTER has requested leave to sue proposed defendants SANDRA MERAZ and KAYODE KADARA in quo warranto on the following questions:

1. Is Sandra Meraz unlawfully serving as a board trustee of the Deer Creek Storm Water District because she was appointed to fill a vacancy by the remaining members of the district board, rather than by the Tulare County Board of Supervisors?

2. Is Kayode Kadara unlawfully serving as a board trustee of the Deer Creek Storm Water District because he is not a “freeholder” of land within the district?

CONCLUSIONS

1. Leave to sue in quo warranto is GRANTED to determine whether Sandra Meraz is unlawfully serving as a board trustee of the Deer Creek Storm Water District because she was appointed to fill a vacancy by the remaining members of the district board, rather than by the Tulare County Board of Supervisors.

2. Leave to sue in quo warranto is DENIED to determine whether Kayode Kadara is unlawfully serving as a board trustee of the Deer Creek Storm Water District because he is not a “freeholder” of land within the district.

ANALYSIS

The Deer Creek Storm Water District is organized under the Storm Water District Act of 1909.1 A storm water district prevents and controls soil erosion, and protects the lands in the district from storm-water damage, by constructing dams, ditches, and dikes, by planting vegetation, and by keeping water in the soil.2 The District, which is located mostly in Tulare County, is governed by three board trustees, who are elected to four-year terms.3

Proposed relator Virgil Cotter requests permission to sue proposed defendants Sandra Meraz and Kayode Kadara to oust them as trustees of the District. Relator claims that the trustees’ appointment of Meraz to fill a vacancy on the District board was unlawful because only the Tulare County Board of Supervisors is authorized to make such an appointment. As to Kadara, Relator claims that he is not a “freeholder” of land within the District, and thus is ineligible to serve as trustee.

As we will discuss in more detail, we conclude that there is a substantial question of law as to whether Meraz was lawfully appointed to the District board, and that it would be in the public interest to have a judicial resolution of this question. On the other hand, as to Kadara, we conclude that although he may not yet be a “freeholder” of land within the District—because the county has not given final approval for splitting the seller’s land into two lots—it would not be in the public interest to allow a lawsuit to proceed against him under the circumstances.

Quo Warranto

Code of Civil Procedure section 803 provides:

“An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office . . . within this state.”

This process, known familiarly as quo warranto, is intended to protect the public interest by ensuring that the holder of a public office meets all necessary qualifications.5 The position of board trustee of a storm water district is a “public office” because it is: (1) a governmental position; (2) created or authorized by law; (3) with a continuing and permanent tenure; and (4) in which the incumbent performs a public function and exercises some sovereign powers of government.6

When a private party wishes to file a quo warranto action in the Superior Court, the party must first obtain the Attorney General’s permission.7 In deciding whether to permit a quo

---

warranto action to be filed, the Attorney General does not resolve the merits of the controversy, but rather determines whether the matter presents a substantial issue of fact or law warranting judicial resolution, and whether granting permission to file suit would serve the public interest. With these principles in mind, we consider the circumstances pertaining to Meraz and Kadara.

**Meraz**

We are informed that on October 15, 2016, a trustee of the Deer Creek Storm Water District resigned, leaving a vacancy. On or about October 31, 2016, the two remaining trustees appointed Meraz to fill the vacancy. We conclude that there is a substantial question of law as to whether the remaining trustees were authorized to fill the vacancy by appointment.

The parties direct our attention to two statutes bearing on this issue: Government Code section 1780, and Water Code Appendix section 13-6.

On one hand, Government Code section 1780 provides that, in a special district, the remaining members generally may make an appointment to fill any vacancy on their board. The statute states, “Notwithstanding any other provision of law, a vacancy in any elective office on the governing board of a special district, other than those specified in Section 1781, shall be filled pursuant to this section.” It further provides that “[t]he remaining members of the district board may fill the vacancy by appointment pursuant to subdivision (d) or by calling an election pursuant to subdivision (e).” Subdivisions (d) and (e) set a time limit of 60 days for the remaining board members to make an appointment or to call for an election. In this case, the remaining trustees purported to appoint Defendant Meraz to fill the vacancy under section 1780.

On the other hand, Water Code Appendix section 13-6, which specifically governs storm water districts, provides that the board of supervisors—not the remaining trustees—shall make any appointment to fill a vacancy on a district board. Section 13-6 states, “Should a vacancy occur or be found to exist in the office of trustee, the board of trustees shall submit to the board of supervisors a list of suggested appointees, and the board of supervisors shall fill the vacancy by appointment. If the board of supervisors does not make the appointment from the list submitted by the board of trustees, it shall make a finding stating the reasons for its selection.”

To make sense of these apparently contradictory statutes, we apply well-established tenets of statutory construction. The guiding principle in construing a statute is “to ascertain the intent of the Legislature so as to effectuate the purpose of the law.” We consider both the words of the statutes and their context within the entire statutory framework to determine their scope and purpose and to harmonize all parts of the law. We may consider a statute’s legislative history and historical background in determining the Legislature’s intent.

In evaluating the Legislature’s intent, we also use the following interpretive canons, none of which is necessarily dispositive by itself:

- A specific statute controls over a general statute governing the same subject matter.
- A later enactment controls over an earlier enactment governing the same subject matter.
- The statutory phrase ‘notwithstanding any other law’ is a term of art that declares the legislative intent to override all contrary law and “to have the specific statute control despite the existence of other law which might otherwise govern.”

- Where the Legislature has not expressly repealed a statute, a court will find an implied repeal “only where there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes

9. The next election for the office Meraz currently holds will occur in November 2018.
10. Gov. Code, § 1780. Deer Creek Storm Water District “meets the definition of a ‘special district’—i.e., one created pursuant to law for the purpose of carrying out specified governmental functions in a limited geographical area . . . .” (99 Ops.Cal.Atty.Gen. 82, 86 (2016), fn. omitted; see Gov. Code, § 56036, subd. (a) (“‘District’ or ‘special district’ are synonymous”).
11. Gov. Code, § 1780, subd. (a). Government Code section 1781 states that “[t]he provisions of Section 1780 shall not apply to a school district, a district organized pursuant to Division 6 (commencing with Section 11501) of the Public Utilities Code, or a district subject to the provisions of Chapter 5 (commencing with Section 22825) of Part 5 of Division 11 of the Water Code.” Special districts formed under the Storm Water District Act are not among these exclusions.
13. Gov. Code, § 1780, subd. (d)(1), (e)(1). If the remaining board members fail to make an appointment within 60 days, then the county board of supervisors must fill the vacancy by appointment or election. (Gov. Code, § 1780, subd. (f)(1).) Here, the remaining trustees appointed Meraz within 60 days of the vacancy.
15. Wat. Code App., § 13-6; accord, Deer Creek Storm Water Dist. Bylaws, art. III, § 3.04. The District’s bylaws state, “If the board of supervisors chooses not to fill the vacancy, then the Board of Trustees shall fill the vacancy pursuant to Government Code sections 1770 et seq. [including section 1780].” (Deer Creek Storm Water Dist. Bylaws, art. III, § 3.04, italics in original.)
18. Dyna-Med, supra, 43 Cal.3d at p. 1387.
are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.”\(^\text{22}\)

We recently applied these factors to a similar question regarding appointments to the board of a special district. In 99 Ops.Cal.Atty.Gen. 82 (2016), we explained that the specific statute governing independent library districts, Education Code section 19426, directs a county board of supervisors to fill any vacancy on the library district board.\(^\text{23}\) At the same time, Government Code section 1780, which is the general statute governing special districts, calls for the remaining members of the board to fill the vacancy by appointment.\(^\text{24}\) We acknowledged that the phrase “notwithstanding any other provision of law” in Government Code section 1780 suggests that this general rule should prevail over the other statute.\(^\text{25}\) We concluded, however, that section 19426 should control both because it is the more specific statute and because it was enacted later than the general statute.\(^\text{26}\)

Here too, the general statute (Government Code section 1780) requires the remaining trustees to fill a vacancy on the board, while the specific statute (Water Code Appendix section 13-6) requires the county board of supervisors to fill a vacancy on the board. The key difference between our 2016 opinion and the present situation is that, here, the Legislature enacted the specific statute before the general statute.\(^\text{27}\)

Relator, citing the general principle that a specific statute prevails over a general statute, argues that Water Code Appendix section 13-6 should control over Government Code section 1780. Meraz, however, citing the general principle that a later-enacted statute prevails over an earlier one, and noting the supercession provision (“Notwithstanding any other statute . . .”), argues that Government Code section 1780 should control over Water Code Appendix section 13-6. Relator replies that section 13-6 should nonetheless prevail because it was amended in 1985, after section 1780 was enacted.\(^\text{28}\) Significantly, during the amendment process, the Legislature considered and rejected the option of conforming section 13-6 to section 1780, opting instead to refine the procedure for appointments by the board of supervisors.\(^\text{29}\)

It is true, as Meraz points out, that Government Code section 1780 has been amended multiple times since the 1985 amendment to Water Code Appendix section 13-6.\(^\text{30}\) But we are aware of nothing in the history and amendments to section 1780 indicating that the Legislature intended to reverse its 1985 ratification of section 13-6. In light of the Legislature’s considered decision not to apply section 1780 to storm water districts, we believe it would take more than some general changes to the section 1780 procedure to show that the Legislature meant to repeal section 13-6.\(^\text{31}\) In our view, the legislative history demonstrates that Water Code Appendix section 13-6 is meant to override Government Code section 1780 as to storm water districts, and that Meraz’s appointment may therefore have been invalid. In any event, we conclude that the matter raises a substantial issue of law that warrants judicial resolution.

Moreover, we conclude that it would be in the public interest to grant Relator’s application. In the absence of any countervailing circumstances (such as pending litigation or shortness of time remaining on a term in office), we consider the need for judicial resolution to be an adequate “public purpose” for granting leave to sue here.\(^\text{32}\) Judicial resolution of this issue may help clarify which entity should fill a vacancy on storm water district board in the future.\(^\text{33}\)

\(\)\(^\text{22}\) Garcia v. McCutchen (1997) 16 Cal.4th 469, 477, internal citations and quotation marks omitted.


\(\)\(^\text{26}\) 99 Ops.Cal.Atty.Gen., supra, at p. 86, fn. 27. In the opinion, we ultimately concluded that the Banning Unified School District Library District was a “school-established” library district, not an “independent” library district, and that Education Code section 19426 applied only to the latter, not the former. (99 Ops.Cal.Atty.Gen., supra, at pp. 84-86.)

\(\)\(^\text{27}\) Compare Stats. 1975, ch. 1059, § 1.3 (repealing, reorganizing, and repealing Government Code section 1780) with Stats. 1909, ch. 222, § 6 (enacting Water Code Appendix section 13-6). When Government Code section 1780 was first enacted in 1973, it already specified that the remaining members of the special-district board should fill the vacancy. (Stats. 1973, ch. 934, § 1.) In comparison, the original version of Water Code Appendix section 13-6 in 1909 contained no provision regarding the filling of trustee-vacancies. (Stats. 1909, ch. 222, § 6.) It was not until 1935 that the Legislature added such a provision to section 13-6. (Stats. 1935, ch. 88, § 1 (“Should a vacancy occur or be found to exist in the office of trustee, the board of supervisors shall fill the same by appointment”).)

\(\)\(^\text{28}\) Stats. 1985, ch. 310, § 2; see also In re Marriage of Cutler (2000) 79 Cal.App.4th 460, 475 (“In construing a statute, we presume the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws”).

\(\)\(^\text{29}\) An earlier version of the amendment would have required that “any vacancy shall be filled pursuant to section 1780 of the Government Code.” (Assem. Bill No. 591 (1985-1986 Reg. Sess.), as introduced Feb. 7, 1985.) But in the final version of the bill (now the current version of the statute), the Legislature deleted this language in favor of a middle ground whereby the trustees recommend possible appointees for the board of supervisors to consider in making the appointment. (Stats. 1985, ch. 310, § 2; Assem. Bill No. 591 (1985-1986 Reg. Sess.), as amended Apr. 9, 1985; cf. In re Jonathan T. (2008) 166 Cal. App.4th 474, 481-482 [in deleting language in an amendment to Penal Code section 213 that it was a new offense, rather than a sentencing enhancement or factor, the Legislature intended for section 213 not to constitute a new offense].)


\(\)\(^\text{31}\) See Banks v. Yolo County (1894) 104 Cal. 258, 259 (a specific statute is “never deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect”).


Accordingly, Relator’s application for leave to sue in quo warranto as to Meraz is GRANTED.

Kadara

As it pertains to Kadara, Relator’s application presents different considerations and requires a separate analysis. Relator argues that Kadara is not properly serving on the District board because he is not a “freeholder” of land within the District. For the following reasons, we deny the application as to Kadara.

To serve on the Deer Creek Storm Water board, a person must be “a freeholder of the district.” A “freehold” is an estate of “indeterminate duration, and carries with it title to land.” The California Supreme Court has described “title” as the “complete ownership, in the sense of all the rights, privileges, powers and immunities an owner may have with respect to land.” To be “perfect,” title needs to be “good and valid beyond all reasonable doubt,” and to be good, title “should be free from litigation, palpable defects, and grave doubts, should consist of both legal and equitable titles, and should be fairly deducible of record.” “Marketable title” is “a title that a reasonable buyer would accept because it appears to lack any defect and to cover the entire property that the seller has purported to sell.”

The parties have supplied the following information relating to whether Kadara is a freeholder of land within the District:

- On April 1, 2010, Kadara entered into a five-year lease, with a purchase option, for a specified 0.55-acre area of land located within the District, and in a larger parcel of property owned by his sister-in-law. The agreement permitted Kadara to accelerate his payments and to pay off the purchase price in full at any time. It further provided that, once Kadara had made all the payments on the property, a lot split would be completed in accordance with Tulare County requirements, and the property would be formally transferred to Kadara and recorded.

- Shortly after April 1, 2010, Kadara and his family moved a mobile home onto his leased portion of the property and settled there. Also, in anticipation of completing the purchase, Kadara filed an application with the county for a formal lot split in order to create a separate legal parcel for his portion of the property.

- On November 18, 2010, the Site Plan Review Committee of the Tulare County Resource Management Agency issued a resolution conditionally approving Kadara’s application for a parcel map dividing the property into two separate parcels. The committee imposed what Kadara considered to be “an onerous condition” regarding improvement of the new lot. He appealed to have the condition removed.

- On April 1, 2013, while the appeal was being considered, Kadara availed himself of the accelerated-payment option and paid off the purchase price in full.

- On April 22, 2014, the Tulare County Board of Supervisors appointed Defendant Kadara as a trustee of the District. His seat will be up for election in November 2018.

- On August 2, 2016, the Tulare County Resource Management Agency removed the improvement condition to which Kadara had objected and filed an appeal, and forwarded the committee’s resolution to the county offices of assessor and auditor-controller for final approval of the lot split and creation of the separate parcel.

Based on these undisputed allegations, Relator claims that Kadara is disqualified from the office of trustee. Relator contends that Kadara is not presently a “freeholder” of land, as required by the statute, because the county has not yet formally recognized the land he paid for as a separate lot. Kadara asserts that, when he made the final payment on the property, he became the owner of the land, and thus became a freeholder.

As indicated by the facts recounted above, Kadara has fulfilled his financial obligations to the seller in the lease-to-own agreement by making all payments required to pur-
chase a portion of the seller’s land, and it appears that Kadara has taken the necessary administrative steps to establish his title to it. But although the county’s Site Plan Review Committee has recommended approval of Kadara’s lot split and purchase, and although there do not appear to be any further impediments to such an approval, the matter is still pending with the county assessor and auditor-controller. As a result, it remains debatable whether Kadara’s title to the lot is “good and valid beyond all reasonable doubt,” giving rise to Relator’s contention that Kadara is not currently eligible to serve as a trustee of the District.

We have broad discretion in ruling on quo warranto applications, however, and the presence of a debatable issue does not necessarily establish that the issue is a substantial one, much less that the dispute warrants judicial resolution in a quo warranto action. And even where an issue is deemed to be substantial in our analytic framework, our exercise of discretion whether to grant leave to sue is guided by considerations of the overall public interest. For instance, we have denied applications for quo warranto when there was no substantial likelihood of success on the merits because the issue is, or will likely become, moot. We have also declined to allow a quo warranto case to proceed where the public injury alleged is “insubstantial” or where no “public purpose would be served.”

Kadara has supplied unrefuted evidence that on August 2, 2016, the Tulare County Resource Management Agency forwarded a resolution to approve the lot split and creation of his separate parcel to the assessor and auditor’s offices, where the resolution awaits final approval. Although it is conceivable that final approval could be denied, it seems unlikely: Kadara has apparently complied with or successfully contested all of the agency’s conditions. Once there is a legally recognized lot, and the deed is recorded, Kadara will hold legal title, and will indisputably have freeholder status. Under these circumstances, we think it likely that Relator’s claim will soon become moot.

Moreover, we believe that the public interest would not be served by allowing a quo warranto to proceed against Kadara. The purpose of the District is to prevent storm water damage from timely to the real property in the District. As such, the District “disproportionately affect[s] landowners because the economic burden of its operations is confined to landowners . . . .” The freeholder requirement is intended to ensure that a trustee shares the same interests as district landowners and acts as their agent with a personal stake in the board’s decisions. Although Kadara’s freehold title may not be perfected until the lot split receives final approval, he has consummated the contract for sale with the seller, made all payments for the purchase, and diligently pursued the lot split. Meanwhile, for more than seven years, he and his family have resided on the land. He has much the same interest in protecting the lands in the District from storm water damage as any freeholder of property in the District. We conclude that it would not be in the overall public interest to allow a quo warranto lawsuit to proceed against Defendant Kadara.

Accordingly, Relator’s application for leave to sue in quo warranto as to Kadara is DENIED.

*****

45. 83 Ops.Cal. Atty.Gen., supra, at p. 185 (“While it cannot be accurately predicted how long it would take for the present action to be filed, heard, and resolved, even in the absence of an appeal, it is at least reasonably probable that the issue would become moot prior to resolution,” internal quotation marks omitted); see Citizens, supra, 56 Cal.App.3d at p. 406 (quo warranto “is a preventative remedy addressed to preventing a continuing exercise of an authority unlawfully asserted rather than to correcting what has already been done under that authority”).


47. Choudhry v. Free (1976) 17 Cal.3d 660, 667; see So. Pacific Railroad Co. v. Stibbens (1930) 103 Cal.App. 664, 673 (the Act was “intended to place the burdens of the cost of the improvements upon the lands within the district that were benefited by them”); see generally Cal. Const., art. 1, § 22; Salyer Land Co. v. Tule Lake Basin Water Storage Dist. (1973) 410 U.S. 719, 726-730; Tarpey v. McClure (1923) 190 Cal. 593, 606.

48. See People ex rel. Chapman v. Sacramento Drainage Dist. (1909) 155 Cal. 373, 389 (landowners may “appoint their own agents” in the Sacramento Drainage District); People ex rel. Van Loben Sels v. Reclamation Dist. No. 551 (1897) 117 Cal. 114, 124 (a property qualification to vote for the board of a reclamation district is permissible because the reclamation district “is one of those public enterprises which results in a benefit to private lands, and . . . those who are specially interested, and who must pay for the improvement . . . are permitted to appoint those who shall superintend it”); Argyle v. Johnson (Utah 1911) 118 P. 487, 491 (“Every trustee, as a landowner, is therefore directly interested in any assessment that will be made”).

39. Hocking, supra, 37 Cal.2d at p. 649, internal quotation marks omitted.

40. See Rando, supra, 228 Cal.App.4th at pp. 877-878 (relator’s arguable interpretation of City Charter provision did not automatically elevate claim into a substantial question of law or fact for purposes of determining the appropriateness of quo warranto); 96 Ops.Cal. Atty. Gen. 48, 49 (2013).

41. 96 Ops.Cal. Atty.Gen., supra, at p. 49; see also City of Campbell v. Moss (1961) 197 Cal.App.2d 640, 650 (“We do not believe . . . that the debatable issue inevitably produces the quo warranto. Indeed, the Attorney General’s exercise of discretion is posited upon the existence of a debatable issue. . . . The crystallization of an issue thus does not preclude an exercise of discretion; it causes it. . . . The crystallization of an issue does not necessarily establish that the issue is a substantial one, much less that the dispute warrants judicial resolution in a quo warranto action.”)

